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Introduction to Administrative Law

(A) DEFINITION AND SCOPE OF ADMINISTRATIVE LAW

Administrative Law as a separate branch of legal discipline especially in India came to be recognised only by the middle of the 20th century. Today the administration is ubiquitous and impinges freely and deeply on every aspect of an individual's life. Therefore, administrative law has become a major area for study and research.[1]

It is a harsh fact of life that the phenomenal growth of administrative power as a by-product of an intensive form of government, though necessary for development and growth, at times spells negation of people's rights and values. Profligate and pachydermic administration emboldened by the anesthetised public conscience does not hesitate to trample upon the civil liberties of the people. Thus, administrative adventurists impatient of democratic process may slip into authoritarianism, making all material growth a pretence for tyranny. Here comes the need, importance and purpose of administrative law. Administrative law thus becomes *dharma* which conduces to the stability and growth of the society and the maintenance of a just social order and welfare of mankind by reconciling power with liberty. It seeks to channelise administrative powers to achieve the basic aim of any civilized society, that is "growth with liberty".

Against this backdrop, administrative law has a tremendous social function to perform. Without a good system of administrative law any society would die because of its own administrative weight like a Black Hole—which is a dying neutron star that collapses due to its own gravity. Administrative law, therefore, becomes that body of reasonable limitations and affirmative action parameters which are developed and operationalised by the legislature and the courts to maintain and sustain a rule of law society.

Thus, four basic bricks of the foundation of any administrative law may be identified as: (*i*) to check abuse or detournment of administrative power; (*ii*) to ensure to citizens an impartial determination of their disputes by officials; (*iii*) to protect them from unauthorised encroachment on their rights and interests;[2] and (*iv*) to make those who exercise public power accountable to the people.

1. The first seminar on administrative law was organised by the Indian Law Institute, New Delhi in December 1957 right after its inauguration. Since then the major area of activity of the Institute has been administrative law.
2. *See* Julius Stone: SOCIAL DIMENSIONS OF LAW AND JUSTICE, (1966), p. 711. There the reference is to judicial review.

Nevertheless, for a student 'Administrative Law' defies definition. The reason seems to be that in almost every country, irrespective of its political philosophy, the administrative process has increased so tremendously that today we are living not in its shade but shadow. Therefore, it is impossible to attempt any precise definition of administrative law which can cover the entire range of administrative process. Perhaps this was the reason why Dr F.J. Port who published the first book bearing the title *Administrative Law* in England in 1929 did not venture to define the term. He simply attempted to describe administrative law as follows:

> "Administrative Law is made up of all these legal rules—either formally expressed by statutes or implied in the prerogative—which have as their ultimate object the fulfilment of public law. It touches, first the legislature, in that the formally expressed rules are usually laid down by that body; it touches judiciary, in that (*a*) there are rules which govern the judicial action that may be brought by or against administrative persons, (*b*) administrative bodies are sometimes permitted to exercise judicial powers; thirdly, it is of course essentially concerned with the practical application of the Law."

Even this attempt to describe administrative law rather than to define it is not without difficulty. Administrative law besides touching all branches of government, touches administrative and quasi-administrative agencies, i.e. Corporations, Commissions, Universities and sometimes even private organisations. Furthermore, administrative law is made up not only of legislative and executive rules and a large body of precedents but also of functional formulations, for every exercise of discretion forms a rule for future action.

Early English writers did not differentiate between administrative law and constitutional law and therefore, the definition they attempted was too broad and general.

Sir Ivor Jennings defines administrative law as the law relating to administration. It determines the organisation, powers and the duties of administrative authorities.[3] This formulation does not differentiate between administrative and constitutional law. It lays entire emphasis on the organisation, power and duties to the exclusion of the manner of their exercise. A student of administrative law is not concerned with how a minister is appointed but only with how a minister discharges his functions in relation to an individual or a group. How the Minister of Housing and Rehabilitation is appointed is not the concern of administrative law, but when this minister approves a scheme for a new township, which involves the acquisition of houses and lands of persons living in that area, questions of administrative

3. Jennings: LAW AND THE CONSTITUTION, p. 217.

law arise. Jennings' formulation also leaves many aspects of administrative law untouched, especially the control mechanism.

Dicey, like Ivor Jennings, belongs to that group of English writers who did not recognise the independent existence of administrative law. According to Dicey's formulation, administrative law relates to that portion of a nation's legal system which determines the legal status and liabilities of all State officials; secondly, it defines the rights and liabilities of private individuals in their dealings with public officials; and thirdly, specifies the procedure by which those rights and liabilities are enforced.[4]

Dicey was obsessed with the French 'Droit Administratif' and therefore, his formulation mainly concentrated on judicial remedies against State officials. Therefore, this definition excludes the study of every other aspect of administrative law.

The American approach is significantly different from the early English approach in that it recognised administrative law as an independent branch of the legal discipline. According to Kenneth Culp Davis, administrative law is a law that concerns the powers and procedure of administrative agencies, including especially the law governing judicial review of administrative action. Within his formulation, Davis includes the study of administrative rule-making and rule adjudication but excludes rule application which according to him belongs to the domain of public administration.[5]

However, even this classification by Davis cannot be considered complete because he excludes from his control mechanism the control exercised by the legislature, higher administrative authorities and the mass media representing public opinion and also the vast area of administrative action which is neither quasi-legislative nor quasi-judicative.[6]

The unenviable diversity in definitions of the term 'administrative law' is also due to the fact that every administrative law specialist tries to lay more emphasis on any one particular aspect of the whole administrative process, which according to his own evaluation deserves singular attention. Prof. Upendra Baxi thus lays special stress on the protection of the 'little man' from the arbitrary exercise of public power.[7] According to him, administrative law is a study of the pathology of power in a developing society. Accountability of the holders of public power for the ruled is thus the focal point of this formulation: "The basic expectation in a rule-of-law society is that holders of public power and authority must be able to publicly justify their action as legally valid and socially wise and just." Therefore, "admin-

4. Dicey: LAW OF THE CONSTITUTION, p. 329.

5. Davis: ADMINISTRATIVE LAW TEXT, (1959), p. 2.

6. *See generally* Chapters 7 and 9, *infra*.

7. *See* Introduction by Prof. Upendra Baxi, *supra*.

istrative law is one part of this valiant enterprise of accountability. In any rule-of-law society general forms of accountability do exist. Legislators go to polls periodically, errant judges could be impeached, bureaucrats are responsible to the elected politicians. These forms of general accountability become very feeble in any developing society because of poverty, illiteracy and ignorance of the masses. Consequently, the study of administrative law assumes special significance in any developing society for the development of more specific forms of accountability".[8] Against this backdrop of the situation prevailing in India, administrative law today remains only as an "instrument of middle-class Indians to combat governmental power through courts".[9]

For our purposes, we may define administrative law as that branch of *public law* which deals with the *organisation and powers of administrative and quasi-administrative* agencies and prescribes *principles and rules* by which an *official action* is *reached* and *reviewed* in relation to *individual liberty and freedom.*

An analysis of this formulation would not only give us an acceptable definition of administrative law but would also identify its nature and scope:

(1) Administrative law is a law but it is not a law in the lawyer's sense of the term like property law or contract law. It is a law in the realist's sense of the term which includes statute law, administrative rule-making, precedents, customs, administrative directions, etc. It also includes the study of something which may not be termed 'law' in the true sense of the term such as administrative circulars, policy statements, memoranda and resolutions, etc. Besides this, it includes within its study 'higher law' as well, like the principles of natural justice. However, in India, administrative law basically and wholly remains a judge-made law and thus suffers from "the frailties and benefits from the strengths of judicial law-making".[9] Consequently, personal and institutional constraints make the growth of administrative law vulnerable to judicial meanderings and tentativeness.

(2) Administrative law is a branch of public law in contradistinction to private law which deals with the relationships of individuals inter se. Therefore, administrative law primarily deals with the relationship of individuals with the organised power.

(3) Administrative law deals with the organisation and powers of administrative and quasi-administrative agencies. The stress on the study of organisation is only to the extent that it is necessary to understand the powers, characteristics of actions, procedure for the

8. *See* Introduction by Prof. Upendra Baxi, *supra*.

9. *Ibid.*

exercise of those powers and the control mechanism provided therein. The study includes not only administrative agencies but also the quasi-administrative agencies such as Corporations, Boards, Universities, independent domestic agencies and the like.

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

(5) Administrative law primarily concerns itself with the official action which may be:

(*i*) Rule-making action,

(*ii*) Rule-decision action or adjudicatory action, or

(*iii*) Rule-application action.

Besides these main actions, the actions which are incidental to the main action are also covered within its study. Such incidental actions may be investigatory, supervisory, advisory, declaratory and prosecutory.

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

(*i*) in the statute itself under which the administrative agency has been created;

(*ii*) in the separate procedure code which every administrative agency is bound to follow; i.e. Administrative Procedure Act, 1946 in the USA and Tribunals and Enquiries Act, 1958 in England.

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

(7) Administrative law also includes within its study the control mechanism by which the administrative agencies are kept within bounds and made effective in the service of the individuals. This control mechanism is technically called the 'review process'. An administrative action may be controlled by:

(*i*) courts exercising writ jurisdiction through the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto;

(*ii*) courts exercising ordinary judicial powers through suits, injunctions and declaratory actions;

(*iii*) higher administrative authorities;

(*iv*) public opinion and mass media in the twentieth century is also an important control on any administration which a student of administrative law cannot lose sight of. In America, opinion polls and mass media exercise much more effective control on the administration than any other single control inasmuch as this control mechanism has the potentiality of pre-empting any adverse administrative decision.

(*v*) Consumer organisations and interest representations also play an important role in controlling the arbitrary exercise of public power, both at the pre-natal and post-natal stages. Though in India this form of control is still at the take-off stage, yet organisations such as Consumer Protection and Research Society, Society for the Protection of Civil Liberties, Chipko Movement and other consultative and advisory bodies have played a significant role in this direction.

(*vi*) 'Easy Access to Justice' also provides an effective check on bureaucratic adventurism in the exercise of public power. If the access to justice is easy and quick it may deter administrative instrumentalities from developing an attitude which has been termed as "fly-now-pay-later".[10] Easy Access to Justice includes procedural facility which is cheap, speedy and less formalistic, legal aid, availability of advocates for public interest litigation, intellectual capacity of the party and active participation of the judges. Uncontestably, this control mechanism in India is too weak to provide any effective check on recidivist administrative deviance. Procedural law and practice is highly formalistic, dilatory and expensive and legal aid is merely a concept. Very few advocates are available to take up public interest litigation. Lately, Advocates and journalists are coming forward to sponsor public interest litigation. Cases in the courts relating to the illegal felling of trees, environmental pollution, flesh trade, prison torture, are some of the illustrations. Recently Judges have also showed some signs of active participation. The Supreme Court has demonstrated its eagerness to stretch its long arms and in very many situations it has treated a mere letter as a writ petition. All this will go a long way in influencing the behaviour of the custodians of public power.

10. *See* Introduction by Prof Baxi, *supra*.

(*vii*) The institution of ombudsman and other investigative agencies, such as vigilance commissions, also exercise control on administrative action. Role of public enquiries in this regard is also significant.

(*viii*) Right to Know, Right to Reply and Discretion to Disobey also have inherent potentialities of proving effective, though indirect, in providing check on administrative behaviour.

(8) The study of administrative law is not an end in itself but a means to an end. The focal point of the study of administrative law is the reconciliation of power with liberty. When the administrative process started rising after the death of laissez-faire at the birth of the twentieth century, the stress on the study of administrative law was on circumscription of administrative powers. But now when the administrative process has come to stay, the emphasis has shifted to the regulation of administrative powers. The paradox of the twentieth century in the form of government is the prolific growth in the powers of the State, which on the one hand is necessary for the promotion of human liberty and freedom, but on the other hand threatens to endanger individual freedom. Therefore, the main task of the students of administrative law is to evolve certain principles and rules by which an ideal equilibrium between the powers of the administration and the dictates of individual liberty can be sustained.

The above formulation, however, only delineates the scope of administrative law as is commonly accepted in the common law world. Administrative law specialists in England and India mainly focus their attention on various aspects of judicial control of administrative decisions and actions. In the study of such topics as tribunals and enquiries the emphasis is likely to be between these institutions and the courts as alternative methods of controlling administrative action. These specialists rarely delve into administrative process itself to consider how government departments and other administrative agencies actually operate or how and why their procedures and structures differ from the judicial model of decision-making or how the administrative process could be made more effective and efficient by reform from within. Such matters are usually left to political scientists and administrative lawyers are content to debate the question of proper role of courts in reviewing administrative action. On the contrary, American administrative law specialists discard such a limited vision. In the USA, administrative law is seen to be as much concerned with what goes on inside the fourth branch (administration) of the government as it is with judicial scrutiny of the administrative process.

Friedman,[11] therefore, felt concerned with the legitimacy of administrative process rather than the legitimacy of judicial review of administrative action. In his study of administrative law he includes his concern for: (*i*) failure of the administrative agencies to conform to the constitutional parameters; (*ii*) public ambivalence towards the substantive policies sought to be achieved by some agencies; (*iii*) departure made from judicial procedure in decision-making; (*iv*) scepticism about administrative expertise and bureaucratic expansion; (*v*) apparent absence of direct political accountability; and (*vi*) problems created by the broad delegation of legislative powers.[12]

Viewed against this perspective, administrative law becomes an all-pervasive legal discipline. Principles of administrative law emerge and develop whenever and wherever any person becomes the victim of the arbitrary exercise of public power. And the allegation of arbitrary exercise of power can be raised in almost all areas of substantive law. Therefore, it will not be incorrect to say that no one can specialize in administrative law.[13]

Administrative Law is not a branch of philosophy of law but of sociology of law.

Philosophy of law deals with the cosmos of law, its object being to formulate features which every established legal order must necessarily possess, and which were derived by the sheer force of logic and deduction or through divine ordination. The jurisprudence thus developed assigned a mechanistic role to a judge based on neutral principle. Sociology of law, on the other hand, is a science of practical application which requires an analysis of diverse functions of law in their application to particular situations. Thus, the spirit of law becomes experience and not logic which runs close to the rule of life. In this realm law cannot afford to become divorced from the socio-economic realities of society. It must become people oriented, weighted in favour of the weaker sections of society. In this context, administrative law and its utility and vitality depends on its capacity to solve the just expectations of the neglected segments of the society. Against this backdrop administrative law must run very close to the lives which we daily live.

(B) REASONS FOR THE GROWTH OF ADMINISTRATIVE LAW WITH SPECIAL REFERENCE TO INDIA

Administrative law is a by-product of intensive form of government. During the last century, the role of the government has changed in almost every country of the world, from laissez-faire to paternalism and from pater-

11. Friedman: CRISIS AND LEGITIMACY, (1978).
12. See *Introduction*, International and Comparative Law Quarterly, Vol. 30, Part 4, Oct. 1981, p. 880.
13. *See* Introduction by Prof. Upendra Baxi, *supra*.

nalism to maternalism. Today the expectation from the government is not only that it will protect its people from external aggression and internal disturbance, but also that it will take care of its citizens from the cradle to the grave. Therefore, the development of administrative process and the administrative law has become the cornerstone of modern political philosophy.

Today there is a demand by the people that government must solve their problems rather than merely define their rights. It is felt that the right of equality in the American Constitution will be a sterile right if the black is the first to lose his job and the last to be re-employed. In the same manner the equality clause in the Indian Constitution would become meaningless unless the government comes forward to actively help the weaker sections of society to bring about equality in fact. This implies the growth of administrative law and process.

In the same manner today, the people recognise all problems as solvable rather than political controversies. There was a time, before the industrial revolution in England during the heyday of laissez-faire, when it was considered that the employer-employee conflict was a political controversy and the government would do well by keeping away. But today everyone feels that it is the duty of the government to resolve this conflict and maintain industrial harmony, which is essential for economic growth. Likewise, the regulation of the patterns of ownership, production and distribution is considered the responsibility of any good government to guarantee the maximum good of the maximum number. This again has led to the growth of administrative law and process.

Phenomenal growth in science and technology in the twentieth century has placed a counter-balancing responsibility on a modern government to control the forces which science and technology have unleashed. Modernization and technological developments produce great structural changes and create crucial problems such as cultural conflicts, haphazard urbanisation, ruthless exploitation of natural resources, environmental pollution (water, air and sonic), rapid transport and traffic chaos, automation and consequential unemployment, erratic production and distribution, concentration of economic power, dismal health, education, employment and training conditions, incessant labour strikes and lock-outs, staggering inflation, accelerated smuggling, pervasive corruption, adulteration, tax evasion, commercial malpractices, violence, inadequate management of sea and space, and many others. These multi-dimensional problems with varied social, economic and political ramifications cannot be solved except with the growth of administration and law regulating administration.

The inadequacy of the traditional type of courts and law-making organs to give that quality and quantity of performance which is required in the twentieth century for the functioning of a welfare and functional government

is the biggest single reason which has led to the growth of administrative process and law. Like medicine, in law also there is a shift from punitive to preventive justice. Today litigation is not considered a battle to be won but a disease to be cured. Inadequacy of the traditional courts to respond to this new challenge has led to the growth of administrative adjudicatory process. Furthermore, the traditional administration of justice is technical, expensive and dilatory. It is unworkable where the subject-matter is dynamic and requires not only adjudication but development also, as in the cases of industrial disputes. Therefore, in cases where the need is fair disposition and not merely disposition on file, administrative adjudicatory process seems to be the only answer.

For the same reason, because of limitation of time, the technical nature of legislation, the need for flexibility, experimentation and quick action, the traditional legislative organs cannot pass that quality and quantity of laws which are required for the functioning of a modern government. It is said, not perhaps rightly, that even if our Parliament sits all the twenty-four hours and all the 365 days in a year, it cannot possibly pass all the laws needed by the government today. Therefore, the inevitable growth of administrative legislative process.

No list of causes, howsoever lengthy it may be, can be exhaustive. Nevertheless, a modern functional government in the backdrop of socialism is the main force behind the growth of administrative law and process in the twentieth century.

Growth of Administrative Law in India

There existed in India from very early times a system of both administrative legislation and adjudication. The object of early British administration was to maximize profit and for this efficiency in the administration was the chief necessity. Therefore during the Company days, the courts were tools in the Company's hands. The executive had overriding powers in matters of administration of justice. However, the establishment of the Supreme Court at Calcutta in 1774 under the provisions of the Regulating Act, 1773 inaugurated an era in independent judicial administration. But with the passage of the Act of Settlement, 1781, the era came to an end and all the later developments in the judicial system during the Company's time worked to the detriment of the native population.

From the Battle of Plassey in 1757 until Independence, one significant advantage that the Indian administration had from a centralised but undemocratic form of government, was the facility to make laws. During that period the executive was invested with such wide powers to make rules as a modern democratic legislature cannot even imagine. Even prior to the famous Code of Civil and Criminal Procedures known as Cornwallis Code of 1793, El-

phinstone Code of 1827 and many other regulations were in operation. These regulation laws aimed mainly at the regulation of the powers of the administration and their control. Thus, expansion of the administrative powers and provisions of some kind of control went hand in hand. For instance, Regulation 10 of 1822 which codified the law regarding the excise on salt, opium and general custom dealt mainly with the powers of administrative agencies (salt chowkees) and also the control of these agencies. It made provisions regarding power of confiscation, procedure in the proceeding of confiscation and the control to be exercised by the courts. Section 108 of the Regulation of 1822 reminds one of the provisions of the Administrative Procedure Act, 1946, when administrative agencies were required to record facts, evidence and the decision. Judicial relief was made available only after the exhaustion of administrative remedies. The courts, though had ample powers to set aside an administrative action, yet paid great respect and attention to their decisions.

Till the end of the British rule in India, the government was concerned with the most primary duties only, and the functions of a Welfare State were not discharged. However, increasing and rapid strides in the fields of communication and transport in the West, resulted in the need for the control of administrative agencies through regulatory bodies and tribunals like the Inter-State Commerce Commission in the USA and the Railways and Canal Commission in England. Finally, the two World Wars brought in a plethora of administrative agencies exercising control over almost every aspect of individual life. A brief account of the growth of administrative process during the British rule may be given as follows:

I. 1834 to 1939

(A) PUBLIC SAFETY:

(*i*) Sarai Act, 1867,

(*ii*) Arms Act, 1878,

(*iii*) Explosives Act, 1884, and

(*iv*) Indian Boilers Act, 1923.

(B) HEALTH:

(*i*) Opium Act, 1878,

(*ii*) Epidemic Diseases Act, 1897,

(*iii*) Dangerous Drugs Act, 1930, and

(*iv*) Medical Council Act, 1933.

(C) MORALITY:

(*i*) Dramatic Public Performances Act, 1876, and

(*ii*) Cinematograph Act, 1918.

(D) TRANSPORT:

(*i*) Stage Carriages Act, 1861,

(*ii*) Indian Railways Act, 1890,

(*iii*) Motor Vehicles Act, 1914,

(*iv*) Indian Merchant Shipping Act, 1923,

(*v*) Railway Rates Advisory Commission, 1926, and

(*vi*) Motor Vehicles Act, 1939.

(E) LABOUR:

(*i*) Employers and Workmen's Disputes Act, 1860 (under the provisions of the Act, a magistrate could decide a trade and wage dispute of workmen employed in the Construction, Railway and Canal and Public Works Departments),

(*ii*) Mines Act, 1923,

(*iii*) Workmen's Compensation Act, 1923,

(*iv*) Indian Trade Disputes Act, 1929,

(*v*) Factories Act, 1934, and

(*vi*) Payment of Wages Act, 1936.

(F) ECONOMIC REGULATION:

(*i*) Companies Act, 1850,

(*ii*) Companies Act, 1913,

(*iii*) Cotton Transport Act, 1923,

(*iv*) Tea Control Act, 1933,

(*v*) Rubber Control Act, 1934, and

(*vi*) Reserve Bank Act, 1934.

II. 1939 to 1947

(*i*) Defence of India Act, 1939 and the rules framed thereunder regulated all aspects of life,

(*ii*) Essential Supplies (Temporary Powers) Act, 1946

(*iii*) Import and Export Control Act, 1947, and

(*iv*) Foreign Exchange Regulation Act, 1947.

When India became independent, the philosophy of Welfare State was made the creed of the Indian Constitution. The Preamble of the Constitution laid down that the Constitution aims at establishing a sovereign socialist, secular, democratic republic, so as to secure to all its citizens, social, economic and political justice, liberty of thought, expression, belief, faith and worship, equality of status and opportunity and to promote among them fraternity, assuring dignity of the individual and the unity of the nation. Article 38 further provides that the State shall strive to secure a social order

in which social and economic justice shall inform all institutions of national life. Article 39 requires the State to direct its policy towards securing an order in which citizens have equal rights to an adequate means of livelihood; that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; that there is no concentration of wealth; and that means of production are not used to the common detriment; and that there is equal pay for equal work.

Articles 39-A and 41 oblige the State to provide for equal justice and free legal aid, work within its economic capacity and development, education, assistance in old age, unemployment and other contingencies. Articles 43 and 43-A enjoin upon the State to secure work for the workers, a living wage, a decent standard of living and participation in the management of industries. Article 45 obliges the State to provide free and compulsory education for children up to the age of fourteen years. Article 47 enjoins upon the State to regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. Article 48-A imposes a duty upon the State to protect and improve the environment. This is in brief a blueprint for the development of future India and the motif of socialism which looms large in an otherwise bourgeois constitutional text and context.[14] These welfare and socialistic aims and objects cannot be achieved by the State without the growth of the administrative process.

Besides providing for a functional government and consequential growth in the administrative process, the Constitution has also provided for an elaborate control mechanism so that the water may not overrun its banks. Under Articles 32 and 226, the Supreme Court and the various High Courts have been invested with powers to issue writs of certiorari, mandamus, quo warranto, prohibition and habeas corpus to check the excesses of the government and the administrative agencies. Article 300 gives a right to the individuals to file a suit against the government for the torts committed by its servants. Article 311 protects government servants from arbitrary actions of the government in the matters of dismissal, termination and reduction in rank. In the same manner, Article 136 confers power on the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order passed or made by any court or tribunal in India. Article 227 further invests the High Courts with the power of superintendence over all courts and tribunals within their jurisdiction.

All legislative actions of the administration have been expressly brought by the Constitution within the purview of Article 13 by defining 'law' as

14. *See* Prof. Upendra Baxi: *Pre-Marxist Socialism and the Supreme Court*, a paper submitted to a seminar on Company Law under the auspices of the Indian Law Institute and the J.C. College of Law, Bombay, (1983) 4 SCC (Jour) 3.

including 'order', 'bye-law', 'rule' and 'notification', etc. having the force of law. Therefore, the rule-making action of the administration can be challenged not only on the ground that it is ultra vires the delegating statute but also on the ground that it violates the fundamental rights guaranteed under the Constitution.[15] An administrative act will also be void if it contravenes any other provisions of the Constitution outside Part III of the Constitution i.e. Article 301, 311, 314 or 365.[16] In the same manner when the action of the administration is quasi-judicial it can be challenged not only on the ground that it is ultra vires the Constitution but also on the ground that the delegating act is itself unconstitutional.[17] Thus, within the fabric of tremendous growth in the administrative process in almost every field, an effective control mechanism has been woven.

Besides the growth of administrative process, which is possible through legislation and executive actions, the Constitution itself provides for the establishment of some administrative agencies to regulate a particular field, i.e. Article 263, creation of Inter-State Council; Article 280, Finance Commission; Article 262, Inter-State Water Dispute Authority; Article 315, Public Service Commissions of India; and Article 324, Election Commission.

Today in India, the administrative process has grown so much that it will not be out of place to say that today we are not governed but administered. In this context the Law Commission of India rightly observed:

> "The rule of law and judicial review require greater significance in a Welfare State... the vast amount of legislation which has been enacted during the last three years by the Union and the States, a great deal of which impinges in a variety of ways on our lives and occupations. Much of it also confers large powers on the Executive. The greater therefore is the need for ceaseless enforcement of the rule of law, so that the executive may not, in a belief in its monopoly of wisdom and in its zeal for administrative efficiency, overstep the bounds of its power and spread its tentacles into the domains where the citizen should be free to enjoy the liberty guaranteed to him by the Constitution."[18]

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15. *Dwarka Prasad Laxmi Narain* v. *State of U.P.*, AIR 1954 SC 224; *Zafar Ali Shah (Dr)* v. *Asstt. Custodian* of *Evacuee Property*, AIR 1967 SC 106. *Bidi Supply Co.* v. *Union of India*, AIR 1956 SC 479; *State of Bombay* v. *Bombay Education Society*, AIR 1954 SC 561; *Kameshwar Prasad* v. *State of Bihar*, AIR 1962 SC 1166; *Mervyn* v. *Collector of Customs*, AIR 1967 SC 52; *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597.
16. *Ghulam* v. *State of Rajasthan*, AIR 1963 SC 379; *Atiabari Tea Co. Ltd* v. *State of Assam*, AIR 1961 SC 232; *Sukhbans* v. *State of Punjab*, AIR 1962 SC 1711; *Accountant General, Bihar* v. *Bakshi*, AIR 1962 SC 505.
17. *Bidi Supply Co.* v. *Union of India*, AIR 1956 SC 479; *Express Newspaper (P) Ltd.* v. *Union of India*, AIR 1958 SC 578.
18. FOURTEENTH LAW COMMISSION REPORT, Vol. II, p. 672.

(C) DIFFERENCE BETWEEN CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW

To the early English writers on administrative law there was no difference between administrative law and constitutional law. Therefore, Keith observed:

> "It is logically impossible to distinguish administrative from constitutional law and all attempts to do so are artificial."

However, according to Holland, the constitutional law describes the various organs of the government at rest, while administrative law describes them in motion.[19] Therefore, according to this view, the structure of the legislature and the executive comes within the purview of the constitutional law but their functioning comes within the sphere of administrative law. Maitland, however, does not agree with this classification for, in that case, powers and prerogatives of the Crown would be relegated to the arena of administrative law.[20]

According to another view[21] administrative law deals with the organisation, functions, powers and duties of administrative authorities while constitutional law deals with the general principles relating to the organisation and powers of the various organs of the State and their mutual relationships and relationship of these organs with the individual. In other words, constitutional law deals with fundamentals while administrative law deals with the details.

It may also be pointed out that constitutional law deals with the rights and administrative law lays emphasis on public needs. However a dividing line between constitutional law and the administrative law is a matter of convenience because every student of administrative law has to study some constitutional law.[22]

In countries which have written constitutions, the difference between constitutional law and administrative law is not so blurred as it is in England. In such countries the source of constitutional law is the Constitution while the source of administrative law may be statutes, statutory instruments, precedents and customs.

Whatever may be the arguments and counter-arguments, the fact remains that today administrative law is recognised as a separate, independent branch of the legal discipline though at times the disciplines, of constitutional law and administrative law may overlap.

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19. Holland: CONSTITUTIONAL LAW OF ENGLAND, Ist Ed. p. 506.
20. Maitland: CONSTITUTIONAL HISTORY OF ENGLAND, (1908), p. 526.
21. Jennings: LAW AND THE CONSTITUTION, 5th Edn., p. 217.
22. *See* Benjafield and Whitmore: PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW, 4th Edn., p. 12.

The correct position seems to be that if one draws two circles of administrative law and constitutional law, at a certain place they may overlap and this area may be termed as the 'watershed' in administrative law.

In India, in the watershed one can include the whole control mechanism provided in the Constitution for the control of administrative authorities, i.e. Articles 32, 136, 226, 227, 300 and 311. It may also include the study of those administrative agencies which are provided for by the Constitution itself, i.e. Inter-State Council, Article 263; Finance Commission, Article 280; Inter-State Water Dispute Authority, Article 262; Public Service Commissions, Article 315 and Election Commission, Article 324. It may further include the study of constitutional limitations on delegation of powers to the administrative authorities and also those provisions of the Constitution which place fetters on administrative action, i.e. Fundamental Rights.

(D) DROIT ADMINISTRATIF

In France, Droit Administratif can be defined as a body of rules which determine the organisation and the duties of public administration, and which regulate the relations of the administration with the citizens of the State.

Droit Administratif is associated with the name of Napoleon Bonaparte. Before the Revolution in 1789, there was a constant see-saw struggle for power going on in the French politics between the traditionalist Bonapartists (who supported the executive power even in judicial matters) and reformist parliaments (who supported the jurisdiction of ordinary courts). In pre-revolutionary France, Conseil du Roi advised the King in legal and administrative matters. This body can be compared with Curia Regis and the Privy Council in Britain during feudalistic days. Conseil du Roi also discharged judicial functions such as deciding disputes between great nobles. Ordinary courts (Parlements) became jealous and not only interfered with the functioning of the executive but also tried to impede the growth of the measures which the monarchy wanted to introduce.

After the Revolution in 1789 a major breakthrough was made in this deadlock. The first step taken by the revolutionists was to curtail the power of the executive which was done on the theory of separation of powers by the famous 16-24 August, 1790 Law. Conseil du Roi was abolished and the King's powers were curtailed. Napoleon, who became the first Consul, favoured freedom for the administration and also favoured reforms. He wanted an institution to give relief to the people against the excesses of the administration. Therefore, in 1799 Conseil d'Etat was established. The main aim of the institution was to resolve difficulties which might occur in the course of the administration. However, in due course of time it started exercising judicial powers in matters involving administration. In the beginning it was not an independent court but an appendage of the executive. Its main task

was to advise the minister with whom the complaint was to be lodged. In fact the minister was the judge, and the Conseil d'Etat administered only advisory justice. It did not have public sessions. It had no power to pronounce judgments. It represented the government's point of view. It was this aspect of the Conseil d'Etat which was against Dicey's concept of the Rule of Law.

In 1872 its formal power to give judgment was established. The Arrets (Executive Law) Blanco, February 8, 1873 finally laid down and settled that in all matters involving administration, the jurisdiction of the Conseil d'Etat would be final. It laid down, among other things, the principle that questions of administrative liability would be within the jurisdiction of administrative courts and that the liability was subject to special rules different from those of Droit Civil. In 1889, it started receiving direct complaints from the citizens and not through ministers.

Droit Administratif does not represent principles and rules laid down by the French Parliament; it consists of rules developed by the judges of the administrative courts. Droit Administratif, therefore, includes three series of rules:

1. *Rules dealing with administrative authorities and officials.*—These relate to appointment, dismissal, status, salary and duties etc.

2. *Rules dealing with the operation of public services to meet the needs of citizens.*—These services may be operated either wholly by public officials or under their supervision or they may assist private agencies to provide public utility services.

3. *Rules dealing with administrative adjudication.*—If any injury is done to a private citizen by the administration, the matter would be decided by the administrative courts. Conseil d'Etat is the highest administrative court. This system of administrative adjudication developed in France due to historical reasons in order to avoid encroachment by the courts on the powers of the administrative authorities and prevent intrusion by the judges into the business of the administration.

In case of conflict between the ordinary courts and the administrative courts regarding jurisdiction, the matter is decided by the Tribunal des Conflits. This tribunal consists of an equal number of ordinary and administrative judges and is presided over by the minister of justice.

There is no Code of Droit Administratif like the Code Civil. The Conseil d'Etat has developed and elaborated the doctrines on its own. This has been done neither to justify the arbitrary powers of the administrative officials nor to narrow the field of citizens' liberty but to help citizens against the excesses of the administration. Sometimes these new doctrines created by the Conseil d'Etat have been adopted in the Civil Code through Parliament.

From the above discussion, the following characteristics of the Droit Administratif in France may be noted:

(1) Matters concerning the State and administrative litigation are decided by the administrative courts and not by the ordinary courts of the land.

(2) In deciding matters concerning the State and administrative litigation, special rules as developed by the administrative courts are applied.

(3) Conflict of jurisdiction between ordinary courts and administrative courts are decided by the agency known as Tribunal des Conflits.

(4) It protects government officials from the control of the ordinary courts.

(5) Conseil d'Etat which is the supreme administrative court is not a priori invention but is the product of historical process with deep roots. It is not merely an adjudicatory body but is also a consultative body. In 1979 it considered 147 draft laws which were placed before Parliament in 1980 and also considered 489 draft decrees.[23]

The early common criticism of the Droit Administratif in France has been that it cannot protect the private citizen from the excesses of the administration. However, later researches have shown that no single institution has done so much for the protection of private citizens against the excesses of the administration as has been done by the Conseil d'Etat.[24]

POINTS FOR DISCUSSION

1. There is a great divergence of opinion regarding the definition/concept of administrative law. How did it arise?

2. Difficulties in attempting a uniform agreed definition of administrative law with special reference to different constitutional structurisations and claim patterns.

3. Analysis of cause and effect theory common to all administrative development patterns in various jurisdictions of the world.

4. "Administrative Law is the study of the pathology of governmental power." This formulation may be discussed against the backdrop of the grant and the exercise of public power in 'authoritarian', 'liberal' and 'non-liberal' societies.

5. Administrative Law is a valiant endeavour to help reduce and diminish arbitrariness in the exercise of public power. Students may discuss the general and specific forms of accountability of the rulers to the ruled. Discussion may include constitutional, legislative, judicial and other informal forms of accountability.

6. 'Easy Access to Justice' is considered an important form of accountability. This may include informal procedure, speedy and less expensive trial, legal aid, public interest litigation, easy bail and active participation of judges. This form of control mech-

23. Bernard Ducamin: *Role of Conseil d'Etat in Drafting Legislation*, translated by William Dale, International and Comparative Law Quarterly, Vol. 30, Part 4, Oct. 1981, p. 882.

24. Hamson: JUDICIAL CONTROL OF ADMINISTRATIVE DISCRETION. *See* also Waline: DROIT ADMINISTRATIF, Ch. I.

anism may be discussed with special reference to India with a view to suggest improvements.

7. Administrative Law in India is wholly a judge-made law which has all the "strengths and frailties of judicial law-making". These strengths and frailties may be discussed with special reference to a trade-off between executive arbitrariness and judicial arbitrariness inherent in judicial review.
8. Administrative lawyers in the common law world are content to debate the question of the proper role of the courts in reviewing administrative action. Whereas, the USA administrative law is seen to be as much concerned with what goes on inside the administration as it is with judicial scrutiny of the administrative process. Against this backdrop the proper scope and nature of the administrative law may be discussed
9. Administrative Law is said to be "an instrument in the hands of middle-class Indians to combat administrative authoritarianism through the instrumentality of courts". Students may discuss the constituency, input, output and compliance factors of the judicial process with a view to suggest measures which can make administrative law a shield for the majority of Indians living below or slightly above the poverty line.
10. Relevance of French administrative law in a system of intensive form of government.
11. Overlapping boundaries between constitutional law and administrative law with reference to the obsession of the early English writers to acknowledge administrative law as a regular member of the legal community.

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2

Conceptual Objections against the Growth of Administrative law

(A) CONCEPT OF THE RULE OF LAW

While in Europe, administrative law has been, for a century and a half, a separate branch of law and a subject for academic study, it is only during the last few decades that, in the United States and the common law world, it has attained full stature as a 'respectable' field of study for the law students and practitioners.[1] The reason seems to be that the people had a mistrust regarding the growth of administrative process, and hence did not recognise its independent existence. The weapon which the people in England used to strike at the growth of administrative law was Dicey's formulation of the concept of the Rule of Law.

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

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. In India, concept of Rule of Law can be traced to Upnishad. It provides—Law is the King of Kings. It is more powerful and rigid than they (Kings). There is nothing higher than law. By its powers the weak shall prevail over the strong and justice shall triumph. Thus in monarchy, the concept of law developed to control the exercise of arbitrary powers of the monarchs who claimed divine powers to rule. In a democracy, the concept has assumed different dimension and means that the holders of public powers must be able to justify publically that the exercise of power is legally valid and socially just. Professor 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.[2]

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1. Benjafield and Whitmore: PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW, (1971), p. 1.
2. Dicey: LAW OF THE CONSTITUTION, 8th Edn., p. 198.

The Rule of Law is a viable and dynamic concept and, like many other such concepts, is not capable of any exact definition. This, however, does not mean that there is no agreement on the basic values which it represents. The term Rule of Law is used in contradistinction to 'rule of man' and 'rule according to law'. Even in the most autocratic forms of government there is some law according to which the powers of the government are exercised but it does not mean that there is the Rule of Law. Therefore, Rule of Law means that the law rules, using the word 'law' in the sense of 'jus' and 'lex' both. In this sense 'the Rule of Law' is an ideal. It is a modern name for natural law. In history man has always appealed to something higher than that which is his own creation. In jurisprudence, Romans called it 'jus naturale', Mediaevalists called it the 'Law of God', Hobbes, Locke and Roussueau called it 'social contract' or 'natural law' and the modern man calls it 'Rule of Law'.

The basic concept of the Rule of Law is not a well-defined legal concept. The courts would not invalidate any positive law on the ground that it violates the contents of the Rule of Law. However, in *ADM* v. *Shivakant Shukla*[3], popularly known as *Habeas Corpus case*, an attempt was made to challenge the detention orders during the Emergency on the ground that it violates the principles of the Rule of Law as the "obligation to act in accordance with rule of law ... is a central feature of our constitutional system and is a basic feature of the Constitution". Though the contention did not succeed and some justices even went on to suggest that during an emergency, the emergency provisions themselves constitute the Rule of Law, yet if the reasoning of all the five opinions is closely read it becomes clear that the contention was accepted, no matter it did not reflect in the final order passed by the court.[4] Therefore, even in spite of the unfortunate order to the effect that the doors of the court during an emergency are completely shut for the detenus, it is gratifying to note that the concept of Rule of Law can be used as a legal concept.

In the opinion of some of the judges constituting the majority in *Kesavananda Bharati* v. *State of Kerala*[5], the Rule of Law was considered as an "aspect of the doctrine of basic structure of the Constitution, which even the plenary power of Parliament cannot reach to amend".[6]

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3. (1976) 2 SCC 521: AIR 1976 SC 1207.
4. *See* Upendra Baxi: *Developments in Indian Administrative Law*, in PUBLIC LAW IN INDIA, (1982) (A.G. Noorani, Ed.), p. 134. *See* also by the same author, THE INDIAN SUPREME COURT AND POLITICS (1980).
5. (1973) 4 SCC 225: AIR 1973 SC 1461. *See* also *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405, 431, para 38: AIR 1978 SC 851.
6. *Id.*, para 133 (SCC).

In *Indira Nehru Gandhi* v. *Raj Narain*[7], in which the Supreme Court invalidated clause (4) of Article 329-A, inserted in the Constitution by the Constitution (Thirty-ninth Amendment) Act, 1975[8] to immunise the election dispute to the office of the Prime Minister from any kind of judicial review, Khanna and Chandrachud, JJ. held that Article 329-A violated the concept of basic structure.[9] Other justices though did not go to this extent but certainly held that Article 329-A, clause (4) offends the concept of the Rule of Law. Ray, C.J. held that since the validation of the Prime Minister's election was not by applying any law, therefore it offended the Rule of Law.[10] According to Mathew, J. clause (4) of Article 329-A offended the Rule of Law which postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere.[11] Referring to the same constitutional provision, Beg, J. observed that the jurisdiction of the Supreme Court to try a case on merits cannot be taken away without injury to the basic postulates of the Rule of Law and of justice within a politically democratic constitutional structure.[12] "A study of *Kesavananda, Indira Gandhi* and other *Habeas Corpus cases*," writes Prof. Baxi, "provides a distillation of Indian judicial thought on the conceptions of the Rule of Law, which has evolved well over a quarter century. References to western theories and thinkers from Dicey onwards abound in these opinions; but these occur by way of rhetorical flourishes, masking the typically Indian approaches".[13]

Taking a cue from its earlier decisions, the Supreme Court in *P. Sambamurthy* v. *State of A.P.*[14], categorically stated that Article 371-D(5) (Proviso) of the Constitution clearly violates Rule of Law which is a basic structure and essential feature of the Constitution. This provision had authorized the State Government of Andhra Pradesh to nullify any decision of the Administrative Services Tribunal. Declaring the provision unconstitutional, the court maintained that it is a basic principle of Rule of Law that the exercise of power by the executive or by any other authority must not only be conditioned by the Constitution but must also be in accordance with law and the power of judicial review as conferred by the Constitution with a view to ensuring that the law is observed and there is compliance with the requirement of law on the part of executive and other authorities, and it is through the power of judicial review that the Rule of Law is maintained

7. 1975 Supp SCC 1: AIR 1975 SC 2299.
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9. *See* Upendra Baxi: *Developments in Indian Administrative Law*, in PUBLIC LAW IN INDIA, (1982) (A.G. Noorani, Ed.), p. 134.
10. *See* 1975 Supp SCC 1, para 59.
11. *Id.*, para 336.
12. *Id.*, para 623.
13. See *supra* note 9, p. 134.
14. (1987) 1 SCC 362.

and every organ of the State is kept within the limits of law. The Supreme Court rightly observed in *Som Raj* v. *State of Haryana*[15] that the absence of arbitary power is the first postulate of Rule of Law upon which whole constitutional edifice is based. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of Rule of Law.

Anyone who surveys the decisional law in this area will come to the conclusion that the concept of Rule of Law has developed many facets which are not only negative providing constraints on governmental action but affirmative also imposing an affirmative duty of fairness on the government. These various negative and af-firmative facets have been summarized by Prof. Upendra Baxi thus: "One is that power should not be exercised arbitrarily. This has meant that it should be exercised for the purpose for which it has been conferred. It also means that power should be exercised within the statutory ambit; and purported exercise of it would not just be ultra vires, but in a true sense of the term arbitrary. Simple negation of arbitrariness is, however, not enough to preserve the Rule of Law values. Indian courts have gone further to insist on specific positive content of the Rule of Law obligations. These include the rules of natural justice which have to be followed not just in quasi-judicial action but often also in purely administrative action. The scope and content of the requirements of natural justice have varied from time to time according to the judicial interpretation, but the broad insistence remains. In addition, access to information as to the grounds of decision has remained an important preoccupation of the Indian judiciary, as any impediments to it have the tendency of obstructing judicial review of administrative action. This means that the courts have from time to time insisted that exercise of administrative power be accompanied by reasons, although the exact status of the obligation to give reasons is as yet indeterminate. The Rule of Law notion has been in addition consistently extended to secure for the individual fair dealing by the State in its economic activities. For example, the government is held bound by its assurance to individuals in business transactions by way of estoppel. The State has to follow some of the rules of natural justice before reaching a decision that it would not trade with certain contractors or before blacklisting them. In matters involving government contracts, the courts have been increasingly keen to insist that the ambit of fair play is not lessened in view of the dominating capacity of the State over the individuals. In the area of losses and injury arising out of State economic entrepreneurial function courts have tended to restrict the scope of the defence of sovereign immunity in favour of the affected individuals."[16]

15. (1990) 2 SCC 653, 658-59.
16. See *supra* note 9 at pp. 134, 135.

It is heartening to see that the courts are making all concerted efforts to establish a rule of law society in India by insisting on "fairness" in every aspect of the exercise of power by the State. Some of the recent decisions of the Supreme Court are clear indicators of this trend. In *Sheela Barse* v. *State of Maharashtra*[17], the court insisted on 'fairness' to women in police lock-up and drafted a code of guidelines for the protection of prisoners in police custody, especially female prisoners. In *State of M.P.* v. *Ramashanker Raghuvanshi*[18], the court secured 'fairness' in public employment by holding that reliance on police reports is entirely misplaced in a democratic republic. Thus the efforts of the courts in legitimizing "due" administrative powers and illegitimizing "undue" powers[19] by operationalizing substantive and procedural norms and standards can be seen as a high benchmark of judicial activism for firmly establishing the concept of the Rule of Law in India.

The term Rule of Law can be used in two senses: (*i*) formalistic sense; and (*ii*) ideological sense. If used in the formalistic sense it refers to organised power as opposed to a rule by one man and if used in an ideological sense it refers to the regulation of the relationship of the citizens and the government and in this sense it becomes a concept of varied interest and contents.

In its ideological sense, the concept of Rule of Law represents an ethical code for the exercise of public power in any country. Strategies of this code may differ from society to society depending on the societal needs at any given time, but its basic postulates are universal covering all space and time. These postulates include equality, freedom and accountability. 'Equality' is not a mechanical and negative concept but has progressive and positive contents which oblige every government to create conditions social, economic and political where every individual has an equal opportunity to develop his personality to the fullest and to live with dignity. 'Freedom' postulates absence of every arbitrary action, free speech, expression and association, personal liberty and many others. These basic rights of any society may be restricted only on the ground that the claims of these freedoms would be better served by such circumscription. The basic idea behind 'accountability' is that the rulers rule with the Deference of the people, and therefore must be accountable to them in the ultimate analysis. Forms of accountability may differ, but the basic idea must remain the same that the holders of public power must be able publicly to justify the exercise of public power not only as legally valid but also socially just, proper and reasonable.[20] In this manner

17. (1983) 2 SCC 96: AIR 1983 SC 378. *See* also *Veena Sethi* v. *State of Bihar*, (1982) 2 SCC 583: AIR 1983 SC 339.
18. (1983) 2 SCC 145: AIR 1983 SC 374.
19. *See* M.P. Jain: CHANGING FACE OF ADMINISTRATIVE LAW IN INDIA AND ABROAD, (1982), p. 3.

the concept of Rule of Law represents values and not institutions and connotes a climate of legal order which is just and reasonable wherein every exercise of public power is chiefly designed to add something more to the quality of life of the people. Every legislative, executive and judicial exercise of power must, therefore, depend on this ideal for its validity. Consequently it is the Rule of Law which must define law rather than the law defining the Rule of Law.[21]

Dicey's formulation of the concept of 'Rule of Law', which according to him forms the basis of the English Constitutional Law, contains three principles:

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

(*ii*) No person should be made to suffer in body or deprived of his property except for a breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the Rule of Law implies:

(*a*) absence of special privileges for a government official or any other person;

(*b*) all the persons irrespective of status must be subjected to the ordinary courts of the land;

(*c*) everyone should be governed by the law passed by the ordinary legislative organs of the State.

(*iii*) The rights of the people must flow from the customs and traditions of the people recognised by the courts in the administration of justice.

Dicey developed the contents of his thesis by peeping from a foggy England into a sunny France. In France, Dicey observed that the government officials exercised wide discretionary powers and if there was any dispute between a government official and a private individual it was tried not by an ordinary court but by a special administrative court. The law applicable in that case was not the ordinary law but a special law developed by the administrative court. From this Dicey concluded that this system spelt the negation of the concept of the Rule of Law which is the secret of Englishmen's liberty. Therefore, Dicey concluded that there was no administrative law in England.

20. *See* Prof. Baxi's Introduction to this book.
21. *Ibid.*

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

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

The third principle of Dicey in fact does not lay down any legal rule but merely explains one aspect of the British constitutional system where common law is the source of fundamental freedoms of the people. He thus distinguishes the British system from that of many other countries which had written Constitutions with a chapter on individual rights. Dicey feared that if the source of the fundamental rights of the people was any document, the right could be abrogated at any time by amending the Constitution. This is what happened in India during the 1975 Emergency when the Supreme Court ruled that even illegal acts of the government could not be challenged in a court because it was found that the source of personal liberty in India was Article 21 of the Constitution, which had been suspended by the Presidential Proclamation, and not any common law of the people.[22]

Evaluation of Dicey's thesis.—It has become a fashion to criticise Dicey. Sir Ivor Jennings did it most effectively. But in order to be fair to Dicey, one must understand his personality and the compulsions of the times when he developed his thesis. Until lately, nothing was known about Dicey's inner self. Researches mainly concentrated on his contribution in the field of Constitutional Law. However, Prof R.A. Cosgrove[23] gives a unique insight into various facets of Dicey's personality. The portrait of Dicey which Prof Cosgrove paints shatters all images which students of constitutional law and administrative law have built of this great scholar. Prof Cosgrove has ex-

22. *ADM* v. *Shivakant Shukla*, (1976) 2 SCC 521: AIR 1976 SC 1207.

23. R.A. Cosgrove: RULE OF LAW; Albert Venn Dicey: VICTORIAN JURIST, (1980). Prof Cosgrove's evaluation of Dicey can be accepted only with a pinch of philosophy that idols invariably must possess feet of base clay.

plored the voluminous correspondence of Dicey with friends like Bryce and Strachey. He discovers in Dicey a sombre, uncompromising and artless figure, lacking in confidence as a scholar and frustrated in his political ambitions. He is painted as a remote figure for whom passing years brought increasing disillusionment with the world where politics of party supplants politics of country, where trade unions are above law and where socialist dogma is gaining ground. As a lawyer of the Victorian era, he was highly individualistic and advocated a referendum for giving self-rule to the people of Ireland. This iconoclastic description of Dicey's personality goes a long way in explaining his attitudes towards Droit Administratif of France and his Rule of Law doctrine. His total insistence on the institution of judges for the control of administrative action is clearly referable to his disillusionment with politics and politicians. Letters also confirm that Dicey never fully grasped the merits of administrative law.

By administrative law Dicey meant only a single aspect of the French Droit Administratif, namely, administrative jurisdiction to the exclusion of ordinary civil and criminal process. Dicey admitted, after 1901, that he conceived his idea of the nature and existence of administrative law from de Tocqueville, who himself later admitted his ignorance about the actual working of the Droit Administratif in his own days.[24] Therefore, like de Tocqueville, Dicey also viewed the system as a historian rather than as a lawyer. He thus reached a natural conclusion for he found a similarity between the system of French administrative law of it's days and the institutions of ancient autocratic monarchy.

Dicey was historically correct up to the time of 1873, when Arrets (Executive Law) Blanco finally settled the jurisdiction of the Conseil d'Etat in all questions involving administrative matters. Among other things, the Blanco decision firmly laid down that questions of administrative liability would be within the jurisdiction of administrative courts and that this liability was subject to special rules different from those of droit civil. After the 1789 Revolution the Conseil Du Roi which acted as an advisor to the King in all executive and judicial matters in France, like the Curia Regis of England, was replaced by the Conseil d'Etat in order to give relief to the people against the excesses of the administration. In the beginning, its function was only to resolve difficulties which occurred in the course of administration, but subsequently it entered the judicial sphere too. Prior to 1873, it was not an independent court but an appendage to the executive. It did not receive direct complaints from the public but through ministers. It did not hold open sessions and represented the government's point of view. In fact, a minister was the judge and the Conseil d'Etat thereby merely administered advisory

24. Dicey: INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 9th Edn., (1950) p. 392.

justice. Therefore, writing against this backdrop at the end of the nineteenth century, Dicey entertained doubts, which was natural for an Englishman, and was dubious whether the administrative courts could give protection to the individual against administration.

However, Dicey misconceived the administrative law because he thought that the French system is administrative law, when administrative law is more than that. In fact Dicey was concerned not with the whole body of law relating to administration, but with a single aspect of it, namely, administrative adjudication. His comparison was between the favourable position of an Englishman when in conflict with the State in contrast to that of a Frenchman. It may be emphasised that the difference between judicial and administrative agencies is not fundamental. Both apply the law to individual cases and thereby exercise discretion. But if the safeguards which protect the exercise of judicial functions are applied to administrative bodies the quality of adjudication will be the same.[25] It is not the case that Dicey failed to realize that all lawful authority within the State is legal authority, but he relied upon one organ, the courts, to restrain the illegal excesses of the administration and did not examine the latter's lawful power to the full extent. It is upon this limited view of the administration that his interpretation of the Rule of Law rests.[26] Dicey was also not right when he said that there is no administrative law in England because even during Dicey's time the Crown and its servants enjoyed special privileges on the basis of the doctrine that 'the King can do no wrong'. There were also in existence special courts in England i.e. ecclesiastical and admiralty courts. There were special tribunals established under the Poor Law Amendment Act, 1834 where Poor Law Boards were exercising legislative and adjudicatory powers. In the same manner the Constables Protection Act, 1750 gave special immunity to police officers. Government officials enjoyed wide discretionary powers under the Public Health Acts to enter private properties. However, inspired by the decisions of the House of Lords in *Local Government Board* v. *Arlidge*[27] and *Board of Education* v. *Rice*[28], wherein the administrative agency was authorised to decide even a question of law, Dicey himself recognized his mistake and observed that there exists in England a vast body of administrative law. Even towards the end of his life he doubted whether official law, i.e. 'administrative law', could be as effectively enforced by the courts as by "a body of men who combine official experience with legal knowledge", provided that they are entirely independent of the government.[29]

25. Lauterpacht: FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY, (1933), Ch. XIX, Section 2.
26. Dicey: AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1959). Introduction by E.C.S. Wade, civ.
27. 1915 AC 120.
28. 1911 AC 179.
29. Dicey: *The Development of Administrative Law in England*, 31 LQR 148 (1915). Though

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

Administrative law developed not to sanctify executive arbitrariness but to check it and protect the rights of the people against the administration's excesses. Therefore, the central theme of administrative law is also the reconciliation of liberty with power. Administrative law and the Rule of Law are not discrete series. Both aim at the "progressive diminution of arbitrariness and fostering a discipline of fairness and openness in the exercise of public power".[30] However, though Dicey's distrust of the administrative process and administrative adjudication has been proved wrong in the French context, it is still valid in the Indian situation where administrative action is often arbitrary and based on extraneous considerations and administrative justice is an euphemism for the denial of justice.[31]

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

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 Sethi* v. *State of Bihar*[32] 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

in the final analysis, Dicey asserted that it is not a true administrative law because the supremacy of ordinary courts prevails. Wade, Introduction to Dicey: AN INTRODUCTION TO THE STUDY OF CONSTITUTIONAL LAW, 9th Edn., LXIX.

30. *See* Baxi's Introduction, *supra*.

31. A classical recent illustration of arbitrary action is provided by the Punjab Engineering College, Chandigarh, where admissions for vacant seats were made not from the waiting-list according to merit but from amongst those candidates who perchance were present on the campus. The High Court of Punjab and Haryana quashed the action with the remark that the judicial bar against arbitrary action could not be outflanked by instant whimsicality. *Indian Express*, September 15, 1982, p. 9. (Supreme Court upheld the decision of the High Court. *Indian Express*, March 5, 1983.)

32. (1982) 2 SCC 583, 586: AIR 1983 SC 339.

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.

The Commission divided itself into certain working groups which tried to give content to the concept in relation to an individual's area of activity in a society:

(1) Committee on Individual Liberty and the Rule of Law:

(*i*) that the State should not pass discriminatory laws;

(*ii*) State should not interfere with religious beliefs;

(*iii*) State should not place undue restrictions on freedoms.

(2) Committee on Government and the Rule of Law:
Rule of Law means not only the adequate safeguards against abuse of power but effective government capable of maintaining law and order.

(3) Committee on Criminal Administration and the Rule of Law:
Rule of Law means:

(*i*) due criminal process;

(*ii*) no arrest without the authority of law;

(*iii*) presumption of innocence;

(*iv*) legal aid;

(*v*) public trial and fair hearing.

(4) Committee on Judicial Process and the Rule of Law:
Rule of Law means:

(*i*) independent judiciary;

(*ii*) independent legal profession;

(*iii*) standard of professional ethics.

In 1957, the University of Chicago held a conference on the Rule of Law as understood in the West. It was attended by eleven countries including two communist countries. The secretary of the colloquium described the broad areas of agreement as follows:

(1) The Rule of Law is an expression of an endeavour to give reality to something which is not readily expressible; this difficulty is primarily due to identification of the rule of law with the concept of rights of man—all countries of the West recognize that the rule of law has a positive content, though that content is different in different countries;

it is real and must be secured principally, but not exclusively, by the ordinary courts.

(2) The Rule of Law is based upon the liberty of the individual and has as its object the harmonising of the opposing notions of individual liberty and public order. The notion of justice maintains a balance between these notions. Justice has a variable content and cannot be strictly defined, but at a given time and place there is an appropriate standard by which the balance between private interest and the common good can be maintained.

(3) There is an important difference between the concept of Rule of Law as the supremacy of law over the government and the concept of rule of law as the supremacy of law in society generally. The first concept is the only feature common to the West, connoting as it does the protection of the individual against arbitrary government—different techniques can be adopted to achieve the same end and the Rule of Law must not be conceived of as being linked to any particular technique. But it is fundamental that there must exist some technique for forcing the government to submit to the law; if such a technique does not exist, the government itself becomes the means whereby the law is achieved. This is the antithesis of the Rule of Law.

(4) Although much emphasis is placed [illegible] supremacy of the legislature in some countries of the West, the Rule of Law does not depend upon contemporary positive law—it may be expressed in positive law but essentially it consists of values and not institution; it connotes a climate of legality and legal order in which the nations of the West live and in which they wish to continue to live.[33]

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.[34] Every public servant is a trustee of the society and is accountable for due effectuation of

33. *See* Goodhart: *The Rule of Law and Absolute Sovereignty*, Pennsylvania Law Review, Vol. 106, 946-963. Countries which attended the Conference were: UK, W. Germany, Italy, Canada, Sweden, Turkey, Brazil, Mexico, Israel, USSR and Poland.

34. *State of Punjab* v. *G. S. Gill*, (1997) 6 SCC 129.

constitutional goals.[35] This makes the concept of Rule of Law highly relevant to our context.

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

(B) DOCTRINE OF SEPARATION OF POWERS

Though the doctrine is traceable to Aristotle[36] but the writings of Locke[37] and Montesquieu[38] gave it a base on which modern attempts to distinguish between legislative, executive and judicial power is grounded. Locke distinguished between what he called:

(*i*) discontinuous legislative power;

(*ii*) continuous executive power;

(*iii*) federative power.

He included within 'discontinuous legislative power' the general rule-making power called into action from time to time and not continuously. 'Continuous executive power' included all those powers which we now call executive and judicial. By 'federative power' he meant the power of conducting foreign affairs. Montesquieu's division of power included a general legislative power and two kinds of executive powers; an executive power in the nature of Locke's 'federative power' and a 'civil law' executive power including executive and judicial power.

Locke and Montesquieu derived the contents of this doctrine from the developments in the British constitutional history of the early 18th Century. In England after a long war between Parliament and the King, they saw the triumph of Parliament in 1688 which gave Parliament legislative supremacy culminating in the passage of the Bill of Rights. This led ultimately to a recognition by the King of legislative and tax powers of Parliament and the judicial powers of the courts. At that time, the King exercised executive powers, Parliament exercised legislative powers and the courts exercised judicial powers, though later on England did not stick to this structural classification of functions and changed to the parliamentary form of government.

Writing in 1748, Montesquieu said:

> "When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again

35. *Superintending Engineer* v. *Kuldeep Singh*, (1997) 9 SCC 199.
36. Aristotle: POLITICS, IV, p. 14.
37. SECOND TREATISE OF CIVIL GOVERNMENT, Chaps. 12 and 13.
38. L'ESPRIT DES LOIS (1748), Chap. 12.

there is no liberty if the judicial power be not seperated from the legislative and the executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then a legislator. Where it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of exacting laws, that of executing the public resolutions and of trying the causes of individuals.''[39]

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

(*i*) The same person should not form part of more than one of the three organs of the government. For example, ministers should not sit in Parliament.

(*ii*) One organ of the government should not interfere with any other organ of the government.

(*iii*) One organ of the government should not exercise the functions assigned to any other organ.

It may be pointed out that in none of these senses does a separation of powers exist in England. The King, though an executive head, is also an integral part of the legislature and all his ministers are also members of one or other of the Houses of Parliament. Furthermore, the Lord Chancellor is at the same time a member of the House of Lords, a member of the government, and the seniormost member of the judiciary. Therefore, in England the concept of ''parliamentary executive'' is a clear negation of the first formulation that the same person should not form part of more than one of the three organs of the government. As regards the second formulation, it is clear that the House of Commons ultimately controls the executive. The judiciary is independent but the judges of the superior courts can be removed on an address from both Houses of Parliament. As to the exercise by one organ of the functions of the other organs, no separation exists in England. The House of Lords combines judicial and legislative functions. The whole House of Lords constitutes, in theory, the highest court of the country; in practice, however, by constitutional convention, judicial functions are exercised by specially appointed Law Lords and other Lords who have held judicial office. Again, legislative and adjudicatory powers are being increasingly delegated to the executive. This also distracts from any effective separation of power.

39. THE SPIRIT OF THE LAWS (trans. Nuggnt), pp. 151-152. quoted in Thakker, C.K.: ADMINISTRATIVE LAW, (1992), Eastern Book Company, p. 31.

In America, this doctrine forms the foundation on which the whole structure of the Constitution is based. Article I, Section 1 vests all legislative powers in the Congress. Article II, Section 1 vests all executive powers in the President of the United States. Article III, Section 1 vests all the judicial powers in the Supreme Court. It is on the basis of this theory of separation of powers that the Supreme Court of the United States has not been given power to decide political questions, so that the Court may not interfere with the exercise of power of the executive branch of the government. The Constitution of America has also not given overriding power of judicial review to the Supreme Court. It is a queer fact of American constitutional history that the power of judicial review has been usurped by the Court. However, American constitutional developments have shown that in the face of the complexity of modern government, strict structural classification of the powers of the government is not possible. The President of the United States interferes with the exercise of powers by the Congress through the exercise of his veto power. He also exercises the law-making power in exercise of his treaty-making power. The President also interferes with the functioning of the Supreme Court through the exercise of his power to appoint judges. In fact, President Roosevelt did interfere with the functions of the Court when he threatened to pack the Court in order to get the Court's support for his New Deal legislation. In the same manner Congress interferes with the powers of the President through vote on budget, approval of appointments by the Senate and the ratification of treaty. Congress also interferes with the exercise of powers by the courts by passing procedural laws, creating special courts and by approving the appointment of judges. In its turn, the judiciary interferes with the powers of the Congress and the President through the exercise of its power of judicial review. It is correct to say that the Supreme Court of the United States has made more amendments to the American Constitution than the Congress itself.

Though no separation of powers in the strict sense of the term exists in England and America, yet the curious fact is that this doctrine has attracted the makers of most modern Constitutions, especially during the Nineteenth Century. Thus in France, the doctrine has produced a situation in which the ordinary courts are precluded from reviewing the validity not only of legislative enactments but even of the actions of the administration. The void has been filled by the establishment of special administrative courts.

In India, the doctrine of separation of powers has not been accorded a constitutional status. Apart from the directive principle laid down in Article 50 which enjoins separation of judiciary from the executive, the constitutional

scheme does not embody any formalistic and dogmatic division of powers.[40] The Supreme Court in *Ram Jawaya Kapur* v. *State of Punjab*[41], held:

> "Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our Constitution does not contemplate assumption by one organ or part of the State of functions that essentially belong to another."

In *Indira Nehru Gandhi* v. *Raj Narain*[42], Ray, C. J. also observed that in the Indian Constitution there is separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India. However, the court held that though the constituent power is independent of the doctrine of separation of powers to implant the theory of basic structure as developed in the case of *Kesavananda Bharati* v. *State of Kerala*[43] on the ordinary legislative powers will be an encroachment on the theory of separation of powers.[44] Nevertheless, Beg, J. added that separation of powers is a part of the basic structure of the Constitution. None of the three separate organs of the Republic can take over the functions assigned to the other. This scheme of the Constitution cannot be changed even by resorting to Article 368 of the Constitution.[45]

In India, not only is there a functional overlapping but there is personnel overlapping also. The Supreme Court has the power to declare void the laws passed by the legislature and the actions taken by the executive if they violate any provision of the Constitution or the law passed by the legislature in case of executive actions. Even the power to amend the Constitution by Parliament is subject to the scrutiny of the Court. The Court can declare any amendment void if it changes the basic structure of the Constitution.[46] The President of India in whom the executive authority of India is vested exercises law-making power in the shape of ordinance-making power and also the judicial powers under Article 103(1) and Article 217(3), to mention only a few. The Council of Ministers is selected from the legislature and is responsible to the legislature. The legislature besides exercising law-making powers exercises judicial powers in cases of breach of its privilege, impeach-

40. Upendra Baxi: *Developments in Indian Administrative Law*, in PUBLIC LAW IN INDIA, (1982) (A.G. Noorani, Ed.), p. 136.
41. AIR 1955 SC 549.
42. 1975 Supp SCC 1: AIR 1975 SC 2299.
43. (1973) 4 SCC 225: AIR 1973 SC 1461.
44. 1975 Supp SCC 1, 61, para 136.
45. *Id.*, p. 210, para 555
46. *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461.

ment of the President and the removal of the judges. The executive may further affect the functioning of the judiciary by making appointments to the office of Chief Justice and other judges. One can go on listing such examples yet the list would not be exhaustive.

Apart from the difficulties inherent in the enforcement of any strict doctrine of separation of powers in the functioning of a modern government, there is also the inherent difficulty in defining in workable terms the division of powers into legislative, executive and judicial.[47] Even the Supreme Court has often refrained from delving into this quagmire except that in *Indira Nehru Gandhi* v. *Raj Narain*[48], it held that adjudication of a specific dispute is a judicial function which Parliament, even acting under a constitutional amending power, cannot exercise.

The Constitution has invested the constitutional courts with the power to invalidate laws made by Parliament and State Legislature transgressing constitutional limitations. Where an Act made by the legislature is invalidated by the courts on the ground of legislative incompetence, the legislature cannot enact a law declaring that the judgment of the court shall not operate; it cannot overrule or annual the decision of the court. But this does not mean that the legislature which is competent to enact that law cannot re-enact that law. Similarly, it is open to a legislature to alter the basis of the judgment. The new law or the amended law so made can be challenged on other grounds but not on the ground that it seeks to ineffectuate or circumvent the decision of the court. This is what is meant by "check and balance" inherent in a system of government incorporating separation of powers.[49]

From the above discussion it becomes clear that the doctrine in its classical sense which is structural rather than functional cannot be literally applied to any modern government because neither the powers of the governments can be kept in watertight compartments nor can any government run on strict separation of powers. Nevertheless, in America, people criticised the growth of administrative law on the ground that it violates the principles of the doctrine of separation of powers. The criticism became more intense at the growth of statutory commissions to regulate the new areas of activity. These commissions were given wide legislative, executive and judicative powers. Regulatory powers exercised by regulatory authorities such as Inter-State Commerce Commission, Civil Aeronautics Board, Federal Communication Commission, Federal Power Commission and Security Exchange Commission represented an amalgam of functions devised with little regard to

47. *See* Upendra Baxi: *Developments in Indian Administrative Law* in PUBLIC LAW IN INDIA, (1982) (A.G. Noorani Ed.), p. 136.

48. 1975 Supp SCC 1: AIR 1975 SC 2299; *see* also Upendra Baxi: *Developments in Indian Administrative Law*, in PUBLIC LAW IN INDIA, (1982) (A.G. Noorani, Ed.), p. 137.

49. *P. Kannadasan* v. *State of T. N.*, (1996) 5 SCC 670.

constitutional theory of separation of powers because the control of concentrated industrial power through concentrated governmental power had become inescapable.[50] This led to the appointment of Attorney-General Committee to review the entire growth of administrative process. The Committee saw no danger to the personal liberty in the growth of administrative process if the control mechanism is activated properly. On the recommendations of this Committee, the Administrative Procedure Act, 1946 was passed. The Act "represents a moderate adjustment on the side of fairness to the citizens in the never-ending quest for a proper balance between governmental efficiency and individual freedom".[51] This never-ending quest further led to the appointment of the Task Force of the Second Hoover Commission which also recommended an effective control mechanism to safeguard the liberty of the people in the face of growing administrative process.

Before all these commissions the main problem was how to reconcile the delegation of legislative and judicial powers to administrative agencies with the doctrine of separation of powers? First attempt at such reconciliation was made by using the word 'quasi'. It was pointed out that what the administrative agencies exercise is only a quasi-legislative and quasi-judicial power. No matter, to soften a legal term by a 'quasi' is a time-honoured lawyer's device, yet, in the sphere of administrative process it becomes illogical to grant legislative and judicial powers to administrative agencies and still to deny the name.[52] Therefore, now it is being increasingly realized that the 'cult of quasi' has to move from any theoretical prohibition to a rule against unrestricted delegation circumscribed by the power of judicial review under the compulsions of modern government.[53]

If the doctrine of separation of powers in its classical sense, which is now considered as a high school textbook interpretation of this doctrine, cannot be applied to any modern government, this does not mean that the doctrine has no relevance in the world of today. The logic behind this doctrine is still valid. The logic behind this doctrine is of polarity rather than strict classification, meaning thereby that the centre of authority must be dispersed to avoid absolutism. In the same manner Prof Wade writes that the objection of Montesquieu was against accumulation and monopoly rather than interaction.[54] Montesquieu himself never used the word 'separation'. Therefore, not impassable barriers and unalterable frontiers but mutual restraint in the exercise of power by the three organs of the State is the soul of the doctrine of separation of powers. Hence the doctrine can be better

50. Bernard Schwartz: ADMINISTRATIVE LAW, (1976), p. 13.
51. Byse: *The Federal Administrative Procedure Act*, (1958) 1 JILI 89, 92.
52. Bernard Schwartz: ADMINISTRATIVE LAW, (1976), p. 32.
53. *National Cable Television Assn.* v. *U.S.*, 415 US 336.
54. Wade: ADMINISTRATIVE LAW, p. 251.

appreciated as a doctrine of 'check and balance' and in this sense administrative process is not an antithesis of the doctrine of separation of powers.

In *Indira Nehru Gandhi* v. *Raj Narain*[55], Chandrachud, J. (as he then was) also observed that the ". . . political usefulness of the doctrine of separation of powers is now widely recognised. . . ." No Constitution can survive without a conscious adherence to its fine checks and balances. "Just as courts ought not to enter into problems entwined in the 'political thicket', Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which 'has in it the precept, innate in the prudence of self-preservation. . . that discretion is the better part of valour'."[56]

In conclusion, "Doctrine of separation of Powers" in today's context of Libralisation, privatisation and globalisation cannot be interpreted to mean either 'separation of powers' or 'check and balance' or 'principle of restraint' but 'community powers' exercised in the spirit of cooperation by various organs of the state in the best interest of the people.

POINTS FOR DISCUSSION

1. Dicey's personality and his historical perspective may be discussed in order to appreciate the origin of the contents of his Rule of Law doctrine.
2. Dicey's concept of Rule of Law and its reconciliation with the growth of the administrative process.
3. Development of the doctrine of Rule of Law from a political ideal to a juridical concept designed to keep the administration within bounds. Visible trends in Indian jurisprudence.
4. Rule of Law has ideological contents also. Against this backdrop some ideological parameters may be discussed with special reference to the Indian situation.
5. Dicey had a misconception about administrative law. He was concerned more with institutions than values. Reasons for this misconception may be discussed with reference to the growth of administrative law in France and England.
6. Modern meaning of the Rule of Law, especially its relevance in Western and Communist societies.
7. Recent aggressive judicial activism as an effect to usher in a rule of law society.
8. The virtues of the doctrine of separation of powers do not evoke much enthusiasm today. Is it because the doctrine has accepted a harder core of generally accepted meaning or because some Constitutions survive adequately without relying on it for sustenance?
9. The relevance of logic behind the doctrine of separation of powers and the growth of administrative process to a point that we are living not in its shade but shadow.

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3

Anatomy of Administrative Action

(A) CLASSIFICATION OF ADMINISTRATIVE ACTION

Administrative action is a comprehensive term and defies exact definition. In modern times the administrative process as a by-product of intensive form of government 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 a general agreement among the writers on administrative law that any attempt of classifying administrative functions on any conceptual basis is not only impossible but also futile. Even then a student of administrative law is compelled to delve into the 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:

(1) Rule-making action or quasi-legislative action.

(2) Rule-decision action or quasi-judicial action.

(3) Rule-application action or administrative action.

(4) Ministerial action.

(1) 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 111 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 this law-making power must be exercised by those bodies alone in whom this power is vested.[1] 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 action of the administration or quasi-legislative action.

1. *Delhi Laws Act, 1912, In re*, AIR 1951 SC 332.

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 which 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 particularized, retroactive and based on evidence. According to Chinnappa Reddy, J. a legislative action has four characteristics: (*i*) Generality; (*ii*) Prospectivity; (*iii*) Public interest; and (*iv*) Rights and obligations flow from it.[2] Elaborating the characteristics of a rule-making action of the administrative authority the Apex Court in *State of Punjab* v. *Tehal Singh*[3] held that (1) where the provisions of the statute provide for legislative activity i.e. making a legislative instrument or promulgation of a general rule of conduct or a declaration by a notification; (2) where the power exercised by the authority under a statute does not concern the interest of an individual but relates to the public in general or concerns a general direction of a general character and is not directed against an individual or to a particular situation; and (3) lays down future course of action, such action will generally held to be quasi-legislative action of the authority. Applying this test the Court held that on making of a declaration determining the territorial area of a Gram Sabha and thereafter establing a Gram Sabha for that area is a quasi-legislative act of the administration.

It is on the basis of these characteristics that one can differentiate between quasi-legislative and quasi-judicial action. A quasi-judicial action in contradistinction to a quasi-legislative action is particularly based on the facts of the case and declares a pre-existing right. However, in certain situations, like wage or rate fixing, it is not capable of easy differentiation. In *Express Newspaper (P) Ltd.* v. *Union of India*[4], the Supreme Court left the question open as to whether the function of the Wage Commission under the Working Journalists' (Conditions of Service) Act, 1956 is quasi-judicial or quasi-legislative. However, the delegation to the government of the power to fix the price of levy sugar was held to be a quasi-legislative function.[5] From this it appears that the distinction between legislative and administrative functions is difficult in theory and impossible in practice. According to Wade:

> "They are easy enough to distinguish at the extremities of the spectrum: an Act of Parliament is legislative and a deportation order is administrative. But in between is a wide area where either label can be

2. *Union of India* v. *Cynamide India Ltd.*, (1987) 2 SCC 720.
3. (2002) 2 SCC 7.
4. AIR 1958 SC 578.
5. *Shri Sitaram Sugar Co. Ltd.* v. *UOI*, (1990) 3 SCC 223. *See* also *Shri Malaprabha Coop. Sugar Factory Ltd.* v. *Union of India*, (1994) 1 SCC 648.

used according to taste, for example, where Ministers make orders affecting large number of people...."[6]

In the same manner, the Committee on Ministers' Powers which was appointed in England in 1928 distinguished between administrative and quasi-legislative action on the ground that where the former is a process of performing particular acts or of making decisions involving the application of general rules to particular cases, the latter is the process of formulating a general rule of conduct without reference to particular cases and usually for future operation.[7]

Though the rules of natural justice do not apply to legislative actions yet reasonableness and fair play in action must be observed as Article 14 of the Constitution equally applies to legislative actions.[8]

Administrative rule-making action is controlled by Parliament and the courts. A detailed study of these control mechanisms has been made in Chapter IV.

(2) 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 and quality of justice which is required in a welfare State.

In some jurisdictions the term 'quasi-judicial' is used to denote administrative, adjudicatory or decision-making process. But because the term 'quasi-judicial' is vague and difficult to define, it is falling in disuse. Therefore, the use of this term is being carefully avoided.

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.[9]
2. Disciplinary proceedings against an employee for misconduct.[10]
3. Confiscation of goods under the Sea Customs Act, 1878.[11]

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6. Wade: ADMINISTRATIVE LAW, 6th Edn., p. 848.
7. Command Paper 4060 20 (1948).
8. *Shri Sitaram Sugar Co. Ltd.* v. *UOI*, (1990) 3 SCC 223.
9. *Bhagwan* v. *Ramchand*, AIR 1965 SC 1767.
10. *Calcutta Dock Labour Board* v. *Jaffar Imam*, AIR 1966 SC 282.
11. *East India Commercial Co.* v. *Collector of Customs*, AIR 1962 SC 1893.

4. Cancellation, suspension, revocation or refusal to renew licence or permit by licensing authority.[12]
5. Determination of citizenship.[13]
6. Determination of statutory disputes.[14]
7. Power to continue the detention or seizure of goods beyond a particular period.[15]
8. Refusal to grant 'no objection certificate' under the Bombay Cinemas (Regulations) Act, 1953.[16]
9. Forfeiture of pensions and gratuity.[17]
10. Authority granting or refusing permission for retrenchment.[18]
11. Grant of permit by Regional Transport Authority.[19]
12. Registration of a political party by the Election Commission.[20]

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

The Donoughmore Committee on Ministers' Powers (1932) analysed the characteristics of a 'true judicial decision' and summed up the attributes, the presence or absence of which stamped a decision as administrative decision-making or quasi-judicial action. The Committee was of the view that a true judicial decision presupposes a lis between two or more parties and then involves four requisites:

(1) Presentation of the case.

(2) Ascertainment of questions of fact by means of evidence given by the parties.

(3) Ascertainment of questions of law on the basis of submission of legal arguments.

(4) A decision which disposes of the whole matter by applying the law to the facts.

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12. *Fedco (P) Ltd.* v. *Bilgrami*, AIR 1960 SC 415; *Raman and Raman Ltd.* v. *State of Madras*, AIR 1959 SC 694; *Natraja Mudaliar* v. *State Transport Authority*, (1978) 4 SCC 290.
13. *Ayubkhan* v. *Commr.*, AIR 1965 SC 1623.
14. *CST* v. *Super Cotton Bowl Refilling Works*, (1989) 1 SCC 643.
15. *Lakhanpal* v. *Union of India*, AIR 1967 SC 1507; *I.J. Rao, Asstt. Collector of Customs* v. *Bibhuti Bhushan*, (1989) 3 SCC 202.
16. *State of Gujarat* v. *Krishna Cinema*, (1970) 2 SCC 744.
17. *State of Punjab* v. *Iqbal Singh*, (1976) 2 SCC 1.
18. *Workmen* v. *Meenakshi Mills Ltd.*, (1992) 3 SCC 336.
19. *Mithilesh Garg* v. *Union of India*, (1992) 1 SCC 168.
20. *Indian National Congress (I)* v. *Institute of Social Welfare*, (2002) 5 SCC 685.

A quasi-judicial decision involves the first two determinants, may or may not involve the third but never involves the fourth determinant, because the place of the fourth determinant is in fact taken by administrative action, the character of which is determined by the minister's free choice involving expediency, discretion and policy considerations.

Decisions which are administrative stand on a wholly different footing from quasi-judicial as well as from judicial decisions. In the case of administrative decisions, there is no legal obligation to consider and weigh submissions and arguments, or to collect any evidence, or to solve any issue. The grounds upon which the action is taken and the procedure for taking the action are left entirely to the discretion of the authority.

This approach of the Committee seems fallacious because the judges cannot be regarded as mere norm-producing slot machines, they do take into consideration policy, socio-economic and political philosophy, expediency and exercise discretion while deciding a case. In the Twentieth century, it is admitted at all hands that the judiciary is like any other branch of the government because litigation like legislation and administration is a stage in the accommodation of interests. On the other hand in certain areas of administrative adjudication, like tax, the administration applies law to the facts in the same manner as sometimes the judges do. Therefore, it is wrong to suggest that any admixture of policy in the virgin purity of a judicial determination immediately reduces it to the rank of quasi-judicial decision.[21]

As the English 'law and policy' determinant is devoid of sufficient classification, in the same manner, the American 'position-of-the-judge' approach is not without exception. In the American approach, a court is where a judge sits as arbiter—impartial and with no interest in the suit between the two parties. The institution and presentation are the responsibilities of the parties. In an administrative decision, on the other hand, the judge is rarely one who is disinterested in the case and sits detached like a judge. One may be tempted to argue and rightly so, that this classification matrix would also fail in the case of independent tribunals where the presiding officer does sit in judge-like detachment.

Therefore, only that classification determinant can be reasonable which is institutional rather than functional. There are administrative agencies exercising adjudicatory powers which are as full courts: it is only the will of the legislature that these are not classified as courts.

However, it does not mean that because purple is the confused mixture of red and blue, so there is no distinction between red and blue.[22] Administrative decision-making action is not required to follow the elaborate

21. 49 LQR 94.

22. H.W.R. Wade: *Quasi-judicial and its Background*, (1949), 10 Camb Law J 216.

judicial procedure; it is sufficient if, in the absence of any statutory requirement, the action is rendered by following the minimum procedure of natural justice.

There was a time when the view prevailed that the rules of natural justice have application to a quasi-judicial proceeding as distinguished from an administrative proceeding. The distinguishing feature of a quasi-judicial proceeding in this behalf is that the authority concerned is required by law under which it is functioning to act judicially. Duty to act judicially was spelt out in *Rex* v. *Electricity Commissioners*[23] by Lord Atkins thus:

> "Whenever any body of persons having legal authority to determine questions affecting the rights of the subjects, and having the *duty to act judicially*, acts in excess of its legal authority, they are subject to the controlling jurisdiction of the King's Bench Division."

Lord Hewart, C. J., in *Rex* v. *Legislative Committee of the Church Assembly*[24], read this observation of Lord Atkin to mean that the duty to act judicially should be an additional requirement existing independently of the 'authority to determine questions affecting the rights of the subjects'— something superadded to it. This gloss placed by Lord Hewart, C. J. on the dictum of Lord Atkins, to use the words of Krishna Iyer, J. bedevilled the law for a considerable time and stultified the growth of the doctrine of natural justice. Therefore, the court held that the duty to act judicially need not be superadded and it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person affected.[25] The court was constrained in every case that came up before it to make a search for the duty to act judicially, sometimes from tenuous material and sometimes the service of the statute and this led to oversubtlety and overrefinement resulting in confusion and uncertainty in the law.[26]

In India the judicial search for the duty to act judicially was sometimes made within the corners of the statute[27] under which the authority exercised power, and sometimes in the tenuous material, remote and extraneous, such as, *lis inter partis* including proposition and opposition,[28] implications arising from the nature of the functions and the rights affected thereby.[29]

23. (1924) 1 KB 171.
24. (1928) 1 KB 411.
25. *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597.
26. *Ibid.*
27. *Province of Bombay* v. *Khushaldas Advani*, AIR 1950 SC 222; *Radheshyam* v. *State of M.P.*, AIR 1959 SC 107.
28. *G. Nageswara Rao* v. *APSRTC*, AIR 1959 SC 308.
29. *Babul Chandra* v. *Chief Justice & Judges of Patna High Court*, AIR 1954 SC 524; *Raman and Raman Ltd.* v. *State of Madras*, AIR 1959 SC 694; *Board of High School and Intermediate Education, U.P.* v. *Ghanshyam Das*, AIR 1962 SC 1110; *Shivaji Nathubha* v. *Union of India*, AIR 1960 SC 606; *Board of Revenue, U.P.* v. *Vidyawati*,

This doctrinal approach of the courts in India and England not only made the law confused and uncertain but also eluded justice in many cases.

However, in England, a turning point came with *Ridge* v. *Baldwin*[30] when Lord Reid pointed out that the gloss of Lord Hewart was based on misunderstanding of the observations of Lord Atkins. Lord Reid observed: "If Lord Heward meant that it is never enough that a body has a duty to determine what the rights of the individual should be, but that there must always be something more to impose on it a duty to act judicially, then that appears to me impossible to reconcile with the earlier authorities."[31] Lord Reid held that the duty to act judicially must arise from the very nature of the function intended to be performed and it need not be shown to be super-added. Krishna Iyer, J. quoted Prof. Clark from his article on *Natural Justice, Substance and Shadow*,[32] who is of the view that the observation of Lord Reid has restored light to an area 'benighted by the narrow conceptualism of the previous decade'.

This development of law is traceable in India also where the Supreme Court even earlier than *Ridge* v. *Baldwin*[33] was of the view that if there is power to decide and determine to the prejudice of a person, the duty to act judicially is implicit in the exercise of such power.[34] In fact, the foundation of applying natural justice and administrative actions had been laid down in the dissent of Justice Subba Rao in *Radheyshyam Khare* v. *State of M.P.*[35], is significant to note when he held that "Incompetency carries a stigma with it and what is more derogatory to the reputation of the members of the Committee than to be stigmatized as incompetent to discharge their statutory duties? Would it be reasonable to assume that public men in a democratic country are allowed to be condemned unheard ?" This dissent became strikingly pronounced in *A.K. Kraipak* v. *Union of India*[36]. In this case the Supreme Court held that though the action of making selection for government services is administrative, yet the selection committee is under a duty to act judicially. The Court observed that the dividing line between an administrative power and quasi-judicial power is quite thin and is being gradually

AIR 1962 SC 1217; *Dwarka Nath* v. *ITO*, AIR 1966 SC 81; *Lakhanpal* v. *Union of India*, AIR 1967 SC 1507; *Rampur Distillery* v. *Company Law Board*, (1969) 2 SCC 774: AIR 1970 SC 1789; *Indian Sugar and Refineries Ltd.* v. *Amravathi Service Cooperative Society*, (1976) 1 SCC 318: AIR 1976 SC 775.

30. 1964 AC 40.
31. Quoted in *supra* note 6.
32. *Ibid.*
33. 1964 AC 40.
34. *Board of High School, U.P.* v. *Ghanshyam*, AIR 1962 SC 1110.
35. AIR 1959 SC 107.
36. (1969) 2 SCC 262: AIR 1970 SC 150.

obliterated.[37] In *D.K. Yadav* v. *J.M.A. Industries Ltd.*[38] the Supreme Court further observed that the distinction between quasi-judicial and administrative action which had become thin is now totally eclipsed and obliterated. Proceeding a step further the Supreme Court clearly held in *Chandra Bhavan Boarding and Lodging Bangalore* v. *State of Mysore*[39] that it is not necessary to classify an action of the administrative authority as quasi-judicial or administrative because the administrative authority is bound to follow the principles of natural justice in any case. In this case, the question was whether the power to fix a minimum wage under the Minimum Wages Act is quasi-judicial or administrative.[40]

In *Indian National Congress (I)* v. *Institute of Social Welfare*[41], the Apex Court once again defined the meaning and attributes of a quasi-judicial function. In this case, the question was whether function of the Election Commission to register a political party is quasi-judicial or administrative? The Court held that the legal principle as to when an act of statutory authority would be quasi-judicial act, is that where (*a*) a statutory authority empowered under a statute to do an act, (*b*) which would prejudicially affect the subject, (*c*) although there is no lis or two contending parties and the contest is between the authority and the subject, and (*d*) the statutory authority is required to act judicially under the statute, the decision of the authority shall be quasi-judicial. The Court further elaborated that where the law requires that an authority before arriving at a decision must make an enquiry, such a requirement of law makes the authority quasi-judicial authority. In other words if authority is required to act according to rules, its functions will be quasi-judicial. Therefore, if the authority has power to summon witnesses, enforce their attendance, examine them on oath and requires discovery and production of documents, its functions will be quasi-judicial.[42]

(3) 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.

37. *A.K. Kraipak* v. *Union of India*, (1969) 2 SCC 262: AIR 1970 SC 150.
38. (1993) 3 SCC 259.
39. (1969) 3 SCC 84: AIR 1970 SC 2042.
40. *See* also *Divisional Forest Officer, South Kheri* v. *Ram Sanehi Singh*, (1971) 3 SCC 864: AIR 1973 SC 205.
41. (2002) 5 SCC 685.
42. *State of Maharashtra* v. *M.F. Desai*, (2002) 2 SCC 318.

In *A. K. Kraipak* v. *Union of India*[43], 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. In *State of A. P.* v. *S. M. K. Parasurama Gurukul*[44], replying to the question whether the power of the government to appoint trustees under Section 15 of the A. P. Charitable and Hindu Religious Institutions and Endowments Act, 1966 is quasi-judicial or administrative, the court held the function as administrative and laid down that if there is lis between the parties, and the opinion is to be formed on objective satisfaction, the action is quasi-judicial, otherwise administrative. In the same manner in *Govindbhai Gordhanbhai Patel* v. *Gulam Abbas Mulla Allibhai*[45], the court came to the conclusion that since there is nothing in the Act to show that the Collector has to act judicially or in conformity with the recognised judicial norms and as there is also nothing requiring the Collector to determine questions affecting the right of any party, the function of the Collector in giving or withholding permission of transfer of land to a non-agriculturist under Section 63(1) of the Bombay Tenancy and Agricultural Lands Act, 1947 is administrative. The Delhi High Court applying the same parameters held that the function of the Company Law Board granting authority to shareholders to file a petition in the High Court is an administrative and not a quasi-judicial function.[46] Moving forward in the same direction the Supreme Court further held that the function of the Government under Sections 10, 12(5) and 11-A to make or refuse a reference to the Industrial Tribunal[47] and the power to grant or refuse a licence[48] are administrative in nature. In fact, in some cases, an administrative authority may determine questions of fact before arriving at a decision which may affect the rights of a person, even then such function shall continue to be administrative in character. In the same manner if the authority is dictated by the policy and expediency, its function will be administrative.[49]

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

43. (1969) 2 SCC 262: AIR 1970 SC 150.
44. (1973) 2 SCC 232: AIR 1973 SC 2237.
45. (1977) 3 SCC 179: AIR 1977 SC 1019.
46. *Krishna Tiles & Potteries (P) Ltd.* v. *Company Law Board*, ILR (1979) 1 Del 435, *per* V.S. Deshpande, C.J.
47. *Ram Avtar Sharma* v. *State of Haryana*, (1985) 3 SCC 189: AIR 1985 SC 915.
48. *State of U.P.* v. *Raja Ram Jaiswal*, (1985) 3 SCC 131: AIR 1985 SC 1108.
49. *Indian National Congress (I)* v. *Institute of Social Welfare*, (2002) 5 SCC 685.

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. This requirement to follow a minimum of the principles of natural justice impose a duty on the administration that while taking "administrative action" the authority must act "fairly".[50]

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

(1) Issuing directions to subordinate officers not having the force of law.[51]

(2) Making a reference to a tribunal for adjudication under the Industrial Disputes Act.[52]

(3) Internment, externment and deportation.[53]

(4) Granting or withholding sanction to file a suit under Section 55(2) of the Muslim Wakf Act, 1954.[54]

(5) Granting or withholding sanction by the Advocate-General under Section 92 of the Civil Procedure Code.[55]

(6) Fact-finding action.[56]

(7) Requisition, acquisition and allotment.[57]

(8) Entering names in the surveillance register of the police.[58]

(9) Power of the Chancellor under the U.P. State Universities Act, 1973 to take decision on the recommendation of the selection committee in case of disagreement of the Executive Council with such recommendation.[59]

(10) Functions of a selection committee.[60]

(11) Decision to extend time for anti-dumping investigation.[61]

50. *See* Justice Thakkar, C.K.: *From Duty to Act Judicially to Duty to Act Fairly*, (2003) 4 SCC (J) 1.
51. *Nagarajan* v. *State of Mysore*, AIR 1966 SC 1942.
52. *State of Madras* v. *C.P. Sarathy*, AIR 1953 SC 53.
53. *Gopalan* v. *State of Madras*, AIR 1950 SC 27.
54. *Abdul Kasim* v. *Mohd. Dawood*, AIR 1961 Mad 244.
55. *A.K. Bhaskar* v. *Advocate-General*, AIR 1962 Ker 90.
56. *Narayanlal* v. *Mistry*, AIR 1961 SC 29.
57. *Province of Bombay* v. *Khushaldas Advani*, AIR 1950 SC 222.
58. *Malak Singh* v. *State of Punjab & Haryana*, (1981) 1 SCC 420: AIR 1981 SC 760.
59. *Neelima Misra* v. *Harinder Kaur Paintal*, (1990) 2 SCC 746.
60. *National Institute of Mental Health and Neuro-Sciences* v. *K. Kalyana Raman (Dr)*, 1992 Supp (2) SCC 481.
61. *Designated Authority (Anti-Dumping Directorate)* v. *Haldor Topsoe A/S*, (2000) 6 SCC 626.

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.[62] Though by and large administrative action is discretionary and is based on subjective satisfaction, however, the administrative authority must act fairly, impartially and reasonably.

(4) Ministerial action.—A further distillate of administrative action is ministerial action. Ministerial action is that action of the administrative agency which is taken as a matter of duty imposed upon it by the law devoid of any discretion or judgment. Therefore, a ministerial action involves the performance of a definite duty in respect of which there is no choice. Collection of revenue may be one such ministerial action. Furthermore, if the statute requires that the agency shall open a bank account in a particular bank or shall prepare the annual report to be placed on the table of the minister, such actions of opening of the bank account and the preparation of the annual report shall be classified as ministerial. However, the area of such action is highly limited because any efficient discharge of a governmental function presupposes at least some discretion vested in the administrative authority. Gordon classifies the functions of administrative authorities into judicial and non-judicial. Judicial functions involve the decision of rights and liabilities so that an investigation and application of fixed legal standards was a material part of the functions. Non-judicial functions are further divided into administrative and ministerial functions. Ministerial functions are exercised by taking active, often coercive measures, and administrative functions by meting out policy and expediency with unfettered discretion. When an administrative agency is acting ministerially it has no power to consult its own wishes but when it is acting administratively its standards are subjective and it follows its own wishes.[63]

(B) ADMINISTRATIVE INSTRUCTIONS

Subject to the provisions of the Constitution, the executive power of the Union and the States extends to all matters in respect of which Parliament or State legislatures have power to make laws.[64] The executive power includes both the determination of policy as well as carrying it into execution. Thus the power to issue instructions flow from the general executive power of the administration.

In any intensive form of government the desirability and efficacy of administrative instructions issued by the superior administrative authorities

62. *Raman and Raman Ltd.* v. *State of Madras*, AIR 1959 SC 694. See *A.K. Kraipak* v. *Union of India*, (1969) 2 SCC 262: AIR 1970 SC 150.

63. D.M. Gordon: *Administrative Tribunals and the Courts*, (1933) 49 LQR 94, 419.

64. Articles 73 and 162 of the Constitution of India.

to their subordinates cannot be overemphasised. 'Administrative instruction' is a most efficacious technique for achieving some kind of uniformity in administrative discretion, and to manipulate in an area which is new and dynamic. These instructions also give a desired flexibility to the administration devoid of the technicalities of the rule-making process.

Administrative instructions may be specific or general and directory or mandatory. What kind of instruction it is depends largely on the provisions of the statute which authorises the administrative agency to issue instructions. The instructions which are generally issued not under any statutory authority but under the general power of administration are considered as directory, and hence are unenforceable, not having the force of law. In *Fernandez* v. *State of Mysore*[65], the court held the Mysore PWD Code of Instructions as not having the force of law because this is issued under no statutory authority but in exercise of general administrative power. However, though the violations of such instructions may not be enforceable in a court of law, yet their violation may expose the officer concerned to disciplinary action. The determination of statutory or non-statutory source of administrative direction is a complex question.[66]

Even in those situations where administrative instructions have a statutory source, their binding character depends on multiple factors. In *Raman and Raman Ltd.* v. *State of Madras*[67], the Supreme Court came to the conclusion that the administrative instructions, despite their issuance under Section 43-A of the Motor Vehicles Act, 1939, do not have the force of law. However, another decision of the Supreme Court in *Jagjit Singh* v. *State of Punjab*[68] sets the pace in a new direction. In this case, the State Government requested the Punjab Public Service Commission to select and recommend six candidates for filling six vacancies in the Punjab Civil Services (Executive Branch). A competitive examination was held and the appellant, who was a member of a Scheduled Caste, secured third position among the Scheduled Caste candidates. Since only 20 per cent of the reserved quota was available, the first two successful candidates were issued appointment letters. Later on, one of the candidates was selected in the IAS and he resigned. Since the appellant was next in merit on the selection list, he applied to the government for appointment in the vacancy. This claim was based on the State Government's instructions contained in a circular. The

65. AIR 1967 SC 1753.

66. *I.N. Saksena* v. *State of M.P.*, AIR 1967 SC 1264; *Kumari Regina* v. *St. A.H.E. School*, (1972) 4 SCC 188: AIR 1971 SC 1920.

67. AIR 1959 SC 694.

68. (1978) 2 SCC 196. *See* also *Jayantilal Amritlal Shodhan* v. *F.N. Rana*, AIR 1964 SC 648; *Ellerman Lines Ltd.* v. *C.I.T. Ltd., West Bengal, Calcutta*, (1972) 4 SCC 474: AIR 1972 SC 524; *Indian Airlines Corpn.* v. *Sukhdeo Rai*, (1971) 2 SCC 192: AIR 1971 SC 1828.

claim was rejected by the government and a petition filed in the High Court was dismissed. The Supreme Court, allowing the appeal, held that the government instructions not only deprecate the existing practice of including the resultant vacancy in the normal pool but go on to lay down in unmistakable terms that if the services of a government servant belonging to SC or ST are terminated, the resulting vacancy should not be included in the normal pool but should be filled up on an ad hoc basis from the candidates belonging to those categories. In the face of these clear instructions, nothing contrary from the State Government can be accepted. The thrust of the case is that if the administrative instructions do not run counter to the statutory rules, they are binding and their violation can be enjoined through a court of law. Undoubtedly, the government in exercise of its executive authority cannot supersede a statutory rule or regulation but it can certainly effectuate the purpose of a regulation by supplementing it.[69]

The law relating to the statutory status and the enforceability of administrative instructions or directions is in a highly nebulous state because the approach of the courts has so far been residual and variegated. Judicial meanderings in this area of high legal visibility is scathing. Three decisions of the Supreme Court clearly depict court legerdemain. In *V.T. Khanzode* v. *Reserve Bank of India*[70], the question before the court was whether the staff regulations issued by the Reserve Bank of India fixing the basis of seniority of its employees could be modified by a mere circular issued by it later on. The court reiterated the well-settled proposition that administrative instructions, which by their very nature do not have statutory force, cannot modify statutory rules and regulations, and held that since the staff regulations were not issued under Section 58 of the Reserve Bank of India Act, 1934 they were not rules but merely administrative directions which could be amended by any administrative circular.

However, a different position was taken by the court in *Amitabh Shrivastava* v. *State of M.P.*[71], where the court allowed the enforceability of administrative instructions even in view of the fact that they modified statutory rules. In this case the State Government had prescribed certain qualifying marks by statutory rules for admission to medical colleges in the State. The petitioner did not qualify for admission on the basis of these rules. Subsequently the qualifying percentage of marks was lowered by an executive order, on the basis of which the petitioner became eligible for admission. The Supreme Court allowed admission to the petitioner by enforcing an administrative instruction as against the rules. The only justification which the court found for its ruling appears to be that the government did not

69. *Gurdial Singh Fijji* v. *State of Punjab*, (1979) 2 SCC 368: AIR 1979 SC 1622.
70. (1982) 2 SCC 7: AIR 1982 SC 917.
71. (1982) 1 SCC 514: AIR 1982 SC 827.

object to the enforceability of an administrative direction at the instance of an individual. However, in decisions the Supreme Court held that exclusive instructions can supplement a statute or cover areas to which the statute does not extend. But they cannot run contrary to statutory provisions or whittle down their effect.[72]

Bishambhar Dayal Chandra Mohan v. *State of U.P.*[73], is yet another case in the series which involved the question whether the fundamental rights could be curtailed by an administrative instruction. In this case the State of Uttar Pradesh had issued the U.P. Foodgrains Dealers (Licensing and Restriction of Hoarding) Order, 1976 under the Essential Commodities Act, 1955 which provided for the licensing of trade in foodgrains. The U.P. Foodgrains (Procurement and Regulation of Trade) Order, 1978 further provided for the permitted stock quantity and search and seizure. It may be noted that none of these orders provided for any restriction on the intra-State or inter-State movement of foodgrains. However, by a teleprinter message sent by the Secretary to the government to the regional food controllers inter-district movement of foodgrains was prohibited except with the permission of the competent authority. Wheat belonging to various petitioners was seized which was being transported in violation of this teleprinter message. This case involved a constitutional question relating to the enforceability of administrative instructions in the face of their constraints on fundamental rights of the people. Instead of deciding the question whether the instructions conveyed through the teleprinter had the force of law, the court started evaluating the reasonableness of these restrictions on the exercise of fundamental right contained in Articles 19(1)(*g*) and 301. It is well established that the State cannot interfere with the free exercise of the fundamental right of the people without the authority of law. In this situation neither the Act nor the two orders contained anything which authorized the government to impose restrictions on the free movement of foodgrains. Instead of facing the legal problem squarely with the intention of developing substantive parameters of law, the court evaded the whole issue saying, "their remedy lies in a suit for damages for wrongful seizure".[74]

The administrative directions issued by a body incorporated under a statute [illegible] these are issued under statutory provisions. At best these may be compared with the articles of association of a company which have no force of law.[75]

72. *State of M.P.* v. *G.S. Dall and Flour Mills*, 1992 Supp (1) SCC 150; *C.L. Verma* v. *State of M.P.*, 1989 Supp (2) SCC 437.
73. (1982) 1 SCC 39: AIR 1982 SC 33.
74. *See* S.N. Jain: *Legal Status of Administrative Directions—Three Recent Cases add to the Confusion*, 24 JILI 126 (1982).
75. *Cooperative Bank Ltd.* v. *Additional Industrial Tribunal, Andhra Pradesh*, (1969) 2 SCC 43: AIR 1970 SC 245.

Even if administrative instructions have no force of law but if these are consistently followed for a long time government cannot depart from it at its own sweet will without rational justification because this would be a clear violation of Articles 14 and 16 of the Constitution.[76]

However, no specific instructions can be issued to any administrative authority exercising quasi-judicial power or any other statutory power, laying down the manner in which this power is to be exercised. It has always been considered as an interference in the independent exercise of power by the agency and also is against the principles of administrative due process.[77]

If administrative instructions are intended to make a representation to the people then anyone who acts on the representation can hold the agency bound by it on the ground of equitable estoppel.[78]

Even if the administrative instruction is binding the effect of its non-compliance on the legality of the decision would depend on the fact situation. Therefore, administrative instruction to obtain prior permission of government for making an award under the Land Acquisition Act if the value exceeds Rs 20,000 per acre though binding but held that violation thereof does not constitute an infirmity in the acquisition of land itself.[79]

In *Union of India* v. *Charanjit S. Gill*[80], summarised the law thus:

1. Notes and administrative instruction issued in the absence of any statutory authority has no force of law, nor can supplement any provision of law, Act, or rule and regulation.
2. By administrative instructions government has power to fill up gaps in the rules if the rules are silent on the subject and are not inconsistent with the existing rules.
3. 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.

(C) ADMINISTRATIVE DISCRETION

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. A person writing his will has such discretion to dispose of his property in any manner, no matter how arbitrary or fanciful it may be. But the term 'discretion' when qualified by

76. *Amarjit Singh Ahluwalia (Dr)* v. *State of Punjab*, (1975) 3 SCC 503.
77. *Rajagopala Naidu* v. *State Transport Appellate Tribunal*, AIR 1964 SC 1573; *Sri Rama Vilas Service* v. *Road Traffic Board*, AIR 1948 Mad 400.
78. *Union of India* v. *Anglo Afghan Agencies*, AIR 1968 SC 718. *See* Jain: PRINCIPLES OF ADMINISTRATIVE LAW, pp. 494-505 (1973).
79. *Collector, Ongole* v. *Narra Venkateswarlu*, (1996) 7 SCC 150.
80. (2000) 5 SCC 742.

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.[81] For Coke once said that discretion is a science or understanding to discern between falsity and truth, between right and wrong, and not to do according to will and private affection.

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. It is necessary not only for the individualisation of the administrative power but also because it is humanly impossible to lay down a rule for every conceivable eventuality in the complex art of modern government. But it is equally true that absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.[82] Therefore, there has been a constant conflict between the claims of the administration to an absolute discretion and the claims of subjects to a reasonable exercise of it. Discretionary power by itself is not pure evil but gives much room for misuse. Therefore, remedy lies in tightening the procedure and not in abolishing the power itself.

There is no set pattern of conferring discretion on an administrative officer. Modern drafting technique uses the words 'adequate', 'advisable', 'appropriate', 'beneficial', 'competent', 'convenient', 'detrimental', 'expedient', 'equitable', '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 overemphasised.[83]

Judicial Behaviour 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 behaviour 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:

(1) Control at the stage of delegation of discretion;

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

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81. *Sharp* v. *Wakefield*, 1891 AC 173.

82. Justice Douglas in *U.S.* v. *Wunderlich*, 342 US 98, 101 (1951).

83. Freund: ADMINISTRATIVE POWER OVER PERSON AND PROPERTY, (1928), p. 71. List given above has been further added to.

(1) *Control at the stage of delegation of discretion*

The court exercises 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.

Notable instances: Administrative discretion and Article 14

(*i*) *State of West Bengal* v. *Anwar Ali Sarkar*[84].—In this case, in order to speed up the trial for certain offences, Section 5(1) of the West Bengal Special Courts Act, 1950 conferred discretion on the State Government to refer any offence for trial by the Special Court. Since the procedure before the Special Court was stringent in comparison with that for normal trials, the respondents asserted its unconstitutionality on the ground that it violates the equality clause in Article 14. The court held the law invalid on the ground that the use of vague expressions, like 'speedier trial', confers a wide discretion on the government and can be a basis of unreasonable classification.

(*ii*) *State of Punjab* v. *Khem Chand*[85].—In this case, the truck of Sri Khan Chand was requisitioned by the District Magistrate, Rohtak for famine relief work. He challenged the constitutionality of the East Punjab Requisition of Movable Property Act, 1947, under which the action was taken, on the ground that it violates the provisions of Article 14 of the Constitution. The court, upholding the contention, held that the Act confers wide discretionary powers upon authorities by not laying down the guidelines for requisitioning movable property. Even the words "public purpose" are not used. Therefore, arbitrariness and power to discriminate are writ large on the face of the Act and fall within the mischief which Article 14 seeks to prevent. It would be wrong to assume an element of judicial arrogance in the judicial behaviour striking down the statute.

(*iii*) *Manohar Lal* v. *State of Maharashtra*[86].—In this case and many others, signs of judicial humility or withdrawal in judicial behaviour on account of administrative convenience are strikingly visible. In this case, Section 187-A of the Sea Customs Act gave wide discretionary power to the authorities to either refer a case of smuggled goods to a magistrate or

84. AIR 1952 SC 75.

85. (1974) 1 SCC 549: AIR 1974 SC 543. *See* M.P. Jain: *Administrative Discretion and Fundamental Rights*, 1 JILI 247-8 (1958-59).

86. (1971) 2 SCC 119: AIR 1971 SC 1511. *See* also *Pannalal Binjraj* v. *Union of India*, AIR 1957 SC 397; *Chitralekha* v. *State of Mysore*, AIR 1964 SC 1823.

to look into the matter themselves. The court upheld the constitutionality of the statute on the ground that as this discretion is to be exercised by senior officers, that will stand as a guarantee against its misuse. This kind of judicial behaviour aimed at preserving wide discretionary powers may ultimately end up in destroying it.

(*iv*) *Monarch Infrastructure (P) Ltd.* v. *Commr., Ulhasnagar Municipal Corpn.*[87].—In this case, Municipal Corporation had invited tenders for appointment of agents for the collection of octroi. However, one of the eligibility conditions was deleted after the expiry of time for submission of tenders but before opening thereof. Thereafter, tender was awarded to one who did not fulfil the deleted condition. The Supreme Court held award of tender arbitrary and discriminatory.

Notable instances: Administrative discretion and Article 19

Article 19 contains six freedoms [the freedom to acquire, hold and dispose of property—Article 19(*f*)—has been deleted by the Constitution (Forty-fourth Amendment) Act]. These freedoms are not absolute and are subject to reasonable restrictions. The courts have always taken the view that the vesting of wide discretionary power in the administrative authorities to curtail these freedoms is unreasonable and hence unconstitutional.

(*i*) *State of Bihar* v. *K. K. Misra*[88].—In clause (6) of Section 144, Criminal Procedure Code, the State Government was given discretionary power to extend the life of an order passed by the magistrate beyond the period of two months if it considered it necessary for preventing danger to human life, health and safety or for preventing riot or an affray. The Supreme Court held clause (6) of Section 144 unconstitutional as it invests the administrative authority with blanket discretionary power which is capable of being exercised arbitrarily, and hence would amount to unreasonable restriction on the exercise of freedom.

(*ii*) *Himat Lal K. Shah* v. *Commr. of Police*[89].—Rule 7 under Section 44 of the Bombay Police Act, 1951 gave unguided discretionary power to the Police Commissioner to grant or refuse permission for any public meeting to be held on a public street. The Supreme Court struck down Rule 7 as being an unreasonable restriction on the exercise of a fundamental right.

(*iii*) *State of Madras* v. *V. G. Row*[90].—Section 15(2)(*b*), Criminal Law Amendment Act, 1908 as amended by Madras Act, 1950 gave wide discre-

87. (2000) 5 SCC 287. See also *Mohd. Riazul Usman Gani* v. *Distt. and Session Judge*, (2000) 2 SCC 606.

88. (1969) 3 SCC 337: AIR 1971 SC 1667. See also *Khwaja Ahmed Abbas* v. *Union of India*, (1970) 2 SCC 780: AIR 1971 SC 481.

89. (1973) 1 SCC 227: AIR 1973 SC 87.

90. AIR 1952 SC 196. See also *Ramakrishnaiah* v. *President, District Board*, AIR 1952 Mad 253.

tionary powers to the State Government to declare any association as unlawful. The court struck down Section 15(2)(*b*) as being unconstitutional because it allows the administrative authority to exercise this discretion on subjective satisfaction without permitting the grounds to be judicially tested.

(*iv*) *State of M. P.* v. *Bharat Singh*[91].—The M. P. Public Security Act, 1959 invested the District Magistrate or the State Government with wide discretion, uncircumscribed by procedural safeguards, to extern a person from any area and to intern him in any specified place if his activities were prejudicial to the security of State or maintenance of public order. The Supreme Court held the relevant provision unconstitutional on the ground that it invests the government with such wide discretion without procedural safeguards that a person could even be interned in a place which could render him a destitute without any means of livelihood.

(*v*) *Harakchand Ratanchand Banthia* v. *Union of India*[92].—The Gold Control Act, 1968 invested administrative authority with blanket discretionary power to grant or refuse licence to any dealer in gold ornaments. Though the Act had provided that such power was to be exercised with reference to the number of existing dealers, anticipated demand, suitability of the applicant and public interest, the court struck down the law on the ground that such vague expressions may result in the arbitrary exercise of power.

(*vi*) *State of Maharashtra* v. *Kamal S. Durgule*[93].—In this case the legislature had given the power to the competent authority to declare a land vacant and then to acquire it. The power had been given without laying down any guidelines for the exercise of this discretion and no provision had been made of any notice and hearing to the owner. Quashing Sections 3(1) and 4(1) of the Land Acquisition Act, the Supreme Court held that because law confers arbitrary powers on the government, hence it violates Article 14 of the Constitution. The Court further observed that the fact that the exercise of this power has been given to officers of high echelon makes no difference to the position and is not a palliative to the prejudice which is inherent in the situation.

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 bestowal of such a discretion can be controlled by the court on the ground of excessive delegation.[94] This aspect of 'discretion' has been discussed in detail in the chapter on administrative rule-making.

91. AIR 1967 SC 1170. *See* also *State of M.P.* v. *Baldeo Prasad*, AIR 1961 SC 293.
92. (1969) 2 SCC 166: AIR 1970 SC 237.
93. (1985) 1 SCC 234: AIR 1985 SC 119.
94. *Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554.

(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.

These clauses are however, not mutually exclusive. They may overlap and at times, run into each other.

(*i*) *That the authority is deemed not to have exercised its discretion at all.*—Under this categorisation, 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. The authority in which discretion is vested can be compelled to exercise it, but not to exercise it in a particular manner.

Purtabpore Co. Ltd. v. *Cane Commr. of Bihar*[95], 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 favour 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.[96]

However, this does not mean that the administrative authority cannot frame broad policies for the exercise of its discretion. In *Shri Rama Sugar Industries Ltd.* v. *State of A. P.*[97], Section 21 of the A. P. Sugarcane (Regulation, Supply and Purchase) Act, 1961 gave power to the administrative authority to exempt from payment of tax any new factory which has substantially expanded. The government framed a policy granting exemption

95. (1969) 1 SCC 308: AIR 1970 SC 1896. *See* also *Commr. of Police* v. *Gordhandas Bhanji*, AIR 1952 SC 16; *State of Punjab* v. *Suraj Parkash*, AIR 1963 SC 507.

96. *Anirudhsinghji Karansinghji Jadeja* v. *State of Gujarat*, (1995) 5 SCC 302.

97. (1974) 1 SCC 534: AIR 1974 SC 1745.

only to factories in the co-operative sector. The Supreme Court, negativing the contention that the adoption of this policy has fettered the exercise of discretion, held that a body endowed with a statutory discretion may legitimately adopt general rules or principles to guide itself in the exercise of its discretion provided such rules are not arbitrary and not opposed to the aims and objectives of the Act. The Court further remarked that by adopting such rules the agency must not disable itself from exercising genuine discretion in individual cases. Justice Mathew and Justice Bhagwati, however, gave a dissenting opinion on the ground that the adoption of policy, as has been done in this case, predetermines the issue.[98]

(*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 which 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 unreasonably'.

In *Indian Rly. Construction Co.* v. *Ajay Kumar*[99], elaborating the law on this point, the Court held that in general, a discretion must be exercised only by the authority to which it is committed. The authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case. In the purported exercise of discretion, it must not do, what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter and spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. The distinctive features of some recent cases signify the willingness of the Courts to scrutinize the factual basis on which discretion has been exercised. One can classify these grounds of judicial control of administrative discretion into 'illegality', 'irrationality' and 'procedural impropriety'. To characterize an exercise of discretion as 'irrational' the Court apply Wednesbury Test of Reasonableness and see whether discretion is "so outrageous" as to be in total defiance of

98. *See* Baxi's Introduction to Mathew: DEMOCRACY, EQUALITY AND FREEDOM, pp. XLVIII-XLIX and S.P. Sathe: *Discretion and Policy: A note on Shri Rama Sugar Industries* v. *State of A.P.*, (1974) 1 SCC 534: (1974) 16 JILI 457. See also *UPSRTC* v. *Mohd. Ismail*, (1991) 3 SCC 239.

99. (2003) 4 SCC 579.

logic and moral standards. Exercise of discretionary power can be set aside if there is manifest error in the exercise of such power or the exercise of such power is manifestly arbitrary or mala fide or unreasonable. The decision could be of many choices open to the authority, it is open to the authority to exercise its choice and the Court would not substitute its view. In this way Courts have widened the scope of judicial review of administrative discretion restricting the doctrine of immunity from judicial review to class of cases which relate to deployment of troops and entering into international treaties etc.

Notable Instances

(*i*) *Barium Chemicals Ltd.* v. *Company Law Board*[1].—This case shows a definite orientation in the judicial behaviour for an effective control of administrative discretion in India. In this case the Company Law Board exercising its powers under Section 237 of the Companies Act, 1956 ordered an investigation into the affairs of Barium Chemicals Ltd. Under Section 237, the Board is authorised to order investigation if in its opinion the business of the company is being conducted with intent to defraud its creditors or members, etc., or the management of the company is guilty of fraud, misfeasance or other misconduct, or the members of the company have not been given full information about the affairs of the company. However, the basis of the exercise of discretion for ordering investigation was that due to faulty planning the company incurred a loss, as a result of which the value of the shares had fallen and many eminent persons had resigned from the Board of Directors. The court quashed the order of the Board on the ground that the basis of the exercise of discretion is extraneous to the factors mentioned in Section 237 for such exercise of discretion. This case also stands for the proposition that mere executive declaration that there was material for forming an opinion will not save the exercise of discretion from judicial scrutiny.

(*ii*) *M. A. Rasheed* v. *State of Kerala*[2].—In this case, the Kerala Government issued a notification to prevent high consumption of coir in mechanised industry because the traditional sector was starving, causing unemployment. The main ground of challenge was that there was no reasonable basis for the exercise of this discretion. The court observed: (*i*) Whenever a public authority is invested with the power to make an order which prejudicially affects the rights of an individual, then, whatever may be the nature of the power, whatever may be the procedure prescribed and whatever may be the nature of the authority, the proceedings of the public authority must

1. AIR 1967 SC 295. *See* also *Rohtas Industries* v. *S.D. Agarwal*, (1969) 1 SCC 325: AIR 1969 SC 707.
2. (1974) 2 SCC 687: AIR 1974 SC 2249.

be regulated by the analogy of rules governing judicial determination of disputed questions. (*ii*) Where powers are conferred on the executive authority based on subjective satisfaction, the courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law and fact upon which the exercise of power is predicated. (*iii*) Administrative decision in exercise of powers even if conferred in subjective terms is to be made in good faith based on relevant considerations. The courts can enquire whether a reasonable man could have come to the decision without misdirecting himself on law and fact. The standard of reasonableness may range from the court's own opinion of what is reasonable to the criterion of what a reasonable man might have decided. The courts will find out whether conditions precedent to the forming of opinion have a factual base. (*iv*) Where reasonable conduct is expected, the criterion of reasonableness is not subjective but objective.

(*iii*) *S. R. Venkataraman* v. *Union of India*[3].—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 unauthorised 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. The Court quoted with approval Lord Esher in *The Queen on the Prosecution of Richard Westbrook* v. *Vestry of St. Pancras*[4]: "If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."

(*iv*) *Rampur Distillery Co. Ltd.* v. *Company Law Board*[5].—The Company Law Board exercising wide discretionary power under Section 326 of the Companies Act, 1956 in the matter of renewal of a managing agency refused approval for the renewal to the managing agents of the Rampur Distillery. The reason given by the Board for its action related to the past conduct of the managing agent. The Vivian Bose Enquiry Commission had found these managing agents guilty of gross misconduct during the year

3. (1979) 2 SCC 491: AIR 1979 SC 49.
4. (1890) 24 QBD 375.
5. (1969) 2 SCC 774: AIR 1970 SC 1789.

1946-47 in relation to other companies. The Supreme Court, though it did not find any fault in taking into consideration the past conduct, held the order bad, because the Board did not take into consideration the present acts which were very relevant factors in judging suitability.

(*v*) *G. Sadanandan* v. *State of Kerala*[6].—The petitioner challenged his detention order by the government on the ground of mala fide exercise of discretion. The facts were brought before the court to show that the Deputy Superintendent of Police (Civil Supplies Cell) made a false report against the petitioner who was a wholesale dealer in kerosene in order to benefit his relative in the same trade by eliminating the petitioner from the trade. In the absence of a counter-affidavit from the side of the government the court quashed the order.

(*vi*) *R. D. Shetty* v. *International Airport Authority*[7].—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 restaurant and two snack bars by the International Airport Authority, which is a statutory corporation. The tenders were invited from 'registered second-class hoteliers' 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 tender was accepted. The only snag was that the tenderer was not a hotelier at all. A writ petition 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 standi 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

6. AIR 1966 SC 1925. *See* also *Rowjee* v. *State of A.P.*, AIR 1964 SC 962.
7. (1979) 3 SCC 489: AIR 1979 SC 1628.

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 licences only in favour of those having grey 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.

This case is not an attempt in judicializing the administrative process but only reiterates that 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-governmental 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.[8] The courts have also insisted that before the exercise of discretion, the administrative authority must also frame rules for the proper exercise of the discretion. Courts have emphasised that even the power of the President or the Governor to grant pardon and to suspend; remit or commute sentences or power of the Chief Minister to allot cement, plots or houses from discretionary quota or to make nominations to medical or engineering colleges must conform to this norm. The Himachal Pradesh High Court struck down the nomination of three students to the State Medical College made by the Chief Minister out of his discretionary quota for 1982-83. The main thrust of attack in a bunch of petitions challenging these nominations was that no guidelines have been prescribed for the exercise of discretion and hence the power is uncanalised and liable to be abused and may be subject to political pulls and pressures. Quashing these nominations, the court emphasised that while the college prospectus leaves nominations to the discretion of the Chief Minister, it has not provided any clear policy or guidelines with reference to which the Chief Minister was to exercise his discretion.[9] However, it is not necessary that the guidelines must be ex facie

8. *R.R. Verma* v. *Union of India*, (1980) 3 SCC 402: AIR 1980 SC 1461; *Ramakanyadevi* v. *State*, AIR 1980 Kant 182; *Subash Chandra* v. *State of U.P.*, (1980) 2 SCC 324: AIR 1980 SC 800; *Chanderbhan* v. *S. Kumar*, AIR 1980 Bom 48; *State of Punjab* v. *Gurdial Singh*, (1980) 2 SCC 471: AIR 1980 SC 319; *Accountant General* v. *S. Doraiswamy*, (1981) 4 SCC 93: AIR 1981 SC 783.

9. *Indian Express*, November 20, 1982. The Bench consisted of Chief Justice V.D. Misra and Justice H.S. Thakur. Two of the three nominees had appeared for the Pre-Medical Test of the H.P. University but failed to qualify for admission. The Supreme Court not

found. It is sufficient if guidelines could be gathered on wholesome reading of the statute and rules, regulations, orders or notifications issued thereunder.[10] Nevertheless in order to meet the challenge of arbitrariness clear and unequivocal guidelines, criteria, rule or regulations must be predetermined and published for the public and action should be taken accordingly. Reason and justice and not arbitrariness must inform every exercise of discretion.[11] In the same manner when no guidelines were prepared for the selection of dealers of fair price shops and the selection was left entirely to the whims of the individual officer holding interview the court held that the exercise of such unbridled power is violative of Article 14 of the Constitution.[12] 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.

Nevertheless the Supreme Court has reiterated that the judicial invigilation of administrative decision should not extend as far as reviewing the actions on merit. In *P. Kasilingam* v. *P. S. G. College of Technology*[13], the court held that a High Court transgresses its jurisdiction under Article 226 if it enters upon the merits of the controversy by embarking upon an enquiry into the facts.

Elaborating the same principle the Apex Court in *Air India Ltd.* v. *Cochin International Airport Ltd.*[14], observed that decision-making process and not decision which is amenable to judicial review. In this case Cochin International Airport Authority wrote letters to certain firms for quotations for ground handling services. Combatta Aviation quoted higher offer and thus was recommended by the Evaluation Committee. However, Board of Directors decided to negotiate with Air India, being a public sector undertaking. After negotiation it increased its offer and hence contract was awarded to Air India. Declining to interfere in the exercise of discretion of the authority, the Court observed that state can choose its own methods or various factors of commercial viability therefore, Court should not interfere with the decision unless dire public interest so requires. The Court further observed that even if some defect is found in the decision making process, the decision should not be interfered with unless it is unreasonable, mala fide or arbitrary and overwhelming public interest requires so.

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only upheld the decision of the High Court but also directed on appeal the Union Government and State Government that they must refrain from making such nominations without proper guidelines. *Indian Express*, February 10, 1983.

10. *M.J. Sivani* v. *State of Karnataka*, (1995) 6 SCC 289.
11. *New Public Scholl* v. *HUDA*, (1996) 5 SCC 510; *Gajraj Singh* v. *STAT*, (1997) 1 SCC 650.
12. *Y. Srinivasa Rao* v. *J. Veeraiah*, (1992) 3 SCC 63.
13. (1981) 1 SCC 405: AIR 1981 SC 789.
14. (2000) 2 SCC 617.

The court has developed a kind of caste-based hierarchic view of administrative responsibility when it presumes that 'high' authority is unlikely to use its discretionary power injudiciously or arbitrarily. This presumption is certainly conjectural and hence not tenable.[15] This makes the judicial review of administrative discretion marginal and feeble. However, even where the Court would not look into exercise of discretionary power by a high functionary on merit it would certainly interfere if the exercise of power is arbitrary, mala fide or in absolute disregard of constitutionalism. Thus in *Swaran Singh* v. *State of U.P.*[16] the Court remanded the case back to the Governor who had granted remission of sentence in a situation when adverse material against the petitioner was not brought to his notice. The Apex Court deviated from its earlier view that there is a presumption against abuse of power vested in a high-ranking official.[17] Even the constitutional authorities cannot claim that either there is no discretion in the matter or the discretion is unfettered.[18] Discretionary power has to be exercised to advance the purpose for which the power has been given.

In England, where Parliament is supreme and can confer any amount of discretion on the administrative authority, the courts have always held that the concept of 'unfettered discretion' is a constitutional blasphemy. Besides requiring that the discretion must be exercised in conformity with the general policy of the Act and for a proper purpose, courts insist on its 'reasonable' exercise. Thus the judicial control of administrative discretion in England, USA and India converges on the same point despite divergent constitutional structurizations.

The decision of the House of the Lords in *Padfield* v. *Minister of Agriculture*[19] lays down the parameters of judicial control of administrative discretion in England. In this case under the statutory milk-marketing scheme, the prices paid to milk producers in different areas are fixed by the Milk Marketing Board which consists of representatives of the producers. The producers near the area of London complained that though they were in proximity of the London market, yet the price paid did not reflect the higher value of their milk, and requested the minister to refer the matter to the Statutory Committee for Complaints. To direct or not to direct a complaint to the committee was the sole discretion of the minister. The minister in exercise of his unfettered discretion refused to direct the complaint. One

15. *See* Upendra Baxi: *Developments in Indian Administrative Law* in Public Law In India. (1982) (Ed. A.G Noorani), p. 150; M.P. Jain: CHANGING FACE OF ADMINISTRATIVE LAW IN INDIA AND ABROAD. (1982). p. 31; *State of Punjab* v. *Dial Chand Gian Chand & Co.*, (1983) 2 SCC 503: AIR 1983 SC 743.

16. (1998) 4 SCC 75. *See* also *Satpal* v. *State of Haryana*, (2000) 5 SCC 170.

17. *Accountant General* v. *S. Doraiswamy*. (1981) 4 SCC 93.

18. *Shiv Sagar Tiwari* v. *UOI*. (1997) 1 SCC 444.

19. 1968 AC 997: (1968) 1 All ER 694.

of the reasons given by the ministry was that the minister would be in a difficult political position if, despite the committee's acceptance of the complaint, the minister should take no action. The House of Lords held that the minister's reasons were unsatisfactory and his decision was unreasonable. The purpose of the Act was that every genuine complaint must be forwarded to the committee and anything contrary to this would frustrate that purpose.

R. v. Metropolitan Police Commissioner ex parte Blackburn[20] is another classical example of judicial control of administrative discretion. Illegal gambling had increased considerably in London, but because of shortage of police personnel, the Police Commissioner issued confidential instructions that the observation of gambling clubs was to cease. Thereafter, a policy of not prosecuting these clubs was adopted. Mr Blackburn, a private individual, applied for a writ of mandamus to direct the police to do their duty and enforce the law. Though the writ lapsed because the Police Commissioner reversed his policy, yet the court held that the discretion of the police was not absolute and uncontrollable in the sense that no means were available for enforcing this duty. Therefore, in England, the long arm of the court reaches out to administrative discretion to correct its abuse in the same manner as it does in India and the USA.

In the USA, besides the judicial review of administrative discretion which is available in the 'due process clause' and the general grant of constitutional judicial power, the Administrative Procedure Act, 1946, in Section 10, provides that the reviewing court shall 'hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'. This entails that if administrative discretion is exercised arbitrarily or capriciously, the courts would intervene. Section 10 also provides for a dangerous exception to the rule of judicial review in cases "where agency action is by law committed to agency discretion". However, courts have interpreted this exception in a manner not to cover arbitrary or capricious exercise of discretion. In *Citizens to Preserve Overton Park Inc. v. Volpe*[21], the Secretary of Transportation had authorised the use of federal funds for the construction of a highway through the public park. The statute gave discretion to the Secretary to allow such a construction only if a "feasible and prudent" alternative route did not exist. The Supreme Court did not accept the contention of the Secretary that the determination of 'feasible and prudent' alternative route is committed to his absolute discretion and hence is not subject to judicial review. The court did not allow the exception to Section 10, Administrative Procedure Act to reign supreme. In the same manner, in *Barlow v. Collins*[22]

20. (1968) 2 QB 118: (1968) 1 All ER 763.
21. 425 F 2d 79 (1970).
22. 397 US 159 (1970).

where the statute authorised the Secretary of Agriculture 'to prescribe such regulations as he may deem proper to carry out the provisions of this Chapter' the court did not accept the contention that the contents of the regulation were committed to the absolute discretion of the Secretary which was not subject to judicial review.

In the USA, judicial activism has entered the area of administrative discretion also and courts not only substitute their discretion to the discretion of administrative authority but sometimes exercise discretion which is vested in an administrative authority. In *Boreta Enterprises* v. *Department of Alcoholic Beverage Control*[23], the agency revoked the liquor licence because the licensee employed topless waitresses. The agency exercised its discretion on the ground that the licensee's conduct was contrary to public morals and might lead to socially deleterious conduct. The California Supreme Court held the exercise of discretion invalid on the ground that it is not a legal exercise of discretion covered within the requirement of the 'good cause' clause for revocation of licence. In the same manner in *United States* v. *Professional Air Traffic Controllers' Organization*[24], the court ordered the controllers of air traffic to end a strike and return to work. The order of the court also laid down that the Federal Aviation Authority (FAA) will impose no penalty of suspension or dismissal, no matter that the question of discipline in case of strike was within the sole discretion of the FAA.

In France, the administrative courts exercise power of judicial review over administrative action if the administrative authority abuses its discretionary powers. The term 'abuse of power' includes everything which the term 'unreasonable exercise of power' includes in England and arbitrary and capricious exercise of power includes in the USA. From the above analysis it becomes clear that though some discretion is necessary to keep the giant wheels of administration moving in this age of an intensive form of government, if the power is misused the arms of the court are long enough to reach it.[25]

POINTS FOR DISCUSSION

(1) Is there any need left to study the classification of administrative action after the Supreme Court's decision in *Kraipak case*?

(2) Place of administrative finality in the constitutional structurization in India. Evaluation of judicial behaviour.

(3) Desirability and efficacy of the strategy of administrative instructions to bring uniformity in the area of administrative discretion.

(4) What possible parameters can be developed to identify the binding character of administrative instructions.

23. 84 Cal Reptr 113 (1970).

24. 438 F 2d 79 (1970).

25. *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248, 294: AIR 1978 SC 597.

(5) Administrative discretion has a value of its own in the form of individualization of administrative action but it is a ruthless master also. Are the norms developed by the courts to regulate administrative discretion at the stage of delegation and the exercise of it adequate to eliminate administrative arbitrariness?

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4

Rule-making Power of the Administration

(Quasi-legislative Action or Delegated Legislation)

With the growth of the administrative process in the Twentieth Century, administrative rule-making or delegated legislation has assumed tremendous proportions and importance. Today the bulk of the law which governs people comes not from the legislature but from the chambers of administrators. The fact is that the direct legislation of Parliament is not complete, unless it is read with the help of rules and regulations framed thereunder; otherwise by itself it becomes misleading.

The term delegated legislation is difficult to define. However, if defined, in a simple way, delegated legislation refers to all law-making which takes place outside the legislature and is generally expressed as rules, regulations, bye-laws, orders, schemes, directions or notifications, etc. In other words when an instrument of a legislative nature is made by an authority in exercise of power delegated or conferred by the legislature it is called subordinate legislation or delegated legislation.[1] Salmond defines delegated legislation as "that which proceeds from any authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority".[2] The term delegated legislation may be used in two senses: it may mean (*i*) exercise of law-making power by the administrative authority delegated to it by the legislature, or (*ii*) the actual exercise of law-making power itself in the forms of rules and regulations, etc.[3]

(A) NEED FOR ADMINISTRATIVE RULE-MAKING

Delegated legislation is not a new phenomenon. Ever since the statutes came to be made by Parliament, delegated legislation also came to be made by an authority to which the power was delegated by Parliament. Going back into history one can find the Statute of Proclamation, 1539 under which Henry VIII was given extensive powers to legislate by proclamations. This proves the fact that there was and will always be the need for delegated legislation. The exigencies of the modern State, especially social and economic reforms, have given rise to delegated legislation on a large scale, so

1. HALSBURY'S LAWS OF ENGLAND, 4th Edn., Vol. 44, pp. 981-84.
2. Salmond: JURISPRUDENCE, 12th Edn., p. 116.
3. *See* Jain and Jain: ADMINISTRATIVE LAW, 1986, p. 26.

much so that a reasonable fear arises among the people that they are being ruled by the bureaucracy.[4]

The Indian Parliament enacted from the period 1973 to 1977 a total of 302 laws; as against this the total number of statutory orders and rules passed in the same period was approximately 25,414. Corresponding figures for States and Union Territories are not available, but the number of rules issued under the delegated powers may well be astronomical.[5]

The modern trend is that Parliament passes only a skeletal legislation. A classical example may be the Imports and Exports (Control) Act, 1947 which contains only eight sections to provide through the rule-making power delegated to them under legislation and leaves everything to the administrative agencies and delegates the whole power to the administrative agency to regulate the whole complex mechanism of imports and exports. The examples may be multiplied. This trend brings us to the need matrix of the phenomenon of delegated legislation or administrative rule-making.

The basis of need matrix of administrative rule-making lies in the fact that the complexities of modern administration are so baffling and intricate, and bristle with details, urgencies, difficulties and need for flexibility that our massive legislatures may not get off to a start if they must directly and comprehensively handle legislative business in all their plenitude, proliferation and particularisation. Therefore, the delegation of some part of legislative power becomes a compulsive necessity for viability. If the 525-odd parliamentarians are to focus on every minuscule of legislative detail leaving nothing to subordinate agencies the annual output may be both unsatisfactory and negligible. Law-making is not a turnkey project, readymade in all detail and once this situation is grasped the dynamics of delegation easily follows.[6] From the above generalisation, the factors leading to the growth of administrative rule-making may be particularised as follows:

1. Legislation on ever-widening fronts of a modern Welfare and Service State is not possible without the technique of delegation. It is trite but correct to say that even if today Parliament sits all the 365 days in a year and all the 24 hours, it may not give that quantity and quality of law which is required for the proper functioning of a modern government. Therefore, delegation of rule-making power is a compulsive necessity. It also gives an advantage to the executive, in the sense that a Parliament with an onerous legislative time schedule may feel tempted

4. *Agricultural Market Committee* v. *Shalimar Chemical Works*, (1997) 5 SCC 516.

5. Statement from the working paper presented by Prof Upendra Baxi, quoted in *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137, 160: AIR 1979 SC 321.

6. From the judgment of Krishna Iyer, J., in *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137, 147: AIR 1979 SC 321.

to pass skeleton legislation with the details to be provided by the making of rules and regulations.[7]

2. Today, legislation has become highly technical because of the complexities of a modern government. Therefore, it is convenient for the legislature to confine itself to policy statements only, as the legislators are sometimes innocent of legal and technical skills, and leave the law-making sequence to the administrative agencies.

3. Ordinary legislative process suffers from the limitation of lack of viability and experimentation. A law passed by Parliament has to be in force till the next session of Parliament when it can be repealed. Therefore, in situations which require adjustments frequently and experimentation, administrative rule-making is the only answer.

4. In situations where crisis legislation is needed to meet emergent situations, administrative rule-making is a necessity because the ordinary law-making process is overburdened with constitutional and administrative technicalities and involves delay.

5. In some situations it is necessary that the law must not be known to anybody till it comes into operation. For example, in case of imposition of restrictions on private ownership, it is necessary that the law must be kept secret till it comes into immediate operation, otherwise people could arrange their property rights in such a manner as to defeat the purpose of the law. This secrecy can be achieved only through administrative action because the ordinary legislative process is always very open.

6. Where government action involves discretion, i.e. expansion of public utility services, administrative rule-making is the only valid proposition.

7. Today there is a growing emergence of the idea of direct participation in the structurisation of law by those who are supposed to be governed by it because indirect participation through their elected representatives more often proves a myth. Therefore, administrative rule-making is a more convenient and effective way and provides for this participation.

One may go on multiplying the factors responsible for the growth of administrative rule-making, yet the list may not be exhaustive. It will suffice to say that the technique of administrative rule-making is now regarded as useful, inevitable and indispensable.[8]

However, one must not lose sight of the fact that though the technique of administrative rule-making is useful and inevitable yet constitutional le-

7. *Agricultural Market Committee* v. *Shalimar Chemical Works*, (1997) 5 SCC 516.
8. COMMITTEE ON MINISTERS' POWERS, REPORT 45, 23, 51, 52 (1932).

gitimation of unlimited power of delegation to the executive by the legislature may, on occasion, be subversive of responsible government and erosive of democratic order.[9] At times the legislature passes only skeletal laws without laying down even a policy in clear terms, and leaves everything else to the discretion of the administrative agency. Therefore, the administration armed with the law-making power threatens to overwhelm the little man by trampling upon his liberty and property. The technocracy and the bureaucracy which draft subordinate legislation are perhaps well-meaning and well-informed but insulated from parliamentary audit and isolated from popular pressure and may, therefore, make law which is socially less communicable, acceptable and effective.

Furthermore, if law-making is taken over by the government it may make its administration by barrel of the secretariat pen.[10] Therefore, if the technique of administrative rule-making is to serve its laudable task, the norms of the jurisprudence of delegation of legislative power must be dutifully observed. These norms include a clear statement of policy, procedural safeguards and control mechanisms.

(B) CLASSIFICATION OF ADMINISTRATIVE RULE-MAKING POWER OR DELEGATED LEGISLATION

Administrative rule-making or delegated legislation in India is commonly expressed by the term 'statutory rules and orders'. However, this classification is not exhaustive as it appears in other forms also, i.e. regulation, notification, bye-law, scheme and direction. These terminologies are confusing because different words are used for the same thing and same words are used for different things.

(1) Title-based classification

1. *Rule*: The term 'rule' is defined in the General Clauses Act, 1897 as a rule made in exercise of power conferred by any enactment and shall include a regulation made as a 'rule' under any enactment. These rules may be made applicable to a particular individual or to the general public. It may include rules of procedure as under the Atomic Energy Act, 1948 and also the rules of substantive law as in the Defence of India Rules (now repealed).

2. *Regulations*: This term is not confined to delegated legislation. It means an instrument by which decisions, orders and acts of the government are made known to the public. But in the sphere of administrative rule-making, the term relates to a situation where power is given to fix the date for the enforcement of an Act or to grant exemptions from the Act or to fix prices, etc.

9. *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137, 160: AIR 1979 SC 321.
10. *Ibid.*

3. *Order*: This term is used to cover various forms of legislative and quasi-judicial decisions. Orders may be specific or general. The former refers to administrative action while the latter refers to administrative rule-making.

4. *Bye-laws*: The term has been confined to rules made by semi-governmental authorities established under the acts of legislatures.

5. *Directions*: The term is used in two senses. The Constitution gives powers to the Central Government to give directions to State Governments for the execution of its laws. In this sense it has no application to delegated legislation. In the second sense, the term 'direction' is an expression of administrative rule-making under the authority of law or rules or orders made thereunder. These may be recommendatory or mandatory. If mandatory, these have the force of law.

6. *Scheme*: The term refers to a situation where the law authorises the administrative agency to lay down a framework within which the detailed administrative action is to proceed.

The Committee on Ministers' Powers has recommended for the simplification of the nomenclature and confining the term 'rule' to the statutory instrument regulating procedure, the term 'regulation' to describe the substantive administrative rule-making and the term 'order' to be confined to instruments exercising executive and quasi-judicial decisions.

(2) Discretion-based classification (conditional legislation)

Another classification of administrative rule-making may be based on discretion vested in the rule-making authority. On the basis of 'discretion' administrative rule-making may be classified into subordinate and contingent or conditional legislation. This classification is linked with the leading case of *Field* v. *Clark*[11]. The impugned Act authorised the President by proclamation to suspend the operation of an Act permitting free introduction into the USA of certain products upon his finding that the duties imposed upon the products of the US were reciprocally unequal and unreasonable. The US Supreme Court upheld the validity of the Act on the ground that the President is a mere agent of the Congress to ascertain and declare the contingency upon which the will of the Congress will prevail. The Court further held that the Congress cannot delegate its power to make a law, but it can make a law to delegate the power to determine some factors or state of things upon which the law intends to make its own action depend. Therefore, contingent or conditional legislation may be defined as a statute that provides control but specifies that they are to go into effect only when a given administrative authority finds the existence of conditions defined in the statute itself. In subordinate legislation the process consists of the discretionary elaboration of rules and regulations. The distinction between the two is of

11. 143 US 649 (1892).

'discretion'. Contingent or conditional legislation is fact-finding and subordinate legislation is discretionary. In conditional legislation the gun and the gunpowder is provided by the legislature and the administrative authority is only required to pull the trigger but in subordinate legislation the administrative authority is to manufacture the gunpowder also. It may be noted that this distinction is hardly real. In contingent or conditional legislation also, a certain amount of discretion is always present. The contingent legislation formula is a fiction developed by the U.S. Court to get away from the operation of the doctrine of separation of powers.

It is thus obvious that in the case of conditional legislation the legislation is complete in itself but its operation is made to depend on fulfilment of certain conditions and what is delegated to an outside authority is the power to determine according to its own judgment whether or not those conditions are fulfilled. In case of delegated legislation proper, some portion of the legislative power is delegated to the outside authority, in that the legislature, though competent to perform both the essential and ancillary legislative functions, performs only the former and parts with the latter, i.e. the ancillary functions of laying down details in favour of another authority for executing the policy of the statute enacted. The distinction between conditional legislation and delegated legislation exists in this that whereas conditional legislation contains no element of delegation of legislative power and is, therefore, not open to attack on the ground of excessive delegation, delegated legislation does confer some legislative power on some outside authority and is, therefore, open to attack on the ground of excessive delegation.[12]

In *Emperor* v. *Benoari Lal*[13] the Privy Council for the first time upheld the validity of the Governor-General's Ordinance of special courts, which had delegated the power to extend the duration of the ordinance on provincial governments in case of emergency, on the ground of conditional legislation. The Privy Council observed that it was a piece of conditional legislation as the legislation was complete and what had been delegated was the power to apply the Act on the fulfilment of certain conditions. The Supreme Court also in *Inder Singh* v. *State of Rajasthan*[14] upheld the validity of the Rajasthan Tenants' Protection Ordinance on the ground that it is conditional legislation. The Ordinance was promulgated for two years but Section 3 had authorized the Governor to extend its life by issuing notification if required. In the same manner in *Tulsipur Sugar Co. Ltd.* v. *Notified Area Committee*[15] the Supreme Court upheld the validity of a notification issued under Section 3 of the U.P. Town Areas Act, 1914 on the ground that it is not a case of

12. *State of T.N.* v. *K. Sabanayagam*, (1998) 1 SCC 318.
13. AIR 1945 PC 48.
14. AIR 1957 SC 510.
15. (1980) 2 SCC 295.

'subordinate legislation' but of "conditional legislation". In this case by a notification under the Act the limits of Tulsipur town had been extended to the village Shitalpur where the sugar factory of the plaintiff was situated. In *I.T.C. Bhadrachalam Paper Boards* v. *Mandal Revenue Officer*[16] the Court held that power conferred on government to bring an Act into existence to grant exemption under it is a conditional legislation and not delegated legislation. In *Union of India* v. *Shree Gajanan Maharaj Sansthan*[17], the Court was of the view that statute providing that a certain provision thereof would come into force on a date to be notified by the government is a conditional legislation and such a power did not enable the government to decide whether to bring or not to bring that provision into force. However, no mandamus can be issued against the government to consider whether the provision should be enforced and when the government would be able to do it.

Conditional legislation is classified into three categories: (*i*) Statute enacted by legislature, future applicability to a given area left to the subjective satisfaction of the delegate as to the conditions indicating the proper time for that purpose; (*ii*) Act enforced but power to withdraw the same from operation in a given area or in given cases delegated to be exercised on subjective satisfaction or objective satisfaction of the delegate as to the existence of requisite condition precedent; (*iii*) power exercisable upon the delegate's satisfaction on objective facts by a class of persons seeking benefit of the exercise of such power to deprive the rival class of persons of statutory benefits. Last category of conditional legislation attracts principles of natural justice.[18] Thus, though delegated legislation as such did not attract the principle of natural justice but it applies in the case of conditional legislation where a person is deprived of his statutory rights.

(3) Purpose-based classification

Another classification of administrative rule-making would involve the consideration of delegated legislation in accordance with the different purposes which it is made to serve. On this basis the classification may be as follows:

1. *Enabling Act*: Such Acts contain an 'appointed day' clause under which the power is delegated to the executive to appoint a day for the Act to come into operation. In this category, the legislature prescribes the gun and the target and leaves it to the executive to press the trigger. It is aimed at giving the executive the time to equip itself for the administration of the law. In this class of legislation, rule-making exercise is valid only to the extent it is preparatory to the Act coming into force.[19]

16. (1966) 6 SCC 634.
17. (2002) 5 SCC 44.
18. *State of T.N.* v. *K. Sabanayagam*, (1998) 1 SCC 318.
19. *Venkateswaraloo* v. *Supdt. of Central Jail*, AIR 1953 SC 49.

2. *Extension And Application of Act*: The technique of administrative rule-making may sometimes be used for extension and application of an Act in respect of a territory or for a duration of time or for any other such object. Power may be delegated to extend the operation of the Act to other territories. For example, Section 7 of Part 'C' States Laws Act delegates power to the Central Government to extend to any Part 'C' State, with such restrictions and modifications as it thinks fit, any enactment which is in force in any Part 'A' State. The extension procedure has been extensively employed in 'reciprocal legislation' and 'disability legislation'. The power may also be delegated to extend the duration of a temporary Act which is to come to an end at a fixed period. Sometimes power may be given to extend the operation of the Act to objects or persons other than those for which it was originally made. The Tea District Emigrant Labour Act, 1932 authorised the Central Government to extend the provisions of this Act to any other land and premises in Assam.

3. *Dispensing and Suspending Acts*: Sometimes the power may be delegated to the administrative authority to make exemptions from all or any provision of the Act in a particular case or class of cases or territory, when, at the discretion of the authority, circumstances warrant it. Section 8 of the Stage-Carriages Act, 1861 delegated power to provincial government to exempt any carriage or class of carriages from all or any provision of the Act. In the same manner, the Indian Registration Act, 1908 delegated power to the State Government to exempt any district or tract of land from the operation of this Act. These exemption clauses are meant to enable the administration to relieve hardship which may be occasioned as a result of uniform enforcement of the law. However, delegation of such power in order to be valid, must satisfy the tests of Article 14 of the Constitution. Power may also be delegated to suspend the operation of any Act.

4. *Alteration Acts*: Though technically speaking any alteration amounts to amendment, yet alteration is a wide term and includes both modification and amendment. In Indian legislative practice the power to modify Acts has mostly been delegated as a sequel to the power of extension and application of laws. Power to modify has also been given to administrative authorities in cases which may be described as 'legislation by reference'. It is a device by which the power of modification is delegated to make the adopted Act fit into the adoptive Act. Section 21 of the Excess Profits Act, 1940, enacts that the provisions of the sections of the Income Tax Act, 1922 named therein shall apply with such modifications as may be prescribed by rules. The power of modification is limited to consequential changes, but if overstepped it suffers

challenge on the ground that it is not within the legislative intent of modification. Another type of alteration may be classified as 'amendment'. The most common example is the power to change the Schedule of an Act. Courts have held the exercise of such power as valid provided that the changed items are *ejusdem generis* with the other items mentioned in the Schedule to which the law clearly applies. Power to make alteration may sometimes include the power to 'remove difficulty' so that the various statutes may coexist. This power may include the power to amend and repeal the enabling Act as well as other Acts. This type of delegation may be classed as an exceptional type of delegation and, therefore, must not be used except for the purpose of bringing the Act into operation. A classical example of this type of delegation is the Merged States Laws Act, 1949 which delegates power to any court or any authority to make such alteration in the specified Acts, not affecting the substance, as may be necessary and proper to adapt it to any matter at hand. Such a wide power cannot be defended because the dividing line between 'matter' and 'substance' is very thin.

5. *Taxing Acts*: Normally the purpose, incidence and rate of tax must be determined by the legislature. However, the courts have upheld the delegation of taxing powers to the administrative authorities provided the policy of the taxing statute has been clearly laid down.

6. *Supplementary Acts*: Under the classification power is given to administrative agencies to make rules to elaborate, supplement or help to work out some principles laid down in the Act. In other words the power is delegated to the authority to make rules 'to carry out the purpose of the Act'. The Defence of India Act, 1939 empowered government 'to make such rules as appear to be necessary or expedient for securing the defence of British India, public safety, maintaining public order, efficient prosecution of war, maintaining supplies and services essential to the life of the community'. Such wide powers were also delegated to the government under the Essential Commodities Supplies Act, 1946.

7. *Approving And Sanctioning Acts*: In this type of legislation power is delegated not to make rules but to approve the rules framed by other specified authority.

8. *Classifying And Fixing Standard Acts*: Under this type of delegation, power is given to the administrative authority to fix standard of purity, quality or fitness for human consumption. Courts have upheld the validity of this type of delegation on the ground of necessity.

9. "*Penalty For Violation*" *Acts*: Sometimes power may be delegated to an administrative agency to prescribe punishment for the violation of rules. In the USA, the penalty for violation of administrative rules can be fixed by the Congress. Making an Act penal is a Congress function and cannot be delegated to the administrative agency. However, in England there are some instances where power to impose penalty has been delegated. The London Traffic Act, 1924 provides that the administrative authority may provide, by regulation, the fines recoverable summarily for breaches thereof.

10. '*Clarify the Provisions of the Statute*' *Acts*: In this case power is delegated to the administrative authority to issue interpretations on various provisions of enabling Act. The United States Treasury Department has been delegated the power to issue interpretations on various phases of taxation. However, these regulations are not binding on anyone. They are in the form of opinions for departmental guidance. But in some other cases they are final and binding.

(4) Authority-based classification (sub-delegation)

Another classification of administrative rule-making is based on the position of the authority making the rules. Sometimes the rule-making authority delegates to itself or to some other subordinate authority a further power to issue rules; such exercise of rule-making power is known as sub-delegated legislation. Rule-making authority cannot delegate its power unless the power of delegation is contained in the enabling Act. Such authorisation may be either express or by necessary implication. If the authority further delegates its law-making power to some other authority and retains a general control of a substantial nature over it, there is no delegation as to attract the doctrine of 'delegatus non potest delegare'. The maxim 'delegatus non potest delegare' indicates that sub-delegation of power is normally not allowable though the legislature can always provide for it. Courts have always taken the position that sub-delegation is invalid unless authorised by the parent Act. A classical illustration is *A.K. Roy* v. *State of Punjab*[20]. In this case the power to initiate prosecution for offences under Section 20(*i*) of the Prevention of Food Adulteration Act, 1954 had been given to the State Government. The Act had not authorized sub-delegation of power. Nevertheless under Rule 3 of the Prevention of Food Adulteration (Punjab) Rules, 1958, the power of prosecution was delegated to the Food Inspector. The Court held sub-delegation as ultra vires the parent Act. In *State* v. *Amir Chand*[21] the court further

20. (1986) 4 SCC 326. *See* also *Ganpati Singhji* v. *State of Ajmer*, AIR 1955 SC 188; *Ajaib Singh* v. *Gurbachan Singh*, AIR 1965 SC 1619; *Naraindas* v. *State of M.P.*, (1974) 4 SCC 788; *Barium Chemicals Ltd.* v. *Company Law Board*, AIR 1967 SC 295; *Sahani Silk Mills (P) Ltd.* v. *ESI Corpn.*, (1994) 5 SCC 346.

21. AIR 1953 Punj 1.

held that authorization of sub-delegation must be express, it cannot be inferred. Under the Employees' State Insurance (Central) Rules, 1950, Rule 16(2) had provided for two types of sub-delegations: (*i*) Director-General was empowered to delegate the powers conferred on him by the said rules; (*ii*) Director-General was further empowered to delegate his powers and duties under any resolution of the corporation or the standing committee. The court held sub-delegation in the second case as invalid on the ground that conferment of powers and duties under a resolution of the corporation could be by way of delegation to the corporation and empowering the Director-General to further delegate such powers is impermissible.[22]

The Essential Commodities Act, 1955 provides a unique example of sub-delegation where sub-delegation is authorized at two stages. Section 3 of the Act empowers the Central Government to make rules but Section 5 authorizes sub-delegation of powers to the State Governments who have been further empowered to sub-delegate powers to their officers.

It is now almost settled that the legislature can delegate its powers of law-making after indicating the policy. Therefore, the maxim delegatus non potest delegare which means that a delegate cannot further delegate is not attracted in case of delegation by the legislature but certainly applies in case of sub-delegation. The maxim was originally invoked in the context of delegation of judicial powers and implied that in the entire process of adjudication a judge must act personally except in so far as he is expressly absolved from his duty by a statute. Therefore, the basic principle behind the maxim is that a discretion conferred by the statute on an authority must be exercised by that authority alone unless a contrary intention appears from the language, scope or object of the statute. However, keeping in view the imperatives of modern administration courts are slow in applying the maxim when there is question of exercise of administrative discretionary powers.[23]

The mechanism of sub-delegation makes parliamentary control illusory, postpones the rule-making process and makes publication of rules difficult, therefore it must be resorted to only in unavoidable circumstances. It is against this backdrop that the Committee on Subordinate Legislation in India suggested that sub-delegation in very wide language is improper and some safeguard must be provided before the delegate is allowed to sub-delegate his authority.

(5) Nature-based classification (exceptional delegation)

Classification of administrative rule-making may also be based on the nature and extent of delegation. The Committee on Ministers' Powers distinguished two types of parliamentary delegation:

22. *ESI* v. *T. Abdul Razak*, (1996) 4 SCC 708.
23. *Sahani Silk Mills (P) Ltd.* v. *ESI Corpn.*, (1994) 5 SCC 346.

1. *Normal Delegation:*

   A. *Positive.*—Where the limits of delegation are clearly defined in the enabling Act.

   B. *Negative.*—Where power delegated does not include power to do certain things, i.e. legislate on matters of policy.

2. *Exceptional Delegation*: Instances of exceptional delegation may be:

   (*i*) Power to legislate on matters of principle.

   (*ii*) Power to amend Acts of Parliament.

   (*iii*) Power conferring such a wide discretion that it is almost impossible to know the limits.

   (*iv*) Power to make rules without being challenged in a court of law.

Such exceptional delegation is also known as Henry VIII clause to indicate executive autocracy. Henry VIII was the King of England in the 16th Century. He imposed his autocratic will through the instrumentality of Parliament, so he is described as a "despot under the forms of law". Under this clause very wide powers are given to administrative agencies to make rules, including the power to amend and repeal. Instances of exceptional delegation may be found in Section 20 of the States Reorganisation Act, 1956 (now repealed) where power was given to the executive to make changes in the existing law. This type of delegation is delegation running riot. Even extraordinary conditions do not justify delegation outside the sphere of constitutional authority.

A classical illustration of Henry VIII clause is found in the Constitution itself. Under Article 372(2) the President has been delegated the power to adapt, amend and repeal any law in force to bring it in line with provisions of the Constitution and the exercise of such power has been made immune from the scrutiny of courts. The court also found Henry VIII clause in Regulation 34 of the West Bengal State Electricity Régulation which had authorised the Board to terminate the services of any permanent employee on three months' notice or pay in lieu thereof. The Supreme Court observed that the naked 'hire and fire' rule of Regulation 34 is parallel to Henry VIII clause so familiar to administrative lawyers.[24] Exceptional delegation has always been held to be ultra vires the Constitution.

(C) CONSTITUTIONALITY OF ADMINISTRATIVE RULE-MAKING OR DELEGATED LEGISLATION

The term 'constitutionality of administrative rule-making' means the permissible limits of the Constitution of any country within which the

24. *W.B. State Electricity Board* v. *Desh Bandhu Ghosh*, (1985) 3 SCC 116; *Central Inland Water Transport Corpn.* v. *B.N. Ganguly*, (1986) 3 SCC 156.

legislature, which as the sole repository of law-making power, can validly delegate rule-making power to other administrative agencies. Today the necessity to aid the transition from laissez-faire to a welfare and service State has led to the tremendous expansion of government authority. The new role of the State can be fulfilled only through the use of greater power in the hands of the government which is most suited to carry out the social and economic tasks before the country. The task of enhancing the power of the government to enable it to deal with the problems of social and economic reconstruction has been accomplished through the technique of delegation of legislative power to it. This delegation of legislative power raises a natural question of its constitutionality.

In England, Parliament is supreme and, therefore, unhampered by any constitutional limitations, Parliament has been able to confer wide legislative powers on the executive. However, sovereignty of Parliament does not mean that there are no principles to which the practice of delegation must conform. The Committee on Ministers' Powers in its third recommendation has suggested that the precise limits of law-making power which Parliament intends to confer on a Minister should always be expressly defined in clear language by the statute which confers it—when discretion is conferred, its limits should be defined with equal clearness. Laying down of limits in the enabling Acts within which executive action must work is of greater importance to England than to any other country, because in the absence of any constitutional limitation, it is on the basis of those parliamentary limits alone that the power of judicial review can be exercised.

In the USA, the rule against delegation of legislative power is basically based on the doctrine of separation of powers and its necessary corollary 'delegatus non potest delegare'. In America the doctrine of separation of powers has been raised to a constitutional status. The U.S. Supreme Court has observed that the doctrine of separation of powers has been considered to be an essential principle underlying the Constitution and that the powers entrusted to one department should be exercised exclusively by that department without encroaching upon the powers of another.[25] Therefore, legislative powers cannot be delegated. Hence the syllogism of Prof. Cushman:[26]

Major Premise: Legislative powers cannot be constitutionally delegated by Congress.

Minor Premise: It is essential that certain powers be delegated to administrative officers and regulatory commissions.

Conclusion: Therefore, the powers thus delegated are not legislative powers.

25. *Field* v. *Clarke*, 143 US 649, 692 (1892).

26. Thakker, C.K.: ADMINISTRATIVE LAW, (1992), Eastern Book Company, p. 74.

However, it is accepted at all hands that a rigid application of the doctrine of separation of powers is neither desirable nor feasible in view of the new demand on the executive. This has been seen by Chief Justice Marshall who, perceiving that there are powers of a doubtful nature which need not be arbitrarily fitted into the Montesquieuian trichotomy, held that it was within legislative competence to assign their exercise to the executive branch. The court further observed that the line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less importance in which a general provision may be made and power be given to those who are to act under such general provisions to fill up the details.[27] Therefore, in the USA, courts have made a distinction between what may be termed as "legislative powers" and the power to "fill in the details". This distinction has created a real dilemma for courts and the balance has been swinging left and right depending upon the facts and need matrix. Two decisions of the US Supreme Court arising under the National Industrial Recovery Act, 1933—a New Deal legislation—may be noted which turned the balance to the left.

Panama Refining Co. v. *Ryans*[28] is a case based on Section 9 of the Industrial Recovery Act, 1933. Section 9 authorised the President to prohibit the transportation in inter-State and foreign commerce, petroleum and the products thereof produced or withdrawn from storage in excess of any State law or valid regulation. The President authorised the Secretary of the Interior to exercise all powers under Section 9. Regulation V provided that every purchaser and shipper should submit the details of the purchase and sale of petroleum. Panama Refinery Company challenged Section 9 of the Industrial Recovery Act, 1933 as unconstitutional delegation of legislative powers. The Act laid down that the policy of the law is 'to encourage national industrial recovery' and 'to foster fair competition'. The US Supreme Court held the Act as unconstitutional on the ground that the adequacy of prescribed limits of delegation of legislative power is not satisfied by laying down a vague standard for administrative action. Chief Justice Hughes observed that an executive order must, in order to satisfy the constitutional requirement, show the existence of particular circumstances and conditions under which the making of such an order has been authorised by the Congress.

In *Schechter Poultry Corporation* v. *United States*[29], the corporation, which was engaged in live poultry operations, challenged the constitutionality of Section 3 of the National Industrial Recovery Act on the ground of unconstitutional delegation of legislative power. Section 3 of the Act authorised the President to approve "Codes of Fair Conduct" laying down the

27. *Wagman* v. *Southard,* Wheat 1 US (1825).
28. 293 US 388 (1935).
29. 295 US 495: 79 L Ed 1570 (1935).

standard of fair competition for a particular trade or industry. The Act made violation of the Code punishable. Chief Justice Hughes held Section 3 as unconstitutional on the ground that it supplies no standard besides the statement of the general aims of rehabilitation, correction and expansion described in Section 1. Therefore, in the opinion of the court it was a case of virtual abdication of legislative powers by the Congress.

Since the decision in this case the balance has tilted in the other direction, perhaps because of social and economic imperatives. Thus pragmatic considerations have prevailed over theoretical objections.[30] Hence, the court has allowed a wide margin to the Congress in laying down a valid standard. If the delegation is of a regulatory nature, the court has upheld constitutionality of the delegation of legislative power even in the absence of any specified standard. Therefore, in *Lichter* v. *U.S.*[31] the Supreme Court held the delegation valid observing that the statutory term "excessive profits" was sufficient expression of legislative policy and standards to render it constitutional. In this case the Reorganisation Act, 1942 had empowered Administrative Officers to determine whether the prices were excessive and to recover profits which they determined to be excessive.

(1) Constitutionality of administrative rule-making in India

The question of permissible limits of the Constitution within which law-making power may be delegated can be studied in three different periods for the sake of better understanding:

1. *When the Privy Council was the highest court of appeal*:

The Privy Council was the highest court for appeal from India in constitutional matters till 1949. The question of constitutionality came before the Privy Council in the famous case of *R.* v. *Burah*[32]. An Act was passed in 1869 by the Indian legislature to remove Garo Hills from the civil and criminal jurisdiction of Bengal and vested the powers of civil and criminal administration in an officer appointed by the Lt.-Governor of Bengal. The Lt.-Governor was further authorised by Section 9 of the Act to extend any provision of this Act with incidental changes to Khasi and Jaintia Hills. One Burah was tried for murder by the Commissioner of Khasi and Jaintia Hills and was sentenced to death. The Calcutta High Court declared Section 9 as unconstitutional delegation of legislative power by the Indian legislature on the ground that the Indian legislature is a delegate of British Parliament, therefore, a delegate cannot further delegate. The Privy Council on appeal reversed the decision of the Calcutta High Court and upheld the constitutionality of Section 9 on the ground that it is merely a conditional legislation.

30. Jain and Jain: PRINCIPLES OF ADMINISTRATIVE LAW, 1986, p. 34.
31. 334 US 742 (1947); *see* also *Fahey* v. *Mallonee*, 332 US 245 (1946).
32. ILR 4 Cal 172 (1879): (1878) 3 AC 889.

The decision of the Privy Council was interpreted in two different ways. One interpretation was that since the Indian legislature is not a delegate of British Parliament, there is no limit on the delegation of legislative functions. According to the other interpretation it was argued that since the Privy Council has validated only conditional legislation, therefore, delegation of legislative power is not permissible.

The doctrine of conditional legislation was again applied by the Privy Council in *Emperor* v. *Benoari Lal*[33] when it upheld the constitutionality of an ordinance passed by the Governor-General for the establishment of special courts and delegated power to the provincial governments to declare this law applicable in their provinces at any time they deem fit.

Therefore, during the period the Privy Council was the highest court of appeal, the question of permissible limits of delegation remained uncertain.

2. *When Federal Court became the highest court of appeal*:

The question of constitutionality of delegation of legislative powers came before the Federal Court in *Jatindra Nath Gupta* v. *Province of Bihar*[34]. In this the validity of Section 1(3) of the Bihar Maintenance of Public Order Act, 1948 was challenged on the ground that it authorised the provincial government to extend the life of the Act for one year with such modifications as it may deem fit. The Federal Court held that the power of extension with modification is unconstitutional delegation of legislative power because it is an essential legislative act. In this manner for the first time it was laid down that in India that legislative powers cannot be delegated. However, Fazal Ali, J. in his dissenting opinion held that the delegation of the power of extension of the Act is constitutional because according to him it merely amounted to a continuation of the Act.[35]

3. *When Supreme Court became the highest court of appeal*:

The decision in *Jatindra Nath case* (supra) created doubts about the limits of delegation of legislative powers. Therefore, in order to clarify the position of law for the future guidance of the legislature in matters of delegation of legislative functions, the President of India sought the opinion of the Court under Article 143 of the Constitution on the constitutionality of three Acts covering three different periods: (*i*) Section 7 of the Delhi Laws Act, 1912, (*ii*) Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, and (*iii*) Section 2 of the Part 'C' States (Laws) Act, 1950.

Section 7 of the Delhi Laws Act, 1972 delegated to the provincial government the power to extend to Delhi area with such restriction and modification any law in force in any part of British India. Section 2 of the

33. AIR 1945 PC 48.
34. AIR 1949 FC 175.
35. *Id.*, p. 194.

Ajmer-Merwara (Extension of Laws) Act, 1947 delegated the power to the government to extend to the province of Ajmer-Merwara any law in force in any other province with such modification and restriction as it may deem fit. Section 2 of the Part 'C' States (Laws) Act, 1950 delegated power to the Central Government to extend to Part 'C' States with such modification and restriction as it may deem fit any enactment which was in force in any Part 'A' State. It also empowered the government to repeal or amend any corresponding law which was applicable to Part 'C' States. *In re Delhi Laws Act*[36] is said to be the Bible of delegated legislation. Seven judges heard the case and produced seven separate judgments. The case was argued from two extreme positions. Mr M.C. Setalvad argued that the power of legislation carries with it the power to delegate and unless the legislature has completely abdicated or effaced itself, there is no restriction on delegation of legislative powers. The learned Counsel built his arguments on the theory of separation of powers and *delegatus non potest delegare* and tried to prove before the court that there is an implied prohibition against delegation of legislative powers. The Supreme Court took the via media and held:

(1) Doctrine of separation of powers is not a part of the Indian Constitution.

(2) Indian Parliament was never considered an agent of anybody, and therefore the doctrine of *delegatus non potest delegare* has no application.

(3) Parliament cannot abdicate or efface itself by creating a parallel legislative body.

(4) Power of delegation is ancillary to the power of legislation.

(5) The limitation upon delegation of power is that the legislature cannot part with its essential legislative power that has been expressly vested in it by the Constitution. Essential legislative power means laying down the policy of the law and enacting that policy into a binding rule of conduct.

On the basis of this reasoning, the Supreme Court came to the conclusion that:

(1) Section 7 of the Delhi Laws Act, 1912 is valid.

(2) Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947 is valid.

(3) Section 2 of the Part 'C' States (Laws) Act, 1950 is valid except that part of the section which delegated power of repeal and modification of legislative policy as it amounted to excessive delegation of legislative powers.

36. AIR 1951 SC 332.

Even though seven judges gave seven separate judgments but it will not be correct to hold that no principle was clearly laid down by the majority of judges. Anyone who surveys the whole case comes to an inescapable conclusion that there is a similarity in the views of the judges at least on three points: (*i*) that the legislature cannot give that quantity and quality of law which is required for the functioning of a modern State, hence delegation is a necessity; (*ii*) that in view of a written Constitution the power of delegation cannot be unlimited; and (*iii*) that the power to repeal a law or to modify legislative policy cannot be delegated because these are essential legislative functions which cannot be delegated. The Supreme Court has now made it abundantly clear that the power of delegation is a constituent element of legislative power as a whole under Article 245 of the Constitution and other relative Articles.[37]

After the decision in this case the main controversy in every case involving delegation has, therefore, been the question of determination of what is essential legislative function which cannot be delegated and that which is non-essential which can be delegated.

(2) Excessive Delegation is unconstitutional

It is now firmly established that excessive delegation of legislative power is unconstitutional. The legislature must first discharge its essential legislative functions (laying down the policy of the law and enacting that policy into a binding rule of conduct) and then can delegate ancillary or subordinate legislative functions which are generally termed as power "to fill up details". After laying down policy and guidelines, the legislature may confer discretion on administrative agency to execute the legislative policy and to work out details within the framework of the policy and guidelines.

Whether a particular legislation suffers from 'excessive delegation' is a question to be decided with reference to certain factors which may include, (*i*) subject matter of the law, (*ii*) provisions of the statute including its preamble, (*iii*) scheme of the law, (*iv*) factual and circumstantial background in which law is enacted.[38]

When a statute is challenged on the ground of excessive delegation, there is a presumption in favour of its vires and if two interpretations are possible, one that makes it Constitutional is to be adopted. Courts may also read down and interpret the law in a way as to avoid its being declared unconstitutional.[39] This is being done in view of the fact that today delegation of legislative power has become a "compulsive necessity".

37. *Agricultural Market Committee* v. *Shalimar Chemical Works*, (1997) 5 SCC 516.
38. *St. Johns Teachers Training Institute* v. *Regional Director, NCTE*, (2003) 3 SCC 321.
39. *Id.*, p. 322.

(3) What is an essential legislative function and where is the policy of the law to be found

The opinion of the Supreme Court in individual cases is to be analysed in order to determine the extent of permissible delegation:

(*i*) *Rajnarain Singh* v. *Chairman, Patna Administration Committee*[40]— Section 3(1)(*f*) of the impugned Act empowered the Patna local administration to select any provision of the Bengal Municipality Act, 1884 and apply it to Patna area with such restrictions and modifications as the government may think fit. The government picked up Section 104 and after modification applied it to the town of Patna. The Supreme Court declared the delegation ultra vires on the ground that the power to pick out a section for application to another area amounts to delegating the power to change the policy of the Act which is an essential legislative power, and hence cannot be delegated.

(*ii*) *Harishankar Bagla* v. *State of M.P.*[41]—Section 3 of the Essential Supplies (Temporary Powers) Act, 1946 authorised the Central Government to make rules for the purpose of maintaining or increasing supplies of essential commodities and for securing equitable distribution at fair price. Section 6 further provided that the orders made thereunder shall have effect notwithstanding anything contained in any law for the time being in force. The Supreme Court held the delegation valid on the ground that Section 3 lays down the legislative policy with sufficient clarity within which the government can operate. The Court also upheld the validity of Section 6 on the ground that it is not a delegation of power to repeal but only an attempt to bypass difficulty.

(*iii*) *Edward Mills* v. *State of Ajmer*[42]—The impugned Act authorised the administrative agency for setting up of minimum wages for certain industries specified in the schedule and further empowered the authority to vary the schedule by adding other industries to the list. The Supreme Court upheld the validity of the delegation on the ground that the legislative policy which was to guide in the selection of industries is clearly indicated in the Act, namely, to avoid exploitation of labour due to unequal bargaining power or other reasons. This case also stands for the proposition that the rule of the exercise of essential legislative function by the legislature is applicable to all types of delegation including conditional legislation.

40. AIR 1954 SC 569.
41. AIR 1954 SC 465.
42. AIR 1955 SC 25.

(*iv*) *Bhatnagar & Co.* v. *Union of India*[43]—Section 3(1)(*a*) of the Imports and Exports Control Act, 1947 gave wide powers to the government to revoke import or export licence. In this case the licence to import soda ash was revoked on the ground of trafficking in it. The Supreme Court upheld the validity of delegation because it found the ghost of the legislative policy in the preamble and the Defence of India Act, 1939 the provisions of which the impugned Act was supposed to continue.

(*v*) *D.S. Garewal* v. *State of Punjab*[44]—The All India Services Act, 1951 is a skeletal legislation having only four sections. Section 3 of the Act empowered the Central Government to make rules for the recruitment and regulation of conditions of service of persons appointed in All India Services. On the basis of this power, the government framed the All India Services (Discipline and Appeal) Rules. The Court upheld the delegation as valid and found the policy of the Act for the guidance of administrative rule-making in the existing rules on the subject.

(*vi*) *Hamdard Dawakhana* v. *Union of India*[45]—Parliament passed the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 to check the mischief being done to innocent patients suffering from certain incurable diseases through advertisements claiming magic remedies for such diseases. Section 3 laid down a list of diseases for which advertisements were prohibited and authorised the Central Government to include any other disease in the list. This is the first case in which the Supreme Court struck down an Act on the ground of excessive delegation of legislative powers. The Court held that nowhere had the legislature laid down any policy for guidance to the government in the matter of selection of diseases for being included in the list. The decision of the Court is certainly not in line with its earlier approaches because the clear mention of certain diseases in the list could have supplied the standard and criteria for the selection of other diseases. Furthermore, the title of the Act lays down sufficiently the policy of the Act.

(*vii*) *Jalan Trading Co.* v. *Mill Mazdoor Sabha*[46]—Section 37 of the Payment of Bonus Act, 1965 authorised the Central Government to provide by order for removal of doubts or difficulties in giving effect to the provisions of the Act. The Court held Section 37 ultra vires on the ground of excessive delegation and observed that the Act authorised the government to determine for itself what the purposes of the Act are

43. AIR 1957 SC 478.
44. AIR 1959 SC 512.
45. AIR 1960 SC 554.
46. AIR 1967 SC 691.

which in substance would amount to exercise of legislative power that cannot be delegated.

(*viii*) *Sri Ram Narain* v. *State of Bombay*[47]—In this case, power was given to the government to vary the ceiling area if it was satisfied that it was expedient to do so in the public interest. The Court upheld such a broad statement of policy as 'public interest' sufficient to uphold the vires of delegation.

(*ix*) *Gammon India Ltd.* v. *Union of India*[48]—Section 34 of the Contract Labour (Regulation and Abolition) Act, 1970 provided that if any difficulty arises in giving effect to the provisions of the Act, the Central Government may make such provisions, not inconsistent with the provisions of this Act, as appeared to it to be necessary or expedient for removing the difficulty. The Supreme Court held that Section 34 does not amount to excessive delegation as it does not contemplate any alteration in the Act. It simply authorises the removal of difficulties which may arise in the implementation of the law.

(*x*) *Kerala State Electricity Board* v. *Indian Aluminium Co.*[49]—In this case the validity of the Kerala State Electricity Supply (Kerala State Electricity Board and Licensees Areas) Surcharge Order, 1968 was in question. The order was passed in exercise of the powers conferred by Section 3 of Kerala Essential Articles Control (Temporary Powers) Act, 1961. The Act in Section 2(*a*) defined 'essential article' as meaning any article which may be declared by the government by notified order to be an essential article. The purpose of the Act is to provide in the interest of the general public for the control of the production, supply, distribution of and trade and commerce in certain articles. Section 2(*a*) was challenged on the ground of excessive delegation. The Court upheld the constitutionality of Section 2(*a*) on the ground that the Act lays down sufficient policy to guide the discretion of the administrative authority. However, Justice Gupta disagreed with the majority decision on the ground that the Act contains no specific standard or policy with reference to which an article may be declared as an 'essential article'.

(*xi*) *Avinder Singh* v. *State of Punjab*[50]—In this case, the Supreme Court has taken a very liberal view on the question of the laying down of legislative policy in the Act by the legislature. In this case the petitioners were licence-holders for trade in foreign liquor. The State of Punjab in view of the powers vested in it by Section 90(4) of the Punjab Municipal Corporations Act, 1976, required various municipal bodies

47. AIR 1959 SC 459.
48. (1974) 1 SCC 596: AIR 1974 SC 960.
49. (1976) 1 SCC 466: AIR 1976 SC 1031.
50. (1979) 1 SCC 137: AIR 1979 SC 321.

in the State to impose a tax at the rate of Re 1 per bottle. Since municipalities failed to take any action, the State itself issued a notification imposing the tax. Section 90(1) of the Municipal Corporations Act, 1976 sets out certain items for taxation and lays down that the tax so collected is to be utilised "for the purpose of the Act". Imposition of the tax was challenged on the ground, among others, that the legislature has not laid down any purpose and policy of the Act with reference to which the rate of tax is to be determined, and, therefore, it is a case of excessive delegation. The Court held that the words "for the purpose of the Act" laid down a clear policy of the Act, and, therefore, it is a valid delegation of legislative powers. The Court observed that the words "for the purpose of the Act" are pregnant with meaning. It sets a ceiling on the total quantum that may be collected. It canalises the objects for which the fixed levies may be spent. It brings into focus the functions of municipal bodies and the raising of the resources necessary for discharging those functions. In the case of a body like the municipality with functions which are limited and the requisite resources are also limited, the guidelines contained in the expression "for the purpose of the Act" are sufficient. This may not be sufficient in the case of a State Government whose functions are not so limited. One would agree that this is going too far to find the legislative policy.

(*xii*) *State of Tamil Nadu* v. *Hind Stone*[51]—Rule 8-C of the Tamil Nadu Minor Minerals Concession Rules, 1959 framed under the Industrial Development and Regulation Act, 1957 had the effect of denying quarrying in black granite to private persons. The petitioner challenged the rule on the ground that the creation of State monopoly under the rule-making power involves a major change in policy which is a legislative function and hence ultra vires the Constitution. Rejecting the contention, the Court held that State monopoly can be created even by subordinate legislation. The Supreme Court observed that the monopoly in favour of the State can be created under plenary powers and that Parliament not having chosen its plenary powers for this purpose, it is open to the subordinate legislative body to create a monopoly by making a rule.

(*xiii*) *A.V. Nachane* v. *Union of India*[52]—The Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules, 1981 were made by the Central Government on February 2, 1981 in exercise of the powers conferred by Section 48 of the Life Insurance Corporation Act, 1956 as amended by the Life Insurance Corporation (Amendment) Ordinance, 1981. The rules were challenged

51. (1981) 2 SCC 205: AIR 1981 SC 711.
52. (1982) 1 SCC 205: AIR 1982 SC 1126.

on the ground that Parliament has not laid down any legislative policy for the guidance of the rule-making authority. The Supreme Court found legislative policy in the preamble of the Amendment Act which provided that "for securing the interests of the Life Insurance Corporation of India and its policy-holders and to control the cost of administration, it is necessary that revision of the terms and conditions of services applicable to the employees and agents of the Corporation should be undertaken expeditiously". The Court further met the challenge of excessive delegation of legislative power on the ground that Section 48(3) of the Act which provided for the laying of the rule on the table of Parliament subject to a resolution of modification or annulment perfectly indicates that Parliament has in no way abdicated its authority, but is keeping strict vigilance and control over its delegate.[53] In *Charan Lal Sahu* v. *Union of India*[54], the Court found the legislative policy in the purpose of the Act. In this case the Bhopal Gas Disaster (Processing of Claims) Act, 1985 had been challenged on the ground that without laying any policy and guidelines the government has been authorized to conduct suits and enter into compromises.

Applying the same principle the Supreme Court declared the Tamil Nadu Private Educational Institutions (Regulation) Act, 1966 as ultra vires because the legislature did not lay down any policy or guideline with reference to which the power to regulate and control private educational institutions can be exercised by the government.[55]

However, if the power delegated to the administrative authority is quasi-judicial then guidelines are not required.[56]

However, according to Justice K.K. Mathew, this effort on the part of the Supreme Court to somehow find the legislative policy from somewhere was undignified for any judicial process. He observed that "...the hunt by court for legislative policy or guidance in the crevices of a statute or nook and cranny of its preamble is not an edifying spectacle".[57] In his dissenting opinion in *Gwalior Rayon Mills* v. *Assistant Commr. of Sales Tax*[58], he propounded a new test to determine the constitutionality of delegated legislation. According to him, so long as a legislature can repeal the enabling Act delegating law-making power, it does not abdicate its legislative function and therefore the delegation must be considered as valid no matter howsoever

53. *A.V. Nachane* v. *UOI*, (1982) 1 SCC 205: AIR 1982 SC 1126, 218-219.

54. (1990) 1 SCC 613.

55. *A.N. Parasuraman* v. *State of Tamil Nadu*, (1989) 4 SCC 683.

56. *Workmen* v. *Meenakshi Mills Ltd.*, (1992) 3 SCC 336.

57. See *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.* v. *A.C.S.T.*, (1974) 4 SCC 98: AIR 1974 SC 1660. *See also* U. Baxi: *Developments in Administrative Law* in PUBLIC LAW IN INDIA, (1982) (A.G. Noorani, Ed.).

58. (1974) 4 SCC 98: AIR 1974 SC 1660.

broad and general the delegation may be. However, the majority led by Justice Khanna did not agree to this "abdication test" and reiterated the already well-established test of "policy and guidelines". Nevertheless Justice Mathew ignoring the majority opinion applied his own test in 1975 in *N.K. Papiah* v. *Excise Commissioner*[59]. Thus the Court's decisions in *Gwalior Rayon* and *Papiah cases* took two different and conflicting views on the question of constitutionality of delegated legislation. Added to this the Supreme Court's decision in *Registrar of Cooperative Societies* v. *K. Kunjabmu*[60] though upholds the "policy and guideline" test yet creates an impression that this test is tentative and can be reopened. The Court observed:

> "We do not wish in this case to search for the precise principles decided in the *Delhi Laws Act case*, nor to consider whether *N.K. Papiah* beats the final retreat from the earlier position. For the purposes of this case we are content to accept the 'policy' and 'guidelines' theory...."[61]

Whatever may be the test to determine the constitutionality of delegated legislation, the fact remains that due to the compulsions of modern administration courts have allowed extensive delegation of legislative powers, especially in the area of tax and welfare legislation. In the *Registrar, Cooperative Societies case* (supra) the Court upheld the validity of Section 60 of the Madras Cooperative Societies Act, 1932, which was a "near Henry VIII clause".[62] Section 60 provided:

> "The State Government may, by general or special order, exempt any registered society from any of the provisions of this Act or may direct that such provisions shall apply to such society with such modifications as may be prescribed in the order."

In *Brij Sunder* v. *First Addl. Distt. Judge*[63] the Court even allowed the extension of future laws of another State to which the adopting State Legislature never had the opportunity to exercise its mind. In this case the validity of Section 3 of the Cantonments (Extension of Rent Control Laws) Act, 1957 had been challenged. Section 3 provided, "The Central Government may, by notification in the Official Gazette, extend to any cantonment with

59. (1975) 1 SCC 492: AIR 1975 SC 1007. *See* also M.P. Jain: CHANGING FACE OF ADMINISTRATIVE LAW IN INDIA AND ABROAD, (1982), p. 26.

60. (1980) 1 SCC 340: AIR 1980 SC 350. The Court held that the "power to legislate carries with it the power to delegate" but "excessive delegation may amount to abdication" and "delegation unlimited may invite despotism uninhibited". Therefore the principle of delegation remains: "The legislature cannot delegate its essential legislative functions. Legislate it must by laying down policy and principle and delegate it may to fill in detail and carry out policy." *See* M.P. Jain, *op. cit.*, at pp. 25-26.

61. *Id.*, p. 342.

62. *Per* Chinnappa Reddy, J.

63. (1989) 1 SCC 561.

such restrictions and modifications as it may think fit, any enactment relating to the control of rent and regulation of house accommodation which is in force on the date of notification in the State in which the cantonment is situated.'' However the words ''on the date of notification'' were deleted by the Central Act, 1972 with retrospective effect. It was argued that the deletion of these words signify that on a mere notification by the Central Government, not only the existing provisions but even the future enactments which may come into force from time to time in the State would automatically apply to the cantonment area. Negativating the contention the Supreme Court held once the policy of Parliament becomes clear that the cantonment areas in the State should be subject to the same tenancy legislation as in other areas, it follows that even future amendments in such State legislation should become effective in cantonment areas as well, hence delegation is valid.

The law on the constitutionality of delegated legislation was summed up by the Apex Court in *Mahe Beach Trading Co.* v. *U.T. of Pondicherry*[64]. The Court held, ''If there is abdication of legislative power or there is excessive delegation or if there is total surrender by the legislature of its legislative functions to another body then that is not permissible. There is, however, no abdication, or surrender of legislative functions or excessive delegation so long as the legislature has expressed its will on a particular subject matter, indicated its policy and left the effectuation of that policy to subordinate or subsidiary or ancillary legislation provided the legislature has retained the control in its hands with reference to it so that it can check and prevent or undo the mischief by subordinate legislation.''[65] In this case tax imposed on petrol and diesel by the Mahe Municipal Corporation in 1970 under a French decree was continued by the Pondicherry Administration Act, 1962. After the imposition of this tax had been declared ultra vires by the High Court the legislature passed the Validation Act continuing the tax with retrospective effect. The constitutionality of the validation Act was challenged on the ground of excessive delegation. Rejecting the challenge the Court held that in fact the tax has been levied by the legislature itself when it passed the Validation Act, so it is not a case of delegated legislation.

The same principle was reiterated by the Apex Court in *Agricultural Market Committee* v. *Shalimar Chemical Works*[66]. The Apex Court observed that in order to meet the challenge of complex socio-economic problems Parliament often finds it convenient and necessary to delegate subsidiary or ancillary powers to delegates of its choice for carrying out the policy laid down in the statutes. The essential legislative function consists of the deter-

64. (1996) 3 SCC 741.
65. *Ibid.*
66. (1997) 5 SCC 516.

mination of the legislative policy and the legislature cannot abdicate essential legislative functions in favour of another. Power to make subsidiary legislation may be entrusted by the legislature to another body of its choice but before delegation the legislature should enunciate, either expressly or by implication, the policy and the principles for the guidance of the delegate. The effect of these principles is that the delegate has to work within the scope of authority and cannot widen or restrict the scope of the Act or the policy laid down thereunder. It cannot in the garb of making rules, legislate on the field covered by the Act and has to restrict itself to the mode of implementation of the policy and the purpose of the Act.[67] In this case the Agricultural Market Committee created under the A.P. (Agricultural Produce and Livestock) Markets Act, 1966 had been given power to levy market fee only on the sale or purchase of agricultural produce within the notified area. The Committee imposed a fee on dry coconut purchased from Kerala and received in Hyderabad by truck on the plea that the sale was taking place in Hyderabad and not in Kerala. The Court held that Rule 74(2) framed under Section 34(1) is ultra vires the Act because the Act had empowered the Committee to levy a fee on produce moving out of a notified area after sale/purchase but Rule 74(2) provided for levying tax even if the produce is weighed, measured or counted there no matter if sale may have taken place elsewhere.[68]

Validation of extensive delegated legislation thus continues unabated in India on the ground of administrative necessity.[69] However, Prof. Baxi is of the view that in India no *a priori* ground compelling the conclusion that such untrammelled powers of executive law-making are essential for the attainment of the goals of the Constitution or for attaining administrative efficiency, although this is offered, parrot like, as the justification for such powers. On the other hand, there is ample indication that people affected by exercise of delegated legislative power have no real access to executive law which may determine their status adversely.[70] It may be noticed that the broad delegation of legislative powers in the USA are counterbalanced by the effective procedural and legislative controls which are very feeble in India.

(4) Norms of jurisprudence of delegated legislation emerging from the decisions analysed above

1. The power of delegation is a constituent element of the legislative power as a whole under Article 245 of the Constitution and other

67. *Agricultural Market Committee* v. *Shalimar Chemical Works*, (1997) 5 SCC 741.

68. *Ibid.*

69. *See* U. Baxi: *Developments in Indian Administrative Law* in PUBLIC LAW IN INDIA, (1982) (A.G. Noorani, Ed.), pp. 137-141

70. *Id.*, p. 140.

relative Articles. Delegation of some part of legislative powers has become a compulsive necessity due to the complexities of modern legislation.

2. Essential legislative functions cannot be delegated by the legislature.
3. Essential legislative functions mean laying the policy of the Act and enacting that policy into a binding rule of conduct. In other words the legislature must lay down legislative policy and purpose sufficient to provide a guideline for administrative rule-making. The policy of law may be express or implied and can be gathered from the history, preamble, title, scheme of the Act or object and reason clause, etc.
4. After the legislature has exercised its essential legislative functions, it can delegate non-essentials, however numerous and significant they may be.
5. In order to determine the constitutionality of the delegation of legislative powers, every case is decided in its special setting.
6. Courts have travelled to the extreme in holding very broad general statements as sufficient policy of the Act to determine the question of constitutionality.
7. There are various forms of administrative rule-making. However, the parameter for determining the question of constitutionality is the same, namely, the legislature must lay down the policy of the Act.
8. The delegated legislation must be consistent with the parent Act and must not violate legislative policy and guidelines. Delegatee cannot have more legislative powers than that of the delegator.[71]
9. Sub-delegation of legislative powers in order to be valid must be expressly authorized by the parent Act.
10. The delegated legislation in order to be valid must not be unreasonable and must not violate any procedural safeguards if provided in the parent Act.
11. In determining the validity of delegated legislation if it is within the competence of the authority then motive of delegated legislation is not valid.

(5) Constitutionality of delegation of taxing power

Power to tax is an inherent power of any State. It is also considered as an essential legislative function. Power to tax can be exercised not only for raising revenue for the State but also for regulating the social, economic or

71. *Indian Oil Corpn.* v. *Municipal Corpn.*, (1993) 1 SCC 333.

political structure of the country. Therefore, the delegation of taxing power by the legislature deserves special attention. The permissible limits of a valid delegation of taxing power can be comprehended by analysing the following decisions of the Supreme Court:

(*i*) *Orient Weaving Mills* v. *Union of India*[72]—In this case the Supreme Court upheld the constitutionality of the delegation of power to the Government to exempt any excisable item from duty.

(*ii*) *Banarsi Das* v. *State of M.P.*[73]—The delegation of power to the government to bring certain sale transactions under the Sales Tax Act was upheld against the challenge of excessive delegation.

(*iii*) *Devi Das* v. *State of Punjab*[74]—The delegation of power to the executive to determine the rate of tax between the maximum and minimum laid down in the enabling Act was upheld. The Terminal Tax on Railway Passengers Act, 1958 authorised the executive to impose sales tax at a rate between 1% to 2%. The court held that the discretion in fixing the tax rate is too limited to hold it to be excessive delegation.

(*iv*) *Delhi Municipal Corporation* v. *Birla Cotton, Spinning & Wvg. Mills*[75]—In this case the power delegated to the corporation to impose electricity tax without prescribing any maximum limit was upheld on the ground that the corporation is also a representative and responsive body which stands a guarantee against the misuse of the power.

In the same manner in *Corporation of Calcutta* v. *Liberty Cinema*[76] the constitutionality of the delegation of power to the corporation to levy a licence fee on cinema at such rate as may be prescribed by the corporation was upheld.

In *Cantonment Board* v. *Western India Theatres Ltd.*[77], the power given to the Corporation (of the City of Pune), in terms very wide, to levy 'any other tax' came to be considered from the point of view of abdication of legislative functions. The negation of this argument was based on the key words of limitation contained therein, namely, "for the purpose of the Act" and it was held that this provides sufficient guidance for the imposition of the tax.

In *J.R.G. Manufacturing Association* v. *Union of India*[78], the court further upheld the constitutionality of Section 12(2) of the Rubber Act which

72. AIR 1963 SC 98.
73. AIR 1958 SC 909.
74. AIR 1967 SC 1895.
75. AIR 1968 SC 1232.
76. AIR 1965 SC 1107.
77. AIR 1954 Bom 261. Also see *N.J. Nayadu & Co.* v. *Nagpur Municipality*, AIR 1970 Bom 59.
78. (1969) 2 SCC 644: AIR 1970 SC 1589.

empowered the Rubber Board to levy an excise duty either on the producers of rubber or the manufacturers of rubber goods. The court negatived the challenge of excessive delegation on the ground of inherent checks on the exercise of such power, namely, the representative character of the Board and the control of the Central Government. The Act had provided that tax can be levied only according to the rules made by the government subject to the laying procedure.

In *Avinder Singh* v. *State of Punjab*[79], the Supreme Court upheld the constitutionality of delegation of taxing power even in the face of a broad statement which was considered as sufficient guidance. The State of Punjab acting under Section 90(4) of the Punjab Municipal Corporations Act, 1976 required various municipalities to impose a tax of Re 1 per bottle of foreign liquor. On the failure of the municipalities to take action in the matter, the Government of Punjab imposed the same tax. The power to impose tax was challenged on the ground of excessive delegation. The contention was repelled on the ground that the words "for the purpose of the Act" lay down sufficient guideline for the imposition of tax. Section 90(2) of the impugned Act enables the corporation to levy 'any other tax' which the State legislature has the power to impose under the Constitution. Sub-section (3) leaves the rate of levy to the determination of the State Government. Sub-section (5) empowers the State Government to notify the tax which the corporation shall levy. The court observed that these provisions show that the levy of taxes shall be only 'for the purpose of the Act', an expression which sets a ceiling on the total quantum that may be collected and also canalises the objects for which levies can be spent and, therefore, it provides a sufficient guideline. Constitutionality of delegation was reinforced by the argument of the responsive and representative character of the municipal corporation. Applying the same principle the Supreme Court in *Darshan Lal Mehra* v. *Union of India*[80] held Section 172(2), U.P. Nagar Mahapalika Adhiniyam, 1959 as constitutional. This section had authorised the municipalities to impose taxes mentioned in the Act "for the purpose of the Act": the Court held that the words "for the purpose of the Act" lay down sufficient policy for the guidance of the municipalities to impose tax and, therefore, so long as the tax has reasonable relation to the purpose of the Act the same cannot be held to be excessive delegation. It may be pointed out that even in the USA courts have made an exception in favour of municipalities on the question of constitutionality of delegated legislation.[81]

79. (1979) 1 SCC 137: AIR 1979 SC 321.

80. (1992) 4 SCC 28. *See* also *Agricultural Market Committee* v. *Shalimar Chemical Works*, (1997) 5 SCC 516.

81. Gellhorn and Byse: ADMINISTRATIVE LAW—CASES AND COMMENTS, p. 128.

From an analysis of the above case-law the following general principles can be developed:

(1) Taxing power is an essential legislative power that cannot be delegated.

(2) However, the power to levy tax can be delegated only subject to the legislature itself exercising essential legislative function, namely, laying down the policy of the Act which permits sufficient guideline for the imposition of tax.

(3) Wide expressions like "for the purpose of the Act" the have been held to be sufficient guidelines for the imposition of the tax.

(4) Wide expressions like "for the purpose of the Act" are sufficient policy matrix only when power is delegated to a responsive and representative authority.

(5) Within these limitations, the following powers may be validly delegated:

(*a*) Power to exempt any item from tax.

(*b*) Power to bring certain items within the ambit of tax.

(*c*) Power to determine rate of tax within the minimum and the maximum laid down in the Act.

(*d*) Power to determine rate of tax where no maximum and minimum limits are prescribed.

(*e*) Power to select different rates of tax for different commodities provided there is a rational justification for it.

(*f*) A charge under a taxing statute can only be under the Act and not under the rules.[82]

These principles show that direct control of Parliament over taxing power is on the decline. In this context one must remember the fact that the first big battle of democracy was fought in Britain on the question of the right of the King to impose taxes on his subjects at will. The people won at the end of a long and hard struggle and the world saw the birth of a fundamental canon of democracy: no taxation without representation. It is curious that in India instead of strengthening its grip over taxing, Parliament is weakening it by allowing the delegation of wide taxing power to administrative authorities.

(6) Retrospective operation of delegated legislation

Before the pacesetting judgment of the Supreme Court in *B.S. Yadav* v. *State of Haryana*[83], the simple proposition for retrospective operation of dele-

82. *State of Kerala* v. *Madras Rubber Factory*, (1998) 1 SCC 616.
83. 1980 Supp SCC 524: AIR 1981 SC 561.

gated legislation was that an administrative authority can make its rules and regulations with restrospective effect if the parent statute authorized it either expressly or by necessary implication. For example, Section 36-A of the Administrative Tribunals Act, 1985 expressly authorises the rule-making authority to frame rules with retrospective effect. Section 36-A provides: "The power to make rules under clause (*c*) of sub-section (2) of Section 35 and of clause (*b*) of Section 36 shall include the power to make such rules or any of them retrospectively from a date not earlier than the date on which this Act received the assent of Parliament. . . ." As far as Article 309 is concerned the highest Bench ruled that the article was wide enough to include the making of rules with retrospective effect.[84] Power to pass retroactive law may be inferred from legislative intention also. Therefore, when the Act is declaratory in nature the presumption against retrospectivity is not applicable. The Supreme Court in *Mithlesh Kumari* v. *Prem Behari Khare*[85] held that the Benami Transactions (Prohibition) Act, 1988 shall apply to all pending suits including appeals as it serves a just public purpose. The same principle can be applied to subordinate legislation also. However, now, under the *Yadav* ruling it is not enough that the statute should authorise retrospective operation of the delegated legislation, the authority must also show that there was sufficient, reasonable and rational justifications for applying the rules retrospectively. In this case the Governor of Punjab in exercise of his legislative powers under Article 309 of the Constitution had amended the seniority rules on 31st December, 1976 but gave them retrospective operation from 9th April, 1976. The effect of this amendment was that the "date of confirmation" which was the basis to determine seniority in the judicial services was replaced by the "length of continuous service in a post" criteria. This amendment when given retrospective operation disturbed the seniority of many persons. The Supreme Court struck down the retrospective operation of the rule on the ground that there was no nexus or rational relationship between the rule and its retrospectivity. This ruling of the Apex Court is certainly a welcome step in the area of administrative law.[86] The same principle was reconfirmed by the Supreme Court in *Harbans Misra* v. *Railway Board*[87]. In this case certain employees were promoted according to the existing rules but, thereafter, a correction slip was added which wiped out not only promotions but even the length of service for about nine years with retrospective effect. The rule was struck down on the ground that it was

84. *B.S. Vadera* v. *Union of India*, AIR 1969 SC 118.

85. (1989) 2 SCC 95.

86. *See* S.N. Jain: *Validity of Retrospective Delegated Legislation—The Court Develops a New Principle*, (1981) 23 JILI 102. *See* also *K.V. Subba Rao* v. *State of A.P.*, (1988) 2 SCC 201.

87. (1989) 2 SCC 84.

made to meet exigencies of service and there was no real purpose or objective behind it.

However, by giving rules a retrospective effect or by applying the rule to existing persons a right which is vested cannot be divested. In *Raj Soni* v. *Air Officer, Incharge Admn.*[88], the petitioner was appointed as a teacher under the Delhi Education Code then in force which provided for retirement at the age of 60. However, thereafter the Delhi Education Act, 1973 and the Delhi Education Rules, 1973 fixed the retirement age at 58 years. The petitioner was retired at the age of 58 years. The Apex Court held that since the petitioner was an existing employee when the Act and Rules of 1973 were enacted he could not be retired at the age of 58 years. The Committee on Subordinate Legislation in India, therefore, suggested that rules should not be given retrospective operation, unless such a power has been expressly conferred by the parent Act, as they may prejudicially affect the vested rights of a person.

(D) CONTROL MECHANISM OF ADMINISTRATIVE RULE-MAKING IN INDIA

The control mechanism of administrative rule-making comprises three components, namely, parliamentary control, procedural control and judicial control. These controls will now be discussed in detail.

(1) Parliamentary control

Every delegate is subject to the authority and control of the principal and the exercise of delegated power can always be directed, corrected or cancelled by the principal. Hence parliamentary control over delegated legislation should be a living continuity as a constitutional necessity.[89] The fact is that due to the broad delegation of legislative powers and the generalised standard of control also being broad, judicial control has shrunk, raising the desirability and the necessity of parliamentary control.

In the USA, the control of the Congress over delegated legislation is highly limited because neither is the technique of 'laying' extensively used nor is there any Congressional Committee to scrutinise it. This is due to the constitutional structurisation in that country in which it is considered only the duty of courts to review the legality of administrative rule-making. There is even authority that the negative resolution technique so widely used in Britain would be unconstitutional in an American legislature.[90]

88. (1990) 3 SCC 261. However, the court sounded a different note in *Jagadeesan* v. *Union of India*, (1990) 2 SCC 228.

89. *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137: AIR 1979 SC 321.

90. Schwartz: *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 NYUL Rev 1031.

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

In India parliamentary control of administrative rule-making is implicit as a normal constitutional function because the executive is responsible to Parliament.

1. *Direct general control*

Direct but general control over delegated legislation is exercised—

(*a*) Through debate on the Act which contains delegation. Members may discuss anything about delegation including necessity, extent, type of delegation and the authority to whom power is delegated;

(*b*) Through questions and notices. Any member may ask questions on any aspect of delegation of legislative powers and if dissatisfied can give notice for discussion under Rule 59 of the Procedure and Conduct of Business in Lok Sabha Rules;

(*c*) Through moving resolutions and notices in the House. Any member may move a resolution on motion, if the matter regarding delegation of power is urgent and immediate, and reply of the government is unsatisfactory;

(*d*) Through vote on grant. Whenever the budget demands of a ministry are presented any member may propose a cut and thereby bring the exercise of rule-making power by that ministry under discussion;

(*e*) Through a private member's Bill seeking modifications in the parent Act or through a debate at the time of discussion on the address by the President to the joint session of Parliament, members may discuss delegation. However, these methods are rarely used.

2. *Direct special control*

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

As mentioned earlier in this chapter in the USA the control of the Congress over the exercise of delegated legislation is feeble; however, it does not mean that the technique of 'laying' is non-existent. The notable use of this technique was made in the Reorganisation Acts of 1939 to 1969, which authorised the President to reorganise the executive government by admin-

istrative rule-making. The Acts of 1939 and 1945 provided that the Presidential organisation plans were not to have any effect for a specified period during which they could be annulled by the Congress through a concurrent resolution of both Houses. A classic annulment through this process has been the rejection by the Senate of President Truman's Plan to abrogate the provisions of the Taft-Hartley Act, 1947 providing for a separation of functions between the National Labour Relations Board and the independent Office of General Council.[91] In six States (Connecticut, Kansas, Michigan, Nebraska, Virginia and Wisconsin) provisions exist for the annulment of administrative rules either by the concurrent resolution of two Houses or by the resolution of one.[92]

In England the technique of laying is very extensively used because all the administrative rule-making is subject to the supervision of Parliament under the Statutory Instruments Act, 1946 which prescribes a timetable.[93] The most common form of provision provides that the delegated legislation comes into immediate effect but is subject to annulment by an adverse resolution of either House. Other provisions for laying defer the operation of delegated legislation for a specified period; require affirmative resolutions of the House before the delegated legislation can operate; allow the delegated legislation to operate immediately but require affirmative resolution for subsequent continuance in operation; postpone operation until approved by affirmative resolutions.

By Section 4 of the Statutory Instruments Act, 1946, where subordinate legislation is required to be laid before Parliament after being made, a copy shall be laid before each House before the legislation comes into operation. However, if it is essential that it should come into operation before the copies are laid, it may so operate but notification shall be sent to the Lord Chancellor and the Speaker of the House of Commons explaining why the copies were not laid beforehand.

Where a statutory instrument is subject to annulment by resolution of either House, Section 5 provides that it shall be laid in accordance with Section 4, and if, within forty days, a prayer for annulment is presented to Her Majesty, no further proceedings shall be taken under the delegated legislation after the date of resolution and Her Majesty may revoke the delegated legislation.

Under Section 6, where it is provided that a draft of any statutory instrument shall be laid, but there is no prohibition of making of the rules without the approval of Parliament, then the rules shall not be made until

91. Schwartz: *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 NYUL Rev 1036.

92. *Id.* p. 1038.

93. Sections 5-7.

the expiration of forty days from the laying of the copies before each House of Parliament, nor shall further proceedings be taken on the draft if either House resolves that the rules be not made.

'Laying' may take various forms:

(*a*) *Laying with no further direction.*—In this type of laying the rules and regulations come into effect as soon as they are laid. It is simply to inform the House about the rules and regulations.

(*b*) *Laying subject to negative resolution.*—In this process the rules come into effect as soon as they are placed on the table of the House but shall cease to have effect if annulled by a resolution of the House.

(*c*) *Laying subject to affirmative resolution.*—This technique may take two shapes—

(*i*) that the rules shall have no effect or force unless approved by a resolution of each House of Parliament;

(*ii*) that the rules shall cease to have effect unless approved by an affirmative resolution.

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

(*d*) *Laying in draft subject to negative resolution.*—Such a provision provides that when any Act contains provision for this type of laying the draft rules shall be placed on the table of the House and shall come into force after forty days from the date of laying unless disapproved before that period.

(*e*) *Laying in draft subject to an affirmative resolution.*—In this type of laying the instruments or draft rules shall have no effect unless approved by the House.

The earliest instance of the laying provision found in India is in the Immigration Act, 1922. Between 1929 to 1939 only three Acts made provisions for laying, namely, the Insurance Act, 1938, Agriculture Products Act, 1938 and the Motor Vehicles Act, 1939. After a gap of five years, the Central Excise Act and Salt Act, 1944 and the Indian Aircraft Act, 1944 made provisions that the rules framed thereunder must be laid on the table of the House. Only in a few Acts, i.e. Insurance Act, 1938 and Aircraft Act, 1944 provision was made for laying subject to a negative resolution. The negative resolution procedure differs from its counterpart in England as, in India, it includes the power of modification also.[94] Three other Acts, namely, Representation of the People Act, 1951, Indian Services Act, 1951 and Indian Development and Regulation Act, 1951 contain only the right of modifica-

94. *See* S. 5(3)(1) of Muslim Women's (Protection of Rights on Divorce) Act, 1986 and S. 26 of Employees' Provident Fund Act, 1986.

tion of the rules and not annulment. The period during which the rules could be modified varies from seven days to one month. It may be noted that in England this is a uniform period of 40 days. The Indian Tariff (Amendment) Act, 1950 provides an illustration where rules are made subject to laying with affirmative resolution.

By the Delegated Legislation Provisions (Amendment) Act, 1983 our Parliament has amended 50 Indian statutes and inserted provisions for laying before State legislatures and Parliament where there were no such provisions and in other instances provided for annulment or modification within a specified period. A typical clause reads as follows:

> "Every rule prescribed or sanctioned by the Central Government under this Act shall be laid, as soon as may be after it is prescribed or sanctioned, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session, or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not have effect, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

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

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

(*i*) All Acts of Parliament should uniformly require that rules be laid on the Table of the House 'as soon as possible';

(*ii*) The laying period should uniformly be thirty days from the date of final publication of rules; and

(*iii*) The rule will be subject to such modification as the House may like to make.[95]

Legal consequences of non-compliance with the laying provisions

In England the provisions of Section 4(2) of the Statutory Instruments Act, 1946 makes the laying provision mandatory for the validation of statutory

95. *See* Thakker, C.K.: ADMINISTRATIVE LAW, (1992), Eastern Book Company, p. 152.

instruments.[1] In Australia also, the provisions of the Interpretation Act provide that the failure to comply with the laying provision would render the rules void.

In India, however, the consequences of non-compliance with the laying provisions depend on whether the provisions in the enabling Act are mandatory or directory. In *Narendra Kumar* v. *Union of India*[2], the Supreme Court held that the provisions of Section 3(5) of the Essential Commodities Act, 1955 which provided that the rules framed under the Act must be laid before both Houses of Parliament, are mandatory, and therefore clause 4 of the Non-Ferrous Metals Control Order, 1958 has no effect unless laid before Parliament.

However, in *Jan Mohammad* v. *State of Gujarat*[3], the court deviated from its previous stand. Section 26(5) of the Bombay Agricultural Produce Markets Act, 1939 contained a laying provision but the rules framed under the Act could not be laid before the provincial legislature in its first session as there was then no functioning legislature because of World War II emergency. Nevertheless, the rules were placed on the table of the House in its second session. The court held that the rules remained valid because the legislature did not provide that the non-laying at its first session would make the rules invalid.

This decision may not be considered as a deviation from the *Narendra Kumar* (supra) rule because of the very special circumstances attending the case. This becomes clear from the decision of the Supreme Court in *Hukum Chand* v. *Union of India*[4]. In this case, Section 40 of the Displaced Persons (Compensation) Act, 1954 empowered the Central Government to make rules and required them to be placed before Parliament subject to a negative resolution. The government added an Explanation to Rule 49 and gave it retrospective operation under which non-urban.land could be allotted to displaced persons. The Supreme Court held that out of the three recognised types of laying it comes in the second category which is a mandatory provision of the law. Therefore, the rules were struck down as ultra vires the powers of the administrative agency.

In *Atlas Cycle Industries Ltd.* v. *State of Haryana*[5], the Supreme Court, however, held the impugned provision of law which provided that every order by the Central Government or its officer or authority "shall be laid before both Houses of Parliament as soon as may be after it is made" as merely directory and did not make 'laying' a condition precedent to the

1. *R.* v. *Sheer Metalcraft*, (1954) 1 All ER 542.
2. AIR 1960 SC 430.
3. AIR 1966 SC 385.
4. (1972) 2 SCC 601: AIR 1972 SC 2427.
5. (1979) 2 SCC 196: AIR 1979 SC 1149.

making of the order. According to the court the word "shall" in Section 3(6) of the Essential Commodities Act, 1955 is not conclusive and decisive of the matter; and the court is to determine the 'true intention' of the legislature. The two considerations for regarding a provision as directory are: (*i*) absence of any provision for meeting the contingency of the provision not being complied with; and (*ii*) serious general inconvenience and prejudice that would result to the general public if the act of the government is declared invalid for non-performance with the particular provision. Section 3(6) provides for simple laying in which Parliament has no power either to approve or disapprove the order. Therefore, simple laying is merely directory and non-laying would not make the order void.

Even if the requirement of laying is only directory and not mandatory, the rules framed by the administrative authority without conforming to the requirement of laying would not be permissible if the mode of rule-making has been consciously violated. It is on this line of reasoning that the rules framed by the Inspector-General under Section 21(3) of the Railway Protection Force Act without complying with its laying requirements was held ultra vires the powers of the administrative agency. In the same manner, Parliament had to pass the All India Services Regulations (Indemnity) Bill, 1972 to indemnify the government and its officials from the consequences arising out of the omission to comply with the laying provisions under the All India Services Act, 1951. However, laying would not cure any invalidity of the rules.

3. *Indirect control*

This control is exercised by Parliament through its Committees. In 1950, the Law Minister made a suggestion for the establishment of a Committee of the House on the pattern of the Select Committee on Statutory Instruments, 1944, to examine delegated legislation and bring to the notice of the House whether administrative rule-making has exceeded the intention of Parliament or has departed from it or has affected any fundamental norm or principle. Such a committee known as the Committee on Subordinate Legislation of Lok Sabha was appointed on December 1, 1953. The Committee consisted of 15 members nominated by the Speaker for a period of one year. The Chairman is appointed by the Speaker from amongst the members. If the Deputy Speaker happens to be a member then he shall act as Chairman. In England, the healthy tradition is that the leader of the Opposition is always appointed as Chairman. The Committee has the power to appoint sub-committees and may refer any matter for its consideration. The Committee has the power to compel the attendance of any person and to compel the production of documents and records. The powers of the Indian Committee are much wider than its counterpart. In England the Committee can only ask

government departments to send memos or to depute a person to appear before it as witness.

According to Rule 223 the main functions of the Committee shall be to examine:

(1) Whether the rules are in accordance with the general object of the Act.

(2) Whether the rules contain any matter which could more properly be dealt with in the Act.

(3) Whether it contains imposition of tax.

(4) Whether it directly or indirectly bars the jurisdiction of the court.

(5) Whether it is retrospective.

(6) Whether it involves expenditure from the Consolidated Fund.

(7) Whether there has been unjustified delay in its publication or laying.

(8) Whether, for any reason, it requires further elucidation.

This Committee has, between 1953 and 1961, scrutinized about 5300 orders and rules and has submitted 19 reports.

There is also a similar Committee of the Rajya Sabha which was constituted in 1964. It discharges functions similar to the Lok Sabha Committee.

The Committee on Subordinate Legislation has made the following recommendations in order to streamline the process of delegated legislation in India:[6]

1. Power of judicial review should not be taken away or curtailed by rules.
2. A financial levy or tax should not be imposed by rules.
3. Language of the rules should be simple and clear and not complicated or ambiguous.
4. Rules should not be given retrospective operation, unless such a power has been expressly conferred by the parent Act, as they may prejudicially affect the vested rights of a person.
5. Legislative policy must be formulated by the legislature and laid down in the statute and power to supply details may be left to the executive, and can be worked out through the rules made by the administration.
6. Sub-delegation in very wide language is improper and some safeguards must be provided before a delegate is allowed to sub-delegate his authority to another functionary.
7. Discriminatory rules should not be framed by the administration.

6. *See* Thakker, C.K.: ADMINISTRATIVE LAW, (1992), Eastern Book Company, pp. 154-55.

8. Rules should not travel beyond the rule-making power conferred by the parent Act.
9. There should not be inordinate delay in making of rules by the administration.
10. The defects pointed out to the administration should be cured as soon as possible.
11. The rules framed by the administration and required to be laid before the House by the parent Act should be laid before Parliament as soon as possible, and whenever there is inordinate delay, an explanatory note giving the reasons for such delay should be appended to the rules so laid.
12. The final authority for interpretation of rules should not be with the administration.
13. Rules should contain short titles, explanatory notes, references to earlier amendments for convenience of location, ready reference and proper understanding.
14. Sufficient publicity should be given to the statutory rules and orders.

If in India parliamentary control of administrative rule-making is to be made a living continuity as a constitutional necessity, it is necessary that the role of the committees of Parliament must be strengthened and a separate law like the Statutory Instruments Act providing for uniform rules of laying and publication must be passed. The committee may be supplemented by a specialised official body to make the vigilance of administrative rule-making more effective.

In Britain, the Committee on Ministers' Powers suggested the appointment of a Special Standing Committee of both Houses of Parliament for the supervision of delegated legislation. This was implemented in 1944 by the setting up of a Select Committee for the House of Commons and Special Orders Committee (1925) in the House of Lords. The duty of the Committee was to bring to the notice of the House if its special attention was needed relating to delegated legislation on any of the following grounds:

(1) That it imposes a charge;

(2) That it excludes challenge in courts;

(3) That it purports (without specific authority in the parent Act) to have retrospective effect;

(4) That there has been unjustifiable delay in publication or laying before Parliament or in sending a notification to the Speaker when the instrument comes into operation before it has been laid;

(5) That its form or purport calls for elucidation; or

(6) That it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made.[7]

From 1944 to the end of 1959, the Scrutiny Committee had seen some 10,000 instruments, and had drawn the attention of the House to 120 of these.[8]

(2) Procedural control

Parliamentary control over administrative rule-making is admittedly weak because legislators are sometimes innocent of legal skills. A constant search, therefore, is on for an alternative mechanism which, besides providing effective vigil over administrative rule-making, can guarantee effective people participation for better social communication, acceptance and effectivity of the rules.

Procedural control mechanism has the potential to meet the above-noted requirements for allowing specific audit of rules by those for whose consumption they are made. Procedural control mechanism operates in three components:

1. Drafting.
2. Antenatal publicity.
3. Consultation.
4. Post-natal publicity.

1. *Drafting*

The drafting of delegated legislation by an expert draftsman who is, at the same time, in a position to advise whether the proposed rules and regulations are intra vires is obviously a valuable safeguard. It is no denying the fact that, in the absence of this safeguard, in India poorly drafted rules, in many situations, create great hardship for the people by increasing avoidable litigation. Therefore, the Committee on Subordinate Legislation in India rightly recommended that the language of rules should be simple and clear and not complicated or ambiguous. Throughout Australia the bulk of delegated legislation is either drafted or checked by parliamentary draftsmen. By a long-standing convention all delegated legislation to be made or approved by the Governor of New South Wales is submitted for the opinion of the Attorney-General as to its validity.[9]

2. *Antenatal publicity*

In India there is no separate law governing the procedure of administrative rule-making, and the parent Act may or may not provide for procedural requirement. However, in some cases the parent Acts have pro-

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7. REPORT OF THE SELECT COMMITTEE ON DELEGATED LEGISLATION, (1953), p. XIII.
8. Kersell: PARLIAMENTARY SUPERVISION OF DELEGATED LEGISLATION, (1960), p. 58.
9. *See* Benjafield and Whitmore: PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW, (1976), p. 106.

vided for antenatal publicity. Section 15 of the Central Tea Board Act, 1949, Section 30(3) of the Chartered Accountants Act, 1949 and Section 43 of the Co-operative Societies Act, 1912 may be cited as examples where it was provided that the rules must first be published in draft form to give an opportunity to the people to have their say in the rule-making.

Antenatal publicity required by the enabling Act attracts the application of Section 23 of the General Clauses Act, 1897 which requires:

(*i*) That the rules be published in draft form in the Gazette.

(*ii*) That objections and suggestions be invited by a specific date mentioned therein.

(*iii*) That those objections and suggestions be considered by the rule-making authority.

It may however be noted that the procedure prescribed in the General Clauses Act, 1897 applies only to rules, regulations and bye-laws and the administrative rule-making appearing under any other name is not governed by it.

The American experience shows that antenatal publicity is most beneficial in practice because those subject to administrative regulations tend to be members of trade or business organisations which perform the routine task of scanning the Federal Register and alert their members about the proposed rule-making. It may be noted that in America "lobbying" is an institution and vigorous efforts are made to support the organisation's viewpoint before the administrative agency. Keeping in view the utility of antenatal publicity, Section 4 of the Federal Administrative Procedure Act, 1946 provides for the publication of proposed rules in the Federal Register. The agency concerned must then afford an opportunity to the interested persons to participate in the administrative rule-making through submission of written data, views or arguments, with or without opportunity of being heard orally. The Act also provides an escape clause where this procedure can be dispensed with in cases of its impracticability, or it being unnecessary or contrary to public interest. It may be noted that the requirements of Section 4 apply only to substantive rules and, therefore, has no application to interpretative rules, general statements of policy, rules of agency, organisation, procedure and practice. The American experience shows that the escape clause has been used in very few cases and it has not been abused.

In Britain, unlike in the USA, the emphasis is on informal procedural requirements. The original rules of antenatal publicity and prior consultation laid down in the Rules Publication Act, 1893 have been repealed by the Statutory Instruments Act, 1946 which now provides for publication of rules. In England, the law contains no general requirement for antecedent publicity or any right to hearing. However, in individual cases, Parliament may provide

for antenatal publicity and prior consultation. The Factories Act, 1961 may be cited as an illustration where antenatal publicity of rules, people's participation through consideration of their objections by individual or public hearing, were provided by Parliament. It does not mean that antenatal publicity and people's participation are absent in England. In England these are provided as a matter of unavoidable administrative necessity. It is correct to say that today it is almost unthinkable that the Minister of Health can run the National Health Service through his rule-making power without consulting the medical profession. Britain, therefore, abandoned its attempt to judicialize rule-making the same year as the USA enacted the Administrative Procedure Act, 1946 which laid down an ambitious programme of public participation.

3. *Consultation with affected persons*

This control mechanism makes administrative rule-making a democratic process and, therefore, increases its acceptability and effectivity.

In India there is no general law which provides for prior consultation with affected persons before rules and regulations are framed by administrative authorities. Therefore, the provision of prior consultation is sometimes provided in the enabling Act itself. Such a provision if contained in the enabling Act is considered as mandatory and its violation is visited with the invalidity of rules.[10] However if the prior consultation has not been made mandatory by the parent Act failure to consult will not affect the validity of the rules. Prior consultation shall be considered mandatory when some consequences are provided in the absence of such consultation. Section 16(5) of the Electricity (Supply) Act, 1948 makes provision for consultation with the State Electricity Consultative Council before raising tariffs. The Supreme Court in *Hindustan Zinc Ltd.* v. *APSEB*[11], held that the failure to consult does not render the exercise of power invalid because consultation with the council has not been made mandatory, in the sense that no consequence is provided in the absence of such consultation. In India the provisions for prior consultation made in the enabling Act may be grouped into five possible headings:

(*i*) *Official consultation with a named body.*—The Banking Companies Act provides for prior consultation with the Reserve Bank of India before making rules under the Act.

(*ii*) *Consultation with Administrative Boards.*—The Mines Act, 1901 sets up Administrative Boards to advise the government and make obligatory prior consultation with the Board before the Central Government can make rules under the Act.

10. *Banwarilal Agarwalla* v. *State of Bihar*, AIR 1961 SC 849.
11. (1991) 3 SCC 299.

(*iii*) *Consultation with a statutory board in charge of a particular subject.*—Under the Tea Board Act, the Tea Board has been constituted as a statutory body in charge of the whole subject of tea cultivation, development, marketing, etc. The Act makes it obligatory to consult this Board before the government can frame rules under the Act.

(*iv*) *Consultation with interested persons.*—Law authorised the municipalities to frame rules for the imposition of tax but made it obligatory to publish draft rules in a Hindi daily and consult the inhabitants of the area who are to be affected by such tax. Amendments to the Food Adulteration Rules and standards for food items are similarly for drugs and cosmetics as well as rates of minimum wages call for representations and suggestions from the general public by publishing the draft rules in the Official Gazette. Similarly, under the Industries Development and Regulation Act, representations from industry and the public are invited. Post-decisional representation in matters of excise rates, sales tax rates and customs duty is also provided. This growing awareness of the need to invite people's participation is certainly a healthy development in administrative rule-making in India.

(*v*) *Preparation of rules by the affected interests.*—In order to guarantee complete efficacy and acceptability, the Mines Act empowers the owners of mines to draft rules themselves for the safety and prevention of accidents in mines and submit the draft rules to the inspector of mines. Such rules become operative on being approved by the government. In the same manner the Forward Contracts (Regulation) Act, 1952 gave power to a recognised association to make draft rules and submit them to the government. The rules become effective on approval by the Central Government with such modifications as it may deem fit.

As mentioned earlier, in England the Statutory Instruments Act, 1946 does not mandate prior consultation. However, there is no less public participation in the rule-making process in England. It is provided by the administrative authority as the only workable proposition. The Committee on Ministers' Powers in Britain was informed: "No Minister in his senses with the fear of Parliament before his eyes would even think of making regulations without (where practicable) giving the persons who will be affected thereby (or their representatives) an opportunity of saying what they think about the proposal."[12] In England public participation is provided by another technique of consulting statutory advisory agencies which are supposed to reflect public opinion and to express independent views. Therefore, the Tribunals and Inquiries Act, 1958 requires prior consultation with the Council on Tribunals before procedural laws are made for tribunals and inquiries.

12. *See* Garner: *Consultation in Subordinate Legislation*, (1964), Public Law 105.

In the USA, Section 4 of the Administrative Procedure Act, 1946 provides only for opportunity to submit data, views or arguments. It does not provide for any oral hearing, adversary or auditive. However, it is not uncommon that in the USA, the statutes themselves provide for hearing over and above the minimum laid down in the Administrative Procedure Act, 1946. Unless the statute provides otherwise, the hearing is always informal resembling hearing before a legislative committee rather than before a court. The consultative practices include correspondence, consultations, conferences, Gallup poll techniques and public hearings, auditive or adversary type. Besides these, the practice of consulting advisory committees is also widely followed. For example, under the Fair Labour Standards Act, 1938, the wage orders had to originate from the industry advisory committee consisting of the employer, employee and public representatives.

4. *Postnatal publicity*

Postnatal publicity is a necessary element in the rule-making process because the dictum that ignorance of law is no excuse is based on the justification that laws are accessible to the public.

In India, there is no general law prescribing the mode of publication of rules; therefore, the practice of publication differs from statute to statute. In some cases the statute lays down that the rules must be published in the Official Gazette but in other cases the administrative authority is left free to choose its own mode of publication. In such cases publication is necessary in any 'recognizable' or 'customary' manner.

Where the parent statute prescribes a mode of publication that mode must be followed. Where the parent statute is silent, rules framed by the administrative authority may prescribe the manner of publication, and such mode of publication may be sufficient if reasonable. If the rules do not prescribe the mode of publication or if the rules prescribe an unreasonable mode of publication, then the rules shall take effect only when published through the customary recognized official channel, namely, the Official Gazette or some other reasonable mode of publication. There may be rules and regulations which are concerned with a few individuals or are confined to a small local area. In such cases publication by other means may be sufficient. Thus if a statutory provision requires publication of any notice for the benefit of those who are likely to be affected thereby but the language of notice is not prescribed, it is reasonable to expect that the language of the notice would be the local language and the mode of publication will be a local newspaper. Therefore the Supreme Court in *State of Orissa* v. *Sridhar Kumar*[13], quashed the publication which had been made in a local newspaper but not in the local language. Justice R.S. Pathak (as he then was) held that

13. (1985) 3 SCC 697: AIR 1985 SC 1411.

having regard to the object with which a proclamation was required to be made in a local newspaper, the publication must have been in the local language of the area in which the newspaper circulated since the legislature attached great importance to the views of the residents to be affected by the notification. This decision marks a distinct advance over several decisions in which publication and the medium of publication have been considered merely directory. The question whether the mode, manner and method of publication prescribed in a statute is mandatory or directory cannot be answered with reference to any fixed formula. Much would depend on the language of the statute, the purpose for which the provision was made, the intention of the legislature, inconvenience or injustice to persons resulting from whether the provision is read one way or the other, relation of a particular provision to other provisions dealing with the same subject and other considerations which may arise on facts of a particular case.[14] Hence, if the provision regarding manner and mode of publication is held to be mandatory on factors mentioned above its non-compliance would render the rules invalid and if the provision of publication was found to be directory its non-compliance would not affect the validity of the rules. Likewise if the publication is vague because of which the persons for whom the publication was intended could not properly avail the right of representation, it is bad in law.[15]

The Supreme Court in *Harla* v. *State of Rajasthan*[16] has held that a law cannot be enforced unless published. In this case during the minority of the then Maharaja of Jaipur, the Council of Ministers was appointed by the Crown representative to look after administration. The Council by a resolution enacted the Jaipur Opium Act which was never published in any form. One Harla was prosecuted for the contravention of this law because he was in possession of opium in more quantity than permitted. The court held that the rules of natural justice demand that the laws be published before they are enforced. The same position was maintained by the Supreme Court in *State of Kerala* v. *P.J. Joseph*[17]. In this case the Government of Cochin authorised the Board of Revenue to sanction extra quota of foreign liquor on payment of 2 per cent commission. The court was of the view that this authorisation does not have the force of law because the rule was never published.

However, if the rules framed by the authority though not published but are acted upon by it and are binding on the authority, it will not be open to the authority to contend that rules were not published. If the rules were

14. *Raza Buland Sugar Co.* v. *Rampur Municipality*, AIR 1965 SC 895, 899.
15. *Ibid.* See also *B.K. Srinivasan* v. *State of Karnataka*, (1987) 1 SCC 658.
16. AIR 1951 SC 467.
17. AIR 1958 SC 296. *See* also *Narendra Kumar* v. *Union of India*, AIR 1960 SC 430.

required to be published, the authority cannot take advantage of its failure to publish them.[18]

Unless the rule-making authority has laid down a date on which the rules shall come into force the rules generally come into force on the date of publication.[19] However, because of the special nature of service rules the Allahabad High Court has held in *Banarasi Das* v. *U.P. Government*[20] that the service rules come into operation from the date they are made. Administrative agency can give retrospectivity to their rules provided the rules are not invalid on the ground of their retrospective operation.

Sometimes rule-making may be made subject to approval or permission of the competent authority or the delegating authority. In such a condition, if the rule-making is subject to 'approval' rules can come into operation as soon as made and shall continue in operation until disapproved. However, if the rule-making is subject to 'permission', rule do not come into operation unless permission is obtained.[21]

In England, Section 3 of the Statutory Instruments Act, 1946 provides that the rules shall not come into force unless published. Sub-clause (2) of Section 3 further provides that in case of a prosecution for the breach of any rule, it would be a good defence to plead that the rules were not made known. Section 2(1) of the Act provides the mode of publication. It lays down that unless otherwise provided, the copies of statutory instruments of general nature must be sent to the Queen's Printer to be printed, numbered and sold to the public. However, all instruments of delegated legislation are not brought within the definition of "statutory instruments" and consequently such delegated legislation need not be published unless so required by any other statutory provision.[22]

In the USA, before the passage of the Federal Register Act, 1935 there was no provision for the publication of administrative rules and regulations. However, Section 5(1) of the Federal Register Act now provides that all the rules which are required to be published must be published in the Federal Register. Unless it is so published it cannot be enforced against any person except the one who has actual notice of it. These provisions have been further reinforced by the Administrative Procedure Act, 1946. Section 4(*c*) defers effectivity of the rules by 30 days from the date of publication so that everyone has an opportunity of knowing them, unless the agency decides otherwise in public interest. After the publication of the rules in the Federal Register,

18. *Bejgam Veeranna Venkata Narsimloo* v. *State of A.P.*, (1998) 1 SCC 563.
19. *State of Maharashtra* v. *George*, AIR 1965 SC 722.
20. AIR 1959 All 393. *See* M.P. Jain: *Parliamentary Control of Delegated Legislation in India*, (1964) Public Law 152.
21. *High Court of Judicature for Rajasthan* v. *P.P. Singh*, (2003) 4 SCC 239.
22. *See* Griffith and Street: PRINCIPLES OF ADMINISTRATIVE LAW, (1967), p. 57.

the rules are classified, indexed and codified under the provisions of Section 311(*a*) of the Federal Register Act. In India there is no law providing for codification and indexing of administrative rules. An attempt was made by the Law Ministry's publication branch to bring out a volume in 1960 but this practice could not be continued. This scheme of publication was carried into effect under the title of General Statutory Rules and Orders and was originally planned to be in 22 volumes but till date about 40 volumes have been received. The difficulty remaining that the earlier volumes have become out of date and there is no scheme to update the volumes. Amongst private publications, "Current Central Legislation" is the only publication which publishes latest amendments to rules and regulations issued by the various Ministries and Departments of the Government. It may also be noted that Rule 319 of the Lok Sabha Rules of Procedure provides that the rules required to be laid on the table of the House shall be numbered centrally and published. But these are merely mild palliatives and the disease remains largely uncured. It is suggested that the work of codification and indexing must be given to a statutory body on an all-India basis and a separate law providing for uniformity in the publication process may be enacted.

(3) Judicial control

In India judicial review of administrative rule-making is subject to normal rules governing the review of administrative action. This judicial review of administrative rule-making cannot be foreclosed in any manner by the enabling Act. In *State of Kerala* v. *K.M.C. Abdulla & Co.*[23], the Supreme Court held that the validity of the rules can still be challenged even in the face of such a phrase as "shall not be called in question in any court" in the enabling Act. In the same manner in *General Officer Commanding-in-Chief* v. *Subash Chandra Yadav*[24] the Supreme Court held that an Act providing that rules made thereunder on publication in Official Gazette would be 'as if enacted' in the Act, cannot take away judicial review. Grounds of invalidity may arise on the following counts:

1. *That the enabling Act is ultra vires the Constitution*

If the enabling Act is ultra vires the Constitution which prescribes the boundaries within which the legislature can act, the rules and regulations framed thereunder would also be void. The enabling Act may violate either the implied or express limits of the Constitution.

Implied limits of the Constitution are those laid down in *In re Delhi Laws Act*[25], namely, the laying down policy and enacting that policy into a binding rule of conduct. The legislature cannot delegate its essential power

23. AIR 1965 SC 1585.
24. (1988) 2 SCC 351.
25. AIR 1951 SC 332.

to any other agency and if it so delegates the enabling Act will be ultra vires the Constitution. In *In re Delhi Laws Act*[26], the court held the later part of clause 2 invalid because it authorised the administrative agency to repeal a law which, in the opinion of the court, is an essential legislative function. In the same manner in *Hamdard Dawakhana* v. *Union of India*[27], the court held Section 3(*d*) of the Drug and Magic Remedies (Objectionable Advertisements) Act, as ultra vires the Constitution because the legislature had not provided sufficient guidelines for the exercise of administrative discretion in matters of selecting a disease to be added to the schedule. In *Mohini Jain* v. *State of Karnataka*[28], the Apex Court held that defining 'capitation fee' is an essential legislative function which cannot be delegated, hence Section 2(*b*) is a case of excessive delegated legislation. In this case the Karnataka legislature had passed the Karnataka Educational Institutions (Prohibition of Capitation Fees) Act, 1984 prohibiting charging of capitation fees by private medical colleges. Section 2(*b*) of the Act defined capitation fee as "any amount, by whatever name called, paid or collected directly or indirectly in excess of the fee prescribed under Section 5". Under Section 5 of the Act the government was authorized to prescribe fees to be charged by private medical [illegible] fication prescribing a fee of Rs [illegible] students who did not qualify for admission on merit. [illegible] prescribed for students to be admitted on merit basis was Rs 2000. The Court held it a case of excessive delegation.

Whether a particular legislation suffers from "excessive delegation" is a question to be decided by the Court with reference to certain factors which may include: (*i*) Subject matter of the law, (*ii*) Scheme of the law, (*iii*) provisions of the statute including preamble, (*iv*) Factual and circumstantial background in which law is enacted. However, when a statute is challenged on the ground of excessive delegation, there is a presumption in favour of its constitutionality and if two interpretations are possible, one which makes the statute constitutional shall be adopted. Courts may also read down the law in order to avoid its being declared ultra vires the Constitution.[29] Applying the above indicators the Apex Court in *St. Johns Teachers Training Institute* v. *Regional Director, NCTE*[30], held that Regulations 5(*e*) and (*f*) which required obtaining of an NOC (No Objection Certificate) from the State by appellant is not an excessive delegation of power as sufficient gui-

26. AIR 1951 SC 332.
27. AIR 1960 SC 554.
28. (1992) 3 SCC 666.
29. *St. Johns Teachers Training Institute* v. *Regional Director, NCTE*, (2003) 3 SCC 321.
30. *Id.* p. 324.

delines have been issued to the State Governments by the National Council for Teacher Education.

To consider whether delegation of legislative power suffers from 'excessive delegation' must examine: (1) scheme of the statute including preamble; (2) facts, circumstances and background under which statute was enacted; (3) history of legislation; (4) complexity of the problems which State has to face; (5) liberal construction be given to statute, its policy and guidelines; and (6) statute even if skeletal will be valid. However, this does not mean that court must always discover a dornmant or latent legislative policy to sustain an arbitrary delegation of rule-making power to the executive.[31]

Invalidity of the rules and regulations may also arise if the enabling Act violates the express limits prescribed by the Constitution. No legislature has competence to violate the scheme of distribution of power given in the Constitution,[32] or to give its law extraterritorial applicability[33] or violate the provision of the commerce clause, or Article 20 of the Constitution.

Another ground on which the constitutionality of the parent Act may be challenged is where the statute is well within the legislative competence but violates the provisions of Part III of the Constitution by placing what may be called an unreasonable restriction on the exercise of fundamental rights. In *Chintamanrao* v. *State of M.P.*[34], the court held the C.P. Regulation of Manufacturers of Bidis Act, 1948 and the rules framed thereunder as ultra vires Article 19(1)(*d*) of the Constitution which guarantees freedom of trade and profession. The impugned Act had given wide discretionary powers to the Deputy Commissioner to fix the agricultural season and prohibit the manufacture of bidis in the notified areas in that season. The Deputy Commissioner imposed a total ban on the manufacture of bidis. According to the Supreme Court this amounted to unreasonable restriction on the exercise of the fundamental right and hence both the Commissioner's order and the Act are ultra vires the Constitution.

However while deciding the constitutional validity of any parliamentary legislation on the ground of legislative competence, courts adopt a liberal view and apply the doctrine of pith and substance for the purpose of determining whether the legislation is in respect of a particular entry in the legislative list. Courts have also held that a general word used in an entry must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it.[35]

31. *Kishan Prakash Sharma* v. *UOI*, (2001) 5 SCC 212.
32. Article 246.
33. Article 245.
34. AIR 1951 SC 118. *See* also *N.M.C.S. & W. Mills* v. *Ahmedabad Municipality*, AIR 1967 SC 1801.
35. *United Provinces* v. *Atiqua Begum*, AIR 1941 FC 16. *See* also *Charan Lal Sahu* v. *Union of India*, (1990) 1 SCC 613.

2. *The administrative legislation is ultra vires the Constitution*

It may happen that the enabling Act may not be ultra vires the Constitution yet the rules and regulations framed thereunder may violate any provision of the Constitution. In *Narendra Kumar* v. *Union of India*[36], the Supreme Court held that even if the enabling Act is intra vires, the constitutionality of delegated legislation can still be considered because the law cannot be presumed to authorise anything unconstitutional. In *Dwarka Prasad* v. *State of U.P.*[37], Section 3(1) of the U.P. Coal Control Order issued under Section 3 of the Essential Supplies Temporary Powers Act, 1946 provided that no one can carry on business in coal except under a licence. Rule 3(2)(*b*) further laid down that the State Coal Controller can exempt any person from the licence requirement. The court held Rule 3(2)(*b*) as ultra vires Article 19(1)(*g*) as it places unreasonable restriction by giving arbitrary powers to the executive in granting exemptions.

In the same manner in *Himmat Lal K. Shah* v. *Commissioner of Police*[38], the Supreme Court held Rule 7 framed under the Bombay Police Act, 1951 as ultra vires Article 19(1)(*b*). Section 33(1) of the Bombay Police Act, 1951 had authorised the Commissioner of Police to make rules for the regulation of conduct and behaviour of assemblies and processions by prescribing the routes and time of processions. Rule 7 framed thereunder provided that no public meeting will be held without the previous permission of the Commissioner of Police. The rule was held ultra vires on the ground that the arbitrary discretion vested in the administrative agency in granting or refusing permission amounts to unreasonable restriction on the exercise of the freedom of speech and expression.

Administrative rule-making has also been tested under Article 19(1)(*g*) of the Constitution. Thus in *K. Pandurang* v. *State of A.P.*[39], the court quashed the A.P. Catering Establishments (Fixation and Display of Prices of Foodstuffs) Order, 1978 which had made it compulsory for hoteliers to sell all the seven eatable items provided in the schedule. The Court held that any rule or direction compelling a person to carry on a business against his will violated Article 19(1)(*g*) of the Constitution.

Administrative rule-making may also be challenged on the ground that it is discriminatory. In *Labh Chandra* v. *State of Bihar*[40], the Patna High

36. AIR 1960 SC 430.
37. AIR 1954 SC 224.
38. (1973) 1 SCC 227: AIR 1973 SC 87.
39. AIR 1985 AP 268. *See* also *A. Giridharilal* v. *State of T.N.*, AIR 1985 Mad 234.
40. AIR 1969 Pat 209. *See* also *G. Venkataratnam* v. *Principal, Osmania Medical College*, AIR 1969 AP 35; *R.S. Singh* v. *Darbhanga Medical College*, AIR 1969 Pat 11. In these cases the rules for reserving seats for wards of government servants and for giving preference to B.Sc (Hons.) degree in admissions was held discriminatory and hence violative of Art. 14 of the Constitution.

Court held the rule providing for the management of Jain temples to be discriminatory and hence violative of Article 14. The impugned rule had restricted the voting right to persons who had attained the age of 21 and had made a donation of not less than Rs 500 to the temple and were also living within the State for the last ten years.

However, even in a case where the parent Act cannot be challenged before the court because of the protection of Article 31(*b*) of the Constitution on account of its placement in the Ninth Schedule, the rules and regulations framed thereunder can still be challenged if they violate any provision of the Constitution. This was decided by the Supreme Court in *Prag Rice & Oil Mills* v. *Union of India*[41]. In this case the Mustard Oil (Price Control) Order, 1947 which was passed by the government under the Essential Commodities Act, 1955 was challenged on the ground that it violated Articles 14, 19 and 31 of the Constitution (Article 31 has now been omitted by the Constitution Forty-fourth Amendment Act, 1978, Section 5). The Act had been placed in the Ninth Schedule and got the protection of Article 31(*b*) of the Constitution and, therefore, could not be challenged for any alleged inconsistency with any provision of the Constitution. The Supreme Court held that Article 31(*b*) saves only the Act and not the administrative rule-making under it. Beg, C.J., as he then was, and Desai, J. dissented but, however, both the majority and minority upheld the constitutionality of the impugned order. However it can still be argued that if the Act has been placed in the protective shield of the Ninth Schedule the very purpose of the protection would be destroyed. The rule framed under the Act could still be challenged on the ground of unconstitutionality.[42]

3. *That the administrative legislation is ultra vires the enabling Act*

The challenge to the constitutionality of administrative rule-making on the ground that it is ultra vires the enabling Act can be sustained on the following counts:

(*i*) *That it is in excess of the power conferred by the enabling Act.*—In *Dwarka Nath* v. *Municipal Corporation*[43], the Supreme Court held Rule 32 framed under the Prevention of Food Adulteration Act, 1954 as ultra vires the Act being in excess of the power conferred upon the government. The Prevention of Food Adulteration Act, 1954 authorised the Central Government under Section 23(1) to make rules for restricting the packing and labelling of any article of food with a view to preventing the public from being deceived or misled as to quantity and quality of the article. Rule 32 framed thereunder by the government provided that there shall be specified

41. (1978) 3 SCC 459: AIR 1978 SC 1296.

42. *See Vasanlal Maganbhai* v. *State of Bombay*, AIR 1961 SC 4; *Latafat Ali Khan* v. *State of U.P.*, (1971) 2 SCC 355.

43. (1971) 2 SCC 314: AIR 1971 SC 1844.

on every label name and business address of the manufacturer, batch number or code number either in Hindi or English. Action was initiated against Mohan Ghee Company for violation of Rule 32 because on ghee tins only "Mohan Ghee Laboratories, Delhi-5" was written. It was argued on behalf of Mohan Ghee Company that the requirement of address under Rule 32 is beyond the power of the enabling Act which is restricted to "quantity and quality" only. The Supreme Court agreed with the contention.

In the same manner in *Ibrahim* v. *Regional Transport Authority*[44], the court declared the rules framed by the administrative authority for fixing sites for the bus-stand as invalid being in excess of the power conferred by the enabling Act which authorised the agency to make rules for the control of transport vehicles.

Marching ahead in the same direction the Supreme Court in *Ajoy Kumar Banerjee* v. *Union of India*[45], held the General Insurance (Regularization and Revision of Pay Scales) Second Amendment Scheme, 1980 which fixed salary patterns of employees, violative of Section 16(2) of the General Insurance Business (Nationalization) Act, 1972. The Act had authorized the Government to frame rules for the reorganization of general insurance whereas the rules had provided for salary pattern for employees.

Again in *General Officer Commanding-in-Chief* v. *Subash Chandra Yadav*[46] the Supreme Court quashed the administrative rules on the ground that they are in excess of the power delegated by the parent Act. In this case the Cantonments Act, 1924 had empowered the Central Government to make rules for servants of the Board relating to tenure of office, salaries and allowances, provident fund, pension, gratuities, leave of absence and other service conditions. However rules framed by the Central Government related to the transfer of servants from one Board to another. In the same manner in *Mohini Jain* v. *State of Karnataka*[47] the Court held that rules framed by the Government under the Educational Institutions (Prohibition of Capitation Fees) Act, 1984 are in violation of the purpose and object of the Act, hence void. In this case the statute had prohibited capitation fees whereas the rules framed thereunder prescribed a fee which could be charged by private medical colleges and which was not the tuition fee but capitation fee. The Government had prescribed a fee of Rs 2000 for merit students and Rs 25,000 and Rs 60,000 for non-merit students from Karnakata and non-Karnataka students

44. AIR 1953 SC 79. *See* also *Sales Tax Officer* v. *Abraham*, AIR 1967 SC 1823; *Durga Chand* v. *Union of India*, AIR 1979 Del 249; *Baban Naik* v. *Union of India*, AIR 1979 Goa 1.

45. (1984) 3 SCC 127; AIR 1984 SC 1130. *See* also *K. Venkatagirigowda* v. *Bangalore University*, AIR 1985 Kant 1.

46. (1988) 2 SCC 351.

47. (1992) 3 SCC 666.

respectively. However, the Supreme Court is of the view that while deciding the validity of the rule on this ground the delegation of power shall carry with it the power to make rules on matters which are subsidiary or ancillary to the main purpose. Thus in *Tata Iron & Steel Co.* v. *Workmen*[48] the Court held that the rules relating to the creation of a quasi-judicial tribunal for deciding certain disputes are not in excess of the power conferred by Section 5 of the Coal Mines Provident Fund and Bonus Scheme Act, 1948 which authorized the Government to make rules relating to bonus. Thus courts follow the 'pith and substance' rule in deciding the validity of rules on the ground of excessiveness.[49]

In a pace-setting judgment the Supreme Court in *V. Sudeer* v. *Bar Council of India*[50], declared the Bar Council of India Training Rules, 1995 as ultra vires the enabling Act. Section 49 of the Advocates Act, 1961 as amended in 1973 provided that it shall have power to make rules for discharging its functions under the Act. The rules framed for pre-enrolment training and Bar examination, in fact, did not relate to any of its functions laid down under the Act. Quashing the rules, the Apex Court observed that rules framed under Section 49(1) of the Act must have a statutory peg on which to hang them. If there is no statutory peg, the rule which is sought to be enacted de hors such peg will have no foothold and will become still-born. Therefore, unless Parliament makes provision for pre-enrolment training and examination, the Bar Council of India cannot do it by rule-making power.

Moving in the same direction the Supreme Court in *Addl. District Magistrate (Rev.)* v. *Siri Ram*[51] held the conferment of rule-making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto. In this case the Delhi Land Revenue Act and the Delhi Land Reforms Act did not empower the rule-making authority to classify land or to exclude any area from preparation of record-of-rights and annual Register. However, rules framed under the Act in 1962 classified land into six categories and provided that the name of a tenure holder or a sub-tenure holder occupying land in 'extended abadi' and in the prescribed six cases of land categories will not be reflected in the record-of-rights and the annual register. The Court held that the rules are ultra vires the enabling Acts.

The question whether the delegated legislation is in excess of the power conferred on the delegate has to be determined with reference to the specific

48. (1972) 2 SCC 383.

49. *Supreme Court Employees' Welfare Assn.* v. *Union of India*, (1989) 4 SCC 187.

50. (1999) 3 SCC 176.

51. (2000) 5 SCC 452.

provisions contained in the statute and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. So long as the rules have a rational nexus with the object and purpose of the statute, it is not within the domain of the court to determine whether the purpose of a statute can be served better by adopting a policy different from that what has been laid down by the legislature or its delegate.[52] Thus while determining whether the administrative authority has exceeded its power the court does not sit as a court of appeal but merely reviews the manner in which the decision was made as the court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be allowing the judge to substitute his own wisdom to that of the administrative authority which itself may be fallible.[53]

In America the role of the courts in reviewing administrative rule-making is essentially to determine whether or not the rules are within the power conferred by the enabling Act. In *AIR Reduction Company* v. *Hickel*[54], the statute provided that the 'agencies of Federal Government' should purchase their major requirements of helium from the Secretary and gave him power to make regulations to carry out such provisions. Regulation framed thereunder was one forbidding government agencies "and their contractors" from purchasing their major helium of requirements from any source but the Secretary. The court held the regulation invalid on the ground that the statute was limited to government agencies and the Secretary could not extend its reach by including government contractors.

(*ii*) *That it is in conflict with the enabling Act.*—Administrative rule-making can also be declared invalid if it is in direct conflict with any provision of the enabling Act. In *Ram Prasad* v. *State*[55] the U.P. Panchayat Raj Act, 1947 provided in Section 49 that every case triable by the Panchayat Adalat must be tried by a Bench constituted in a manner laid down in the Act. Rule 87 framed thereunder provided that three members of the Bench would constitute a forum. This number was less than that provided under the Act. The court held the rule invalid as being in direct conflict with the enabling Act.

In *DTU* v. *B.B.L. Hajelay*[56] the Delhi Corporation Act, 1957 in Section 92(1) provided that all persons drawing salary less than Rs 350 p.m. will be appointed by the General Manager of the Delhi Transport Undertaking. Section 95 further provided that no person can be dismissed by any authority

52. *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27: AIR 1984 SC 1543.
53. *Mansukhlal Vithaldas Chauhan* v. *State of Gujarat*, (1997) 7 SCC 622.
54. 420 F 2d 592.
55. AIR 1952 All 843.
56. (1972) 2 SCC 744: AIR 1972 SC 2452.

subordinate to the appointing authority. The General Manager framed a rule under the Act and delegated his power to the Assistant General Manager. A driver drawing salary less than Rs 350 pm was dismissed by the AGM. He challenged the validity of the rule on the ground that it was in direct conflict with the provision of the Act. The Supreme Court declared the rule invalid and observed that the provision of the enabling Act cannot be infringed by any administrative rule or regulation.

Conflict with the enabling Act may also arise with reference to the "objects and purposes" of the enabling Act. Because the delegation is often effected by the use of wide formulae, it does not mean that it will authorise the making of regulations which do not relate to the "objects and purposes" of the Act. What are the "objects and purposes" will involve an assessment by the court not only of the provisions of the Act as a whole but also of the inferences which can be drawn from these provisions and from the surrounding circumstances in which the Act operates. A particular case of restrictive interpretation of this kind occurs when a general formula of delegation is followed by a list of specific topics on which rules may be made. Here courts will tend to limit the ambit of the general formula to matters which are ancillary to the enumerated specific powers.[57] However if the delegated legislation is within the power/competence of the administrative authority as is evident from the parent Act then motive of delegated legislation for determining its validity is not material.[58]

In *State of Karnataka* v. *H. Ganesh Kamath*[59], the Supreme Court struck down Rule 5(2) of Karnataka Motor Vehicles Rules, 1963 as being inconsistent with the enabling Act. Rule 5(2) had provided that even though a person has passed the test for driving heavy motor vehicle he cannot obtain a licence unless he has already possessed a licence for and has two years' experience in driving a medium motor vehicle, which licence he cannot obtain unless he has previously passed the test in driving a medium motor vehicle. This rule was found to be in direct conflict with Section 7(*vii*)(*a*) of the enabling Motor Vehicles Act, 1939 which had provided that a person who passes the test in driving a heavy motor vehicle is to be deemed also to have passed the test in driving any medium motor vehicle. The highest Bench reasserted that the conferment of rule-making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

In *Kunj Behari Lal Butail* v. *State of H.P.*[60], the Supreme Court held that an administrative authority (in this case the State) cannot bring within

57. See *Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554.
58. *State of M.P.* v. *Mahalaxmi Fabric Mills*, 1995 Supp (1) SCC 642.
59. (1983) 2 SCC 402: AIR 1983 SC 550.
60. (2000) 3 SCC 40.

the net of the rules what has been excluded by the Act itself. In this case the H.P. Ceiling on Land Holdings Act, 1972 had delegated to the State Government the power to make rules for the purpose "for carrying out the purpose of this Act". The Act by Section 5 had exempted 'Tea Estates and land subservient thereto' from the operation of the Act. However, rules framed by the State Government had put embargo on the transfer of the land subservient to tea estates. Thus the rules were held ultra vires the enabling Act being inconsistent and repugnant thereto.

(iii) *That it is in conflict with the prescribed procedure of the enabling Act.*—Sometimes the enabling Act lays down a procedure which must be followed by the administrative authority while exercising rule-making power under it. If the procedure is violated, the rules may be declared invalid. In *Banwarilal Agarwalla* v. *State of Bihar*[61], the Mines Act, 1952 under Section 12 made it obligatory on the Central Government to consult the Mining Board constituted under the Act before making rules. The Supreme Court held that the rules framed without consulting the Mining Board were invalid, being ultra vires the procedure prescribed by the enabling Act. In the same manner in *District Collector, Chitoor* v. *Chittor District Groundnut Traders' Assn.*[62], the Central Government in exercise of its powers under Section 3 of the Essential Commodities Act, 1955 empowered State Governments to make necessary orders with the prior permission of the Central Government. The orders were however issued without the prior concurrence of the Central Government. The Court held the orders ultra vires the procedure of the Act.

In determining the validity of the rules on this ground, the court looks to the spirit rather than the letter of the law. In *Raza Buland Sugar Co.* v. *Rampur Municipality*[63] the U.P. Municipalities Act, 1916 provided that the rule in the draft form must be published in the local Hindi daily. In this case the draft rules were published in an Urdu daily. The court did not accept the contention of invalidity of rules arising out of a violation of a mandatory procedure clause on the ground that what was important was the publication and not the Hindi daily. However, non-mentioning or wrong mentioning of statutory provision under which rule-making power has been exercised would not vitiate an order for which there is a source under general law or statute law.[64]

(iv) *That it is unreasonable, arbitrary and discriminatory.*—In India the law is not settled whether apart from the ground of unreasonable restriction on fundamental rights, the court can invalidate an administrative rule on the ground of unreasonableness. In *Mulchand* v. *Mukund*[65], the Bombay High

61. AIR 1961 SC 849.
62. (1989) 2 SCC 58.
63. AIR 1965 SC 895.
64. *High Court of Gujarat* v. *Gujarat Kisan Mazdoor Panchayat*, (2003) 4 SCC 712.
65. AIR 1952 Bom 296.

Court held the view that the statutory rules cannot be challenged on the ground of unreasonableness as they become a part of the statute. The Supreme Court in a number of cases has also held that courts have no jurisdiction under Article 226 to go into the reasonableness of rates.[66] In *Trustee, Port of Madras* v. *Aminchand*[67] the Supreme Court held that the scale of rates fixed by the Board cannot be declared ultra vires on the ground of unreasonableness. In the same manner in *Narayan Iyer* v. *Union of India*[68] the court refused to go into the question of reasonableness of telephone rates. It may be pointed out that this is taking the principle of judicial self-restraint too far. Now when Article 14 strikes at every arbitrariness in State action whether under the authority of law or in exercise of executive power there seems to be no reason why the rates fixed by the government if found arbitrary or capricious cannot be held unreasonable. However, in *State of Assam* v. *Om Prakash*[69], the High Court of Assam held that Rule 24(3) framed under the Mines and Minerals Regulation and Development Act, 1957 which provided that if the application for renewal of lease is not disposed of within ninety days, it would be deemed to have been refused as invalid on the ground of unreasonableness. The Supreme Court in appeal though it did not agree with the conclusion of the High Court, yet it never said that 'unreasonableness' cannot be a ground for the invalidation of administrative rules and regulations.

Unreasonableness of administrative rule-making now can also be challenged on the ground that it violates Article 14 of the Constitution. As interpreted by the Supreme Court, Article 14 which guarantees equality before law can now be used to invalidate any law and action which is arbitrary or unreasonable. Therefore, in India, the doctrine of unreasonableness of delegated legislation has been based on a more firmer ground, viz. Article 14, rather than on a common law principle like in England.[70] In *Air-India* v. *Nergesh Meerza*[71], the Supreme Court quashed the service regulation framed by Air India which had provided for the termination of services of an airhostess on the first pregnancy. The Court held this regulation as most unreasonable and arbitrary and interfering with the ordinary course of human nature, and hence violative of Article 14 of the Constitution.

The Supreme Court struck down the Bombay Civil Services Rules which had provided that a convicted government employee, even if he is in the appeal process, will be paid Re 1 as subsistence allowance. The Court held

66. *Central Inland Water Transport Corpn.* v. *Brojo Nath Ganguly*, (1986) 3 SCC 156.
67. (1976) 3 SCC 167.
68. (1976) 3 SCC 428.
69. (1973) 1 SCC 584: AIR 1973 SC 678.
70. *See* M.P. Jain: *Administrative Law*, XVII ASIL (1981), p. 468.
71. (1981) 4 SCC 335: AIR 1981 SC 1829.

this provision in Service Rule 151(1)(*ii*)(*b*) "unreasonable and void". Justice Chinnappa Reddy who wrote a separate judgment remarked: "The award of subsistence allowance at the rate of Re 1 per month can only be characterised as ludicrous. It is a mockery to say that subsistence allowance is awarded and to award Re 1 a month." Justice Varadarajan stated: "His right to get the normal subsistence allowance pending consideration of his appeal against his conviction should not depend upon the chance of his being released on bail and not being lodged in prison on conviction. Whether he is lodged in jail or released on bail, his family requires a bare minimum by way of subsistence allowance. Allowance of Re 1 is meaningless."[72]

In the same manner the Supreme Court in *West Bengal Electricity Board* v. *Desh Bandhu Gosh*[73], held that Regulation 34 of the W.B. Electricity Board which provided for termination of services of permanent employees by giving three months' notice or on payment of salary for the said period is totally arbitrary and hence violative of Article 14 of the Constitution. The Supreme Court also quashed a rule of the Haryana Government which had classified persons released from military service on compassionate grounds differently from those released on any other ground for the purpose of seniority in government service on the plea that it violates Articles 14 and 16 of the Constitution.[74] In *State of Maharashtra* v. *Raj Kumar*[75] the Supreme Court similary quashed the rule on the ground of unreasonableness as it had allowed a weightage of 10% of marks to persons who had passed the SSC examination from rural areas because in the opinion of the Court this had no relevance with the object of the selection of candidates having aptitude to work in rural areas. In *Indravadan* v. *State of Gujarat*[76] the Supreme Court held Rule 6 of the Gujarat Judicial Services Recruitment Rules, 1961 providing that a Civil Judge after completing 48 years of age will not be eligible for promotion as Assistant Judge as arbitrary and unreasonable. Similarly in *Meenakshi* v. *University of Delhi*[77] a condition requiring schooling for the last two years in any school in Delhi for admission to any medical college in Delhi was held to be arbitrary and unreasonable. In *Gujarat*

72. *State of Maharashtra* v. *Chanderbhan Tale*, (1983) 3 SCC 387: AIR 1983 SC 803. While both the judges agreed on the unconstitutionality of the rule they disagreed on the juristic aspect of public employment. Justice Varadarajan approvingly quoted Justice P.A. Choudhary of the A.P. High Court who declared that public employment is a new form of property that should not be monopolised by any particular section of the people in the name of efficiency, though it cannot altogether be ignored.

73. (1985) 3 SCC 116: AIR 1985 SC 722. *See* also *Central Inland Water Transport Corpn.* v. *B.N. Ganguly*, (1986) 3 SCC 156: AIR 1986 SC 1571.

74. *K.C. Arora* v. *State of Haryana*, (1984) 3 SCC 281. *See* also *J.S. Rukmani* v. *State of T.N.*, 1984 Supp SCC 650: AIR 1985 SC 785.

75. (1982) 3 SCC 313: AIR 1982 SC 1301.

76. 1986 Supp SCC 254.

77. (1989) 3 SCC 709.

University v. *Rajiv Bhatt*[78], the Court quoted the rule framed by the Gujarat University which had provided that for admission to superspeciality the first preference will be given to candidates from Gujarat University, second preference to students from other Gujarat Universities and thereafter, seats remaining vacant will remain vacant, and held it to be unreasonable and irrational.

It may be pointed out that, unlike an administrative action, subordinate legislation cannot be challenged on the ground of violation of the principles of natural justice, therefore, this gap is filled when subordinate legislation is challenged on the ground of unreasonableness and arbitrariness under Articles 14 and 19 of the Constitution.[79] The Supreme Court again reiterated in *State of M.P.* v. *Mahalaxmi Fabric Mills*[80], that delegated legislation is open to challenge on the ground of being arbitrary, irrational and confiscatory in nature so as to be violative of Articles 14 and 19(1)(*g*) of the Constitution.

It is important to note that the court cannot strike down an administrative rule on the ground of unreasonableness merely because the court thinks that it goes farther than is necessary or that it does not contain provisions which in the opinion of the court would have been fair. Judges cannot substitute their wisdom with the wisdom of administrative authorities. Unless a rule is manifestly unjust, capracious, inequitable or partial in operation it cannot be invalidated on the ground of unreasonableness. A responsible administrative authority entrusted with the power of rule-making must ordinarily be presumed to know what is necessary, reasonable, just and fair. The validity of rules has to be judged by the generalities of the cases they cover and not by the stray instances of errors and irregularities discovered. Therefore, the test of reasonableness should be applied in the context of life's realities. These observations were made by the Supreme Court in *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth*[81], where Rule 104 of the Board did not provide for inspection of the answer book and revaluation thereof in the presence of the student had been challenged. The net distillate of this approach is that it is not a pedantic and idealistic but a pragmatic approach which must determine the standard of reasonableness. In *G.B. Mahajan* v. *Jalgaon Municipal Corpn.*[82] the Supreme Court further observed that the test of reasonableness as applied to administrative actions is different from the test as applied in the law of torts. In torts the test is that of a "reasonable man" or as figuratively identified as the "man on the Clapham Omnibus". In administrative law this is

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78. (1996) 4 SCC 60.
79. *Indian Express Newspapers* v. *Union of India*, (1985) 1 SCC 641: AIR 1986 SC 515.
80. 1995 Supp (1) SCC 642.
81. (1984) 4 SCC 27: AIR 1984 SC 1543.
82. (1991) 3 SCC 91.

not the test because then judges can substitute their own judgment with the judgment of the administrator. Therefore, in administrative law 'reasonableness'' is the standard indicated by the true construction of the Act which distinguishes between what the statutory authority may or may not be authorized to do. It distinguishes between proper and improper use of power. It is often expressed by saying that the decision is unreasonable if it is one to which no reasonable authority could have come, the essence of what is now commonly called "Wednesbury unreasonableness".[83] Therefore, an action of the administrative authority will be considered reasonable if it directs itself properly in law, considers the matter which it is bound to consider, excludes irrelevant considerations and there must not be anything so absurd that no sensible man could ever dream that it lay within the powers of the authority.

In *Khoday Distilleries Ltd.* v. *State of Karnataka*[84], the Supreme Court held that the test of reasonableness is whether it is manifestly arbitrary, such as could not be reasonably expected from the authority.

In America, in the area of judicial review of administrative rule-making, the test of reasonableness plays a prominent part. The court can always see whether the authority had reasonable ground for exercising the judgment.[85] An illustration of the review power of the Supreme Court on the ground of unreasonableness is *FCC* v. *American Broadcasting Company*[86] in which the Supreme Court invalidated regulations of the Federal Communication Commission (FCC) which prohibited broadcasting of 'give-away' programmes, under which prizes are distributed to home listeners for solving a problem or answering a question. The Court held that it was unreasonable for the FCC to treat such programmes as 'any lottery, gift, enterprise or similar scheme' which was prohibited by Federal statute.[87]

In England the rule is that administrative rules framed by any body except government departments are challengeable on the ground of unreasonableness. Rule-making by government departments is considered as an exception because Ministers are responsible to Parliament. In *Kruse* v. *Johnson*[88] Lord Russell laid down the test of unreasonableness of delegated legislation as:

[illegible] ...tween different classes.

83. *G.B. Mahajan* v. *Jalgaon Municipal Corpn.*, (1991) 3 SCC 91, 110-11 based on the passage in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*, (1947) 2 All ER 680, 682 (CA).
84. (1996) 10 SCC 304.
85. *American Tracking Assn.* v. *United States*, 344 US 298. *See* also *Manhattan General Equipment Co.* v. *Commr.*, 297 US 129.
86. 347 US 285.
87. *Ibid.*
88. (1898) 2 QB 91.

(2) Manifestly unjust.

(3) Bad faith.

(4) Oppressiveness.

(5) Gross interference with the rights of the people that no justification can be found in the mind of a reasonable man.

An illustration of the exercise of the power of judicial review on the ground of unreasonableness can be found in *Arlidge* v. *Islington Corporation*[89] in which the court invalidated a bye-law which required a landlord of a lodging-house to clean his premises at least once a year. The court observed that this bye-law imposed an absolute duty which may be difficult to perform without breaking a contract or committing a trespass for fear of criminal penalty.

In the USA administrative rule-making can also be challenged as unreasonable under the due process clause of the American Constitution. In such a challenge, the court is to see whether there is a rational relationship between the rules and the statute or whether the rules are reasonably approximate and calculated to carry out the purpose of the Act. In India and England such a challenge cannot be sustained on the ground of violation of the principles of natural justice.

(*v*) *That it is mala fide.*—Administrative rule-making can be challenged on the ground of bad faith or ulterior purpose. The Drugs and Cosmetics Act, 1940 empowers the government to prescribe the standards of quality of drugs and cosmetics. Rule 150-A framed by the Government of India under the said Act required manufacturers of eau de cologne to add one per cent of diethylphthalate, a poisonous substance, to render the product unpotable. The Bombay High Court held the rule invalid on the ground that the government cannot enforce its prohibition policy in the guise of prescribing standards.[90] It is the sole case in India where power of judicial review has been exercised on the ground of bad faith and on that ground administrative legislative action has been found to be invalid. In the USA challenge on bad faith can be sustained under the Due Process Clause of the Constitution. Similarly in England subordinate legislation can be challenged on the ground of mala fide or bad faith. However, the allegations of mala fide or bad faith are more easily made than made out.[91]

(*vi*) *That it encroaches upon the rights of the private citizens derived from the common law in the absence of an express authority in the enabling Act.*—Administrative rules and regulations can also be challenged on the ground that they arbitrarily interfere with common law rights of a private

89. (1909) 2 QB 127.

90. *Hindustan Times*, April 28, 1972, p. 1, col. 4.

91. *Mittal* v. *Union of India*, (1983) 1 SCC 51.

citizen. In *Sophy Kelly* v. *State of Maharashtra*[92], a regulation of the Maharashtra Education Board which provided that all Headmasters should forward all forms of candidates for S.S.C. examination to the Board irrespective of their academic progress during the year was held ultra vires the common law right of Headmasters to forward only forms of those students who make satisfactory progress during the year. In the same manner in *Chester* v. *Bateson*[93] a statute authorised making of regulations for public safety and successful prosecution of war. Regulation made thereunder provided that no premises can be recovered from the possession of any workman employed in the manufacture of war material and imposed a penalty for taking legal proceedings in this behalf. The court held the regulation ultra vires the common law right of a private citizen to move a court of law for justice.

(*vii*) *That it conflicts with the terms of some other statute*.—In many cases it may happen that the delegated legislation conflicts with the provisions of some other statute. In England, a conflict with the statute law is a ground of invalidity of delegated legislation only where the empowering statute does not, expressly or by necessary implication, grant power to override statute law. There are many examples of statutes which have explicitly given power to override statute law and, in the so-called "Henry VIII clause", power is given to amend even the parent Act or any other Act for the purpose of bringing the parent Act smoothly into operation. A classical example of this is found in Section 342(*g*)(*iv*) of the N.S.W. Local Government Act, 1919-1969, which provides that in relation to town planning schemes "a scheme may suspend either generally or in any particular case or class of cases the operation of any provision of this or any other Act...". As a result, Section 536(*c*) of the Act, which provides the method of computing compensation for the acquisition of land, has been suspended in some respects by a considerable number of town planning schemes.[94] In India, the conflict of delegated legislation with statute law may be a ground of invalidity even in the face of any statutory authorization. Courts have held that the power of repeal or amendment of statute law is unconstitutional.[95]

However, in *Harishankar Bagla* v. *State of M.P.*[96], the court upheld the constitutionality of Section 6 of the Essential Supplies (Temporary Powers) Act, 1946 which provided inter alia that any order made by the government shall have effect notwithstanding anything inconsistent therewith contained in any enactment, on the ground that this provision does not provide for either repeal or abrogation but merely for bypassing the existing law to the

92. (1967) 69 Bom LR 186.
93. (1920) 1 KB 829.
94. *See* C.K. Allen: LAW AND ORDERS, (1965), p. 170.
95. See *Delhi Laws Act, In re*, AIR 1951 SC 332.
96. AIR 1954 SC 465.

extent of inconsistency. The same point came up for the consideration of the court in the case of *A.V. Nachane* v. *Union of India*[1]. In this case the Central Government framed the Life Insurance Corporation of India Class III and Class IV Employees' (Bonus and Dearness Allowance) Rules, 1981 in exercise of the powers conferred by Section 48 of the Life Insurance Corporation Act, 1956 as amended by the Life Insurance Corporation (Amendment) Ordinance, 1981. Rule 3 of these rules relates to the subject of bonus concerning Class III and Class IV employees of the Corporation. Clearly Rule 3 seeks to supersede the terms of the 1974 settlements relating to bonus. The court held that Rule 3 operating retrospectively cannot nullify the effect of the writ issued in *Life Insurance Corporation of India* v. *D.J. Bahadur*[2] directing the Corporation to give effect to the terms of the 1974 settlements relating to bonus until superseded by a fresh settlement, an industrial award or relevant legislation.

(*viii*) *Validity and the vires of the legislation, primary or delegated, has to be tested on the anvil of law-making power of the legislature.*—In a recent decision (October 10, 2003) the Supreme Court ruled that the validity of delegated legislation has to be tested on the anvil of law-making power of the legislature. If the authority has the requisite power, then irrespective of the fact whether the legislation fails in its object or not, its validity is not liable to be questioned. In this case an NGO had challenged the notification of the government restraining the Income Tax authorities from proceeding against Mauritius-based Foreign International Investors for being protected under the Indo-Mauritius Double Taxation Avoidance Convention. Rejecting the argument that the notification leads to 'treaty shopping' and is not efficacious, the Court held that the validity of a delegated legislation is to be decided not by its efficacy, but by the fact that it is within the parameters of the legislative provision delegating the power to the executive.

(*ix*) *Effect of an ultra vires administrative legislation.*—If a subordinate legislation has been declared ultra vires by the court it becomes null and void. It will be considered if this rule or regulation was not in existence at all. Therefore, it will neither operate as an estoppel nor can it be ratified. Thus in *Bar Council of India* v. *Surjeet Si*[illegible] [illegible] qualifications and conditions entitling an advocate to vote at an election is ultra vires the Advocates Act, 1961 which empowers only the Bar Council of India to make such rule and, therefore, even a ratification of such rules by the Bar Council of India cannot validate them. The same view was taken by the Court in *Marathwada*

1. (1982) 1 SCC 205: AIR 1982 SC 1126.
2. (1981) 1 SCC 315: AIR 1980 SC 2181.
3. (1980) 4 SCC 211.

University v. *Sheshrao*[4]. In this case the Marathwada University Act, 1974 had empowered the Executive Council to appoint officers. The Court held that the delegation of this power by the Executive Council to the Vice-Chancellor is ultra vires and the same cannot be validated by ratification of the delegant.

POINTS FOR DISCUSSION

1. If law-making is taken over by the government it may make the administration by the barrel of the secretariat pen [Krishna Iyer, J., in *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137, 160]. In the backdrop of this statement, need and the norms of delegation jurisprudence may be discussed.
2. In our legal system judicative and administrative law-making has become de facto primary and the law-making by the legislature secondary. Within the framework of the Indian Constitution, how far is this situation constitutional?
3. How far is it correct to say that the delegation of legislative power is a constitutional impropriety condoned only on the ground of expediency, but a potentially serious threat to the liberties of the people?
4. 'Does any human being read through this mass of departmental legislation?' asked Lord Hewart (THE NEW DESPOTISM, pp. 96-97). Perhaps not; but since ignorance of law is no excuse for breaking it, administrative rules and regulations must be readily available to the public. In the light of this observation the progress of publication of administrative rule-making and strategies for future action may be discussed.
5. Parliamentary control over delegated legislation should be a living continuity as a constitutional necessity but extensive parliamentary control frustrates the basic object of delegating law-making power to the administration to make for economical use of parliamentary time. Strategies of parliamentary control over administrative rule-making may be discussed in the backdrop of the above observation.
6. Administrative rule-making is highly democratic because it can provide effective people's participation for better acceptance and effectivity. In the light of the experience of administrative rule-making in India, validity of this statement may be discussed. Will it be desirable to have a legislation providing for compulsory publication and consultation?
7. A critical performance audit of the Supreme Court may be made relating to the development of norms determining the constitutional validity of administrative rule-making. Will it be correct to say that judicial behaviour in this area has been residual and variegated?
8. Students may attempt to draft a Bill providing for all the problems of delegated legislation in India. Such an attempt may cover drafting, pre-publication, consultation, post-publication, compilation, laying and remedial parameters.

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5

Decision-making or Adjudicatory Power of the Administration

The term 'administrative decision-making' has been used synonymously with 'administrative adjudication'. Today the bulk of decisions relating to personal or property rights of the people comes not from courts but from administrative agencies exercising judicial power. From early times the administrative and judicial functions were inextricably blended in the organs of the Government. It was a later development that these powers were separated. Today, there is a revivalism of the past when administration has again come to acquire judicial powers. However, in the context of changed circumstances, purpose and need, it may be regarded as a new development. This new development has led to a host of controversies, and therefore, provides a fascinating pursuit for the writers of administrative law.

(A) NEED FOR ADMINISTRATIVE ADJUDICATION

Administrative decision-making is a by-product of an intensive form of government and consequential socialization of law. Vast expansion of State activity has taken place in India since 1947. Though on the day of Independence the political battle was won, but the war against poverty, illiteracy and disease had just started. The Government embarked on ambitious, massive plans of public health, education, planning, social security, transport, agriculture, industrialization and national assistance. It was impossible to carry out these programmes and determine the legal questions involved therein with the assistance of the law courts because of their highly individualistic and ritualistic approach. Therefore, if social control over this area of action was desirable, administrative decision-making was the only answer.

Another practical reason for the growth of administrative decision-making was the desire to provide a system of adjudication which was informal, cheap and quick. Litigation before a court of law is not only time consuming but is a luxury of the rich. The Supreme Court lamented on the failure of justice in *Mahabir Jute Mills* v. *Shibban Lal Saxena*[1] where after a long-drawn-out legal battle, the case was finally decided after a period of twenty-five years, when most of the 400 persons who claimed justice on the ground of wrongful dismissal had died and the new appointees in their place had completed twenty-five years of service. Therefore, as it became clear that the weight of social legislation would be intolerable, both for the people

1. (1975) 2 SCC 818: AIR 1975 SC 2057.

and the court, the burden had to be shared by the administrative adjudicatory system.

An even more important cause for the growth of administrative decision-making was the need to explore new public law standards based on moral and social principles away from the highly individualistic norms developed by courts. Employees' State Insurance Scheme in India required a new standard of medical service and treatment to which all the insured population and doctors must conform to. Town planning requires new standards of zoning, amenities, dispersal of industries, housing and a series of similar measures. This setting up of new standards requires expertise, specialization and experimentation. The development of a standard for restricting traffic over a bridge with reference to load and the flow of water requires the knowledge of an engineer. Developing new standards to prevent environmental hazards arising out of industrialization requires the knowledge of an environmentalist. Realising their limitation, the Supreme Court once said that leaving such technical matters to the decision of the court is like giving surgery to a barber and medicine to an astrologer. Therefore, the need to develop new standards and to apply them has led to the growth of administrative adjudication.

Like medicine, in law also there is a growing emphasis on preventive justice rather than punitive. If it is necessary that the injury done to the person is to be remedied, it is equally necessary that the chances of injury must be eliminated. Therefore, it is necessary that any spurious drink or rotten article of food must be destroyed before being offered for public sale. This can be done only by administrative agencies exercising adjudicatory powers.

Administrative adjudication also represents a functional approach to law. In certain situations, justice lies not in disposal of the case according to law but in fair disposition. In cases like licensing, nationalisation, fixing priorities in planning and action, the decision is to be reached not according to law as such but on the ground of policy considerations. Therefore, such matters are either unfit for courts' decision or courts, with their inherent limitations, are ill-equipped to make such decisions.

In any Welfare State there may be areas of adjudication where instead of concentrating on isolated facts in a dispute, the whole area is to be concentrated upon with sympathetic attitude coupled with an awareness of social context of the problem. The Labour and Capital relationship may be one of such areas where, while, deciding any labour dispute, the whole spectrum of industrial harmony necessary for national development is to be kept in view. Therefore, decisions in this area are to be reached not merely according to strict principles of law but on the principle of mutual give and take. Here

again administrative adjudication is the answer because courts, due to their limitations, cannot adopt this approach.

No intensive form of government can function without a decision-making system of its own. Courts are already groaning under the weight of pending cases and, as such, if the whole mass of fresh litigation arising in an intensive form of government is diverted towards them, the judicial system would virtually collapse. Therefore, in the administrative decision-making process, the Government develops its own justice system which supplements the existing one.

Court of law and the administrative agency exercising adjudicatory powers

English and American views differ on the basis of distinction between a court of law and the administrative authority exercising adjudicatory powers. This difference is mainly due to the divergent constitutional structurizations in both countries and the difference in outlook. Americans put a lot of faith in judges and therefore, in the judicialisation of the administrative process. The Englishmen, on the other hand, lay great emphasis on laymen and the informality of the administrative process.

According to the English view, the main distinction between a court of law and an administrative agency exercising adjudicatory power lies in the law and policy distinction. A court first ascertains facts and then applies law to these facts. Therefore, the function of a judge is like a slot-machine—controlled fact-finding and controlled application of law. The administrative agency exercising adjudicatory powers proceeds with controlled fact-finding and uncontrolled application of policy.

The Committee on Ministers' Powers also reached the same conclusion when it pointed out that, unlike a judicial decision which disposes of the whole matter by applying law to facts, a quasi-judicial decision is given after applying 'policy' to facts.

However, this differential matrix of law and policy seems to be more apparent than real, because judges today rarely act like slot-machines; they do take into consideration policy parameters also while deciding a dispute. The decision in *Maneka Gandhi* v. *Union of India*[2], would not have been possible had the court not taken into consideration the current policy and philosophy of society. On the other hand, some independent administrative agencies exercising adjudicatory powers apply law to facts in the same manner as a court. The Tax Tribunal, which is an administrative agency, applies law to facts in a highly objective manner, unconcerned with policy considerations.

2. (1978) 1 SCC 248: AIR 1978 SC 597.

'Discretion' cannot be a basis for distinction as both—courts and administrative agencies—exercising adjudicatory powers use discretion for the interpretation and application of the law.

According to the American view, it is the position of the person who decides which is the determining factor of difference between a court and an administrative agency exercising adjudiciatory powers. In a court there are two parties and the judge sits as arbiter, detached and impartial. The institution and the presentation of a case is the responsibility of the parties. An administrative agency, on the other hand, is rarely disinterested in a case. However, even this basis of distinction is not without exception. There are independent tribunals where a presiding officer sits in the same detached manner as a judge. Election Tribunals, before their abolition, decided disputes between contesting parties in a highly detached manner. Institution and presentation was the responsibility of the parties.

'Nature of functions' is not a sufficient distinctive criterion either. It may be argued that a court exercises only judicial functions while administrative agencies exercising adjudicatory powers undertake various other administrative functions also. The President of India discharges multifarious functions and also decides disputes relating to the age of a judge under Article 217 of the Constitution. However, there are many administrative agencies like the Industrial Tribunal which exercise judicial powers only.

'Procedure' may also be a possible criterion of distinction but not without exception. There is no uniform procedure which the administrative agencies are required to follow while exercising adjudicatory powers. The procedure differs from agency to agency. Sometimes the procedure is prescribed by the statute which creates the adjudicatory authority and sometimes the agencies are left free to prescribe their own procedure, yet one common feature of these agencies is that they all follow the principles of natural justice. Courts, on the other hand, follow a uniform, fixed statutory procedure. However, in many cases administrative agencies are also vested with powers of a Civil Court for the purpose of summoning witnesses, examining them on oath, compelling the production of documents, etc.

Courts of Law are bound by precedents, principle of res judicata and technical rules of Evidence Act and procedural law, but administrative tribunals are not uniformly and strictly bound by them. Furthermore, an administrative tribunal cannot decide on the constitutionality of a legislation except tribunals constituted under Articles 323-A and 323-B of the Constitution, whereas law courts (Supreme Court and High Courts) can decide this issue.

Structure and qualification may also provide possible parameters for distinction. The structure of administrative authorities exercising adjudicatory

powers is not based on any uniform conventional pattern and is derived from a statute or a statutory rule. Sometimes these agencies are an integral part of the administration and sometimes autonomous. Adjudicatory powers may be given to a single individual or to a multi-member body. These agencies, besides exercising adjudicatory powers, exercise other regulatory and administrative powers. No uniform formal qualifications are prescribed for persons manning these agencies. Sometimes a legal qualification is prescribed and sometimes a technical one, but in most cases no qualification and experience is prescribed. On the other hand, the structure of courts is based on a uniform pattern and judges are required to have the necessary legal qualifications and experience; and they exercise no other functions, except judicial. However, there are administrative adjudicatory agencies which are autonomous; their members are required to have prescribed qualifications and exercise only judicial functions. For example, the Income Tax Appellate Tribunal is an autonomous body exercising only adjudicatory powers and its members are required to have prescribed legal or technical qualifications.

One may go on and on like this without arriving at any conclusion. The only difference between a court and an administrative agency exercising adjudicatory powers seems to be the legislative classification. A court is a court because it has been classified as such; and an administrative agency exercising adjudicatory powers is an administrative agency because it has been designated as such.

(B) PROBLEMS OF ADMINISTRATIVE DECISION-MAKING

Administrative justice has been a host of controversies in India. While people are not alarmed when the administration is given law-making powers, brows are certainly raised when administration is given adjudicative powers. People doubt the independence of administrators as judges and also fear their non-legal approach. Like Americans, the people of India put a lot of faith in judges.

In India, no systematic research has been done on the functioning of administrative agencies exercising adjudicatory powers and, therefore, their problems cannot be exhaustively listed. However, a few common problems with which the whole administrative adjudicatory process suffers may be discussed.

(1) Number and complexity

Administrative agencies with adjudicatory powers have grown wild like mushrooms in the rainy season. Since 1947, these agencies have proliferated so much that an attempt even to prepare a comprehensive list seems impossible. Every statutory scheme contains its own machinery for decision-making. A large number of parallel bodies adjudicating on the same kind of dispute and giving divergent decisions is no exception. This com-

plicates the task of administrative law in drawing uniform principles for uniform application. Therefore, the need to reorganise this formidable number into a system with fewer units cannot be overemphasised.

(2) Bewildering variety of procedures

As the number of administrative agencies are formidable, so is their procedure. Even the best lawyer cannot say with certainty how he will proceed before a particular agency. Sometimes the procedure is laid down in the Act under which the agency is constituted. Sometimes the agency is left free to develop its own procedure. Sometimes the agency is invested with the powers of a Civil Court in matters of compelling attendance and production of documents. But in a great number of cases, the agency is required to follow only the minimum procedure of the principles of natural justice. Because the principles are not rigid and do not apply uniformly in all situations, the consequent uncertainty results at times in arbitrary actions. In the interests of justice and liberty, insistence on procedural regularity is essential. In the USA and England, certainty, though limited, has been achieved by the Administrative Procedure Act, 1946 and Tribunals and Enquiries Act, 1977 respectively. In India no such attempt has been made so far though it is overdue.

(3) Unsystematic system of appeal

An appeal is a definite safeguard against an accident in the administration of justice. However, no uniform system of appeal has been followed in administrative adjudications. Sometimes administrative decisions are made appealable before an independent tribunal as in tax cases and sometimes appeal is provided for before a higher administrative agency. Under Section 24 of the Medical Council Act the decision of the Medical Council of India is appealable before the Central Government. Few Acts allow appeal on questions of law only. Section 64 of the Motor Vehicles Act may be cited as an illustration. The period for allowing appeals also differs from agency to agency. Some Acts do not provide for any appeal and make the decision of the administrative agency final. Section 6 of the Land Acquisition Act makes the decision of the Collector regarding public purpose final. To eliminate this ad hocism in appeals from the decisions of the administrative agencies, it is necessary that at least one appeal on questions of fact must be allowed before a higher administrative authority and another appeal on questions of law to a court of law.

Unlike American law, English law provides the right to appeal to a law court from administrative decisions. This is done not only in the interests of justice, but also with a desire to keep the judicial system unitary. On questions of facts, as a general rule, there is no appeal, but since courts recognise 'no evidence' and 'jurisdictional facts' as questions of law, the deficiency to a large extent is mitigated. In the USA, the decision of the hearing exam-

iner is appealable before the agency and the decision of the agency is subject to the ordinary review powers of courts under the Constitution and the Administrative Procedure Act.

(4) Invisibility of the decisions

Unlike courts, not all administrative agencies exercising judicial powers publish their decisions; their decisions, therefore, go beyond the pale of public criticism. In the absence of this necessary safeguard, the quality of administrative justice suffers. In some cases, even no record is prepared and justice is administered in an anti-legal fashion. It is because of this reason that the Administrative Procedure Act, 1946 insists on a formal record in all administrative adjudications. In England the procedure is so informal that no transcript is insisted upon to save time and expense.

(5) Unpredictability of decisions

In judicial decisions there is a certain amount of predictability. On similar facts, the decision will be the same because of the doctrine of precedent which courts in India follow. Predictability of decisions is an essential ingredient of the Rule of Law which insists that justice must be done through known principles. In administrative adjudication this essential element of predictability is frequently absent. Administrative agencies exercising adjudicatory powers do not follow the doctrine of precedent, hence they are not bound to follow their own decisions. This ad hocism not only makes the development of law incoherent but also violates the principles of the Rule of Law. Therefore, the Supreme Court's advice to such agencies is that they must be slow in overruling their own decisions.

(6) Anonymity of decisions

In administrative adjudication, though not always, the decisions are made in a 'hole-and-corner' fashion. No one knows from where the decision comes. One fine morning a person receives a communication that the President of India or the Governor, as the case may be, is pleased to take such and such decision in his case. This divided responsibility where one hears and another decides is against the concept of fair hearing.[3]

Anonymity in decision-making or institutionalisation of the decisions remains an intricate problem of administrative law in India. In the USA, the problem has been solved through the agency of 'hearing officers'. Under the provisions of the Administrative Procedure Act, 1946 a group of semi-independent hearing officers is maintained. They preside over cases not heard by agency's heads themselves. The appointment, tenure and promotion of these officers is in the hands of the Civil Service Commission to make them independent from the control of any agency. At the hearing, these hearing

3. *G. Nageswara Rao* v. *A.P. SRTC*, AIR 1959 SC 308.

officers exercise all the powers of a trial judge. They are required to make initial decisions after hearing, which becomes the decision of the agency unless appealed from. The entire record of the hearing is certified by the hearing officer.

In England, the system developed after the Tribunals and Enquiries Act, 1977 does not go to the extremes of American law. There the inspectors who are the counterparts of the American hearing officers hold enquiry and hear, but do not decide. They can only make recommendations to the Minister concerned who can either accept or reject the inspectors' recommendations.

Recently a practice is developing in England where an inspector hears and decides also in many routine cases. This practice has been firmly established in Scotland.

In India, if administrative justice is to command respectability and public confidence, some such system as has been developed in the USA and England is inevitable.

(7) Combination of functions

In India, except in the case of civil servants, in all disciplinary proceedings the functions of a prosecutor and the judge are either combined in one person or in the same department. Whether it is accepted or not, in such a situation bias is inevitable.[4] In the USA and England the problem has been solved, though not entirely by internal separation through the agency of hearing officers and inspectors. The Administrative Procedure Act, 1946 further provides that no official with an investigative or prosecuting function can participate in decision-making.[5]

(8) No evidence rule

In India, the technical rules of the Evidence Act do not apply to administrative adjudications. The gap is filled, though inadequately, by the judge-made rule of 'No Evidence'. The Supreme Court explained the substance of this rule in *State of Haryana* v. *Rattan Singh*[6]. In this case, a bus of the Haryana Road Transport Corporation with Rattan Singh as conductor was taken over by a flying squad. The inspector found eleven passengers without tickets though they had paid money for it. However, the inspector did not record the statements of those persons as required under the rules. After the formality of enquiry, the services of the conductor were terminated.

4. In *Hari K. Gawali* v. *Dy. Commr. of Police*, AIR 1956 SC 559, the Supreme Court held that where the functions of a prosecutor and the judge are exercised by two persons, though of the same department, there is no violation of principles of natural justice.

5. Section 8(*b*).

6. (1977) 2 SCC 491: AIR 1977 SC 1512. *See* also *J.D. Jain* v. *State Bank of India*, (1982) 1 SCC 143: AIR 1982 SC 673.

All the courts up to the High Court quashed the decision on the ground of insufficiency of evidence and violation of rules of natural justice as none of the eleven witnesses was examined and the Inspector did not record the statements of witness as required by law. On appeal by the State, the Supreme Court reversed the decision and held that the simple point in the case was, was there some evidence or was there no evidence—not in the technical sense governing the regular court proceedings but in a fair common-sense way as a man of understanding and worldly wisdom would accept. Viewed from this angle, sufficiency of evidence in proof of findings of a domestic tribunal is beyond scrutiny. The evidence of the inspector is some evidence.

The end-result of the decision is that in an administrative adjudication if there is some evidence in some corner of the record, the decision is valid though it may not be any evidence at all in accordance with accepted norms of a judicial decision. *Nand Kishore Prasad* v. *State of Bihar*[7] highlights the problem. In this case the appellant was a clerk in the District Magistrate's office. He was prosecuted before a criminal court for embezzling a certain amount, but was acquitted. Thereafter, disciplinary administrative proceedings were initiated against him and the appellant was found guilty, and hence removed from service. Upholding the decision of the administrative authority in a writ proceeding, the Supreme Court held that this was not a case of 'no-evidence' but of evidence which was inadequate to carry a conviction in a criminal court. In disciplinary proceedings, however, the order passed cannot be interfered with on the ground that the evidence would be insufficient in a criminal trial. It is true that this 'no-evidence' rule resulting in inadequate basis for action has not earned any credibility for administrative justice.

In England, courts do not disturb the findings of fact by an administrative authority unless it is based on no evidence. *Coleen Properties Ltd.* v. *Minister of Housing and Local Government*[8] is an illustrative case on the point. In this case a first-class building was included in a clearance order for undertaking a housing project. The Housing Act, 1957 provided that a first-class building cannot be so included unless it is 'reasonably necessary' for the whole scheme. The inspector who gave the hearing recommended the exclusion of this building. The minister overruled the inspector's findings and confirmed the clearance order. The court quashed the minister's order on the ground that there was no evidence of 'necessity' before the minister. However, now a shift is visible in the approach of courts in England from the 'no-evidence' rule to 'sufficient-evidence/substantial-evidence' rule. Their Lordships of the House of Lords in *R.* v. *Home Secy., ex parte Khwaja*[9]

7. (1978) 3 SCC 366: AIR 1978 SC 1277.
8. (1971) 1 WLR 433.
9. (1984) 1 AC 74 (HL).

held that while exercising a power of judicial review, court must see that there is 'sufficient evidence' on record and thus the 'no-evidence rule' was not applied for review of administrative action.

American law allows wide judicial review of finding of facts by administrative authorities. Courts can re-examine facts to find out whether there is substantial evidence to support administrative action. But how much evidence is substantial has been a complex question of American administrative law. Before the Administrative Procedure Act, 1946 the approach of the courts was that so much evidence as standing alone would be sufficient to support administrative action and would be substantial.[10]

After the passing of the Administrative Procedure Act, which requires in Section 10(*e*) that the determination of 'substantial evidence' must be based on the whole record, two significant changes have been brought about in judicial behaviour: (*i*) the determination of 'substantial evidence' must be made not by weighing evidence supporting the administrative action alone but after taking into consideration the evidence of the other side also; (*ii*) the quantum of evidence necessary to constitute 'substantial' must be such that it can be accepted by any reasonable man as 'substantial'. Therefore, in *N.L.R.B.* v. *Universal Camera Corpn.*[11], the court struck down the action of the Board on the ground that though the action of the Board is based on some evidence, but after considering the evidence of the opposite side, no reasonable mind can accept such evidence as 'substantial'. In India on similar facts the decision would be the reverse.

Beyond the above area also the evidence projections of the administrative authorities are uncertain. However, the Supreme Court in *Bareilly Electricity Supply Co.* v. *Workmen*[12] while deciding a bonus dispute laid down the broad evidence projections of administrative authorities exercising adjudicatory powers. The Supreme Court observed that administrative tribunals are not bound by the strict rules of evidence and procedure. They follow the principles of natural justice. But this does not mean that they can act on something which is not evidence at all. On the other hand, what it means is that no material can be relied upon to establish contested facts which are not spoken of by persons who are competent to speak about them and are not subjected to cross-examination by the party against whom they are sought to be used. If a balance sheet is produced, it does not itself become proof of the entries therein. If the entries are challenged, then every entry must be proved by producing books. If a letter or other document is produced to establish a fact, then either the writer must appear or an affidavit must be

10. *Interstate Commerce Commission* v. *Union Pacific Rly. Co.*, 222 US 541 (1912).
11. 190 F 2d 429 (1951).
12. (1971) 2 SCC 617, 629: AIR 1972 SC 330.

filed. Even if all the technicalities of the Evidence Act are not applicable is it inconceivable that the tribunal can act on what is not evidence but hearsay, nor is it conceivable that the tribunal can base its awards on copies of documents the originals of which, though in existence, are not produced and proved either by affidavits or by witnesses who have executed them, if they are alive and can be produced. Again if the party wants an inspection it is incumbent on the tribunal to permit inspection so far as it is relevant to the enquiry. The applicability of these principles are well recognised and admit no doubt.[13]

It must be borne in mind that the remarks of the Supreme Court relate to an independent tribunal, therefore, no other administrative authority exercising adjudicatory powers is bound by it.

In England, generally the legal rules of evidence are not followed by tribunals. Therefore, a tribunal may take into consideration an unauthenticated document without calling the author to prove it. In the USA also, in cases of non-regulatory agencies, the same informality in matters of evidence persists.[14]

In order to create confidence among people in administrative justice, a code prescribing a minimum procedure for administrative agencies exercising adjudicatory powers must be adopted. Till this is done, judicial review must be enlarged by using the test of reasonableness of administrative findings of fact and law.

(9) Official perspective

In administrative justice, official perspective is inherent. In any disciplinary proceeding, the presumption is of guilt rather than innocence. The actions are taken on the basis of expediency and various other extra-legal considerations. This projection of official perspective does more damage where the administrative agency is not required to follow the standard rules of evidence and procedure. Though no research has been undertaken in this aspect of administrative justice, but it is certain that official perspective does infest administrative adjudication.

(10) Official bias

Official or departmental bias is one of the most baffling problems of administrative law. In the opinion of the Committee on Ministers' Powers, bias arising from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest. Therefore, the Committee suggested that in such cases where the minister would approach the issue with a desire that the decision should go one way rather than

13. *Bareilly Electricity Supply Co.* v. *Workmen*, (1971) 2 SCC 617, 629.
14. *Richardson* v. *Perales*, 402 US 389 (1971).

another, Parliament should provide that the matter should be judged by an independent tribunal.[15] However, the problem of departmental bias is something which is inherent in administrative process itself. Realising this the Appeal Court in *Franklin* v. *Minister of Town and Country Planning*[16] held that the mere desire of the minister that the issue be decided in a particular way will not vitiate administrative action unless bad faith or improper purpose is proved. In India, the Supreme Court quashed the decision of the Andhra Pradesh Government nationalizing road transport, among other grounds, on the ground of departmental bias because the Secretary of Transport who had initiated the scheme also heard the objections.[17] Realising the inevitability of departmental bias in the administrative process, the Supreme Court, however, quickly added a caveat to its approach and held in the *Gullapalli case (II)*[18] that if the minister concerned hears the objections, the decision would be valid because he is a formal head of the department. In USA and England the problem has been minimized to a great measure through internal separation wherein hearing officers are inducted to conduct hearings. For detailed treatment of this problem *see* the chapter on Natural Justice.

(11) Plea bargaining

Plea bargaining means the bargaining of 'plea of guilt' with lesser charges and punishment. It is very common that a poor employee is bullied by an overbearing superior to accept the charge against him on the promise that a lesser punishment will be awarded. Plea bargaining, besides being immoral, violates the accepted canons of justice. It does the most damage where people are poor and the unemployment rate is very high.

It is for this reason plea bargaining as is being used in the USA is not available in India. It is still considered unethical as any person after committing a crime if admits it, can get away with a flee-bite punishment. In India a limited compounding of offences is allowed under Section 320 of the Criminal Procedure Code. Beyond this provision no negotiated settlement of crimes is allowed in India. This was made clear by the Supreme Court while disposing a criminal appeal in which the High Court had reduced the imprisonment punishment of eight years to imprisonment already undergone on the ground that the accused agreed not to challenge legality of the lower Court decision in his case.[19]

15. Report of the Committee on Ministers' Powers, p. 78.
16. 1948 AC 87: (1947) 1 All ER 612. In 1957 the Frank Committee also made a similar recommendation, p. 5.
17. *Gullapalli Nageswara Rao* v. *A.P. SRTC*, AIR 1959 SC 308.
18. *Gullapalli Nageswara Rao* v. *State of A.P.*, AIR 1959 SC 1376.
19. *State of U.P.* v. *Chandrika*, (1999) 8 SCC 638.

(12) Political interference

Instrumentalities of administrative justice are, by their very nature, subject to some manner of political interference, though this cannot be said with certainty about every tribunal. No statistics are available to prove the quantum of political interference, but a strong conviction persists among people that administrative justice is polluted by political interference. It was this conviction which made people raise a hue and cry against the government's proposal for establishing Service Tribunals to decide service disputes of government servants during the Emergency of 1975-77. Some system must, therefore, be devised to invest administrative agencies exercising adjudicatory powers with a reasonable degree of freedom, responsibility and security of tenure.

(13) Off-the-record consultation

Section 5(*c*) of the Administrative Procedure Act, 1946 provides that no administrative authority exercising adjudicatory powers is to consult any person or party upon any fact in issue except upon notice and opportunity for all parties to participate. This is done to avoid off-the-record consultations by the authority in a manner that may prejudice the case of the other party. In England, a standard rule has developed which applies to all enquiries; if the minister differs from the findings of fact by the inspector, or receives any new evidence, or takes into consideration any new issue after the close of the hearing, he must bring it to the notice of the other party and must reopen the enquiry if so demanded by the other party. This limitation on off-the-record consultation will now avoid such problems as were involved in *Errington* v. *Minister of Health*[20].

In India there is no law to eliminate the dangers inherent in off-the-record consultation by an administrative authority. The principles of natural justice only demand that the authority must not base its decision on any evidence which is not brought to the notice of the other party. Since in India there is no legal requirement for the preparation of a 'record' in the sense in which it is insisted upon in the USA, off-the-record consultation which may prejudice the mind of the authority is endemic.

(14) Reasoned decisions

In the USA the right to reasoned decision arises from the provisions of the Administrative Procedure Act and also from the due process clause of the Constitution. In England the provisions of the Tribunals and Enquiries Act, 1977 require an agency to give reasons only when demanded.

In India apart from the requirement, if any, of the statute establishing the administrative agency, there is no requirement for the administrative auth-

20. (1935) 1 KB 179.

ority to give reasons. The Supreme Court in *Tara Chand* v. *Municipal Corpn., Delhi*[21], also held that there is no principle of natural justice requiring a statutory tribunal to give reasons in every case. In order to develop faith in administrative justice, it is essential as a general requirement that every administrative agency must give reasons at least when demanded.[22]

(15) Legal representation and cross-examination

Apart from the requirement of a specific statute, there is no general requirement of the principles of natural justice that the administrative agency should always allow legal representation and cross-examination in every case. Detailed discussion on the subject has been made in the chapter on natural justice. In the USA the requirement of legal representation and cross-examination is insisted upon by the due process clause and the Administrative Procedure Act. In England, the administrative procedure being more informal, this requirement is not insisted upon in every case.

From the above discussion it appears that the one problem with which administrative justice in India is confronted is the problem of organisation and procedure of the administrative agencies exercising adjudicatory powers. If there is merit in a flexible procedure there is also the danger that informality may not develop an anti-legal posture. Therefore, the need for a minimum procedure code cannot be overemphasised. This will combine the elements of flexibility and certainty in the realm of administrative justice.

(16) Administrative versus Judicial action

Sometimes it happens that a person is proceeded against both in the department and in a court of law. In such a situation what impact will a judicial decision have on administrative adjudicatory process? The Supreme Court of India held that merely because the accused is acquitted by a court of law the power of the authority to continue the departmental enquiry and action is not taken away, nor is its discretion in any manner fettered because in a judicial proceeding the standard of proof differs much from that in an administrative proceeding. While in departmental proceedings the standard of proof is one of preponderance of possibilities, in a criminal case, the charge has to be proved beyond reasonable doubt. Furthermore, both the proceedings operate in distinct and different jurisdiction areas. In departmental proceedings, factors operating on the mind of the authority may be many, such as enforcement of discipline or to investigate the level of integrity of the delinquent and other staff. This proposition was laid down by the highest bench in *Corpn. of the City of Nagpur* v. *Ramchandra*[23]. In this case, an employee had been suspended pending enquiry on the charge of swindling

21. (1977) 1 SCC 472: AIR 1977 SC 567.
22. For further details *see* Chapter VI, *supra*.
23. (1981) 2 SCC 714: AIR 1984 SC 626.

the money deposited with the corporation as fine by the people. A criminal case was also filed in which he was acquitted. It was held that departmental action could still be taken.

Elaborating the law further the Supreme Court in *M. Paul Anthoney* v. *Bharat Gold Mines Ltd.*[24], concluded:

1. Both the proceedings can proceed separately or simultaneously.
2. If both the proceedings are based on identical facts and the charge in criminal proceeding is of a grave nature which involves complicated questions of law and fact, it is desirable that departmental proceedings may be stayed till the conclusion of the criminal case.
3. Whether the nature of charge in a criminal case is grave and involves complicated questions of law and fact would depend on the basis of evidence collected during investigation and reflected in the charge sheet.
4. Factors mentioned in 2 and 3 above cannot be considered in isolation to stay departmental proceedings but due regard has to be paid to the fact that departmental proceedings cannot be unduly delayed. Departmental proceedings if stayed due to pendency of a criminal case can be revised so as to conclude them at an early date. The purpose is that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at an early date.

(C) MODES OF ADMINISTRATIVE DECISION-MAKING

The decision-making or adjudicatory functions of the administration are exercised in such a variety of ways that it is difficult to bring them under any bibliographical control. However, the most popular modes of adjudication through tribunals may be discussed in this chapter. It may be pointed out at the very outset that Administrative Tribunals constituted under the provisions of Articles 323-A and 323-B of the Constitution of India are beyond the purview of this Chapter.[25]

(1) Statutory Tribunals

Intensive form of government is responsible for entrusting the administration with adjudicatory powers. For the exercise of this power, a tribunal is a very efficacious instrumentality, which from a functional point of view is somewhere between a court and the government department exercising adjudicatory power.

The dictionary meaning of the word 'tribunal' is 'seat of a judge' and, if used in this sense, it is a wide expression which includes within it 'court'

24. (1999) 3 SCC 679.
25. For detailed discussion on Administrative Service Tribunals *see* Chap. 13.

also. But in administrative law, this term 'tribunal' is used in a special sense and refers to adjudicatory bodies outside the sphere of ordinary courts of the land. Under the Constitution, in Articles 136, 226 and 227, the terms 'court' and 'tribunal' have been used to mean two different things.[26] Therefore, a tribunal may possess some but not all trappings of a court.[27] A body in order to be designated as a 'tribunal' must be one which is administrative in character but is invested with judicial powers to adjudicate on questions of law or fact affecting the rights of citizens in a judicial manner.

In *Kihoto Hollohan* v. *Sri Zachillu*[28] the Supreme Court referred to its earlier decisions[29] and observed that in order to determine whether an authority exercising adjudicatory powers is a tribunal or not the test is whether:

(*i*) There is a lis — an affirmation by one party and denial by the other.

(*ii*) The dispute involved decision on the rights and obligations of parties.

(*iii*) The authority is called upon to decide it.

From a functional point of view, an administrative tribunal is neither exclusively a judicial body nor exclusively an administrative body but is somewhere between the two. However, generally an administrative tribunal shall have the following characteristics:[30]

(1) An administrative tribunal is the creation of a statute and thus has statutory origin.

(2) It has some trappings of a court but not all.

(3) An administrative tribunal is entrusted with the judicial powers of a State and, thus, performs judicial and quasi-judicial functions, as distinguished from pure administrative or executive functions and is bound to act judicially.

(4) Even with regard to procedural matters, an administrative tribunal possesses powers of a court, e.g., to summon witnesses, to administer oath, to compel production of documents, etc.

(5) An administrative tribunal is not bound by strict rules of evidence and procedure.

(6) The decisions of most of the tribunals are in fact judicial rather than administrative inasmuch as they have to record findings of

26. *Harinagar Sugar Mills* v. *Shyam Sunder*, AIR 1961 SC 1669.
27. *ACC* v. *P.N. Sharma*, AIR 1965 SC 1595.
28. (1987) 1 Scale 338.
29. *Harinagar Sugar Mills* v. *Shyam Sunder Jhunjhunwala*, (1962) 2 SCR 339; *Associated Cement Co. Ltd.* v. *P.N. Sharma*, (1965) 2 SCR 366.
30. Frank's Report, 1957, Cmnd. 218, para 40 quoted in Thakker, C.K.: Administrative Law, (1992), Eastern Book Company, p. 231.

facts objectively and then to apply the law to them without regard to executive policy. Though the discretion is conferred on them, it is to be exercised objectively and judicially.

(7) Most of the tribunals are not concerned exclusively with cases in which the Government is a party: they also decide disputes between two parties; e.g., the Election Tribunal, Rent Tribunal, Industrial Tribunal, etc. On the other hand, the Income Tax Appellate Tribunal always decides disputes between the Government and the assessees.

(8) Administrative tribunals are independent and they are not subject to any administrative interference in the discharge of their judicial or quasi-judicial functions.

(9) The prerogative writs of certiorari and prohibition are available against the decisions of administrative tribunals.

In the Indian context, the term "tribunal" may be used in four different senses. Firstly, all administrative bodies exercising quasi-judicial functions, whether as part and parcel of the department or otherwise, may be termed as 'tribunals'. The only distinguishing feature of these bodies as against other bodies exercising administrative powers is that these bodies have to follow the rules of natural justice while rendering decisions. Secondly, all those administrative adjudicatory bodies may be regarded as tribunals which are outside the control of the department involved in the dispute and hence decide disputes like a judge free from any departmental bias. The Income Tax Appellate Tribunal may be covered in this category as it is under the control of the Ministry of Law, and not Ministry of Finance, hence it can decide matters impartially. Thirdly, the term 'tribunal' as used in Article 136 of the Constitution has a special meaning. With reference to its special leave jurisdiction the Supreme Court held that the authority must exercise 'inherent judicial powers of the State'.[31] The court would not hear an appeal merely from an administrative body which in its decision-making process is required to follow the principles of natural justice if it is not discharging the inherent judicial powers of the State. Thus, the test to identify a tribunal is not its control, composition or procedure but its functions. Consequently, even departmental bodies may be classified as 'tribunals'.[32] Fourthly, the term 'tribunal' is also used for those tribunals which are constituted and established under Articles 323-A and 323-B of the Indian Constitution, such as

31. *ACC* v. *P.N. Sharma*, AIR 1965 SC 1595.

32. Custodian-General of Evacuee Property, the Central Government exercising powers under Section 111(3) of the Companies Act, 1956, the Central Board of Revenue exercising appellate powers under Section 190 of the Sea Customs Act, 1878, and also the Central Government exercising powers under Section 191 of the Sea Customs Act, 1878 have been held to be *tribunals*. *See* S.N. Jain: ADMINISTRATIVE TRIBUNALS IN INDIA, Indian Law Institute (1977).

Administrative Service Tribunals. These tribunals have a constitutional origin and enjoy the powers and status of a High Court in matters within their jurisdiction and are amenable only to the jurisdiction of the Supreme Court under Article 136 of the Constitution.

Much research has not been undertaken in India on administrative tribunals, however, the Indian Law Institute, New Delhi has done some pioneering work. It has listed 43 tribunals functioning under various Central enactments. It has also identified 25 bodies which have been held to be tribunals under Article 136 of the Constitution.[33]

Articles 323-A and 323-B of the Constitution indicate that we are at the threshold of a new era of tribunals. No exhaustive list of tribunals can be prepared as they appear under various names. However, the following authorities have been held to be tribunals within the meaning of Article 227 of the Constitution:

(*a*) Industrial Tribunals established under the Industrial Disputes Act, 1947.

(*b*) Railway Rates Tribunals established under the Indian Railways Act, 1890.

(*c*) Income Tax Appellate Tribunal established under the Income Tax Act, 1961.

(*d*) Employees' Insurance Court established under the Employees' State Insurance Act, 1948.

(*e*) Court of Survey established under the Merchant Shipping Act, 1958.

(*f*) Copyright Board established under the Copyright Act, 1958.

(*g*) Unlawful Activities Tribunal established under the Unlawful Activities (Prevention) Act, 1967.

(*h*) The Press and Registration Appellate Board established under the Press and Registration of Books Act, 1867.

(*i*) Foreigners' Tribunal established under the Foreigners Act, 1946.

(*j*) Compensation Tribunals established under the various Zamindari Abolition Acts, Slum Clearance and Planning Laws, Air Corporation Act, Life Insurance Corporation Act, etc.

(*k*) Claims' Tribunals established under the Motor Vehicles Act, 1939.

(*l*) Rent Control Authority.

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33. Custodian-General of Evacuee Property, the Central Government exercising powers under Section 111(3) of the Companies Act, 1956, the Central Board of Revenue exercising appellate powers under Section 190 of the Sea Customs Act, 1878, and also the Central Government exercising powers under Section 191 of the Sea Customs Act, 1878 have been held to be tribunals. *See* S.N. Jain: ADMINISTRATIVE TRIBUNALS IN INDIA, Indian Law Institute (1977).

(*m*) Excise Appellate Authority.

(*n*) Commissioner for Religious Endowments.

(*o*) Panchayat Court.

(*p*) Custodian, Evacuee Property.

(*q*) Payment of Wages Authority.

(*r*) Statutory Arbitrator.

(*s*) Speaker exercising powers under paragraph 6(1) of the Tenth Schedule of the Constitution.

On the other hand, the following authorities are not tribunals under Article 227 of the Constitution:[34]

(*a*) Domestic Tribunal.

(*b*) Conciliation Officer.

(*c*) Military Tribunal.

(*d*) Private Arbitrator.

(*e*) Legislative Assembly.

(*f*) Registrar acting as Taxing Officer.

(*g*) Customs Officer.

(*h*) Zonal Manager of Life Insurance Corpn. of India.

(*i*) Advisory Board under Preventive Detention Laws.

(*j*) State Government exercising power to make a reference under the Industrial Disputes Act.

In India these tribunals do not follow any uniform procedure. The procedure is sometimes laid down in the statute and sometimes the tribunal is left free to develop its own procedure. The procedure for the Copyright Board is given in the Copyright Act, while the Tax Appellate Tribunal is left free to decide its own procedure. However, as a matter of general practice, the tribunals exercise the powers of a Civil Court relating to examination, discovery, inspection, production of documents, compelling attendance of witnesses and issuing commissions. In the absence of statutory requirements the tribunals follow the principles of natural justice. Their proceedings are considered as judicial proceedings for the purposes of Sections 193, 195 and 226 of the Indian Penal Code and they are deemed to be Civil Courts for the purposes of Sections 480 and 482 of the Criminal Procedure Code. In the interests of flexibility and adaptability, the technical rules of the Indian Evidence Act do not apply to tribunals. However, the rules of procedure of the tribunals should not violate the requirements of fair procedure and they must conduct themselves with openness, fairness and impartiality.

34. Thakker, C.K.: ADMINISTRATIVE LAW, (1992), Eastern Book Company, p. 227.

To this end in view tribunals are required to give reasons for their decision. This is necessary not only for a sound system of judicial review but also in the interest of discipline for the tribunal and public confidence.[35] The principle of res judicata in its technical sense does not apply to tribunals.[36] Tribunals are bound by the law declared by the Supreme Court[37] and the tribunals working under the territorial jurisdiction of a High Court are bound by the law laid down by that High Court.[38] Tribunals are subject to the writ jurisdiction of the Supreme Court and the High Courts. By the Forty-second Amendment to the Constitution, 1976, Articles 323-A and 323-B had been added to the Constitution which authorised the Government to establish special tribunals to perform a substitutional role to the High Court. Under this provision, Administrative Service Tribunals had been established as a substitute to the High Court in service matters of government servants. These tribunals thus, were not under the jurisdiction of High Courts under Articles 226 and 227 of the Constitution. In a significant judgment in 1997, the Apex Court declared Articles 323-A and 323-B as unconstitutional and thus these tribunals have been brought under the jurisdiction of High Courts.[39]

As the tribunals are under the supervisory jurisdiction of High Courts, various High Courts have laid down a few rules regarding the functioning of these tribunals. In *Mallappa Murigeppa Sajjan* v. *State*[40] the Karnataka High Court held that the Government cannot suspend the working of a tribunal. The tribunal in this case had been constituted under the Karnataka Land Reforms Act, 1961. It had official and non-official members. Non-official members were drawn from the Congress (I) Party. When the Congress (U) government came to power, it issued an order directing the suspension of the working of the tribunal until further orders. Non-official members challenged this order as mala fide. Allowing the appeal, the court held that because the Act has not given the Government a power of superintendence over the tribunal, the Government could not directly impinge on the judicial functioning of the tribunal which falls under the supervisory jurisdiction of the High Court under Article 227 of the Constitution.

In *P. Satyanarayana* v. *Land Reforms Tribunal*[41], the Andhra Pradesh High Court ruled that in the absence of any statutory provisions, a tribunal cannot review its own decisions. However, it can recall its orders obtained through fraud in exercise of its inherent powers. In *G. Rajlakshmi* v. *Appel-*

35. *S.N. Mukerjee* v. *Union of India*, (1990) 4 SCC 594.
36. *India General Navigation Co.* v. *Workmen*, AIR 1960 SC 1286.
37. Art. 141 of the Constitution.
38. *Jain Exports* v. *UOI*, (1988) 3 SCC 579.
39. *L. Chandra Kumar* v. *UOI*, (1997) 3 SCC 261.
40. AIR 1980 Kant 53.
41. AIR 1980 AP 149.

late Authority[42], the question before the court was that if the tribunal fails to consider the objections filed before it can the appellate tribunal consider the merits of the case as the original authority? The Andhra Pradesh High Court answering the question in the negative held that the proper course in such a situation would be to remand the case to the original tribunal.

When out of several charges only a few could be proved and the rest were found either irrelevant or non-existent, can a person be held guilty by a quasi-judicial body? The Supreme Court held that the order can be sustained if the exclusion of irrelevant and non-existent grounds could not have affected the ultimate decisions.[43]

It is not possible to discuss all the statutory tribunals functioning in India in various spheres. Hence, as an illustrative measure, the details of the Income Tax Appellate Tribunal may be noted. This tribunal functions under the Income Tax Act, 1961 as a second appellate authority to hear appeals in cases relating to income tax, wealth tax and estate duty. The tribunal functions under the control of the Ministry of Law, to ensure its independence. It consists of as many judicial and accountant members as the Central Government may deem fit to appoint. Any person may be appointed as a judicial member who has held a civil judicial post for at least ten years, or who has been a member of the Central Legal Service for at least three years, or has been an advocate of not less than ten years' standing. Ten years' practice as a Chartered Accountant or service as Assistant Commissioner for at least three years is the prescribed qualification for an accountant member. The members hold office till the age of sixty and enjoy the status of a full-time civil servant. Ordinarily the judicial member is appointed by the Central Government as the President of the tribunal. Members of the tribunal may be empowered to sit singly or in Benches. Ordinarily the Bench consists of one judicial member and one accountant member. A special bench consisting of three or more members may also be constituted by the President. The decisions are given by majority and in case of equal division the case is referred to one or more other members. The proceedings of the tribunal are not open to the public and its decisions are not published. Appeals to the tribunal may be filed by the assessee and the Income Tax Officer acting on the directions of the Commissioner against an order of the Assistant Appellate Commissioner. The tribunal is free to prescribe its own procedure and, therefore, the Income Tax (Appellate Tribunal) Rules, 1963 have been passed to regulate the procedure. The hearing before the tribunal is oral and it exercises the powers of a civil court relating to examination, discovery, inspection, production of documents, compelling attendance of witnesses and

42. AIR 1980 AP 100.
43. *Swaran Singh* v. *State of Punjab*, (1976) 2 SCC 868: AIR 1976 SC 232.

issuing orders for the formation of commissions. The decisions of the tribunal are final on questions of fact.[44] But a reference may be made to the High Court or Supreme Court on questions of law. The decision of the High Court on a reference is appealable before the Supreme Court if the High Court certifies it a fit case for appeal. The Law Commission and the Direct Taxes Administration Committee have reviewed the functioning of the tribunal and made various recommendations regarding appointment of its members, appeal and procedure to improve its functioning.[45] The fact that in 1963-64, the Income Tax Department lost 88% of the appeals brought by it before the tribunal indicates the independent and impartial manner in which the tribunal discharges its functions.[46]

If statutory tribunals are to develop in India as a system for the administration of justice and not as mere administrative expedients, it is necessary that their functioning be properly supervised. With this end in view, in England, a Council on Tribunals was constituted under the Tribunals and Enquiries Act, 1958. The membership of this committee is sixteen. Except five legal members, the rest are lay persons. This constitution introduces the elements of public opinion and flexibility in the functioning of the Council. The Parliamentary Commissioner (Ombudsman) is also an ex officio member. Except the Parliamentary Commissioner, all the members are appointed by the Lord Chancellor and the Secretary of State for Scotland acting jointly. The Council has only advisory jurisdiction. Its main function is to deal with the problems of tribunals and enquiries and for this purpose it is in constant negotiation with the government regarding new proposals for legislation, rules of procedure, organisational problems, quality of members, individual complaints, etc. Therefore, right from the proposal stage to the final establishment of a tribunal, the Council is in the picture to help administrative justice to develop as an organised system. The Council is empowered to receive complaints against the functioning of tribunals and inquiries. After investigation, it can publish its views to create public opinion for reform in the system.

To supervise the working of administrative agencies exercising adjudicatory powers in the USA, the Congress passed a legislation in 1964 for the establishment of an Administrative Conference, which came into existence in 1968. Its present membership is 83. The Conference has three components: Chairman, Council and General Assembly. The Chairman is appointed by

44. *Karam Chand Thapar* v. *CIT*, (1972) 4 SCC 124: AIR 1971 SC 1590.

45. *See* LAW COMMISSION OF INDIA REPORT ON INCOME TAX ACT, 1922 (TWELFTH REPORT) 48 (1958) and the REPORT OF THE DIRECT TAXES ADMINISTRATIVE COMMITTEE, pp. 81-86 (1958-59).

46. SAMPATH-IYENGER SOUVENIR published on the occasion of Silver Jubilee of the Tribunal, p. 103.

the President for a period of five years. The Council consists of ten members appointed by the President for three-year terms. The General Assembly of members is chosen by different federal agencies. A few members of the public are also chosen by the Chairman with the approval of the Council for a term of two years. The Conference is entirely a recommendatory body and its main function is to put forward recommendations to improve the efficiency, adequacy and fairness of the legal procedure of federal administrative agencies exercising adjudicatory and rule-making powers. More recent recommendations of the Conference have dealt with procedural refinement, i.e. recruitment and status of hearing examiners, summary decisions, discovery, sovereign immunity, etc.

In India there is an undeniable need for such an agency which could supervise the functioning of decision-making and rule-making administrative agencies. Such an agency would help in the development of administrative justice as a system.

(2) Domestic tribunals

The term 'domestic tribunal' refers to those administrative agencies which are designed to regulate professional conduct and to enforce discipline among the members by exercising investigatory and adjudicatory powers. Such agencies may be contractual or statutory. Contractual domestic tribunals are those which exercise jurisdiction arising not from any statute but from an agreement between the parties. An agency constituted by a private club to decide disputes between its members is a contractual domestic tribunal. Such a tribunal is not subject to the writ jurisdiction of the court but in certain situations remedy by way of injunction, declaration or damages may be available.

Statutory domestic tribunals are those which derive power and authority from a statute and exercise regulatory and disciplinary jurisdiction over its members. Such agencies have been established under the Advocates Act, 1961; Chartered Accountants Act, 1949; Medical Councils Act, 1945 and Press Council Act, 1965. The list is merely illustrative and not exhaustive. Such tribunals are free to develop their procedure but in every case they are bound to follow the principles of natural justice. The decisions of statutory domestic tribunals are subject to the writ jurisdiction of the Supreme Court and High Courts in the same manner as any other statutory tribunals. However, the scope of judicial review in case of domestic tribunals is highly limited because the essential function of a domestic tribunal is discipline among its members. This seems to be the thrust of the Supreme Court decision in *State of Haryana* v. *Rattan Singh*[47]. In this case, Rattan Singh who was a conductor of the Haryana Road Transport Corporation, was dismissed.

47. (1977) 2 SCC 491: AIR 1977 SC 1512.

On the Palwal route, his bus was taken over by the flying squad. The inspector found eleven passengers without tickets though they had paid the fare. An inquiry was held on the report of the inspector and the services of the conductor were terminated. A suit for declaring that the services were illegally terminated was filed by the conductor. The court granted the declaration and on appeal the High Court sustained the decision on the grounds—

(*i*) that none of the eleven witnesses was examined by the domestic tribunal;

(*ii*) that the inspector did not record the statement of the eleven passengers which was necessary as per the rules.

On appeal the Supreme Court disagreed with the High Court and observed that the simple point involved in the case was, was there evidence or was there no evidence—not in the technical sense governing regular court proceedings but in a fair common-sense way as a man of understanding and worldly wisdom would accept. Viewed from this angle, sufficiency of evidence in proof of findings by a domestic tribunal is beyond scrutiny.

As an illustrative measure the constitution and the functioning of the domestic adjudicatory authority constituted under the Advocates Act, 1961 to regulate and to enforce discipline in the legal profession may be noted. The Advocates Act, 1961 makes provisions for the creation of a Bar Council at the State level and a Bar Council of India at the Centre. The State Bar Council is empowered by Section 35 of the Act to enforce discipline in the legal profession. The task of deciding cases of professional misconduct is entrusted to a Disciplinary Committee. The State Bar Council, either on its own initiative or on an application by any other person, can refer the matter of alleged professional misconduct by a lawyer to the Disciplinary Committee. For the conduct of business before it, the Committee exercises the power of a civil court relating to examination, discovery, inspection, production of documents, compelling attendance of witnesses and issuing commissions. Its proceedings are deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code. The Committee is also deemed to be a civil court within the meaning of Sections 482 and 485 of the Criminal Procedure Code. The Committee has the power to either reprimand or suspend or remove the name of a lawyer from its rolls. The decisions of the Committee are appealable before the Bar Council of India within a period of sixty days from the date of the order. From the orders of the Bar Council of India a further appeal lies to the Supreme Court under Section 38 of the Act.

Besides tribunals, there exists a whole multitude of administrative officers and agencies exercising adjudicatory powers in varied forms. No systematic research has so far been undertaken in India regarding the manner

of functioning of these officers and agencies. Therefore, this still remains a dark and dismal patch in the administrative law in India.[48]

Can enquiry be instituted against person exercising quasi-judicial powers

Recently in *Union of India* v. *K.K. Dhawan*[49] the Supreme Court has answered this question in the affirmative. In this case an Income Tax Officer exercising quasi-judicial powers, while deciding the case, acted with undue haste to give benefit to the assessee. Departmental enquiry was instituted against him. Holding the departmental action valid, the court held that when an officer in exercise of judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person, he is not acting as a judge and hence can be subjected to disciplinary action. Such action can be taken in the following cases:

1. Where the officer has acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty.
2. If there is a prima facie case to show recklessness or misconduct in the discharge of duties.
3. If he has acted in a manner unbecoming of a government servant.
4. If he acted negligently or he omitted the prescribed conditions which are necessary for the exercise of statutory powers.
5. If he has acted in a manner to unduly favour a party.
6. If he has been actuated by corrupt motives, however small the bribe may be.

POINTS FOR DISCUSSION

1. Administrative decision-making is a by-product of an intensive form of government and consequential socialisation of law. Against this backdrop need-parameters of administrative adjudication may be discussed. Is it correct to say that the strategy of administrative adjudication was developed not as a result of public necessity but for governmental convenience and expediency?
2. Today in the Twenty-first Century we appear to be losing ourselves in a labyrinth of administrative adjudication through which even the most expert guide could not be relied on to conduct us. In this background, the formidable problem of a bewil-

48. For detailed study *see* S.N. Jain: ADMINISTRATIVE TRIBUNALS IN INDIA, ILI 1977; Balram K. Gupta: *Administrative Tribunals and Judicial Review: A Comment on Forty-second Amendment* in INDIAN CONSTITUTION—TRENDS AND ISSUES, ILI, 1978, p. 401; Jain and Jain: PRINCIPLES OF ADMINISTRATIVE LAW, Chap. V, pp. 129-171; S.P. Sathe: FORTY-FOURTH CONSTITUTIONAL AMENDMENT, E & PW, Vol. XI, No. 43, October 23, 1976; U. Baxi: *Constitutional Changes: An Analysis of the Swaran Singh Committee Report*, (1976) 2 SCC (Journal) pp. 17-28; I.P. Massey: *Constitution Amended*, Secular Democracy Journal, December 11, 1976, p. 13.

49. (1993) 2 SCC 56. In this case court explained its earlier decision in *Union of India* v. *Desai*, (1993) observing that in that case enquiry officer did not find anything against the officer.

dering variety of administrative procedures may be discussed. Discussion may aim at evolving certain basic principles on which a uniform administrative procedure code may be drafted relevant to the Indian context.

3. In India, the process of establishing administrative adjudicatory agencies has not developed as a system. Therefore, in order to maintain some degree of coherence and surveillance over these agencies, is it necessary to establish a standing agency? After discussing the constitution and the working of the Council on Tribunals in England and the Administrative Conference in the USA, students should be able to develop a working hypothesis for the establishment of some such institution in India also.
4. Administrative justice in India has been through a host of controversies. However, official perspective, departmental bias, plea bargaining and political interference are some of such controversies which are making the administrative adjudicatory process irrelevant. Students may discuss the technique of internal separation through the medium of the Hearing Officer in the USA and Hearing Inspectors in England as a means of finding an adequate answer to these problems. How and to what extent may this strategy be employed in India?
5. Can an enquiry be instituted against an authority exercising adjudicatory powers? In the light of the answer to this question, students may discuss the concept of 'fairness' in the exercise of quasi-judicial functions.

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