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Practice and Procedure of Administrative Adjudication: Rules of Natural Justice

In India there is no statute laying down the minimum procedure which administrative agencies must follow while exercising decision-making powers. There is, therefore, a bewildering variety of administrative procedure. Sometimes the statute under which the administrative agency exercises power lays down the procedure which the administrative agency must follow[1] but at times the administrative agency is left free to devise its own procedure.[2] However, courts have always insisted that the administrative agencies must follow a minimum of fair procedure. This minimum fair procedure refers to the principles of natural justice.

Principles of Natural Justice

Rules of Natural Justice have developed with the growth of civilization and the content thereof is often considered as a proper measure of the level of civilization and Rule of Law prevailing in the community.[3] In order to protect himself against the excesses of organized power man has always appealed to someone beyond his own creation. Such someone could only be God and His laws, divine law or natural law, to which all temporal laws and actions must conform. This is the origin of the concept of natural justice. However, natural justice is not justice of the nature where the lion devours the lamb and the tiger feeds upon the antelope. Natural justice is of the 'higher law of nature' or 'natural law' where the lion and lamb lie down together and the tiger frisks with the antelope.[4] Thus natural justice implies fairness, reasonableness, equity and equality. Natural justice is a concept of common law and it is the common-law world counterpart of the American 'procedural due process'. Natural justice represents higher procedural principles developed by judges which every administrative agency must follow in taking any decision adversely affecting the rights of a private individual.

Natural Justice is another name for common-sense justice. Rules of natural justice are not codified canons. They are principles ingrained in the conscience of man. Justice is based substantially on natural ideals and values

1. S. 5(A), Land Acquisition Act, 1894.
2. S. 33, Indian Medical Council Act, 1956.
3. *K.I. Shephard* v. *Union of India*, (1987) 4 SCC 431, 448 *per* R.N. Misra, J.
4. *Union of India* v. *Tulsiram Patel*, (1985) 3 SCC 398, 464. *See* also *Ravi S. Naik* v. *Union of India*, 1994 Supp (2) SCC 641; *Maharashtra State Financial Corpn.* v. *Suvarna Board Mills*, (1994) 5 SCC 566.

which are universal. Natural justice is not circumscribed by linguistic technicalities and grammatical niceties or logical prevarication. It supplies the omission of a formulated law. It is the substance of justice which has to determine its form. What particular form of natural justice should be implied and what its extent should be in a given case must depend to a great extent on the facts and circumstances of that case and the framework of the statute under which action is taken.[5] The expressions 'natural justice' and 'legal justice' do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this purpose, natural justice is called in aid of legal justice.[6]

During the period of Reformation the forces of secularism repudiating the formulae, characteristic of medieval thought with universal application, now concentrated on individual phenomenon and indulged in a more specialised type of enquiry into specific problems. Side by side with the particularisation, need was equally felt for evolving a new and secularised type of universalism known as the 'Enlightenment'. Man in relation to his environment (nature) had certain basic problems which differed in degree and dimension. A systematic pattern of ideas and values had to be evolved out of the doctrine of natural law for universal application and acceptance. This juristic humanitarianism with its universal approach led to the development of the principles of natural justice. Thus dogmatic approach to problems of the Dark Ages gave way to a more particularised approach to problems during Reformation and to a more specialised enquiry into a specific problem. This led to individualisation of justice. In the course of time systematic patterns developed out of this particularisation led to the development of general principles for universal application which came to be known as principles of natural justice. Earliest expression of 'natural justice' could be found in philosophical expressions of Roman jurists (*Jus Naturale*) and signified rules and principles for the conduct of man which were independent of enacted law or customs and could be discovered by the rational intelligence of man and would grow out of and conform to his nature—which meant the whole mental, moral and physical constitution of man.[7] The basis of the principles of natural justice is rule of law. The observance of these principles is demanded by our sense of justice to which the total system of governance must conform.

Natural justice meant many things to many writers, lawyers and systems of law. It is used interchangeably with Divine Law, *jus gentium* and the common law of the nations. It is a concept of changing content. However,

5. See *Canara Bank* v. *Debasis*, (2003) 4 SCC 557.

6. *Id.* p. 570.

7. Black's Law Dictionary, cited in *Union of India* v. *Tulsiram Patel*, (1985) 3 SCC 398, 463-465.

this does not mean that at a given time no fixed principles of natural justice can be identified. The principles of natural justice through various decisions of courts can be easily ascertained, though their application in a given situation may depend on multifarious factors. For fairness itself, it is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop or a bee in one's bonnet.[8] Often the concept of natural justice is criticised as being an unruly horse. Replying to the criticism Lord Denning said, "with a good man in the saddle, the unruly horse can be kept under control. It can jump over obstacles. It can leap fences put up by fiction and come down on the other side of justice".[9] Natural justice contents yield to change with exigencies of different situations and, therefore, do not apply in the same manner to situations which are not alike. They are neither cast in a rigid mould nor can they be put in a legal straitjacket. They are not immutable and can be adapted, modified, and excluded by statute, rules or the Constitution; except where such exclusion is not charged with the vice of unreasonableness and consequential voidness.[10]

Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes it, applies when people are adversely affected by acts of any administrative authority. It is the bane of a healthy Government, recognised from earliest times and not a mystic testament of judge-made law. Indeed, from the legendary days of Adam and of Kautilya's ARTHASHASTRA, the rule of law has had this stamp of natural justice which makes it social justice.

The principles of natural justice have enriched law and Constitutions the world over. Though the Indian Constitution does not use the expression natural justice, the concept of natural justice divested of all its metaphysical and theological trappings pervades the whole scheme of the Constitution. The concept of social and economic justice, in the Preamble of the Constitution, conceptually speaking, is the concept of fairness in social and economic activities of society which is the basis of the principles of natural justice. Article 311 contains all the principles of natural justice without using the expression as such. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21 of the Constitution. Every activity of a public authority or those under public duty or obligation must be informed by reason

8. Justice Krishna Iyer in *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405, 434: AIR 1978 SC 851.

9. *Enderby Town Football Club* v. *Football Association*, (1971) Ch D 591, 606.

10. *Satyavir Singh* v. *UOI*, (1985) 4 SCC 252: AIR 1986 SC 555. *See* also *Ravi S. Naik* v. *Union of India*, 1994 Supp (2) SCC 641; *Jamaat-e-Islami Hind* v. *UOI*, (1995) 1 SCC 428; *Shiv Sagar Tiwari* v. *UOI*, (1997) 1 SCC 444.

and guided by public interest.[11] Exercise of jurisdiction by courts in India, in this behalf, is not something extra-constitutional. Now the principles of natural justice are firmly grounded in Articles 14 and 21 of the Constitution. With the introduction of the concept of substantive and procedural due process in Article 21 of the Constitution all that fairness which is included in the principles of natural justice can be read into Article 21 when a person is deprived of his life and personal liberty. In other areas it is Article 14 which now incorporates the principles of natural justice. Article 14 now applies not only to discriminatory class legislation but also to arbitrary or discriminatory State action. Because violation of natural justice results in arbitrariness, therefore, violation of natural justice is violation of the Equality Clause of Article 14. This all suggests that now the principles of natural justice are grounded in the Constitution.[12] Therefore, the principle of natural justice cannot be wholly disregarded by law because this would violate the fundamental rights guaranteed by Articles 14 and 21 of the Constitution. It was for this reason that the Supreme Court barely saved Section 314 of the Bombay Municipal Corporation Act, 1888 which empowered the Commissioner to get illegal constructions and structures removed or demolished without notice by holding that Section 314 does not contain a command, it only gives discretion to the Commissioner which must be reasonably exercised.[13] In *State of U.P.* v. *Vijay Kumar Tripathi*[14] the Supreme Court further held that the principles of natural justice must be read into the provision of a law. Such a course is necessary where the rule excludes, either expressly or by necessary implication, the application of the principles of natural justice. In the same manner in *Saij Panchayat* v. *State of Gujarat*[15], where the government had transfered panchayat area as notified area, the Court held that though the law did not provide for hearing before transfer of land yet denial of such opportunity is not in consonance with the scheme of law governing our society. The validity of the law that excludes the principles of natural justice becomes suspect. The principles of natural justice are not violated where the opportunity of being heard was afforded but not utilised.[16]

In *Hindustan Petroleum Corpn.* v. *H.L. Trehan*[17] the Supreme Court made it absolutely explicit that even when the authority has statutory power to take action without hearing, it would be arbitrary to take action without hearing and thus violative of Article 14 of the Constitution. In the same

11. *LIC* v. *Consumer Education and Research Centre*, (1995) 5 SCC 482, 500.
12. *Satyavir Singh* v. *UOI*, (1985) 4 SCC 252: AIR 1986 SC 555. *See* also *State of Maharashtra* v. *K.S. Durgule*, (1985) 1 SCC 234: AIR 1985 SC 119.
13. *Olga Tellis* v. *Bombay Municipal Corpn.*, (1985) 3 SCC 545.
14. 1995 Supp (1) SCC 552.
15. (1999) 2 SCC 372. *See* also *Piara Singh* v. *State of Punjab*, (2000) 5 SCC 765.
16. *Nagar Palika, Nataur* v. *U.P. Public Service Tribunal*, (1998) 2 SCC 400.
17. (1989) 1 SCC 764.

manner in *D.K. Yadav* v. *J.M.A. Industries Ltd.*[18] the Supreme Court further held that even where statutory standing orders empowered the management to terminate the services of an employee who overstayed the leave period, without hearing the termination of services would be violative of Article 21 of the Constitution as such a procedure established by law which deprives a person of his livelihood cannot be said to be just, fair and reasonable under Article 21 of the Constitution.

Moving with the same strides, the Apex Court, in *State Bank of India* v. *P.K. Narayanan Kutty*[19] following its earlier decision,[20] held that the principles of natural justice have to be read into the relevant service rule [Rule 50(3)(*ii*), State Bank of India (Supervisory Staff) Service Rules]. In this case the enquiry officer had found certain charges against an officer of the Bank as partly proved. The disciplinary authority holding that charges proved, were in fact fully proved, passed the orders of dismissal which was challenged. It was contended that Rule 50(3)(*ii*) of the State Bank of India (Supervisory Staff) Service Rules does not provide for any notice and hearing, hence action cannot be challenged on the ground of violation of the principles of natural justice. The Apex Court held that the principles of natural justice must be read into the service rules and the officer will have to be given opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The Court further clarified that for the application of the rules of natural justice it is not necessary that some prejudice must be caused.

For some three or four hundred years Anglo-American courts have actively applied two principles of natural justice. However, this reduction of the concept of natural justice to only two principles should not be allowed to obscure the fact that natural justice goes to "the very kernel of the problem of administrative justice".[21] These two principles are:

1. *Nemo in propria causa judex, esse debet.*—No one should be made a judge in his own cause, or the rule against bias.
2. *Audi alteram partem.*—Hear the other party, or the rule of fair hearing, or the rule that no one should be condemned unheard.

These principles will now be discussed in detail because they provide the foundation on which the whole superstructure of judicial control of administrative action is based.

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18. (1993) 3 SCC 259.
19. (2003) 2 SCC 449.
20. *Punjab National Bank* v. *Kunj Behari Mishra*, (1998) 7 SCC 84.
21. H.W.R. Wade: ADMINISTRATIVE LAW, (1967), p. 154.

A. RULE AGAINST BIAS

'Bias' means an operative prejudice, whether conscious or unconscious, in relation to a party or issue. Such operative prejudice may be the result of a preconceived opinion or a predisposition or a predetermination to decide a case in a particular manner, so much so that it does not leave the mind open. In other words 'Bias' may be generally defined as partiality or preference which is not founded on reason and is actuated by self-interest—whether pecuniary or personal.[22] Therefore, the rule against bias strikes against those factors which may improperly influence a judge in arriving at a decision in any particular case. The requirement of this principle is that the judge must be impartial and must decide the case objectively on the basis of the evidence on record. The dictionary meaning of the word 'bias' also suggests 'anything which tends or may be regarded as tending to cause such a person to decide a case otherwise on evidence must be held to be biased'. In other words a predisposition to decide for or against one party without regard to the merit of the case is 'bias'. Therefore, if a person, for whatever reason, cannot take an objective decision on the basis of evidence on record he shall be said to be biased. A person cannot take an objective decision in a case in which he has an interest, for, as human psychology tells us, very rarely can people take decisions against their own interests. Therefore the maxim that a person cannot be made a judge in his own cause. This rule of disqualification is applied not only to avoid the possibility of a partial decision but also to ensure public confidence in the impartiality of the administrative adjudicatory process because not only must "no man be a judge in his own cause" but also "justice should not only be done but should manifestly and undoubtedly be seen to be done".[23] The minimal requirement of natural justice is that the authority must be composed of impartial persons acting fairly, without prejudice and bias. In this manner impartiality, objectivity and public confidence provide the foundation on which the superstructure of the rule against bias is built. A decision which is a result of bias is a nullity and the trial is "Coram non-judice".[24] Inference of bias, therefore, can be drawn only on the basis of factual matrix and not merely on the basis of insinuations, conjectures and surmises.[25]

The principle *nemo judex in causa sua* will not apply where the authority has no personal lis with the person concerned. Therefore, where cases of malpractice and pilferage by consumers of electricity were decided by the Electricity Board itself, the Supreme Court held that it is not a violation of

22. *G.N. Nayak* v. *Goa University*, (2002) 2 SCC 290.
23. *Per* Lord Hewart, C.J., in *R.* v. *Sussex Justices ex p. McCarthy*, (1924) 1 KB 256, 259.
24. *Ranjit Thakur* v. *Union of India*, (1987) 4 SCC 611.
25. *M. Sankaranarayanan* v. *State of Karnataka*, (1993) 1 SCC 54.

the rule against bias. Such cases are similar to income tax and sales tax cases.[26]

In the same manner every kind of preference is not sufficient to vitiate an administrative action. If a preference is rational and unaccompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate a decision. Therefore, if a senior officer expresses appreciation of the work of a junior in the confidential report, it would not amount to bias nor would it preclude the officer from being part of the Departmental Promotion Committee to consider such junior officer along with others for promotion.[27]

Bias manifests itself variously and may affect a decision in a variety of ways.

(1) Personal bias

Personal bias arises from a certain relationship equation between the deciding authority and the parties which incline him unfavourably or otherwise on the side of one of the parties before him. Such equation may develop out of varied forms of personal or professional hostility or friendship. However, no exhaustive list is possible.[28]

Mineral Development Corporation Ltd. v. *State of Bihar*[29] is a typical case of personal bias. In this case the petitioners were granted mining licence for 99 years in 1947. But in 1953, the Secretary of the Revenue Board sent a notice to the petitioners to show cause within 15 days why the licence should not be cancelled for violations of Sections 10, 12 and 14 of the Mining Act. The petitioners submitted a written reply denying the allegations. Two years later, the Government issued a notification cancelling the licence. The action of the government was challenged on the ground of personal bias. The facts relevant to personal bias before the court were:

(1) that Raja Kamakshya Narain Singh, the owner of the Mineral Development Corporation Ltd., had opposed the minister in the General Election of 1952;

(2) that the minister had filed a criminal case under Section 500, IPC against the petitioner which was transferred by the High Court of the State of Bihar to Delhi on the ground of political rivalry between the parties.

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26. *Hyderabad Vanaspathi Ltd.* v. *A.P. State Electricity Board*, (1998) 4 SCC 470.

27. *G.N. Nayak* v. *Goa University*, (2002) 2 SCC 712.

28. *Meenglas Tea Estate* v. *Workmen*, AIR 1963 SC 1719. The Supreme Court held that the Manager cannot conduct an enquiry against a worker arising from the allegation that he had beaten the Manager. In *D.K. Khanna* v. *Union of India*, AIR 1973 HP 30, the High Court quashed the selection of the candidate where his son-in-law was the member of the Selection Committee.

29. AIR 1960 SC 468.

The court quashed the order of the government, among other grounds, on the ground of personal bias.[30]

In *APSRTC* v. *Satyanarayana Transports (P) Ltd.*[31], also, the petitioner successfully challenged the action of the State Government nationalizing road transport on the ground of personal bias. In this case the minister who heard objections of private bus owners had asked the petitioner to persuade the members of the Congress Party to vote for him in the elections. The petitioner, despite his efforts, did not succeed as a result of which the minister lost the election.

Similarly in *S.P. Kapoor* v. *State of H.P.*[32], the Supreme Court quashed the selection list prepared by the Departmental Promotion Committee which had considered the confidential reports of candidates prepared by an officer who himself was a candidate for promotion. Again in *Baidyanath Mohapatra* v. *State of Orissa*[33] the Supreme Court quashed the order of the Tribunal confirming premature retirement on the ground that the Chairman of the Tribunal was also a member of the review committee which had recommended premature retirement.

Real Likelihood of Bias/Reasonable Suspicion of Bias

However, in order to challenge administrative action successfully on the ground of personal bias, it is essential to prove that there is a "reasonable suspicion of bias"[34] or a "real likelihood of bias". The "reasonable suspicion" test looks mainly to outward appearance, and the "real likelihood" test focuses on the court's own evaluation of possibilities; but in practice the tests have much in common with one another and in the vast majority of cases they will lead to the same result. In this area of bias the real question is not whether a person was biased. It is difficult to prove the state of mind of a person. Therefore, what the courts see is whether there is reasonable ground for believing that the deciding officer was likely to have been biased. In deciding the question of bias judges have to take into consideration the human possibilities and the ordinary course of human conduct.[35] But there

30. Other typical cases of personal bias are:

(i) *Meenglas Tea Estate* v. *Workmen*, AIR 1963 SC 1719, Manager conducts enquiry against workman who is alleged to have assaulted him.

(ii) *Ramjag Singh* v. *State of Bihar*, AIR 1958 Pat 7, Gram Panchayat sits as appellate court against its own conviction.

(iii) *A.K. Kraipak* v. *Union of India*, (1969) 2 SCC 262: AIR 1970 SC 150. Candidate for selection is himself a member of Selection Board.

31. AIR 1965 SC 1303.

32. (1981) 4 SCC 716.

33. (1989) 4 SCC 664. *See* also *Rattan Lal Sharma* v. *Managing Committee*, (1993) 4 SCC 10. A witness was also a member of enquiry committee.

34. *Metropolitan Properties Ltd.* v. *Lannon*, (1968) 3 All ER 304.

35. *S.N. Jodhawat* v. *University of Jodhpur*, ILR (1981) 31 Raj 137. *See* also *G.N. Nayak* v. *Goa University*, (2002) 2 SCC 712.

must be real likelihood of bias and not mere suspicion of bias before the proceedings can be quashed on the ground that the person conducting the proceedings is disqualified by bias. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension and vague suspicion of whimsical, capricious and unreasonable people.[36] Therefore, in *Jiwan K. Lohia* v. *Durga Dutt Lohia*[37] upholding the decision of the High Court while removing an arbitrator appointed by the court on the ground of bias the Supreme Court observed that with regard to bias the test to be applied is not whether in fact bias has affected the judgment but whether a litigant could reasonably apprehend that a bias attributable might have operated against him in the final decision. The test of bias is whether a resonable man, in possession of relevant information, would have thought that the bias was likely and whether the person concerned "was likely to be disposed to decide the matter only in a particular way".

Therefore, the real test of 'real likelihood of bias' is whether a reasonable man, in possession of relevant information, would have thought that bias was likely and whether the authority concerned was likely to be disposed to decide the matter in a particular way. What is relevant is the reasonableness of the apprehension in that regard in the mind of the party. Hence the proper approach in case of bias for the Court is not to look into his own mind and ask "Am I biased?" but to look into the mind of the party before it.[38] The Court must look at the impression which would be given to the other party. Therefore, the test is not what actually happened but the substantial possibility of that which appeared to have happened. Even if the deciding officer was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias, the deciding officer is disqualified. Therefore, the court would not enquire whether there was bias in fact if reasonable people might think that there was a bias. The reason is plain enough, writes Lord Denning, "Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'."[39] It was on this ground that in *Metropolitan Properties Co. Ltd.* v. *Lannon*[40] the Court held that Lannon was disqualified from sitting as Chairman of a Rent Assessment Committee because his father was a tenant who had a case pending against that company, even though it was acknowledged that there was no actual bias and no want of good faith on the part of Lannon. However, if the bias of a person is inconsequential the administrative action is not vitiated. In

36. *B.B. Rajwanshi* v. *State of U.P.*, (1988) 2 SCC 415.
37. (1992) 1 SCC 56.
38. *Ranjit Thakur* v. *Union of India*, (1987) 4 SCC 611.
39. Lord Denning: THE DISCIPLINE OF LAW, (1982), p. 87.
40. (1969) 1 QB 577.

Ramanand Prasad Singh v. *Union of India*[41] the Supreme Court held that participation in the selection committee as a member where his brother was a candidate but was not selected is inconsequential bias on which the whole select list cannot be quashed. In the same manner in *Jasvinder Singh* v. *State of J&K*[42], the Supreme Court held that in the absence of any specific allegation of bias against the Selection Board or any member thereof, awarding of higher percentage of marks to those who got lower marks in a written examination would not vitiate selection especially when there were only a few negligible instances and there was no conscious effort to bring some candidates within the selection zone. In *Federation of Railway Officers Association* v. *Union of India*[43], the Court further held that allegation of Bias on imaginary basis cannot be sustained. In this case a Study Group had recommended for formation of new railway zones after considering all factors relevant to the efficient functioning of Railway, none of which was irrelevant. The Association had challenged it on the ground that the report was prepared under pressure from Minister to suit his whims.

No uniform cut and dried formula can be laid down to determine real likelihood of bias. Each case is to be determined on the basis of its facts and circumstance. In *Charanjit Singh* v. *Harinder Sharma*[44], the Court held that there is a real likelihood of bias when in a small place there is a relationship between selectees and members of the selection committee. A few cases in this connection may be noted by way of illustration.

(*i*) *Manak Lal* v. *Dr Prem Chand*[45]

In order to decide a complaint for professional misconduct filed by Dr Prem Chand against Manak Lal, an advocate of the Rajasthan High Court, the High Court appointed a tribunal consisting of a senior advocate, once Advocate-General of Rajasthan, as Chairman. The decision of the tribunal was challenged on the ground of personal bias arising from the fact that the Chairman had represented Dr Prem Chand in an earlier case. The Supreme Court refused to quash the action holding that the Chairman had no personal contact with his client and did not remember that he appeared on his behalf, and that, therefore, there seemed to be no 'real likelihood of bias'. However, the high professional standards led the court to quash the action in the final analysis on the ground that justice should not only be done but must appear to have been done.

41. (1996) 4 SCC 64.
42. (2003) 2 SCC 132.
43. (2003) 4 SCC 289.
44. (2002) 9 SCC 732.
45. AIR 1957 SC 425.

(ii) State of U.P. v. *Mohd. Nooh*[46]

In this case a Dy. S.P. was appointed to conduct a departmental enquiry against a police constable. In order to contradict the testimony of a witness, the presiding officer offered himself as witness. The Supreme Court quashed the administrative action on the ground that when the presiding officer himself becomes a witness, there is certainly a 'real likelihood of bias' against the constable.

(iii) A.K. Kraipak v. *Union of India*[47]

In this case, Naquishbund, who was the acting Chief Conservator of Forests, was a member of the Selection Board and was also a candidate for selection to the all-India cadre of the Forest Service. Though he did not take part in the deliberations of the Board when his name was considered and approved, the Supreme Court held that there was a real likelihood of bias, for the mere presence of the candidate on the selection board may adversely influence the judgment of the other member.

(iv) J. Mohapatra and Co. v. *State of Orissa*[48]

In this case, the State of Orissa had constituted an Assessment Committee in order to recommend and select books of various authors and publishers for various school subjects. Some of the persons whose books were in the selection list were members of the Assessment Committee. The meeting of the Committee was held. In this meeting when the books were being assessed an individual member would withdraw when his book was taken up for consideration. However, that member participated in deliberations when books of other members were considered. The result was that the books of members of the Assessment Committee were accorded approval. The action of the Government was challenged on the ground of bias. Quashing the action, the Supreme Court held that when some members whose books were in the list for selection were members of the Assessment Committee, there is every likelihood of bias. Actual bias is not material, but the possibility of such bias in all such cases. Therefore, the court concluded that withdrawal of persons is not sufficient because the element of quid pro quo with other members cannot be eliminated. It may be pointed out that the doctrine of necessity does not apply in this case.

(v) Ganga Bai Charities v. *CIT*[49]

In this case a lawyer while acting as special counsel for the Income Tax Department had given his opinion that the assessee trust was not entitled to tax exemption. Later on he was elevated as a judge of the High Court and

46. AIR 1958 SC 86.
47. (1969) 2 SCC 262: AIR 1970 SC 150
48. (1984) 4 SCC 103: AIR 1984 SC 1572
49. (1992) 3 SCC 690.

seven years later heard and decided the same point, in a reference, against the trust. None of the parties brought this aspect before the judge during hearing. On appeal the Supreme Court rightly held that there was no real likelihood of bias as opinion had been given seven years ago and the judge may not have remembered the routine opinion given as a busy lawyer after a long lapse of time. However in *Fakharudin* v. *Principal Custodian*[50] the Supreme Court held that when a judge who was formerly the lawyer of the client whose case he decides even after objection there is a real liklihood of bias. In *R. Balakrishna Pillai* v. *State of Kerala*[51], moving away from its earlier perception, the Supreme Court held that where one of the judges was the opposing advocate in an Enquiry Commission proceeding against the appellant, it cannot be presumed that the judge is biased. The Court observed that though the state of mind of the person who entertains an apprehension of bias is relevant but that is not all. Apprehension must appear to the Court as genuine, reasonable and justifiable.

Plea of bias can be raised against a judge also and in this connection reference may be made to *Sheonandan Paswan* v. *State of Bihar*[52]. In this case the Supreme Court held that withdrawal of criminal cases against the former Chief Minister of Bihar, Jagannath Misra, was valid. After the judgment was delivered Justice Baharul Islam who was one of the judges who decided the case resigned only 46 days before his retirement to accept the Congress Party nomination for election and become a minister. In a review petition it was alleged that Justice Islam was biased when he held the withdrawal of criminal cases against Misra, who also belonged to the Congress Party, as valid. Though the petition was dismissed for technical reasons yet fact remains that judicial bias is a justiciable issue.

However, it may be noted that if a party willingly and with full knowledge of the facts submits to the jurisdiction of an administrative body then it cannot, on being unsuccessful, raise the plea of bias.[53] An objection on the ground of bias must be taken immediately. Where the Committee considered the inter se seniority of two batches of recruits—one of them contending that the wife of the head of the committee being also one of the recruits, seniority should not have been determined by the committee. The Supreme Court rejected the plea on the ground that such objection should have been taken at the time of constitution of the committee itself.[54]

50. (1995) 4 SCC 538.
51. (2000) 7 SCC 129.
52. (1983) 1 SCC 438: AIR 1983 SC 194.
53. *G. Sarana (Dr)* v. *University of Lucknow*, (1976) 3 SCC 585: AIR 1976 SC 2428.
54. *U.D. Lama* v. *State of Sikkim*, (1997) 1 SCC 111.

(*vi*) *Tata Cellular* v. *Union of India*[55]

In this case the tender for operating the Cellular Mobile Telephone Service in four metropolitan cities filed by the son of one of the members of the Tender Evaluation Committee had been accepted. This was challenged on the basis of personal bias. Applying the principle of necessity, as the involvement of the Director-General of the Telecommunications and Telecom Authority was necessary in view of Section 3(6) of the Telegraph Act, 1885, the Court held that the involvement of his father as a member of the Tender Evaluation Committee did not vitiate the selection on the ground of bias. It may be noted in this case that the Tender Evaluation Committee was only a recommendatory body and selection was based on merit through the normal procedure. Therefore, it is necessary to ascertain what role that person played in the decision-making against whom bias is alleged.

(*vii*) *G.N. Nayak* v. *Goa University*[56]

In this case a senior officer expressed appreciation of the work of a junior officer in his confidential report. He was also a member of the Departmental Promotion Committee to consider such junior officer along with others for promotion. The committee recommended this junior officer for promotion which was challenged on the ground of personal bias actuated by an element of personal interest. The Apex Court held that unless preference is unreasonable and is based on self-interest, it will not vitiate an administrative decision.

(*viii*) *Padma* v. *Hiralal Motilal Desarda*[57]

S was a Director in the Special Planning Authority, viz., CIDCO. The Authority allotted plots to three associations comprising family members or relatives of *S*. The Apex Court quashed allotment on the ground of bias holding that in such circumstances *S* ought to have, at least, very specifically informed CIDCO of his relationship with the associations and CIDCO while dealing with them should be consciously aware of that fact.

(2) Pecuniary bias

Judicial approach is unanimous and decisive on the point that any financial interest, howsoever small it may be, would vitiate administrative action. The disqualification will not be avoided by non-participation of the biased member in the proceedings if he was present when the decision was reached.[58]

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55. (1994) 6 SCC 651.
56. (2002) 2 SCC 721.
57. (2002) 7 SCC 564.
58. *R.* v. *Hendon Rural District Council ex p. Chorley*, (1933) 2 KB 696.

In *R.* v. *Hendon Rural District Council ex p. Chorley*[59], the court in England quashed the decision of the Planning Commission where one of the members was an estate agent who was acting for the applicant to whom permission was granted.

In *Jeejeebhoy* v. *Asstt. Collector, Thana*[60] the Chief Justice reconstituted the Bench when it was found that one of the members of the Bench was a member of the cooperative society for which the land had been acquired. The Madras High Court also quashed the decision of the Collector who in his capacity as the Chairman of the Regional Transport Authority had granted a permit in favour of a cooperative society of which he was also the Chairman.[61] Similarly, the Andhra Pradesh High Court also quashed the order of the Regional Transport Authority where one of its members had issued a permit in his own favour.[62] The Supreme Court also in *J. Mohapatra & Co.* v. *State of Orissa*[63] quashed the decision of the Textbooks' Selection Committee because some of its members were also authors of books which were considered for selection.

However, the rule against bias will not be applied where the judge, though having a financial interest, has no direct financial interest in the outcome of the case. Therefore, the Court of Appeal in *R.* v. *Mulvihill*[64] did not set aside the conviction of the accused on a charge of robbery in a bank on the ground that the trial judge had shares in that bank. In such cases unless there is a real likelihood of bias administrative action will not be quashed.

(3) Subject matter bias

Those cases fall within this category where the deciding officer is directly, or otherwise, involved in the subject-matter of the case. Here again mere involvement would not vitiate the administrative action unless there is a real likelihood of bias.

In *R.* v. *Deal Justices ex p. Curling*[65], the magistrate was not declared disqualified to try a case of cruelty to an animal on the ground that he was a member of the Royal Society for the Prevention of Cruelty to Animals as this did not prove a real likelihood of bias.

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59. (1933) 2 KB 696.
60. AIR 1965 SC 1096.
61. *Vishakapatnam Coop. Motor Transport Ltd.* v. *G. Bangaru Raju*, AIR 1953 Mad 709.
62. AIR 1957 AP 739.
63. (1984) 4 SCC 103.
64. (1990) 1 All ER 436. *See also* Thakker, C.K.: ADMINISTRATIVE LAW, (1992), Eastern Book Company, pp. 174-75.
65. (1881) 45 LT 439.

Similarly in *Murlidhar* v. *Kadam Singh*[66], the court refused to quash the decision of the Election Tribunal on the ground that the wife of the Chairman was a member of the Congress Party whose candidate the petitioner defeated. In the same manner in *Sub-Committee of Judicial Accountability* v. *Union of India*[67] the court did not allow the challenge of bias against the Speaker for his actions under the Judges Enquiry Act, 1968 on the basis that he was affiliated to a particular political party. The court also sustained its decision on the ground of 'necessity' as no other person could take a decision under the Act.

However, in *Gullapalli Nageswara Rao* v. *APSRTC*[68], the Supreme Court quashed the decision of the Andhara Pradesh Government, nationalizing road transport on the ground that the Secretary of the Transport Department who was given a hearing was interested in the subject-matter. It may be mentioned that in the USA and England predisposition in favour of a policy in the public interest is not considered as legal bias vitiating administrative action.

(4) Departmental bias

The problem of departmental bias is something which is inherent in the administrative process, and if it is not effectively checked, it may negate the very concept of fairness in the administrative proceeding.

The question of departmental bias was considered by the Supreme Court in *Gullapalli Nageswara Rao* v. *APSRTC*[69]. In this case, the petitioner challenged the order of the government nationalizing road transport. One of the grounds for challenge was that the Secretary of the Transport Department who gave the hearing was biased, being the person who initiated the scheme and also being the head of the department whose responsibility it was to execute it. The court quashed the order on the ground that, under the circumstances, the Secretary was biased, and hence no fair hearing could be expected.

Thereafter, the Act was amended and the function of hearing the objection was given over to the minister concerned. The decision of the government was again challenged by G. Nageswara Rao[70] on the ground of departmental bias because the minister was the head of the department concerned which initiated the scheme and was also ultimately responsible for its execution. However, on this occasion the Supreme Court rejected the

66. AIR 1954 MP 111.
67. (1991) 4 SCC 699.
68. AIR 1959 SC 308.
69. *Ibid.*
70. *Gullapalli Nageswara Rao* v. *State of A.P.*, AIR 1959 SC 1376 [known as *Gullapalli case (II)*]. See also *Prakash Chander Sahu* v. *Managing Director, O.R.T. Co.*, AIR 1980 Ori 122.

challenge on the ground that the minister was not a part of the department in the same manner as the Secretary was. The reasoning of the court is not very convincing perhaps because, as observed earlier, departmental bias is something which is inherent in the administrative process. In the USA and in England the problem of departmental bias has been solved, to some extent, with the institution of hearing officers and inspectors.

The problem of departmental bias also arises in a different context—when the functions of judge and prosecutor are combined in the same department. It is not uncommon to find that the same department which initiates a matter also decides it, therefore, at times, departmental fraternity and loyalty militates against the concept of fair hearing.

This problem came up before the Supreme Court in *Hari* v. *Dy. Commr. of Police*[71]. In this case an externment order was challenged on the ground that since the police department which initiated the proceedings and the department which heard and decided the case were the same, the element of departmental bias vitiated administrative action. The Court rejected the challenge on the ground that so long as the two functions (initiation and decision) were discharged by two separate officers, though they were affiliated to the same department, there was no bias.

The decision of the court may be correct in the ideal perspective but it may not always prove wise in practice. It may be suggested that the technique of internal separation which is being followed in America and England can be profitably used in India if a certain amount of confidence is to be developed in the minds of the people in administrative decision-making.

In *Krishna Bus Service* v. *State of Haryana*[72], the Supreme Court however quashed the notification of the government which had conferred powers of a Deputy Superintendent of Police on the General Manager, Haryana Roadways in matters of inspection of vehicles on the ground of departmental bias. In this case private bus operators had alleged that the General Manager of Haryana Roadways who was a rival in business in the State could not be expected to discharge his duties in a fair and reasonable manner and would be too lenient in inspecting the vehicles belonging to his own department. The reason for quashing the notification according to the Supreme Court was the conflict between the duty and the interest of the department and the consequential erosion of public confidence in administrative justice.

(5) Preconceived notion bias

Bias arising out of preconceived notions is a very delicate problem of administrative law. On the one hand, no judge as a human being is expected to sit as a blank sheet of paper, on the other, preconceived notions would vitiate a fair trial.

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71. AIR 1956 SC 559.
72. (1985) 3 SCC 711. *See* also *Institute of C.A.* v. *Ratna*, (1986) 4 SCC 537.

A classic case bringing this problem to the forefront is *Franklin* v. *Minister of Town and Country Planning*[73] known as *Stevenage case*. In this case the appellant challenged the Stevenage New Town Designation Order, 1946 on the ground that no fair hearing was given because the minister had entertained bias in his determination which was clear from his speech at Stevenage when he said: "I want to carry out a daring exercise in town planning (jeers, catcalls, boos). It is no good your jeering! It is going to be done." Though the court did not accept the challenge on the technical grounds that the minister in confirming the report was not performing any quasi-judicial function, but the problem still remains that the bias arising from strong convictions as to policy may operate as a more serious threat to fair action than any other single factor.

This point came up for consideration before the Supreme Court in *T. Govindaraja Mudaliar* v. *State of T.N.*[74]. The government decided in principle to nationalize road transport and appointed a committee to frame the scheme. The Home Secretary was made a member of this committee. Later on, the scheme of nationalization was finalized, published and objections were heard by the Home Secretary. It was contended that the hearing was vitiated by the rule against bias because the Secretary had already made up his mind on the question of nationalization as he was a member of the committee which took this policy decision. The court rejected the challenge on the ground that the Secretary as a member of the committee did not finally determine any issue as to foreclose his mind. He simply helped the government in framing the scheme. Similarly, in *Kondala Rao* v. *APSRTC*[75] the court did not quash the nationalization of the road transport order of the Minister who had heard the objections of private operators on the ground that the same Minister had presided over a meeting only a few days earlier in which nationalization was favoured. The court rejected the contention on the ground that the decision of the committee was not "final and irrevocable" but merely a policy decision.

The problem of bias arising from preconceived notions may have to be disposed of as an inherent limitation of the administrative process. It is useless to accuse a public officer of bias merely because he is predisposed in favour of some policy in the public interest. Lord Devlin once said, "The judge who is confident that he has no prejudices (or bias) at all is almost certain to be a bad judge. Prejudice cannot be exorcised, but like a weakness of the flesh it can be subdued. But it has first to be detected."

73. 1948 AC 87: (1947) 2 All ER 289 (HL).

74. (1973) 1 SCC 336: AIR 1973 SC 974. *See* also *Kondala Rao* v. *APSRTC*, AIR 1961 SC 82; *K.S. Rao* v. *State of Hyderabad*, AIR 1957 AP 414.

75. AIR 1961 SC 82.

(6) Bias on account of obstinacy

The Apex Court[76] has discovered a new category of bias arising from thoroughly unreasonable obstinacy. Obstinacy implies unreasonable and unwavering persistence and the deciding officer would not take 'no' for an answer. This new category of bias was discovered in a situation where a judge of the Calcutta High Court upheld his own judgment while sitting in appeal against his own judgment. Of course a direct violation of the rule that no judge can sit in appeal against his own judgment is not possible, therefore, this rule can only be violated indirectly. In this case in a fresh writ petition the judge validated his own order in an earlier writ petition which had been overruled by the Division Bench. What applies to judicial process can be applied to administrative process as well.

Doctrine of necessity

Bias would not disqualify an officer from taking an action if no other person is competent to act in his place. This exception is based on the doctrine of necessity. The law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. The doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It can be invoked in cases of bias where there is no authority to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit from it. If the choice is between either to allow a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making. Therefore, the Court held that bias would not vitiate the action of the Speaker in impeachment proceedings[77] and the action of the Chief Election Commissioner in election matters.[78]

In the USA, the disqualification arising out of bias arises from the due process clause of the American Constitution. Therefore, an administrative action can be challenged in the USA on all those counts of bias on which it can be challenged in India and England. Recent trends in the judicial behaviour of the American Supreme Court also indicate that where the administrative authority prejudged the issue, the action will be vitiated.[79]

However, the term 'bias' must be confined to its proper place. If bias arising out of preconceived notions means the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial, and no one

76. *The Tribune*, 18th May, 1998, p. 11.

77. *Sub-Commissioner on Judicial Accountability* v. *UOI*, (1991) 4 SCC 699.

78. *Election Commissioner of India* v. *Dr Subramaniam Swamy*, (1996) 4 SCC 104.

79. *American Cyanamide Co.* v. *Federal Trade Commission*, 363 F 2d 757 (1966).

ever will.[80] Therefore, unless the strength of the preconceived notions is such that it has the capacity of foreclosing the mind of the judge, administrative action would not be vitiated.

The element of bias causes a curious problem in contempt of court cases. In *Vinay Chandra Mishra, In re*[81], the court held that in case of facie curiae contempt (contempt in the face of the court) the rule against bias does not apply and the judge before whom contempt is committed can punish the contemner on the spot. However, in order to bring an element of fairness in contempt cases the Allahabad High Court has made a rule that the judge will place the matter before the Chief Justice who will allot it to any judge for hearing because it is a contempt not of the judge but of the court.

(B) AUDI ALTERAM PARTEM OR THE RULE OF FAIR HEARING

This is the second long arm of natural justice which protects the 'little man' from arbitrary administrative actions whenever his right to person or property is jeopardised. Thus one of the objectives of giving a hearing in application of the principles of natural justice is to see that an illegal action or decision does not take place. Any wrong order may adversely affect a person and it is essentially for this reason that [illegible] opportunity may have to be granted before passing an administrative order.[82] The principle of *audi alteram partem* is the basic concept of the principle of natural justice. The omnipotency inherent in the doctrine is that no one should be condemned unheard. In the field of administrative action, this principle has been applied to ensure fair play and justice to affected persons. However, the doctrine is not the cure to all ills in the process. Its application depends upon the factual matrix to improve administrative efficiency, expediency and to mete out justice. The procedure adopted must be just and fair.[83] The expression *audi alteram partem* simply implies that a person must be given an opportunity to defend himself. This principle is a sine qua non of every civilized society. Corollary deduced from this rule is *qui aliquid statuerit, parte inaudita altera aeuquum licet dixerit, haud aequum fecerit* (he who shall decide anything without the other side having been heard although he may have said what is right will not have done what is right). The same principle was expressed by Lord Hewart when he said, "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seem to be done."[84] As has been frequently observed, the benefit of this rule was given to Adam and Eve even by God before they were punished for disobeying His command. Administrative difficulty in giving notice and hearing to a person cannot provide any justifi-

80. *Linahow, In re*, 138 F 2d 650, 652 (1943) *per* Frank, J.

81. (1995) 2 SCC 584.

82. *BALCO Employees' Union v. Union of India*, (2002) 2 SCC 333.

83. *Sarat Kumar Dash v. Bishwajit Pathak*, 1995 Supp (1) SCC 38.

84. *R. v. Sussex Justices, ex p. McCarthy*, (1924) 1 KB 256, 259.

cation for depriving the person of an opportunity of being heard.[85] Furthermore, observance of the rules of natural justice has no relevance to the fatness of the stake but is essentially related to the demands of a given situation.[86] The whole course of decisions beginning with *Dr Bentley case*[87] in which the Court of King's Bench held that the University of Cambridge could not cancel the degree of a great but rebellious scholar without giving him an opportunity of defending himself, firmly establishes that although there may not be a statutory requirement that both parties shall be heard, yet the justice of the common law will supply the omission of the legislature. In the same manner even if the legislature specifically authorizes an administrative action without hearing, then, except in cases of recognised exceptions, the law would be violative of the principles of fair hearing now also read into Articles 14 and 21 of the Indian Constitution.[88] The court thus held that though the rules permit award of censure entry without notice and hearing yet the principles of natural justice should be read into such rules and no censure entry can be awarded without any notice and hearing.[89] However, refusal to participate in an enquiry without a valid reason cannot be pleaded as violation of natural justice at a later stage.[90]

Administrative agencies in India are not bound by the technical rules of procedure of lawcourts; this accentuates the need to follow the minimum procedure of fair hearing. Courts, from case to case, have in their decisions developed a fine code of administrative procedure, which applies to every administrative decision-making but in a pragmatically flexible manner.

In *Bank of Patiala* v. *S.K. Sharma*[91] the Apex Court rightly observed that where enquiry is not convened by any statutory provision and the only obligation of the administrative authority is to observe the principles of natural justice the court/tribunal should make a distinction between a total violation of the rule of fair hearing and violation of a facet of that rule. In other words a distinction must be made between 'no opportunity' or 'no adequate opportunity'. In case of the former, the order passed would undoubtedly be invalid and the authority may be asked to conduct proceedings afresh according to the rule of fair hearing. But in the latter case, the effect of violation

85. *Bhagwant Singh* v. *Commr. of Police*, (1985) 2 SCC 537: AIR 1985 SC 1285.

86. *Jain Exports (P) Ltd.* v. *Union of India*, (1988) 3 SCC 579.

87. *R.* v. *University of Cambridge*, (1723) 1 Str. 757: 93 ER 698.

88. *Olga Tellis* v. *Bombay Municipal Corpn.*, (1985) 3 SCC 545. *See* also *D.K. Yadav* v. *J.M.A. Industries Ltd.*, (1993) 3 SCC 259.

89. *State of U.P.* v. *Vijay Kumar Tripathi*, 1995 Supp (1) SCC 522. *See* also *Saij Panchayat* v. *State of Gujarat*, (1999) 2 SCC 372; *Piara Singh* v. *State of Punjab*, (2000) 5 SCC 765.

90. *Bank of India* v. *Apuraba Kumar Saha*, (1994) 1 SCC 615.

91. (1996) 3 SCC 364. *See* also *Jamaat-e-Islami Hind* v. *UOI*, (1995) 1 SCC 428, held the requirement of natural justice in a case of this kind (organisation had been declared as illegal organisation) had to be tailored to safeguard public interest which must always weigh over every lesser interest.

of a facet of the rule of fair hearing has to be examined from the standpoint of prejudice, in other words the court/tribunal has to see whether in the totality of circumstances the person has suffered a prejudice. If the answer is in the affirmative the action shall be invalid. The sole purpose of the rule of fair hearing is to avoid failure of justice. It is this purpose which should be a guide in applying the rule of fair hearing to varying situations that may arise. There may be situations where the interest of the State or the public interest may call for curtailing of the rule of fair hearing. In such circumstances, the court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision.

Byles, J. in *Cooper* v. *Wandsworth Board of Works*[92], observed: "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God Himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'Where art thou; Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also."

A civil right adversely affected is the core for the invocation of this rule. But what is a civil consequence? "Bypassing verbal booby traps, civil consequences undoubtedly cover infraction of not merely property of personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence."[93] To this may be added the infraction of some legitimate expectations also, of which it would not be fair to deprive a person.[94] 'Legitimate expectations' though cannot defeat or invalidate a legislation but may vitiate an administrative action. Therefore, when persons enjoy certain benefits or advantages under a policy of a government, even though they may not have a legal right, cannot be deprived of their legitimate expectations by changing the policy without following the principles of fair hearing.[95] However, denial of legitimate expectations can be justified by overriding public interest. Relief in such cases would be limited only to cases where it amounts to a denial of a right or where action is arbitrary, unreasonable and not in the public interest.[96]

(For detailed discussion on the doctrine of Legitimate Expectation *see* Chap. 7).

92. (1861-73) All ER Rep 1554.

93. *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405, 440: AIR 1978 SC 851.

94. *Per* Denning, M.R. in *Schmidt* v. *Secy. of State for Home Affairs*, (1969) 2 Ch 149.

95. *Navjyoti Coop. Group Housing Society* v. *Union of India*, (1992) 4 SCC 477. *See* also *S.C. and W.S. Welfare Assn.* v. *State of Karnataka*, (1991) 2 SCC 604.

96. *Union of India* v. *Hindustan Development Corpn.*, (1993) 3 SCC 499. *See* also *Madras City Wine Merchants' Assn.* v. *State of T.N.*, (1994) 5 SCC 509.

Therefore, no order involving adverse civil consequences can be passed against any person without giving him an opportunity to be heard against the passing of such order and this rule of natural justice applicable to quasi-judicial and administrative proceedings would also *a fortiori* apply to judicial proceedings such as a petition for winding up of a company. No system of law designed to promote justice through fair play in action can permit the court to make a winding-up order which has the effect of bringing about termination of services of workers without giving them an opportunity of being heard against the making of such order. It would be violative of the basic principles of fair procedure and in the absence of any express provisions in the Companies Act, 1956 forbidding workers from appearing at the hearing of the winding-up petition and participating in it, the workers must be held entitled to appear and be heard in the winding-up petition.[1] In the same manner in *Jt. Council of Bus Syndicate* v. *Union of India*[2] the Supreme Court held that before increasing the insurance tariff on operators of buses, taxis and goods vehicles parties affected by this escalation should be given an opportunity of hearing, whether required by the statute or not.[3] In *Piara Singh* v. *State of Punjab*[4], the Supreme Court held that before setting aside auction sale on ground of defective proclamation, the authority ought to give notice and hearing to the highest bidder as his right would be adversely affected. This extension of the reach of principles of natural justice would certainly go a long way in providing protection to a vulnerable section of our society.

Before the decision of the Highest Bench in *S.L. Kapoor* v. *Jagmohan*[5], the rule was that the principles of natural justice shall apply only where an administrative action has caused some "prejudice" to the person, meaning thereby that he must have suffered some "civil consequences". Therefore, the person had to show something extra in order to prove "prejudice" or "civil consequence". This approach had stultified the growth of administrative law within an area of highly-practical significance. It is gratifying that in *Jagmohan case* the court took a bold step in holding that a separate showing of prejudice caused is not necessary. The non-observance of natural justice is in itself a prejudice caused. Hence merely because the facts are admitted or are indisputable it does not follow that the principles of natural justice need not be observed.

1. *National Textile Workers' Union* v. *P.R. Ramakrishnan*, (1983) 1 SCC 228, 252: AIR 1983 SC 759 *per* Bhagwati, J.
2. 1992 Supp (2) SCC 125.
3. *Ibid.*
4. (2000) 5 SCC 765.
5. (1980) 4 SCC 379: AIR 1981 SC 136. *See* also *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602.

Duty to act judicially/Duty to act fairly[6]

Law is clear on the point that in cases classified as "quasi-judicial" there is a "duty to act judicially", i.e. to follow the principles of natural justice in full, but in cases which are classified as "administrative" there is only a "duty to act fairly" which simply means that the administrative authority must act justly and fairly and not arbitrarily or capriciously.

Though after the epoch-making decision of the Apex Court in *A.K. Kraipak* v. *Union of India*[7] the dividing line between quasi-judicial and administrative functions of the administration has become thin but is still not completely obliterated. There still exists a vast area of administrative and executive functions of the administration wherein a person does not claim a right but still has legitimate expectations of receiving a benefit or a privilege. It is in this area though there is no duty of the administration to act judicially but certainly there is a duty to act fairly. Lord Pearson stated this position in *Pearlberg* v. *Varty*[8] thus:

> "But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required although, as 'Parliament is not to be presumed to act unfairly', the Courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness."[9]

In India this position was taken by the Apex Court in various cases starting from *Keshav Mills Co. Ltd.* v. *Union of India*[10]. In this case the government, on the basis of a report of an inquiry committee, had taken over the management of the mill-company, which had been closed down without supplying the copy of the report to the management and without affording an opportunity of hearing. The takeover was challenged on the ground of violation of the principles of natural justice. The Apex Court though did not interfere with the order on the ground that no prejudice was caused to the mill-company, yet observed:

> "The only essential point that has to be kept in mind in all cases . . . that the administrative authority concerned should act fairly, impartially and reasonably."[11]

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6. For detailed discussion *see* Thakker, C.K., *From Duty to Act Judicially to Duty to Act Fairly*, (2003) 4 SCC (J) 1
7. (1969) 2 SCC 262
8. (1972) 2 All ER 6 (1972) 1 WLR 534
9. *Id.*, p. 547 (WLR)
10. (1973) 1 SCC 380
11. *Id.*, p. 381

Following the same line of reasoning the Supreme Court in *M.S. Nally Bharat Engg. Co.* v. *State of Bihar*[12] held that 'fairness' is the basic principle of good administration. In this case the government had transferred the case of a workman from one labour court to another without any notice and hearing to the employer. The Court set aside the order on the ground of lack of fairness.

The basic purpose behind developing the 'fairness doctrine' within the area of 'administrative or executive' functions of the administration where principles of natural justice are not attracted is to reconcile "fairness to the individual" with the "flexibility of administrative action". It is an attempt over-judicialization of administrative process. Therefore, where an administrative authority is not exercising quasi-judicial powers and as such there is no duty to act judicially because the principles of natural justice are not attracted in such cases, Court may still insist on a "duty to act fairly". As both the doctrines operate in different areas of administrative action, so there is no chance of any conflict. Thakker, C.J. rightly concludes:

> ". . .'acting fairly' is an additional weapon in the armoury of the Court. It is not intended to be substituted for another much more powerful weapon 'acting judicially'. Where, however, the former 'acting judicially' cannot be wielded, the Court will try to reach injustice by taking resort to the latter less powerful weapon 'acting fairly'."[13]

The right to fair hearing is a code of procedure, and hence covers every stage through which an administrative adjudication passes, starting from notice to final determination. The fluctuating content of the rule of fair hearing produced by the irreconcilable mass of court decisions has tempted some writers to say that the *audi alteram partem* rule has ceased to exist.[14] However, Lord Reid has condemned this view as "tainted by the perennial fallacy that because something cannot be cut and dried or nicely made or measured therefore it does not exist". Impossibility of laying down a universally valid test to cover an infinite variety of circumstances that may exist is not unnatural also. Detailed requirement of *audi alteram partem* range is a continuum from notice to the final determination.

(1) Right to notice

The term 'Notice' originated from the Latin word '*Notitia*' which means 'being known'. In its popular sense it is equivalent to information, intelligence or knowledge. In legal sense it embraces a knowledge of

12. (1990) 2 SCC 48.
13. Thakker, C.K.: *From Duty to Act Judicially to Duty to Act Fairly*, (2003) 4 SCC (J) 1, 11.
14. *See* Benjafield and Whitmore: PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW, (1971), p. 145. *See* also *Ridge* v. *Baldwin*, 1964 AC 40, 64.

circumstances that ought to induce suspicion or belief, as well as direct information of that fact.

Notice embodies rule of fairness and must precede an adverse order. It should be clear and precise so as to give the party adequate information of the case he has to meet. Time given should be adequate for a person so that he could prepare an effective defence. Denial of notice and opportunity to respond make the administrative decision completely vitiated.[15]

Notice is the starting point of any hearing. Unless a person knows the formulation of subjects and issues involved in the case, he cannot defend himself. It is not enough that the notice in a case be given, but it must be adequate also. The adequacy of notice is a relative term and must be decided with reference to each case. But generally a notice in order to be adequate must contain the following:

1. Time, place and nature of hearing.
2. Legal authority under which hearing is to be held.
3. Statement of specific charges which the person has to meet.

The test of adequacy of notice will be whether it gives sufficient information and material so as to enable the person concerned to put up an effective defence. Therefore, the contents of notice, persons who are entitled to notice and the time of giving notice are important matters to ascertain any violation of the principles of natural justice. Sufficient time should also be given to comply with the requirement of a notice. Thus when only 24 hours were given to demolish a structure allegedly in a dilapidated condition, the court held that the notice was not proper.[16] In the same manner where the notice contained only one charge, the person cannot be punished for any other charge for which notice was not given.[17]

In *Joseph Vilangandan* v. *Executive Engineer (PWD)*[18] the court held that the notice given was inadequate. The facts of this case were that when the appellant did not start the contract work within time, he received a letter from the Executive Engineer in which the relevant sentence was: "You are, therefore, requested to show cause within seven days from the receipt of this notice why the work may not be arranged otherwise at your risk and loss through other agencies after debarring you as defaulter." The reply contained a statement that the delay was caused by the conduct of the respondent. Thereafter, the contract was cancelled and the appellant was debarred from all future contracts under the PWD Quashing the order, the Supreme Court held that the words 'debarring you as defaulter' did not give

15. *Canara Bank* v. *Debasis Das*, (2003) 4 SCC 557.
16. *State of J&K* v. *Haji Wali Mohammed*, (1972) 2 SCC 402.
17. *Govindsingh* v. *Subbarao*, AIR 1971 Guj 131: (1970) 11 GLR 897.
18. (1978) 3 SCC 36: AIR 1978 SC 930.

adequate notice to the appellant of the fact that he would be debarred from 'all future contracts' with the PWD. In the same manner in *Appropriate Authority* v. *Vijay Kumar Sharma*[19] the Apex Court held that if material on the basis of which compulsory purchase of property by the Income Tax Department was not disclosed in the show-cause notice and venue of hearing was changed without giving reasonable time to transferor to reach the venue, there is a violation of the principles of natural justice.

The requirement of notice under Section 105-B of the Bombay Municipal Corporation Act, 1888 to an allottee of municipal premises for eviction need not be given to all persons living with the allottee.[20] In the same manner principles of natural justice are not violated if notice is not given to all the members of a society proposing amalgamation of the society.[21] However, when a dealership agreement is modified[22] or a telephone is disconnected notice becomes necessary.[23]

If notice is to be given to a large class of persons who are educated it may be given by publishing it in a newspaper. In such a case individual notice is not the requirement of natural justice. In *Shiv Sagar Tiwari* v. *UOI*[24] the court held that the notice published in newspapers to enable the out-of-turn allottees of government quarters in Delhi to represent before the Supreme Court against proposed cancellation of allotments is sufficient and adequate notice.

However, the requirement of notice will not be insisted upon as a mere technical formality, when the party concerned clearly knows the case against it and is not thereby prejudiced in any manner in putting up an effective defence. Therefore, in *Keshav Mills Co. Ltd.* v. *Union of India*[25], the court did not quash the order of the government taking over the mill for a period of 5 years on the technical ground that the appellants were not issued notice before this action was taken, because, at an earlier stage, a full-scale hearing had already been given and there was nothing more which the appellant wanted to know. In the same manner in *Maharashtra State Financial Corporation* v. *Suvarna Board Mill*[26] the Court held that a notice calling upon the party to repay dues within 15 days failing which the factory would be taken over is sufficient for taking over the factory and no fresh notice is required. In the same manner no fresh notice is required for pulling down

19. (2001) 1 SCC 739.
20. *Ajit* v. *G.M., BEST Undertaking*, AIR 1985 Bom 362.
21. *Daman Singh* v. *State of Punjab*, (1985) 2 SCC 670: AIR 1985 SC 973.
22. *Sub-Divisional Controller* v. *A. Rattan*, AIR 1985 Cal 281.
23. *Union of India* v. *Narayanbhai*, AIR 1985 Guj 31.
24. (1997) 1 SCC 444.
25. (1973) 1 SCC 380: AIR 1973 SC 389.
26. (1994) 5 SCC 566.

an unauthorised structure when notice for removing such structure has already been given.[27] In the same manner in *State of Karnataka* v. *Mangalore University Non-Teaching Employees' Assn.*[28], the Court held that where no prejudice is caused to the person on account of non-affording of opportunity to make representation, violation of the principles of natural justice cannot be insisted upon. In this case House rent and city compensatory allowance were given to the employees at a higher rate. At a later date the government wanted to recover excess payment. The Vice-Chancellor espoused the cause of the employees although unsuccessfully. In these circumstances, the Court was of the view that action taken for the recovery of excess payment without notice and affording opportunity to make representation did not vitiate the action.

Article 21 of the Constitution requires that a detenu must be furnished with the grounds of detention and if the grounds are vague, the detention order may be quashed by the court.[29] In other areas of administrative action a notice has been held to be vague if it does not specify the action proposed to be taken[30] or the property proposed to be acquired,[31] or the grounds on which licence is to be cancelled.[32] Requirement of notice, mandated by statute, can be waived if it is solely for the benefit of the individual concerned.[33]

Consequences of non-issue of notice

The principles emerging from case-law are:[34]

1. Non-issue of notice or mistake in the issue of notice or defective service of notice does not affect the jurisdiction of the authority, if otherwise reasonable opportunity of being heard has been given.
2. Issue of notice as prescribed by law constitutes a part of reasonable opportunity of being heard.
3. If prejudice has been caused by non-issue or invalid service of notice the proceedings would be vitiated. But irregular service of notice would not render the proceedings invalid, more so if the person by his conduct has rendered service impracticable or impossible.

27. *Cantt. Board* v. *Mohan Lal*, (1996) 2 SCC 22.
28. (2002) 3 SCC 302: AIR 2002 SC 1223.
29. *State of Bombay* v. *Atma Ram*, AIR 1951 SC 157.
30. *Abdul Latif* v. *Commr.*, AIR 1978 All 44.
31. *Tulsa Singh* v. *State of Haryana*, AIR 1973 Punj 263.
32. *M.R.K.K. & Co.* v. *State*, AIR 1973 Punj 62.
33. *Collector of Customs* v. *Universal Synthetics*, (2001) 10 SCC 190.
34. *CST* v. *Subash Chandra*, (2003) 3 SCC 454.

4. In case of non-issue of notice, or defective service, which violates the principles of natural justice, an administrative authority may decide the case de novo with proper notice.

(2) Right to know the evidence against him

Every person before an administrative authority exercising adjudicatory powers has the right to know the evidence to be used against him. This principle was firmly established in *Dhakeshwari Cotton Mills* v. *Commr. of Income Tax*[35]. In this case the Appellate Income Tax Tribunal did not disclose the information supplied to it by the department. The Supreme Court held that the assessee was not given a fair hearing. However, the supply of adverse material, unless the law otherwise provides, in original form is not necessary. It is sufficient if the summary of the contents of the material is supplied provided it is not misleading. A person may be allowed to inspect the file and take notes. Whatever mode is used, the fundamental remains the same that nothing should be used against the person which has not been brought to his notice.

(3) Right to present case and evidence

The adjudicatory authority should afford reasonable opportunity to the party to present his case. This can be done through writing or orally at the discretion of the authority, unless the statute under which the authority is functioning directs otherwise.

The requirements of natural justice are met only if opportunity to represent is given in view of the proposed action. The demands of natural justice are not met even if the very person proceeded against has been furnished information on which the action is based, if it is furnished in a casual way or for some other purposes. This does not mean that the opportunity need be a "double opportunity", that is, one opportunity on the factual allegations and another on the proposed penalty. But both may be rolled into one.[36]

Courts are unanimous on the point that oral hearing is not an integral part of fair hearing unless the circumstances are so exceptional that without oral hearing a person cannot put up an effective defence. Therefore where complex legal and technical questions are involved or where the stakes are very high oral hearing shall become a part of fair hearing.[37] Thus in the absence of a statutory requirement for oral hearing courts will decide the matter taking into consideration the facts and circumstances of every case.[38]

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35. AIR 1955 SC 65.

36. *S.L. Kapoor* v. *Jagmohan*, (1980) 4 SCC 379: AIR 1981 SC 136.

37. *State of U.P.* v. *Maharaja Dharmendra Prasad Singh*, (1989) 2 SCC 505.

38. In *Ram Chander Tripathi* v. *U.P. Public Services Tribunal*, (1994) 5 SCC 180, the court held that deconfirmation of an employee in view of the High Court injunction does not warrant hearing. In *Director of School Education* v. *O. Karuppa Thevan*, 1994 Supp (2) SCC 66, the court held hearing in case of transfer of an employee is not necessary.

In *Union of India* v. *J.P. Mitter*[39] the court refused to quash the order of the President of India in a dispute relating to the age of a High Court judge on the ground that the President did not grant oral hearing even on request. The court was of the view that when the person has been given an opportunity to submit his case in writing, there is no violation of the principles of natural justice if oral hearing is not given. However, in *Southern Printers* v. *Fertilizer and Chemicals Travancore Ltd.*[40], the Supreme Court held that deletion of name from the approved list of contractors warrants hearing.[41] Though the same is the law in England[42] but in practice oral hearing is the rule. In USA the right to oral hearing flows from the Administrative Procedure Act, 1946.

The administrative authority must further provide full opportunity to present evidence—testimonial or documentary. In *Dhakeswari Cotton Mills Ltd.* v. *CIT*[43], the Supreme Court quashed the decision of the administrative authority on the ground that not allowing the assessee to produce material evidence violates the rule of fair hearing. Again in *R.B. Shreeram Durga Prasad* v. *Settlement Commissioner*[44] where the Commissioner only allowed the assessee an opportunity to make submissions on objections of the Commissioner of Income Tax regarding settlement of assessment, the Supreme Court held that mere opportunity to make submission is not enough. Clear opportunity must be given to demonstrate that the reporting authority was not justified in making objections. However, it does not mean that a person can be allowed to unnecessarily prolong and confuse the administrative proceedings by adducing irrelevant evidence. The question of relevancy of evidence is, therefore, a justiciable issue.

The opportunity to present evidence raises another question as to what extent the authority should help the party in presenting his evidence. This point came up for the consideration of the Supreme Court in *N.M.T. Coop. Society* v. *State of Rajasthan*[45]. In this case an enquiry was held under the Motor Vehicles Act for nationalization of road transport. The witnesses whose names were filed by the objectors did not appear even in response to the summons issued by the administrative authority. The authority refused to issue any coercive process. The Supreme Court refused to quash the order

In *State Bank of India* v. *Mahendra Kumar Singhal*, 1994 Supp (2) SCC 463, the court held that in the absence of any rule to the contrary personal hearing in departmental appeal is not necessary.

39. (1971) 1 SCC 396: AIR 1971 SC 1093.

40. 1994 Supp (2) SCC 699.

41. *See* also *Bhagwan Shukla* v. *Union of India*, (1994) 6 SCC 154.

42. *Local Government Board* v. *Alridge*, 1915 AC 120.

43. AIR 1955 SC 65.

44. (1989) 1 SCC 628.

45. AIR 1963 SC 1098.

of nationalization holding that the authority is not bound to use its coercive process when the statements of the material witnesses were already on the file. If the statements of the witnesses are not on file, whether the denial of a coercive process would amount to a violation of the rule of fair hearing still remains to be decided. In *A.K. Roy* v. *Union of India*[46], the Supreme Court held that if the detenu desires to examine any witnesses he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Board can also limit the time within which the detenu must complete his evidence.

(4) The right to rebut adverse evidence

The right to rebut adverse evidence presupposes that the person has been informed about the evidence against him. In *Dhakeswari Cotton Mills Ltd.* v. *CIT*[47], the court quashed the order of the Tax Tribunal where the information supplied by the department against the assessee was not disclosed to him. This does not, however, necessitate the supply of adverse material in original in all cases. It is sufficient if the summary of the contents of the adverse material is made available provided it is not misleading.[48]

It is not enough that the party should know the adverse material on file but it is further necessary that he must have an opportunity to rebut the evidence. Rebuttal can be done either orally or in writing at the discretion of the administrative authority provided the statute does not provide otherwise.

The opportunity to rebut evidence necessarily involves the consideration of two factors: cross-examination and legal representation.

1. *Cross-examination*

Cross-examination is a most powerful weapon to elicit and establish the truth. However, courts do not insist on cross-examination in administrative adjudication unless the circumstances are such that in the absence of it a person cannot put up an effective defence. The right to cross-examination as an ingredient of fair hearing was considered by the Supreme Court in *State of J&K* v. *Bakshi Gulam Mohammed*[49]. In this case an enquiry was instituted against Bakshi Gulam Mohammed, former Chief Minister of Jammu and Kashmir State, under the Jammu and Kashmir Commission of Inquiry Act, 1962. The request of Bakshi Gulam Mohammed to cross-examine witnesses who had filed affidavits against him was denied. The decision of the Commission was challenged before the Supreme Court and

46. (1982) 1 SCC 271: AIR 1982 SC 710.
47. AIR 1955 SC 65.
48. *City Coroner* v. *P.A. to Collector and Addl. Magistrate*, (1976) 1 SCC 124: AIR 1976 SC 143.
49. AIR 1967 SC 122. *See* also *Gurbachan Singh* v. *State of Bombay*, AIR 1952 SC 221.

one of the grounds of challenge was that the denial of the opportunity to cross-examine witnesses violates the rule of fair hearing. The Supreme Court disallowed the challenge on the ground that the evidence of the witnesses was in the form of affidavits and the copies had been made available to the party.

The Supreme Court reiterated this position in *Kanungo & Co.* v. *Collector of Customs*[50]. In this case, the business premises of the appellant were searched and 390 watches were confiscated. The order was challenged on the ground that the appellant was not allowed to cross-examine the persons who gave information to the authorities. The court came to the conclusion that the principles of natural justice do not require that in matters of seizure of goods under the Sea Customs Act, the person should be allowed to cross-examine the informants. In the same manner in *Surjeet Singh Chhabra* v. *UOI*[51], the Court held that in case of confiscation under the Foreign Exchange Regulation Act, 1973 failure to afford an opportunity to cross-examine a Panch witness is not violative of the principles of natural justice. In *State of Kerala* v. *Shaduli Grocery Dealer*[52], the court held that the denial of the dealer's request by the sales tax authorities to cross-examine the third party before making the best-judgment assessment, is a denial of fair-hearing.[53] The same principle was reiterated by the Supreme Court in *Town Area Committee* v. *Jagdish Prasad*[54]. In this case the department submitted the charge-sheet, got an explanation and thereafter straightaway passed the dismissal order. The court quashed the order holding that the rule of fair hearing includes an opportunity to cross-examine the witnesses and to lead evidence. However, in externment proceedings[55] and proceedings before Customs authorities to determine whether goods were smuggled or not the right of cross-examination was held not to be a part of natural justice.[56] On the grounds of practicability also opportunity of cross-examination may be disallowed. Therefore, the Supreme Court rejected the contention of the appellants that they were not allowed to cross-examine girl students on the ground that if it was allowed no girl would come forward to give evidence, and further that it would not be possible for the college authorities to protect girl students outside the college precincts.[57] Thus in the absence of a statutory requirement about legal representation, courts will have to decide the matter taking into

50. (1973) 2 SCC 438: AIR 1972 SC 2136.
51. (1997) 1 SCC 508.
52. (1977) 2 SCC 777: AIR 1977 SC 1627.
53. *See* also *Ram Bharosey* v. *Har Swarup*, (1976) 3 SCC 435: AIR 1976 SC 1739.
54. (1979) 1 SCC 60: AIR 1978 SC 1407.
55. *Gurbachan* v. *State of Bombay*, AIR 1952 SC 221.
56. *Kanungo & Co.* v. *Collector of Customs*, (1973) 2 SCC 438.
57. *Hira Nath Mishra* v. *Principal, Rajendra Medical College*, (1973) 1 SCC 805. In this case male students had entered quite naked in a Girls' Hostel late at night and misbehaved with them.

consideration the facts and circumstances of each case. In the same manner in *State of Maharashtra* v. *Saleem Hassan Khan*[58], the Supreme Court held that in the case of a bad charactered person while passing externment order evidence need not be discussed as it may give rise to a fresh spate of violence against witnesses.

Where the witnesses have orally deposed, the refusal to allow cross-examination would certainly amount to violation of the principles of natural justice.[59] In *S.C. Girotra* v. *United Commercial Bank*[60] the Bank got certain reports prepared on which the charges were based. These reports were certified by the Bank Officers who were examined by the enquiry officer. On the basis of the report an employee was dismissed. The Court held that there was a violation of the principles of natural justice as the employee was not allowed to cross-examine the officers who deposed orally before the enquiry officer. In the area of labour relations and disciplinary proceedings against civil servants also, the right to cross-examination is included in the rule of fair hearing.[61] In USA the right to cross-examination is included in the due process clause and also in the Administrative Procedure Act, 1946. In England, the law is the same as in India and courts are engaged in working out the details of the right to cross-examination.[62]

Regarding the right to the detenu of cross-examination before the advisory board, the Supreme Court did not find it an integral and inseparable part of the principles of natural justice. The court reasoned that firstly the question before the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for his detention and, secondly, the witnesses would be most reluctant to testify and often it may harm public interest to disclose their identity. The court did not agree with the contention that there can be no effective hearing without the right of cross-examination.[63] Thus once again an important component of fairness in a situation of total eclipse of freedom was lost in a great confusion of rhetoric.

2. *Legal Representation*

Normally representation through a lawyer in any administrative proceeding is not considered an indispensable part of the rule of natural justice as oral hearing is not included in the minima of fair hearing.[64] This denial of legal representation is justified on the ground that lawyers tend to complicate matters, prolong the proceedings and destroy the essential informality of the proceedings. It is further justified on the ground that representation through

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58. (1989) 2 SCC 316.
59. *Meenglas Tea Estate* v. *Workmen*, AIR 1963 SC 1719.
60. (1996) 2 LLJ 10.
61. *Central Bank of India* v. *Karunamoy*, AIR 1968 SC 266.
62. *R.* v. *Gaming Board ex p. Benaim*, (1970) 2 QB 417.
63. *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271: AIR 1982 SC 710.
64. *N. Kalindi* v. *Tata Locomotive & Engg. Co.*, AIR 1960 SC 914.

a lawyer of choice would give an edge to the rich over the poor who cannot afford a good lawyer. No research has so far been made to test the truth of these assertions, but the fact remains that unless some kind of legal aid is provided by the agency itself, the denial of legal representation, to use the words of Professor Allen, would be a 'mistaken kindness' to the poor people.

To what extent legal representation would be allowed in administrative proceedings depends on the provisions of the statute. Factory laws do not permit legal representation, Industrial Disputes Acts allow it with the permission of the tribunal and some statutes like the Income Tax Act permit legal representation as a matter of right.

Right to legal representation through a lawyer or agent of choice may be restricted by a standing order also. In *Crescent Dyes and Chemicals Ltd.* v. *Ram Naresh Tripathi*[65], the Supreme Court held that where a standing order restricted the right of representation to any employee of the factory only it would not be considered as a denial of natural justice as to vitiate an administrative enquiry.

However, courts in India have held that in situations where the person is illiterate,[66] or the matter is complicated and technical,[67] or expert evidence is on record[68] or a question of law is involved,[69] or the person is facing a trained prosecutor,[70] some professional assistance must be given to the party to make his right to defend himself meaningful.

It is relevant to note at this stage that the Supreme Court in *M.H. Hoskot* v. *State of Maharashtra*[71], while importing the concept of 'fair procedure' in Article 21 of the Constitution held that the right to personal liberty implies provision by the State of free legal service to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service.

In *Khatri* v. *State of Bihar*[72], the Supreme Court further ruled that the State is constitutionally bound to provide legal aid to the poor or indigent accused not only at the stage of trial but at the time of remand also. Such right cannot be denied on the ground of financial constraints or administrative inability or that the accused did not ask for it. The Supreme Court emphasised

65. (1993) 2 SCC 115.
66. *James Bushi* v. *Collector of Ganjam*, AIR 1959 Ori 152.
67. *Natya Ranjan* v. *State*, AIR 1962 Ori 78.
68. *Harishchandra* v. *Registrar, Coop. Societies*, (1966) 12 FLR 141 (MP).
69. *J.J. Mody* v. *State of Bombay*, AIR 1962 Guj 197; *Krishna Chandra* v. *Union of India*, (1974) 4 SCC 374.
70. *C.L. Subramaniam* v. *Collector of Customs*, (1972) 3 SCC 542: AIR 1972 SC 2178.
71. (1978) 3 SCC 544: AIR 1978 SC 1548.
72. (1981) 1 SCC 627: AIR 1981 SC 928.

that it is the duty of the presiding officer to inform the accused of such right.

In the same manner in *Nandini Satpathy* v. *P.L. Dani*[73], the Court held that the accused must be allowed legal representation during custodial interrogation and the police must wait for a reasonable time for the arrival of a lawyer. However, the Court, which took the right step, did not take a long stride in holding that the State must provide a lawyer if the accused is indigent. The observation of the Court could well be inducted in the administration. In the area of criminal justice the Criminal Procedure Code now provides for legal aid to the accused.

Legal assistance in preventive detention cases poses a curious problem because on the one hand preventive detention laws disallow legal representation and on the other they seek to detain people for unproved crimes. However, it is gratifying to note that in this highly-sensitive area, judicial behaviour has shown some remarkable signs of improvement. In *Nandlal Bajaj* v. *State of Punjab*[74], the court allowed legal representation to the detainee through a lawyer, even when Section 11 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 and Section 8(*e*) of the COFEPOSA, 1974 denied legal representation in express terms, because the State had been represented through a lawyer. The Supreme Court observed that even when the law does not allow legal representation to the detenu, he is entitled to make such a request and the advisory board is bound to consider this request on merit, and the Board is not precluded to allow such assistance when it allows the State to be represented through a lawyer. Maintaining the same tenor, the court in *A.K. Roy* v. *Union of India*[75] while deciding the constitutionality of the National Security Act, 1980, held that if the Act disallows legal representation to a detenu, the State also cannot take the help of a lawyer. In its eagerness to protect the interest of the detenu, the court in *Phillippa Anne Duke* v. *State of Tamil Nadu*[76] and *Devji Vallabhai Tandel* v. *Administrator, Goa, Daman and Diu*[77], conferred upon him the right to appear through his friend who in truth and substance is not a legal practitioner, and is also not a comrade-in-profession of the detenu for which he is detained. Therefore, even in the face of constitutional and statutory denial of legal representation to a detenu, he is entitled to a common law right of representation through a 'friend'.[78]

73. (1978) 2 SCC 424; AIR 1978 SC 1025.
74. (1981) 4 SCC 327; AIR 1981 SC 2041.
75. (1982) 1 SCC 271; AIR 1982 SC 710.
76. (1982) 2 SCC 389; AIR 1982 SC 1178.
77. (1982) 2 SCC 222; AIR 1982 SC 1029.
78. *Id.*, p. 1238 (AIR)

In USA, a person has a right to legal representation which is guaranteed by the combined effect of the 'Due Process' clause of the Constitution and Section 6(*a*) of the Administrative Procedure Act, 1946.

In England, ordinarily, the right to be represented by a lawyer is not included in the principles of fair hearing. But where there is a right to appear in person or a technical matter of law and fact is involved, the denial of legal representation is considered as an antithesis of fair hearing.[79] The Franks Committee has also recommended that the right of legal representation should not be curtailed save in exceptional circumstances.

(5) No evidence should be taken at the back of other party

That ex parte evidence taken in the absence of the other party violates the principle of fair hearing was discussed by the court in *Errington* v. *Minister of Health*[80]. The facts were that in 1933 Jarrow Corporation passed a clearance order for the demolition of certain buildings found unfit for human habitation and submitted the same for the confirmation of the Minister of Health. An enquiry was held and the owners of the building were given a hearing. Thereafter some officials of the ministry again visited the place and collected evidence but the owners were not informed about the visit. The clearance order was confirmed by the Minister after taking into account the facts thus collected. On challenge the clearance order was quashed by the court and one of the grounds for so deciding was that the ex parte statements taken in the absence of the other party, without affording an opportunity to rebut, is against the recognised principles of natural justice.

This decision does not imply that administrative agencies cannot obtain information in the manner they consider best. The main thrust of *Errington case* (supra) is that whatever information is obtained by the administrative authority must be disclosed to the other party and an opportunity to rebut it must be provided.

The same approach was followed by the court in *Ceylon University* v. *Fernando*[81] where the Privy Council upheld the order of the university under circumstances where the evidence of witnesses was taken at the back of the student charged with misconduct but he was informed of their statements.

The Supreme Court of India reiterated this position in *Hira Nath Mishra* v. *Principal, Rajendra Medical College*[82]. In this case thirty-six girl students of a medical college filed a report with the Principal regarding misbehaviour of the boys in the girls' hostel. The Enquiry Committee appointed by the

79. *R.* v. *St. Mary Assessment Committee*, (1891) 1 QB 378; *Pett* v. *Greyhound Racing Assn.*, (1968) 2 WLR 1471.

80. (1935) 1 KB 249.

81. (1960) 1 WLR 223.

82. (1973) 1 SCC 805: AIR 1973 SC 1260.

Principal recorded the statements of the girls, but in the absence of the appellants. The appellants were also identified by the girls through photographs. The Committee found the appellants guiity and consequently an expulsion order was served on them. The order of expulsion was challenged before the Supreme Court and one of the grounds of challenge was that the evidence was taken behind their backs. The court rejected the contention holding that the girls would not have ventured to make the statements in the presence of the appellants except at a [illegible]at risk of retaliation and harassment. In this case, whatever evidence was collected behind the backs of the appellants was brought to their notice and they were provided with an opportunity to rebut the evidence.

Therefore, any administrative agency may inform its mind in any manner it thinks best. It may take official notice of certain things and may make off-the-record consultation, but fairness demands that the party must be apprised of all these matters if these form the basis of the agency's decision. In USA, Section 5(*c*) of the Administrative Procedure Act provides that no officer is to consult any person or party upon any fact in issue except upon notice and opportunity for all parties to participate. Section 7(*d*) further provides that where an agency decision rests on official notice of a material fact not appearing in evidence on the record any party on timely request shall be afforded an opportunity to show to the contrary. A somewhat similar solution has been adopted in England in the case of ministerial inquiries.[83] But there is nothing to prevent an administrator from collecting information before the hearing and he is not compelled to disclose it.[84] Equally there is no compulsion to disclose information which is obtained after the hearing.[85] The rationale behind this formulation is that to make an administrator solely dependent on evidence adduced by trial procedures would destroy the value of the administrative process.

(6) Report of the enquiry to be shown to the other party

In no administrative proceeding it is necessary that everything must be done by the same officer alone. He is permitted to take help from his subordinates. If it is not so, the administration would come to a grinding halt, because today the administration is ubiquitous and impinges freely and deeply on every aspect of an individual's life.

In very many cases, especially in disciplinary matters, it happens that the inquiry is entrusted to someone else and on the report being submitted, action is taken by the competent authority. Under these circumstances a very

83. Statutory Instrument 1962, No. 1424, para 9. *See also* Griffith: *The Council and the Chalkpit*, (1961) 39 Public Administration 369.

84. *Johnson (B) and Co. (Builders) Ltd.* v. *Minister of Health*, (1947) 2 All ER 395.

85. *See* De Smith: JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, (1968), pp. 194-95.

obvious question of megaimportance that arises is 'whether the copy of the report of the inquiry officer be supplied to the charged employee before a final decision is taken by the competent authority?'.

Keeping in view the importance of this question and its wide ramifications Thakker, J., in *Union of India* v. *E. Bashyan*[86] did not venture to pronounce a final judgment on it but rather thought it proper to refer this question to a larger Bench. This was a special leave petition by the Union of India from the judgment and order dated November 12, 1987 of the Central Administrative Tribunal, New Bombay, wherein this question had been answered in the affirmative by holding that the failure to supply the inquiry report to the delinquent before the disciplinary authority takes a final decision would constitute a violation of Article 311(2) of the Constitution and also violation of the principles of natural justice.

This question is important from the constitutional and administrative laws' points of view. One of the cardinal principles of administrative law is that any action which has civil consequences for any person cannot be taken without complying with the principles of natural justice. Therefore, the administrative law question in disciplinary matters has always been 'whether failure to supply the copy of the report of the inquiry to the delinquent employee before the final decision is taken by the competent authority would violate the principles of natural justice?'.

In the same manner the constitutional question in such a situation will be 'whether failure to supply a copy of the report of the inquiry to the delinquent would violate the provisions of Article 311(2) of the Constitution of India?'. Article 311(2) of the Constitution provides that no government employee can be dismissed or removed or reduced in rank without giving him a reasonable opportunity of being heard in respect of charges framed against him. Therefore, it has always been a perplexing question 'whether failure to supply the report of the inquiry officer to the charged government employee before a final decision is taken would amount to failure to provide a "reasonable opportunity" as required under Article 311(2)?'. Another constitutional question that can be asked in such a situation can also be 'whether any final action which is taken by the authority on the basis of the report of the inquiry without first supplying a copy of it to the delinquent would be arbitrary and hence violative of Article 14 of the Constitution which enshrines the great harmonizing and rationalizing principle?'.[87]

86. (1988) 2 SCC 196.

87. *Satyavir Singh* v. *Union of India*, (1985) 4 SCC 252: AIR 1986 SC 555. Supreme Court opined that Art. 14 applies not only to discriminatory class legislation but also to arbitrary or discriminatory State action. Violation of principles of natural justice results in arbitrariness grounded in Art. 14 of the Constitution.

At the very outset it must be made clear that the question of supplying a copy of the report of the inquiry to the delinquent government employee before final action is taken in his case on the basis of the report is not the same thing as a second opportunity against the punishment which has been abolished by the 42nd Amendment of the Constitution.[88] After this Amendment a second show-cause notice as regards the measure of penalty before its imposition is no more necessary. However, the issue of supplying a copy of the inquiry report to the delinquent employee before the authority takes a final decision on the guilt is altogether a different matter and is not covered under the purview of Section 44 of the Constitution (Forty-second Amendment) Act, 1967 which only prohibits a second show-cause notice against the proposed punishment. A 'second show-cause notice' refers to a situation where the disciplinary authority has already taken a decision on the guilt and proposed punishment. However, the issue of supplying a copy of the report of the inquiry officer refers to a situation where the authority has yet to take a decision on the guilt and the consequential punishment on the basis of the report of the inquiry officer. Therefore, in this context the issue of the 'second show-cause notice' is post-decisional and the issue of supplying the report of the inquiry officer is predecisional.

Thakker, J., rightly observed:

> "It needs to be highlighted that serving a copy of the Inquiry Report on the delinquent to enable him to point out anomalies, if any, therein before the axe falls and before finding about guilt is recorded by the Disciplinary Authority is altogether a different matter from serving a second show-cause notice to enable the delinquent to represent in the context of the measure of the penalty to be imposed."[89]

After reaching this basic conclusion that the "second show-cause notice" is different from serving a "copy of the inquiry report" the only question that remains to be answered is 'whether failure to serve a copy of the inquiry report on the delinquent so as to enable him to point out anomalies, if any, therein before the final decision is reached violates the "reasonable opportunity" clause of Article 311(2) in case of government employees and the principles of natural justice for other employees.

It is important to note that until recently there was no precedent or law which made it obligatory, in all cases, for the disciplinary authority to serve a copy of the inquiry report on the delinquent before final action on the basis of the report is reached. However, it was for the first time on November 6, 1987 that a Full Bench of the Central Administrative Tribunal, speaking through K. Madhava Reddy, J., Chairman, held that failure to supply a copy

88. *See* S. 44 of the Constitution (Forty-second Amendment) Act, 1976.
89. *Union of India* v. *E. Bashyan*, (1988) 2 SCC 196, 198.

of the inquiry report to the delinquent before recording a finding against him is obligatory and failure to do so would vitiate the inquiry.[90] Before this decision this question had not been answered squarely by any court in India.

About a quarter of a century ago, in 1964. a similar question had also come before the Supreme Court in *Union of India* v. *H.C. Goel*[91], though in a different context. In this case the Inquiry Officer had found the charged employee not guilty of the charge of making an offer of a bribe to his superior officer. The Union Public Service Commission had also endorsed the conclusions of the Inquiry Officer. Nevertheless the Disciplinary Authority, rejecting the report of the Inquiry Officer, found the delinquent officer guilty and punished him. This action was challenged on the ground that the decision of the Disciplinary Authority was not based on evidence and hence void. The Highest Bench while quashing the administrative action enunciated the following propositions:

1. The inquiry officer holds the inquiry against the delinquent as a delegate of the government.
2. The object of the inquiry by an inquiry officer is to enable the government to hold an investigation into the charges framed against the delinquent, so that the government can, in due course, consider the evidence adduced and decide whether the said charges are proved or not.
3. The findings on the merit recorded by the inquiry officer are intended merely to supply appropriate material for the consideration of the government. Neither the findings nor the recommendations are binding on the Disciplinary Authority as was held in *A.N. D'Silva* v. *Union of India*[92].
4. The inquiry report (along with the evidence recorded by the inquiry officer) constitutes the material on which the government has ultimately to act. That is the only purpose of the inquiry and the report which the inquiry officer makes as a result thereof.[93]

From the above propositions it becomes clear that the inquiry officer as a delegate of the disciplinary authority investigates the matter, collects evidence and makes his recommendations on the basis thereon. Therefore, when the disciplinary authority holds the delinquent guilty, contrary to the material and the recommendation of the inquiry officer in his report, then the Auth-

90. *Premnath K. Sharma* v. *Union of India*, (1988) 6 ATC 904. Decision was given on November 6, 1987.

91. AIR 1964 SC 364.

92. AIR 1962 SC 1130.

93. *See* also *Union of India* v. *E. Bashyan*, (1988) 2 SCC 196. Thakker, J., also enunciated these propositions, p. 198.

ority certainly is acting on 'no evidence' before it and hence its decision holding the delinquent guilty is not legal. The decision of the Highest Bench in this case, therefore, is a pointer to the fact that if the disciplinary authority disagrees with the 'not guilty' report of the inquiry officer and decides to hold the delinquent 'guilty', the report of the inquiry officer must be supplied to the 'delinquent to give him an opportunity to address the mind of the disciplinary authority who alone can find him guilty. Nevertheless, in spite of this pointer, the court did not clearly lay down the principle that the failure to supply a copy of the inquiry report to the delinquent before final action is taken violates the principles of natural justice and the provisions of 'reasonable opportunity' of Article 311(2).

In 1964, the Highest Bench missed yet another opportunity of squarely answering this important question. In *Suresh Koshy* v. *University of Kerala*[94], instead of answering the question the Supreme Court raised another question: Whether the denial to furnish a copy of the report when demanded would amount to violation of the principles of natural justice? In this case the Vice-Chancellor had instituted an inquiry into the charge of use of unfair means by a student and, on the basis of the report, the University expelled him from the University. This action was challenged on the ground that a copy of the report was not supplied. The court held that since a copy of the report was not specifically asked for by the student, there was no breach of the principles of natural justice.

The same question was once again posed to the Supreme Court in *Keshav Mills Co. Ltd.* v. *Union of India*[95]. In this case the appellant company after doing business for 30 years suddenly had to be closed down because of fall in production. As a result, 1200 persons became unemployed. The Government of India appointed a commission to inquire into the affairs of the company under Section 15 of the Industries (Development and Regulation) Act, 1951. On the basis of the report of the inquiry commission, the government passed an order under Section 18-A of the Act, authorising the Gujarat State Textile Corporation to take over the Mill for a period of 5 years. This decision was challenged before the Supreme Court and one of the grounds of challenge was that the report of the inquiry commission was not furnished. The Court held that it was not possible to lay down any general principle on the question as to whether the report of an investigating body or an inspector appointed by an administrative authority should be made available to the person concerned before the authority reaches a decision upon that report. The answer to this question must always depend on the facts and circumstances of each case. It is not at all unlikely that there may be certain cases where, unless the report is given to the party, the party concerned

94. AIR 1969 SC 198.
95. (1973) 1 SCC 380: AIR 1973 SC 389.

cannot make any effective representation about the action taken on the basis of that report. Whether the report should be furnished or not must, therefore, depend on the circumstances of every individual case. Therefore, if the non-disclosure of a report causes any prejudice in any manner to a party, it must be disclosed, otherwise non-disclosure would amount to a violation of the principles of natural justice.

Maintaining the same line of approach, in *Bishnu Ram Borah* v. *Parag Saikia*[96], the Highest Bench again reiterated that refusal to give a copy of the report before a final decision is reached would not be such as to amount to denial of the principles of natural justice in all cases for the obvious reason that the rules of natural justice must necessarily vary with the nature of the right and the attendant circumstances.

Those who hold the view that it must be obligatory in all cases for the disciplinary authority to supply a copy of the inquiry report to the delinquent before a final decision is reached argue that there may be errors and omissions, misstatements and lack of evidence in the report of the inquiry officer which will affect the mind of the disciplinary authority. Therefore, if no opportunity is given to the delinquent to make a representation on the basis of the report it would be a clear violation of the principles of natural justice. This is the line of reasoning which found favour with Thakker, J., also when he observed:

> "The Disciplinary Authority builds his final conclusions on the basis of his own assessment of the evidence, taking into account the reasoning articulated in the Inquiry Officer's report and the recommendations made therein. If the report is not made available to the delinquent the crucial material which enters into the consideration of the Disciplinary Authority never comes to be known to the delinquent and he gets no opportunity whatsoever to have a say in this regard to this crucial material at any point of time till Disciplinary Authority holds him guilty or condemns him."[97]

He further goes on to say:

> "There can be glaring errors and omissions in the report. Or it may have been based on no evidence or rendered in disregard of or by overlooking evidence. Even so, the delinquent will have no opportunity to point out to the Disciplinary Authority about such errors and omissions and disabuse the mind of the Disciplinary Authority before axe falls on him and he is punished."[98]

96 (1984) 2 SCC 488: AIR 1984 SC 898; *see also Chingleput Bottlers* v. *Majestic Co.*, (1984) 3 SCC 258: AIR 1984 SC 1030. Also see *Secretary, Central Board of Excise & Customs* v. *Mahalingam*, (1986) 3 SCC 35.

97. *Union of India* v. *E. Bashyan*, (1988) 2 SCC 196, 198.

98. *Ibid.*

Justice Thakker, after finding a similarity between the report of the inquiry officer in disciplinary proceedings and the report of the Commissioner appointed by the court for taking accounts in a partnership suit, comments:

> "It would be a startling proposition to propound that the court can accept or reject the report of the Commissioner with or without modification, without even showing the same to the parties or without hearing the parties in the context of the report."[1]

Those who hold the view that it must not be obligatory on the part of the disciplinary authority to supply a copy of the inquiry report to the delinquent before a final decision argue that the only virtue of the principles of natural justice is that they are not rigid like the principles of law and hence can be moulded to suit the requirement of fairness in an individual case, therefore, it would not be proper to hold that in every case non-supply of copy of the inquiry report would amount to violation of the principles of natural justice. It is also argued that the second show-cause notice compulsory under Article 311 was abolished in 1976 only to avoid long delays in prosecution of delinquent employees which had led to a further deterioration in public service discipline. Thus, it is in the public interest that the disciplinary proceedings must be brought to a final termination as quickly as possible. They further argue that the administrative process which developed due to the inadequacies of the judicial process would lose its vitality and viability if any attempt is made to overjudicialize it.

It was perhaps this reasoning which led the House of Lords to suggest in *Local Government Board* v. *Arlidge*[2], that the report of an inspector need not be shown if it is not tendered as a piece of evidence. In this case the Hampstead Borough Council had passed a closing order in respect of a dwelling house which was considered unfit for human habitation. On an appeal by Arlidge to the Local Government Board, the Minister appointed an inspector to hold an inquiry and on the basis of the inspector's report confirmed the closing order. This order was challenged before the court and one of the grounds of challenge was that the report of the inquiry was not shown to the petitioner before the authority took final action on the basis of that report. Denying the challenge, Their Lordships of the House of Lords held that the report of the inspector is merely a step in statutory procedure for enabling the administrative authority to arrive at a conclusion, therefore, the report need not be shown. This is still the law in England, though as a matter of practice the report is usually shown to the other party. However, *Kanda* v. *Government of Malaya*[3] is a pointer in a different direction. In this case

1. *Union of India* v. *E. Bashyan*, (1988) 2 SCC 196, 198, para 4.
2. 1915 AC 120.
3. 1962 AC 322.

Inspector Kanda had been dismissed by the Government of Malaya on the basis of an inquiry report which he had never seen. He brought an action for a declaration that his dismissal was void. Quashing the dismissal, Their Lordships of the Privy Council held: ". . . . Their Lordships do not think it was correct to let the adjudicating officer have the report of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice."

The report of the inquiry officer in relation to a decision thereupon by the disciplinary authority may take any of the following broad shapes:

1. The inquiry report may indict the delinquent and the disciplinary authority may exonerate him.
2. The inquiry report may exonerate the delinquent and the disciplinary authority may indict him.
3. The inquiry report may indict the delinquent and the disciplinary authority may also indict him.
4. The inquiry report may exonerate the delinquent and the disciplinary authority may also exonerate him.

In the first and fourth situations supply of the inquiry report would be unnecessary. In the second case if the report of the inquiry is not supplied to the delinquent along with the comments of the disciplinary authority it would violate the principle of fairness because in its absence the decision of the disciplinary authority would be based on 'no evidence'. Similarly, in the third situation it will be in the interest of fairness if a copy of the report is supplied to the delinquent before a final decision is taken in his case. This will all the more be necessary in situations where inquiry has been held for the imposition of any major penalty. The report may contain errors, omissions, misstatements or it may be based on 'no evidence' or 'insufficient evidence'. In this situation unless the delinquent is given an opportunity to clear the matter any decision of holding him guilty would be against the principles of natural justice and the requirement of 'reasonable opportunity' under Article 311(2). In this behalf it is gratifying to note that the rules relating to disciplinary proceedings against civil servants working in the CPWD require that if a major penalty like dismissal, removal or reduction in rank is to be imposed on the delinquent he is to be given a show-cause notice along with the copy of the report to enable him to make a representation to the disciplinary authority.[4]

But in *Kailash Chander Asthana* v. *State of U.P.*[5], a Bench of three judges of the Supreme Court held that after the Forty-second Constitutional

4. Indian Law Institute: DISCIPLINARY PROCEEDINGS AGAINST GOVERNMENT SERVANTS: A CASE-STUDY, (1962), p. 80.

5. (1988) 3 SCC 600

Amendment of Article 311 a copy of the enquiry report need not be shown to the delinquent government servant. Curiously enough, in *Union of India* v. *Mohd. Ramzan Khan*[6], again a Bench of three judges of the Supreme Court held the opposite by holding that non-furnishing of the enquiry report would amount to denial of the principles of natural justice. This could happen because the earlier decision of the coordinate Bench was not cited before it. Therefore, in *Managing Director, Electronic Corpn. of India Ltd.* v. *B. Karunakar*[7] when the same question came before the Court the matter was referred to a larger Bench.

It may be pointed out that the rule laid down in *Mohd. Ramzan Khan case* (supra) will not apply if the disciplinary authority itself is the hearing officer. There will not be a violation of Article 14 also as both the cases come under different classifications.[8]

The larger Bench to which this question of megaimportance was referred answered it in the affirmative. The Court held that the delinquent employee has a right to a copy of the enquiry report before the disciplinary authority takes a decision on the question of his guilt. The Court further emphasised that this rule extends to all establishments—government, non-government, public or private. Failure of the employee to ask for the report would not amount to waiver. Rules/standing orders denying this first-stage right will be invalid.[9] Thus the court tilted the scales in favour of the claims of individual justice against the claims of discipline in public services. However keeping in view the basic fact that principles of natural justice are not rigid like the rules of law the court modifying its stand in *S.K. Singh* v. *Central Bank*[10] held that there would be no automatic invalidation of administrative orders if the report was not shown. It must be shown by the party what prejudice was been caused to him when the report of the enquiry officer was not shown to him. This has brought an element of fairness back into the law on this point.

(7) Reasoned decisions or speaking orders

In India, in the absence of any particular statutory requirement, there is no general requirement for administrative agencies to give reasons for their decisions. However, if the statute under which the agency is functioning requires reasoned decisions, courts consider it mandatory for the administrative agency to give reasons which should not be merely 'rubber-stamp' reasons but a brief, clear statement providing the link between the material

6. (1991) 1 SCC 588.
7. (1992) 1 SCC 709.
8. *Union of India* v. *Mohd. Ramzan Khan*, (1991) 1 SCC 588.
9. *Managing Director, ECIL* v. *B. Karunakar*, (1993) 4 SCC 727.
10. (1996) 6 SCC 415.

on which certain conclusions are based and the actual conclusion.[11] In *M.J. Sivani* v. *State of Karnataka*[12] the Court reiterated that when the rules direct recording of reasons it is a sine qua non and a condition precedent for a valid order. Appropriate brief reasons, though not like a judgment, are necessary for a valid order. Normally they must be communicated to the affected party so that he may have an opportunity to have them tested in the appropriate forum. An administrative order itself may contain reasons or the file may disclose reasons to arrive at the decision showing application of mind to the facts in issue.

In cases where the statute does not provide for reasoned decisions, courts in India are still in the process of developing workable parameters between the claims of individual justice and administrative flexibility.

1. *Implied Constitutional Perspective*

In case of legislative silence a reasoned decision may be a constitutional requirement. In *Anumathi Sadhukhan* v. *A.K. Chatterjee*[13], the Calcutta High Court allowed the challenge to the validity of law which did not require a speaking order on the ground of unreasonable restriction on the exercise of fundamental rights. In this case clauses 9 and 13 of the West Bengal Rice Mills Control Order, 1949 which had authorised the refusal to issue or renew a licence or suspension or cancellation of a licence already issued "without assigning any reasons" were held as imposing unreasonable restrictions on the petitioner's right to trade and business guaranteed under Article 19(1)(g) of the Constitution, hence unconstitutional. The Madras[14] and Andhra Pradesh High Courts[15] also reiterated the same proposition and held that a law which does not require a reasoned decision constitutes an unreasonable restriction on the fundamental rights under Article 19, clauses (2) to (6). There is no decision of the Supreme Court on this point. However, in *Kishan Chand Arora* v. *Commissioner of Police*[16], the Supreme Court with a majority of three to two negatived the proposition by holding that the Commissioner was exercising administrative and not quasi-judicial functions, therefore, he was not obliged to give reasons. In this case the question before the court was whether Section 39 of the Calcutta Police Act, 1866 which authorised the Commissioner of Police to refuse a licence at his discretion to any eating or entertainment house imposed an unreasonable restriction on

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11. *Gurdial Singh Fijji* v. *State of Punjab*, (1979) 2 SCC 368: AIR 1979 SC 1622. *See* also *Union of India* v. *Mohan Lal Capoor*, (1973) 2 SCC 836: AIR 1974 SC 87.
12. (1995) 6 SCC 289.
13. AIR 1951 Cal 90.
14. *Narasimha* v. *Distt. Magistrate*, AIR 1953 Mad 476
15. *V.K. Balarama Chetty* v. *State of Madras*, AIR 1958 AP 93. *See* also *D. Balakrishnamurthy* v. *Municipal Commr.*, AIR 1961 AP 489 where this proposition was neither allowed nor denied.
16. AIR 1961 SC 705.

the fundamental right guaranteed under Article 19(1)(g) of the Constitution. It may be pointed out that since the distinction between administrative and quasi-judicial functions has become blurred,[17] *Arora case* (supra) cannot be accepted as a proposition negativing the requirement of 'reasons' as a constitutional mandate.

Reasons are the link between the order and the mind of the maker. 'Reasoned decisions' also involve a question of 'procedural fairness'. A law which allows any administrative authority to take a decision affecting the rights of the people without assigning any reason cannot be accepted as laying down a procedure which is fair, just and reasonable and hence would be violative of Articles 14 and 21.[18] Requirement of 'reasons' may also be implied in the principles of natural justice.[19] In *Sunil Batra* v. *Delhi Administration*[20] the Supreme Court read in Section 56 of the Prisons Act, 1894 an implied duty on the jail superintendent to give reasons for putting fetters on a prisoner.

It may be emphasised that the implied requirement of 'reasons' is the foundation on which the whole scheme of judicial review under the Indian Constitution is based. Articles 32, 136, 226 and 227 provide for judicial review of administrative action. The decisions of administrative agencies unaccompanied by reasons will have the effect of whittling down the efficacy of these constitutional provisions. If an administrative authority is allowed to keep its errors off the record by not writing reasons, the whole concept of judicial review would be meaningless.

2. *Implied Statutory Perspective*

In the face of legislative silence can the requirement of reasons be implied in administrative decisions? This has been a very vexing question. The law in this behalf is confusing because courts have been shifting their stand very often. However, one proposition has been clearly established that a statute shall always be deemed to imply reasons to be given in cases of quasi-judicial decisions where it also provides for appeal for revision of such decisions. In *Mahabir Prasad* v. *State of U.P.*[21] the Supreme Court clearly held that if a quasi-judicial order is subject to appeal the law necessarily implies the requirement of reasons otherwise the right to appeal shall become 'an empty formality'. Similarly in *S.N. Mukherjee* v. *Union of India*[22] the

17. *A.K. Kraipak* v. *Union of India*, (1969) 2 SCC 262: AIR 1970 SC 150; *Govt. of Mysore* v. *J.V. Bhatt*, (1975) 1 SCC 110: AIR 1975 SC 596.
18. *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597; *Govt. Branch Press* v. *D.B. Belliappa*, (1979) 1 SCC 477: AIR 1979 SC 429.
19. *Siemens Engg. & Mfg. Co.* v. *Union of India*, (1976) 2 SCC 981: AIR 1976 SC 1785
20. (1978) 4 SCC 494: AIR 1978 SC 1675.
21. (1970) 1 SCC 764: AIR 1970 SC 1302.
22. (1990) 4 SCC 594. *See* also *Star Enterprises* v. *City Industrial Development Corpn., Maharasthra*, (1990) 3 SCC 280.

Supreme Court observed that unless the requirement of recording of reasons has been dispensed with, either expressly or by necessary implications, an administrative authority exercising judicial or quasi-judicial functions must record reasons in support of its decision because it facilitates the exercise of appellate or revisional powers, acts as a deterrent against the arbitrary exercise of power and satisfies the party against whom the order is made.

Recognising the efficacy of reasons in any administrative adjudicatory process, courts have even held that if the statute does not provide for appeal or revision, administrative authorities must give reasons if they are exercising quasi-judicial functions.[23] In *Bhagat Ram* v. *State of Punjab*[24], the Supreme Court rightly pointed out that the absence of appeal rather makes it essential to express reasons where severe penalty is imposed. It has also been held that an order imposing penalty by a quasi-judicial tribunal must be supported by reasons in support of conclusions because if reasons for an action are given there will be less scope for arbitrary or partial exercise of power and the order ex facie will indicate whether extraneous circumstances were taken into consideration by the authority passing the order.[25] Nevertheless the court has not gone so far to hold that the requirement of reason is also implied when the authority is exercising administrative functions.[26] The only valid reason for this judicial behaviour seems to be 'administrative efficiency, flexibility and celerity'. It may be pointed out that administrative expediency and individual fairness are not discrete values.

Implied requirement of reasons in the face of legislative silence in the decisions of administrative authority exercising appellate or revisional powers is also an important aspect of the whole spectrum of 'reasoned decisions'. The law is certain on the point that if the decision of the authority of first instance is wholly or partially reversed in appeal or revision, the authority must give reasons for such reversal.[27] However, courts have been changing their positions on the requirement of reasons in case the appellate or revisional authority simply affirms a decision. The Supreme Court in *M.P. Industries* v. *Union of India*[28] held that since the State Government had

23. *See* also *Mahindra & Mahindra Ltd.* v. *Union of India*, (1979) 2 SCC 529: AIR 1979 SC 798.
24. (1972) 2 SCC 170: AIR 1972 SC 1571.
25. *A.L. Kalra* v. *Project and Equipment Corpn.*, (1984) 3 SCC 316: AIR 1984 SC 1361.
26. See *Mahavir Jute Mills* v. *Shibban Lal Saxena*, (1975) 2 SCC 818: AIR 1975 SC 2057. *See* also *Govt. Branch Press* v. *Belliappa*, (1979) 1 SCC 477: AIR 1979 SC 429 where the court held that reasons cannot be withheld on the ground of purely administrative character of the action. However, the court was emphasising the need for disclosing reasons to the court.
27. *Hari Nagar Sugar Mills Ltd.* v. *Shyam Sunder*, AIR 1961 SC 1669; *State of Gujarat* v. *P. Raghav*, AIR 1969 SC 1297; *Commissioner of Income Tax* v. *Walchand & Co.*, AIR 1967 SC 1435.
28. AIR 1966 SC 671. *See* also *Som Dutt* v. *Union of India*, AIR 1969 SC 414; *Ranganath*

given reasons, the Central Government confirming the decision in appeal need not give reasons. Where the disciplinary authority examines the whole record and applies its mind before concurring with the enquiry officer the authority need not give reasons for concurrence.[29] In the same manner the authority accepting the recomendations of the selection committee is not bound to give reasons.[30] In this case the Central Government exercising revisional power had agreed with the decision of the State Government in which the application of the petitioner for a mining licence had been rejected with reasons. However, under similar circumstances the Supreme Court came to a different conclusion in *Bhagat Raja* v. *Union of India*[31]. In this case the application of the petitioner for the grant of mining lease had been rejected stating that the lease was being granted to another person who had general experience and technical knowledge and was an old lessee without any arrears of mineral dues. The revisional application was rejected by the Central Government without assigning any reasons. In an appeal under Article 136, the Supreme Court held that the Central Government was bound to give reasons. The decision in this case was followed in other cases also.[32] Following the same line of reasoning in *Siemens Engg. and Mfg. Co.* v. *Union of India*[33], the Supreme Court gave a bit of advice to the administrative agencies exercising quasi-judicial powers. The Court observed that if courts of law are to be replaced by administrative authorities and tribunals, as indeed in some kinds of cases, with the proliferation of administrative laws, they may have to be replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their order and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone will administrative authorities and tribunals exercising quasi-judicial functions be able to justify their existence and carry credibility with the people by inspiring confidence in the administrative adjudicatory process. In this case the Assistant Collector of Customs by a non-speaking order had imposed duty on certain imported items. A revision from this order was rejected by the Appellate Collector by a brief order and on further revision the Central Government by a non-speaking order had rejected the revision application. The same opinion was reiterated by Bhagwati. J. in *Maneka Gandhi* v. *Union of India*[34] when he

v. *Daulatrao*, (1975) 1 SCC 686; AIR 1975 SC 2146; *Tara Chand* v. *Delhi Municipality*, (1977) 1 SCC 472; AIR 1977 SC 567.

29. *State of Bikaner and Jaipur* v. [illegible] SCC 279.

31. AIR 1967 SC 1606.

32. *State of M.P.* v. *Narsinghdas Jankidas Mehta*, AIR 1969 SC 115; *Travancore Rayon* v. *Union of India*, (1969) 3 SCC 868; AIR 1971 SC 862.

33. (1976) 2 SCC 981; AIR 1976 SC 1785.

34. (1978) 1 SCC 248; AIR 1978 SC 597.

observed that the Central Government was wholly unjustified in withholding the reasons for impounding the passport of the petitioner, and in this way not only a breach of statutory duty was committed but it also amounted to denial of opportunity of hearing to the petitioner.

Reasons are required to be recorded when it affects the public interest. When the only obvious remedy available to the aggrieved person against the award is judicial review under Article 226 of the Constitution and if reasons are not given it will be difficult for the High Court to exercise its powers. The reasons would indicate as to how the mind of the arbitrator was applied to the facts of the case.[35] In the same manner in matters of granting exemption by the State requirement of recording reasons is implicit even in absence of express statutory provisions to give an administrative decision a non-arbitrary look.[36] Keeping in view the basic principle of administrative law that every State action must satisfy the rule of non-arbitrariness the Supreme Court in *Krishen Lal* v. *Union of India*[37] held that while disposing an application made under Section 220(2-A) for reduction in interest imposed on account of default in payment of tax it must be disposed of by a speaking order by the Central Board of Direct Taxes.

In disciplinary matters where full-scale hearing is given to the person and a detailed report giving full facts and reasons is prepared by the enquiry officer, perhaps the writing of reasons by the disciplinary authority when it fully agrees with the report will be a mere duplication of the process. The Highest Bench also observed in *Tara Chand* v. *Municipal Corporation*[38], that it would be laying down the proposition a little too broadly to say that even an order of concurrence must be supported by reasons. However, where the disciplinary authority disagrees with the report of the enquiry officer, it must state its reasons. In this case an assistant teacher had been dismissed on the ground of moral turpitude. An enquiry was conducted in which the charge was fully established. The Assistant Education Commissioner confirmed the report without giving reasons. On appeal the Commissioner of Education also upheld the dismissal by "an elaborate order". The petition challenging the dismissal order was dismissed by the Delhi High Court. In the special leave appeal under Article 136 the main contention was that the order of dismissal was bad as the Assistant Education Commissioner while confirming the report of the enquiry officer did not give reasons.

It may be noted that, even in cases where reasons are to be given, the reasons must not always be in writing and supplied to the parties immediately. An oral pronouncement of reasons in the presence of the parties and

35. *Star Enterprises* v. *Industrial Development Corpn. of Maharashtra*, (1990) 3 SCC 280.
36. *T.R. Thakur* v. *UOI.*, (1996) 3 SCC 690.
37. (1998) 2 SCC 392. Delhi High Court had held that reasons are not necessary.
38. (1977) 1 SCC 472: AIR 1977 SC 567.

their subsequent recording on the file to the knowledge of the parties will be sufficient compliance with the requirement.[39] If the reasons are given their adequacy is a justiciable issue. Courts do not prescribe any particular form or scale of reasons.[40] The nature and elaboration of reasons shall, therefore, depend on the fact situation of every case.[41] However, the reasons should reveal a rational nexus between the facts considered and the conclusions reached.[42] Mere mechanical or rubber stamp and uniform reasons given would not satisfy the requirement.[43] The reasons must show that the authority has applied its mind to the case[44] and must be given in such a manner that the appellate court may be in a position to canvass the correctness of the reasons given by it.[45] The reasons must also be intelligible, sufficient to sustain the decision and must deal with all the substantial points. Mere fact that the proceedings were treated confidential does not dispense with the requirement of recording reasons.[46] The validity of an administrative action must be judged by the reasons recorded therein and not in the light of subsequent explanation or affidavit.[47] Therefore, it is not permissible for the authority to support the order by reasons not contained in the record.

The variegated and residual judicial behaviour in such an important area as "reasoned decisions" does not undermine the efficacy of 'reasons' in any way but merely indicates the difficulty of evolving a single inflexible rule which can be reasonably applied to all the varied fact situations of every case.[48] It is worthwhile to recollect that India is a party to the recommendations of the 1959 Delhi Congress of the International Commission of Jurists which suggested:

> "It will further the Rule of Law if the Executive is required to formulate its reasons when reaching its decisions of a judicial or administrative character and affecting the rights of individuals and at the request of a party concerned to communicate them to him."[49]

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39. *Maharashtra SRTC* v. *B.R.M. Service*, AIR 1969 SC 329.
40. *M.P. Industries* v. *Union of India*, AIR 1966 SC 671.
41. *Ibid.*
42. *Union of India* v. *M.L. Capoor*, (1973) 2 SCC 836: AIR 1974 SC 87.
43. *Ibid.*
44. *Vedachala Mudaliar* v. *State of Madras*, AIR 1952 Mad 276.
45. *M.U.M. Services Ltd.* v. *R.T.A.*, AIR 1953 Mad 59.
46. *Harinagar Sugar Mills* v. *Shyam Sunder*, AIR 1961 SC 1669.
47. *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405. *See* also *Union of India* v. *E.G. Nambudri*, (1991) 3 SCC 38.
48. *Poyser & Mills' Arbitration, In re*, (1963) 2 WLR 1309.
49. THE RULE OF LAW IN A FREE SOCIETY: A REPORT ON THE INTERNATIONAL CONGRESS OF JURISTS, p. 8 (New Delhi, 1959).

Thus, in order to maintain and uphold the Rule of Law it is necessary that in all administrative and quasi-judicial actions the requirement of a 'reasoned decision' must be implied unless expressly excluded.[50]

In *Chairman and Managing Director, United Commercial Bank* v. *P.C. Kakkar*[51] wherein the High Court had reduced the punishment awarded by the administrative authority without giving reasons, the Supreme Court held mere expression that the punishment is 'shockingly disproportionate' would not meet the requirement of law, Court must give reasons because reasons substitute subjectivity by objectivity. Therefore, 'Right to Reasons' is an indispensable part of a sound judicial system and one of the statutory requirements of natural justice. However, keeping in view the twin claims of individual justice and administrative flexibility, the better proposition seems to be that the administrative agencies must give reasons when demanded, because in certain situations, giving of the reasons may do more injustice than not giving of them.

In England, Section 12(1) of the Tribunals and Inquiries Act, 1958 imposes a duty to give reasons only where the party requests for them on or before the giving or notification of the decision. But many tribunals give reasons as a matter of course without waiting for such request. This clause however admits certain exceptions. In some cases of rule-making actions based on hearing reasons may not be given. Reasons may also be refused by any individual tribunal if in its opinion it may cause injustice. For example, the Mental Health Tribunal which determines the question whether a mental patient should be forcibly confined, does not give reasons in the interests of the patient. The Lord Chancellor also has the power under the 1958 Act to direct by order that in certain classes of decisions, the authority shall not give reasons if in its opinion it is unnecessary or unpracticable.[52]

Outside the area which the 1958 Act applies, courts have declined to hold that decisions supported by reasons are a requirement of natural justice. It may be noted that the Committee on Ministers' Powers (1932) made a strong plea that the principles of natural justice must be so extended as to include reasoned decisions.

In the USA, Section 8(*b*) of the Administrative Procedure Act, 1946 requires administrative agencies to give reasons for their decisions. The right to reasoned decisions also arises from the due process clause to the Constitution. A decision unaccompanied by reason may not be considered a 'due' dec[illegible]

50. *See* M.P. Singh: *Duty to Give Reasons for Quasi-Judicial and Administrative Decisions*, (1979) 21 JILI 45. However, such an express exclusion would be unconstitutional where the violation of fundamental rights is involved.

51. (2003) 4 SCC 364.

52. S. 12(4), Tribunals and Inquiries Act, 1958.

record which must consist of evidence, arguments, reasons and all the papers filed in the case.

(8) Institutional decision or one who decides must hear

The expression 'one who decides must hear' which is popular in common law jurisdiction is known by the term 'institutional or anonymous decisions' in American law. Unlike lawcourts, the decision in many administrative proceedings is not the decision of one man from start to finish. Often one person hears and another decides. The divided responsibility may work contrary to the concept of fair hearing.

This problem was raised before the House of Lords in *Local Govt. Board* v. *Arlidge*[53]. In this case the Hampstead Borough Council made a closing order in respect of a dwelling house. Hearing was given by the inspector but the actual decision confirming the closing order came from the Local Government Board. The decision was challenged on the ground that it was a denial of natural justice insofar as the person who actually decided the case did not hear. The challenge was rejected on the ground that government departments are not expected to conduct their business like a court of law and, therefore, could act according to their routine, taking the assistance of their subordinates. This still remains the position of law in England even after the Tribunals and Inquiries Act, 1977, because the inspector who holds the enquiry cannot take any decision but is only entitled to make a recommendation to the minister.

In the USA the concept of 'one who decides must hear' was discussed by the Supreme Court in *Morgan* v. *United States*[54]. In this case, the statute authorised the Secretary of Agriculture to make an order fixing the maximum rates for dealings in stockyards of Kansas City. The hearing in this case was given by a subordinate officer and the final decision regarding rates came from the Secretary. It may be noted that there was evidence on file showing that the Secretary did not personally consider the case and appraise the evidence. Under these circumstances, the Supreme Court of the USA, quashing the order of the Secretary, observed that when an official is vested by law with the power to decide, he has the duty to exercise real deciding function in which evidence is received and weighed by the trier of facts. That duty cannot be performed by one who has not considered the evidence or the arguments. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.[55]

The momentum which this case generated in administrative procedure led the draftsmen of the Administrative Procedure Act, 1946 to make pro-

53. 1915 AC 120.
54. 298 US 468 (1936).
55. *Local Govt. Board* v. *Arlidge*, 1915 AC 120, 481.

visions for eliminating the separation between hearing and decision-making within the agency. The Administrative Procedure Act requires a positive decision from the person or the body that actually receives the evidence. Those cases which are heard by the examiners are initially decided by them. Therefore, unlike inspectors in England, the examiners in USA exercise powers analogous to that exercised by a trial judge.

In India, *Gullapalli Nageswara Rao* v. *APSRTC*[56], is a case where an administrative action was challenged on the ground that the one who decided did not hear. In this case, the petitioners challenged the order of the government confirming the scheme of road nationalisation. The Secretary of the Transport Department gave the hearing but the final decision came from the Chief Minister. The Supreme Court held that this divided responsibility was against the concept of fair hearing because if one who decides does not hear the party, he gets no opportunity of clearing doubts in his mind by reasoned arguments. However, in the *Gullapalli case (II)*[57] where the Minister gave hearing and the Chief Minister decided the case the Supreme Court held that there was no violation of the principles of natural justice.

Whatever may be the merit of this rule, the fact remains that in view of the complexity of modern administration, a literal application of this rule will cause a spoke to be put in the wheels of administration, bringing it to a grinding halt. This, again, is not the correct import of *Morgan case* on which the Supreme Court based its decision in *Gullapalli case*. The real thrust of *Morgan case* is that the person or authority charged with the responsibility of taking a decision may take help from subordinates, but he must personally consider and appraise the evidence and independently come to a decision. Demanding something more than this would amount to breaking a quixotic lance against something deeply ingrained in the administrative process.

(9) Rule against dictation

Any administrative authority invested with the power of decision-making must exercise this power in exercise of its own judgment. The decision must be actually his who decides. Therefore, if a decision is taken at the direction of any outside agency, there is a violation of fair hearing. In *Mahadayal* v. *CTO*[58], the Supreme Court quashed the decision of the Commercial Tax Officer imposing tax on the petitioner on directions from his superior officer even when he himself was of the opinion that the petitioner was not liable to tax. In the same manner in *Orient Paper Mills* v.

56. AIR 1959 SC 308.

57. *Gullapalli Nageswara Rao* v. *State of A.P.*, AIR 1959 SC 1376.

58. AIR 1958 SC 667. *See* also *Commr. of Police* v. *Gordhandas*, AIR 1952 SC 16; *Rambharosa Singh* v. *State of Bihar*, AIR 1953 Pat 370; *Purtabpore Co. Ltd.* v. *Cane Commr.*, (1969) 1 SCC 308: AIR 1970 SC 1896.

Union of India[59], the Supreme Court quashed the order of the Deputy Superintendent levying excise duty passed on the directions of the Collector.

(10) Financial incapacity to attend the enquiry

This new break in the concept of natural justice has special relevance in developing countries. If the circumstances are such that due to financial incapacity a person is unable to attend enquiry proceedings and thus does not have the opportunity to adduce and rebut evidence it may amount to a denial of fair hearing. In *Ghanshyam Das Shrivastava* v. *State of M.P.*[60], the Supreme Court held that when due to non-payment of even suspension allowance for a long period, the employee could not attend the departmental enquiry held away from his home, the ex parte order of the government violated the fundamentals of fair hearing. In the same manner if due to financial incapacity of a person defence witnesses could not be examined, then any decision by an administrative authority shall violate the principles of fair hearing. In *Mumtaz Husain Ansari* v. *State of U.P.*[61] the appellant, a District Superintendent of Police at Pilibhit, had been charged on various counts including wilful absence from duty. Before the Tribunal he wanted eight witnesses be examined in his defence. The Tribunal asked him to deposit Rs 900 for the allowance to be paid to the witnesses. The appellant could not deposit the amount and hence witnesses were not examined. The Supreme Court ruled that if the appellant was under suspension for a long time and hence could not deposit the amount due to his financial incapacity, the failure not to summon defence witnesses at the government's expense was a violation of the principles of natural justice unless it was decided by the authority that the evidence of such witnesses was not material.

(11) Decision post-haste

Fundamentals of fair hearing demand that the administrative authority must not rush decisions. In *City Coroner* v. *P.A. to Collector and Addl. District Magistrate*[62], the appellant applied for a licence under the Places of Public Resort Act, 1888 for conducting games of skill and dance. The licence was granted to him on October 10, 1974. Thereafter, the appellant spent about Rs 27,000 and put up a temporary structure. On January 21, 1975, the Additional District Magistrate asked him to show-cause why the licence should not be revoked because the Superintendent of Police and two other local associations had objected to the grant of licence. On January 25, 1975 the notice reached the appellant and on January 27, 1975 he wrote back for the supply of original adverse material because the summary supplied was

59. (1970) 3 SCC 76: AIR 1970 SC 1498.
60. (1973) 1 SCC 656: AIR 1973 SC 1183.
61. (1984) 3 SCC 295: AIR 1984 SC 1116.
62. (1976) 1 SCC 124: AIR 1976 SC 143.

misleading. Without caring to wait for a reply, the licence was revoked on January 28, 1975. The Supreme Court held that the order passed post-haste without supplying copies of adverse material or intimating that the summary of documents already supplied was sufficient, offends the principles of natural justice. In the same manner in *S.P. Kapoor (Dr)* v. *State of Himachal Pradesh*[63], the Supreme Court quashed the action of the government taken in haste. In this case the Departmental Promotion Committee was constituted the very next day of the finalisation of the seniority list of the candidates who were continuing on ad hoc promotion for about six years. At the time of constitution of the committee, one of its members (Secretary to the department concerned) was on leave for a short period and, therefore, the person officiating (Principal Secretary to the Chief Minister) was included in his place as a committee member. Selections were made and the orders of appointment were also issued on the very date of the constitution of the committee. The Supreme Court held that the way the whole thing was completed in haste gives rise to the suspicion that some high-up was interested in pushing through the matter hastily and hence the matter requires to be considered afresh.

(C) POST-DECISIONAL HEARING

The idea of post-decisional hearing has been developed to maintain a balance between administrative efficiency and fairness to the individual. This harmonizing tool was developed by the Supreme Court in *Maneka Gandhi* v. *Union of India*[64]. In this case the passport dated June 1, 1976 of the petitioner, a journalist, was impounded 'in the public interest' by an order [illegible] 1977 and the government having declined to furnish her the reasons for its decision[65] she filed a petition before the Supreme Court under Article 32 challenging the validity of the impoundment order. The government also did not give her any predecisional notice and hearing. One of the contentions of the government, relevant for our purposes, was that the rule of *audi alteram partem* must be held to be excluded because it may have frustrated the very purpose of impounding the passport. Rejecting the contention the court rightly held that though the impoundment of the passport was an administrative action yet the rule of fair hearing is attracted by necessary implication and it would not be fair to exclude the application of this cardinal rule on the ground of administrative convenience. However, the court did not outright quash the order and allowed the return of the passport because of the special socio-political factors attending the case. On the con-

63. (1981) 4 SCC 716: AIR 1981 SC 2181.

64. (1978) 1 SCC 248: AIR 1978 SC 597.

65. The government however filed an affidavit in the court stating that her passport was impounded because her presence was required before the Shah Commission which was enquiring into the 1975 Emergency excesses.

trary the technique of post-decisional hearing was developed in order to balance these factors against the clear requirements of law, justice and fairness. The court stressed that a fair opportunity of being heard following immediately the order impounding the passport would satisfy the mandate of natural justice. The concept of post-decisional hearing in situations where pre-decisional hearing is required either expressly or by necessary implication is itself based on wrong hypothesis that administrative efficiency and fairness to the individual are discreet values. One cannot expect that a post-decisional hearing would be anything more than a mere empty formalistic ritual.

The same technique of validating void administrative decision by post-decisional hearing was adopted in *Swadeshi Cotton Mills* v. *Union of India*[66]. The Court validated the order of the government for taking over the management of the company which had been passed in violation of the *audi alteram partem* rule and which was found to have been attracted by necessary implication because the government had agreed to give post-decisional hearing. However, doubts were expressed over the majority decision in this case which led Koshal, J. to refer this matter for the decision of a larger Bench when he was confronted with the same problem in *Tea Trading Corporation* v. *Pashok Tea Co.*[67].

Besides this *K.I. Shephard* v. *Union of India*[68] also reflects the thought process of the Highest Bench on this important issue. In this case in terms of the scheme drawn under Section 45 of the Banking Regulation Act, 1949 three erstwhile banks had been amalgamated. Pursuant to the scheme, certain employees of the amalgamated banks were excluded from employment and their services were not taken over. Some excluded employees filed writs before the High Court under Article 226 for relief. The Single Judge granted partial relief by proposing post-decisional hearing. On appeal the Division Bench dismissed the writ petitions. Some of the excluded employees then filed writ petitions directly before the Supreme Court. Allowing the writs the court held that post-decisional hearing in this case would not do justice especially where the normal rule of fair hearing should apply. The court pointed out that there is no justification to throw a person out of employment and then give him an opportunity of representation when the requirement is that he should have an opportunity as a condition precedent to action. The Court observed that it is a common experience that once a decision is taken there is a tendency to uphold it and the representation may not yield any fruitful result. Therefore, even in cases of emergent situations pre-decisional

66. De Smith: (1981) 1 SCC 664: AIR 1981 SC 818.
67. (1981) 4 SCC 113.
68. (1987) 4 SCC 431.

hearing is necessary which may not be an elaborate one, especially in cases where the action has grave consequences such as loss of livelihood.

Justifying the idea of post-decisional hearing, Professor de Smith writes: "Can the absence of a hearing before a decision is made be adequately compensated for by a hearing ex post facto? A prior hearing may be better than a subsequent hearing but a subsequent hearing is better than no hearing at all; and in some cases courts have held that statutory provision for an administrative appeal or even full judicial review on merits is sufficient to negative the existence of any implied duty to hear before the original decision is made. The approach may be acceptable where the original decision does not cause serious detriment to the person affected, or where there is also a paramount need for prompt action, or where it is impracticable to afford antecedent hearings."[69] In substance it is the "necessity for speed" which justifies post-decisional hearing at a later stage. In emergent situations the principles of natural justice are excluded and therefore if the court comes to the conclusion that in a given situation these rules are applicable there seems to be no reason why their observance should not be insisted upon at the pre-decisional stage. Following this line of reasoning the Supreme Court in *Trehan* v. *Union of India*[70] observed: "In our opinion, the post-decisional opportunity of hearing does not subserve the rules of natural justice. The authority who embarks upon a post-decisional hearing will normally proceed with a closed mind and there is hardly any chance of getting a proper consideration of the representation at such a post-decisional opportunity." Thus in every case where the pre-decisional hearing is warranted post-decisional hearing will not validate the action except in very exceptional circumstances.[71]

(D) EXCEPTIONS TO THE RULE OF NATURAL JUSTICE

The word exception in the context of natural justice is really a misnomer, because in these exclusionary cases the rule of *audi alteram partem* is held inapplicable not by way of an exception to 'fair play in action', but because nothing unfair can be inferred by not affording an opportunity to present or meet a case.[72] Such situations where nothing unfair can be inferred by not affording fair hearing must be few and exceptional in every civilized society. Principles of natural justice are ultimately weighed in the balance of fairness

69. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, (3rd Edn.), p. 170.

70. (1989) 1 SCC 764.

71. See *Bari Doab Bank* v. *UOI*, (1997) 6 SCC 417. Government passed the order of moritorium under Banking Regulations Act, 1949 on the petitioner-Bank—held, petitioners are not entitled to pre-decisional hearing before passing order as post-decisional hearing at the stage of filing objections to the draft scheme would be sufficient.

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

and hence the courts have been circumspect in extending these principles to situations where it would cause more injustice rather than justice.[73] For example, a party would forfeit its right to hearing if undue advantage obtained is protracting the proceedings somehow and nullifying the objectives.[74] Thus, where a teacher of the Navodaya Vidalaya was dismissed on gross moral turpitude without giving exhaustive hearing per CCA rules, the Court held the termination valid on the ground that fairness cannot be made counterproductive.[75]

Application of the principles of natural justice can be excluded either expressly or by necessary implication, subject to the provisions of Arts. 14 and 21 of the Constitution. Therefore, where the Ordinance provided for hearing before taking over non-government schools but the Act following the Ordinance deliberately omitted it, the Supreme Court held that by implication the Legislature excluded the rule of hearing.[76] Therefore, if the statute, expressly or by necessary implication, precludes the rules of natural justice it will not suffer invalidation on the ground of arbitrariness. Other exclusionary situations may include:

(1) Exclusion in emergency

In such exceptional cases of emergency where prompt action, preventive or remedial, is needed, the requirement of notice and hearing may be obviated. Therefore, if the right to be heard will paralyse the process, law will exclude it. It has been said that no army can be commanded by a debating society, but it is also true that the House of Commons did debate, during the days of debacle and disaster, agony and crisis of the Second World War, the life and death aspect of the Supreme Command by the then British Prime Minister to the distress of all friends and to the delight of all foes. Hence, if to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity.[77] Therefore, in situations where a dangerous building is to be demolished,[78] or a company has to be wound up to save depositors,[79] or there is imminent danger to peace,[80] or a trade dangerous to society is to be prohibited,[81] dire social necessity requires exclusion of the elaborate process of fair hearing. In the same manner where power theft was detected by

73. *Karnataka Public Service Commission* v. *B.M. Vijay Shanker*, (1992) 2 SCC 206.

74. *Ram Krishen Verma* v. *State of U.P.*, (1992) 2 SCC 620.

75. *Avinash Nagra* v. *Navodaya Vidyalaya Samiti*, (1997) 2 SCC 534.

76. *Rash Lall Yadav (Dr)* v. *State of Bihar*, (1994) 5 SCC 267.

77. Extract from judgment of Krishna Iyer, J., in *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405, 432: AIR 1978 SC 851. *See* also *Liversidge* v. *Anderson*, 1942 AC 206.

78. *Nathubhai* v. *Municipal Corpn.*, AIR 1959 Bom 332.

79. *Joseph* v. *Reserve Bank of India*, AIR 1962 SC 1371.

80. *Babulal Parate* v. *State of Maharashtra*, AIR 1961 SC 884.

81. *Cooverjee* v. *Excise Commr.*, 1954 SCR 873.

officials, immediate disconnection of supply is not violative of the principles of natural justice.[82]

Even in a situation of emergency where precious rights of people are involved, post-decisional hearing has relevance to administrative and judicial gentlemanliness.[83]

However, the administrative determination of an emergency situation calling for the exclusion of rules of natural justice is not final. Courts may review the determination of such a situation. In *Swadeshi Cotton Mills* v. *Union of India*[84] the court held that the word "immediate" in Section 18-AA of the Industries (Development and Regulation) Act cannot stand in the way of the application of the rules of natural justice.

Under Section 18-A of the Industries (Development and Regulation) Act, the Central Government can take over an industry after investigation, but under Section 18-AA(1) the government can take over without any notice and hearing on the ground that production has been or is likely to be affected and hence immediate action is necessary. The question was whether Section 18-AA(1) excludes the principles of natural justice. The government took the plea that since Section 18-AA(1) relates to emergent situations, therefore, the principles of natural justice are excluded. Furthermore, it was also argued that since Section 18-A provides for hearing and Section 18-AA(1) does not so provide, consequently Parliament has excluded hearing therein. Rejecting these arguments the court held that even in emergent situations the competing claims of 'hurry and hearing' are to be reconciled, no matter the application of the *audi alteram partem* rule at the pre-decisional stage may be 'a short measure of fair hearing adjusted, attuned and tailored to the exigency of the situation'.[85]

Natural justice is pragmatically flexible and is amenable to capsulation under compulsive pressure of circumstances.[86] It is in this context that the Supreme Court observed: "Natural Justice must be confined within its proper limits and must not be allowed to run wild. The concept of natural justice is a magnificent thoroughbred on which this nation gallops forward towards

82. *Hyderabad Vanaspathi Ltd.* v. *A.P. State Electricity Board*, (1998) 4 SCC 470.

83. *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248: AIR 1978 SC 597. *See* also *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405, 432: AIR 1978 SC 851.

84. (1981) 1 SCC 664: AIR 1981 SC 818. *See* also *Tea Trading Corporation* v. *Pashok Tea Co.*, (1981) 4 SCC 113. Mention may be made of *S.L. Kapoor* v. *Jagmohan*, (1980) 4 SCC 352: AIR 1981 SC 136, where it was held that even in emergent situations where swift action is necessary to avert disaster, minimal natural justice is not excluded.

85. *See* also M.P. Jain: CHANGING FACE OF ADMINISTRATIVE LAW IN INDIA AND ABROAD, (1982), pp. 23-24. Also see *K.I. Shephard* v. *Union of India*, (1987) 4 SCC 431. Highest Bench ruled that even in emergent situations pre-decisional hearing is necessary which may not be an elaborate one especially when the action has grave civil consequences.

86. *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405, 436.

its proclaimed and destined goal of justice, social, economic and political. This thoroughbred must not be allowed to run into a wild unruly horse, careering off where it lists, unsaddling its rider and bursting into a field where the sign 'no pasaran' is put up."[87]

(2) Exclusion in cases of confidentiality

In *Malak Singh* v. *State of Punjab*[88] the Supreme Court held that the maintenance of surveillance register by the police is a confidential document. Neither the person whose name is entered in the register nor any other member of the public can have access to it. Furthermore, the Court observed that the observance of the principles of natural justice in such a situation may defeat the very purpose of surveillance and there is every possibility of the ends of justice being defeated instead of being served. The same principle was followed in *S.P. Gupta* v. *Union of India*[89] where the Supreme Court held that no opportunity of being heard can be given to an Additional Judge of a High Court before his name is dropped from being confirmed. It may be pointed out that in a country like India surveillance may provide a very serious constraint on the liberty of the people, therefore, the maintenance of the surveillance register cannot be so utterly administrative and non-judicial that it is difficult to conceive the application of the rules of natural justice.

(3) Exclusion in case of purely administrative matters

A student of the university was removed from the rolls for unsatisfactory academic performance without being given any pre-decisional hearing. The Supreme Court in *Jawaharlal Nehru University* v. *B.S. Narwal*[90] held that the very nature of academic adjudication appears to negative any right of an opportunity to be heard. Therefore if the competent academic authorities examine and assess the work of a student over a period of time and declare his work unsatisfactory, the rules of natural justice may be excluded. In the same manner in *Karnataka Public Service Commission* v. *B.M. Vijay Shanker*[91] when the Commission cancelled the examination of the candidate because, in violation of rules, the candidate wrote his roll number on every page of the answer-sheet, the Supreme Court held that the principles of natural justice were not attracted, the Court observed that the rule of hearing be strictly construed in academic discipline and if this was ignored it would not only be against the public interest but would also erode the social sense of fairness. However, this exclusion would not apply in case of disciplinary

87. *Satyavir Singh* v. *Union of India*, (1985) 4 SCC 252, 263: AIR 1986 SC 555.

88. (1981) 1 SCC 420: AIR 1981 SC 760. Generally the Court is inclined against confidentiality and would prefer open government. See *Judges' case* (*S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87: AIR 1982 SC 149).

89. 1981 Supp SCC 87.

90. (1980) 4 SCC 480: AIR 1980 SC 1666.

91. (1992) 2 SCC 206.

matters or where the academic body performs non-academic functions. Granting sanction of prosecution is a purely administrative function, therefore, principles of natural justice are not attracted.[92] In the same manner cancellation of a bid for failure to execute lease deed and to deposit security amount, held, would not attract principles of natural justice.[93]

(4) Exclusion based on impracticability

In *R. Radhakrishnan* v. *Osmania University*[94], where the entire MBA entrance examination was cancelled by the university because of mass copying, the court held that notice and hearing to all candidates is not possible in such a situation, which had assumed national proportions. Thus the court sanctified the exclusion of the rules of natural justice on the ground of administrative impracticability. Moving in the same directions the Apex Court once again in *Union of India* v. *O. Chakradhar*[95], held that cancellation of panel, select, reserve, waiting, merit or rank lists, individual hearing to candidate is not necessary where the mischief in conducting selection was so widespread and all-pervasive, affecting the result, that it was difficult to identify the persons unlawfully benefited or unlawfully deprived of selection. Thus even the consequent termination of service does not attract principles of natural justice. Anyone who analyses judicial behaviour in this area may be tempted to conclude that "fairness" and "administrative convenience" have been taken by the court as discrete values and this underlines not only the basic fallacy in judicial behaviour, but also exposes the administration's indolence and inertia. It may be recalled that when Japanese bombs cascaded upon Pearl Harbour on December 7, 1941, plunging the United States into a global struggle for existence during World War II, orders were passed for the relocation of thousands of persons of Japanese ancestry on the West Coast in relocation camps, Justice Stone, in his powerful dissent, was not prepared to accept that the inconvenience and administrative difficulty of holding individual loyalty hearings for the 1,12,000 persons involved could justify the governmental action.[96] The Supreme Court expressed the same sentiment when in *W.B. Electricity Regulatory Commission* v. *CESC Ltd.*[97], it opined that when a statute confers a right which is in conformity with the principles of natural justice, the same cannot be negativated by a Court on an imaginary ground that there is a likelihood of an unmanageable hearing before the authority or practical inconvenience. In this case the W.B. Electricity

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92 *Supdt. of Police* v. *Deepak Chowdhary*, (1995) 6 SCC 225.

93 *State of Karnataka* v. *Saveen Kumar Shetty*, (2002) 3 SCC 426.

94 AIR 1974 AP 283. *See* also *Bihar School Education Board* v. *S.C. Sinha*, (1970) 1 SCC 648: AIR 1970 SC 1269

95 (2002) 3 SCC 146

96 *Hirabayashi* v. *United States*, 320 US 490, 102

97. (2002) 8 SCC 715

Regulatory Commission had contended that though Act requires consumers' hearing before fixing tariff, yet giving hearing to 17 lakh electricity consumers would be a practical impossibility and inconvenience. Rejecting the contention, the Court observed that the Act does not give individual rights to every consumer and the same is regulated by Regulations, therefore, the question of indiscriminate hearing does not arise.

(5) Exclusion in cases of interim preventive action

If the action of the administrative authority is a suspension order in the nature of a preventive action and not a final order, the application of the principles of natural justice may be excluded. In *Abhay Kumar* v. *K. Srinivasan*[1], the institution passed an order debarring the student from entering the premises of the institution and attending classes till the pendency of a criminal case against him for stabbing a co-student. This order was challenged on the ground of denial of natural justice. The Delhi High Court rejecting the contention held that such an order could be compared with an order of suspension pending enquiry which is preventive in nature in order to maintain campus peace and hence the principles of natural justice shall not apply. Therefore, natural justice may be excluded if its effect would be to stultify the action sought to be taken or would defeat and paralyse the administration of law. The Supreme Court in *Maneka Gandhi* v. *Union of India*[2] observed: "Where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action, especially action of a preventive or remedial nature, right of prior notice and opportunity to be heard may be excluded by implication."

(6) Exclusion in cases of legislative action

Legislative action, plenary or subordinate, is not subject to the rules of natural justice because these rules lay down a policy without reference to a particular individual. On the same logic principles of natural justice can also be excluded by a provision of the Constitution also. The Constitution of India excludes the principles of natural justice in Articles 22, 31(A), (B), (C) and 311(2) as a matter of policy. Nevertheless if the legislative exclusion is arbitrary, unreasonable and unfair courts may quash such a provision under Articles 14 and 21 of the Constitution. In *Laxmi Khandsari* v. *State of U.P.*[3] the Supreme Court held that the notification of the Uttar Pradesh Government Sugarcane (Control) Order, 1966 directing that no power-crusher of a khandsari unit in a reserved area of a sugar mill will work during the period October 9 to December 1, 1980 is legislative in character and hence the

1. AIR 1981 Del 381. *See* also M.P. Jain: *Administrative Law*, XVII ASIL (1981), pp 481-82.
2. (1978) 1 SCC 248.
3. (1981) 2 SCC 600. AIR 1981 SC 873.

principles of natural justice are not attracted. In this context the court mentioned the analogy of price fixing.[4] This order had been challenged on the ground that the petitioners' valuable rights were infringed upon without any notice and hearing. In the same manner the Court held in *J.R. Vohra* v. *Indian Export House*[5], that Sections 21 and 37 of the Delhi Rent Control Act dealing with the termination of limited tenancies do not violate the principles of natural justice. The Court observed that if a limited tenancy has been validly created then at the expiry of the period a warrant of possession can be issued without any notice or hearing to the tenant. In *Panipat Woollen and General Mills Co. Ltd.* v. *Union of India*[6] the court further held that where a decision is left to the Legislature itself under the Act, the question of affording an opportunity of hearing to affected persons before taking the decision does not arise. In this case the Legislature had itself fixed the criteria and on the basis of that criteria it had also identified persons and undertakings to which the law applied. Therefore, it was natural to suppose that the legislature is not expected to give a notice and afford a hearing while laying down a general rule. The same trend in judicial thinking is visible in *Union of India* v. *Cynamid*[7] when the Supreme Court held that no principles of natural justice had been violated when the government issued a notification fixing the prices of certain drugs. The Court reasoned that since the notification flowed from a legislative act and not an administrative one so the principles of natural justice would not apply. *L.N.M. Institute of Economic Development and Social Change* v. *S.O., Bihar*[8], is a high benchmark in this direction. In this case the Bihar Legislative Assembly passed a statute for taking over a private Institute named after its former Chief Minister. The Act also provided for the termination of services of its employees. In pursuance of these provisions the government terminated the services of the employees of the Institute. Justifying the action, the court held that where there is a legislative direction for termination of services of employees of the institute which is taken over by the government, compliance with the principles of natural justice may not be read into such a direction and, if terminations are effected without giving employees concerned an opportunity of being heard, no exception can be taken of the same. The same principle was followed by the court in *Charan Lal Sahu* v. *Union of India*[9] (*Bhopal Gas Disaster case*) where the constitutionality of the Bhopal Gas Leak Dis-

4. *Saraswati Industrial Syndicate* v. *Union of India*, (1975) 2 SCC 630: AIR 1975 SC 460. *See* also M.P. Jain: *Administrative Law*, XVII ASIL (1981), p. 470.
5. (1985) 1 SCC 712: AIR 1985 SC 475.
6. (1986) 4 SCC 368: AIR 1986 SC 2082.
7. (1987) 2 SCC 321.
8. (1988) 2 SCC 435.
9. (1990) 1 SCC 613. *See* also *Madras City Wine Merchants' Assn.* v. *State of T.N.*, (1994) 5 SCC 509.

aster (Processing of Claims) Act, 1985 was involved. The Supreme Court held: "For legislation by Parliament no principle of natural justice is attracted, provided such legislation is within the competence of the legislature." The same principle applies in case of subordinate legislation. Hence for fixing tax, fee and charges, principles of natural justice are not attracted. However, in case of modification representation made must be considered.[10] Similarly, where seniority rules were relaxed with retrospective effect for reserved category candidates, the court held that no hearing was necessary to those who were adversely affected as it was a rule-making function.[11] To sum up, in case of legislative act of legislature, no question of application of rule of natural justice arises, however, in case of subordinate legislation, legislature may provide for observance of the principles of natural justice and in that case its violation would vitiate administrative legislative action. This Legal aspect was exemplified by the Apex Court in *State of Punjab* v. *Tehal Singh*[12]. In this case the Punjab Panchayati Raj Act did not provide for any opportunity of notice and hearing to the residents before any area falling under a particular Gram Sabha is excluded and included in another Gram Sabha. The Court held that residents of that area which has been excluded and included in a different Gram Sabha cannot make a complaint regarding denial of the rules of natural justice. Thus where the legislature in its wisdom has not chosen to provide for any opportunity for observance of principles of natural justice, its observance cannot be insisted upon. It need not be overemphasised that this trend increases the possibilities of legislative arbitrariness. Therefore, there seems to be no reason to exempt legislative actions from natural justice in areas where law is based on adjudicative facts.

The principles of natural justice have been given a constitutional status in the USA by the 5th and 14th Amendments. These amendments provide that no person shall be deprived of "life, liberty or property without the due process of law". This constitutional guarantee has been consistently interpreted as meaning generally that the rights of a citizen shall not be interfered with unless he has been given a hearing in an objective manner. The recent approach of courts is that hearing under the "due process" clause must be given whenever a decision is based on "adjudicative facts", i.e., facts which pertain to the parties, their business and activities. Hearing may be avoided only where emergency action is necessary.

10. *Visakhapatnam Port Trust* v. *Ram Bahadur Thakur*, (1997) 4 SCC 582.

11. *M. Venkateswarlu* v. *Govt. of A.P.*, (1996) 5 SCC 167.

12. (2002) 2 SCC 7. *See* also *Laxmi Narian & Sons* v. *State of Haryana*, (2001) 10 SCC 370. Court held that in case of issuing a notification to amend the schedule to the Act, principles of natural justice are not attracted.

In England the history of the application of the principles of natural justice up to the mid-1960s reveals two opposite viewpoints. According to one point of view, in the absence of any statutory requirement of hearing, a hearing will be implied by courts whenever any decision affects the rights of subjects. This aspect is clearly reflected in *Cooper* v. *Wandsworth Board of Works*[13]. In this case the Metropolis Management Act, 1855 provided that a person who intended to build a house should give seven days' notice to the District Board, failing which the Board could demolish the house. Cooper built the house without giving the required notice and consequently his house was demolished without giving him a hearing. The Court held that Cooper could maintain an action for trespass because no valid decision could be reached in breach of the principles of natural justice. This principle of applying the rules of natural justice by implication has been followed in a multitude of cases dealing with (*i*) interference with property rights,[14] (*ii*) deprivation of membership of professional or other non-statutory bodies,[15] (*iii*) dismissal from office,[16] (*iv*) imposition of penalties,[17] and (*v*) deprivation of advantages.[18] The other viewpoint was based on a restrictive attitude towards certiorari and prohibition which were generally used to compel the observance of principles of natural justice in situations where there was no express statutory requirement for hearing. The holders of this view advocated 'freedom of action' for the administration. Therefore, in *Franklin* v. *Minister of Town and Country Planning*[19] when the House of Lords had to consider whether the minister was subject to the rules of natural justice in designating the site of a new township it decided that the minister was acting executively and not judicially, hence not subject to the rules of natural justice. Following the same line of reasoning the Privy Council held in *Nakhuda Ali* v. *Jayaratne*[20] that in the absence of any express statutory requirement for hearing, the rules of natural justice are not attracted even when the power to cancel a licence is coupled with the fact that 'reasonable grounds' must exist for the exercise of power.

Fortunately, in 1963, *Cooper's* formulation was reasserted in *Ridge* v. *Baldwin*[21]. The appellant in this case was the Chief Constable of Brighton, England who had been dismissed from service by the area Watch Committee in exercise of its powers under the Municipal Corporation Act, 1882, on the

13. (1863) 14 CB (NS) 180.
14. *Errington* v. *Minister of Health*, (1935) 1 KB 249.
15. *General Medical Council* v. *Spackman*, 1943 AC 627.
16. *Hogg* v. *Scott*, 1947 KB 759.
17. *R.* v. *North ex p. Oakey*, (1927) 1 KB 491.
18. *R.* v. *Boycott*, (1939) 2 KB 651.
19. 1948 AC 87.
20. 1951 AC 66.
21. 1964 AC 40.

ground of negligence in the discharge of duties. The Act did not require any hearing before dismissal. A declaratory judgment was sought on the ground of violation of the rules of natural justice. The declaration was refused both by the court of first instance and the Court of Appeal on the strength of *Nakhuda Ali's* holding. However, by a majority of four to one, the House of Lords decided that there is no point in labelling functions as quasi-judicial and administrative because even the administrative or executive functions are subject to the rules of natural justice. *Ridge case* brought new liberality in approach to the question of the application of the rules of natural justice and judicial review. Formerly the presumption had been that there was no obligation to give a hearing unless the statute expressly provided for it; now the presumption is that there is always such an obligation unless the statute clearly excludes it, notwithstanding the vesting of a power in subjective terms.[22] Nevertheless, it does not mean that the rules of natural justice shall be applied in every administrative action to the same extent. In situations where policy considerations are paramount the requirement of natural justice would be minimal and at times they would probably vanish altogether.

(7) Where no right of the person is infringed

Where no right has been conferred on a person by any statute nor any such right arises from common law the principles of natural justice are not applicable. This can be illustrated by the decision of the Supreme Court in *J.R. Vohra* v. *Indian Export House (P) Ltd.*[23]. The Delhi Rent Control Act makes provisions for the creation of limited tenancies. Sections 21 and 37 of the Act provide for the termination of limited tenancies. The combined effect of these sections is that after the expiry of the term a limited tenancy can be terminated and warrant of possession can be issued by the authority to the landlord without any notice of hearing to the tenant. Upholding the validity of warrant of possession without complying with the principles of natural justice, the Supreme Court held that after the expiry of the period of any limited tenancy, a person has no right to stay in possession and hence no right of his is prejudicially affected which may warrant the application of the principles of natural justice. In the same manner the Court in *Andhra Steel Corporation* v. *Andhra Pradesh State Electricity Board*[24] held that a concession can be withdrawn at any time without affording any opportunity of hearing to affected persons except when the law requires otherwise or the authority is bound by promissory estoppel. In this case the Electricity Board had withdrawn the concession in electricity rate without any notice and hearing to the appellant. Therefore, where an order of extension was cancelled before it became operational[25] or the order of stepping up salary was with-

22. Nettheim: *The Privy Council, Natural Justice and Certiorari*, (1967) 2 Fed L Rev 215.
23. (1985) 1 SCC 712: AIR 1985 SC 475.
24. (1991) 3 SCC 263.
25. *State Bank of India* v. *Girish Bihari*, (1997) 4 SCC 362.

drawn before the person was actually paid[26] or the services of the probationer terminated without charge[27] the principles of natural justice are not attracted.

(8) Exclusion in case of Statutory Exception or Necessity

Disqualification on the ground of bias against a person will not be applicable if he is the only person competent or authorized to decide that matter or take that action. If this exception is not allowed there would be no other means for deciding that matter and the whole administration would come to a grinding halt. But the necessity must be genuine and real. Therefore, the doctrine of necessity cannot be invoked where the members of the Textbook Selection Committee were themselves the authors of books because the constitution of the selection committee could have been changed very easily by the government.[28]

Charan Lal Sahu v. *Union of India*[29] (*Bhopal Gas Disaster case*) is a classical example of the application of this exception. In this case the constitutional validity of the Bhopal Gas Disaster (Processing of Claims) Act, 1985, which had authorized the Central Government to represent all the victims in matters of compensation award, had been challenged on the ground that because the Central Government owned 22 per cent share in the Union Carbide Company and as such it was a joint tortfeasor and thus there was a conflict between the interests of the government and the victims. Negativating the contention the court observed that even if the argument was correct the doctrine of necessity would be applicable to the situation because if the government did not represent the whole class of gas victims no other sovereign body could so represent and thus the principles of natural justice were not attracted.

In the same manner in *Sub. Commission of Judicial Accountability* v. *Union of India*[30], the Supreme Court did not allow the contention of mala fide against the Speaker of the Lok Sabha on the ground of his affiliation to the Congress Party because under the Judges Enquiry Act, 1968 only the Speaker has the statutory authority to take all actions (*see* Doctrine of necessity).

It was on the basis of this principle alone that Judges of the Court of Appeal were held competent to decide the question whether they were subject to payment of tax because they were bound to act *ex necessitate*.[31]

26. *Calcutta Municipal Corpn.* v. *S.B. Mukerjee*, (1997) 11 SCC 463.
27. *High Court of Patna* v. *M.M.P. Sinha*, (1997) 10 SCC 409.
28. *J. Mohapatra & Co.* v. *State of Orissa*, (1984) 4 SCC 103.
29. (1990) 1 SCC 613.
30. (1991) 4 SCC 699.
31. *Judges* v. *Attorney-General for Saskatchewan*, (1937) 53 TLR 464.

(9) Exclusion in case of contractual arrangement

In *State of Gujarat* v. *M.P. Shah Charitable Trust*[32], the Supreme Court held the principles of natural justice are not attracted in case of termination of an arrangement in any contractual field. Termination of an arrangement/agreement is neither a quasi-judical nor an administrative act so that the duty to act judicially is not attracted.

(10) Exclusion in case of government policy decision

In *BALCO Employees' Union* v. *Union of India*[33], the Apex Court was of the view that in taking of a policy decision in economic matters at length, the principles of natural justice have no role to play. In this case employees had challenged the government's policy decision regarding disinvestment in Public Sector Undertakings. The Court held that even though workers may have interest in the decision, but unless the policy decision to disinvest is capricious, arbitrary, illegal or uninformed, and is not contrary to law, the decision cannot be challenged on the grounds of violation of the principles of natural justice. Therefore, if in exercise of executive powers the government takes any policy decision, principles of natural justice can be excluded because it will be impossible and impracticable to give formal hearing to all those who may be affected whenever a policy decision is taken and at times it will be against public interest to do so.

(11) 'Useless formality' theory

'Useless formality' theory is yet another exception to the application of the principles of natural justice. Where on the admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not insist on the observance of the principles of natural justice because it would be futile to order its observance.[34] Therefore, where the result would not be different, and it is demonstrable beyond doubt, order of compliance with the principles of natural justice will not be justified.[35] The Supreme Court applied this theory in *Dharmarathmakara Rai Bahadur Arcot Ramaswamy Mudaliar Educational Institution* v. *Education Appellate Tribunal*[36]. In this case a lecturer who had been granted leave for doing M. Phil, in violation of leave condition, had joined Ph.D. Course. She was given notice and after considering her reply, wherein she had admitted joining Ph.D. Course, her service were terminated. She challenged the termination order before the Education Tribunal on the ground that the

32. (1994) 3 SCC 552.
33. (2002) 2 SCC 333.
34. *S.L. Kapoor* v. *Jagmohan*, (1980) 4 SCC 379, 395.
35. *R.* v. *Eailing Magistrate's Court, ex p. Fannaran*, (1996) 8 Admn LR, 351, 358 (Lord Straughton).
36. (1999) 7 SCC 332.

provisions of the Karnataka Private Educational Institutions (Discipline and Control) Act, 1975 which under Sections 6-8 had provided for a statutory enquiry before termination of service of any teacher were not complied with. The Tribunal and subsequently the High Court in appeal held termination invalid for failure to comply with the statutory requirement of the Act. However, allowing the appeal, the Supreme Court held that opportunity to show cause was not necessary where facts are undisputed and the affected person could not put forth any valid defence even when opportunity was given by the Court. The Court observed that giving opportunity of hearing is a check and balance concept that no one's rights be taken away without hearing where the statute so requires, but this is not necessary when one admits one's violations. Thus in cases where grant of opportunity in terms of the principles of natural justice does not improve the situation, "useless formality" theory is pressed into service.[37]

However 'useless formality' theory has still not been able to firmly establish itself in administrative law because there exists a strong opinion which suggests that this theory is wrong as a Court cannot prejudge any issue.[38]

(E) EFFECT OF BREACH OF THE RULES OF NATURAL JUSTICE: ACTION VOID OR VIODABLE

Courts are unanimous that a decision rendered in violation of the rule against bias is merely voidable and not void. The aggrieved party may thus waive his right to avoid the decision; as where timely objection is not made even though there is full knowledge of the bias and the right to object to it.[39]

However, there is fundamental disagreement amongst courts and jurists as to the effect of a breach of the rule of fair hearing on any decision. Professor H.W.R. Wade is of the view that breaches of the rules of natural justice must have the effect of producing void decisions.[40] But D.M. Gordon argues that procedural breaches can never render a decision void as jurisdictional error. At first Professor de Smith appeared to have agreed with him, but later on he changed his stance.[41] Courts' decisions are also available on both sides.[42] A full-scale examination of the problem came in *Ridge* v.

37. *Canara Bank* v. *Debasis Das*, (2003) 4 SCC 557.
38. See *Indian Drugs and Pharmaceuticals Ltd.* v. *Punjab Drug Manufacturers Association*, (1999) 6 SCC 247.
39. *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon*, (1968) 3 All ER 304.
40. Wade: ADMINISTRATIVE LAW, (1967), p. 188, *Unlawful Administrative Action: Void or Voidable?*, (1967) 83 LQR 499. *See* also Akehurst: *Void or Voidable?— Natural Justice and Unnatural Meanings*, (1968) 31 Mod L Rev 2.
41. De Smith: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, (1959), p. 294. He changed his stance in 1968 Edition, p. 222.
42. See *R.* v. *North ex p. Oakey*, (1927) 1 KB 491; *White* v. *Kuzych*, 1951 AC 585.

Baldwin.[43] The House of Lords was divided. Lord Reid and Lord Hodson considered the decision of the Watch Committee which terminated the services of the constable as void because the rule of fair hearing had been violated.[44] But Lord Evershed and Lord Devlin considered it merely voidable.[45] Later a decision confirms this uncertainty.[46] The Privy Council in *Durayappah* v. *Fernando*[47] was of the view that denial of natural justice makes a decision voidable and not void. It is rather unfortunate that the law on this point of practical significance is in a state of utter confusion.

In India the Supreme Court in *Nawabkhan* v. *State of Gujarat*[48] categorically held that an order which infringes a fundamental freedom passed in violation of the *audi alteram partem* rule is a nullity.[49] The appellant in this case had been prosecuted and convicted for disobeying an externment order which was later held invalid for want of hearing. The Apex Court emphasised that an externment order passed in violation of the rules of natural justice is of no effect and its violation is no offence because such a determination is a jurisdictional error going to the very roots of a determination.

However, the decision of the Supreme Court in *Maneka Gandhi* v. *Union of India*[50] created doubts about the efficacy of this proposition. In this case the passport authority had impounded the passport of the appellant without giving any notice and hearing. The court however concluded that the impounding of the passport attracts rules of natural justice and their violation is a fatal flaw which could make the order void. But, taking note of the assurance of the government that the appellant would be provided with a post-decisional hearing, declined to interfere with the impoundment order. The effect of this decision is that an order passed in violation of the rules of natural justice is not void or *non est* and hence can be validated by a post-decisional hearing. The same was the conclusion of the Supreme Court in *Swadeshi Cotton Mills* v. *Union of India*[51]. In this case the Government of India in exercise of its powers under Section 18-AA(1)(*a*) of the Industries Development and Regulation Act passed the order for the taking over of the management of the company by the National Textile Corporation. This order

43. 1964 AC 40.

44. *Id.*, p. 80.

45. *Id.*, p. 86. Lord Morris can be counted on both sides.

46. *Leary* v. *National Union of Vehicle Builders*, (1970) 2 All ER 713. There is a dicta that a decision in violation of natural justice is void. *R.* v. *Aston University Senate: ex p. Roffey*, (1969) 2 WLR 1418. Decision in violation of natural justice was held voidable.

47. 1967 AC 337.

48. (1974) 2 SCC 121: AIR 1974 SC 1471.

49. *Id.*, p. 133.

50. (1978) 1 SCC 248: AIR 1978 SC 597.

51. (1981) 1 SCC 664: AIR 1981 SC 818.

had been passed without compliance with the principles of natural justice. The court speaking through Sarkaria and Desai, JJ., though held that a quasi-judicial or administrative decision rendered in violation of the *audi alteram partem* rule, whenever it can be read as an implied requirement of the law, is null and void, yet it refrained from striking down the impugned order on the assurance of the Solicitor-General that a post-decisional hearing would be given. The operational principle laid down by the court is that an order passed in violation of the rules of natural justice is not such a nullity, *non est* and stillborn which cannot be revived by a post-decisional hearing. It is certainly contrary to the holding of the court in *Nawabkhan*.

Once again the Supreme Court in *Tea Trading Corporation* v. *Pashok Tea Co.*[52], was called upon to pronounce on the effect of breach of the rules of natural justice. In this case in pursuance of two orders passed by the Central Government under clause (*a*) of sub-section (1) of Section 16-E of the Tea Act, 1953, the Tea Trading Corporation of India took over the management of the two estates owned by the Pashok Tea Company. The orders were challenged before the Calcutta High Court in two writ petitions which were allowed. Appeal to the Division Bench also failed. Hence the appeal before the Supreme Court. It may be noted that clause (*a*) of sub-section (1) of Section 16-E of the Tea Act, 1953 is basically the same as Section 18-AA of the Industries Development and Regulation Act which had been found to contain rules of natural justice by necessary implication in *Swadeshi Cotton Mills' case* (supra). The orders in the instant case had been passed without giving any hearing. On the strength of the observation of the Supreme Court it was contended by the government that even if it be held that the impugned orders could be passed only after the company had been given a fair opportunity to be heard, the attributes of a nullity attaching to the two orders make them only voidable and not *non est* and that their "voidability" would also vanish if the opportunity is given *ex post facto*. This contention was seriously challenged on the ground that if a pre-decisional hearing is required to be given either expressly or by necessary implication as part of the rule of natural justice, failure to give it would make the order *non est* or stillborn which cannot be revived by any post-decisional hearing.[53] It is only where pre-decisional hearing cannot be read into the statute because of the necessity

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52. (1981) 4 SCC 113.

53. Bhagwati, J. while writing a foreword to Justice K.N. Goyal's ADMINISTRATIVE LAW (in Hindi) (1981) also mentioned that "it is clear law that if prior hearing is required to be given as a part of the rule of natural justice, failure to give it would indubitably invalidate the exercise of the power and it cannot be saved by post-decisional hearing. It is only where the necessity for prior hearing cannot be read into the statute because to do so would be to defeat the object and purpose of the exercise of the power, that post-decisional hearing is required to be given and if that is not done, the exercise of the power would be vitiated".

of an emergent action, that the post-decisional hearing is required to be given. Thus, in view of the doubts expressed on the majority view in *Swadeshi Cotton Mills* (supra), Koshal, J. thought that this important question of law may be properly determined by a larger Bench.

However, a decision of the Supreme Court in *A.R. Antulay* v. *R.S. Nayak*[54], favoured the proposition that any action in violation of the principles of natural justice is a nullity. One of the questions for the consideration of the Supreme Court was 'whether the Supreme Court's direction dated February 16, 1984 given *suo motu* directing the withdrawal of a criminal case against A.R. Antulay, a former Chief Minister of the State of Maharashtra, from a special judge and its transfer thereof to the High Court without affording an opportunity to him was void and hence liable to be set aside?'. Answering the question in the affirmative the court held that an action in violation of natural justice is a nullity and the trial "coram non judice".

Following the same line of reasoning the Supreme Court in *R.B. Shree Ram Durga Prasad* v. *Settlement Commissioner*[55] held that the decision of the Settlement Commission of denying the composite assessment without hearing renders the action as completely void and of no value.

Nevertheless, it may be pointed out that whenever an order is struck down as invalid, being violative of principles of natural justice, there is no final decision of the case and, therefore, proceedings are left open. All that in done is that the order assailed by virtue of its inherent defect is vacated but the proceedings are not terminated.[56] The administrative authority may start the proceedings de novo.

Those who suggest that a decision in breach of the *audi alteram partem* rule is merely voidable simply try to emphasise the fluctuating contents of the rule and the administrative inconvenience which would be caused if the decision is considered as void. It may be pointed out that the courts should not worry about administrative inconvenience because the administration can well look after its own convenience. Furthermore, in situations of denial of fair hearing at the pre-decisional stage, a post-decisional hearing cannot serve any purpose because in all probability it will be nothing more than a shallow public relations exercise. If the rules of natural justice are sacrificed for the sake of administrative convenience it would be like throwing the baby with the bathwater.

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54. (1988) 2 SCC 602.

55. (1989) 1 SCC 628. *See* also *Ravi S. Naik* v. *Union of India*, 1994 Supp (2) SCC 641. Supreme Court held that order passed in violation of the principles of natural justice is ultra vires and hence suffers from jurisdictional error.

56. *CST* v. *Subhash & Co.*, (2003) 3 SCC 454.

POINTS FOR DISCUSSION

1. Principles of natural justice are not precise rules of unchaining contents; their scope will vary according to the context. Even where the rules of natural justice are prima facie applicable, they may be partly or wholly excluded by clear statutory language or necessary implication. Therefore, the whole concept of natural justice has acquired a kaleidoscopic unpredictability. Against this backdrop the suitability and efficacy of the principles of natural justice in providing a minimum standard Administrative Procedure Code may be discussed. Is it a good substitute for a codified Administrative Procedure Code?

2. The rule against bias has two main aspects: Firstly, that an administrator exercising adjudicatory powers must not have any direct personal or proprietary interest in the outcome of the proceedings. Secondly, there must be a 'real likelihood' of bias. The first rule is very strict but the second is uncertain and vague. How should the test of disqualification for likelihood of bias be formulated? Students may discuss the following formulations:
   (*i*) 'Real likelihood' of bias means 'a reasonable suspicion' of bias.
   (*ii*) 'Real likelihood' of bias means 'actual bias'.

3. Legal representation and cross-examination is not essential to fair hearing and natural justice does not require that reasons for decisions should be given. [*Pett* v. *Greyhound Racing Association (No. 2)*, (1970) 1 QB 46 and *R.* v. *Gaming Board of Great Britain ex parte Bernaim*, (1970) 2 QB 471.] Students may discuss these formulations with special reference to the constitutional requirements of Articles 19 and 21. Students may also attempt to identify the legal basis in the absence of legislative silence on the grounds of which legal representation, cross-examination and reasoned decisions may be made a mandatory procedural requirement for administrative agencies exercising adjudicatory powers.

4. One of the fundamental principles of administrative law is that the violation of the principles of natural justice vitiates an administrative action which may be quashed by a court of law. Against the background of this formulation, students may discuss whether an administrative action in violation of the principles of natural justice is void or voidable. The discussion must include elaboration and reconciliation of the principles of law laid down in *Nawabkhan Abbaskhan* v. *State of Gujarat*, (1974) 2 SCC 121; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 and other recent decisions.

5. In situations where due to some emergent nature of the action pre-decisional hearing cannot be provided, no matter if it is attracted in that situation, ex post facto or post-decisional hearing may be required. The whole concept of post-decisional hearing may be discussed with special reference to India.

6. The word 'exception' in the context of natural justice is a misnomer, because in certain situations the principles of natural justice are inapplicable not by way of an exception but because nothing unfair can be inferred by not applying these principles. In this context students may be asked to identify areas in which the application of the rules of natural justice may be excluded. Can the exclusionary rules be challenged on the ground of unreasonableness in a court of law?

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24. Wade, H.W.R.: *Unlawful Administrative Action: Void or Voidable?* (1967) 83 LQR 499; (1968) 84 LQR 95.

25. Wade, H.W.R.: *The Twilight of Natural Justice*, (1951) 67 LQR 103.

26. Webber, G.J.: *Natural Justice in Recent English Case Law*, (1964) Current Legal Problems 17.

27. Thakker, C.K.: FROM DUTY TO ACT JUDICIALLY TO DUTY TO ACT FAIRLY, (2003) 4 SCC (J) 1.

7

Judicial Review of Administrative Action: Principles

The system of judicial review of administrative action has been inherited from Britain. It is on this foundation that the Indian courts have built the superstructure of control mechanism. The whole law of judicial review of administrative action has been developed by judges on case-to-case basis. Consequently, a thicket of technicality and inconsistency surrounds it.

However, present trend of judicial decisions to widen the scope of judicial review of administrative actions and to restrict the immunity from judicial review to class of cases which relate to deployment of troops and entering into international treaties, etc.[1]

(A) JURISDICTION OF THE SUPREME COURT

(1) Under Articles 32 and 136

India has a hierarchical judicial system in which Supreme Court of India is the Apex Court. It is the final interpreter of law and the ultimate court of appeal in all civil, criminal and constitutional matters. It is also the final protector of people's Fundamental Rights.

Judicial Review is thus not only an integral part of the Constitution but is also a basic structure of the Constitution which cannot be abolished or whittled down even by an amendment of the Constitution.[2] In any democratic society judicial review is the soul of the system because without it democracy and the rule of law cannot be maintained.[3] Thus extraordinary jurisdiction of the Court under Article 32 or 136 of the Constitution cannot be taken away by legislation or principle of election or estoppel or even by amending the Constitution.[4]

The Supreme Court is invested with the power of judicial review under Article 32. Article 32(1) guarantees the right to move the Supreme Court for the enforcement of Fundamental Rights and Article 32(2) invests the Supreme Court with the power to issue directions, orders or writs for the enforcement of these rights. The right to move the Supreme Court for the enforcement of any Fundamental Right is itself a Fundamental Right and the Court has no power to refuse in its discretion to grant appropriate remedy

1. *Indian Railway Construction Co. Ltd.* v. *Ajay Kumar*, (2003) 4 SCC 579.
2. *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461.
3. *Minerva Mills* v. *UOI*, (1980) 3 SCC 625.
4. *Ramchandra Deshpande* v. *Maruti Balaram Haibatti*, 1995 Supp (2) SCC 539.

if the violation of any Fundamental Right is proved.[5] Therefore, it is not only the right and power but the duty of the Supreme Court to protect and safeguard the Fundamental Rights of the people.[6] Where no Fundamental Right of a person is violated, Court can decline jurisdiction. It is for this reason in *Federation of Bar Association, Karnataka* v. *Union of India*[7], the Court declined relief in a PIL petition for the establishment of High Court benches at other places in Karnataka.

The nature and purpose of judicial review is not the review of the decision of the administrative authority but of the decision-making process. Therefore, Supreme Court cannot assume appellate jurisdiction and reappreciate the primary or perceptive facts found by the fact-finding authority.[8] The right of seeking judicial review depends on the facts of each individual case, however, there cannot be a review of an abstract proposition of law.[9]

Though the jurisdiction of the Supreme Court under Article 32 is confined to the enforcement of Fundamental Rights yet if there is a clear abuse of process of the court petition is maintainable even if no violation of any Fundamental Right is involved. Thus when a person manipulated facts in order to get a decree by a court to defeat the ends of justice in such a situation petition under Article 32 is maintainable.[10] While exercising jurisdiction the court will not go into questions of policy of the State which is required to be dealt with by the legislature. On this basis the Court declined jurisdiction where the personal laws of Hindus, Muslims and Christians were challenged as violative of fundamental rights of women.[11] The Court also cannot : suc direction which would result in amendment of government existing policy.[12] Existence of alternative remedy does not affect the jurisdiction of the Writ Court, but it would be a good ground for not entertaining the petition.[13]

The judgment of the Court operates in rem, hence, no new parties can reagitate a concluded issue on fresh grounds. Where the Supreme Court

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5. *Masthan Sahib* v. *Chief Commr., Pondicherry*, AIR 1962 SC 797, 804. *See* also *Fertiliser Corpn. Kamgar Union* v. *UOI*, (1981) 1 SCC 568, 574-75.
6. Thakker, C.K.: ADMINISTRATIVE LAW, (1992) Eastern Book Company.
7. (2000) 6 SCC 715.
8. *H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority* v. *Gopi Nath and Sons*. 1992 Supp (2) SCC 312. *See* also *Apparel Export Promotion Council* v. *A.K. Chopra*, (1999) 1 SCC 579; *UOI* v. *Lt. Gen. R.S. Kadyan*, (2000) 6 SCC 698.
9. *Sarojini Ramaswami* (*Mrs*) v. *UOI*, (1992) 4 SCC 506.
10. *Jhumman Singh* v. *CBI*, (1995) 3 SCC 420.
11. *Ahmedabad Women's Action Committee* v. *UOI*, (1997) 3 SCC 573.
12. *Principal, Madhav Institute of Science and Technology* v. *R.S. Yadav*, (2000) 6 SCC 608.
13. *State of Bihar* v. *Jain Plastics and Chemicals Ltd.*, (2002) 1 SCC 216.

under Article 136 held that special duty allowance payable to Central Government employees in North-Eastern region will not be admissible to employees belonging to the region, a subsequent writ by the local employees on new ground will not be maintainable.[14] In the same manner a final judgment/order passed by the Supreme Court after even exhausting the remedy of review under Article 137 of the Constitution cannot be assailed under Article 32 of the Constitution by an aggrieved person, whether he was the party of the case or not.[15] Although the right to move the Supreme Court for the enforcement of Fundamental Right is itself a fundamental right yet as regards the issuance of writs against judicial orders of the Supreme Court it cannot be allowed. It has been firmly established that the Court can grant compensation for established breach of fundamental rights and abuse of power while exercising jurisdiction under Article 32 of the Constitution.[16] For this purpose the Court can enforce Fundamental Rights even against private bodies or individuals. The Court can exercise jurisdiction suo motu or on the basis of a PIL in the absence of personal approach by the victim.[17] In order to enforce the concept of accountability the Court can also award exemplary damages for oppressive, arbitrary and unconstitutional action of government servants while exercising jurisdiction under Article 32 of the Constitution.[18] The State has a right to change its policy from time to time in public interest under the changing circumstances and, therefore, generally the Court would not interfere unless the change of policy is arbitrary or violative of law and the Constitution.[19]

Article 136 which is in the nature of a residuary reserve power of judicial review in the area of public law lays down that the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal. Thus Article 136 does not confer a right of appeal on any party, but it confers a discretionary power on the Supreme Court to interfere in suitable cases to advance the cause of justice. Even in cases where special leave is granted, the discretionary power vested in the Court continues to remain with the Court even at the stage when appeal comes for hearing. Power under Article 136 of the Constitution, on the one hand, is an exceptional power to be exercised sparingly, with caution and care and to remedy extraordinary situations of gross failure of justice; on the other hand, it is

14. *Sub-Inspector Sadhan Kumar Goswami* v. *UOI*, (1997) 2 SCC 225.

15. *Rupa Ashok Hurra* v. *Ashok Hurra*, (2002) 4 SCC 388.

16. *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416; *Thirath Ram Saini* v. *State of Punjab*, (1997) 11 SCC 623.

17. *Bodhisattva Gautam* v. *Subhra Chakraborty*, (1996) 1 SCC 490.

18. *Common Cause* v. *UOI*, (1996) 6 SCC 593 (petrol pumps' matter).

19. *State of Punjab* v. *Ram Lubhaya Bagga*, (1998) 4 SCC 117.

an overriding power whereunder the Court may generously step in to impart justice and remedy injustice.[20]

Since the Court has power to grant special leave to appeal against the decisions of administrative tribunals and other agencies, it is now regarded as an important mode of judicial review of administrative adjudicatory actions.

Article 136 also refers to tribunals, a term which necessarily refers to a statutory body having the power to affect the rights of the people and the duty to act judicially. A 'tribunal' for the purpose of Article 136 must have some trappings of a law court which include:

(*i*) That the proceedings before it must start on an application in the nature of a plaint.

(*ii*) That it possesses the powers of a civil court in matters compelling attendance of witnesses, discovery and inspection.

(*iii*) That it allows cross-examination and legal representation.

(*iv*) That it decides on the basis of evidence and according to law.

(*v*) That its members are qualified to be judges.[21]

On the basis of these, the Supreme Court found that the Conciliation Officer acting under the U.P. Industrial Disputes Act is not a tribunal as he does not enjoy the powers of a civil court.[22] In the same manner an arbitrator appointed under the Industrial Disputes Act, 1947 is not considered to be a tribunal, as he is appointed by the parties and is not invested with inherent judicial power of the State.[23] But on the other hand, an Industrial Tribunal, Election Commission, Railway Rates Tribunal, Labour Appellate Tribunal, Income Tax Appellate Tribunal, Custodian-General of Evacuee Property, Authority under Payment of Wages Act, Central Government acting under Section 111(3) of the Companies Act and under Section 30 of the Mines and Minerals (Development and Regulation) Act, have been held to be 'tribunals' within the meaning of Article 136. Administrative Service Tribunals constituted under the Administrative Tribunals Act, 1985 are also covered within the jurisdiction of the Supreme Court under Article 136.

The power to grant special leave to appeal is discretionary and, therefore, cannot be defined exhaustively. Courts will exercise this power in exceptional circumstances to prevent the miscarriage of justice.[24] The term 'exceptional circumstances' cannot be defined by any set formula. However, the court may exercise its power in cases where there has been an illegality or irregularity of procedure or violation of the principles of natural justice

20. *Ashok Nagar Welfare Association* v. *R.K. Sharma*, (2002) 1 SCC 749.

21. *Bharat Bank* v. *Employees*, AIR 1950 SC 188.

22. *Jaswant Sugar Mills* v. *Lakshmi Chand*, AIR 1963 SC 677.

23. *Engineering Mazdoor Sabha* v. *Hind Cycles Ltd.*, AIR 1963 SC 874.

24. *Pritam Singh* v. *State*, AIR 1950 SC 169.

resulting in gross miscarriage of justice.[25] In the same manner the Supreme Court may decline jurisdiction where the conduct of the petitioner is objectionable[26] or where appeal involves a matter of purely academic interest and is of no practical value[27] or where appeal is frivolous,[28] or where there is unreasonable delay in filing petitions.[29]

Normally in exercise of its powers under Article 136, the Supreme Court does not re-examine the questions of fact unless the decision of the authority is patently perverse and manifestly unjust.[30] In *Variety Emporium* v. *Mohd. Ibrahim Naina*[31], though the Supreme Court reiterated that concurrent finding of fact by courts below shall not be lightly interfered yet added that this does not mean that injustice must be perpetuated because it has been committed by the lower courts. Therefore, if the concurrent decision is manifestly unjust it is not only right but duty of the Supreme Court to do justice. In the same manner the Court would not grant leave to appeal if other remedies of appeal and revision are available. But it is not a rule without exception.[32] 'Finality clause' in a statute excluding judicial review would not be a bar for the exercise of this jurisdiction by the Supreme Court.[33] The court would not permit the plea of jurisdiction of the tribunal to be raised before it for the first time[34], but where a question of law is involved the court may allow it.[35] In *Ujagar Singh* v. *State (Delhi Admn.)*[36], popularly known as *Vidya Jain murder case*, the Supreme Court, rejecting the application of the special leave to appeal under Article 136, observed that it is time to realise that the jurisdiction of the court to grant special leave to appeal can be invoked in very exceptional circumstances. A question of law of general public importance or a decision which shocks the conscience of the court are some of the prime requisites for the grant of special leave. Substantial question of law must be discernable from the pleadings. If pleadings are contemptuous, irrelevant and incoherent and do not disclose any question of law, much less a substantial question of law, SLP is liable to be dismissed in limine.[37]

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25. *State of U.P.* v. *Ram Manorath*, (1972) 3 SCC 215: AIR 1972 SC 701.
26. *State of Maharashtra* v. *Ramdas Shrinivas Nayak*, (1992) 2 SCC 463.
27. *Controller of Estate Duty* v. *Ratna Kumari Kumbhat*, 1993 Supp (1) SCC 420.
28. *State of Punjab* v. *Bir Singh*, 1992 Supp (2) SCC 103.
29. *Union of India* v. *Om Prakash Agarwal*, 1992 Supp (2) SCC 129.
30. *Gian Singh* v. *State of Punjab*, (1974) 4 SCC 305: AIR 1974 SC 1024. *See* also *Jayaraman* v. *State of T.N.*, 1992 Supp (3) SCC 161; *Hindustan Development Corpn.* v. *State of Raj*, 1995 Supp (2) SCC 752.
31. (1985) 1 SCC 251: AIR 1985 SC 207.
32. *Ram Saran* v. *CTO*, AIR 1962 SC 1326.
33. *Dhakeswari Cotton Mills* v. *CIT*, AIR 1955 SC 154.
34. *Remington Rand of India* v. *T.R. Jambulingum*, (1975) 3 SCC 254: AIR 1974 SC 1915.
35. *Alembic Chemical Works Co. Ltd.* v. *Workmen*, AIR 1961 SC 647.
36. (1979) 4 SCC 530.
37. *Charanjeet Singh* v. *R.C. Jain*, (2003) 1 SCC 758.

Special leave petition may also be granted where against the impugned order no appeal or revision lies.[38]

In order to reach justice to the deprived and disempowered section of the society the Apex Court in *State of Karnataka* v. *A.B. Ingale*[39], held that the power of judicial review under Articles 32, 136, 226 can be exercised to supplement changing social needs and values and felt necessities of the time having regard to social inequalities, inequities and imbalances the law intended to remove. However, the jurisdiction of the Court cannot be invoked lightly. If the amount involved in the appeal is meagre the petition may not be admitted.[40]

Though the principle of res judicata applies to writ proceedings but the Supreme Court held that non-filing of appeals before the Supreme Court by the State in similar matters in the past would not itself bar the jurisdiction of the Court under Article 136 of the Constritution.[41] In the same manner if the SLP has been dismissed in limine[42] or has been dismissed without laying any law the principle of res judicata will not apply.[43] However, respondent will not be permitted to reopen the question which had been decided by the Supreme Court by dismissing the Special Leave Petition filed earlier.[44]

Generally no new plea can be directly taken in SLP but the failure to take plea of non-maintainability of suit before the civil court can be directly taken before the Supreme Court because any order or decree passed by any court without jurisdiction is non est in law.[45]

In order to prevent the abuse of Court's jurisdiction under Article 136 the Court held that if it is satisfied that the respondent abused the process of law and misused the legal system by deceit, falsehood or sharp practice, the court besides granting any other relief may also impose exemplary cost.[46]

It is for the Supreme Court to decide whether to entertain an appeal or not. When the point of law raised in appeal was of general public importance, appeal cannot be dismissed in limine on the preliminary issue of maintainability on the ground that no appeal was preferred against the two earlier decisions of the High Court which were followed in the case under appeal.[47]

38. *Usha K. Pillai* v. *Raj K. Srinivas*, (1993) 2 SCC 208.
39. 1995 Supp (4) SCC 469. (*Per* K. Ramaswamy J.).
40. *Collector of Customs* v. *Madras Rubber Factory*, (1995) 5 SCC 439; *Eicher Goodearth Ltd.* v. *CCE*, (1995) 5 SCC 443.
41. *State of Bihar* v. *Ramdeo Yadav*, (1996) 3 SCC 493.
42. *Yogendra N. Chowdhry* v. *UOI*, (1996) 7 SCC 1.
43. *Kirloskar Bros. Ltd.* v. *ESI Corpn.*, (1996) 2 SCC 682.
44. *State of Gujarat* v. *Bhaterdevi Ramnivas Sanwalram*, (2002) 7 SCC 500.
45. *P.M.A. Metropolitan (Mot : Rev.)* v. *Moran Mar Marthoma*, 1995 Supp (4) SCC 286
46. *Municipal Corpn., Delhi* v. *Kamla Devi*, (1996) 8 SCC 285.
47. *Sales Tax Officer* v. *Shree Durga Oil Mills*, (1998) 1 SCC 572.

Thus a new plea involving a question of law not taken before the forum below can be raised before the Supreme Court.[48] Nevertheless new plea of res judicata will not be allowed to be raised before the Court, if not taken before forum below because res judicata is a mixed question of law and fact.[49]

The Court has power to recall its judgment either on a review petition or suo motu also. The Court recalled its judgment in *S. Jamaldeen* v. *High Court of Madras*[50], suo motu because it had decided the question of inter se seniority of direct and regularised recruits to the Tamil Nadu Judicial Service without notice to the High Court and the Public Service Commission.

Keeping in view the congestion of cases before it, the Supreme Court itself has suggested to the government to curtail its jurisdiction of special leave to appeal under Article 136. But because Article 136 is also a lawyer's paradise, the move always faced strong opposition from the Bar.[51]

48. *Grasim Industries Ltd.* v. *Collector of Customs*, (2002) 4 SCC 297.

49. *Madhukar D. Shinde* v. *Tarabai Aba Shedage*, (2002) 2 SCC 85.

50. (1997) 4 SCC 30 recalled for rehearing in, (1998) 2 SCC 705.

51. *Indian Express*, April 14, 1979, reports:

SUPREME COURT PLEA NOT ACCEPTED BY GOVERNMENT

Express News Service: New Delhi, April 13.—The Government has not accepted the Supreme Court's request to fetter its powers to grant special leave of appeal from any judgment on any matter.

The request was meant to decrease the number of cases pending before the Supreme Court. And it would have necessitated an amendment to Art. 136 of the Constitution

Special leave to appeal is determined by Art. 136 and it is unrestricted in scope. The discretion lies entirely with Supreme Court.

The extraordinary power conferred by Art. 136 cannot be taken away by any legislation short of a constitutional amendment.

The Government which came to power in the wake of the Emergency, does not want to give a remote impression of putting any restriction on the Supreme Court's powers or privileges.

On the other hand, the Supreme Court's predicament is that the cases for the special leave to appeal are piling up. They now average nearly 1000 a month as against a mere 100 a few years ago.

Lord Scarman, former Chairman of the British Law Commission and now a member of the court of appeal who was recently in India, reportedly told the Supreme Court judges that the way they have increased the hearings, the system would collapse under its own weight.

The Government feels that the Supreme Court has itself to blame for the spurt in cases of special leave to appeal. Over the period, the Government believes, the Supreme Court has unnecessarily stretched the scope of Art. 136 and has admitted such cases as it should not have.

A Law Ministry spokesman points out how the Supreme Court used to take care till the early sixties to admit only those cases which related either to the interpretation of the Constitution or to the relationship between two States.

Now in the name of "social justice", according to the Law Ministry spokesman, Article 136 has been stretched beyond recognition, so much so the Supreme Court grants special leave to appeal even in ordinary criminal cases.

No doubt the power of the Supreme Court to grant special leave to appeal from the decision of any court or tribunal save military tribunals is not subject to any

(2) Jurisdiction of the High Courts under Articles 226 and 227

Article 226 empowers the High Courts to issue directions, orders or writs for the enforcement of Fundamental Rights and for any other purpose also. Thus the power of judicial review of the High Courts is wider than that of Supreme Court. The words 'for any other purpose' enable the High Courts to exercise their power of judicial review for the enforcement of ordinary legal rights which are not Fundamental Rights. The jurisdiction of the High Court under Article 226 for the enforcement of Fundamental Rights is mandatory whereas for the enforcement of ordinary legal rights it is discretionary.[52] The power of judicial review of the High Court under Article 226 is constitutional, therefore, no measure of finality given by the legislature to any action or decision can take away this power.[53] High Court is bound to follow the technical procedure of the English Law in the matter of issuing a writ, hence a petition will not be thrown out because the proper writ has not been prayed for.[54] High Court can issue a writ to a person or authority having its location or residence within the territorial jurisdiction of the court; or, if the cause of action either wholly or partly arises within its territorial jurisdiction. Therefore, a High Court can issue a writ even when the person or authority is located outside its territorial jurisdiction.

The power of the High Court under Article 226 is discretionary[55] and the power cannot be exercised as a court of appeal.[56] The jurisdiction is supervisory in nature. It can strike down an impugned rule and direct the authorities to reframe it but cannot itself frame it.[57] The power of judicial review under Article 226 is not directed against the decision but is confined to the decision-making process.[58] High Court would generally not re-appreci-

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constitutional limitation. It is, however, presumed that the cases admitted will not be many and the power conferred will be used sparingly.

According to the Supreme Court sources, the court has imposed certain limitations on its own powers. When the Supreme Court reaches the conclusion that a person has been dealt with arbitrarily or a court or tribunal has not given a fair deal to a litigant, then it gives special leave to appeal.

It is pointed out that the Supreme Court does not assume a jurisdiction which is not warranted by the provisions of the Constitution nor provides a relief which has been omitted in the Constitution. Similarly, the court does not grant special leave on grounds which would not sustain the appeal itself.

52. *Manjula* v. *Director of Public Instruction*, AIR 1952 Ori 344. *See* also *Kailash Chander* v. *State of Haryana*, 1989 Supp (2) SCC 696.
53. *Kihoto Hollohan* v. *Zachillhu*, 1992 Supp (2) SCC 651.
54. *Kanu Sanyal* v. *Distt. Magistrate*, (1973) 2 SCC 674; AIR 1973 SC 2684.
55. *State of Maharashtra* v. *Digambar*, (1995) 5 SCC 730.
56. *State of U.P.* v. *Committee of Management of S.K.M. Inter College*, 1995 Supp (2) SCC 535.
57. *Swapan Kumar Choudhry* v. *Tapas Chakarborty*, (1995) 4 SCC 478.
58. *H.B. Gandhi* v. *Gopinath*, 1992 Supp (2) SCC 312; *Haryana Urban Development Authority* v. *Roochira Ceramics*, (1996) 6 SCC 584.

ate evidences or enter into determination of questions which demand an elaborate examination of evidence or interfere in the punishment imposed unless the administrative determination is mala fide, or made in contravention of principles of natural justice, or prompted by extraneous consideration or is in violation of any constitutional provision, or is such that shocks the conscience of the court.[59] High Court, being a court of plenary jurisdiction, has inherent power to do 'complete justice' between the parties similar to Supreme Court's power under Article 142 of the Constitution.[60] Unless the facts and circumstances of the case clearly justify the laches or delay may disentitle a person from seeking relief.[61] The Constitution places no limitation or fetters on the power of the High Court except self-imposed limitation, therefore, the arms of the court are long enough to reach injustice wherever it is found. It is for this reason that the distinction between public law and private law is being obliterated, and a person can enforce a legal right founded upon a contract or a statute or instrument having the force of law.[62] While dismissing a petition in limine/summary dismissal the High Court must record reasons so that in appeal the Apex Court is not denied opportunity of testing and weighing those reasons.[63]

Court-martial proceedings under the Army Act are subject to review by the High Court under Article 226 of the Constitution. However, court-martial is not subject to superintendence of the High Court under Article 227. Proceedings of a properly constituted court-martial, if conducted in accordance with the rules are beyond the scope of judicial review. Where evidence was sufficient, subject-matter was within jurisdiction, prescribed procedure was followed and punishment awarded was within power, the court held, that the conviction and the sentence passed by the court-martial cannot be disturbed. The Court further held that mere want of proper and adequate pre-trial investigation would not, in the absence of prejudice caused to the accused or violation of a mandatory provision would vitiate the court-martial proceedings.[64]

Where the facts justify filing of petition either under Article 226 or 227 but it is filed under both the Articles, the Court treats the petition under Article 226 so as not to deprive the party of the right to appeal.[65]

59. *B.C. Chaturvedi* v. *UOI*, (1995) 6 SCC 749.
60. *Tax Appellate Tribunal* v. *CIT*, (1996) 7 SCC 454.
61. *State of Maharashtra* v. *Digambar*, (1995) 4 SCC 683; *State of J.&K.* v. *A.K. Gupta*, (1996) 2 SCC 82.
62. *Air India Statutory Corpn.* v. *United Labour Union*, (1997) 9 SCC 377.
63. *Llewellyn Fertado* v. *Govt. of Goa*, (1997) 7 SCC 533.
64. *UOI* v. *A. Hussain (Maj)*, (1998) 1 SCC 537.
65. *Sushilabai Laxminarayan Mudaliyar* v. *Nihal Chand Waghajibhai Shahov*, 1993 Supp (1) SCC 11.

Article 227 invests High Courts with the power of superintendence over administrative agencies exercising adjudicatory powers. The nature of this power is both administrative and judicial.

Article 227 though confers the right of superintendence over all Courts and tribunals throughout the territories in relation to which High Court exercises jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under this Article as a matter of right. In fact power of superintendence casts a duty upon a High Court to keep the inferior Courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duty by such Courts and tribunals in accordance with the law. Only wrong decision may not be the ground for the exercise of jurisdiction under Article 227 unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate Courts and tribunals resulting in grave injustice to any party.[66]

Jurisdiction of the High Court under Article 227 is revisional and not appellate, hence limited and restrictive in nature. For this reason it does not confer an unlimited authority to correct all wrong orders made within the jurisdiction of the Courts and tribunals below. Jurisdiction under Article 227, thus, may be exercised for want of jurisdiction, errors of law, perverse findings, gross violation of the principles of natural justice and where finding of fact is based on no evidence resulting in manifest injustice.[67]

The Forty-second Constitution Amendment Act, 1976 denuded this power of the High Courts by deleting the word 'tribunal' in Article 227, but the Forty-fourth Constitution Amendment Act, 1978 restored this power.

The Supreme Court observed that Article 227 does not invest the High Courts with unlimited right to interfere with the administrative adjudicatory process. This power is to be exercised to prevent grave miscarriage of justice or flagrant violation of law.[68] The power of superintendence of the High Court under Article 227 is not confined to administrative superintendence only, such power includes the power of judicial review also. As regards administrative action the High Court can interfere in cases of erroneous assumption of jurisdiction or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on the face of the record, arbitrary or capricious exercise of authority or discretion, a patent error of procedure, arriving at a finding which is perverse or based on no material, or resulting in manifest injustice. As regards subordinate court its findings of fact can be reviewed if based on no evidence or upon manifest misreading of evidence or if its conclusions are perverse.[69]

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66. *Ouseph Mathai v. M. Abdul Khadir*, (2002) 1 SCC 319.
67. *Essen Dinki v. Rajiv Kumar*, (2002) 8 SCC 400.
68. *D.N. Banerji v. P.R. Mukherjee*, AIR 1953 SC 58.
69. *Achutananda Baidya v. Prafulla Kumar Gayen*, (1997) 5 SCC 76.

The jurisdiction under Arts. 226 and 227 are separate and independent. The power of judicial superintendence over inferior courts and tribunals which is intended to keep them within bounds is not limited by technical rules which govern the exercise of power under Article 226. Thus the power under Article 226 can be exercised only on an application but power under Article 227 can be exercised either on an application or suo motu. In the same proceeding the court can quash an order under Article 227 and also issue further directions, like making further inquiries after taking evidence, which is not available in the proceedings under Article 226. The power under Article 227 may be exercised even in cases where no appeal or revision lies to the High Court.[70] However where any alternative remedy is available to the person, the court may not exercise this power.[71]

The term 'tribunal' in reference to Article 227 is to be interpreted in the same manner as in Article 136. Any authority created by law with the power to adjudicate upon the rights of the parties and invested with the trappings of a lawcourt shall be considered as tribunal. But this will not include a tribunal constituted by or under any law relating to the armed forces. The power of superintendence of the High Court under Article 227 extends not only to quash the decision of a tribunal but also to give directions regarding the disposal of the case. The power under Article 227 may be exercised by the High Court either on petition from an aggrieved person or suo motu.[72] The Constitution Forty-second Amendment Act had added Arts. 323-A and 323-B to the Constitution which had authorised Parliament to establish special courts to perform substitutional role of the High Courts. In 1985 the Administrative Tribunals Act was passed by Parliament and service tribunals were established to determine service matters of government servants. The jurisdiction of High Courts over these tribunals under Arts. 226 and 227 had been taken away as these tribunals had been given substitutional role of the High Courts. However, now the Apex Court in *L. Chandra Kumar* v. *UOI*[73], has restored the power of the High Courts under Arts. 226 and 227 of the Constitution by declaring Arts. 323-A(2) and 323-B(*d*) of the Constitution as unconstitutional. The Court held that the power of judicial review of the High Courts under Arts. 226/227 is a basic feature of the Constitution which cannot be abridged or ousted.

Before leaving the area of public law review, it is pertinent to note that in USA, in the Federal jurisdiction, the use of writs as means of controlling administrative action has been abandoned. The decision of the Supreme

70. *Ram Roop* v. *Bishwa Nath*, AIR 1958 All 456. *See* also *Waryam Singh* v. *Amar Nath*, AIR 1954 SC 215.

71. *Ibid.*

72. *State of Orissa* v. *Murlidhar*, AIR 1963 SC 404.

73. (1997) 3 SCC 261.

Court in *Degge* v. *Hitchcoch*[74], has confined the writ of certiorari to judicial decisions only. Writs have been replaced by injunction, declaratory action, and a combination of the two. The prophesy of Lord Denning, written in 1949, that just as the pick and shovel are no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari and action on the case are not suitable for the winning of freedom in the new age, has thus proved true.[75] Perhaps Lord Denning's prophesy was founded on the technicalities with which these writs suffered.

Judicial control over administrative action is also exercised extensively by remanding the case to the administrative authority instead of merely quashing it as is done in India. It has a definite advantage because besides removing the cause of grievance, the decision largely remains the decision of the administrative authority. However, in American States, writs still hold the ground, though slowly the ground is slipping under their feet. Civil Practice Law and Rules of the New York State, Administrative Review Act of Illinois State and Model State Administrative Procedure Act provide for a simple and less technical form of judicial review of administrative actions.

In principles and modes, public law review in England is more or less the same as in India. Where on the one side prerogative writs are being stripped of their technicalities, on the other an increasing use is being made of the private law remedies of injunction and declaratory actions to control administrative action.

Judicial review of administrative/legislative action is a basic feature of the Constitution which cannot be taken even by amending the Constitution, because by amending the Constitution basic features of the Constitution cannot be abrogated. Therefore, doctrine of immunity from judicial review has been restricted only to a few class of cases, i.e. deployment of troops and foreign affairs and national security. In these areas Courts regard themselves as ill equipped to investigate beyond an initial decision whether the claim of the government is bona fide. Thus even in such non-justiciable area judicial review is not entirely excluded. In justiciable area of judicial review, it is not the review of administrative action but of the process of action. Administrative authority may be compelled to exercise power, but not to exercise it in a particular manner. There may be various options available to the administration, Court will not impose the option which it thinks is the best option. It for the administration to select option which it considers best in public interest. One can classify grounds of judicial review of administrative action into three categories—illegality, irrationality and procedural impropriety. The Courts will be slow to interfere with any ad-

74. 229 US 162 (1913).

75. Denning: FREEDOM UNDER LAW, p. 126.

ministrative action if it does not fall in any of these three categories. The administrative authority must not transgress the limits, substantive or procedural set by the law and must act reasonably. The authority must act properly within law, apply its mind to matters which it is bound to consider and exclude all that is not relevant and there should not be anything so absurd in the decision which no sensible person could even dream. This is what is termed as "Wednesbury test of reasonableness". Over and above this authority must act in good faith. All these factors are not selectively exclusive, they may overlap.[76]

Compliance with the Court Orders

In India the compliance jurisprudence is not so developed. There is no systematic study about the impact and compliance with court orders. It is rightly said that the real trouble of the litigant begins after the court has granted him a decree. Contempt proceedings are too much for a poor litigant who has already suffered financially and physically in a long-drawn-out expensive litigation. However, at present, the law does not provide any alternative. Therefore the need for the development of a system for judicial feedback on impact and compliance cannot be overemphasised.

For the satisfaction of a common man who has no strings to pull the Supreme Court has clearly indicated that if the government does not obey its orders, in suitable cases, the officer concerned may be imprisoned and the government property may be attached. In *Union of India* v. *Satish Chandra*[77], Krishna Iyer, J. observed:

> "We are in no mood to condone wilful procrastination nor suffer wanton stagnation in administration as a ground for default in obeying court orders. Law does not respect lazy bosses and 'cheeky' evaders."

Nevertheless, behaving in a pragmatic manner and taking into consideration the paper-logged procedure and millions of babus and miles of red tape in governmental functioning the court stressed that contempt power must be used sparingly if it is convinced that there has been wilful defiance or disobedience.[78]

(B) PUBLIC LAW REVIEW

(1) Constituency of Public Law Review: Against whom writ can be issued

Under the provisions of Articles 32 and 226 of the Indian Constitution, the Supreme Court and the High Courts have the power to issue writs in

76. See *Indian Railway Construction Co. Ltd.* v. *Ajay Kumar*, (2003) 4 SCC 579.

77. (1980) 2 SCC 144: AIR 1980 SC 601.

78. *Id.* pp. 150-51. Justice P.D. Desai, Chief Justice of the H.P. High Court ordered the government to pay compensation with interest at the residence of the appellant who was unpaid for a decade for acquisition of his property due to governmental inertia and callousness.—*Indian Express*, Chandigarh, May 11, 1984.

the nature of habeas corpus, mandamus, certiorari, prohibition and quo warranto. The jurisdiction of the Supreme Court is limited only to the enforcement of fundamental rights, while the High Courts can issue writs not only for the enforcement of fundamental rights but for other purposes also.

1. *Authorities amenable to the writ jurisdiction of the Supreme Court.*— The main purpose of Article 32 is to protect the individual against the infringement of his fundamental rights. The threat to fundamental rights may arise from the following sources:

(*a*) Government and Parliament of India, Governments and legislatures of States and local governments.

(*b*) Government departmental undertakings.

(*c*) Agencies incorporated by statutes.

(*d*) Agencies registered under statutes, e.g., Companies Act and Societies Registration Act.

(*e*) Courts.

(*f*) Private individuals and bodies.

Judicial opinion is clear that the authorities falling under the first three categories are amenable to the writ jurisdiction of the Supreme Court and are included within the definition of 'State' in Article 12.[79]

Agencies falling under the fourth category (incorporated public or private companies, government companies, registered societies) may be included within the term 'State' and, therefore, are amenable to the writ jurisdiction of the Supreme Court, if such authorities are instrumentalities or agencies of the Government.[80]

Courts of law are not mentioned as such in Article 12 but they may pose a threat to the fundamental rights of the people in exercise of their administrative powers. In *Prem Chand Garg* v. *Excise Commr.*[81], the Supreme Court struck down certain rules framed by it as violative of fundamental rights.

Some of the fundamental rights given under Articles 15(2), 17, 23(1) and 24 can be claimed against private individuals also. The judicial opinion is that these rights though belong to private individuals cannot be enforced by private individuals. Therefore, as the law stands today, such private individuals and bodies are not amenable to the jurisdiction of the Supreme

79. *Rajasthan State Electricity Board* v. *Mohan Lal*, AIR 1967 SC 1857; *Sukhdev Singh* v. *Bhagatram*, (1975) 1 SCC 421: AIR 1975 SC 1331.

80. *R.D. Shetty* v. *International Airports Authority*, (1979) 3 SCC 489: AIR 1979 SC 1628. For details read under the rubric "*Authorities amenable to the writ jurisdiction of the High Court*" in this Chapter.

81. AIR 1963 SC 996.

Court, no matter they violate fundamental rights.[82] There seems to be no valid reason for this kind of a judicial exclusion.

The approach of the court in the area of fundamental rights must not be whether the authority is 'State' within the meaning of Article 12. The correct approach should be that every authority or person who poses a threat to a fundamental right should be amenable to the jurisdiction of the court. Therefore, not the 'type of agency' but the 'threat to the fundamental rights' must be the determining factor for the issue of writs under Article 32.

2. *Authorities amenable to the writ jurisdiction of High Courts.*—The High Courts have a wider power to issue writs against 'any person or authority' for the enforcement of fundamental rights and any other legal right. As regards the 'person and authority' against whom such writs can be issued, the law seems to be in a thicket of inconsistencies. There is no controversy about the writs of habeas corpus and quo warranto which can be issued against private individuals and public officers respectively. Therefore, the discussion will mainly concentrate on writs of certiorari, prohibition and mandamus.

It is gratifying to note that the area for the operation of these writs has been extended, and rightly so, to cover various administrative agencies exercising multifarious functions.

There is no dispute that all constitutional and administrative authorities are amenable to the jurisdiction of the courts. Therefore a writ can be issued against public acts of the President of India, Governors, Union and State Governments, Ministers, government officers and departments, and other bodies given in the Constitution, i.e., Union Public Service Commission, Election Tribunal, Finance Commission, Water Dispute Authority and Attorney-General of India.[83]

The combined effect of *In re Constitution of India*[84] and *State of Punjab* v. *Satyapal*[85], is that a writ can be issued in appropriate cases, where there is a violation of the Constitution or any law, to Parliament and State legislatures.

82. Writ of habeas corpus being the exception.

83. See *Madhav Rao Scindia* v. *Union of India*, (1971) 1 SCC 85: AIR 1971 SC 530; *K.A. Mathialagan* v. *Governor*, AIR 1973 Mad 198; *Shivji Nathubhai* v. *Union of India*, AIR 1960 SC 606; *K. Venkataramaiah* v. *State of A.P.*, AIR 1960 AP 420; *Deodutt Sharma* v. *Zahoor Ahmed*, AIR 1960 Raj 25; *G. Nageswara Rao* v. *APSRTC*, AIR 1959 SC 308; *Mira Chatterjee* v. *Public Service Commission*, AIR 1958 Cal 345; *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405, 432: AIR 1978 SC 851; *Mayer Simon* v. *Advocate-General*, AIR 1975 Ker 57.

84. AIR 1965 SC 745.

85. AIR 1969 SC 903.

A more recent decision of the Supreme Court in *State of M.P.* v. *Babulal*[86] has established the law beyond doubt that a writ of certiorari can be issued against a court to correct the record if the court has usurped jurisdiction. In this case, a civil suit, collusive in nature, was filed by Babulal against one Baddiya, a member of the Scheduled Tribe who was prohibited under a law of Madhya Pradesh to transfer land to a non-tribal except with the prior permission of the competent authority, for mutation in revenue record as owner of land. The court decreed the suit on the basis of a compromise deed filed by the parties transferring the rights in favour of the plaintiff. The government filed a writ before the High Court which was dismissed with an advice that the government could go in for declaration. On appeal the Supreme Court issued the writ of certiorari. The writ can also be issued to any judge quashing an action taken in an administrative capacity.[87]

The opinion of the courts is also decisive that writs can be issued to statutory bodies irrespective of their functions and 'profit' orientations. Therefore writs can be issued to bodies like LIC, NSC, University, Dock Labour Board, State Transport Corporation, Warehousing Corporation, Steel Authority of India, etc.[88]

The law relating to the amenability of registered agencies, i.e., companies registered under the Indian Companies Act and societies registered under the Societies Registration Act, is still in a developing stage and has not reached the stage of maturity.

However, some High Courts have taken the view that not only government companies but private companies also are amenable to the writ jurisdiction because their bye-laws have the force of law. Standing orders made by the companies under the Industrial Employment (Standing Orders) Act, 1946 were considered as having the force of law.[89] The Kerala High Court also issued a writ against the Cashew Corporation of India, a government company, on the ground that it was performing a statutory function, under the Imports and Exports Control Act, 1947 and Import Control Order, 1955, of controlling import and export of cashewnuts.[90] Similarly, various

86. (1977) 2 SCC 435: AIR 1977 SC 1718.

87. See *K. Prabhakaran* v. *State of Kerala*, AIR 1970 Ker 27 (FB); *Pradyat Kumar Bose* v. *Chief Justice, Calcutta H.C.*, AIR 1956 SC 285 (Supreme Court did not express any final opinion).

88. *LIC* v. *S.K. Mukherjee*, AIR 1964 SC 847; *Mafatlal N. Barot* v. *Divl. Controller, State Transport Corpn.*, AIR 1966 SC 1364; *N.N. Misra* v. *V.C. Gorakhpur University*, AIR 1975 All 290; *Hira Nath Mishra* v. *Principal, Rajendra Medical College*, (1973) 1 SCC 805: AIR 1973 SC 1260; *Bihar State Harijan Kalyan Parishad* v. *Union of India*, (1985) 2 SCC 644: AIR 1985 SC 983.

89. *Borhan Kumar* v. *Indian Oil Corpn.*, AIR 1971 Pat 174; *Prafulla Chandra* v. *Oil India Ltd.*, AIR 1971 A&N 19; *Abani Bhusan* v. *Hindusthan Cables Ltd.*, AIR 1968 Cal 124.

90. *K.L. Mathew* v. *Union of India*, AIR 1974 Ker 4.

High Courts have issued writs against societies registered under the Societies Registration Act on the ground that their bye-laws have statutory force.[91] However, the view of the Supreme Court in *Cooperative Central Bank Ltd.* v. *Addl. Industrial Tribunal*[92], does not favour this approach.

An authority may also be constituted under the executive powers of government. Such authorities, though do not owe their origin to any statute, are controlled and regulated by the government. The Calcutta High Court was of the view that such agencies are amenable to the writ jurisdiction of the High Court and issued a writ against the State Medical Faculty, an unincorporated or non-statutory body, solely established by the government, in exercise of its executive powers.[93] However, the High Courts of Manipur and Madhya Pradesh reached a different conclusion because in their opinion such bodies cannot be classified as public authorities.[94] As regards the amenability of private institutions and private persons to the writ jurisdiction of the High Courts, the trend of judicial decisions is wholesome. The courts have broken new ground in order to redress the injury caused to a private individual. The Supreme Court has taken the view that a writ can be issued against a private college affiliated to the university on the ground that the university rules which are applied to the college especially in disciplinary matters of the staff have the force of law.[95] In the same manner, students can invoke the writ jurisdiction of the High Courts against a private college for the violation of any university rule which has a force of law.[96] In *Rajsoni* v. *Air Officer-in-charge Administration*[97], the Supreme Court further held that a private body even if it is not a State under Article 12 but if governed by a statute is bound to provide the benefit under the statute and hence the benefit of writ would be available. In the case above, the Supreme Court issued writ against an Air Force School which was unaided but recognised and the Delhi Education Act and Rules governed it.

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91. *Dukhooram* v. *Coop. Agrl. Assn.*, AIR 1961 MP 289; *Madan Mohan* v. *State of W.B.*, AIR 1966 Cal 23; *Ramswarup* v. *M.P. State Coop. Marketing Federation*, AIR 1976 MP 152; *Harbhajan Singh* v. *State of Punjab*, AIR 1973 P & H 31; *Nayagarh Coop Central Bank Ltd.* v. *N. Rath*, (1977) 3 SCC 576: AIR 1977 SC 112; *Amir Jamia* v. *Deshrath Raj*, ILR 1969 Del 202.
92. (1969) 2 SCC 43: AIR 1970 SC 245.
93. *Bijoy Ranjan* v. *B.C. Das Gupta*, AIR 1953 Cal 289.
94. *Satkhosei Thangeo* v. *President, D.S.S. and A. Board*, AIR 1968 Mani 68; *S.K. Kalani & Co.* v. *Iron and Steel Controller*, AIR 1969 MP 25.
95. *P.R. Jodh* v. *A.L. Pande*, (1971) 1 LLJ 26; *Executive Committee of Vaish Degree College* v. *Lakshmi Narain*, (1976) 2 SCC 58: AIR 1976 SC 888.
96. *Kumkum Khanna* v. *Principal, Jesus and Mary College*, AIR 1976 Del 35. See also *G. Misra* v. *Orissa Assn. of Sanskrit Learning and Culture*, AIR 1971 Ori 212; *H. Mahtab* v. *Chief Minister, Orissa*, AIR 1971 Ori 175; *Radha Kumari* v. *M.M. Mahila Mahavidyalaya*, AIR 1976 Pat 378.
97. (1990) 3 SCC 261.

The Supreme Court in *R.D. Shetty* v. *International Airports Authority*[1], has rightly extended its reach in matters of issuing writs by liberalising the test which brings an administrative authority within the gravitational orbit of the term 'State' in Article 12 of the Constitution. The core question in writ jurisdiction in India has always been whether an administrative authority is included in the category of 'other authorities' as contemplated by Article 12 within the definition of the term 'State'. In *Rajasthan Electricity Board* v. *Mohan Lal*[2], the court held that a constitutional or statutory authority would be within the meaning of the expression 'other authorities' if it has been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law. This test was followed in *Sukhdev Singh* v. *Bhagatram*[3]. However, in this case, Mathew, J. enunciated a broader test, namely, whether the administrative authority is an instrumentality or agency of the government: if it is, it would fall within the meaning of the expression 'other authorities' and would be 'State'. This test of 'governmental instrumentality or agency' was found to be most satisfactory by the Supreme Court in *R. D. Shetty* v. *International Airports Authority*[4]. In this case one of the questions involved was whether the International Airports Authority constituted under the International Airports Authority Act, 1971 is 'State' within the meaning of that expression in Article 12. It is no denying the fact that the question of determining whether an administrative authority is acting as an instrumentality or agency of the government is a highly complex question. However, Bhagwati, J. attempted to particularise certain relevant factors which may provide an answer to the above question, though such factors may not be exhaustive. He observed that a finding of extensive and unusual financial assistance plus an unusual degree of control over the management and policies might lead one to characterise an operation as State action. Moreover, the existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. It may also be a relevant factor to consider whether the administrative authority enjoys monopoly status which is State conferred or State protected, for there can be little doubt that this type of monopoly status would tie the authority to the State. Again, if the functions of the authority are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the authority as an instrumentality or agency of the government. However, it does not mean that an agency which is otherwise a private entity, would be an

1. (1979) 3 SCC 489: AIR 1979 SC 1628.
2. AIR 1967 SC 1857.
3. (1975) 1 SCC 421: AIR 1975 SC 1331.
4. (1979) 3 SCC 489: AIR 1979 SC 1628.

instrumentality of the government by reason of carrying the functions of public importance. But the public nature of functions, if impregnated with governmental character or tied or entwined with government or fortified by some other additional factor, may render the authority an instrumentality or agency of the government. Specifically, if a department of government is transferred to an administrative authority, it would be a strong factor supportive of this inference. The court will have to consider the cumulative effect of these various factors and arrive at its decision on the basis of a particularised inquiry into the facts and circumstances of each case. It is not enough to examine seriatim each of the factors upon which an administrative authority is claimed to be an instrumentality or agency of the government and to dismiss each individually as being insufficient to support a finding to that effect. It is the aggregate or cumulative effect of all the relevant factors that is controlling.[5] Therefore, in order to decide whether an administrative authority is subject to the writ issuing jurisdiction of the court, the test is not the establishment of the authority by a statute or its incorporation under the Companies Act, 1956 or Societies Registration Act, 1860 but the relationship with the government.

Picking up the same thread the Supreme Court in *Som Prakash Rekhi* v. *Union of India*[6], held that the Bharat Petroleum Corporation, a government company registered under the Indian Companies Act, 1956, is 'State' within the meaning of Article 12 of the Constitution. By the Burmah Shell (Acquisition of Undertaking in India) Act, 1976, the government had acquired the undertakings in India of the Burmah Shell Oil Storage and Distribution Company and handed them over to Bharat Petroleum Corporation Ltd., a government company formed for this purpose. A writ petition was filed by an employee of the Burmah Shell Company, who had retired and was entitled to get pension from the Bharat Petroleum Corporation, for the restoration of cut in his pension. A preliminary objection was taken against the writ that no writ could lie against Bharat Petroleum Ltd. since it being a company registered under the Indian Companies Act, was not 'State' within the meaning of Article 12 of the Constitution. Overruling the objection the Supreme Court held that the true test for classifying a body as 'State' within the meaning of Article 12 is not whether it is created by a statute or under a statute but whether besides discharging the functions or doing business as the proxy of the State, there must be an element of ability to affect legal relations by virtue of power vested in it by the law.[7] While dealing with the various forms of public enterprise such as government departments, statutory

5. *R.D. Shetty* v. *International Airports Authority*, (1979) 3 SCC 489, 510, 511: AIR 1979 SC 1628.
6. (1981) 1 SCC 449: AIR 1981 SC 212.
7. *Id.*, p. 452 (SCC).

corporations and government companies, the Court observed that merely because a company or other legal person had functional and jural individuality for certain purposes and certain areas of law, it did not follow that for the effective enforcement of the fundamental rights "We should not scan the real character of the entity". If it was found that it was "a mere agent or surrogate of the State" and was in fact owned by the State or controlled by the State and "in effect as incarnation of State", why should it not be included within Article 12 of the Constitution. In the instant case on the basis of the extensive control exercised by the government through the Acquisition Act, 1976 the Court ruled that unlike an ordinary company Bharat Petroleum Ltd. was a limb of government, an agency of the State, a vicarious creature of statute working on the wheels of the Acquisition Act.

Applying the same "instrumentality or agency" test in *Ajay Hasia* v. *Khalid Mujib*[8], the Supreme Court held that the Regional Engineering College, Srinagar established and administered by a society registered under the Jammu and Kashmir Registration of Societies Act, 1898 is 'State' within the meaning of Article 12. In this case the validity of admission procedure of the college had been challenged. The Court observed that the composition of the society was dominated by the representatives of the Central and State Governments; the rules to be made by the society had to be approved by the Central Government and the accounts of the society were required to be submitted for government approval and scrutiny. In view of such control mechanism of the government, the engineering college was held to be an "other authority" within the meaning of Article 12 of the Constitution.

Against the backdrop of these cases now it has been consistently held that government companies and cooperative societies are 'State' within the meaning of Article 12 of the Constitution. Therefore, now bodies such as Food Corporation of India,[9] Oil and Natural Gas Commission,[10] Bihar State Electricity Board,[11] U.P. State Warehousing Corporation,[12] Panchayat,[13] Cooperative Society,[14] Central Inland Water Transport Corporation,[15] Life Insurance Corporation,[16] Industrial Finance Corporation,[17] Road Transport

8. (1981) 1 SCC 722: AIR 1981 SC 487.
9. *State of Punjab* v. *Raja Ram*, (1981) 2 SCC 66: AIR 1981 SC 1694.
10. *K.C Joshi* v. *Union of India*, (1985) 3 SCC 153: AIR 1985 SC 1046.
11. *Surya Narain Yadav* v. *B.S.E. Board*, (1985) 3 SCC 38: AIR 1985 SC 941.
12. *U.P. Warehousing Corpn.* v. *Vijay Narain*, (1980) 3 SCC 459: AIR 1980 SC 840.
13. *State of Gujarat* v. *R.L. Keshavlal*, (1980) 4 SCC 653: AIR 1981 SC 53.
14. *Chotelal Panna Lall* v. *D.M., Indore*, AIR 1978 MP 191. *See* also *Tekraj Vasandi* v. *UOI*, (1988) 3 SCC 459. Supreme Court held that a registered society will be treated as 'State' if either government business has been undertaken by it or it is performing a public obligation of the State
15. *Central Inland Water Transport Corpn.* v. *Brojo Nath Ganguli*, (1986) 3 SCC 156
16. *LIC* v. *Manubhai D. Shah*, (1992) 3 SCC 637.
17. *Sukhdev Singh* v. *Bhagatram*, (1975) 1 SCC 421

Corporation,[18] Railway Board,[19] Reserve Bank of India,[20] Nationalised Banks,[21] State Finance Corporation,[22] Bharat Petroleum Corporation,[23] Industrial Statistical Institute,[24] Steel Authority of India,[25] Project and Equipment Corporation of India,[26] Hindustan Steels Limited,[27] Indian Council of Agricultural Research,[28] Modern Bakery,[29] School run by a Public Trust receiving full or substantial amount of expenses by way of grant from Government,[30] G.B. Pant University of Agriculture and Technology[31] and Indian Council of Agricultural Research[32] have been brought within the writ jurisdiction of the courts. Food Corporation of India is an instrumentality of State because one expects a fair and impartial deal from it.[33] But applying the same 'instrumentality and agency text' the Court held that the Institute of Constitutional and Parliamentary Studies, New Delhi is not 'State' for the purposes of writ jurisdiction.[34]

Even though the courts in India have greatly extended the meaning of the term 'State' in order to extend their long arms nevertheless the question still to be decided is whether a public corporation owned by private individuals can be considered as 'State'. This question was debated before the Supreme Court in *M.C. Mehta* v. *Union of India*[35]. In this case the point for discussion was whether Shriram Fertilizer and Chemicals Ltd., Delhi, a public company owned by Delhi Cloth Mills Ltd. is 'State' within the meaning of Article 12 of the Constitution. It was contended that Shriram Company is 'State' because it is carrying on an industry vital to the public interest with a potential to affect the life and health of the people under the active control of the government. Furthermore it is carrying on an industry which according to the declared policy of the government was ultimately intended to be carried out by the government itself. It was also pointed out that a sizeable financial aid comes from the government. Taking aid of the

18. *Mysore State Road Transpt. Corpn.* v. *Devraj Urs*, (1976) 2 SCC 863.
19. *Rly. Board* v. *Observer Publications*, (1972) 2 SCC 266.
20. *Reserve Bank of India* v. *Paliwal*, (1976) 4 SCC 838.
21. *K. Shephard* v. *Union of India*, (1987) 4 SCC 431.
22. *Gujarat Finance Corpn.* v. *Lotus Hotels*, (1983) 3 SCC 379.
23. *M.S. Desai* v. *Hindustan Petroleum Corpn.*, AIR 1987 Guj 19.
24. *Mishra* v. *Indian Statistical Institute*, (1983) 4 SCC 582.
25. *Bihar State Harijan Kalyan Parishad* v. *UOI*, (1985) 2 SCC 644.
26. *A.L. Kalra* v. *Project and Engineering Corpn. of India*, (1984) 3 SCC 316.
27. *Workmen* v. *Hindustan Steels Ltd.*, 1984 Supp SCC 554.
28. *P.K. Ramachandra Iyer* v. *UOI*, (1984) 2 SCC 141.
29. *Modern Food Industries* v. *Juvekar*, AIR 1988 Guj 261.
30. *Manmohan Singh* v. *U.T. Chandigarh*, 1984 Supp SCC 540.
31. *Chairman, Combined Entrance Exam.* v. *Osiris Das*, (1992) 3 SCC 543.
32. *S.M. Ilyas (Dr)* v. *I.C.A.R.*, (1993) 1 SCC 182.
33. *Food Corpn. of India Workers' Union* v. *Food Corpn. of India*, (1996) 9 SCC 439.
34. *Tekraj Vasandi* v. *Union of India*, (1988) 1 SCC 236.
35. (1987) 1 SCC 395.

American State Action doctrine, it was also argued that a private activity if supported, controlled or regulated by State may get so intertwined with governmental activity as to be termed State action and it would then be subject to the same constitutional restraints as the State. The Supreme Court though discussed these arguments in detail leading to an inescapable conclusion that the corporate device will not be allowed to be used as a barrier for ousting the Constitutional Control of Fundamental Rights, yet it missed a unique opportunity of deciding the question squarely which had a direct bearing on the expansion of human rights jurisprudence and social conscientiousness with reference to corporate structure in India.

However, following the same liberal trend the Supreme Court in *Unni Krishnan* v. *State of A.P.*[36] observed that the term 'authority' used in Article 226 must receive a liberal meaning unlike the term in Article 12 because Article 12 is relevant only for the enforcement of Fundamental Rights under Article 32 but Article 226 confers powers on the High Court not only for the enforcement of Fundamental Rights but for non-fundamental rights also. Therefore, the term 'authority' as used in Article 226 must not be confined only to statutory authorities and instrumentalities of the State. It may cover any other person or body performing public duty. Applying the test of 'public duty' the Supreme Court held that a private medical/engineering college comes within the writ jurisdiction of the Court irrespective of the question of aid and affiliation. Therefore, where 'public interest element' is present writ is maintainable. The Apex Court thus allowed a writ against a non-aided private educational institution where its employees were seeking parity in scale with employees of government institutions.[37]

In *Pardeep Kumar Biswas* v. *Indian Institute of Chemical Biology*[38], once again got the opportunity to define the scope of word 'state' in Article 12 of the Constitution which determines the reach of writ jurisdiction of the Constitutional Courts. In this case appellant had filed a writ petition against Indian Institute of Chemical Biology, Calcutta, a unit of Council of Scientific and Industrial Research (CSIR) for quashing his termination order before the Calcutta High Court which was rejected on the ground that CSIR is not a "state" as decided by the Supreme Court as back as 1975 in *Sabhajit Tiwari* v. *Union of India*[39] and hence not under the writ jurisdiction of the Court. Appellant approached the Supreme Court where two-judge Bench decided that the decision in *Sabhajit Tiwari case* deserves reconsideration. Therefore, the matter was referred to the Constitution Bench.

36. (1993) 1 SCC 645.

37. *K. Krishnamacharyulu* v. *Sri Venkateshwara Hindu College of Engineering*, (1997) 3 SCC 571.

38. (2002) 5 SCC 111.

39. (1975) 1 SCC 485.

Overruling *Sabhajit Tiwari* ruling, the Constitution Bench held that CSIR is 'state' within the meaning of the term in Article 12 and hence within the writ jurisdiction of the Court. Majority of the Bench opined that the definition of the term 'state' in Article 12 of the Constitution is inclusive and not exhaustive and hence represents "great generalities of the Constitution" the contents of which are to be supplied by the Court from time to time, and further held that bodies created for the purpose of promoting the educational and economic interests of the people are covered within the scope of 'other authorities' in Article 12 of the Constitution The test applied in this case was that whether the authority is financially, functionally and administratively dominated or under the control of the government.

Such a control must be particular to the authority and must be pervasive. If it is found then the authority/body is a 'state' within the meaning of Article 12. Amplifying the reason for the need to expand the meaning of the term 'state', the Court observed that with the widening of the concept of equality under Articles 14 and 16 of the Constitution by judicial interpretation Courts sought to curb arbitrary exercise of power against individual by 'Centers of power' and for this reason corresponding expansion in judicial definition of the term 'state', to bring all such powers within the writ jurisdiction of the Supreme Court and the High Courts. Therefore, a body, whether created by a statute or under a statute, if set up in the national interest to further the economic welfare of the society, a function which is fundamental in the governance of the country, falls within the definition of the term 'state' being an 'other authority'. The Court indicated that powers vested in the Prime Minister as ex officio President of the Society proves the dominant role played by the government in the affairs of the CSIR.

In another case *Mysore Paper Mills Ltd.* v. *Mysore Paper Mills Officers' Association*[40] Court held a government company where 97% of its shares are held by the government or financial institutions under the control of the government, its directors are nominee of the government and is entrusted with the public duties is 'State' within Article 12 of the Constitution being the agency and instrumentality of the state because these facts show a pervasive state control over the day-to-day functioning of the company. Applying the test the Court concluded that Mysore Paper Mills Ltd. a government company, registered under the Companies Act, is 'state', hence, under the writ jurisdiction of the Court. On the same analogy, nationalised banks were held to be 'State'.[41]

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40. (2002) 2 SCC 167.
41. *Bank of India* v. *O.P. Swarnkar*, (2003) 2 SCC 721.

Within the area of public law review an interesting question which came before the Court was whether a society though not sponsored by the government but taken over by the government under the Cooperative Societies Act is 'State' in order to be within the jurisdictional reach of the writ jurisdiction. The matter is pending before the Constitution Bench of the Supreme Court.[42]

It is no denying the fact that though the extension of the Court's writ aid to companies and societies would make them more responsible and responsive yet if it in any manner hampers the corporate management viability it may adversely affect the economic grounds and accountability. It is for this reason that the Supreme Court has left the question open whether Air India Corporation is a State and, therefore, bound by constitutional reservations under Article 16(4) of the Constitution.[43]

Though the trends in judicial behaviour as discussed above are welcome, the whole approach has been halting and variegated. The trend of the Indian courts to take shelter behind technicalities of law makes the growth of law stultifying. The primary purpose of jurisdiction of the High Courts as laid down under Article 226(1) is to protect the 'little man' from any injury of a substantial nature or substantial failure of justice besides enforcing his fundamental rights. Therefore, instead of being obsessed with the status of 'person or authority', the court must exercise its power for the protection of the 'little man'. Threat of injustice may arise not only from the constitutional or statutory agencies but also from private persons and bodies commanding vast economic and political powers. It is gratifying that the Apex Court in *Bodhisattva Gautam* v. *Subhra Chakaraborty*[44] held that the court can enforce fundamental rights even against private bodies or individuals and also award compensation for violation of fundamental rights. The court may exercise its jurisdiction suo motu or on the basis of a PIL in the absence of personal approach by the victim.

Generally speaking no writ can be issued to any constitutional functionary to form an opinion about the eligibility and suitability of a person for appointment as a judge of the superior court. In this case allegedly a seniormost District and Sessions Judge wanted his name to be considered for appointment as a High Court judge which was held not permissible.[45]

42. See *P. Vaidya Rajan* v. *State of T.N.*, 1992 Supp (2) SCC 104.

43. *Air-India* v. *B.R. Age*, (1995) 6 SCC 359. *See* also *Calcutta State Transport Corporation* v. *CIT*, (1996) 8 SCC 758. Whether STC is an 'authority' under Art. 12, question was left open.

44. (1996) 1 SCC 490. This case came before the Supreme Court in an SLP petition under Art. 136.

45. *R.K. Mahajan* v. *Chief Justice of H.P. High Court*, 1995 Supp (3) SCC 655.

(2) Locus Standi to challenge Administrative Action

After discussing the subject 'against whom writ may lie', a legitimate question arises as to who can challenge an administrative action? This brings us to the problem of standing of a person necessary to entitle him to sue the administrative agencies. The development in this area has been a patch-work of case-law. It has not yet been fully realised that no one will spend his money and time in challenging an action unless he has some interest in it; why then should he be discouraged?

In case of a writ of habeas corpus any person can file the writ to secure the release of a person in illegal detention, public or private. In the early days of 1979, a lawyer of the Supreme Court filed a writ to secure the release of undertrials in various jails in Bihar.[46]

A writ of quo warranto also can be filed by any person to challenge the appointment of a person to a public office, whether or not he has a personal interest in it. This is allowed perhaps on the ground that everyone has an interest that public money must not be wasted on invalid appointments. In the same manner filing of a writ petition in public interest is also an exception to the general rule of locus standi.[47]

The general rule governing the writs of mandamus and certiorari is that it is only the person whose rights have been infringed who can apply for the writ. However, it is not necessary that it must be only his personal right which is adversely affected. He may challenge an action even when he has a right common with others. Therefore, a taxpayer shall have standing to prevent a misapplication or misappropriation of public funds by an authority,[48] and an ordinary citizen shall have standing to challenge an election held contrary to the provisions of law.[49] In the same manner, in case of a breach or abuse of a statutory duty, anybody who is adversely affected can file a petition for writ no matter if he does not have an enforceable right.[50]

However, a mere interest would not entitle a person to a writ unless he can show that his interest is more than that of an ordinary member. It is on this count that the Supreme Court refused to grant the writs in *Maganbhai* v. *Union of India*[51], where the petitioners sought to restrain the government from giving effect to a Kutch Tribunal award by handing over certain territory in Rann of Kutch to Pakistan. The Court found that no petitioner had

46. *Hussainara Khatoon (I) to (VI)* v. *Home Secy., State of Bihar*, (1980) 1 SCC 81, 91, 93, 98, 108, 115.
47. *Gulam Qadir* v. *Special Tribunal*, (2002) 1 SCC 33.
48. *Kalyan Singh* v. *State of Punjab*, AIR 1962 SC 1183.
49. *T. Venkateswara Rao* v. *State of A.P.*, AIR 1958 AP 458.
50. *K.N. Guruswamy* v. *State of Mysore*, AIR 1954 SC 592.
51. (1970) 3 SCC 400: AIR 1969 SC 783. *See* also *I.C. Bose Tenants' Assn.* v. *Collector*, AIR 1977 Cal 437.

any clear interest in the action of the government, because neither did anyone live there nor did they have any property there. On the other hand, a member of the public who has a right to worship in a particular temple shall have locus standi to challenge the misapplication or misappropriation of temple property and the appointment of trustees.[52]

In case of juristic persons such as companies, normally, the juristic person must vindicate its own rights. However, the trend of judicial decisions is that even a shareholder can sue for the infringement of a juristic person's right if he can show that his personal rights are directly and substantially affected adversely by the action.[53]

It is gratifying to note that the courts have started realising the public purpose which public law review serves in any intensive form of society. The essential purpose of public law review is not so much the enforcement of rights as the control of administrative action. Therefore, whosoever challenges an administrative action which is patently bad, the courts ought not to raise objection in reviewing such action on the technical ground of locus standi.

In another case, the International Airports Authority invited tenders from "registered second-class hoteliers" for running a second-class restaurant and two snack bars at the International Airport, Bombay. It was stipulated that "the acceptance of tender will rest with the Director...who reserves for himself the right to reject all or any of the tenders received without assigning any reason". In this case the highest tender was accepted but the snag was that the tenderer was not a 'registered second-class hotelier'. A writ was filed by a person who had not filed any tender, challenging the award of the contract to a person who was not a registered second-class hotelier. Objection was raised regarding maintainability of the proceedings on the ground of locus standi. The contention of the petitioner 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 it could be ignored in his case also. The petitioner argued that he did not fill a tender because of the prescribed requisite qualification. He could have applied had he known that the condition of eligibility was indeed flexible. This resulted in violation of the right to equality. The Supreme Court though did not disturb the contract in exercise of its discretion but accepted the plea on standing.[54]

These liberal trends in judicial behaviour are certainly welcome but one is not to forget the warning given by Prof de Smith that in a developed legal

52. *Nabaghan* v. *Sadananda*, AIR 1972 Ori 188.

53. *Dwarkadas* v. *Sholapur Spinning and Weaving Mills*, AIR 1954 SC 119; *R.C. Cooper* v. *Union of India*, (1970) 1 SCC 248: AIR 1970 SC 564; *Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788: AIR 1973 SC 106.

54. *R.D. Shetty* v. *International Airports Authority*, (1979) 3 SCC 489: AIR 1979 SC 1628.

system the professional litigant and meddlesome interloper who invoke the jurisdiction of the court in matters that do not concern them must be discouraged.[55] Therefore, Justice V.S. Deshpande rightly observed that a petitioner will have standing to sustain a public action only if he fulfils one of the two following qualifications: he must either convince the court that the direction of law has such a real public significance that it involves a public right and an injury to the public interest or he must establish that he has a sufficient interest of his own over and above the general interest of other members of the public in bringing the action.[56] This thinking is clearly reflected in the judicial behaviour where the Rajasthan High Court came to the conclusion that an advocate had no locus standi to challenge the action of the President establishing a Bench of the High Court at Jaipur on the ground that the Chief Justice had not been consulted,[57] but on the other hand various High Courts have held that a person has a right to challenge the constitutional validity of the caretaker government of Mr Charan Singh at the Centre.[58] Though no particularisation of relevant factors determining locus standi in all situations can be exhaustive in view of the increasing assumption of new tasks by the government and the various administrative agencies, the need for maintaining a proper balance between private right and public defence cannot be overemphasised.

The technical doctrine of 'locus standi' is being gradually widened to give it a 'social' content in conformity with the letter and spirit of the Indian Constitution.[59] In *Fertilizer Corporation Kamgar Union* v. *Union of India*[60], Krishna Iyer, J. prepared a real case for a broad-based application of the principle of locus standi necessary to challenge administrative actions. He made the following points:

(1) If the tone of public life in the country were sufficiently honest and fairminded, formal norms to control administration may not be needed. But when "corruption permeates the entire fabric of the government", legality is the first casualty, for then the State power "is exercised on grounds unrelated to its nominal purposes".

(2) In such a climate, civil remedies for administrative wrongdoing depend upon the action of individual citizen. An individual must at

55. De Smith: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, pp. 362-63. See also *Jasbhai Motibhai Desai* v. *Roshan Kumar*, (1976) 1 SCC 671: AIR 1976 SC 578. The Supreme Court held that a meddlesome interloper has no locus standi but a stranger may have one where exceptional circumstances involving a grave miscarriage of justice have an adverse effect on public interest.

56. *Standing and Justiciability*, (1971) 13 JILI 153, 178.

57. *Ram Rakh* v. *Union of India*, AIR 1977 Raj 243.

58. Writs were filed in the High Courts of Calcutta, Tamil Nadu and other High Courts.

59. *Fertilizer Corporation Kamgar Union* v. *Union of India*, (1981) 1 SCC 568: AIR 1981 SC 344.

60. *Ibid*.

his own expense challenge the vast panoply of State power by a civil action in a court at a great financial cost to himself.

(3) A pragmatic approach to social justice compels us to interpret constitutional provisions (including Articles 32 and 226) liberally with a view to see that effective policing of the corridors of power is carried out by the court until other ombudsman arrangements are made. Court's function, of course, is limited to testing whether administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the procedural norms set for it by the rules of public administration and that the action of the administration is not mala fide.

(4) Locus standi must be liberalised to meet the challenges of the times. *Ubi jus ibi remedium* must be enlarged to embrace all interests of public-minded citizens or organisations with serious concern for conservation of public resources and the direction and correction of public power so as to promote justice in all its facets.

(5) Restrictive rules of standing are antithesis to a healthy system of administrative law. If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest. Litigants are unlikely to expend their time and money unless they have some real interest at stake. In the rare cases where they wish to sue merely out of public spirit, why should they be discouraged? Effective access to justice is the most basic human requirement — the 'most basic human right'— of a system which purports to guarantee legal rights.

(6) Public interest litigation is part of the process of participative justice and 'standing' in civil litigation of that pattern must have liberal reception at the judicial doorsteps. It has been conclusively proved that the liberalised standing rules had caused no significant increase in the number of actions brought, arguing that parties will not litigate at considerable personal cost unless they have a real interest in the matter.

(7) If a citizen is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country, the door of the court will not be ajar for him. But if he belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busybody, "he cannot be told off at the gates, although whether the issue raised by him is justifiable may still remain to be considered".

(8) Justiciability of the issues and standing to agitate them are two different things.

There is no dispute that the orthodox rule of interpretation regarding locus standi of a person to reach the Court had undergone a sea change with the development of Constitutional law in India and the Constitutional Courts have been adopting a liberal approach in dealing with the cases or dislodging the claim of a litigant merely on hypertechnical grounds. If a person approaching the Court can satisfy that the impugned action is likely to affect his right which is shown to be having some source in some statutory provision, the petition filed by such person cannot be rejected on the ground of his not having locus standi. In other words, if a person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having locus standi.[61]

(3) Standing in public interest litigation

The first building blocks for the expanding concept of locus standi were provided by those Supreme Court decisions which indicated that the expression "aggrieved persons" to whom standing may be given is an elastic concept the meaning of which would vary from circumstance to circumstance, from statute to statute and that while in private law its ambit was narrow, in regard to professional conduct and morality it had to be taken as having a wide import.[62] In order to have a coherent view of the standing in Public Interest Litigation the following situational responses of the courts in India may be noted:

1. *Expression 'standing' to include notional injury*

The concept of 'direct personal injury' has been expanded to include a 'notional injury' within the area of public law litigation. Therefore, the court held that a ratepayer has standing to control deliberations of the Corporation meetings which may involve a waste of time and money because it is his money which will be wasted.[63] In the same manner it was held that a taxpayer has locus standi to challenge the decision of a municipality for erecting even a privately donated statue because the statue would have to be maintained out of taxpayers' money.[64] Elaborating the same idea, the High Court of Orissa in *Nabaghan Naik* v. *Sadananda Das*[65] held that the members of the general public who worship or who have the right to worship the deity have

61. *Gulam Qadir* v. *Special Tribunal*, (2002) 1 SCC 33.

62. *J.M. Desai* v. *Roshan Kumar*, (1976) 1 SCC 671: AIR 1976 SC 578, *Bar Council of Maharashtra* v. *M.V. Dabholkar*, (1975) 2 SCC 702: AIR 1975 SC 2092.

63. *N.N. Chakravarty* v. *Corporation of Calcutta*, AIR 1960 Cal 102.

64. *R. Vardarajan* v. *Salem Municipal Council*, AIR 1973 Mad 55.

65. AIR 1972 Ori 188.

a sufficient interest to challenge the appointment of trustees and mismanagement of the temple's affairs.

2. *"Public duties" standing*

Public duties are owned by the State to the people at large and, therefore, every citizen has a right to enforce the performance of such duties for the benefit of all. In *Municipal Council, Ratlam* v. *Vardichand*[66], the Supreme Court allowed 'standing' to an ordinary citizen to initiate action against the municipality which failed to discharge its public duties such as maintenance of roads and providing sanitary facilities. In the area of criminal law also where it is the duty of the State to prosecute a criminal because a crime is considered to be an offence against the society, the Court allowed a private party to initiate and pursue a criminal case in a situation where the State has not prosecuted the offender for reasons which do not bear on public interest but are prompted by private influence, mala fides and other extraneous considerations.[67]

3. *"Class" standing*

Courts have recognised the right of a member of a 'class' to initiate action in a case where the whole class is likely to be affected by an action. In *Sunil Batra (II)* v. *Delhi Administration*[68], the Supreme Court granted standing to Sunil Batra as one of the prisoners to challenge the lodging of the prisoners in unsatisfactory and inhuman prison conditions. The Court also recognised his right to move it in regard to the alleged torture of another prisoner. Similarly the Court recognised the right of members of a union to move the court on a matter which may affect their jobs. This was firmly established in *Fertilizer Corporation Kamgar Union* v. *Union of India*[69] that the members of the union had the right to challenge the corporation decision for sale of the chemical plant at Sindri. Therefore, if a person belongs to an organisation which has a special interest in the subject-matter and has some deeper concern than that of a busybody, he cannot be refused the court's access. Walking forward with the same stride the technical doctrine of locus standi was given 'social content' in conformity with the letters and the spirit of the Constitution. In a major judgment[70] supporting the workers' rights, the Highest Bench ruled that workers have locus standi to be heard in a

66. (1980) 4 SCC 162: AIR 1980 SC 1622; *R.K. Shenoy* v. *Town Municipal Council*, (1974) 2 SCC 506. Justice V.D. Misra, Chief Justice of the Himachal Pradesh High Court recently admitted a writ of a citizen against the Simla Municipality for the enforcement of its ordinary duty of keeping the city clean. *Indian Express*, May 5, 1983.

67. *Sadhanantham* v. *Arunachalam*, (1980) 3 SCC 141: AIR 1980 SC 2113.

68. (1980) 3 SCC 488: AIR 1980 SC 1579.

69. (1981) 1 SCC 568: AIR 1981 SC 344.

70. *National Textile Workers' Union* v. *P.R. Ramakrishna*, (1983) 1 SCC 228: AIR 1983 SC 75. For details *see* Upendra Baxi: *Pre-Marxist Socialism and the Supreme Court of India*, (1983) 4 SCC (Jour) 3.

winding-up proceeding of a company. According to the Indian Companies Act, 1956, only the creditors and contributories are entitled to be heard in a winding-up proceeding. The workmen have no locus standi except when their dues are unpaid, but that would be only in their capacity as creditors. Bringing out the concept of 'locus standi' from the thickets of the 19th Century laissez faire doctrine into the fresh breeze of the directive principles of State policy which enjoin on the government to secure workers' participation in the management of the undertakings, Bhagwati, J. who wrote the main judgment said that the concept of company has undergone radical transformation and the traditional view that a company is a property of the shareholders is now an exploded myth in view of the new social values. It is not only the shareholders who have supplied capital who are interested in the enterprise which is being run by the company but the workers who supply labour are also equally, if not more, interested because what is produced by the enterprise is the result of labour as well as capital. Capital is only one of the factors of production and it cannot confer on the owner exclusive domain over all other factors. While the owner invests only part of his money in the company and bears only a limited financial risk and otherwise contributes nothing to the production, the workers contribute a major share of the product. The workers invest their 'sweat and toil' and in fact "their life itself". Justice Reddy said the same thing when he began his judgment with Shakespeare: "You take my life when you do take the means whereby I live." In this manner the workers' locus standi to participate in winding-up proceedings of the company which adversely affect their very 'livelihood' is also implied in the principles of natural justice. Thus developing horizons of the technical doctrine of 'locus standi' would go a long way in the direction of the implementation of the new social values aimed at improving the quality of life in this country.[71]

The same approach has been developed further to cover a person who though a member of the class to which the victim belongs, is not himself likely to be affected by the action. It is on this ground that any person can be allowed standing to file a petition of quo warranto to challenge the appointment to a public office.

4. *"Public Concern" standing*

Under this category a person acquires standing not because he belongs to a class or he has any special interest or has suffered personal injury but because being a responsible citizen he feels concerned on a matter of public concern. It is on this ground that the Consumer Education and Research Centre, Ahmedabad was allowed access to the court for challenging a Gujarat

71. According to a survey conducted in the USA, India ranks 85th on the graph of 'quality of life' out of 110 countries. USA comes fourth. First three positions go to Scandinavian countries. *Indian Express*, Chandigarh, December 7, 1982.

Government notification winding up the Machhu Commission inquiring into the Morvi Dam disaster of August 11, 1979 in which 1826 persons lost their lives and caused an estimated damage of 100 crores in the Morvi town of Rajkot district. The government had appointed a one-man commission of Justice B.K. Mehta.[72] The decision to wind up the inquiry commission was found by the court not only unreasonable but mala fide also. Similarly, the Citizens For Democracy was allowed to intervene in *Sunil Batra* v. *Delhi Administration*[73], Hindustani Andolan was allowed to intervene in the *Special Bearer Bonds case*[74], People's Union for Civil Liberties was allowed to intervene in *National Security Ordinance case*,[75] Free Legal Aid Committee, Jamshedpur was allowed to initiate action for improving prison conditions,[76] Free Legal Aid Committee, Hazaribagh was allowed to initiate proceedings for the release of illegally detained prisoners who were in detention for almost two or three decades,[77] Delhi units of two civil rights organizations — People's Union for Civil Liberties and Citizens for Democracy — were allowed to file a joint writ petition for the release of the report of the National Police Commission,[78] Delhi-based citizens' group was allowed to initiate proceedings on inequities of specific pension rules, the members of the Chipko Movement were allowed to initiate action for the illegal felling of trees in forests, Bandhua Mukti Morcha was allowed standing to seek release of bonded labourers in Faridabad district stone quarries,[79] People's Union for Democratic Rights was allowed to seek relief on behalf of labourers working on Salal Hydro-Electric Project against exploitation and denial of the benefit of labour laws by contractors,[80] Lok Vidayan Sanghatana was allowed standing to petition for staying the telecast of serial *Honi Anhoni*, on the ground it spreads superstition and obscurity.[81]

Under this category not only groups and organisations have been allowed standing but individuals have also been granted access to courts. Two Professors of Law from Delhi University were allowed to initiate proceedings for investigation into the functioning of a Women's Protective Home in Agra though neither of these Professors nor any of their friends or relatives were

72. *Consumer E and R Centre* v. *State of Gujarat*, (1981) 22 GLR 712. The Centre has also been allowed standing in matters relating to tariff increase by the Gujarat State Electricity Board, Gujarat Road Transport Corporation and Indian Airlines, to excise refunds claimed by manufacturers on grounds of wrongful levy and to low cost insurance policy floated by the Life Insurance Corporation.
73. (1980) 3 SCC 488: AIR 1980 SC 1579.
74. *R.K. Garg* v. *Union of India*, (1981) 4 SCC 675: AIR 1981 SC 2138.
75. *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271: AIR 1982 SC 710.
76. Writ Petition No. 53 of 1980 (SC).
77. *Veena Sethi* v. *State of Bihar*, (1982) 2 SCC 583: AIR 1983 SC 339.
78. *Indian Express*, July 19, 1982.
79. *Bandhua Mukti Morcha* v. *UOI*, (1984) 3 SCC 161: AIR 1984 SC 802.
80. *Labourers Working on Salal Hydro-Electric Project* v. *State of J&K*, (1984) 3 SCC 538.
81. *See* R.V. Pillai, T.V. *Censorship and Law*, *Tribune*, Aug. 29, 1988, p. 4.

affected by the sub-human conditions in the Home.[82] Similarly the court allowed journalists to move petitions in the Supreme Court. One petition concerned the bulldozing of Bombay pavement dwellings at the height of the monsoon season. The other petition was based on a series of investigative reports on Naxalite prisoners in Tamil Nadu.[83] The writ petition filed by C.K. Daphtary, former Attorney General of India, against senior officers of the Delhi Telephones and the Government of India for excessive billing by the telephone authorities, which is a common feature, is noteworthy. His plea to the Delhi High Court to treat his petition as Social Action Litigation and to afford reliefs which would benefit all the subscribers was promptly accepted.[84] The *Kamla case*[85] is again a pointer in the right direction. In this case three journalists in order to highlight the inhuman traffic in women purchased Kamla from the flesh trade market in Morena in Madhya Pradesh and filed a writ in the Supreme Court praying for various reliefs so that this inhuman treatment to women may be mitigated. Acceptance of this writ by the Supreme Court and the direction to the State Government for investigation clearly show that any 'public-minded citizen' can approach the court with grievances of the poor and the illiterate, the silent majority. It is against this backdrop that the efforts of the public-spirited citizens who filed a writ in the Supreme Court to attract the attention of the government in order to secure relief to alleviate the sufferings of the labourers engaged in the construction of ASIAD 1982 complex may be appreciated.[86] The Court also allowed standing to an employee of the Border Roads Organisation (BRO) to file a writ petition against the Union of India for seeking action against drunken armymen who indiscriminately shot and killed at least 5 workers of the BRO on Independence Day of 1982. The incident was reported by the *Indian Express* on October 26, 1982. It was alleged that the army authorities were hushing up the matter.[87] Standing has also been allowed to individuals seeking investigation into cases of prison torture and human sacrifice.[88] In the same manner the University College of Law Students' Legal Aid Society, Dharwar was allowed standing for challenging the levy of capitation fees for professional course admissions at the cost of meritorious students.[89] Standing was also granted to the General Secretary, Public

82. *Upendra Baxi (Dr) v. State of U.P.*, (1981) 3 Scale 1137.
83. *Indian Express*, August 13, 1981.
84. *Indian Express*, October 18, 1981.
85. Writ Petition No. 2229 of July 30, 1981. *Coomi Kapoor (Ms), Ashwini Sarin, Arun Shourie v. State of M.P., State of Rajasthan, State of U.P., Delhi Administration, Union of India*
86. *People's Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235: AIR 1982 SC 1473
87. *Indian Express*, Chandigarh, December 3, 1982
88. *Indian Express*, November 9, 1982
89. *Indian Express*, March 2, 1983.

Interest Law Service Society, Cochin who sought sale and distribution of all the drugs recommended to be banned by the Drugs Consultative Committee.[90] Sheela Barse, a journalist, was allowed standing to seek relief against torture to women in police lock-ups in Maharashtra.[91] Maintaining the same tenor the Highest Bench ruled in *D.S. Nakara* v. *Union of India*[92], that any member of public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or Law and seek enforcement of public duty and observance of such constitutional or legal provision. Hence standing was allowed to the petitioner for enforcing the rights available to a large number of old and infirm retirees. In this case on May 25, 1979 pension rules for government servants were liberalised but benefit was given only to those who retired on or after that. A petition was filed on behalf of all the pensioners who had been denied benefit and thus suffered prejudice. The time is fast approaching when the court would allow access to its aid to consider the plight of workers dying of sclerosis in Mandsaur, adivasis losing limbs collecting metal on a firing range in Madhya Pradesh, and landless labourers or brick-kiln workers or tribals in a forest.[93]

Maintaining the thrust forward a parent of a student of Medical College, Shimla was allowed standing for banning ragging in the college.[94] Neerja Chaudhary, a journalist was allowed standing to compel the government to rehabilitate released bonded labourers.[95] Similarly in *D.C. Wadhwa* v. *State of Bihar*[96], the court held that every citizen has a right to question the law made by the executive usurping legislative functions which is a fraud on the Constitution. In this case the petitioner, a professor in the Gokhla Institute of Politics and Economics had found, on the basis of his research, that the practice of repromulgation of ordinances by the Bihar Government was a colourable exercise of power. The high bench-mark is *Ramesh* v. *Union of India*[97] where the court allowed standing to a citizen to file a petition for maintenance of communal harmony even though no provision of the Constitution

90. *Indian Express*, April 11, 1983.

91. *Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96: AIR 1983 SC 378. The court issued detailed directions to the government for the protection of women in police lock-up. *See* also *Kadra Pahadiya* v. *State of Bihar*, (1983) 2 SCC 104: AIR 1983 SC 1167. In this case a researcher and social scientist sought relief for three young boys belonging to a backward tribe who were languishing in jails for eight years without trial, kept in leg-irons and forced to work outside the jail.

92. (1983) 1 SCC 305: AIR 1983 SC 130.

93. *Indian Express*, April 17, 1980, Aug. 14, 1980, Sep. 29, 1980, July 13, 1981, July 15, 1981, May 27, 1981, May 29, 1981 and Nov. 5, 1982.

94. *State of H.P.* v. *A Parent of Student of Medical College, Shimla*, (1985) 3 SCC 169: AIR 1985 SC 910.

95. *Neerja Chaudhary* v. *State of M.P.*, (1984) 3 SCC 243: AIR 1984 SC 1099.

96. (1987) 1 SCC 378.

97. (1988) 1 SCC 668.

is violated. In this case a petition had been filed by a person for restraining the government from telecasting the serial *Tamas* which according to him breeds communal hatred.

The liberal theory in Social Action Litigation is that the judge would not ask the petitioner how he was affected and what was his personal injury or loss. The major outcome of these cases would be a widening of the power of the citizen to move the courts even when his own rights are not violated. In *S.P. Gupta* v. *Union of India*[1], popularly known as the *Judge case* the court discussed the rationale behind this expansion of the rule of locus standi. In this case the petitioners were generally lawyers practising in High Courts and the Supreme Court who felt that the independence of the judiciary in India has been threatened by certain governmental action relating to: (*i*) the issuance of a circular by the Union Law Minister on March 18, 1981; (*ii*) the practice of granting short-term extensions to Additional Judges on the expiry of their initial term; and (*iii*) the transfer of judges from one High Court to another. One of the very important issues involved in this case was the standing of the lawyer-petitioners to have access to the court in this matter of public importance, i.e., independence of the judiciary. Granting them standing the court observed that the profession of lawyers is an integral part of the judicial system and therefore the lawyers have sufficient interest to maintain an action for the preservation of the independence of the judiciary, which is a basic feature of the Constitution.[2] Thus though the rule of locus standi was liberalised it does not mean that it is without any limitation. The court was quick to add that the petitioner must not be a mere wayfarer or officious intervener or bystander or meddlesome interloper.[3] He must be acting bona fide and must have sufficient interest before he can be accorded standing. 'Sufficient interest' would have to be determined by the court in each individual case.[4] One such situation where the petitioner shall be deemed as not having 'sufficient interest' would be where though the administrative action or inaction causes public injury but also causes specific injury to an individual or a group and the latter does not want to maintain any action for reasons not actuated by poverty, illiteracy or fear. Contrary to this would be something like thrusting a relief on someone who does not want it.[5] Furthermore, the individual who moves the court in matters of public interest must be acting bona fide with a view to vindicate the cause of justice,[6] so if he is acting for personal gains or private profit or out of

1 1981 Supp SCC 87, AIR 1982 SC 149.
2 *Id.*, pp. 214-15 (SCC), *per* Bhagwati, J.
3 *Id.*, p. 220 (SCC).
4 *Id.*, p. 214 (SCC).
5 *Id.*, p. 264 (SCC).
6 *Id.*, p. 211 (SCC).

political motivation or other oblique considerations, the court would not allow itself to be activated at the instance of such person.[7]

The main thrust of the court's ruling in this case is that any individual acting bona fide and having sufficient interest can have access to the court for the purpose of redressing public injury, enforcing public duty, protecting social, collective, diffused rights and interests or vindicating public interest.[8] This desired liberalisation of the rule of locus standi would not only make the administration more responsible and responsive to the people but would also make it possible for the courts to effectively police the corridors of power and prevent violations of law.[9] Among the many justifications provided by Justice Bhagwati for this liberal approach to the rule of locus standi, the following are important from the present perspective. First, the rule of law will be 'substantially impaired' if "no one can have standing to maintain an action for judicial redress in case of public wrong or public injury". It is "absolutely essential that the rule of law must wean people away from lawlessness on streets and win them for the court of law". If the breach of public duties was 'allowed' to go unredressed by courts on the ground of standing, it would "promote disrespect for rule of law". It will also lead to corruption and encourage inefficiency. It might also create possibilities of the "political machinery" itself becoming a participant in the misuse or abuse of power. Finally, the newly emergent social and economic rights require a new kind of enforcement.[10] Besides controlling administrative wrongs and illegalities which may otherwise remain unchecked, it may also ensure "interest representation" and "people's participation" in the administrative process.[11] If only the 'directly injured' has the right to move the court it would sometimes lead to anomalous situations. When forests are denuded, the court will hear only the forest official, who may be in collusion with the vandals. Or when protected species are shot it will entertain only complaints from wardens, who may be conspiring with the poachers.

However, this liberal approach will not apply in cases where conviction and sentence of a regular criminal court are challenged through a public interest litigation. This was ruled by the Supreme Court in *Simranjit Singh Mann* v. *Union of India*[12], wherein Akali Dal (M) leader had challenged the conviction and sentence of the two accused in *Gen. Vaidya murder case* on

7. *Id.*, p. 702, *per* Desai, J. *See* also *Janata Dal* v. *H.S. Chowdhary*, (1992) 4 SCC 305. Court observed that court should not allow its process to be abused by politicians.
8. *Id.*, pp. 214-15.
9. *Id.*, pp. 211-16.
10. *See* note 62 of Prof. Baxi's article *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, Mimeographed 1991-92. *See* also *L.M. Chagla* v. *P. Shiv Shankar*, (1981) 4 SCC 1975
11. *See* Jain, S.N.: LOCUS STANDI AND PUBLIC INTEREST LITIGATION, Mimeographed, p. 20.
12. (1992) 4 SCC 653.

the ground that he has an interest in the future of two convicts and also in upholding the rule of law. The Apex Court observed that the petitioner being a total stranger to the prosecution has no locus standi to maintain the petition. Similarly in *Karamjeet Singh* v. *Union of India*[13], the Court refused standing where the petitioner had filed a PIL petition as a 'next friend' of the same two convicts in *Gen. Vaidya murder case* whom he claimed were under a disability due to their intense obsession based on religious belief.

However, some may be tempted to comment that this new constitutionalism is an 'unseemly trend' and besides providing an unreasonable constraint on administrative efficiency and celerity would also open a floodgate of litigation.[14] If what is happening in some foreign countries, where liberal rule of standing in public interest litigation has come to stay, can be any indicator, then the fallacity can be easily established. Litigation, especially in India, is not such an enjoyable process that everyone would litigate for a lark. This fact is proved statistically also. In the Supreme Court 35,000 cases were filed in 1985 and in comparison to this only 200 PIL petitions were filed. What it important to note is that if 35,000 cases benefited 35,000 persons, perhaps 200 PIL petitions may have benefited millions.[15] The trend of liberalising standing in public interest litigation opens up a new era of unique judicial role perception and performance in India. The nature of the judicial process is not purely adjudicatory nor is it functionally that of an umpire. The dynamics of the judicial process has a new 'enforcement' dimension which includes 'rights mobilisation' without which the rights and interests of the poor and illiterate silent majority would become sterile.

Besides judicial activism in the area of locus standi, standing can be bestowed by statute also. The Legislature by passing the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 conferred standing on the Central Government to represent on behalf of the gas victims before the Supreme Court for the settlement of compensation claims.

These liberal trends in law relating to locus standi reached a culmination point in *Ramesh* v. *Union of India*[16]. In this case a writ was filed regarding telecast of serial *Tamas* which depicted communal violence after the partition of India in 1947. It was a public interest writ wherein attention of the court had been drawn to the public and national interest which the serial was likely to jeopardize by developing communal hatred. Rejecting the preliminary objection as to locus standi of the petitioner the Supreme Court held that the

13. (1992) 4 SCC 666.

14. Antony, M.J.: *Court as Watchdog of Citizens' Rights*, Indian Express, August 13, 1981. *See* Editorial, *Indian Express*, November 17, 1982.

15. *Indian Express*, Oct. 27, 1986, p. 6.

16. (1988) 1 SCC 668.

writ is maintainable even though no provision of the Constitution is violated including Articles 21 and 25. The Apex Court further observed that the petitioner can file the petition and draw the attention of the Court to ensure that the communal atmosphere is kept clean and unpolluted.

In the USA, the question of locus standi is a by-product of 'cases and controversies' clause of the American Constitution. Unless a person has a direct personal interest in the action, it will not be a situation of 'case and controversy'. However, today the trend is towards the expansion of horizons of standing.[17]

The courts are moving away from 'economic injury concept' to 'non-economic value concept'. A taxpayer is deemed to have sufficient interest to challenge the unconstitutionality of the exercise of power by Congress if it violates the taxing and spending clauses of the Constitution. Tremendous development is taking place regarding consumers' standing to challenge an administrative action, and a consumer is now allowed to challenge administrative action if it affects the price or quality of product and services.

In *Reade* v. *Ewing*[18], the court allowed a challenge by a consumer against the order of the administrative authority allowing a vitamin content to be supplied from a synthetic source on the ground that it affects the quality of the product which the person consumes. In the same manner in *Citizens' Commissioner* v. *Volpe*[19], the court allowed a challenge by citizens against the decision of the authority which had the effect of destroying the scenic river area by the construction of a highway.

A big stride was taken by the court in *Office of Communication* v. *Federal Communication Centre*[20], in which the Supreme Court accepted the standing of the representatives of television viewers as sufficient to challenge the action of the authority renewing the television operation licence on the ground that the station discriminated against blacks in its programmes and thus denied the viewer of a fair programme required by law.

In England, too, the development of standing law is a patchwork of case-law. Public interest actions like the interest of a taxpayer were enforced in the name of Attorney-General who lent his name to the private individual. However, now the courts have started allowing challenge in the name of the individual taxpayer.[21] In the case of prerogative writs the law is liberal and any person can point out the excess or abuse of jurisdiction by any administrative authority. Therefore, the court accepted the standing of a member

17. *Association of Data Processing Organisations* v. *Comp.*, 397 US 150 (1970).

18. 205 F 2d 630 (1953).

19. 425 F 2d 79 (1970)

20. 359 F 2d 994.

21. *Prescott* v. *Birmingham Corpn.*, (1955) Ch 210: (1954) 3 All HB 698.

of the public to enforce the law against gambling houses.[22] In this case the Police Commissioner had circulated a confidential note that on account of shortage of police force, vigilance over gambling houses shall cease.

In January 1978 the new Rules of Court were brought into force in England. In respect of all remedies Order 53, Rule 3(5) lays down one simple test of locus standi. The test is that the applicant must have 'a sufficient interest in the matter to which the application relates'. What is the test of 'sufficient interest'? The courts have developed the test in *Blackburn*[23] and *McWhirter*[24] *cases*. "The court will not listen to a busybody who is interfering in things which do not concern him, but it will listen to an ordinary citizen who comes asking that the law should be declared and enforced, even though he is one of a hundred, or one of a thousand, or one of a million, who are affected by it." Thus, through this *actio popularis* an ordinary citizen can enforce the law in England for the benefit of all—as against public authorities in respect of their statutory duties.[25]

(4) Laches or unreasonable delay

Though writ-issuing power of the Supreme Court and High Courts for the enforcement of fundamental rights is mandatory, however, the court may refuse remedy if there is unreasonable delay in invoking the jurisdiction of the court. Unlike limitation there is no fixed period for laches. Every case will be determined on its own merit. Without reference to the limitation law the court must see whether there is any explanation for the delay in filing the petition.[26]

As regards the power of the High Court to issue writs for any other purpose, if the period of limitation as laid down in the Limitation Act, 1963 has expired, the High Court will decline jurisdiction. The rationale is that if the relief cannot be claimed in the ordinary manner because the limitation period has expired, the same will not be granted by the High Court in exercise of its extraordinary power.[27] However, the High Court is not bound by the limitation law in the sense that a petition even if within limitation may still be refused on the ground of unreasonable delay,[28] because the extraordinary remedy is discretionary.

22. *R.* v. *Metropolitan Police Commr. ex parte Blackburn*, (1968) 2 QB 118: (1968) 1 All ER 763.
23. *R.* v. *Metropolitan Police Commr., ex parte Blackburn*, (1968) 2 QB 118.
24. *Attorney-General* v. *Independent Broadcasting Authority*, (1973) QB 629.
25. Lord Denning: THE DISCIPLINE OF LAW, (1982), p. 133.
26. *Tilok Chand Moti Chand* v. *H.B. Munshi*, (1969) 1 SCC 110: AIR 1970 SC 898, *per* Hidayatullah, C.J.
27. *Durga Prasad* v. *Chief Controller*, (1969) 1 SCC 185: AIR 1970 SC 769.
28. *Kamini Kumar* v. *State of W.B.*, (1972) 2 SCC 420: AIR 1972 SC 2060.

Applying these principles the Supreme Court held in *Arun Kumar* v. *S.E. Railway*[29]. that when the appellant had made a representation against the seniority list to the administration in 1967 which was replied in 1973, there is no inordinate delay in filing the petition in view of the fact that the railway administration was itself guilty of delay. Likewise a delay of four years was ignored by the Karnataka High Court in view of the serious adverse consequences to the petitioner.[30] But on the other hand an unexplained delay of two years after the completion of acquisition process was found fatal for the maintainability of the writ petition.[31] Again, even a delay of a few days was considered as fatal because it involved upsetting the admission of others.[32] From these decisions it appears that 'laches or delay' is a matter of discretion with the court which must be exercised judiciously and reasonably on the basis of the fact situation of every case. The Supreme Court in *P.S. Sadasivaswamy* v. *State of T.N.*[33], also observed that it would be sound and wise exercise of discretion for the courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the court to put forward State claims and try to unsettle settled matters. Therefore, in *M.S. Mudhol (Dr)* v. *S.D. Halegkar*[34], the Apex Court ruled that the challenge to the appointment of principal after a period of nine years on the ground that he did not fulfil the requisite qualification, cannot be allowed. Similarly in *LIC* v. *Joyti Chander Biswas*[35] the Court did not allow petition filed after a lapse of six years against dismissal from service for long absence from duty.

For the application of the doctrine of laches, no distinction is made between petitions for the enforcement of fundamental rights and for other purposes.[36] Unfortunately the courts do not take into consideration the time taken in pursuing non-legal remedies for the application of this doctrine.[37] Therefore, if a person who has been denied licence proceeds with the matter through his political representative, e.g., MLA or MP, instead of rushing through the expensive and dilatory judicial process, the time thus consumed will not be considered an excusable delay. It is difficult to reconcile this

29. (1985) 2 SCC 451: AIR 1985 SC 482.
30. *Mohd. Ismail* v. *State of Karnataka*, AIR 1985 Kant 123.
31. *Keshav Pal* v. *State of Bihar*, AIR 1985 Pat 70.
32. *Krishna Kumar* v. *State*, AIR 1981 All 287.
33. (1975) 1 SCC 152. *See* also Thakker, C.K : ADMINISTRATIVE LAW, (1992) Eastern Book Company, pp. 395-400.
34. (1993) 3 SCC 591.
35. (2000) 6 SCC 562.
36. *Infra* note 41, 43.
37. *Gandhinagar Motor Transport Society* v. *State of Bombay*, AIR 1954 Bom 202. For criticism *see* Seervai, CONSTITUTIONAL LAW, 1976, p. 843.

judicial behaviour with the norms of functioning of an intensive form of democratic society.

Can laches extinguish fundamental rights? Following *Tilokchand*[38] and *Rabindranath*[39], the Supreme Court in *R.S. Makashi* v. *I.M. Menon*[40] reiterated the same principle that laches applies to writ petitions under Articles 32 and 226 for the enforcement of fundamental rights hence laches would extinguish fundamental rights. In this case the bone of contention was the seniority between two groups of government employees. The cause of action arose in 1968 but the writ under Article 226 was filed after eight years. The petitioners claimed violation of their fundamental right. Unfortunately this decision of the Supreme Court, which was a three-judge decision, did not even refer to a five-judge decision in *Ramachandra Shanker Deodhar* v. *State of Maharashtra*[41], in which, speaking for the majority, Justice Bhagwati said that the claim for the enforcement of fundamental right of equal opportunity under Article 16 is itself a fundamental right guaranteed under Article 32 and the Supreme Court which has been assigned the role of a sentinel on the *qui vive* for protection of the fundamental rights cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of laches, delay or the like.[42] Moving in the same direction the court allowed a writ petition of persons displaced due to acquisition of land for steel plant for seeking employment in the plant after 38 years of acquisition of land and 33 years after the setting up of the plant in view of the nature of the problem and the decision taken by the government just about four years ago to provide employment to displaced persons.[43]

In *Jawahar Lal Sazawal* v. *State of J&K*[44], the Apex Court was of the view that a writ petition filed before High Court on 1982 and coming for hearing after 16 long years is not barred by laches due to special circumstances of the case. In this case a writ had been filed in the High Court in 1972 by permanent government servants, serving in Government industrial undertaking, subsequent to privatisation, for a declaration that they still continue to be government servants was dismissed as premature. Company granted them wages at a rate admissible to government servants till 1979. In 1980 company denied them parity. Such order was challenged in 1981 before Supreme Court which relegated the petitioners to the remedy under Article 226. Writ accordingly was filed before High Court in 1982 and came

38. *Tilokchand Motichand* v. *H.B. Munshi*, (1969) 1 SCC 110: AIR 1970 SC 898.
39. *Rabindranath Bose* v. *Union of India*, (1970) 1 SCC 84: AIR 1970 SC 470.
40. (1982) 1 SCC 379: AIR 1982 SC 101.
41. (1974) 1 SCC 317: AIR 1974 SC 259.
42. *Id.*, pp. 325-27 (SCC).
43. *Buttu Prasad Kumbhar* v. *Steel Authority of India*, 1995 Supp (2) SCC 225.
44. (2002) 3 SCC 219.

up for hearing after 16 years. In the same manner where the petitioner was an illiterate widow with meagre resources who had been deprived by the Railways her gangman husband's arrears of family pension, the Court held that petition was admissible despite delay.[45] Sufficient cause for condoning delay or laches was also found by the Court when the lawyer withheld papers and did not inform the client of an adverse decision in a writ petition.[46] Question of delay or laches is a question which must be considered by the Writ Court. Where jurisdiction is exercised by the High Court, it cannot be assailed under Article 136, more so when the order is legally sustainable.[47]

(5) Alternative remedy

The law is that the Supreme Court and High Courts cannot refuse relief under Articles 32 and 226 on the ground of alternative remedy if the person complains of violation of his fundamental rights. But if the person invokes the jurisdiction of the High Court for any other purpose, in exercise of its discretion the High Court may refuse relief. The law was laid down with sufficient clarity by the Supreme Court in *A.V. Venkateswaran* v. *R.S. Wadhwant*[48]. In this case, the petitioners had imported Schaeffer pens with gold plating from Australia. The customs authorities charged higher rate of duty than was fixed for ordinary pens. This action was challenged in a writ proceeding. The main contention before the court was that the petitioner has not exhausted the alternative remedy of review by the Central Government before coming to the court. The court observed that the rule of exhaustion of alternative remedy is not one that bars the jurisdiction of the court, but it is a rule which courts have laid down for the exercise of their discretion.[49] Even in the face of an alternative remedy, the discretion lies with the High Court to entertain the petition. No inflexible rules can be laid down for the exercise of discretion in this regard. Even then the broad policy behind the doctrine is that the writ jurisdiction is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance, where the very vires of the statute is in question or where private or public wrongs are so intricably mixed up and the prevention of public injury and the vindication of public justice require that recourse may be had to extraordinary remedy. However, even then the court must have good and sufficient reasons to bypass the alternative remedy provided by statute.[50]

45. *S.K. Mastan Bee* v. *G.M. South Central Railway*, (2003) 1 SCC 184.
46. *Devendra Swamy* v. *Karnataka SRTC*, (2002) 9 SCC 644.
47. *Dayal Singh* v. *UOI*, (2003) 2 SCC 593.
48. AIR 1961 SC 1506.
49. *State of U.P.* v. *Indian Hume Pipe*, (1977) 2 SCC 724; AIR 1977 SC 1132.
50. *Asstt. Collector, Central Excise* v. *Dunlop India Ltd.*, (1985) 1 SCC 260; AIR 1985 SC 330, 332, *per* O. Chinnappa Reddy, J.

Therefore, if the alternative remedy is either not adequate,[51] or was lost for no fault of the person,[52] or is illusory,[53] or involves delay,[54] the High Court may grant relief. Leaving aside these cases, in all cases of absence of jurisdiction and abuse of jurisdiction the court may exercise jurisdiction even when alternative remedies are available.[55] In the same manner where there is a violation of Fundamental Rights the Supreme Court in exercise of its jurisdiction under Article 32 and the High Court under Article 226 will issue writs and alternative remedy will not be considered a bar because it is the duty of the Supreme Court and the High Court to issue appropriate writ for the enforcement of Fundamental Rights.[56]

It may be pointed out that the Constitution (Forty-second Amendment) Act, 1976 had absolutely barred the jurisdiction of the High Courts in all cases where alternative remedy was provided by or under any other law except in cases of the enforcement of fundamental rights. Clause (3) inserted in Article 226 had provided that no petition for the redress of any injury referred to in sub-clause (*b*) or (*c*) of clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. However, this amendment has now been repealed by the Constitution (Forty-fourth Amendment) Act, 1978.

Parallel remedies in respect of same matter at the same time ordinarily not permissible but extraordinary situations or circumstances may warrant a different approach where court's orders are violated or thwarted with impunity. In such cases alternative remedy will not bar the jurisdiction of Writ courts.[57] However, in a writ petition filed during pendency of appeal before the statutory authority an alternative remedy will be a bar to the exercise of jurisdiction.[58] In the same manner where the remedy by way of appeal and revision was available High Court cannot assume jurisdiction.[59] Normally in a dispute relating to terms of private contract the proper course would be arbitration or institution of suit and not the writ petition.[60]

51. *Himmatlal* v. *State of M.P.*, AIR 1954 SC 403; *Ganpat Roy* v. *Addl. D.M.*, (1985) 2 SCC 307: AIR 1985 SC 1635.
52. *Zila Parishad* v. *Kundan Sugar Mills*, AIR 1968 SC 98.
53. *B.E.S. Co. Ltd.* v. *CTO*, AIR 1956 Cal 299; *Ram & Shyam Co.* v. *State of Haryana*, (1985) 3 SCC 267: AIR 1985 SC 1147.
54. *Bhagirath Singh* v. *State of Punjab*, AIR 1965 Punj 170.
55. *Baburam* v. *Zila Parishad*, AIR 1969 SC 556.
56. *Himmat Lal* v. *State of M.P.*, AIR 1954 SC 403. *See* also Thakker, C.K.: ADMINISTRATIVE LAW (1992), Eastern Book Company, pp. 400-405.
57. *Awadh Behari Yadav* v. *State of Bihar*, (1995) 6 SCC 31.
58. *Bombay Metropolitan Region Development Authority* v. *Gokak Patel Volkart Ltd.*, (1995) 1 SCC 642.
59. *Swetamber Sthanakwasi Jain Samiti* v. *Alleged Committee of Management, Sri R.J.I. College*, (1996) 3 SCC 11.
60. *State of U.P.* v. *Bridge and Proof Co.*, (1996) 6 SCC 22.

Though existence of alternative remedy does not oust the jurisdiction of writ Courts, yet it would be a good ground for not entertaining the petition.[61] Where statute provided Service Tribunals for adjudicating disputes of government servants, the said tribunal cannot be bypassed by filing writ petition on the ground that tribunal lacks power to pass interim order.[62] In *Sadhana Lodh* v. *National Insurance Co. Ltd.*[63], the Apex Court further held that a writ petition by an insurer challenging the award of tribunal is not maintainable in the face of the fact that an alternative remedy by filing appeal before the High Court under Motor Vehicles Act was available to the insurer.

From the above discussion it becomes clear that the rule of exclusion of writ jurisdiction when alternative remedy is available is a rule of discretion and not one of compulsion. In at least four contingencies the Court may still exercise writ jurisdiction in spite of availability of alternative remedy. Such contingencies include: (*i*) where writ seeks enforcement of fundamental rights; (*ii*) where there is a failure of principles of natural justice; (*iii*) where orders or proceedings are wholly without jurisdiction; or (*iv*) where the vires of the law is challenged. Applying these principles the Apex Court in *Harbanslal Sahnïa* v. *Indian Oil Corporation*[64] held that where the petitioner's dealership, which was their bread and butter, was terminated on irrelevant and non-existence cause, alternative remedy by way of arbitration would not oust the jurisdiction of Writ Court.

In the USA, except in cases of lack of jurisdiction, exhaustion of alternative remedy is invariably insisted upon.[65] But in Federal jurisdiction, the rule is rigorously followed even in cases of lack of jurisdiction.[66] In England, there is no requirement for the exhaustion of alternative remedies if the action is unlawful.[67]

(6) Res judicata

The principle of res judicata which is grounded on public policy applies in the public review area also. If a petition has been heard and dismissed, the same petition on the same ground cannot be filed in the same court again. The principle of res judicata also applies in cases for the enforcement of fundamental rights. A person is free to reach the High Court or the Supreme Court for the enforcement of his fundamental rights. If such person has made a choice of the forum and his petition has been heard and dismissed

61. *State of Bihar* v. *Jain Plastic and Chemicals Ltd.*, (2002) 1 SCC 216.
62. *Secy., Minor Irrigation & Rural Engg. Services U.P.* v. *Shangoo Ram Arya*, (2002) 5 SCC 521.
63. (2003) 3 SCC 524.
64. (2003) 2 SCC 107.
65. *Ward* v. *Keenan*, 70 A 2d 77: 3 NJ 298 (1949).
66. *Myers* v. *Bethlehem Shipbuilding Corpn.*, 303 US 41: 82 L Ed 638 (1938).
67. *Cooper* v. *Wilson*, (1937) 2 KB 309: (1937) 2 All ER 726.

or accepted, he cannot agitate the same matter before another court in a writ proceeding.[68] But if the petition has been dismissed otherwise than on merits, the person may file a fresh writ in another forum. Therefore, if the petition under Article 136 has been dismissed in limine by the Supreme Court by a non-speaking order it will not preclude the party from seeking the same relief under Article 226 from the High Court on identical grounds.[69] In the same manner contentions raised in an earlier Special Leave Petition which was dismissed, held could not be raised in subsequent appeal before the Supreme Court between the same parties.[70] Res judicata however does not apply in the case of habeas corpus petitions; if the petition has been dismissed on merits by the High Court, it can again be filed in the Supreme Court.[71]

Res judicata shall apply even if the petition has been dismissed without giving notice to the other party.[72] Summary dismissal of a petition without recording reason does not attract res judicata and a fresh petition on the same ground can be entertained.[73] Similary if a petition has been dismissed as withdrawn res judicata shall not apply.[74] Principle of res judicata shall also not apply if the Court incidentally records findings on issues not raised before it.[75] Findings given in a petition at one stage and later held to be final, challenge to such finding at a later stage of the same petition will be barred by res judicata.[76]

The question of applicability of constructive res judicata to writs was considered by the Supreme Court in *State of U.P.* v. *Nawab Hussain*[77]. In that case a PSI challenged his dismissal by the DIG on the ground that he was not given a fair hearing. The High Court, however, dismissed his petition. He filed a suit thereafter, and raised an additional plea that he was appointed by the IG so cannot be dismissed by the DIG who is a subordinate officer. The Supreme Court held that the additional plea is barred by constructive res judicata.

However, raising the question of constitutionality of a provision of law stands on different footing than raising a matter on a bare question of law, or mixed question of law and fact or on fact. There is a presumption always in favour of the constitutionality of the law. Onus is heavy on the person challenging it. When a person enters a court for relief and does not challenge

68. *Daryao Singh* v. *State of U.P.*, AIR 1961 SC 1457.
69. *Indian Oil Corpn. Ltd.* v. *State of Bihar*, (1986) 4 SCC 146: AIR 1986 SC 1780.
70. *P. Lal* v. *Union of India*, (2003) 3 SCC 393.
71. *Niranjan Singh* v. *State of M.P.*, (1972) 2 SCC 542: AIR 1972 SC 2215.
72. *Virudhunagar Steel Rolling Mills* v. *Government of Madras*, AIR 1968 SC 1196.
73. *Workmen* v. *Board of Trustees Cochin Trust*, (1978) 3 SCC 119.
74. *Ahmedabad Mfg. Co.* v. *Workmen*, (1981) 2 SCC 663.
75. *Madhvi Amma Bhawani Amma* v. *Kunjikutti Pillai*, (2000) 6 SCC 301.
76. *M.C. Mehta* v. *Kamal Nath*, (2002) 3 SCC 653.
77. (1977) 2 SCC 806.

the constitutionality of law governing the matters directly and substantially in issue, it only means and implies that he goes by the presumption of constitutionality. He cannot on this instance be deemed to have raised the question of constitutionality and therefore, question of constitutionality shall not be deemed to have been decided against him alongwith all matters which were directly and substantially in issue. Therefore if the question of constitutionality is raised in another writ proceeding the principle of constructive res judicata shall not be attracted.[78] Summary disposal of writ petition by the High Court does not constitute res judicata. Further where a recurring liability has been held to be ultra vires the power, earlier summary disposal of the case would not operate as res judicata.[79] In the same manner once an order passed on merit by the Supreme Court exercising the power under Article 136 has become final no writ petition under Article 132 on the self-same issue is maintainable.[80]

Thus it can be concluded that principles of res judicata and constructive res judicata apply to writs also as they apply in case of civil suits. Therefore, if a dispute has already been decided by a competent court which has become final any petition under Articles 32 or 226 will be barred.[81]

(7) No dismissal of petition without speaking order

In the immediate past a tendency was growing amongst High Courts to dismiss petitions under Articles 226 and 227 in limine without a speaking order. Depricating this practice, the Supreme Court in *Arun* v. *Addl. Inspector General of Police*[82], observed that High Courts should not dismiss petitions in limine without a speaking order just by the use of a laconic word 'rejected' or 'dismissed' because a speaking order would help the Supreme Court in understanding the thought process of the High Court which in turn would facilitate a quick and satisfactory disposal of Special Leave Petitions. No matter this practice will certainly inspire public confidence in the judicial administration but it has started giving rise to the accumulation of cases before High Courts. High Courts now feel it convenient to admit a petition rather than writing reasons for dismissal. This will not apply to the Apex Court which can dismiss a petition in limine without recording of reasons because being the highest court there is no appeal thereafter.[83] Recording of

78. *Nand Kishore* v. *State of Punjab*, (1995) 6 SCC 614.
79. *UOI* v. *Ranchi Municipal Corpn.*, (1996) 7 SCC 542.
80. *Babu Singh Bains* v. *UOI*, (1996) 6 SCC 565.
81. *Direct Recruit Class II Engineering Officers' Association* v. *State of Maharashtra*, (1990) 2 SCC 715.
82. (1986) 3 SCC 696: AIR 1986 SC 1497.
83. *D.C. Saxena* v. *Chief Justice of India*, (1996) 5 SCC 216, *per* K. Ramaswamy, J. (N.P. Singh and Bharucha, JJ., *concurring*).

reasons is not only necessary for appeal but is also necessary for generating public confidence, hence the need to record reasons can never be obviated.

(8) High Court must be approached first

There is a growing tendency to file petitions before the Supreme Court even in a case where it could have been filed before the High Court. Discouraging this tendency the Supreme Court held in *P.N. Kumar* v. *Municipal Corpn. of Delhi*[84], that in cases where writ can be filed before the High Court parties should not approach the Supreme Court.

(9) Power to grant remedial assistance is implicit in public law review

Under Article 32(1) of the Constitution, the court has power to devise any procedure appropriate for the purpose of enforcing the fundamental rights under Article 32(2). The power of the court is thus not only injunctive in ambit to prevent the violation of fundamental rights but is also remedial in scope to provide relief in case of breach of these rights. Thus the court has implicit power to grant remedial assistance by way of compensation in such cases. However, this does not mean that in every case of breach of fundamental right compensation can be awarded because Article 32 cannot be used as a substitute for the ordinary civil court process of compensation. Award of compensation must be confined to exceptional cases of gross and patent violations of fundamental rights. Such exceptional cases though may not be defined with any exactitude yet may include situations where either the fundamental rights of a large section of a society are involved or the affected persons are not expected to pursue action in a civil court due to their socio-economic disadvantage. The same principle shall apply to High Courts also.[85]

Compensation granted by the Supreme Court and the High Court is in addition to the private law remedy for tortious action and punishment to wrongdoer under criminal law. Award of compensation in writ proceedings may be adjusted against damages awarded in civil suit. The old doctrine of relegating the aggrieved to the remedies available in civil law limits the role of the constitutional courts too much, as the protector and custodian of the indefeasible rights of citizens.[86]

(10) Greater good of greater number

In a pace-setting decision the Supreme Court held in *Sadhu Ram* v. *Pulin Behari Sarkar*[87], that in certain situations social justice must prevail

84. (1987) 4 SCC 609.

85. *M.C. Mehta* v. *Union of India*, (1987) 1 SCC 395.

86. *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416; *Trith Ram Saini* v. *State of Punjab*, (1997) 11 SCC 623.

87. (1984) 3 SCC 410: AIR 1984 SC 1471. *See* also *National Textile Workers' Union* v. *P.R. Ramakrishnan*, (1983) 3 SCC 105: AIR 1983 SC 759.

over the technical rules. Thus jurisprudence has shifted away from technical rules to the recognition of human beings as human beings because without this approach any science of law would become jejune. In this case a residential complex which had been occupied by tenants had been sold by the owner to an outsider even when the persons who were actually living thereon were prepared to purchase even at a higher price. The Court held that as between two parties if a deal is made with one party without serious detriment to the other then the Court would lean in favour of the weaker section of the society. Thus social justice as a recognition of the greater good of greater number without the deprivation of any right of anybody was established as a principle of public law review. It is against this spirit that writ jurisdiction was used for enforcing contractual obligation against government.[88]

(11) Compulsion of administrative expediency and the constraints of Public Law Review

Today the government in any welfare State is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas and various other benefits. In such a society public law review of administrative action assumes a delicate position in view of the demands of administrative expediency and flexibility. The judicial behaviour in the immediate past has been lax and the courts have not confined their invigilation of administrative decisions to situations of arbitrariness and mala fide. It was for this reason that the Highest Bench deprecated the practice of passing ex parte prohibitory orders just by mere asking even at the cost of public interest.[89]

In *R.D.' Shetty* v. *International Airports Authority*[90], Bhagwati, J. reiterated a well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. Government actions must be informed with reason and should be free from arbitrariness. It was a case where the International Airports Authority had given the contract, in exercise of its discretion, to a contractor who did not fulfil the prescribed qualification laid down for the tenderers. The court, though did not interfere with the decision of the authority on the ground of expediency, yet clearly laid down that the discretion of the government in giving contracts is not unlimited in that the government cannot give or withhold largesse in its arbitrary discretion. The government is still a government when it acts in the matters of granting largesse and it cannot act arbitrarily.

88. *M.S. Desai & Co.* v. *Hindustan Petroleum Corpn. Ltd.*, AIR 1987 Guj 19.
89. *State of Rajasthan* v. *Swaika Properties*, (1985) 3 SCC 217: AIR 1985 SC 1289.
90. (1979) 3 SCC 489: AIR 1979 SC 1628.

In *T.N. Educational Deptt. Ministerial and General Subordinate Services Assn.* v. *State of T.N.*[91], the court refused to interfere in the administrative functioning of the State in the absence of arbitrariness or mala fides.

"All life including administrative life, involves experiment, trial and error, but within the leading strings of fundamental rights, and, absent unconstitutional 'excesses', judicial correction is not right."

"The court cannot substitute its wisdom for government's, save to see that unreasonable perversity, mala fide manipulation, indefensible arbitrariness and like infirmities do not defile the equation for integration."

(This was a case where District Board Schools and government schools—and their services—were integrated. The basis of ratio for promotion and fixing of common seniority was assailed by the government wing as arbitrary, mala fide and capricious but the court held, punctuated by the above remarks, that it was rational enough to warrant its non-interference.)

In *State of Kerala* v. *T.P. Roshana*[92], Krishna Iyer, J. rightly observed that any incisive study of the exercise of the writ power in India may reveal that it limits its action to quashing or nullifying orders but stops short of reconstruction whereby a valid scheme may replace a void project. This seems to be the most pragmatic approach in the area of public law review keeping in view the dictates of administrative expediency and flexibility.

(12) Court does not sit as appellate court while exercising power of review

The basic principle of judicial review is that it is only the decision-making process and not the merits of the decision which is reviewable unless the decision or action of the administrative authority is vitiated by arbitrariness, unfairness, illegality, irrationality or when decision is such as no reasonable person on proper application of mind could take such a decision. However, the court would not substitute its own opinion for that of experts.

In *Tata Cellular* v. *Union of India*[93], the Supreme Court observed that judicial review is concerned with reviewing not the merits of the decision but the decision-making process itself. It is thus different from an appeal. When hearing an appeal the court is concerned with the merits of the decision but in judicial review the court is basically concerned with the decision-making process because even otherwise the court is hardly equipped to review the merits of the decision. The court rightly remarked that it is not the function of the court to act as a superboard or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

91. (1980) 3 SCC 97: AIR 1980 SC 379.
92. (1979) 1 SCC 572: AIR 1979 SC 765.
93. (1994) 6 SCC 651.

Following the same principle, the Apex Court in *Chairman and Managing Director, United Commercial Bank* v. *P.C. Kakkar*[94], held that Court should not interfere with administrator's decision unless it is illogical or suffers from procedural impropriety or was shocking to the conscience of the Court in the sense that it was in defiance of logic or moral standards (Wednesbury principle). The Court would not go into the correctness of the choice made by the administrator and will not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency of decision making process and not the decision.

The duty of the court in exercising the power of judicial review is thus to confine itself to the following questions:[95]

1. Whether a decision-making authority exceeded its powers ?
2. Whether the authority has committed an error of law ?
3. Whether the authority has committed a breach of the principles of natural justice ?
4. Whether the authority has reached a decision which no reasonable person would have reached ?
5. Whether the authority has abused its powers ?

The power of judicial review is not directed against the decision but is confined to the decision-making process.[96] Therefore, courts generally do not appreciate evidences or enter into determination of questions which demand elaborate examination of evidences or interfere in the punishment imposed unless the administrative decision is mala fide or made in contravention of the principles of natural justice or in violation of any constitutional provision or is such which shocks the conscience of the court.[97]

Thus the judicial review of administrative actions can be exercised on the following grounds:

1. *Illegality*: This means that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it.
2. *Irrationality*: This means that the decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person could have arrived at such a decision.
3. *Procedural impropriety*: This means that the procedure for taking administrative decision and action must be fair, reasonable and just.

94. (2003) 4 SCC 364.

95. (1994) 6 SCC 651, 676.

96. *Haryana Development Authority* v. *Roochira Ceramics*, (1996) 6 SCC 584.

97. *B.C. Chaturvedi* v. *UOI*, (1995) 6 SCC 749.

4. *Proportionality*: This means in any administrative decision and action the end and means relationship must be rational.
5. *Unreasonableness*: This means that either the facts do not warrant the conclusion reached by the authority or the decision is partial and unequal in its operation.

Thus the modern trend in the area of judicial review is towards judicial retraint.[1] Against this backdrop the policy decision of the government is not the subject of judicial review unless it is unreasonable or against public interest.[2]

(13) Policy Decisions

"Unless government's policy decisions are contrary to any statutory or Constitutional provision, Court shall not interfere with it. It is not for the Courts", opined the Supreme Court, "to consider the relative merit of the policy and to strike it down merely on the ground that another policy would have been fairer and better. It is the prerogative of the administration. The administration has, while taking decision, right to 'trial and error' as long as both trial and error are bona fide and within the limits of authority. For testing the correctness of a policy, appropriate forum is Parliament and not the Courts. Therefore, the Courts are very circumspect in conducting an enquiry into policy statements of the government and most reluctant to impugn the judgment of the experts unless is an illegality in it".[3] Applying the same principle, the Court in *Aruna Roy* v. *Union of India*[4] held, that it is for Parliament to take a decision on a National Education Policy one way or the other, Court cannot take a decision on the good or bad points of an educational policy. Court can intervene in the implementation of policy only if it is against any statute or the Constitution.

(14) Finality of administrative action

The subject of administrative finality is extremely complex with intricate ramifications because courts very often shift their positions. The grasp of general principles may be simple, yet their application to a particular situation demands flexibility and subtlety.

Students of administrative law fear not so much the fact of the growing powers of the administration as that of the powers assuming a finality. Generally a clause is inserted in the statute by which the actions of an administrative authority is made final. Such a clause may be given various names, i.e., finality clause, private clause, exclusion clause, ouster clause, conclusive clause.

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1. *Tata Cellullar* v. *UOI*, (1994) 6 SCC 651, 677-678.
2. *State of U.P.* v. *U.P. University Colleges Pensioners' Association*, (1994) 2 SCC 729.
3. *BALCO Employees' Union* v. *Union of India*, (2002) 2 SCC 333.
4. (2002) 7 SCC 368.

1. *Modes of conferring finality*

No specific generalisation is possible as to the manner in which administrative actions are made final. However, there may be five usual modes of conferring finality on any administrative action:

(*i*) Sometimes the finality clause in a statute may make the administrative action final by expressly barring the jurisdiction of the court. For example, Section 2 of the Foreigners Act, 1946 provides that the administrative actions taken under this Act "shall not be called in question in any legal proceeding before any court of law".

(*ii*) Sometimes the finality clause does not expressly bar the jurisdiction of the court but otherwise makes the administrative action final. For example, Section 17(2) of the Industrial Disputes Act, 1947 provides that "the actions of the administrative authority shall be final".

(*iii*) Sometimes the statute neither expressly bars the jurisdiction of courts nor confers finality on the administrative action, yet the finality of the administrative action may be inferred by necessary implication. Such an inference may be drawn when the statute is a self-contained code which gives a right and also provides a machinery for the vindication of such right.

(*iv*) Inference of finality may also be drawn if the power of the authority to take certain action is rendered in subjective terms. For example, if the authority is "satisfied" or the action is 'desirable' or if it appears "necessary", "expedient", etc., to that authority that such action should be taken. However, leaving aside emergency situations, the courts have indicated that the authority's own declaration about the "satisfaction", "necessity" or "expediency" is not conclusive.[5]

(*v*) Yet there may be another category of finality clause. An Act may provide a certain time-limit within which an administrative action can be challenged in court and after the lapse of that period the action becomes final. Housing Acts in England contain a proviso that a person aggrieved by the order may question its validity within six weeks and unless it is so challenged the "order shall not be questioned in any legal proceedings whatsoever". In such cases the court has asserted that the statutory period for judicial review cannot be a rule of absolute limitation but it is certainly a rule of discretion and in appropriate cases the court can interfere even after the lapse of six weeks.[6]

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5 *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Town and Country Planning*, (1951) 2 KB 284.

6 *Ashbridge Investment Co. v. Minister of Housing*, (1965) 1 WLR 1320. This overrules

2. *Finality clause and the power of judicial review*

The question of conferring finality on administrative action in India can be conveniently studied under the following headings:

(*i*) Constitutional modes of judicial review and administrative finality.

(*ii*) Non-constitutional modes of judicial review and administrative finality.

(*i*) *Constitutional modes of judicial review and administrative finality.*— No finality clause contained in any statute and expressed in any language can bar the judicial review available under Articles 32, 226, 337 and 136 of the Constitution. In *Deokinandan Prasad* v. *State of Bihar*[7], the Supreme Court held that Section 23 of the Pension Act, 1871 which provided that suits relating to matters mentioned therein cannot be entertained in any court does not bar the constitutional modes of judicial review. In the same manner the High Court of Andhra Pradesh quashed Section 6(*a*) of the A.P. Preventive Detention Act, 1970 which provided that the order of detention would not be invalidated on the ground that it contained some vague and irrelevant grounds, as violative of Article 22(5) of the Constitution.[8]

Even in cases where the Constitution itself makes the action of an administrative authority final, the constitutional modes of judicial review cannot be barred by any necessary implication. In *Union of India* v. *J.P. Mitter*[9], the Supreme Court held that even in the face of Article 217(3) of the Constitution which makes the order of the President final, in cases of dispute relating to the age of a judge, the constitutional mode of judicial review is not barred.

Sticking to the same kind of judicial behaviour, the Supreme Court again held in *Indira Nehru Gandhi* v. *Raj Narain*[10], that clause (4) of Article 329-A (inserted by the Constitution Thirty-ninth Amendment Act, 1975) which frees the disputed election of the Prime Minister and the Speaker from the restraints of all election laws, does not bar the constitutional modes of judicial review. In *Satyavir Singh* v. *Union of India*[11], also the Supreme Court held that Article 311(3) of the Constitution which makes the decision of the government on question whether it is impracticable to hold enquiry against a

Smith v. *East Elloe RDC*, 1956 AC 736 where it was held that after six weeks order becomes conclusive.

7. (1971) 2 SCC 330: AIR 1971 SC 1409. *See* also *Durga Shankar* v. *Raghuraj*, AIR 1954 SC 520 wherein the Supreme Court held that Section 105 of the Representation of the People Act which made every order of the Election Tribunal final and conclusive does not bar constitutional modes of judicial review.

8. ILR 1972 AP 1025.

9. (1971) 1 SCC 396: AIR 1971 SC 1093. *See* also *Election Commission* v. *V. Rao*, AIR 1953 SC 210.

10. 1975 Supp SCC 1: AIR 1975 SC 2299.

11. (1985) 4 SCC 252: AIR 1986 SC 555.

government servant before disciplinary action as final, is not so final that the court cannot do anything. Therefore, even in the face of finality clause of Article 311(3) court can still consider whether the power has been properly exercised. Similary the Supreme Court while upholding the validity of the Constitution Fifty-second Amendment Act, 1985 popularly known as the anti-defection law, held that clause 7 which has taken away the power of judicial review of the courts by making the actions taken by the Speaker under the Act as final shall not take away the writ jurisdiction of the High Court and the Supreme Court.[12] Clause 7 provided that "no court shall have jurisdiction in respect of any matter connected with the disqualification of any member of a House under the Tenth Schedule notwithstanding anything in the Constitution".

(ii) Non-constitutional modes of judicial review and administrative finality.—The non-constitutional mode of judicial review is exercised by the civil courts. Section 9 of the Civil Procedure Code, 1908 lays down that courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred either expressly or by necessary implication.

The approach of the Court in cases of express exclusion of the jurisdiction of the civil courts has been to strictly interpret the clause and if the words are clear and the statute is a self-contained code, to refrain from exercising jurisdiction. In *Firm of Illuri Subbayya Chetty* v. *State of Andhra Pradesh*[13], the Supreme Court held that Section 18-A of the Madras General Sales Tax Act, 1939, which provided that no suit can be instituted in any civil court to set aside or modify the assessment made under the Act, does bar the jurisdiction of the civil court. In this case a suit had been filed in a civil court on the ground that the administrative authority instead of taxing sale has taxed purchases also. However, in *Government of Madras* v. *Basappa*[14], Justice Hidayatullah took a contrary view on more or less similar facts, and held that the word 'final' means final for the purpose of the Act only. But this view of the court was soon reversed in *State of Kerala* v. *Ramaswami Iyer and Sons*[15] and the Supreme Court held that the finality clause contained in Kerala Sales Tax Act bars the jurisdiction of the civil courts in entertaining any suit for the recovery of excess tax collected by the sales tax authority.

12. *Kihoto Hollohan* v. *Zachillhu*, (1987) 1 Scale 338.

13. AIR 1964 SC 322. *See* also *Secretary of State* v. *Mask & Co.*, AIR 1940 PC 105.

14. AIR 1964 SC 1873.

15. AIR 1966 SC 1738. *See* also *Kamala Mills* v. *State of Bombay*, AIR 1965 SC 1942.

Judicial behaviour became still more explicit in *Ram Singh* v. *Gram Panchayat, Mehal Kalan*[16] when the Supreme Court held that Section 13 of the Punjab Village Common Lands (Regulation) Act, 1961 which barred the jurisdiction of the civil court in question whether a property is for common purpose of the village is final and the civil court cannot interfere with the decision of the Collector on this point. The Supreme Court further emphasised that when the jurisdiction of the civil court is expressly excluded, the plaintiff cannot be allowed to circumvent that provision by means of clever drafting of pleading.

The implied exclusion of the jurisdiction of the civil courts may be inferred if the statute containing finality clause is a self-contained code. The inference of implied exclusion may also be drawn when the action is left to the subjective satisfaction of the administrative authority by using such words as 'if satisfied' or 'if in the opinion of the administrative authority it is just and proper'. In view of such an implied exclusion, if the civil courts decline jurisdiction, it may be a case of self-limitation and not inherent lack of power. However, if the statute creates a new right and also provides a machinery for the vindication of such right, the jurisdiction of the civil court shall be deemed to have been barred by necessary implication. Generally speaking broad guiding considerations in such situations are that whenever a right not pre-existing at common law is created by a statute and that statute itself provides a machinery for the enforcement of that right, then even the absence of an exclusionary provision the civil court's jurisdiction is impliedly barred. If however, a pre-existing right in common law is recognised by the statute and a new statutory remedy for its enforcement is provided, without expressly excluding the jurisdiction of the civil court, then both the common law and statutory remedies might become concurrent leaving open an element of election to the plaintiff.[17] In *Premier Automobiles Ltd.* v. *K.S. Wadke*[18], the Supreme Court held that the jurisdiction is impliedly barred as the Industrial Disputes Act is a self-contained code. The facts of this case were that in Premier Automobiles Ltd. there were two unions, the Sabha Union and the Association Union. There were some employees who were not members of either. On December 31, 1966 under the incentive scheme an agreement was entered into between the Sabha Union and the company which applied to its members and others who opted for it. Later on, because of the increase in the membership of the Association Union, the company entered into a fresh agreement with it overruling the Sabha agreement; hence the dispute. The court below and the High Court granted the request for

16. (1986) 4 SCC 364: AIR 1986 SC 2197; *See* also *Anwar* v. *First Addl. Judge*, (1986) 4 SCC 21: AIR 1986 SC 1785.

17. *Raja Ram Kumar Bhargava* v. *Union of India*, (1988) 1 SCC 681.

18. (1976) 1 SCC 496: AIR 1975 SC 2238.

injunction restraining the company from giving effect to the later agreement on the ground that it is a dispute which arises under the common law and the law of contract as it relates to the conditions of service. On appeal, the Supreme Court held that the jurisdiction of the civil court is impliedly barred as the Industrial Disputes Act is a self-contained code and the subject-matter could form an industrial dispute where the remedy lies under the Industrial Disputes Act.

The same stand was taken by the Supreme Court in a recent case *Upadhya H. Devashankar* v. *D.V. Solanki*[19]. The Representation of the People Act, 1951 as amended by the Amendment Act, 1966 is a self-contained code. Under Section 80-A of the Act election petitions are to be decided by any Single Judge of the High Court as designated by the Chief Justice. The decision of the Single Judge has been made appealable to the Supreme Court. There is no provision for appeal against interlocutory orders. Therefore, in view of the fact that the Representation of the People Act is a self-contained code, the Supreme Court held that no appeal shall lie to the Division Bench against the decision of the Single Judge where such appeal is available under Letters Patent provisions and no other judge of the High Court can hear the election petition except the one designated by the Chief Justice.

However, the law relating to administrative finality as discussed above does not cover the cases of ultra vires acts of the administrative authority or the unconstitutionality of law under which the authority exercises power. The finality clause does not bar the jurisdiction of the courts if the action is ultra vires the powers of the administrative authority. In *Munni Devi* v. *Gokal Chand*[20], the Supreme Court held that the U.P. (Temporary Control of Rent and Eviction) Act, 1947 which gives power to the District Magistrate to allot a vacant shop and also makes the decision of the District Magistrate final, does not bar the jurisdiction of the court in cases where the authority commits a jurisdictional error and allots a shop which is not vacant. Therefore, not only in the cases of substantive ultra vires but in cases of procedural ultra vires also the finality clause is not final. In *Pabbojan Tea Co.* v. *Dy. Commr.*[21], the Supreme Court held that the finality clause as laid down under Section 24 of the Minimum Wages Act, 1941 does not bar jurisdiction of the civil courts if the authority has violated the mandatory procedure of hearing before fixing the minimum wages for the tea plant workers. Similarly in *Shiv Kumar Chadha* v. *Municipal Corporation of Delhi*[22], the Supreme

19. (1988) 2 SCC 1; *see* also *C.J. Patel (Dr)* v. *V.L. Mehta*, 12 Guj 850 (1982); *Kadiravan* v. *B. Thirumalai Kumar*, ILR (1970) Mad 183; *L.N. Nayak* v. *R. Chaturvedi*, AIR 1986 MP 165 overruled. *Siaram* v. *Nathuram*, 1968 ALJ 576; *Ram Dhan* v. *Bhanwarlal*, AIR 1985 Raj 185, *upheld*

20. (1969) 2 SCC 879: AIR 1970 SC 1727.

21. AIR 1968 SC 271.

22. (1993) 3 SCC 162. *See* also *Kihoto Hollohan* v. *Zachillu*, 1992 Supp (2) SCC 651.

Court held Section 347-E of the Delhi Municipal Corporation Act which bars the jurisdiction of the civil court in cases of demolition of unauthorised structures does not oust the Court's jurisdiction to go into the question whether the order was a nullity being vitiated by jurisdictional error.

In the same manner, it is also not the implication of the finality clause that void laws be enforced without a remedy. This view was expressed by the Supreme Court in *Dhulabhai* v. *State of M.P.*[23]. In this case certain notifications issued by the government under the Madhya Bharat Sales Tax Act, 1950 were declared ultra vires Article 301 of the Constitution. Thereafter, a suit was filed for the recovery of tax charged under these unconstitutional notifications. Section 17 of the Act contained a finality clause which provided that the orders made under the Act shall not be called in question in any court. The Supreme Court upholding the maintainability of the civil suit in the face of the finality clause held that it is not the implication of the finality clause that void laws be enforced without any remedy.

Reiterating the propositions laid down in *Dhulabhai case* (supra) by Hidayatullah, C.J., the Supreme Court in *Sayed Mohamed Baquir El Edroos* v. *State of Gujarat*[24] held that Section 2(1)(*e*) Explanation of the Bombay Personal Inams Abolition Act, 1952 which provides that if any question arises whether any grant is an inam such question shall be referred to the State Government and the decision of the State Government shall be final cannot exclude the jurisdiction of the civil court. Explaining the reasons the court observed that the Act does not give any detail about the reference and to the enquiry by the government and no appeal has been provided for hence it cannot be said that the case of the plaintiff has been considered by the government in the same way as it would have been considered if the case had been filed before a civil court. Accepting the first proposition of *Dhulabhai* (supra) the court further held that where a statute gives a finality to the orders of the special tribunal, the civil court's jurisdiction shall be excluded "if there is adequate remedy to do what the civil courts would normally do in a suit".[25] The Highest Bench also found that the second proposition of *Dhulabhai* (supra) which provides that "where there is an express bar to the jurisdiction of the court", "an examination of the scheme of the particular Act to find out the adequacy or the sufficiency of the

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Court held that the finality clause under Anti-defection Law does on bar judicial review of actions falling outside the jurisdiction of the authority.

23. AIR 1969 SC 78. *See* also *Venkataraman* v. *Madras*, AIR 1966 SC 1089 in which *Raleigh Investment Co.* v. *Governor-General-in-Council*, AIR 1947 PC 78 was *overruled*.

24. (1981) 4 SCC 383: AIR 1981 SC 2017.

25. Jain, M.P.: *Judicial Response to Privative Clauses in India*, (1980) 22 JILI, pp. 6-10. *See* also Jain, M.P.: *Administrative Law*, XVII ASIL (1981), pp. 517-18.

remedies provided may be relevant", is not attracted in the instant case because the Act does not lay down the detailed procedure to be followed by the State Government and there is no detailed procedure for appeal and revision also. Therefore, the court concluded that the 'finality clause' in Section 2(1)(*e*) does not bar the jurisdiction of the civil court.

The declaration by the President of India under Arts. 341 and 342 of the Constitution, with respect to lists of Scheduled Castes and Scheduled Tribes in relation to a State was held by the court to be conclusive subject to the amendment by the Parliament. Thus by necessary implication, the jurisdiction of the civil court to take cognizance and give a declaration stands prohibited.[26]

Exclusion of the civil court's jurisdiction cannot be readily inferred on ground of availability of remedy and the forum under special Acts when the action in question is taken without complying with the provisions of the Act. Where the high-power transmission line was taken over the property of the respondent without his consent, it was argued that the civil court's jurisdiction is barred as statutory remedy under the Electricity Act is available, the Court held that laying transmission line without the consent of the respondent and without any approved scheme cannot be treated in accordance with the provisions of the Act and hence the jurisdiction of the civil court is not barred.[27] The finality clause providing for the exclusion of court's jurisdiction cannot be provided by the rules framed by the administrative authority. Where the rules framed under the Electricity (Supply) Act, 1948 provided for the exclusion of the jurisdiction of the court, it was accepted that this cannot bar the jurisdiction of the civil court to entertain a suit and consider the validity of the orders passed by the Board against consumers.[28]

(15) Comparative study: The position regarding ouster/finality

In England where Parliament is supreme and can exclude judicial review of any administrative action, the attitude of courts in the Nineteenth Century was to accept the finality clause as final. In *Institute of Patent Agents* v. *Lockwood*[29], the House of Lords interpreted the finality clause "as contained in this Act" to mean that the jurisdiction of the court is barred. However, as courts jealously guard their jurisdiction, the *Lockwood* doctrine was overruled in *Minister of Health* v. *Yaffee*[30]. Interpreting a finality clause couched in similar language, the court held that it can still scrutinise whether the subordinate legislation conflicts with the parent Act or whether the procedural requirements have been complied with. The tool which the court may

26. *State of T.N.* v. *A. Gurusamy*, (1997) 3 SCC 542.

27. *M.P. Electricity Board* v. *Vijay Timber Co.*, (1997) 1 SCC 68.

28. *Hyderabad Vanaspathi Ltd.* v. *A.P. Electricity Board*, (1998) 4 SCC 470.

29. 1894 AC 347.

30. 1931 AC 347.

wield to get around the finality clause is the interpretation of the clause in such a manner as not to exclude the power of the court where it is so possible without offending the canons of interpretation.

This judicial behaviour in the face of parliamentary sovereignty created controversy in England, resulting in the inclusion of this question in the terms of reference of the Franks Committee. This committee recommended that in cases involving jurisdictional facts and in cases where appeal on the point of law is not provided, the power of judicial review should not be excluded. On this recommendation, Section 11(1) was inserted in the Tribunals and Enquiries Act, 1958 which provided that any finality clause in any statute passed before 1958 shall not exclude judicial review.

Therefore, in England, there cannot be finality in cases of ultra vires actions of the administrative authority. *Anisminic Ltd.* v. *Foreign Compensation Commission*[31] is a pace-setter for judicial behaviour in this direction. In this case, following the Suez crisis, the Egyptian Government took over British companies and signed a treaty in which the Egyptian Government made available a certain amount of money to the British Government for distribution amongst the companies. The names of the companies were given in the treaty and included the name of the appellant-company. This amount was made over to the Foreign Compensation Commission constituted under the Foreign Compensation Act, 1950. Section 4 of the Act contained a finality clause to the effect that the decisions of the Commission shall not be called in question in any court. The claim of Anisminic Ltd. was rejected on the ground that they had transferred their interest to an Egyptian company. Under the Act, the Commission had no power to decide the question of entitlement to compensation. The court held that since the Commission had committed an error of jurisdiction in determining an issue which was outside its jurisdiction, the jurisdiction of the court was not barred. As the distinction between error of jurisdiction and error within jurisdiction is not very clear, the decision in the *Anisminic case* (supra) makes the judicial review broad-based even in the face of a clear finality clause. Therefore, even if the constitutionality of an Act of Parliament cannot be questioned by courts, the courts can still enquire as to what Parliament intended in passing the impugned provision or as to whether there was any abuse of power conferred by Parliament, whether rules of natural justice were observed by the authority, or whether the authority acted within or in excess of jurisdiction.[32]

Another technique of giving finality to administrative action used in England was to confer power on administrative authorities in 'subjective terms'. For example, use of words like 'when they are satisfied' or 'as they

31. (1969) 1 All ER 208. The principle laid down in this case was followed in *S.E. Asia Fire Bricks* v. *Non-Metallic Products*, 1981 AC 363.

32. *See* Thakker, C.K.: ADMINISTRATIVE LAW (1992), Eastern Book Company, p. 259.

deem it fit and proper', etc., gave the administrative authority absolute discretion in the exercise of their power. This technique was used in England to meet the conditions created by wars. However, even in the face of absolute subjective discretion conferred by Parliament on administrative authorities courts consistently held that the discretionary powers must be exercised judiciously and there if power is exercised in bad faith courts will exercise the power of judicial review.[33] Thus even in England where Parliament is supreme 'finality' is not absolutely final.

Under the French Constitution Parliament is supreme. Courts have no power to declare the law of Parliament unconstitutional in the popular sense though constitutional council exercises pre-promulgation review. It may follow therefore that the finality clause in any French statute would oust the jurisdiction of the court. However, it is heartening to note that French courts have never accepted this position and there is no instance in French legal history of a successful exclusion of judicial review, though it still remains a theoretical possibility. In Lamotte (February 17, 1950), the power was given to an administrative officer to requisition and bring into cultivation any farmland which is abandoned or uncultivated for more than two years. The statute contained a finality clause to the effect that the action of the administrator cannot be the object of any administrative or judicial proceeding. The Conseil d'Etat held that this does not bar judicial review in cases of excess of jurisdiction.[34]

There is no denying the fact that in the area of administrative finality, courts hold a very delicate balance between power and liberty in a modern form of government. Therefore, a trend in judicial behaviour which regards 'finality' and 'judicial review' as complementary and not contradictory is a welcome sign.

In the USA, the right to judicial review, which is grounded both in 'due process' and the constitutional position of judicial power, cannot be taken away by any 'finality' clause in the statute. The basis of this proposition is that the Congress cannot override the fundamental principle of the constitution of separation of power and so it cannot divest courts of their inherent power to review the actions of administrative authorities which are illegal, arbitrary or unreasonable and which impair personal or property rights.

The decision of the U.S. Supreme Court in *Breen* v. *Selective Service Local Board*[35] is a pointer in this direction. Though judicial review outside the constitutional structurisation can be regulated by the Congress,[36] yet to

33. *Robinson* v. *Minister of Town and Country Planning*, (1947) 2 All ER 395. *See* also Thakker, C.K., *Administrative Law*, (1992), Eastern Book Company, p. 260.

34. Quoted in Brown and Garner: FRENCH ADMINISTRATIVE LAW (1967).

35. 396 US 460 (1970). *See* also *Shaughnessy* v. *Pedreiro*, 349 US 48.

36. Section 12, Administrative Procedure Act, 1946. Section 12 of the Administrative

interpret the finality clause literally may mean the creation of serious constitutional problems. In *Breen case* (supra) the petitioner who was an undergraduate student, and thus entitled to deferment, was classified as 'available for military service'. The statute contained a finality clause which prohibited judicial review of 'classification' after the registrant responds negatively to an induction order. The Supreme Court held that the statute cannot be interpreted literally as a bar to pre-induction review. Therefore, the denial of judicial review in USA in the face of finality clause constitutes judicial self-limitation and not the lack of power. The Supreme Court of USA rightly stated in *Barlow* v. *Collins*[37], "preclusion of judicial review of administrative actions...is not lightly to be interfered with".

(C) VIOLATION OF PROCEDURAL NORMS

To what extent an administrative action in violation of a prescribed norm of procedure will be invalid is a complex question. The Supreme Court had the opportunity of examining this question in *Bank of Patiala* v. *S.K. Sharma*[38]. In this case an order was passed imposing punishment on an employee after an enquiry in violation of a procedural norm laid down in Rule 68(*b*)(*iii*) Bank Officers' Service Regulation which provided that the copies of the statement of witnesses must be provided to the employee at least three days before the enquiry. In this case though the employee had been given an opportunity to examine the file and take notes but copies of the statements of witnesses had not been provided as such. Upholding the validity of administrative action the Apex Court discussed in detail the legal consequences of the violation of a procedural norm. The court held:

1. An order passed imposing punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The court/tribunal should enquire whether (*a*) the provision violated is of substantive nature, or (*b*) whether it is procedural in character.
2. In case of violation of a procedural provision the position is that procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent employee. They are generally conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate an enquiry held or order passed. Except in cases falling under 'no notice, no opportunity and no hearing' categories, the complaint of violation

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Procedure Act, 1946 states: "Except so far as (1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion, the power of judicial review has been retained."

37. 397 US 159, 166 (1970).

38. (1996) 3 SCC 364.

of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself a proof of prejudice. The court cannot insist on proof of prejudice in such cases. For example, where there is an express provision providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to produce evidences in his defence, and if in a given case the delinquent employee has not been afforded that opportunity even when requested, the prejudice is self-evident. No proof of prejudice is required in such a case.

3. The whole question can also be looked from the point of view whether the procedural provision is directory or mandatory. In the case of a procedural provision which is directory and not mandatory in character, the complaint of violation has to be examined from the standpoint of substantial compliance. An order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

In case the violation of a procedural provision is of mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in the public interest. If it is in the interest of the person, then it must be seen whether the delinquent employee has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on violation of that provision. If, on the other hand, it is found that the delinquent employee has not waived it or the provision could not be waived by him because it is conceived in the public interest, then the court shall make appropriate directions, including the setting aside of the order of punishment.

4. Where the enquiry is not governed by any specific rule or regulation and the authority is simply to follow the principles of natural justice, then a distinction must be made between 'no opportunity' and 'no adequate opportunity'. In case of 'no opportunity' order would undoubtedly be invalid and authority may be asked to take proceedings afresh according to law. In case of 'no adequate opportunity' effect of violation must be examined from the standpoint of prejudice

caused to the delinquent employee. If prejudice has been caused court may pass necessary order including the quashing of the order of punishment.

5. There may be situations where the interest of the State or public interest may call for the curtailing of the rule of fair hearing. In such situations, the court will have to balance public/State interest with the requirement of fair hearing and arrive at an appropriate decision.
6. The test of prejudice or substantial compliance shall not apply in case of violation of a substantive provision of law. For example, provisions regarding the constitution of the enquiry committee must be strictly complied with and violation of such a provision would render the administrative order invalid.
7. These principles shall not apply in cases where bias is alleged.

(D) DOCTRINE OF LEGITIMATE EXPECTATION

The doctrine of legitimate expectation belongs to the domain of public law and is intended to give relief to the people when they are not able to justify their claims on the basis of law in the strict sense of the term though they had suffered a civil consequence because their legitimate expectation had been violated. The term 'legitimate expectation' was first used by Lord Denning in 1969 and from that time it has assumed the position of a significant doctrine of public law in almost all jurisdictions.[39]

In India the Apex Court has developed this doctrine in order to check the arbitrary exercise of power by the administrative authorities. In private law a person can approach the court only when his right based on statute or contract is violated but this rule of locus standi is relaxed in public law to allow standing even when a legitimate expectation from a public authority is not fulfilled. Therefore, this doctrine provides a central space between 'no claim' and a 'legal claim' wherein a public authority can be made accountable on the ground of an expectation which is legitimate. For example, if the Government has made a scheme for providing drinking water in villages in certain area but later on changed it so as to exclude certain villages from the purview of the scheme then in such a case what is violated is the legitimate expectation of the people in the excluded villages for tap water and the government can be held responsible if exclusion is not fair and reasonable. Thus this doctrine becomes a part of the principles of natural justice and no one can be deprived of his legitimate expectations without following the principles of natural justice.

39. *See* Clerk, R., *In Pursuit of Fair Justice*, AIR 1996 (J) 11.

Like the bulk of the administrative law the doctrine of legitimate expectation is also a fine example of judicial creativity. Nevertheless it is not extra legal and extra-constitutional. A natural habitat for this doctrine can be found in Article 14 of the Constitution which abhors arbitrariness and insists on fairness in all administrative dealings. It is now firmly established that the protection of Article 14 is available not only in case of arbitrary "class legislation" but also in case of arbitrary 'State action'. Thus the doctrine is being hailed as a fine principle of administrative jurisprudence for reconciling power with liberty.[40]

The doctrine has negative and positive contents both. If applied negatively an administrative authority can be prohibited from violating the legitimate expectations of the people and if applied in a positive manner an administrative authority can be compelled to fulfil the legitimate expectations of the people. This is based on the principle that public power is a trust which must be exercised in the best interest of its beneficiaries—the people.

(1) Development in England

As mentioned earlier though the term 'legitimate expectation' was first used by Lord Denning in *Schmidt* v. *Secretary of State for Home Affairs*[41] wherein the government had cut short the period already allowed to an alien to enter and stay in England, the court held that the person had legitimate expectation to stay in England which cannot be violated without following a procedure which is fair and reasonable. In this manner Lord Denning used the term 'legitimate expectation' as an alternative expression to the word 'right'.

However, it was in *Breen* v. *Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers' Union)*[42] that the doctrine of legitimate expectation found its legitimate place. In this case the District Committee of a trade union had refused to endorse a member's election as shop steward. The Court held that if a person claims a privilege he can be turned away without hearing but here a persón has something more than a mere privilege—a legitimate expectation that his election would be approved unless there are relevant reasons for not doing so, therefore, the natural justice principles are attracted to the case in order to ensure fairness.

In the same manner in the case of *Melnnes* v. *Onslow Fane*[43], also the doctrine of legitimate expectation found fine exposition. In the case of the

40. *Food Corporation of India* v. *Kamdhenu Cattle Feed Industries*, AIR 1993 SC 1601.
41. (1969) 1 All ER 904 (CA).
42. (1971) 1 All ER 1148 (CA); *see* also *Padfield* v. *Trade Union of Agriculture, Fishries and Food*, (1968) 1 All ER 694 (HL). House of Lords held that dairy farmers have legitimate expectation that their complaint would be referred to a committee for investigation.
43. (1978) 3 All ER 211 (Ch D).

British Boxing Board of Control a Domestic Tribunal had rejected an application for entrance licence without hearing. The court speaking through Megrry V.C. made a distinction between application, forfeiture and legitimate expectation situations in licence cases. On the one extreme are application cases where person has no right to the grant of his application. On the other extreme are forfeiture cases in which a person's existing right is violated and, therefore, he is clearly entitled to the benefit of principles of natural justice. In between these extreme situations lies a third situation of legitimate expectation cases. This situation may cover cases of renewal of licence. In this situation a person can legitimately expect that his licence will be renewed and if his licence is not renewed he has a right to know what makes him unsuitable now when he was suitable earlier—principles of natural justice.

The Privy Council in *A.G. of Hongkong* v. *Ng. Yuen Shiu*[44] while quashing the removal order passed by the Hongkong Immigration Authority without notice and hearing also held that there is a violation of the legitimate expectation of the immigrant based on announcement of the authority that while examining the cases of illegal immigration each case would be decided on its own merit and, therefore, removal cannot be passed without fair hearing.

Invoking the doctrine of legitimate expectation the House of Lords in *Council of Civil Services Union* v. *Minister of Civil Services*[45] held that legitimate expectations may arise from an expression or promise made by the authority or from an established past practice which cannot be violated without good reasons. In this case the administrative authority had withdrawn a long-standing practice by a mere oral instruction.[46]

In a sense the doctrine of legitimate expectation imposes a duty on the authority to act fairly and is not restricted to situations where expectationer is to be consulted or be given an opportunity to make representation. This was held by the court in *R.* v. *Secretary of State for Home Department ex parte Ruddock*[47]. In this case violating the established criteria for the issuance of interception order the Home Department had issued warrant for the interception of telephone calls of the applicant. Though the court did not grant relief as nothing unfair or improper was found yet the duty to act fairly where legitimate expectations are involved was firmly established.

44. (1982) 2 All ER 346 (PC).

45. (1984) 3 All ER 935 (HL)

46 In this case the staff at the Communication Headquarters had a long standing to belong to National Trade Unions, and thus an established practice of alteration in terms and conditions of service only through consultation. In this case though the relief was denied on the ground of national security but the doctrine of legitimate expectation was firmly rooted.

47. (1987) 2 All ER 518 (QBD)

In the same manner in *R.* v. *Secretary of State for Home Department, ex parte Khan*[48], the court held that if the authority had made a statement that a certain criterion or procedure would be followed the people can legitimately expect that it would be followed in the decision-making process of the authority, therefore, the authority is under an obligation to follow that criterion or procedure. In this case, in violation of the provisions of the circular regarding entry of adopted children in England, the authority had refused entry to the adopted child of Mr Khan. The court quashed the order of the authority as it was on considerations of policies which were not in existence when the circular had been issued.

In *R.* v. *Secretary of State for Transport, ex parte Greater London Council*[49], the doctrine was applied in tax cases. The court held that a taxpayer had legitimate expectations to make representation that he should not pay tax at the maximum rate.

Though the doctrine as evolved in England is still in an evolutionary stage yet one thing in certain that it is an equity doctrine and, therefore, the benefit of the doctrine cannot be claimed as a matter of course. It is a flexible doctrine which can be moulded to suit the requirements of each individual case. The court did not apply the doctrine where applicant's own conduct was unlawful or claim was unworthy. In *Cinnamond* v. *British Airports Authority*[50] the court upheld the decision of the authority to prohibit the entry of taxi drivers into the airport because of their own past conduct which invited fines. In *Lloyd* v. *Mahon*[51], the House of Lords further held that the doctrine does not include within its ambit a right to oral hearing. Courts have also not protected expectations by judicial review when nothing unfair was found on the part of the authority or legitimate public interest demanded otherwise.[52] The doctrine, however, has been applied to statutory as well as non-statutory authorities.[53]

(2) Development in India

The capacity of the Apex Court to import legal doctrines and to plant them in a different soil and climate and to make them flourish and bear fruits is tremendous. The importation of the doctrine of legitimate expectation is recent. The first reference to the doctrine is found in *State of Kerala* v. *K.G. Madhavan Pillai*[54]. In this case the government had issued a sanction to the respondents to open a new unaided school and to upgrade the existing

48. (1985) 1 All ER 40 (CA).
49. (1985) 3 All ER 300 (QBD).
50. (1980) 2 All ER 368 (CA).
51. (1987) 1 All ER 1118 (HL).
52. *Supra* notes 45 & 47.
53. *Supra* note 49.
54. (1988) 4 SCC 669: AIR 1989 SC 49.

ones. However, after 15 days a direction was issued to keep the sanction in abeyance. This order was challenged on the ground of violation of the principles of natural justice. The Court held that the sanction order created legitimate expectation in the respondents which was violated by the second order without following the principles of natural justice which is sufficient to vitiate an administrative order.[55] The doctrine was further applied in *SC and WS Welfare Association* v. *State of Karnataka*[56]. In this case the government had issued a notification notifying areas where slum clearance scheme will be introduced. However, the notification was subsequently amended and certain areas notified earlier were left out. The Court held that the earlier notification had raised legitimate expectation in the people living in an area which had been left out in a subsequent notification and hence legitimate expectations cannot be denied without a fair hearing. Thus where a person has legitimate expectation to be treated in a particular way which falls short of an enforceable right, the administrative authority cannot deny him his legitimate expectations without a fair hearing. Legitimate expectation of fair hearing may arise by a promise or by an established practice.[57]

The same principle was followed by the Apex Court in *Navjyoti Coop. Group Housing Society* v. *Union of India*[58]. In this case the Development Authority, without notice and hearing, had changed the order of priority for the allotment of land to cooperative societies from 'serial number of registration' to the 'date of approval of list of members'. Quashing the order on the ground of violation of legitimate expectation the Court held that where persons enjoying certain benefits or advantage under old policy of government derive a legitimate expectation even though they may not have any legal right under private law in regard to its continuance but before changing that policy affecting adversely that benefit or advantage the aggrieved persons are entitled to a fair hearing.

The concept of legitimate expectation has now gained importance in administrative law as a component of natural justice, non-arbitrariness and rule of law.[59] It aims at checking the growing abuse of administrative power as a supplement to the principles of natural justice, unreasonableness, fiduciary duty of administrative authorities and in future, perhaps, the principle of proportionality.[60]

55. It is curious to note that in this case doctrine was invoked by the government to deny respondents a legal standing. However, Court held that respondents not only have locus standi but are also entitled to the benefit of the principles of natural justice.

56. (1991) 2 SCC 604.

57. See also *State of H.P.* v. *Kailash Mahajan*, 1992 Supp (2) SCC 351.

58. (1992) 4 SCC 477.

59. *Food Corporation of India* v. *Kamdhenu Cattle Feed Industries*, (1993) 1 SCC 71, 76.

60. *Union of India* v. *Hindustan Development Corpn.*, (1993) 3 SCC 499.

The Court in *Union of India* v. *Hindustan Development Corpn.*[61] got the opportunity of laying down the meaning and scope of this doctrine. Explaining the meaning of the doctrine and the legitimacy of the doctrine when it arises, the Court held:

> "Time is a three-fold present: the present as we experience it, the past as a present memory and future as a present expectation. For legal purpose, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in a natural and regular sequence. Again it is distinguishable from a mere expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and, therefore, it does not amount to a right in a conventional sense."[62]

In this case in the absence of any fixed procedure for fixing price and quantity for the supply of foodgrains, the Government adopted a dual pricing system (lower price for big suppliers and higher price for small suppliers) in the public interest in order to break the cartel. The Court held that there is no denial of legitimate expectation as it is not based on any law, custom or past practice. The Court said that it is not possible to give an exhaustive list wherein legitimate expectations arise but by and large they arise in promotion cases, though not guaranteed as a statutory right, in cases of contracts, distribution of largess by the government and in somewhat similar situations.

Demarcating the scope of the doctrine the Court held that legitimate expectation gives sufficient locus standi to the applicant for judicial review. The doctrine is to be confined mostly to a right of fair hearing before a decision which results in negativating a promise or withdrawing an undertaking is taken. Though the denial of legitimate expectation is a ground for challenging an administrative action but the court will not interfere unless the denial is arbitrary, unreasonable, not in the public interest, and inconsistent with the principles of natural justice or where denial is in violation to a right. However, it does not mean that an administrative body cannot change its policy, so, denial of legitimate expectation can be justified only by showing some overriding public interest.[63] The Court further held that

61. *Union of India* v. *Hindustan Development Corpn.*, (1993) 3 SCC 499.

62. *Id.*, p. 540.

63. *See* also *P.T.R. Exports* v. *UOI*, (1996) 5 SCC 268. Court will interfere only if change

unless the fair hearing is not a pre-condition for the exercise of power the doctrine has no role to play and the court should not interfere with the exercise of discretion by the administrative authority. The court must allow full choice to the authority which the legislature is presumed to have intended. Thus the extent of judicial review of administrative action is very limited. The doctrine of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits". The court should exercise self-restraint and restrict the claim of denial of legitimate expectation to the legal limitations.[64]

The doctrine of legitimate expectation confers upon person a right which is enforceable in case of its denial. But whether an expectation is legitimate or not is a question of fact which has to be determined not according to claimant's perception but in the larger public interest. Thus in *U.T. Chandigarh* v. *Dilbagh Singh*[65], the Court held that selectees are not entitled to an opportunity of hearing before cancellation of the list even though they have legitimate expectations but they have no indefeasible right to be appointed in absence of any rule to that effect. On the other hand in *U.P. Awas Evam Vikas Parishad* v. *Gyan Devi*[66], the Court held that the local body which has the right to lead evidence under Section 20(2) of the Land Acquisition Act for the purpose of determining compensation can legitimately expect to receive notice about the pendency of the proceedings and its right to lead evidence and if this legitimate expectation is denied the court can intervene. Again in *M.P. Oil Extraction Co.* v. *State of M.P.*[67], the Apex Court held that selected industries with which an agreement has been entered into by the government can legitimately expect that the renewal clause should be given effect to in usual manner and according to past practice unless there is any special reason not to adhere to such practice the denial of legitimate expectation would vitiate an administrative action.

In *National Building Construction Co.* v. *S. Raghunathan*[68], the Supreme Court brought in the concept of 'detriment' in legitimate Expectation Theory and held that enforcement of any legitimate expectation required: (*i*) reliance on representation; (*ii*) resultant detriment. The Court further observed that though the government has the power to change its policy in public interest yet the court can look into the question of proportionality of change of policy

of policy is mala fide and there is abuse of power which applicant must prove.

64. *Union of India* v. *Hindustan Development Corpn.*, (1993) 3 SCC 499.

65. (1993) 1 SCC 154. *See* also *Supreme Court Advocates on Record Assn.* v. *UOI*, (1993) 4 SCC 441 (*per* Verma, Dayal, Roy, Anand and Bharucha, JJ.), p. 478. Opined that doctrine applicable in selecting appointees to Supreme Court to make them non-arbitrary.

66. (1995) 2 SCC 326.

67. (1997) 7 SCC 592.

68. (1998) 7 SCC 66.

and can see whether legitimate expectation has been properly balanced against the need for change. However, Court's discretion must not transgress Wednesbury principle. Court cannot judge the merit of the policy. Therefore, unless the change of policy is so outrageous that no sensible person who had applied his mind to the question to be decided could have arrived at it, Court will not interfere because flexibility necessarily inherent in this principle must not be sacrificed on the alter of legal certainty. In this case persons working on deputation in Iraq were given 125% of basic pay as foreign allowance. After revision of pay scales by the Fourth Pay Commission, this allowance was withdrawn. The Court rejected the contention of violation of legitimate expactation on the ground that peculiar situation prevailing in Iraq justified change in policy. Thus unless the change of policy is clearly irrational or perverse, court will not interfere.

Similarly the Court rejected the contention of legitimate expectation in *State of Bihar* v. *S.A. Hasan*[69]. In this case government had taken over the management of a private Medical College. Employees initially continued on ad hoc basis but later on regularised. There was no material on record to show that erstwhile management was liable for pension or any pensionary benefits in relation to its employees. Under these circumstances Court rejected the claim of employees to count their past services towards retiral benefit being legitimate expectations. Dealing with the applicability of the doctrine the Apex Court in *Chanchal Sarkar (Dr)* v. *State of Rajasthan*[70] further held that if service of a person has been terminated in terms of his original appointment order, this does not provide legitimate expectation against termination. In this case appellant had been appointed temporarily for a period of six months or till the availability of a candidate selected by Public Service Commission. Service rules prohibited continuance of a temporary appointment beyond one year without the approval of Public Service Commission. In such circumstance, Court held that mere continuance in service by virtue of successive extension orders does not imply waiver of the condition attached to the original order, and hence does not provide a ground for legitimate expectation.

Elaborating the law further in *Punjab Communications Ltd.* v. *Union of India*[71], the Apex Court observed that legitimate expectations may be procedural and substantive both. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before any change in decision is made. The substantive part of the principle relates to the representation that a benefit of a substantive nature will be granted or will be continued. Procedural legitimate expectation cannot be

69. (2002) 3 SCC 566.
70. (2003) 3 SCC 485.
71. (1999) 4 SCC 727.

withdrawn without giving a person some opportunity of advancing reason for contending that it should not be withdrawn. In the same manner substantive expectation cannot be withdrawn unless some rational grounds for withdrawing it has been communicated to the person and on which he has been given an opportunity to comment. The principle of legitimate expectation in the substantive sense that the decision-making authority can normally be compelled to give effect to his representation unless overriding public interest demands otherwise has become the part of Indian law no matter it has still not been accepted in many jurisdictions.[72] On the other hand European Courts go a step further and try to balance legitimate interest with the demand of public interest.

It cannot be overemphasised that the concept of legitimate expectation has now emerged as an important doctrine. It is stated that it is the latest recruit to a long list of concepts fashioned by the court to review an administrative action.[73] It operates in public domain and in appropriate cases constitutes a substantive and enforceable right.[74] As a doctrine it takes its place beside such principles as rules of natural justice, rule of law, non-arbitrariness, reasonableness, fairness, promissory estoppel, fiduciary duty and, perhaps, proportionality to check the abuse of the exercise of administrative power.[75] The principle at the root of the doctrine is Rule of Law which requires regularity, predictability and certainly the governments' dealing with the public.[76] An expectation could be based on an express promise, or representation or by established past action or settled conduct. It could be a representation to the individual or generally to a class of persons. Whether an expectation exists is a question of law, but clear statutory words override any expectation, however founded. However as an equity doctrine it is not rigid and operates in areas of manifest injustice. It enforces a certain standard of public morality in all public dealings. However, considerations of public interest would outweigh its application. It would immensely benefit those who are likely to be denied relief on the ground that they have no statutory right to claim relief.

(E) DOCTRINE OF PUBLIC ACCOUNTABILITY

Doctrine of Public Accountability is one of the most important emerging facet of administrative law in recent times. The basic purpose of the emergence of the doctrine is to check the growing misuse of power by the administration and to provide speedy relief to the victims of such exercise of power. The doctrine is based on the premise that the power in the hands

72. *Canada Assistance Plan, Re*, (1991) 83 DLR (IV) 297.

73. *Union of India* v. *Hindustan Development Corpn.*, (1993) 3 SCC 499.

74. *M.P. Oil Extraction Co.* v. *State of M.P.*, (1997) 7 SCC 592.

75. *Supra* note 73.

76. *Chanchal Goyal (Dr)* v. *State of Rajasthan*, (2003) 3 SCC 485.

of administrative authorities is a public trust which must be exercised in the best interest of the people. Therefore, the trustee (public servant) who enriches himself by corrupt means holds the property acquired by him as a constructive trustee.

The celebrated decision of the Privy Council in *A.G. of Hong Kong* v. *Reid*[77] has greatly widened the scope of this principle of jurisprudence in public law adjudication. Lord Templeman observed that engaging in bribery is an evil practice which threatens the foundations of any civilised society and that any benefit obtained by a fiduciary through the breach of duty belongs in equity to the beneficiary (the State), is the basic norm subject to which all legal principles require to be interpreted. The Privy Council further observed that when bribe is accepted by a fiduciary (public servant) in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value the fiduciary (public servant) must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe and incurred the risk of loss. If the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of a duty.

It was further held that a gift accepted by a person in fiduciary position as an incentive for breach of duty constituted a bribe and, although in law it belonged to the fiduciary, in equity he not only becomes a debtor for the amount of the bribe to the person to whom the duty was owed but he also holds the bribe and any property acquired therewith on constructive trust for that person.

In this pace-setting case the respondent, Reid who was a Crown prosecutor in Hong Kong, took bribes as an inducement to suppress certain criminal prosecutions and with those monies acquired properties in New Zealand in his name, in the name of wife and his solicitor. The administration of Hong Kong claimed these properties on the ground that owners thereof are constructive trustees for the Crown. The Privy Council upheld the claim.

The Privy Council observed that if the theory of constructive trust is not applied and properties attached when available, the danger is that properties may be sold and the proceeds whisked away to some 'numbered bank account'.

It was further observed that one can understand the immorality of the bankers who maintained numbered bank accounts but it is difficult to understand the ammorality of the governments and their laws which sanction such practices—in effect encouraging them. The law laid down in this case equally applies to a situation even when fiduciary relationship does not exist.

77. (1993) 3 WLR 1143.

The concept of constructive trust and equity to enforce public accountability as laid down in *Reid case*[78] was followed by the Supreme Court in *A.G. of India* v. *Amritlal Prajivandas*[79]. In this case the court was dealing with the challenge to the validity of the "illegally-acquired properties" in clause (*c*) of Section 3(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA). The Act provided for the forfeiture of properties earned by smuggling or other illegal activities whether standing in the name of the offender or in the name of other parties. The court upheld the validity of the Act.

The Apex Court in *DDA* v. *Skipper Construction Co.*[80] not only further followed the above principle but enlarged its scope by stating that even if there was no fiduciary relationship or no holder of public office was involved, yet if it is found that someone has acquired properties by defrauding the people and if it is found that the persons defrauded should be restored to the position in which they would have been but for the said fraud, the court can make necessary orders. This is what equity means and in India the courts are not only courts of law but also courts of equity. The Court further held that all such properties must be immediately attached. The burden of proof to prove that the attached properties were not acquired with the aid of monies/properties received in the course of corrupt deals shall lie on the holder of such properties.[81]

The Court further observed that a law like the SAFEMA has become an absolute necessity, if the canker of corruption is not to prove the death-knell of this nation and suggested to the Parliament to act in this matter if they really mean business.[82]

In this case Skipper—a private limited company—had purchased a plot of land in an auction from the Delhi Development Authority (DDA) but did not deposit the bid amount. When the DDA proposed to cancel the allotment Skipper obtained a stay from the High Court. Meanwhile it started selling the space in the proposed building. Thus prospective buyers of space were cheated to the tune of about Rs 14 crore. This was done in violation of the Supreme Court order.

Further elaborating the doctrine of public accountability the Court applied the theory of 'lifting the corporate veil' in order to fix the accountability on persons who are the actual operators. The Court observed that the concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegality or to defraud people. In such cases the

78. *Hong Kong* v. *Reid*, (1993) 3 WLR 1143.
79. (1994) 5 SCC 54.
80. (1996) 4 SCC 622.
81. *Id.* p. 642.
82. *Ibid.*

court would look at the reality behind the corporate veil so as to do justice between the parties.[83] The Court further held that in order to compensate those who are defrauded or cheated the Court can pass necessary orders under Article 142 of the Constitution. The absence of a statutory law like the SAFEMA will not inhibit the Supreme Court while making appropriate orders under Article 142.

Though the Court certainly put the right foot forward but did not take a long stride. It missed the opportunity of providing to the doctrine of public accountability its due reach. The Court did not express any opinion on the question whether the misdeeds of public servants which are not only beyond their authority but done with mala fide intent would bind them personally or the State/corporation will be vicariously liable. It cannot be overemphasised that if the doctrine of accountability is to be given its full sweep the concept of State/corporation liability be shifted to officer's liability in appropriate cases. This will have an inhibiting effect on the temptation of the public servants to misuse power for personal gains.

In order to strengthen the public accountability further in *State of Bihar* v. *Subash Singh*[84] the Court held that the Head of Department is ultimately responsible and accountable unless there are special circumstances absolving him of the accountability. The Supreme Court observed that no matter if there is hierarchical responsibility for decision-making yet the Head of the Department/designated officer is ultimately responsible and accountable for the result of the action done or decision taken. Despite this, if there is any special circumstance absolving him of the accountability or if someone else is responsible for the action, he needs to bring it to the notice of the court. The controlling officer holds each of them responsible at the pain of disciplinary action. The object thereby is to ensure compliance with the rule of law.[85]

The concept of public liability has been further strengthened by the Court by strictly applying the contempt law. Recently many senior public servants were sent to jail for deliberately violating court orders. The Court has also imposed cost personally against the erring officer after due notice and hearing for delay in the discharge of duties.[86] In the same manner where the public servant has caused a loss to the public exchequer the Court has allowed the government to recover such loss personally from the erring officer.[87]

83. *DDA* v. *Skipper Construction Co.*, (1996) 4 SCC 622, 639.

84. (1997) 4 SCC 430.

85. *Ibid.*

86. *State of Bihar* v. *Subash Singh*, (1997) 4 SCC 430.

87. *State of Kerala* v. *Thressia*, 1995 Supp (2) SCC 449.

It is now established law that the writ courts while exercising jurisdiction under Arts. 32 and 226 of the Constitution can award compensating and exemplary cost for the violation of a person's fundamental rights and for the abuse of power by the State.[88] In *Nilabati Behera* v. *State of Orissa*[89] the Court held that a claim in public law for compensation for violation of human rights and abuse of power is an acknowledged remedy for the enforcement and protection of such rights. Thus every individual has an enforceable right to compensation when he is victim of violation of his fundamental rights and abuse of power. In such a situation, the Court observed, that leaving the victim to the remedies available in civil law limits the role of constitutional courts as protectors and guarantors of fundamental rights of the citizens. Thus courts are under an obligation to make the State or its servants accountable to the people by compensating them for the violation of their fundamental rights.

The principle of accountability through compensation was further reinforced by two more principles evolved by the Apex Court. In *Nilabati Behera* v. *State of Orissa*[90] the Court laid down that the concept of sovereign immunity is not applicable to the case of violation of right to life and personal liberty guaranteed by Art. 21 of the Constitution. In *M.C. Mehta* v. *Union of India*[91] the Court further held that if the harm is caused due to handling of hazardous material, the liability of the State or its instrumentality will be absolutely strict under the rule of *Rylands* v. *Fletcher*[92] and such a liability will not admit even the recognised exception of the rule such as an 'act of God'. The compensation, thus, provided under the public law is in addition to the private law remedy for tortious action and punishment to the wrongdoer under criminal law. Following the principle the Court awarded a compensation of Rs 10,000 to the legal heirs of each of the deceased who died in a fire in a jhuggi colony caused due to illegal and unauthorised electricity connections given by the employees of the Delhi Electricity Supply Undertaking.[93] The scope of public accountability has been further strengthened by developing such principles as "pollutor must pay" in case of environmental pollution[94] and that every administrative authority shall be accountable for the proper and efficient discharge of its statutory duty.[95]

88. See *Rudul Sah* v. *State of Bihar*, (1983) 4 SCC 141: AIR 1983 SC 1086; *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416.
89. (1993) 2 SCC 746.
90. *Ibid.*
91. (1987) 1 SCC 395.
92. (1968) LR 3 HL 330.
93. *H.C. Srivastava* v. *UOI*, (1996) 8 SCC 80.
94. *Indian Council for Enviro-Legal Action* v. *Union of India*, (1996) 8 SCC 212.
95. *Ratlam Municipal Corpn.* v. *Vardhi Chand*, AIR 1980 SC 1622. Court held that lack of funds will not be defence for the enforcement of statutory duty.

The establishment of Central Human Rights Commission and States Human Rights Commissions under the Human Rights Protection Act, 1993 is also a step in the direction of making the State accountable for the violation of human rights of the people. These commissions exercise jurisdiction suo motu or on a complaint and provide justice in an informal manner to the victim of violations of human rights and abuse of power.

At this point a few cases decided by the Apex Court may be noted:

1. For abusing the process of court the public officer was held responsible and liable to pay costs from his own pocket.[1]
2. For adopting casual approach by which the land could not be purchased by the authority and instead purchased by private builder, held officer personally liable.[2]
3. For irregularities committed in auction of land resulting in loss to public[3] held official responsible for the loss.
4. For oppressive, arbitrary and unconstitutional actions of public servants, held exemplary damages can be awarded.[4]
5. For abuse of power while exercising discretionary power in granting State largesse in an arbitrary, unjust, unfair and mala fide manner public servant can be held personally liable.[5]
6. For abuse of power for extraneous reasons in acceptance of tender, held all public officers concerned including Minister shall be liable to punishment.[6]
7. For granting illegal promotion with retrospective effect which resulted in frittering away huge public funds, held that erring officers shall be personally liable.[7]
8. For misuse of public power not only the Minister but also the official working under him will be personally liable.[8] Thus departmental head is vicariously responsible for the actions of his subordinates, although in actual fact he is not responsible for their use of power which he must, of necessity, delegate to them.[9]

The Central Bureau of Investigation (CBI) is the prime instrumentality within the area of enforcing accountability. It is under the control of the

1. *State of Kerala* v. *Thressia*, 1995 Supp (2) SCC 449.
2. *State of Maharashtra* v. *P.K. Pangare*, 1995 Supp (2) SCC 119.
3. *DDA* v. *Skipper Construction Co.*, (1996) 1 SCC 272.
4. *Common Cause (Petrol Pump matter)* v. *UOI*, (1996) 6 SCC 593.
5. *Ibid. See* also *Shivsagar Tiwari* v. *UOI*, (1996) 6 SCC 558.
6. *Dutta Associates* v. *Indo Mercantiles*, (1997) 1 SCC 53.
7. *H.R. Ramachandriah* v. *State of Karnataka*, (1997) 3 SCC 63.
8. *Secy., Jaipur Development Authority* v. *Daulat Mal Jain*, (1997) 1 SCC 35.
9. *State of Punjab* v. *G.S. Gill*, (1997) 6 SCC 129.

executive so it was functioning in a manner which left much to be desired especially in enforcing accountability in high places. The Supreme Court in a pace-setting judgment separated the CBI from the executive by vesting its superintendence in the Central Vigilance Commission (CVC) and directed a fixed tenure, of at least two years, for its director except in extraordinary circumstances. It also held that the CBI would no longer need government concurrence to investigate corruption cases against government officers of joint secretary level and above. Taking note of the inertia the Court directed that the Central Vigilance Commission be given statutory status and its superintendence over the functioning of the CBI. In order to ensure independence of the Commission the Court further directed that the selection for the post of Commissioner would be made by a committee comprising the Prime Minister, Home Minister and the leader of the Opposition from a panel of outstanding civil servants and others with impeccable integrity. Recommendation for the appointment of the CBI Director will be made by a committee headed by the Vigilance Commissioner with the Home Secretary and Secretary (personnel) as members. The Court further said that the CBI Director shall have full freedom to allocate work and constitute investigation teams and the post of the Director of the Enforcement Directorate shall be upgraded to that of Additional Secretary/Special Secretary of the government. The Court further recommended the constitution of a body on the lines of Director of Prosecution in the U.K. for prosecution of cases. The judges said till the appointment of this body special counsel shall be appointed for the conduct of important trials on the recommendation of the Attorney General. The Court directed the preparation of a panel of competent lawyers to act as prosecuting attorneys in cases of significance. Every prosecution which resulted in a discharge or acquittal of the accused must be reviewed and responsibility should be fixed of dereliction of duty, if any. The Court asked the Central government to ask the States to set up similar mechanisms. With all these directions the Supreme Court entertained the belief that the investigative agencies shall function better now and the principle of accountability shall be better served.[10]

Moving swiftly in the direction of accountability the Apex Court in another pace-setting judgment held that Members of Parliament and Members of Legislative Assemblies are public servants under the Prevention of Corruption Act. The Court observed that there is no doubt that these persons hold an office and are authorised to carry out public duty. The Court clarified that these persons also cannot claim exemption from prosecution under Article 105(2) of the Constitution regarding the protection of privileges as MPs and ML. As for any offence committed outside Parliament/Legislature. The Court held that Article 105(2) could not be interpreted as a charter of freedom

10. *The Tribune*, December 18, 1997, p. 1.

of speech and also freedom for corruption. The object of Article 105(2) is to ensure independence to legislators in parliamentary democracy but it cannot put a member above law. This immunity cannot cover corruption and bribery. Though there is no authority prescribed under the Prevention of Corruption Act, 1988, the Court observed, yet prosecution can be launched with the permission of the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha, as the case may be.[11] Thus by redefining the role of the State, rewriting the rules, codes and manuals, relaying decision making, fixing accountability at all levels and providing for transparency in administration the Court is simply trying to make government function better in the interest of the people by swinging public opinion.

Before parting with the subject of public accountability one is impelled to reproduce classical observations of the Apex Court which require serious consideration by every thinking individual. The Apex Court observed, "Some persons in the upper strata (which means the rich and the influential class of society) have made the 'property career' the sole aim of their life. The means have become irrelevant—in a land where its greatest son born in this century said 'means are more important than the ends'. A sense of bravado prevails; every thing can be managed; every authority and every institution can be managed. All it takes is to 'tackle' or 'manage' it in an appropriate manner. They have developed an utter disregard for law—nay, a contempt for it; the feeling that the law is meant for lessor mortals and not for them. The courts in this country have been trying to combat this trend, with some success as the recent events show. But how many matters we can handle? How many of such matters are still there? The real question is how to swing the polity into action, a polity which has become indolent and soft in its vitals? Can the courts alone do it? Even so, to what extent, in the prevailing state of affairs? Not that we wish to launch upon a diatribe against anyone in particular but judges of this Court are also permitted, we presume, to ask in anguish, 'what have we made of our country in less than fifty years?' Where has the respect and regard for law gone? And who is responsible for it?"[12]

A similar note was struck by the Apex Court in *Superintending Engineer, Public Health, U.T. Chandigarh* v. *Kuldeep Singh*[13] when it observed:

> "Every public servant is a trustee of the society and in all facets of public administration, every public servant has to exhibit honesty, integrity, sincerity and faithfulness in the implementation of the political,

11. *The Tribune*, April 18, 1998, p. 1 (*JMM bribery case*) However in another decision Court held that the officers of government companies or public sector undertakings are not entitled to protection of sanction before prosecution under S. 197 of CrPC.

12. *DDA* v. *Skipper Construction Co.*, (1996) 4 SCC 622, 645-646.

13. (1997) 9 SCC 199.

social, economic and constitutional policies to integrate the nation, to achieve excellence and efficiency in public administration. A public servant entrusted with duty and power to implement constitutional policy . . . should exhibit transparency in implementation and should be accountable for due effectuation of constitutional goals."

In *State of Punjab* v. *G.S.Gill*[14] the Supreme Court further observed:

"Many of the functions which the modern State undertakes are designed to make opportunities more nearly equal for everybody and to protect weaker individuals from the rapacity of the strong. In these days of fallen rectitude and honesty in the performance of public duty the bureaucracy is too willing to sabotage public policy and constitutional philosophy. Judiciary/Tribunal should be astute in the declaration of law or in its solemn power of judicial review or dispensation of justice to issue directions or mandamus against the law, constitutional comments or public policy."

In *Vineet Narain* v. *Union of India*[15], the Apex Court went on to emphasise that when it comes to corruption, as it exists at different levels, proves to be both powerful and stubborn to stall any real or superficial moves in that direction. In other words politico-bureaucratic wall proves to be impregnable against all possible onslaughts against corruption. Judicial response has been slow and varied but that is the only response available at the moment. There is no premium on honesty. Every thing is a matter of manipulation. Being a soft state every thing is circumvented and manipulated. In the name of elimination of corruption we see shadow boxing.

It was against this conceptual backdrop the Supreme Court decided *P.V. Narasimha Rao* v. *State*[16], (popularly known as *Jharkhand Mukti Morcha bribery case*). In 1991 elections Congress remained 14 members short of a clear majority in the Parliament. On July 28, 1993 Government faced a no confidence motion which was defeated by 265 to 251. Thereafter, a First Information Report (FIR) was filed with the Central Bureau of Investigation (CBI) alleging conspiracy of taking and receiving bribe by the members of JMM and others for voting against the motion. It was for quashing the FIR that a petition was filed with the Delhi High Court which was dismissed. Thus, appeal before the Supreme Court which was heard by a Constitution Bench. The Constitution Bench with a majority of 3 to 2 held that Article 105 of the Constitution confers immunity on the members of Parliament for freedom of speech and the right to give vote in Parliament.

14. (1997) 6 SCC 129, 137.

15. (1998) 1 SCC 226.

16. (1998) 4 SCC 626. Special CBI Court has in Oct. 2000 awarded three years' rigorous imprisonment to Narasimha Rao, Former Prime Minister and Buta Singh, Former Minister.

Therefore, those MPs who received bribes and voted in the Parliament cannot be prosecuted. However, those MPs who gave bribes or did not vote can be subjected to criminal proceedings. The Court further held that a member of Parliament is a public servant and therefore, can be proceeded against under the Prevention of Corruption Act, 1988 and the Indian Penal Code. This decision of the Court generated a lot of controversy. It was argued that Article 105 of the Constitution does not protect corruption. The purpose of immunity is to preserve legislative independence, but taking bribe is no part of any legislative process. The Court failed to follow its own wisdom reflected in its earlier decisions,[17] aimed at rooting out corruption in high places. It is certain that the object of immunity is to ensure independence of a member of parliament for a healthy functioning and protecting him against crime will be repugnant to any healthy functioning. The object of Article 105 of the Constitution is not to create a superman immune from law of crimes.

Another classical case decided by the Supreme Court on public accountability was *Common Cause* v. *Union of India*[18]. This case was the result of a Public Interest Litigation petition which brought to the notice of the Court arbitrary allotment of petrol outlets by the concerned Minister. The Court cancelled all allotments and also imposed exemplary damages of rupees fifty lakhs for misfeasance of a public servant. In a review petition, reversing its decision, the Court held that imposing of exemplary damages is a concept of tort where it can be awarded for misfeasance if the plaintiff has suffered due to any administrative arbitrary action, and because in a PIL petition, as there is a no plaintiff whose interest is adversely affected, no damages can be awarded. The Court further observed that merely because a person is elected and inducted as a minister in the government he cannot be said to be holding a trust on behalf of the people and hence, cannot be said to have committed the criminal breach of trust. The Supreme Court explained that the idea that a person on being elected by the people and on becoming a Minister holds a sacred trust on behalf of the people is a philosophical concept and reflects the image of virtue in its highest conceivable perfection, hence, this philosophy cannot be employed for the determination of the offence of criminal breach of trust. The Court cautioned that if the Ministers of the government work under threat of being proceeded in a Court of law or work under constant fear of exemplary damages being awarded against them, they will develop a defensive attitude which will not be in the interest

17. *See* also *Gill* v. *R.*, (1948) 75 IA 41. Privy Council held that if a judge accepts bribe, he is not acting in exercise of any public duty and hence, there is no immunity; *Satwant Singh* v. *State of Punjab*, (1960) 2 SCR 89. A Constitution Bench of the Supreme Court held that some offences like accepting bribe cannot be committed by a public servant while acting in discharge of his office as official status only furnishes an opportunity.
18. (1999) 6 SCC 667 (known as *Satish Sharma case*).

of the administration. This case also generated a lot of controversy and it was felt as if a good cause was lost in the abstraction of pure logic and the Court failed to catch the bull by its horns. Fact remains that law is not pure logic but experience.

(F) DOCTRINE OF PROPORTIONALITY

The application of the doctrine of proportionality in administrative law is a debatable issue and has not been fully and finally settled. Proportionality means that action should not be more drastic than it ought to be for obtaining the desired result. It covers some common ground with reasonableness. Proportionality is a course of action which could have been reasonably followed and should not be excessive or severe, etc. Proportionality can be described as a principle where the court is "concerned with the way in which the administrator has ordered his priorities; the very essence of decision-making consists, surely, in the attribution of relative importance to the factors in the case, . . .: This is precisely what proportionality is about."[19] If elaborated further it is the "preparedness to hold that a decision which overrides a fundamental right without sufficient objective justification will, as a matter of law, necessarily be disproportionate to the aims in view . . . . The deployment of proportionality sets in focus the true nature of the exercise; the elaboration of a rule about permissible priorities".[20] The doctrine of proportionality used in fundamental rights' context involves a balancing test and the necessity test. The "balancing test" means scrutiny of excessive onerous penalties or infringements of rights or interests and a manifest imbalance of relevant considerations. The "necessity test" means that the infringement of fundamental rights in question must be by the least restrictive alternative.[21]

(1) Development in England

While judging the validity of an administrative action or statutory discretion, normally the Wednesbury test is applied. According to this test the court would consider whether irrelevant matters had been taken into consideration or whether relevant matters had not been taken into consideration or whether the action is bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of choice made by the administrator amongst the various alternatives open to him. Nor the court would substitute its decision to that of the administrator. The decision of the administrator must be within the four corners of law and not one which no sensible person could have reasonably arrived at. Besides these, the decision should be bona fide. The

19. *See* Laws, J., *Is the High Court the Guardian of Fundamental Constitutional Rights?* (1993 PL 59) quoted in *UOI* v. *G. Ganayutham*, (1997) 7 SCC 463, 473.

20. *Id.*, p. 474.

21. *Ibid.* De Smith, Woolf and Jowell: *Judicial Review of Administrative Action*, (1995) 601-605.

decision could be one of many choices open to the authority but it is for that authority to decide upon the choice and the court does not substitute its own view.[22]

In a further development in 1985 Lord Diplock in *Council of Civil Services Unions* v. *Minister of Civil Services*[23] summarised the principles of judicial review of administrative action as illegality, procedural impropriety and irrationality. He further said that the doctrine of proportionality as a principle of judicial review may become later available in the same manner as is available in several member States of European Economic Community. Illegality means that no authority should act beyond its powers. Therefore, excess of jurisdiction is the basis of judicial review on ground of illegality. Irrationality is Wednesbury test of unreasonableness. It applies to actions which are so outrageous in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. Procedural impropriety refers to what may be called procedural ultra vires. Adoption of 'proportionality' as a ground of judicial review was left for the future. However, Wednesbury test of reasonableness is not the standard of "the man on the Clapham Omnibus". It is the standard indicated by a true construction of the act which distinguishes between what is authorised and what is not. These are called CCSU standards of judicial review.[24]

The next decision came in 1991 by the House of Lords in *R.* v. *Secy. for Home Affairs, ex parte Brind*[25], where it was again reiterated that doctrine of proportionality cannot become a part of administrative law in England unless European Convention of Human Rights and Fundamental Freedoms are incorporated by the Parliament into domestic law. In this case Lord Bridge explained the two judgments which the court can make while exercising power of judicial review of administrative action: (1) Primary judgment as to whether the particular competing public interest justifies the particular restriction. (2) Secondary judgment as to whether a reasonable administrative officer, on material before him, could reasonably make the primary judgment. It was held that the Court would make only the secondary judgment and the primary judgment would be made by the administrative officer whom Parliament has entrusted the discretion. It follows that if the European Human Rights Convention is incorporated into the domestic law of England Court will be obliged to make the primary judgment also and

22. *Associated Provincial Picture Houses* v. *Wednesbury Corpn.*, (1948) 1 KB 223. In this case a person had challenged the local authority order that allowed performance on Sunday but disallowed children below the age of 15 to be admitted to performance.

23. 1985 AC 374.

24. *Ibid.*

25. (1991) 1 All ER 720.

apply the principle of proportionality in situations involving human rights. Until it is done the Court would confine itself to making a secondary judgment only.

The same principle was restated in 1996 in *R.* v. *Ministry of Defence, ex parte Smith*[26]. Lord Bingham explained that in the case appellants' rights as human beings are in issue which are justiciable the Court can thrust itself into the position of the primary decision maker.[27] From this it appears that doctrine of proportionality as a ground of judicial review of administrative action is not available for the present but may be available in future when the European Human Rights Convention is incorporated into the domestic law of England.

(2) Development in India

In India Fundamental Rights form a part of the Indian Constitution, therefore, courts have always used the doctrine of proportionality in judging the reasonableness of a restriction on the exercise of fundamental rights. The law is clear on the point that while deciding the reasonableness of the restriction on fundamental rights the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, *disproportion of the imposition*, prevailing conditions at the time should all enter into judicial verdict.[28] Thus while exercising the power of judicial review court performs the primary role in Brind's sense of evaluating if a particular competing public interest justifies the particular restriction under the law. This situation arises when the court is deciding on the constitutionality of a law imposing unreasonable restriction on the exercise of fundamental rights.

However whether the courts dealing with executive or administrative action or discretion exercised under statutory powers where fundamental rights are involved could apply principle of 'proportionality' and take up primary role is still not certain. In 1997 while deciding *Union of India* v. *G. Ganayutham*[29], the Court left this question open because it was not necessary for the decision in the case as the party had not pleaded the violation of fundamental rights. In this case 50% of respondent's pension and 50% of gratuity had been withheld on proof of his misconduct. One of the grounds taken by respondent was that the penalty was excessive. The Central Ad-

26. (1996) 1 All ER 257.

27. *Id.*, pp. 264-265.

28. *Laxmi* v. *State of U.P.*, AIR 1981 SC 873; *Trivedi* v. *State of Gujarat*, AIR 1986 SC 1323; *State of A.P.* v. *McDowell & Co.*, (1996) 3 SCC 709.

29. (1997) 7 SCC 463. *See* also *State of A.P.* v. *McDowell & Co.*, (1996) 3 SCC 709. Held: "It is one thing to say that a restriction imposed upon fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say if it thinks it unreasonable, unnecessary or unwarranted".

ministrative Tribunal came to the conclusion that the punishment awarded was "too severe", that the lapse was procedural, there was no collusion between the respondent and any party, that the officer had otherwise done excellent work and, therefore, it was a fit case where the withholding of pension of 50% had to be restricted for a period of 10 years instead of on a permanent basis. Allowing the appeal the Supreme Court held that in such cases the judicial review is restricted to secondary judgment[30] and thus in review court cannot substitute its own views of the punishment. Power of judicial review is limited to illegality, procedural impropriety and irrationality meaning thereby that no sensible person who weighed the pros and cons could have arrived at or that the punishment is outrageous in defiance of any logic or standard of morality. Therefore, as neither the Wednesbury[31] nor CCSU tests[32] had been satisfied, the order of the Tribunal was set aside. It was emphasised by the Court that unless the Court/Tribunal opines in its secondary role, that the administrator was, on the material before him, irrational according to the *Wednesbury* or *CCSU* norms, the punishment cannot be quashed. Even then, the matter has to be remitted back to the appropriate authority for reconsideration. It is only in a very rare situation in order to shorten litigation that the Court may substitute its own view on punishment. Such a rare situation may include a case where punishment awarded is such which shocks the conscience of the Court/Tribunal.[33] A similar view as taken in *Indian Oil Corpn.* v. *Ashok Kumar Arora*[34] when the Court held that in matters of punishment the Court will not intervene unless the punishment is wholly disproportionate.

It may be noted that the Apex Court had applied the doctrine of proportionality while quashing the punishment of dismissal from service and sentence of imprisonment awarded by the court-martial under the Army Act.[35]

However, while quashing the punishment on the ground of its being "strikingly disproportionate" the Court observed:

> ". . . . The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amounts in itself to conclusive evidence of bias. The doctrine of proportionality, as a part of the concept of judicial

30. *Ex parte Brind*, (1991) 1 AC 696.

31. *Supra* note 22.

32. *Supra* note 23. *See* also *Tata Cellular* v. *Union of India*, (1994) 6 SCC 651.

33. *B.C. Chaturvedi* v. *UOI*, (1995) 6 SCC 749.

34. (1997) 3 SCC 72.

35. *Ranjit Thakur* v. *UOI*, (1987) 4 SCC 611.

review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."[36]

It is pertinent to note that though this case applied the doctrine of proportionality but in fact the court confined itself to the description of irrationality as laid down in *CCSU*[37], namely, that it should be in outrageous defiance of logic.

It is a cardinal principle of criminal jurisprudence that the punishment imposed should not be disproportionate to the gravity of offence proved. However, while dealing with a disciplinary matter of a government servant, the Apex Court in *State of Orissa* v. *Vidya Bhushan Mahapatro*[38] held that if the High Court is satisfied that some but not all the findings of the Tribunal were unassailable, then it had no jurisdiction to direct the disciplinary authority to review the penalty. "If the order may be supported on any finding as to substantial misdemeanour for which the punishment can be lawfully imposed, it is not for the court to consider whether that ground alone would have weighed with the authority in dismissing a public servant."[39]

The jurisdiction of the High Court under Article 226 of the Constitution, according to the Supreme Court, is highly limited. It can only go into the questions of illegality, irrationality and procedural impropriety, therefore, it is not within the power of the court to substitute a decision taken by a competent authority simply because the decision sought to be substituted is a better one.[40] Thus it is clear that while deciding the proportionality of a punishment/penalty CCSU rules are to be followed.[41] Therefore, unless the punishment is so outrageous and in defiance of logic that no sensible person could have arrived at it, the court would not interfere.

In cases of adjudication under the Industrial Disputes Act, the principle of proportionality fully applies by virtue of Section 11-A of the Act. The Industrial Court as well as the High Court, on a perusal of the charges and the punishment imposed, can always reduce the punishment if it is disproportionate to the gravity of the charge held proved. Rule of proportionality shares ground with the rule against arbitrariness. Therefore, in the absence of any statutory provision if a major penalty has been imposed for a minor

36. *Ranjit Thakur* v. *UOI*, (1987) 4 SCC 611, 620.
37. *Council of Civil Services Unions* v. *Minister of Civil Services*, 1985 AC 374.
38. 1963 Supp (1) SCR 648.
39. *Ibid.*
40. *Dwarkadas Marfatia* v. *Board of Trustee, Bombay Port*, AIR 1989 SC 1642. *See* also *State of A.P.* v. *McDowell & Co.*, (1996) 3 SCC 709.
41. *Council of Civil Services Unions* v. *Minister for Civil Services*, 1985 AC 374.

lapse it would be clearly arbitrary falling within the inhibition of Article 14.[42]

Rule of proportionality is fully applicable in constitutional adjudication where the court has to decide on the reasonableness of a restriction on the exercise of fundamental rights. However, its application in the field of administrative law is still in an evolving stage. For the present the doctrine is not available in administrative law in the sense that the court cannot go into the question of choice made and priority fixed by the administrator, the court can only see if given the material before the administrative officer he has acted as a reasonable man. In an action for review of an administrative action the court cannot act as a court of appeal. Even in cases where the validity of a restriction imposed on the fundamental right is involved the court must exercise self-restraint and allow greater margin of appreciation to the administrator and the legislature in certain cases.[43]

Summing up the current position of the application of the doctrine of proportionality in administrative law in England and India the Apex Court was of the view:

(1) To judge the validity of any administrative order or statutory discretion, normally the *Wednesbury test* is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker, could, on material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not be however go into the correctness of the choices made by the administrator amongst the various alternatives open to him. Nor the court would substitute its decision to that of the administrator. This is the *Wednesbury test*[44].

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational—in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are Council of Civil Services Unions principles.[45]

42 See *Director, NRSA* v. *G. Reddeppa*, (1991) 1 APLJ 243.

43 *Union of India* v. *G Ganayutham*, (1997) 7 SCC 463.

44. *Associated Provincial Picture Houses* v. *Corpn. of Wednesbury*, (1948) 1 KB 223.

45. *Council of Civil Services Union* v. *Minister of Civil Services*, 1985 AC 374.

(3) (*a*) As per *Bugdaycay*[46], *Brind*[47] and *Smith*[48] as long as the Convention on Human Rights is not incorporated into English Law, the English courts merely exercise *secondary* judgment to find out if the decision maker could have, on the material before him, arrived at the *primary* judgment in the manner it has been done.

(*b*) If the Convention on Human Rights is incorporated in England making available the principle of proportionality, then the English courts will render *primary* judgment on the validity of administrative action and find out if the restriction is disproportionate or excessive or is not based upon fair balancing of fundamental freedom and the need for the restriction thereupon.

(4) (*a*) The position in India, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the Courts/ Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles to find out if the executive or administrative authority has reasonably arrived at his decision as a primary authority.

(*b*) Whether in a case of administrative or executive action affecting fundamental freedoms, the courts in India will apply the principle of "proportionality" and assume the primary role, is left open, to be decided in appropriate cases. It will then be necessary to decide whether the courts will have a primary role only if the freedoms under Arts. 19 and 21, etc., are involved and not for Article 14.[49]

POINTS FOR DISCUSSION

1. The efforts of courts in developing a rational law of locus standi has been an exercise in futility because no one would waste his time and money in challenging an administrative action in which he has no interest. However, it is equally true that in any developed legal system, professional litigants and meddlesome interlopers need discouragement. How is the dilemma to be solved in the best interests of individual justice and administrative viability. Discussion on the subject should aim at evolving workable principles of locus standi to sustain public actions.

2. The basis of Social Action Litigation is the gradual liberalisation of the technical rule of locus standi. This gradual unfolding and its possible limits may be discussed.

3. The system of judicial review of administrative action has been inherited from England. It is on this foundation that the Indian Courts have built the superstructure of

46. *R.* v. *Secy. of State, ex p. Bugdaycay*, 1987 AC 514.
47. *R.* v. *Secy. for Home Deptt., ex p. Brind*, (1991) 1 All ER 720.
48. *R.* v. *Ministry of Defence, ex p. Smith*, (1996) 1 All ER 257.
49. *UOI* v. *G. Ganayutham*, (1997) 7 SCC 463, 478-479, *per* Jagnnadha Rao, J.

control mechanism. In this background the students may discuss historically the development of principles and instrumentalities of judicial review in England.

4. The constituency of public law review in India still remains undermined. The reason seems to be that the 'type of agency' and not the 'rights of the person' is the focal point of attention by courts. What possible parameters can be developed to redetermine the constituency of public law review as to cover every possible violation of public and private right through an administrative action?

5. Sometimes it is suggested that keeping in view the norms of functioning of an intensive form of government in a democratic society, if a person first proceeds through his political representative instead of rushing through the expensive and dilatory judicial process, the time thus consumed in seeking a negotiated relief against any administrative action must be considered as an excusable delay by the courts. Is it a sound suggestion keeping in view the socio-political realities in India?

6. If the concept of class actions as provided in the Civil Procedure Code are encouraged and other grievance mechanisms like the institution of Ombudsman is strengthened the SAL jurisdiction of the court may not be as necessary as it seems today. Students may discuss the validity of this statement.

7. The doctrine of Legitimate Expectation is the latest recruit to a long list of concepts fashioned by the Courts to check the abuse of the exercise of administrative powers. It imposes morality in all public dealings. In the light of this statement this doctrine may be discussed keeping in view its impact on the flexibility of administrative action.

8. Public accountability is a concept developed to make administration responsive and responsible. This doctrine may be discussed as developed in India through case law with a special emphasis on the concept of administrative powers as public trust.

9. Doctrine of proportionality if fully established as a constitutional law concept but its application in administrative law is still being debated. Desirability of applying this doctrine in administrative law may be discussed keeping in view its various claims and counter claims.

10. In certain situation curtailing the right to procedural due process becomes necessary in public interest. Such situations may be discussed in order to develop some norms necessary for balancing public interest with the requirement of fair hearing.

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8

Judicial Review of Administrative Action: Modes

(A) PUBLIC LAW REVIEW

An important aspect of public law review is not only the enforcement of private rights but to keep the administrative and quasi-administrative machinery within proper control. This aspect of public law review was rightly stressed by the Supreme Court in *S.L. Kapoor* v. *Jagmohan*[1]. In this case two non-official members of the New Delhi Municipal Committee had filed a petition before the Supreme Court under Article 136 against the governmental action of superseding the Municipal Committee without complying with the principles of natural justice. During the pendency of the case, the term of office of the petitioner expired. It was argued that since the petition has become infructuous, the Court has no power to continue with the appeal. Rejecting the contention the Apex Court held that since the petition involves an issue of public importance, the Court can still decide the issue even in the face of loss of standing of the petitioners.

It is no denying the fact that today due to the intensive form of government, there is a tremendous increase in the functions of the administration. Therefore, if these new-found powers are properly exercised these may lead to a real welfare State and if abused these may lead to a totalitarian State.[2] Against this backdrop the prime function of judicial review is to check the abuse of administrative powers and to enforce accountability on the operators of these powers.

The power of public law review is exercised by the Supreme Court and High Courts through writs of certiorari, prohibition, mandamus, quo warranto and habeas corpus and also through the exercise of power under Articles 136 and 227 of the Constitution. These modes of public law review may now be discussed in detail.

(1) Writ of Certiorari

'Certiorari' is a Latin word, being the passive form of the word *Certiorare* meaning to 'inform'. It was essentially a royal demand for information. The King wishing to be certified of some matter, ordered that the necessary information be provided for him. In the beginning certiorari was never used to call for the record of proceedings of an Act or Ordinance

1. (1980) 4 SCC 382.
2. Lord Denning: FREEDOM UNDER THE LAW, 1949, p. 126, quoted in Thakker, C.K.: ADMINISTRATIVE LAW, 1992, Eastern Book Company, p. 374.

for quashing these. The proper remedy in such cases was declaration and mandamus. However, with the passage of time the scope of certiorari has undergone change.[3] 'Certiorari' may be defined as a judicial order operating in personam and made in the original legal proceedings, directed by the Supreme Court or High Court to any constitutional, statutory or non-statutory body or person, requiring the records of any action to be certified by the court and dealt with according to law.

It is a remedy operating in personam, therefore, writ can be issued even where the authority has become functus officio, to the keeper of the records.

As has been discussed earlier in this chapter, the constituency within which certiorari can be operative has been tremendously enlarged because it is corrective in nature. Writ now can be issued against constitutional bodies (legislature, executive and judiciary or their officers), statutory bodies like corporations and other authorities created under a statute, non-statutory bodies like companies and cooperative societies and private bodies and persons.

The requirement that certiorari can be issued only when the action is judicial or quasi-judicial is no more valid. Certiorari can be issued to quash actions which are administrative in nature. In *A.K. Kraipak* v. *Union of India*[4], the writ of certiorari was issued to quash the action of a Selection Board.

Grounds for the issue of writ of certiorari

Certiorari can be issued on any of the following grounds:

1. *Lack of jurisdiction.*—Lack of jurisdiction refers to such situations where the authority has no jurisdiction at all to take action. Such situations may arise:

(*a*) If the authority is improperly constituted.

(*b*) If the authority commits an error in its decision on jurisdictional facts and thereby assumes jurisdiction which never belonged to it.

(*c*) If the authority is incompetent to take action in respect of a locality, party or subject-matter.

(*d*) If the law which gives jurisdiction is itself unconstitutional.

(*e*) If preliminary essentials have been disregarded, i.e., omission to serve notice as required by law.

It may be noted that when an authority has jurisdiction to determine a matter, it does not lose it by coming to a wrong conclusion on law or fact.

3. *Prabodh Verma* v. *State of U.P.*, (1984) 4 SCC 251: AIR 1985 SC 167.
4. (1969) 2 SCC 262: AIR 1970 SC 150.

Notable instances

(*i*) *Rafiq Khan* v. *State of U.P.*[5]—Section 85 of the U.P. Panchayat Raj Act, 1947 gave power to the Sub-Divisional Magistrate either to quash the entire order of the panchayat adalat or to cancel its jurisdiction. The SDM had no power to modify the order in any manner. The court issued the writ of certiorari to quash the decision of the SDM where he had modified the conviction passed by the panchayat adalat by quashing the conviction of the accused for one offence and maintaining it in respect of the other offence.

(*ii*) *Budh Prakash Jai Prakash* v. *STO.*[6]—This case illustrates lack of jurisdiction where the subject-matter was outside its scope. The Sales Tax Officer, exercising powers under the U.P. Sales Tax Act, imposed tax on forward contracts irrespective of the place where delivery took place. The court issued the writ of certiorari on the ground that the subject-matter was outside the jurisdiction of the authority.

(*iii*) *Nalini Ranjan* v. *Ananda Shankar*[7]—This case illustrates lack of jurisdiction where an agency committed an error on jurisdictional facts. The jurisdiction of the Compensation Commissioner under the War Injuries Ordinance, 1941 depended on the existence or otherwise of the war injury. Therefore, as the Commissioner was wrong in his findings as regards the injury, a writ of certiorari was issued by the High Court to quash it.

Certiorari may also be issued to quash the decision of the authority declining jurisdiction where it legally belongs to it.[8]

2. *Excess of jurisdiction.*—Excess of jurisdiction refers to cases where the authority has jurisdiction but it exceeds its permitted limits.

J.K. Chaudhuri v. *Datta Gupta*[9] is illustrative of this aspect. In this case, the governing body of a college affiliated to the Gauhati University dismissed its Principal, Datta Gupta, on the ground of misconduct. The Executive Committee of the Gauhati University after hearing representations ordered reinstatement. The court issued certiorari to quash the decision on the ground of excess of jurisdiction, because the jurisdiction of the university under Section 21(9) of the Gauhati University Act was confined to teachers and did not extend to a case where the person holds the office of principal also.

3. *Abuse of jurisdiction.*—Certiorari will also lie to quash an action where the authority has jurisdiction but has abused it. An authority shall be deemed to have abused its jurisdiction when it exercises its power for an

5. AIR 1954 All 3. See also *Chetkar Jha (Dr)* v. *V.P. Verma (Dr)*, (1970) 2 SCC 217: AIR 1970 SC 1832.
6. AIR 1952 All 764.
7. AIR 1952 Cal 112.
8. *H.L.G.B. Manufacturers* v. *Abdul Rashid*, AIR 1964 Bom 89.
9. AIR 1958 SC 722.

improper purpose, or on extraneous considerations, or in bad faith, or leaves out a relevant consideration, or does not exercise the power by itself but at the instance and discretion of someone else. All these factors have been discussed in detail in Chapter III (Administrative Discretion).

4. *Violation of the principles of natural justice*.—Principles of natural justice have been discussed in detail in Chapter VI. These principles include:

(*a*) *Rule against bias*.—Bias may include:

Personal bias.

Pecuniary bias.

Subject-matter bias.

Departmental bias.

Preconceived notion bias.

(*b*) *Rule of audi alteram partem*.—This right to fair hearing may include:

Right to know adverse evidence.

Right to present case.

Right to rebut evidence.

Right to cross-examination and legal representation.

Right to reasoned decisions, etc.

If an administrative agency violates any of the above rules in a case where they must be observed, the decision of the agency may be quashed by the court through the writ of certiorari.

Notable instances

(*i*) *State of Punjab* v. *K.R. Erry*[10].—In this case the pension benefits of an Assistant Engineer, PWD, were reduced on the basis of an adverse confidential report without giving him a hearing. The court issued certiorari to quash the decision on the grounds of violation of the principles of natural justice.

(*ii*) *Sirsi Municipality* v. *Cecelia Kom Francis Tellis*[11].—In this case a hospital worker was dismissed for alleged negligence, which resulted in the death of a patient in the maternity ward of the municipal hospital, without providing him a hearing. The court quashed the decision on the ground of violation of the principles of natural justice.

(*iii*) *Daud Ahmed* v. *D.M., Allahabad*[12].—In this case the District Magistrate requisitioned property in the personal possession of the owner for a judge without giving any hearing. Section 3 of the Requisition Act provided

10. (1973) 1 SCC 120: AIR 1973 SC 834.
11. (1973) 1 SCC 409: AIR 1973 SC 855.
12. (1972) 1 SCC 655: AIR 1972 SC 896

that accommodation in personal possession cannot be requisitioned unless the D.M. is of the opinion that an alternative accommodation exists. The court came to the conclusion that the owner should have been given an opportunity to be heard before arriving at the conclusion, and issued the writ of certiorari to quash the action.

5. *Error of law apparent on the face of the record*—It is well-settled that certiorari will be issued to quash decisions which though made within jurisdiction reveal on the 'face of the record' an error of law.[13]

The 'record' for this purpose shall include:

(*i*) Documents in which the determination is recorded.

(*ii*) Documents which indicate the proceedings and pleadings.

(*iii*) Reports, the extracts of which are included in the record.

(*iv*) Documents which are mentioned in the formal order to be the basis of the decision.

The term 'error apparent on the face of the record' cannot be defined with exactitude. The real difficulty is not so much with the statement of principles as in its application to the facts of a particular case.[14] Except in a rare case it is possible to argue on both sides.[15]

Whether or not an error is an error of law and an error which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened.[16]

'Error apparent on the face of the record' shall include not a mere error but a manifest error based on clear ignorance or disregard of the law,[17] or on a wrong proposition of the law,[18] or on clear inconsistency between facts and the law and the decision.[19] Error of law apparent on the record is an insult to the legal system which the courts cannot overlook. It may also include cases of abuse of jurisdiction. For this purpose where the decision is based on 'no evidence' it will be considered as question of law.

In *Sangram Singh* v. *Election Tribunal*[20], the Election Tribunal construed Section 9 of the CPC to mean that if a person fails to appear before it without good cause, he can be debarred from taking part in subsequent

13. *Veerappa* v. *Raman & Raman Ltd.*, AIR 1952 SC 192.
14. *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque*, AIR 1955 SC 233.
15. *Ujjam Bai* v. *State of U.P.*, AIR 1962 SC 1621.
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17. *Chetkar Jha (Dr)* v. *V.P. Verma (Dr)*, (1970) 2 SCC 217: AIR 1970 SC 1832.
18. *Nanagram* v. *Ghinsilal*, AIR 1952 Raj 107.
19. *R.* v. *Westminster Appeal Tribunal*, (1953) 1 All ER 687. *See* also *Parry & Co.* v. *P.C. Pal*, (1970) 2 SCC 48: AIR 1970 SC 1334.
20. AIR 1958 SC 440.

proceedings. The court quashed the decision of the Tribunal on the ground of error of law, apparent on the face of the record.

6. *Fraud.*—If the decision of the agency has been obtained by fraud or the fraud operates to take away jurisdiction or bestows jurisdiction or results in the denial of justice, the decision may be quashed by issuing certiorari. There is no Indian case on the point.

As discussed earlier, it is a discretionary remedy and the High Court can refuse it on the ground of acquiescence, laches, available alternative remedy and no benefit to the party.

It is well-settled law that certiorari cannot be issued to disturb a finding of fact unless it is based on no evidence or purely on surmises and conjectures or which is manifestly against the basic principles of natural justice. In that case the finding of fact shall be deemed to suffer from an error of law.[21] The court has also emphasised that the purpose of the certiorari is not only negative (to quash an action) but it contains affirmative action also. In *Gujarat Steel Tubes* v. *Mazdoor Sabha*[22], the Supreme Court held that while quashing the order of dismissal, the court can also order reinstatement and the payment of back wages. The court made it clear that while the extraordinary remedy is of Anglo-Saxon vintage, it is not a carbon copy of the English process. Judicial power is not restricted where glaring injustice demands affirmative action.

(2) Writ of Prohibition

Prohibition is a judicial order issued by the Supreme Court or a High Court to any constitutional, statutory or non-statutory agency to prevent these agencies from continuing their proceedings in excess or abuse of their jurisdiction or in violation of the principles of natural justice or in contravention of the law of the land.

Before the writ of prohibition can be issued there must be something to be done. It is a writ of right and a court cannot refuse it in cases of excess of jurisdiction or where jurisdiction is being exercised in violation of the law of the land.[23]

Law relating to injunctions in the Specific Relief Act, 1963 to some extent but not entirely covers the same ground. But due to limitations imposed on the grant of injunction, most of the field of prohibition remains uncovered.

Prohibition has also much in common with certiorari, both in scope and the rules by which it is governed. But there is one fundamental difference

21. *Mukunda* v. *Bangshidhar*, (1980) 4 SCC 336: AIR 1980 SC 1524.

22. (1980) 2 SCC 593: AIR 1980 SC 1896. For a different approach see *U.P. Warehousing Corpn.* v. *Vijay Narain*, (1980) 3 SCC 459: AIR 1980 SC 840.

23. *Isha Beevi* v. *Tax Recovery Officer*, (1976) 1 SCC 70: AIR 1975 SC 2135.

between the two. Prohibition is issued at a stage when the proceedings are in progress to forbid the authority from continuing the proceedings. Certiorari is issued at a stage when the proceedings have terminated and the authority has given a final decision to quash the decision. Sometimes these two writs may overlap. If an agency gives a decision which does not finally dispose of the matter, certiorari will lie to quash the decision and prohibition will lie to forbid the agency from further continuing the proceedings. The usual practice is to pray for prohibition and alternatively certiorari because it may happen that pending proceedings for prohibition the agency may hand over its final decision.

Grounds for the issue of Prohibition

Prohibition can be issued on the same grounds on which certiorari can be issued except in case of error of law apparent on the face of the record. The grounds for the issue of prohibition are:

(*i*) Lack of excess of jurisdiction.[24]

(*ii*) Violation of principles of natural justice.

(*iii*) Infringement of fundamental rights.

(*iv*) Fraud.

(*v*) Contravention of the law of the land.

All the grounds except the last have been discussed in detail earlier. Therefore, the expression "contravention of the law of the land" requires elucidation.

The definition of prohibition given in HALSBURY'S LAWS OF ENGLAND states that an order of prohibition forbids an agency to continue proceedings in contravention of the law of the land. This would prima facie mean that erroneous interpretation of the law, especially statute law, which forms the bulk of law in operation is included in the grounds for the issue of prohibition. In India, this is not of much significance because it refers to an era in England where certain agencies were not subject to the writ of certiorari to whom prohibition was issued for every error regarding the law of the land.

In India, prohibition is issued to protect the individual from arbitrary administrative actions. In *Munnusamappa & Sons* v. *Custodian, Evacuee Property*[25], the Custodian, after accepting the petitioners as tenants of the evacuee property and after accepting rent for five months, purported to proceed against them as if they were in permissive possession. Prohibition was issued to forbid him from proceeding further.

24. *Asstt. Collector, Central Excise* v. *National Tobacco Co.*, (1972) 2 SCC 56: AIR 1972 SC 2563.

25. AIR 1962 SC 789.

Prohibition is a writ of right, hence the existence of an alternative remedy is an irrelevant consideration when the complaint is that the inferior tribunal is exceeding its jurisdiction or is assuming jurisdiction not vested in it by law because it would amount to forcing the person to first suffer and submit to the jurisdiction of the authority which is illegal and then take advantage of the alternative remedy before approaching the court.[26]

It is an efficacious and speedy remedy where a person does not desire any other relief except to stop the administrative agency. An alternative remedy does not bar the issue of this writ.[27] The fact that something must be left to be done is necessary, for the issue of the writ is not a rule of disability. It can be issued even when the agency has reached a decision, to stop the authority from enforcing its decision. It can be issued even in cases where the authority has not kept any record.

(3) Writ of Mandamus

Mandamus is a judicial remedy issued in the form of an order from the Supreme Court or a High Court to any constitutional, statutory or a non-statutory agency—to do or to forbear from doing some specific act which that agency is obliged to do or refrain from doing under the law and which is in the nature of a public duty or a statutory duty.

It is considered as a residuary remedy of public law. It is a general remedy whenever justice has been denied to any person.[28] English writers trace the development of the writ from the Norman conquest; however, it was only in the early part of the eighteenth century that the writ came to be frequently used in public law to compel the performance of public duties.

1. *Conditions for the grant of Mandamus*

(*i*) *There must be public or Common Law duty.*—Until recently, the law was that mandamus would lie only to enforce a duty which is public in nature. Therefore, a duty private in nature and arising out of a contract was not enforceable through this writ. It was on this basis that in *CIT* v. *State of Madras*[29], the court refused to issue mandamus where the petitioners wanted the Government to fulfil its obligation arising out of a contract. However, in *Gujarat State Financial Corpn.* v. *Lotus Hotel*[30], the Supreme Court issued writ of mandamus for the specific performance of a contract to advance money. In this case, the Gujarat Financial Corporation, a government

26. *Lakshmindra Theertha Swamiar* v. *Commr., Hindu Religious Endowments*, AIR 1952 Mad 613.
27. *Bengal Immunity Co. Ltd.* v. *State of Bihar*, AIR 1955 SC 661.
28. *R.* v. *Baker*, (1762) 3 Burr 1265, 1267.
29. AIR 1954 Mad 54.
30. (1983) 3 SCC 379, AIR 1983 SC 848.

instrumentality, had sanctioned a loan of Rs 30 lakhs to Lotus Hotel for the construction but later on refused to pay the amount.

A public duty is one which is created either by a statute, rules or regulations having the force of law, the Constitution, or by some rule of common law.[31]

The public duty enforceable through mandamus must also be an absolute duty. Absolute is one which is mandatory and not discretionary. Therefore in *Manjula Manjari* v. *Director of Public Instruction*[32], the court refused to issue mandamus against the Director of Public Instruction compelling him to include the petitioner's textbook in the list of approved books because it was a matter at the complete discretion of the authority. However, if the authority is under law obliged to exercise a discretion, mandamus would lie to exercise it in one way or the other.[33] Mandamus would also lie if the public authority invested with discretionary powers abuses the power or exceeds it, or acts mala fide. Mandamus, thus, is issued to compel performance of public duties which may be administrative, ministerial or statutory in nature. A statutory duty may be either directory or mandatory. A statutory duty, if intended to be mandatory in character, is indicated by the use of the words "shall" or "must" but this is not conclusive as "shall" and "must" have, sometimes, been interpreted as 'may'. Therefore, what is determinative of the nature of duty, whether it is obligatory, mandatory or directory, is the scheme of the statute in which the duty has been set out. Even if the duty is not set out clearly and specifically in the statute, it may be implied as co-relative to a right. If in the performance of this duty, the authority in whom the discretion is vested under the statute, does not act independently and passes an order under the instructions and orders of another authority, the court may issue mandamus to that authority to exercise its own discretion.[34] Writ of mandamus along with suitable directions can be issued by the court for the protection and enforcement of fundamental rights.[35]. Mandamus cannot be issued to enforce administrative directions which do not have the force of law, hence it is discretionary that the authority accept it or reject it.[36] But where the administrative instructions are binding, mandamus would lie to enforce them.[37]

31. *Commr. of Police* v. *Gordhandas*, AIR 1952 SC 16.
32. AIR 1952 Ori 344. *See* also *Vijay Mehta* v. *State*, AIR 1980 Raj 207.
33. *Alcock Ashdown & Co.* v. *Chief Revenue Authority*, 50 IA 227.
34. *Mansukhlal Vithaldas Chauhan* v. *State of Gujarat*, (1997) 7 SCC 622.
35. *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241. Court issued mandamus with directions to protect women against sexual harassment at workplace.
36. *G.J. Fernandez* v. *State of Mysore*, AIR 1967 SC 1753.
37. *Jagjit Singh* v. *State of Punjab*, (1978) 2 SCC 196: AIR 1978 SC 988.

Mandamus would also lie to compel the authority to refund the amount of fee it has collected under law which has been declared ultra vires by the competent court.[38]

The expression 'public duty' does not imply that the person or body whose duty it is must be a public official or an official body. Therefore, mandamus would lie against a company constituted under a statute for the purpose of compelling it to fulfil its public responsibilities.[39] Writ can be issued against a private individual also for the enforcement of public duties. Thus, in *Rohtas Industries* v. *Workers' Union*[40] writ was issued against the award of an arbitrator appointed under Section 10(1) of the Industrial Disputes Act, 1947.

(*ii*) *There must be a specific demand and refusal.*—Before mandamus can be granted, there must be a specific demand for the fulfilment of a duty and there must be specific refusal by the authority. Therefore, in *Naubat Rai* v. *Union of India*[41], the court refused mandamus because the petitioner who was illegally dismissed from the military farm never applied to the authority for reinstatement.

However, the specific demand for the performance of a duty may not be necessary where it appears that the demand would be unavailing, or where the respondent by his own conduct has made the demand impossible, or where the duty sought to be enforced is of a public nature and no one is specially empowered to demand performance, or where the duty is imperatively required by law of a ministerial officer, or where a person has by inadvertence omitted to do some act which he was under a duty to do and the time within which he can do it has expired.[42]

However, express demand and refusal are not necessary. Demand and refusal can be inferred from the circumstances also. Therefore, in *Venugopalan* v. *Commr., Vijayawada Municipality*[43], the court inferred demand and refusal from the situation in which the petitioner filed a suit for injunction restraining the municipality from holding elections and the suit was contested by the municipality.

(*iii*) *There must be a clear right to enforce the duty.*—Mandamus will not be issued unless there is, in the applicant, a right to compel the performance of some duty cast on the authority. Therefore, in *S.P. Manocha* v.

38. *Shiv Shankar Dal Mills* v. *State of Haryana*, (1980) 2 SCC 437; AIR 1980 SC 1037.
39. *Praga Tools Corpn.* v. *C.A. Imanual*, (1969) 1 SCC 585; AIR 1969 SC 1306.
40. (1976) 2 SCC 82; AIR 1976 SC 425. *See* also *Sarvarya Sugars Ltd.* v. *A.P. Civil Supplies Corpn. Ltd.*, AIR 1981 AP 402
41. AIR 1953 Punj 137.
42. *Guru Charan* v. *Belonia Vidyapith*, AIR 1955 Tri 33.
43. AIR 1957 AP 833.

State of M.P.[44], the court refused to issue mandamus to the college to admit, the petitioner because the petitioner could not establish a clear right to admission in the college. In the same manner the Court did not grant mandamus for payment of interest on delayed refund under the Customs Act as the claim was not backed by a statutory right at the relevant time.[45]

The right to enforce a duty must subsist till the date of the petition. If the right has been lawfully terminated before filing the petition, mandamus cannot be issued.[46]

The right to enforce the duty must belong to the petitioner. Therefore, a shareholder cannot enforce the right of the company which is itself a legal person capable of enforcing its own rights, unless the petitioner can show that in the infringement of the company's rights his own personal rights have been adversely affected.[47]

However, this does not mean that a person can never enforce a public right which does not specifically belong to any individual. Mandamus can be issued on the petition of a taxpayer to restrain a municipality from misallocation or misappropriation of public funds. In *Guruswamy* v. *State of Mysore*[48], the court held that in the case of lack of power and abuse of power by the administrative authority, anybody who is affected by the action, though he may not have a substantive, enforceable right, can claim mandamus.

(iv) *The right must be subsisting on the date of the petition.*—If the right is not subsisting on the date of petition, mandamus cannot be issued. Therefore, when a High Court upheld the unconstitutionality of a law and directed interim payment, but the Supreme Court in appeal, disagreeing with the High Court upheld the validity of the law and further provided that interim payment could be made only until the date of determination by the Director under the Law. The Apex Court held that the High Court committed serious error in issuing mandamus for the enforcement of so-called right which never subsisted on the date of issue of mandamus in view of the decision of the Supreme Court to the contrary.[49]

2. *Grounds for the grant of Mandamus*

Mandamus can be issued on all those counts on which certiorari and prohibition can be issued. Therefore, mandamus can be issued for lack of jurisdiction, excess of jurisdiction, abuse of jurisdiction, for violation of the

44. AIR 1973 MP 84; see *Shabi Construction Co.* v. *City and Industrial Development Corpn.*, (1995) 4 SCC 301.
45. *Union of India* v. *Orient Enterprises*, (1998) 3 SCC 501.
46. *Kalyan Singh* v. *State of U.P.*, AIR 1962 SC 1183.
47. *R.C. Cooper* v. *Union of India*, (1970) 2 SCC 298; AIR 1970 SC 564.
48. AIR 1954 SC 592.
49. *Director of Settlement, A.P.* v. *M.R. Apparao*, (2002) 4 SCC 638.

principles of natural justice and error of law apparent on the face of the record. Mandamus may be issued not only to compel the authority to do something but also to restrain it from doing something.[50] Therefore, it is both negative and positive and hence can do the work of all other writs. It provides a general remedy in administrative law.

Like any other extraordinary remedy, the grant of mandamus is discretionary. The court may refuse it if there is unreasonable delay in filing the petition, or if there is adequate alternative remedy, or if it is premature, or if its issuance would be infructuous and futile. It may also be refused on equitable considerations, i.e., where there is a misstatement or suppression of facts in the petition. In view of the provisions of Articles 122(2) and 212(2) of the Constitution, mandamus will not lie against any officer or member of Parliament or State Legislature in whom powers are vested for regulating the procedure or the conduct of business for maintaining order. Mandamus would also not lie against the President or Governor of any State for the exercise and performance of powers and duties of his office.[51] Articles 327, 328 and 329 preclude the jurisdiction of the court in matters of election process to Parliament or the State Legislature except on a petition as provided by a law passed by Parliament; therefore, the remedy of mandamus will not be available against any person involved in the election process.[52]

Writ of mandamus cannot be issued to compel an authority to pass an order in violation of a statutory provision. Where the Income Tax Officer has no power to make assessment beyond the prescribed period, mandamus cannot be issued to make him extend his assessment order beyond that period.[53] Where the administrative authority refused an application for licence without any notice and hearing the High Court is not justified in issuing mandamus to grant licence to the company.[54] Mandamus can also not be issued to refrain an authority from enforcing the law.[55] In the same manner mandamus cannot be issued to compel the authority to reach a particular decision.[56]

In hearing the petition for mandamus, the court does not sit as a court of appeal. The court will not examine the correctness or otherwise of the

50. *Tapendra Nath Roy v. University of Calcutta*, AIR 1954 Cal 141. Mandamus was issued against the university to restrain it from giving effect to an order passed in violation of its own rules. *See* also *K.K. Samaj v. Nagpur Corpn.*, AIR 1956 Nag 152. Mandamus was issued to restrain municipality from collecting an illegal tax.
51. Art. 361.
52. *Shankar v. Returning Officer*, AIR 1952 Bom 277.
53. *Hope Textile Corpn. v. UOI*, 1995 Supp (3) SCC 199.
54. *State of Maharashtra v. Poona Brew-Chemical Industries*, 1995 Supp (4) SCC 179.
55. *State of U.P. v. Harish Chandra*, (1996) 9 SCC 309; *State of Bihar v. Ramdeo Yadav*, (1996) 3 SCC 493.
56. *Mansukhlal Vithaldas Chauhan v. State of Gujarat*, (1997) 7 SCC 622.

decision on merits.[57] It cannot substitute its own wisdom for the discretion vested in the authority unless the exercise of discretion is illegal.[58] This is true for other writs also.

(4) Writ of Quo Warranto

Quo warranto means "by what warrant or authority". It is a judicial order issued by the Supreme Court or a High Court by which any person who occupies or usurps an independent public office or franchise or liberty, is asked to show by what right he claims it, so that the title to the office, franchise or liberty may be settled and any unauthorised person ousted.

It is a method of judicial control in the sense that the proceedings practically review the actions of the administrative authority which appointed the person. Furthermore, it tunes the administration by removing inefficient and unqualified personnel and impostors from public offices. Thus, the writ of quo warranto gives the judiciary a weapon to control the executive, the legislature, statutory and non-statutory bodies in matters of appointments to public offices. Conversely, it protects a citizen from being deprived of a public office to which he has a right.

Originally, quo warranto was a high prerogative writ. The essence of the procedure was calling a subject to account for an invasion or usurpation of the royal prerogative or the right of franchise or liberty of the Crown. At that period of time it was the King's weapon, and subjects were not allowed to use it. The Statute of 1710 extended this remedy to the public.

1. *Conditions for the grant of Quo Warranto*

(*i*) *Office must be a public office*.—In *Anand Behari* v. *Ram Sahai*[59], the court held that a public office is one which is created by the Constitution or a statute and the duties of which must be such in which the public is interested. In this case, it was held that the office of the Speaker of the Legislative Assembly is a public office. In *G.D. Karkare* v. *Shevde*[60], it was held that the office of Advocate-General is a public office. In the same manner the office of members of a municipal board[61] or the office of a university official[62] are public offices. Therefore, quo warranto would not be issued against a managing committee of a private school[63] or against a

57. *Vice Chancellor, Utkal University* v. *S.K. Ghosh*, AIR 1954 SC 217.

58. *Ibid*.

59. AIR 1952 Mad 31.

60. AIR 1952 Nag 333.

61. *Shiam Sunder* v. *State of Punjab*, AIR 1958 Punj 128.

62. *Rajendra Kumar* v. *State of M.P.*, AIR 1957 MP 60. *See* also *Ram Singh Saini* v. *H.N. Bhargava*, (1975) 4 SCC 676: AIR 1975 SC 1852, where the post of a university professor was held to be a public office.

63. *Amarendra* v. *Narendra Basu*, AIR 1953 Cal 114.

member of the working committee of the Arya Samaj Pratinidhi Sabha,[64] because these are private offices not created by law.

(ii) *Public office must be substantive in nature.*— A substantive office is one which is permanent in character and is not terminable at will. In *R.* v. *Speyer*[65], the word 'substantive' was interpreted to mean an 'office independent of title'. Therefore, quo warranto would be granted even when the office is held at the pleasure of the State provided it is permanent in character. In other words, the official must be an independent official and not merely one discharging the functions of a deputy or servant at the pleasure of another officer.[66]

(iii) *The person must be in actual possession of the office.*—Mere declaration that a person is elected to an office or mere appointment to a particular office is not sufficient for the issue of quo warranto unless such person actually accepts such office.[67]

(iv) *The office must be held in contravention of law.*—There must be a clear violation of law in the appointment of a person to the public office. If there is a mere irregularity, quo warranto will not lie. In *State of Assam* v. *Ranga Muhammad*[68], the court found the transfer and posting of two district judges contrary to law, but did not issue quo warranto as it was a case of mere irregularity that did not make the occupation of office wrongful.

Quo warranto will also be issued when a person validly occupies the office but acquires a disqualification later on.

2. *Locus standi for the Writ of Quo Warranto*

The proposition that a writ can be issued on the petition of a person whose rights are adversely affected has no application to the writ of quo warranto. A petition for quo warranto is maintainable at the instance of any person, although he is not personally aggrieved or interested in the matter.[69] However, he must not be a man of straw set up by anyone. For example, in order to challenge a municipal office, the person must at least be the resident of the area where the municipality governs.

Like any other extraordinary remedy, quo warranto is also a discretionary remedy. It can be refused on the ground of unreasonable delay. Therefore, when a person has held office for a long time without challenge the writ may be refused. However, in *K. Bheema Raju* v. *Govt. of A. P.*[70], the court

64. *Jamalpur Arya Samaj* v. *D. Ram (Dr)*, AIR 1954 Pat 297.

65. (1916) 1 KB 595

66. *Ibid.*

67. *Paranlal* v. *P.C. Ghosh*, AIR 1970 Cal 118.

68. AIR 1967 SC 903.

69. *G. Venkateswara Rao* v. *Govt. of A.P.*, AIR 1966 SC 828.

70. AIR 1981 AP 24, 29

remarked that in a matter which involves a fundamental right to a public office and violation of legal procedure to be adopted in the matter of public appointment to the public office, the delay should not deter the court in granting the relief and rendering justice because the usurper's continuance in office gives cause of action each day and every hour till he is ousted. Furthermore, a usurper does not cease to be one by lapse of time.[71]

Normally, acquiescence is no ground for refusing the remedy in cases of public office appointments but it may be a relevant factor in cases of election.[72]

The writ may also be refused if there is an adequate alternative remedy. Therefore, in *V.D. Deshpande* v. *State of Hyderabad*[73], the court refused the writ against members of Legislatures who had become disqualified since they held offices of profit as Article 192 of the Constitution provided an adequate remedy. However, in *State of Haryana* v. *Haryana Coop. Transport Ltd.*[74], the Supreme Court issued the writ against the appointment of a presiding officer of a labour court on the ground that the officer did not possess the prescribed qualifications, holding that the remedy provided under Section 9(1) of the Industrial Disputes Act cannot detract the High Court from exercising its jurisdiction to issue the writ under Article 226 of the Constitution.

In cases where the issue of writ would be futile in its result, the court may refuse it. In *P.L. Lakhanpal* v. *A.N. Ray, Chief Justice of India*[75], the Delhi High Court refused the writ against the former Chief Justice of India, Justice Ray, on the ground that on the resignation of three senior judges, Justice Ray becomes the seniormost and, therefore, can be reappointed even if it is held that Article 124(2) embodies the seniority rule. The court further observed that the motive of the appointing authority is not relevant for the grant of the writ.

While issuing the writ of quo warranto, the court will at the outset determine whether a case for the issuance is made out. The jurisdiction of the court to issue quo warranto can be exercised only when the appointment is contrary to statutory rules. While issuing such a writ Court cannot consider the respective impact of the candidates and other such factors.[76]

(5) Writ of Habeas Corpus

Habeas corpus is a Latin term, which may be translated into English in some such form as 'you must have the body'. However, recent developments

71. *Pushpadevi* v. *M.L. Wadhwan, Addl. Secretary, Govt. of India*, (1987) 3 SCC 367.
72. *Ruttonjee & Co.* v. *State of W.B.*, AIR 1967 Cal 450.
73. AIR 1955 Hyd 36.
74. (1977) 1 SCC 271: AIR 1977 SC 237.
75. AIR 1975 Del 66.
76. *High Court of Gujarat* v. *Gujarat Kishan Mazdoor Panchayat*, (2003) 4 SCC 712.

of law indicate that in a writ of habeas corpus the production of the body of the person alleged to be unlawfully detained is not essential.[77]

Habeas corpus may be defined as a judicial order issued by the Supreme Court or a High Court by which a person who is confined by any public or private agency may secure his release. The writ in the form of an order calls upon the person in whose confinement the person is to let the court know the legal justification for the detention, and in the absence of such justification to release the person from his confinement. The efficacy of this writ lies in its promptness and effectiveness in securing the release of persons illegally detained.

The true origin of the writ in the common law is still to be traced,[78] but it is certain that the present writ developed out of the prerogative writ of *ad subjiciendum* by which people could secure their release from illegal detention in jails.

Writ of habeas corpus can be filed by any person on behalf of the person detained or by the detained person himself. However, every petition must be supported by an affidavit stating the facts and circumstances of detention and, where relevant, the reasons as to why the prisoner is unable to make an application. In the case of a minor, any person entitled to the minor's custody can file a petition. If no such person is available, any other person may file such petition.

In *Ichhu Devi v. Union of India*[79], the Supreme Court held that in case of a writ of habeas corpus the court does not, as a matter of practice, follow strict rules of pleadings nor does it place undue emphasis on the strict observance of the rules of burden of proof. Even a postcard by a *pro bono publico* is sufficient to galvanise the court into examining the legality of detention.

In order to maintain a petition for habeas corpus, physical confinement is not necessary. It is sufficient if some kind of control, custody or restraint is exercised over the person. Thus, if a child is forcibly kept away from his parents, if a man is wrongly kept in confinement as a lunatic, if a nun is alleged to be prevented from leaving her convent, the court will always issue the writ of habeas corpus.[80]

The purposes for which the writ of habeas corpus may be issued may include: (*i*) testing the regularity of detention under preventive detention laws and any other law; (*ii*) securing the custody of a minor; (*iii*) securing

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77. *Kanu Sanyal v. D.M.*, (1973) 2 SCC 674: AIR 1973 SC 2684.

78. Maitland: ORIGIN LIES IN FEUDAL CUSTODY; Jenk: IN THE VAGUE ASSERTIONS OF CIVIL LIBERTIES, Holdsworth: PROCEDURAL LAW; Cohen: NORMAN ORIGIN.

79. (1980) 4 SCC 531: AIR 1980 SC 1983. *See* also *Veena Sethi v. State of Bihar*, (1982) 2 SCC 583: AIR 1983 SC 339.

80. Dicey: LAW OF THE CONSTITUTION, p. 219.

the custody of a person alleged to be a lunatic; (*iv*) securing the custody of a marriage partner; (*v*) testing the regularity of detention for a breach of privilege by the House; (*vi*) testing the regularity of detention under court-martial; (*vii*) testing the regularity of detention by the executive during Emergency, etc.

Besides these traditional grounds for which the writ of habeas corpus may be issued, Krishna Iyer, J. in *Sunil Batra (II)* v. *Delhi Administration*[81] opened new vistas for the issuance of this writ. *Sunil Batra (II) case* arose out of a letter written by a convict to one of the judges of the Supreme Court alleging inhuman torture to a fellow convict. Krishna Iyer, J. treated this letter as a petition of habeas corpus filed on behalf of Prem Chand though the latter had not demanded his release from the jail. The learned judge followed a series of American cases[82] employing the writ of habeas corpus for the neglect of State penal facilities like overcrowding, understaffing, insanitary facilities, brutality, constant fear of violence, lack of adequate medical and mental health, censorship of mail, inhuman isolation, segregation, inadequate or non-existent rehabilitative or educational opportunities. The writ was also issued when a ban was imposed on law students to conduct interviews with prisoners for affording them legal relief.[83] Thus, this new dynamics of the writ of habeas corpus is a high benchmark of judicial creativity in India which has made the writ co-extensive with growing human rights jurisprudence.

In India, as in England, successive applications to different judges and benches of the same court are not allowed if the order on the first application has been made on merit.[84] However, if the petition has been heard and rejected by the High Court, a fresh petition under Article 32 can still be filed in the Supreme Court.[85] Therefore, this is an exception to the principle of res judicata which applies to other writs. In the same manner, in *Lallubhai Jogibhai* v. *Union of India*[86], the Supreme Court held that when a writ petition challenging an order of detention is dismissed by a court, a second petition can be filed on additional grounds to challenge the legality of continued detention and it will not be barred by res judicata. In the same manner constructive res judicata also does not apply to habeas corpus proceedings as it would whittle down the wide sweep of this constitutional protection.[87]

81. (1980) 3 SCC 488: AIR 1980 SC 1579.
82. *Id.*, pp. 501-502.
83. *Id.*, p. 502. *See* also Mohammad Ghouse: *Constitutional Law I*, 1980 XVI ASIL 193-94.
84. *Bansi* v. *Addl. Director, Consolidation of Holdings*, AIR 1967 Punj 28.
85. *Ghulam Sarwar* v. *Union of India*, AIR 1967 SC 1335.
86. (1981) 2 SCC 427: AIR 1981 SC 728.
87. *Ibid.*

In England no appeal lies against the order if the petition of habeas corpus has been accepted. In India, there is no such restriction and appeal would lie to the Supreme Court under Article 136 against the order of the High Court granting or rejecting the petition for the writ.

Writ of habeas corpus provides security against administrative and private 'lawlessness' but not against judicial 'foolishness'. Therefore, if a person has been imprisoned under the order of conviction passed by a court, writ would not lie. The normal procedure in such case is appeal. In exercise of its discretion, the court may refuse the petition if there is special alternative remedy available. But it is not a rule of the limitation of jurisdiction. The court may still grant relief in appropriate cases.[88]

In a habeas corpus writ proceeding not only the fact of detention but the constitutionality of the law can also be challenged. In *A.K. Gopalan* v. *State of Madras*[89], the court examined the constitutionality of the Preventive Detention Act.

Constitution and the Writ of Habeas Corpus

The writ of habeas corpus gives meaning and colour to the rights of personal liberty guaranteed under Article 21 of the Constitution. Without the remedy of habeas corpus, the right to personal liberty would be merely a tale told by an idiot full of sound and fury but signifying nothing.

Judicial behaviour before 1978 gave not only a restricted meaning to the term personal liberty but did not allow the importation of the principles of natural justice or procedural due process into the words 'procedure established by law'.

The decision of the Supreme Court in *Maneka Gandhi* v. *Union of India*[90] electrified the whole concept of liberty by making two significant innovations with far-reaching consequences: (*a*) The court gave a wide, extended meaning to the term 'personal liberty' as including everything that makes life worthwhile including the right to education involving the right to participate in the activities and the corporate life of the university[91] and right to legal aid in cases of criminal convictions with long loss of liberty;[92] (*b*) the court imported the element of fairness and justness in the 'procedure established by law' depriving a person of his liberty. Therefore, now a writ of habeas corpus would lie if the law which deprives a person of his liberty is not fair, just and equitable.

88. *Gopal Ji* v. *Shree Chand*, AIR 1955 All 28.

89. AIR 1950 SC 27. See also *Kanu Sanyal* v. *D.M.*, (1973) 2 SCC 674; AIR 1973 SC 2684.

90. (1978) 1 SCC 248; AIR 1978 SC 597.

91. *A.V. Chandel* v. *Delhi University*, AIR 1978 Del 308.

92. *M.H. Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 544; AIR 1978 SC 1548.

Before the Forty-fourth Constitution Amendment Act, 1978, the President of India could suspend the enforcement of Article 21 during the Emergency — under Article 359(1) — and therefore, courts were debarred from considering the legality of executive detention during the Emergency even on the ground that it was ultra vires the Act, or palpably wrong or mala fide. But now after the amendment of the Constitution in 1978, the right to personal liberty under Article 21 cannot be suspended even during an Emergency, therefore, the writ of habeas corpus will be available to people against any wrongful detention during Emergency proclaimed under Article 352 of the Constitution. Thus, the 1978 Constitutional Amendment overrules the *Habeas Corpus case*[93] decided during the 1975 Emergency which remains a blot on the glorious history of the Supreme Court.

(B) PRIVATE LAW REVIEW

Private law review refers to powers of ordinary courts of the land, exercised in accordance with ordinary law of the land to control administrative action. Private law review is exercised through injunction, declaratory action and suit for damages.

In countries like the USA where the administrative process has grown tremendously, emphasis on writs as a strategy for the control of administrative acts is shifting in favour of more speedy and flexible remedies like injunction and declaration. This demonstrates the inherent virtue of private law review.

The instrumentalities of private law review, being ordinary remedies, are free from technicalities of writs with regard to locus standi, nature of administrative authority and action. Private law remedies are broad-based when compared with writs insofar as these allow production of evidence and examination of witnesses as a fundamental requirement for a decision. Private law review is cheaper and easily available. However, one difficulty with this kind of judicial review is the requirement of two months' notice under Section 80 of the Code of Civil Procedure before any suit can be filed against the Government. This created a difficulty where immediate injunctive relief was required. But after the amendment of Section 80 by the Civil Procedure Amendment Act, 1976, this difficulty has been removed as courts have now been authorised to waive the requirement of notice in suitable cases.

93. *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521. In this case the Supreme Court had taken the view that during Emergency a detention order cannot be challenged even on the ground that it is ultra vires the Act, or illegal or mala fide or based on extraneous considerations.

(1) Injunction

The jurisdiction of Indian courts to issue injunctions is statutory. Sections 36 to 42 of the Specific Relief Act, 1963 govern the grant of injunctive relief.

Injunction may be defined as an ordinary judicial process that operates *in personam* by which any person or authority is ordered to do or to refrain from doing a particular act which such person or authority is obliged to do or to refrain from doing under any law. The remedy is coercive but not rigid and can be tailored to suit the circumstances of each individual case. It can be negative or affirmative, absolute or conditional, temporary or perpetual or it can operate immediately or at a future date. The court in its proceedings for injunction can review all actions: judicial, quasi-judicial, administrative, ministerial or discretionary. Its equitable nature leaves a discretion with the court to prevent its abuse. It can operate against any authority or person, constitutional, statutory, non-statutory or private.

Injunction is more incisive than certiorari. Certiorari can quash an action, which can be restarted, but injunction, if perpetual, may forbid the authority from taking that action in perpetuity. Injunctive relief is not only negative but also positive and can compel an authority to do something which under law it is obliged to do and may, therefore, be very effective as a control mechanism of administrative action.

Temporary injunction is granted as an interim measure on an application by the plaintiff to preserve the status quo until the case is heard and decided. The grant of temporary injunction is governed by Order 39 of the Civil Procedure Code, 1908. In granting temporary injunction, the court takes into consideration the prima facie case of the plaintiff, nature and the extent of his injury, balance of convenience and the existence or otherwise of the alternative remedy.

Perpetual injunction is granted on the final determination of the case to prevent the infringement of those rights to which the plaintiff is entitled permanently. Under Section 38 of the Specific Relief Act, perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the plaintiff either expressly or by necessary implication, or to prevent a breach arising from a contract, or to prevent the invasion of the right to, or enjoyment of the property, if the defendant is a trustee or where there exists no standard to ascertain damages or money compensation would not be an adequate relief or where it is necessary to prevent the multiplicity of suits.

Injunction will not be granted:

(*i*) to restrain a person from instituting or prosecuting any judicial proceeding, civil or criminal;

(*ii*) to restrain any person from petitioning to any legislative body;

(*iii*) to prevent the breach of a contract which cannot be specifically enforced. i.e., service contracts.

Since it is an equitable relief, the court may refuse it in exercise of its discretion if the plaintiff has acquiesced in the matter, or an equally efficacious relief is available, or the conduct of the plaintiff is objectionable.

Under Section 39 the court may grant a mandatory injunction as a final decision in a case to prevent a person from continuing with a wrong action as also to compel him to do a positive act necessary to remedy the harm already done. Therefore, an Improvement Authority can be issued a mandatory injunction not only to restrain the construction of a building if it interferes with the easementary rights of the plaintiff but also to pull down the construction already made in contravention thereof.

The court under Section 42 may grant an injunction restraining the breach of a negative contract, express or implied, in those cases where according to clause (*e*) of Section 41 an injunction cannot be granted to prevent the breach of a contract the performance of which could not be specifically enforced. Therefore, where there is an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, and the court cannot compel the specific performance of the affirmative agreement, it can still grant an injunction to perform the negative agreement. Suppose *A* contracts to play the piano in *B*'s orchestra in a particular hotel for the whole summer season and not to play the piano with any other orchestra elsewhere. *B* cannot obtain specific performance of the contract to play the piano in his orchestra by an affirmative injunction because the contract of personal service is not specifically enforceable. *B* is still entitled to get an injunction restraining *A* from playing the piano at any other hotel.

The court, in its discretion, may grant damages in lieu of or in addition to injunction.

Injunction can be granted on the petition of a person who has a personal interest in the matter. This is interpreted to mean that either there must be an existing obligation in favour of the applicant or the person has suffered some injury. Does this mean that no person can enforce a public right which he shares with everybody else? In such situations, Section 91 of the Civil Procedure Code provides that any two persons with the consent of the Advocate-General or by leave of the court may file a suit for the removal of a public nuisance whether or not they have suffered special damage. In this manner a person can, through injunction, enforce his public right against any administrative authority for doing or refraining from doing certain acts which cause any injury, damages or annoyance to the public.

In *A. Venkata Subbiah Naidu* v. *S. Chollappan*[94], the Supreme Court ruled, that a litigant has right to appeal against an ex parte injunction passed by the Court if it did not finally dispose of the stay application within 30 days, of making the order. If it is not possible to decide the matter within 30 days it must record reasons. Therefore, where the mandate of Order 39, Rule 3-A of the Civil Procedure Code is flouted, the aggrieved party is entitled to appeal notwithstanding the pendency of the application for grant or vacation of a temporary injunction against the order remaining in force.[94]

Nuisance may be of fact or of law. Nuisance of law refers to ultra vires acts of the administrative authority. Therefore, in such situations, any member of the public must be allowed to file a suit for its abatement by right even without the permission of the Advocate-General.

The Constitution (Forty-second Amendment) Act, 1976[95] had considerably curtailed the powers of the High Court under Article 226 in matters of making interim orders whether by an injunction or stay or in any other manner. The High Court could not issue interim orders by way of injunction or otherwise unless the opportunity was given to the other party to be heard except in exceptional circumstances, for reasons to be recorded in writing. Even in such exceptional circumstances the order ceased to have effect on the expiry of fourteen days from the date on which it was made unless before the expiry of this period the other party had been heard. Clause (6) of the Amendment Act, 1976 had further imposed a blanket ban on interim orders if it had the effect of delaying an inquiry into any matter of public importance, or any offence punishable with imprisonment, or any execution of any project of public utility, or any acquisition of property by the Government. These restrictions were, however, removed by the Constitution (Forty-fourth Amendment) Act, 1978.[96] Now, under clause (3) of Article 226, the High Court shall have the power to issue ex parte interim orders, whether by way of injunction or stay or in any other manner; however, the court shall have to decide the matter within a period of two weeks from the date when the application for the vacation of the order is made or received whichever is later failing which such order shall stand vacated.

Injunction is an effective method of judicial control of administrative action where the authority has acted without jurisdiction or has abused its jurisdiction or has violated the principles of natural justice.

Injunction is also an effective instrument in controlling the exercise of administrative discretion. Therefore, if the administrative authority has either not exercised its discretion at all, or has exercised it at the discretion of

94. (2000) 7 SCC 695.
95. S. 38, cls. (4), (5) and (6).
96. S. 30.

some other body, or it is arbitrary, or has been exercised on extraneous considerations, or for an improper purpose, or where its exercise is mala fide, injunction would lie. *Ganga Narain v. Municipal Board*[97] is an illustrative case on the efficacy of injunctive relief in cases of abuse of discretion by the administrative authority. In this case, the Kanpur Municipality constructed a market, but because of high rent, traders shifted to an old market owned by the plaintiff. In order to earn profit for its own market, the municipality served a notice to the plaintiff to close down the market as it was a nuisance. In a suit filed by the plaintiff, the court held that the market was not a nuisance. Thereafter, the municipality got the regulation amended and secured for itself the power to close down any market on the ground of nuisance. The plaintiff was prosecuted for not removing a nuisance, i.e., the market. In a suit the plaintiff claimed the remedy of injunction and declaration on the ground of abuse of discretion which was granted. In practice injunction has proved to be a suitable remedy for the control of administrative action, but it is not frequently resorted to because people have placed much faith in extraordinary remedies. If the remedy of injunction is to secure its due place, it is necessary that every person should be allowed to establish his rights without showing special injury or the consent of the Advocate-General.

In granting relief courts have consistently taken the view that law must always have precedence over any consideration of administrative convenience. *B. Prabhakar Rao v. State of A.P.*[98] is an illustrative case on this point. In this case the reduction in retirement age for government servants from 58 to 55 had been challenged by those who had been retired under the new dispensation. However, later on the retirement age was again raised to 58. The question before the Court was whether petitioners were entitled to reinstatement with back wages? The contention of the government was that there would be considerable chaos in the administration if those already retired were again reinducted into the service. The Court negativated the contention by holding that "those that have stirred up a hornet's nest cannot complain of being stung".[99] Thus, it was firmly established that the Constitution must always take precedence over administrative convenience.

In some countries a greater use of injunction is being made in public law. In the USA and England even in cases of administrative rule-making, the court examines an application for injunction to find out if the rule-making power has been properly exercised or not. As mentioned earlier, within the federal jurisdiction in the USA, writs have been completely replaced by injunction

97. ILR (1897) 19 All 313.

98. 1985 Supp SCC 432.

99. *Id.*, p. 463.

and declaration. In England injunction is freely used against administrative authorities. In *Bradbury* v. *Enfield, London Borough Council*[1] injunction was granted against the Local Education Authority on an application by a parent restraining the authority from converting a grammar school into a comprehensive school in violation of the Education Act, and the fact that the parent had no legal right to enforce was not treated as a disqualification.

(2) Declaration

Declaratory action may be defined as a judicial remedy which conclusively determines the rights and obligations of public and private persons and authorities without the addition of any coercive or directory decree.

In the words of Jennings, declaratory action is a symbol of the twentieth-century conception of law, because it is highly democratic. In an age where more and more an individual's action is liable to bring him in conflict with the administration, declaratory action satisfies the need of a simple but all-embracing method of redress against the administration. Sometimes coercive relief is unnecessary against public authorities where merely a declaration is enough to keep the authority within the bounds of legality. In England, under the Crown Proceedings Act, every claim against the government may be by a declaratory action. Being an ordinary law remedy it is free from the technicalities of writs relating to locus standi, choice of remedy, character of administrative action and the nature of the administrative authority.

The history of declaratory action in India begins with the Act of 1854 by which the provisions of the Chancery Procedure Act, 1852 relating to the grant of declaratory relief were made applicable to the Supreme Court in India in Presidency Towns. At that initial stage courts declared the rights of parties as introductory to the directory relief which they ultimately granted. In 1859 the same provisions found place in Section 19 of the Civil Procedure Code, 1859. In 1877 this declaratory relief was transferred to Section 42 of the Specific Relief Act and, thereafter, to Sections 34 and 35 of the Specific Relief Act, 1963.

Conditions for the grant of declaratory relief

(*i*) *The person must be entitled to a 'legal character' or to a 'right to any property'*.—The term 'legal character' is not in frequent use in legal drafting, but if interpreted in its wide connotation, may include every jural relationship of an individual which is recognised by law. In juristic parlance, legal character is equivalent to legal status which may include official position, profession, sex, marital status, minority, legitimacy, nationality, franchise etc. Therefore, the right to stand for a public election or the right to get an election declared invalid may be the subject of declaratory relief.

1. (1967) 3 All ER 434.

In the same manner, the 'right to any property' may include any right which is not a mere hope or chance or which is not contractual in nature.

There seems to be no reason, except multiplicity of suits, why this remedy cannot be made more broad-based by using only the word 'right' which would include the right of status, property rights and other rights also. The term 'right' would comprehend both 'liability' and 'immunity'. Therefore, it would be possible for a person to obtain a declaration to the effect that a certain statute does not apply to him.

(ii) There must be some danger or detriment to such right or character.—There must be some person or authority, public or private, either interested in denying such character or right or must have actually denied it.

(iii) Plaintiff must seek further relief if he is entitled to it.—This places a restriction on the power of the court to grant a mere declaration. In situations where the plaintiff is entitled to consequential relief and does not claim it, the court will not grant declaratory relief.[2] Consequential relief is that relief which directly flows from the declaration. In a suit for declaration in a case of wrongful dismissal, the consequential relief would be reinstatement and arrears of salary. Injunction may be a consequential relief in certain situations. In England and USA, courts are entitled to grant 'mere declaration', and the plaintiff may reserve further relief for a separate action.

In the area of public law, consequential relief ought not to be of significance. The very nature of a declaratory proceeding is not compensation or restitution but prevention. As in the case of writs, the question of consequential relief does not arise, so in a declaratory action it should not be relevant. In a case of administrative inaction, a person may be interested in a mere declaration that the inaction is void and may not necessarily be interested in action in a particular manner.

The essential role of declaratory action in public law as a means of judicial control of administrative action is yet to be appreciated in India. It is largely considered and utilised as a mode to regulate private relationships rather than the relationship between citizens and the administration. This perspective is the moving spirit behind the loading of this remedy with the restrictions mentioned earlier. However, this does not mean that the use of declaratory action in public law is wholly absent. In all cases where the administrative authority lacks, exceeds or abuses jurisdiction or violates the principles of natural justice, declaratory action provides the required relief.

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2. *Qabool Singh v. Board of Revenue*, AIR 1973 All 158; *D.R. Reddy v. D.K. Reddy*, AIR 1973 AP 189.

In *Brij Raj Krishna* v. *Shaw and Bros.*[3], the Supreme Court applied the principles of certiorari in the disposal of a declaratory suit by a tenant for the declaration that the eviction order of the House Rent Controller under the Bihar Building Control Act was ultra vires. In the same manner in *Joseph* v. *Calcutta Corpn.*[4], where the Calcutta Corporation had issued a notice to the plaintiff to remove certain projections under the Calcutta Municipal Act, a declaration was granted.

In *State of M.P.* v. *Mangilal Sharma*[5] the court held that a declaratory decree merely declares the right of the decree-holder and does not direct anybody to do or refrain from doing any particular act or thing, hence a declaratory decree is beyond the purview of execution proceedings. In this case, the respondent had filed a suit for declaration under Section 34 of the Specific Relief Act, 1963 that he continues to be in service but did not claim consequential benefit like arrears of salary. The court granted a declaration but the respondent in execution proceedings had claimed consequential benefits.

In *Ramaraghava Reddy* v. *Seshu Reddy*[6], the Supreme Court added a new dimension to this remedy by allowing a declaration for the enforcement of a public right. In this case, the petitioner prayed for a declaration to the effect that certain properties belonged to the deity. Though this claim was not for a legal character or a right to property, the declaration was given. The remedy is also available to a taxpayer for getting a declaration against the municipality for misapplication or misappropriation of property. But whether a declaration could be given regarding the unconstitutionality of a statute is still unclear. If the limitations of 'consequential relief', 'legal character' and 'property rights' are eliminated from the precincts of declaratory relief, it would do the work of certiorari, mandamus, prohibition and quo warranto insofar as judicial control of administrative action is concerned. Declaration and injunction may be proper relief in a petition under Article 32 of the Constitution.[7]

It is a discretionary remedy and may be refused if it would be infructuous, or if an adequate alternative exists or on other equitable consideration.[8]

After the Federal Declaratory Judgments Act, 1934, declaratory relief as a measure of control for administrative action in USA has greatly in-

3. AIR 1951 SC 115.
4. AIR 1916 PC 123.
5. (1998) 2 SCC 510.
6. AIR 1967 SC 436.
7. *K.K. Kochuni* v. *State of Madras*, AIR 1959 SC 725.
8. *H. Mathewson* v. *Gobardhan Tribedi*, (1900) 5 CWN 654; *Mohd. Israil* v. *Patna Municipality*, AIR 1943 Pat 34.

creased. Though in England, it has not reached that level of efficacy and utility, it is in constant use along with other writs.

(3) Suit for Damages

Whenever any person has been wronged by the action of an administrative authority, he can file a suit for damages against such authority. Such a suit is filed in the civil court of first instance and its procedure is regulated by the Civil Procedure Code. The requirement of two months' notice is mandatory under Section 80 of the amended Code before filing the suit, unless it is waived by the court in special circumstances. The extent of liability of the administration in contracts entered into with private individuals for torts committed by its servants has been discussed in Chapter VIII. Principles determining the quantum of damages are the same that govern private individuals.[9]

(4) Affirmative action for the enforcement of public duties

During the last few years, the Supreme Court of India has certainly developed a fine jurisprudence of right mobilization. Affirmative action for the enforcement of public duties is one of the areas where the genius of the Indian judiciary has been registered in a unique manner. It is a fact that judicial redress can more readily be available for wrongful acts than for wrongful omissions of public bodies and the effectiveness of the judicial remedies is also limited either by their intrinsic characteristics or by restrictive technical rules.[10] However, *Ratlam Municipality* v. *Vardichand*[11] is a unique testimony of a new judicial dynamism, unhampered by these limitations, which has produced new 'enforcement' dimensions to public duties owed by administrative bodies to people at large.

The Ratlam Municipality is a statutory body constituted to undertake and make reasonable and adequate provisions for cleaning public streets and public places, abating all public nuisances and disposing of nightsoil, rubbish etc. The Ratlam Municipality, however, neglected its public duties and created unbearable insanitary conditions. When nothing could move the municipality to remedy the deplorable conditions, one of the residents filed a suit against it under Section 133 of the Criminal Procedure Code for the removal of nuisance to the public which were 'unhygienic conditions' in this case. The magistrate ordered the municipality to abate the nuisance within 15 days. The municipality instead of doing its duty which was its legal and moral responsibility decided to challenge the magistrate's order. The case ultimately reached the Supreme Court which not only expressed appreciation for the 'activist' application of Section 133 of the Criminal

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9. *Thawardas Pherumal* v. *Union of India*, AIR 1955 SC 468.

10. De Smith: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, 1980, p. 526.

11. (1980) 4 SCC 162: AIR 1980 SC 1622.

Procedure Code by the magistrate but also characterised this case as a "pathfinder in the field of people's involvement in the justicing process".[12]

To everybody's dismay and surprise, the municipality pleaded not only insufficiency of funds to carry out its duties but also requested for more time for doing its duty which it neglected to do for the last many years. Turning down both these tactical manoeuvres by the municipality, the Supreme Court emphasised that a public body cannot extricate itself from public duties and responsibilities on the pretext of financial inability. The court observed:

> "The Criminal Procedure Code operates against statutory bodies and others regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provisions. Likewise, Section 133 of the Act has no saving clause when the municipal council is penniless. Otherwise a profligate statutory body or pachydermic governmental agency may legally defy duties under the law by urging in self-defence a self-created bankruptcy or perverted expenditure budget. That cannot be."[13]

Turning down the plea for extension of time the court pointed out that eight years had passed since the magistrate made the order but the municipality had done nothing to implement the same. This was perhaps the most shocking request coming from a public body charged with the public duty of maintaining sanitation on which public health depends.

Maintaining its activist posture the Supreme Court sought to frame a scheme and fix a timetable to implement the same and even to supervise the implementation of the scheme. It directed the magistrate to supervise the implementation of the scheme and to prosecute the municipality if the scheme was not fully implemented within a period of one year. The court also exhorted the State Government to provide sufficient funds to the Ratlam Municipality to enable it to implement the scheme.

Assuring its aid to people in similar situations the Supreme Court categorically asserted that the heads of public bodies whether appointed or elected "will have to face the penalty of law if what the Constitution and follow-up legislation direct them to do are defied or denied wrongfully. The wages of violation are punishment, corporate or personal".[14]

In this case a provision of the Criminal Procedure Code was used for the enforcement of public duties. But as the trend in judicial behaviour indicates there seems to be no reason why mandamus cannot be used for this purpose.[15]

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12. *Ratlam Municipality* v. *Vardichand*, (1980) 4 SCC 162, 163.
13. (1980) 4 SCC 162, 170, AIR 1980 SC 1622.
14. *Id.*, p. 174.
15. *See* XVI ASIL 435 (1980), comment by Professor M.P. Jain.

Judging by past experience, however, one salutary judicial rap on the knuckles will not move the establishment out of traditional inertia and apathy, but it does indicate a 'writing on the wall' which public bodies cannot afford to ignore. This decision shall also remain a refreshing example of how an enlightened judiciary, even within the limitations of law, can enlarge and enrich the concept of citizens' rights in a democracy.

PROPOSED AREAS OF DISCUSSION

1. The prophecy of Lord Denning, written in 1949, that as the pick and shovel is no longer suitable for the winning of coal, so also the procedures of writs are not suitable for the winning of freedom in the new age, has come true. Perhaps Lord Denning's prophecy was founded on the technicalities from which these writs suffered. Against this backdrop procedural technicalities and inconveniences of writ jurisdiction in India may be discussed. The discussion should aim at exploring a simple but effective technique for providing judicial review of administrative action. Students may consider the suggestion of the Law Commission in England, that an 'application for review' by the court should replace the present complex remedies [REMEDIES IN ADMINISTRATIVE LAW: Law Commission Working Paper No. 40 (1971)]
2. In India, the importance of injunction and declaratory action as the general utility remedy by which the legality of an administrative action may be determined is still to be recognised. One of the reasons is the statutory constraints of 'relator action' and 'further relief requirement'. Discussion must review the efficacy of these remedies in the public law area with the aim of evolving certain principles by which the use of these less technical remedies in protecting not only the personal but public, economic, aesthetic and environmental rights may be increased.
3. The above discussions on various aspects of judicial review of administrative action should enable students to review existing remedies with a view to evolving simpler and effective system. In this behalf, the following options may be discussed.
   - (*a*) Creation of an Administrative Division of High Courts and the Supreme Court. Assessors experienced in administrative matters and professional skills would assist where necessary.
   - (*b*) Engrafting an administrative jurisdiction of the continental type for our legal system, administered by a court corresponding to the Conseil d'Etat.
   - (*c*) 'Application for review' procedure to replace the existing restrictive remedies which would also obviate the need to specify any specific remedy to be sought.
4. The Constitution and writ of the habeas corpus may be discussed against the backdrop of the *Habeas Corpus case*. Special attention may be paid to the dissent of Justice H. R. Khanna which set the tone for future development of the law.
5. "Instead of being astute to discover reasons for not applying this great constitutional remedy (Mandamus) for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable constructions, it can be made applicable." [Martin, J., *Rochester Corpn.* v. *R.*, (1958) 120 ER 792.] Students may discuss the use of mandamus in India in the light of this statement.
6. Writs of Prohibition and Certiorari are complementary writs but certiorari is remedial whereas prohibition is preventive. In the light of this statement students may discuss the scope of both these writs.

7. Union of injunction and declaration can completely replace technical writs. Against this backdrop students may discuss the relative merits of both the systems of review of administrative action.

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9

Public Interest Litigation or Social Action Litigation

Social Action Litigation (SAL) and Public Interest Litigation (PIL) are the terms which are used interchangeably in India.[1] The term PIL comes to us from American jurisdiction where it was designed to provide legal representation to previously unrepresented groups and interests. The necessity for this was the recognition that the ordinary market place for legal services fails to provide such services to significant segments of the American population and to significant interests. Such groups and interests include poor, environmentalists, consumers, racial and ethnic minorities, and others.[2]

SAL is a socio-economic movement generated by the judiciary to reach justice especially to the weaker sections of the society for whom even after two and a half decades of independence justice is merely a teasing illusion. In other words, it is a long-arm strategy of the judiciary to reach justice to those who due to socio-economic handicap cannot reach the doors of the courts. Therefore, it is a judge-led and judge-induced strategy and represents high benchmark of judicial creativity and sensitivity to the problems of the weak and the vulnerable. The idea of SAL/PIL came from *actio popularis* of the Roman jurisprudence which allowed court access to every citizen in matters of public wrongs. In India inspiration to court for the development of this strategy came from the oath which a judge takes to defend the Constitution wherein socio-economic justice and equal court access are the prime principles. Thus this innovative strategy while providing easy access to justice to the weaker sections of Indian society also provides a powerful tool in the hands of public-spirited individuals and social action groups for combating exploitation and injustice and securing for the underprivileged segment of society, their social and economic entitlements.[3]

(A) NATURE AND PURPOSE

Public Interest Litigation which means "litigation in the interest of public" entered judicial process in 1970. This type of litigation was innovated

1. I am tempted to agree with Prof. Upendra Baxi that the term SAL is more appropriate in the Indian context. *See* Baxi: *Taking Suffering Seriously: Social Action Litigation and the Supreme Court*, 29 ICJ Review, 37-49 (Dec., 1982).
2. *Balancing the Scales of Justice—Financing Public Interest Law in America* (A Report by the Council for the Public Interest Law) (1976) pp. 6-7, quoted by Prof. S.K. Agarwal: PUBLIC INTEREST LITIGATION IN INDIA, A CRITIQUE, p. 2.
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by judges to provide "equal access" to the judicial process to those who could not come to the Court for the vindication of their rights due to socio-economic handicaps, for which there was a dire need.

It is not a litigation in the real sense of the term. It is, in fact, a challenge and an opportunity to undo historical injustice done by a few to many. Therefore, it is totally different from ordinary litigation which is essentially of an adversary character. In SAL, litigation is not considered as a battle to be won but a disease to be cured. Unlike ordinary litigation the purpose of the SAL is not the enforcement of the right of one person against the other but to reach justice to the deprived sections of the society and hence SAL is not so much for the benefit of an individual as it is for a class. Viewed in that perspective, SAL is a collaborative effort between the petitioner, court and the government and its instrumentalities to make socio-economic rescuer programmes for the disadvantaged and deprived meaningful for them. Therefore, the State must not only welcome it but must also actively participate in this movement because the idea behind the movement is not to tread on the toes of the administration or to usurp its powers but to reach justice to the darkest and remotest corners of India. Any attempt to undermine this movement would be destructive of the rule of law which is a basic feature of our Constitution. Rule of law demands equal access to justice but in our society a vast majority has no access because of socio-economic handicap. Therefore, SAL movement strives to create a rule of law society in India.

(1) Constitutional habitat

It may be pointed out that in SAL/PIL the court is not exercising any extra-constitutional jurisdiction as this strategy is now firmly rooted in Articles 14 and 21 of the Constitution. Article 14 provides protection against all arbitrariness and lawlessness in administrative actions and Article 21 provides for protection of 'life' which embodies everything that goes for a dignified living including rightful concerns for others. It also encompasses violations of various directive principles of State policy in the Constitution which are for the benefit especially of the weaker sections of the society.

(2) Locus standi

SAL/PIL strategy has been developed by the court by lowering the threshold level of locus standi. As discussed in Chapter 7 (*supra*), traditional view of locus standi was that only an 'aggrieved person' who has personally suffered a legal injury by reason of violation of his right or legally protected interest can file a suit for the redress of his grievance.[4] This was the highly restrictive and individualistic view of Anglo-Indian mould which did not suit to the needs of the present day society and therefore, the phrase has

4. *S.P. Gupta* v. *UOI*, 1981 Supp SCC 87.

been liberally interpreted in the field of SAL/PIL to allow standing to any *pro bono publico*.[5] Thus, interpreted the rule of locus standi has been made broad-based and people-oriented to allow access to justice through 'class actions'; 'representative actions' and 'public or social action litigation' so that justice may become easily available to the lowly and lost.[6] Courts now have travelled long distance from 'pers[illegible] injury' standing to 'public concern' standing in order to allow access to public-spirited individuals, groups and organisations on behalf of those who because of their poverty, illiteracy and ignorance cannot come before the court and thus continue to suffer injustice and deprivation.[7]

The strategy of PIL was devised for increasing citizen's participation in the judicial process for making access to the judicial delivery system to one who could not otherwise reach court for various reasons. Thus, any member of the public having sufficient interest can maintain an action for public injury. This is absolutely necessary for maintaining rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objectives. However, it is equally necessary that any busybody or meddlesome interloper who masquerades as crusader for justice should not be allowed to abuse the process of the court for improper motives. Thus, court will not allow that its process be obstructed or polluted by unscrupulous litigants for oblique reasons under the garb of public interest litigation.[8] Locus standi in Public Interest Litigation (PIL) thus will not be lightly allowed to any one to litigate in the name of public interest to cause damage to others. Therefore, where the union challenged the action of the Vice-Chancellor who had allowed students to appear at the examination through a PIL, the court held that such a union must disclose: (*i*) whether it was authorized to file litigation; (*ii*) if so, by whom; (*iii*) whether it has sufficient fund to indulge in such type of litigation; and (*iv*) the basis of alleging public harm. This shows that standing in PIL cannot be taken for granted.[9]

In *Malik Brothers* v. *Narendra Dadhich*[10], the Apex Court clarified beyond doubt that standing in PIL/SAL is to be judged keeping in view the purpose of the petition. Purpose of the petition should be the betterment of the society and not individual benefit, so that, this strategy is not allowed to degenerate into personal, publicity or political interest litigation. According to the Court real purpose of PIL/SAL is: (1) Vindication of Rule of

5. *S.P. Gupta* v. *UOI*, 1981 Supp SCC 87, 381-87
6. *Per* Bhagwati, J., in *People's Union for Democratic Rights* v. *UOI*, (1982) 3 SCC 235.
7. For detailed discussion *see* Chap. 7.
8. See *Janata Dal* v. *H.S. Chowdhry*, (1992) 4 SCC 305; *S.P. Gupta* v. *UOI*, (1981) Supp SCC 87; *Meera Massey (Dr)* v. *S.R. Mehrotra (Dr)*, (1998) 3 SCC 88.
9. *Bhartiya Homeopathy College* v. *Students' Council of Homeopathy Medical College*, (1998) 1 SCC 449.
10. (1999) 6 SCC 552.

Law; (2) facilitating effective access to justice to socio-economic weaker sections of the society; (3) meaningful realisation of fundamental rights. In other words PIL/SAL petition can be entertained for redressing public injury, enforcing public duty, protecting socio-economic rights of weaker sections and vindicating public interest. In this case, petitioner had purchased a land by auction but as he failed to deposit the amount as stipulated, his security deposit was forfeited. His prayer for referring his case to arbitration was accepted. Nevertheless he came before the Court in PIL in his capacity as a tax payer for quashing the award.

The Court in this case took opportunity of issuing a warning that if the Courts do not restrict the free flow of cases in the name of PIL/SAL traditional litigation would suffer and the Courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions. It is only when there is a gross violation of fundamental rights by a group or a class action or where basic human rights are invaded or when there are complaints of such acts as will shock judicial conscience then only such petitions be heard and the Court should extend its jurisdiction for remedying the hardships and miseries of the needy, the underdog and the neglected. The Court also observed that PIL/SAL cannot be filed in the first instance unless all the alternative remedies have been exhausted so that the time of the Court is not wasted. Whether a person who is himself not a candidate for the post can challenge the appointment to certain posts under the government by way of PIL on the ground that appointments were secured on the basis of forged experience certificates? This question was left open by the Court.[11]

(3) Procedure

As discussed earlier social or public action litigation is different from private litigation, therefore, if the technical rules of procedure applicable to the private litigation applied to public interest litigation also it would be counter-productive. Hence the courts have developed new procedural norms to suit the requirements of this strategy.

SAL/PIL can be initiated by any public spirited person or group on behalf of any person, or persons who because of any socio-economic handicap cannot come before the court or where the right which is violated is a 'diffused' right. However, no busybody, meddlesome interloper, wayfarer or officious intervener will be allowed to abuse the process of law by initiating frivolous litigation for personal or political gains or for mere publicity or for other oblique reasons.[12] Thus, only a genuine public-spirited person

11. *Partap Singh* v. *State of Haryana*, (2002) 7 SCC 484.

12. *Krishna Bhatt* v. *UOI*, (1990) 3 SCC 65; *Janata Dal* v. *H.S. Chowdhry*, (1992) 4 SCC 305; *S.P. Gupta* v. *UOI*, 1981 Supp SCC 87.

or group will be allowed standing in SAL/PIL. However, drafting of petition should be done by persons having expert knowledge in the field after making proper research especially when petition is concerned with issues of constitutional law.[13] It is also necessary that in PIL petition public interest must be prominant. A PIL filed alleging mala fide on the part of Municipal Corporation in demolishing multi-storyed building where family members of the petitioner got trapped is not maintainable because in the opinion of the court no public interest is involved. Dispute raised being factual dispute cannot be examined under Art. 32 of the Constitution.[14]

In a number of cases courts have entertained 'Letters' also not only from the aggrieved persons but also from persons acting pro bono publico to initiate public interest litigation.[15] In exceptional cases courts have even acted suo motu on the basis of a press report. Generally, the Public Interest Litigation petitions are heard on priority basis therefore, unless the petitioner has a genuine public interest, he will not be allowed to jump the queue, otherwise it would irk others waiting in long queue for justice.

No matter the Supreme Court and the High Courts have by rules prescribed procedure for moving the Court under Article 32 and Article 226 but in SAL/PIL the cause of justice is not allowed to be thwarted by procedural technicalities.[16] Therefore, the court does not insist on a regular writ petition and sworn affidavits. Evidences are generally taken on commission at the State expense. No matter the jurisdiction of the Supreme Court is confined to the violation of Fundamental rights but if there is a breach of a social legislation or a matter of serious public concern is involved, the court has allowed access.[17] Even in cases where the Court is called upon to give effect to the Directive Principles or Fundamental Duties under the Constitution, the Court will not shrug its shoulders and say that these are not enforceable rights, it will issue directions.[18] Regarding withdrawal of petitions the Court developed a unique procedural norm when it held that the petitioner can withdraw but the petition would stay and the Court will ask any other person to represent the case.[19] However, the court may grant permission to withdraw keeping in view the consideration of public interest and checking abuse of process of the court.[20] In the area of SAL/PIL justice is done mostly through Court's directives. No matter it is open to the Court to supplement the pres-

13. *S.P. Anand* v. *H.D. Deve Gowda*, (1996) 6 SCC 734.
14. *Daljit Singh Dalal* v. *UOI*, (1997) 4 SCC 62.
15. *S.P. Gupta* v. *UOI*, 1981 Supp SCC 87; *Bandhua Mukti Morcha* v. *U.O.I.*, (1984) 3 SCC 161, 239-40.
16. *Bandhua Mukti Morcha* v. *U.O.I.*, (1984) 3 SCC 161.
17. *Sheonandan Paswan* v. *State of Bihar*, (1987) 1 SCC 288
18. *Sachidanand Pandey* v. *State of W.B.*, (1978) 2 SCC 295.
19. *Sheela Barse (II)* v. *UOI*, (1986) 3 SCC 632.
20. *S.P. Anand* v. *H.D. Deve Gowda*, (1996) 6 SCC 734.

cribed procedure by evolving its own rule in this area, nevertheless, the supplement procedure must conform at all stages to the principles of natural justice, and other accepted procedural norms characteristic of a judicial proceedings.[21] Therefore, where the number of person affected by the PIL is large and indeterminate public notices issued in large number of newspapers in English and local language about the pendency of the litigation and the date of next hearing will be considered as sufficient notice to all those who would be affected by the decision of the court and in such cases principles of Order 1, R. 8 of the Civil Procedure Code are not invocable and no one can say to have received no notice.[22]

In a pace-setting judgment the Apex Court held that while exercising power under Article 32 of the Constitution for the enforcement of Fundamental Rights under PIL, it can issue guidelines and norms to fill up the vacuum in existing legislation. Thus in *Vishaka* v. *State of Rajasthan*[23], the court issued detailed directions to protect working women from sexual harassment and to make their fundamental rights meaningful to them.

Regarding maintainability of PIL filed for non issuance of writ against private units for environmental pollution but against Union of India, State Government and Pollution Board for compelling them to fulfil their statutory obligation, the court held that such petitions are maintainable and court can direct the authority to perform their statutory duties.[24]

However, one cannot deny the fact that in recent times, in increasing instances the PIL strategy has been abused. This special type of litigation which was essentially meant to protect basic human rights of the weak and the disadvantaged who on account of poverty, helplessness, or social and economic disabilities could not approach the Court for relief, has now become private or publicity litigation in a number of cases. Increasingly it is becoming a weapon in the hands of persons who are not disadvantaged or deprived to protect their entitlements. Therefore, the Supreme Court thought it proper to re-emphasise the parameters within which PIL could be resorted to by the petitioner and entertained by the Court in *BALCO Employees' Union* v. *Union of India*[25]. The Court emphasised that PIL is meant to protect the violation of Article 21 of the Constitution (Right to life and personal liberty) or human rights. It can be initiated for the benefit of the poor and the under-privileged who are unable to come before the Court. In such cases, also it is the legal rights which are secured by the Court as PIL

21. *Bandhua Mukti Morcha* v. *UOI*, (1984) 3 SCC 161, 230-31.
22. *Gopi Aqua Farma* v. *UOI*, (1997) 6 SCC 577. *See* also *Jagannath* v. *UOI*, (1997) 2 SCC 87.
23. (1997) 6 SCC 241.
24. *Indian Council for Enviro-Legal Action* v. *UOI*, (1996) 3 SCC 216.
25. (2002) 2 SCC 333. *See* also *Mohd. Aslam* v. *UOI*, (2003) 4 SCC 1.

cannot be a panacea for all wrongs. Therefore, the Court concluded that PIL cannot be used to challenge the financial or economic decisions taken by the government. No doubt a person who is personally aggrieved by such decisions can himself come before the Court but a PIL at the behest of the stranger ought not be entertained. Such a litigation cannot per se be on behalf of the poor and the downtrodden, unless court is satisfied that there has been a violation of Article 21 of the Constitution and persons adversely affected are unable to come before the court. The Court further emphasised that PIL is available if there is a injury to public because of dereliction of constitutional or statutory obligation on the part of Government. The Court restated that every matter of public interest or curiosity cannot be subject of PIL, because courts are not expected to conduct the administration of the Country.

Explaining the scope of enquiry of the Constitutional Court while hearing a Public Interest Litigation petition, the Apex Court held after giving notice to the parties, the Court may enter issues wider than those raised in the PIL. Technicalities do not deter the Court in wielding its power to do justice, enforcing the law and balancing equities. The Court is obliged to see while scrutinizing the conduct and activities of a public body to see that its activities bear no colour except being transparent; are guided with the object of public good and are within the four corners of law. These observations were made by the Court in *Padma* v. *Hiralal Motilal Desarda*[26], wherein the High Court after framing questions, put all the parties on notice before it that it proposed to enter into issues wider than raised in petition. Non-petitioners including appellants were allowed full opportunity of defending themselves. The Court also called for the record of the authority and scrutinized it. Thus while hearing a PIL the Constitutional Court acts as a custodian of constitutional morality, ethics and code of conduct. In another case, the Apex Court recommended that the PIL should be disposed of at the earlier as delay may cause further injury to the public.[27]

Nevertheless in a more recent (Sept. 2003) decision, the Apex Court stopped the disinvestment initiative of the government in respect of BPCL and HPCL, two Indian Oil Companies, in a PIL petition filed by its employees on the ground that these companies were acquired under an Act of Parliament, hence only Parliament has the right to repeal or modify the Act. The Court held, disinvestment in such case cannot be done by mere executive action. The Court made it clear that they are not going into the merits of disinvestment policy as in the petition there was no challenge to it. Therefore, in this PIL petition the Court was dealing with a limited question whether the method adopted by the government in this case for disinvestment without repealing or modifying the Act is valid or not.[28]

26. (2002) 7 SCC 564.

27. *BALCO Employees Union* v. *Union of India*, (2002) 2 SCC 333.

28. *Tribune*, Sept. 17, 2003, p. 1

(4) Complexities and problems of SAL/PIL

One of the distinctive features of SAL/PIL movement has been that from its very inception it became a hypersensitive area and generated a lot of controversies and apprehensions. One such controversy is that the SAL/PIL strategy is a status quoist approach of the court to avoid any change in the system and so it is a painkilling strategy which does not treat the disease. It is argued that the problems of the poor, disadvantaged and the deprived cannot be solved by any trickle down method, therefore whatever the court is doing in SAL/PIL is merely symbolic, simply to earn a legitimacy for itself which it has lost over the years. There may be truth in this assertion and whatever little the court is doing through SAL/PIL may be just straws floating in the air but one thing is certain that they are floating in the right direction.

It is further argued that by extending its jurisdiction through SAL/PIL, the court is trying to bite more than what it can chew. Lawyers have started complaining that much of the court's time is being consumed by SAL/PIL and hence for the court a postcard is more important than a fifty-page affidavit. It is further argued that at a time when the figures of pending cases before the courts are astronomical, this new area of litigation would spell a total collapse of the judicial system in India as it would open floodgates of litigation. However, the history of SAL/PIL in India does not support this apprehension. Indian litigation system is a very tiresome process, therefore, no one would like to litigate for the lark. In the Supreme Court 35,000 cases were filed in 1985 and in comparison to this only 200 SAL/PIL petitions were filed. Important to note is that if 35,000 cases benefited 35,000 persons, perhaps 200 SAL/PIL petitions may have benefited millions.[29] Contrary to the popular belief fresh SAL/PIL filing has registered a decline in the subsequent years. It is ironical that decline started exactly when the doors of the courts were open wide to the common man. The reasons for this trend are many. The tribe of conscientious citizens who regularly moved social action cases is feeling discouraged because of frequent adjournments and long delays in the grant of final relief and whatever relief is granted, in many cases, stops at the gates of the court because of the indifferent attitude of the administration. Furthermore, well intentioned persons feel insulted and discouraged when administration imputes motives to them. Lawyers who readily offered their services for a laudable cause are retracing their feet because of the realisation that it is not all publicity and glamour but time and money also. Furthermore, those who have been sending letters as petitions in the past to a particular judge have found that it may not be heard by him. A new practice developed by the court is to refer such letters to

29. *Indian Express*, 27-10-1986, p. 6.

Legal Aid Committees which would convert them into writ. It is also now being increasingly recognised that leading evidence is more difficult than sending newspaper clippings to the court. Added to this is the time consumed in waiting upon lawyers, for some of whom social action litigation is only a cosmetic touch to their public image.[30] Division among judges on the desirability of SAL/PIL, some of whom even do not hesitate in making a sardonic remark in the open court, is also responsible for this backlash effect.

Without being exhaustive other popular criticisms of the opponents of SAL/PIL are: It is an attempt at picking a judge and making him a commercial item; it is a politics of liberation wherein court seeks social legitimacy for itself; in a country which is full of injustices it is nothing but Don Quixotic forays in the harsh realities of life; it is an attempt to pre-empt legislation and administrative initiative; it is an attempt at using a system against system which would hit back; it is leading to class conflict and social tension; it is an attempt at disturbing constitutional balance between legislature, executive and the judiciary; it is a shift away from democratic system as the people instead of looking up to their elected representatives took up to the court; it is a tool of blackmail. Even in the USA, PIL is not without hostility. In *US* v. *Richardson*[31], Justice Powell observed: "Relaxation of standing requirement is directly related to the expansion of judicial power and that such relaxation would significantly alter the allocation of power at the national level, with shift away from the democratic form of government."[32]

According to one opinion, the misuse of PIL/SAL has reached ridiculous limits and petitions are being filed all over the country before the writ courts for matters like students and teachers strike, shortage of buses, lack of cleanliness in hospitals, irregularities in stock exchange, painting of road signs, Dengue fever, examinations and admissions in universities and colleges etc. One can go on but the list will not be exhaustive. Classical case came up when PIL petition was filed in Delhi High Court to seek direction to the United Front Government at the Centre (1997) to form a Coalition Cabinet with the Congress. A petition (1999) was filed for invalidating no-confidence vote against the Vajpayee Government. Recently (2003) PIL was filed challenging the decision of the U.P. Governor inviting Mulayam Singh Yadav to form government in the State of Uttar Pradesh. In most situations lawyers file PIL petitions for themselves and not for other PIL petitioners. More than half of the PIL work of the courts answers the description of the 'Hyde Park' syndrome where petitions are more like illprepared public speeches or memoranda than judicial petitions. Power and publicity apart, many judges

30. *Indian Express*, Chandigarh, Sept. 6, 1983, p. 7.
31. 418 US 166 (1974)
32. *Id.*, p. 188.

have to entertain PIL because of the liberalisation of the rule of locus standi and the concept of social justice for the poor, oppressed and exploited sections of the society. Thus, indiscriminate use of this strategy is bringing it into disrepute because it has become the privilege of the privileged to have access to the court.[33] In fact, majority of the petitions either should not have been filed or should not have been entertained. PIL must be confined to cases where justice is to be reached to that section of the society which cannot come to the court due to socio-economic handicap or where a matter of grave public concern is involved.

Even if all this criticism is valid no one would suggest to abolish this strategy which the courts have innovated to reach justice to the deprived sections of the society. Anything contrary would be like suggesting the abolition of marriage in order to solve the problem of divorce. This socio-economic movement generated by court has at least kept alive the hope of the people for justice and thus has weaned people away from self-help or seeking redress through a private system of justice. It is necessary for sustaining the democratic system and the establishment of a rule of law society. Therefore, one has to be both adventurous and cautious in this respect and the judiciary has to keep on learning mostly by experience.[34]

Public Interest Litigation must not be allowed to degenerate into Private Publicity or Political or Paisa Interest Litigation. Finding the delicate balance between ensuring justice and maintaining institutional legitimacy is the continuing challenge before the higher judiciary.

Needless to emphasise that the strategy of SAL/PIL must be used by the courts carefully, prudently and with discrimination because any indiscriminate use of it would bring it into contempt both from the public and the government.[35] Therefore, the correct approach of the court in SAL/PIL cases should be a judicious mix of restraint and activism determined by the dictates of existing realities. Any misuse of this strategy must be strongly discouraged by the courts.[36]

It is for this reason that the Apex Court in *BALCO Employees' Union v. Union of India*[37] clearly held that administrative powers cannot be chal-

33. Ahuja Sangeeta: PEOPLE, LAW AND JUSTICE, 1997, Vol. 2. There was mass rejection of PILs by Rajasthan High Court (1997); Anupam Gupta: *The Tribune, News Review*, Dec. 10, 1997, p. 11.
34. S. Rangarajan: SOME THOUGHTS ON LEGAL RESEARCH, (Mimeo) p. 6 (1982).
35. In *J.P. Sanghi v. M.P.*, AIR 1985 MP 109, PIL was used for getting the road signs painted. In *Sathyalaya Social and Cultural Organisation v. Madras Doordarshan*, AIR 1985 Mad 186, PIL was used for the deletion of a few songs from a film. See also *Chhetriya Pradushan Mukti Sangarsh Samiti v. State of U.P.*, (1990) 4 SCC 449.
36. Mukharjee, C.J., *Chhetriya Pradushan Mukti Sangarsh Samiti v. State of U.P.*, (1990) 4 SCC 449, 452.
37. (2002) 2 SCC 333.

lenged in PIL unless there is a violation of Article 21 of the Constitution and persons adversely affected are unable to approach the Court. This limits the power of the Court and the initiative of a busybody. In this case, the union had challenged the economic policy of disinvestment of the government.

It is absolutely true that the courts through SAL/PIL cannot take care of all the problems of the poor. The ultimate guarantee of one's right, however lies in self-assertion. The poor and the weak must, therefore be organised and made self-reliant.[38] Bhagwati, J., rightly emphasised:

> "We must always remember that social action litigation is a necessary and valuable ally in the cause of the poor, but it cannot be a substitute organisation of the poor, development of community, self-reliance and establishment of effective organisational structures through which the poor can combat exploitation and injustice, protect and defend their interest and secure their rights and entitlements."[39]

In the USA where the liberalising trend in the rule of standing has already reached maturity, courts have recognized not only taxpayers' or competitors' or consumers' standing asserting economic or uneconomic interests but also the standing to include aesthetic and environmental interest also.[40] The courts have recognized standing in citizens' groups concerned with protection of natural, scenic and historic resources and a National Conservation Organization challenging the construction of expressway;[41] a public benefit corporation bringing a class action against a proposed nuclear detonation;[42] an organization devoted to environmental protection challenging the use of DDT;[43] a citizens' group attacking a model cities programme;[44] and a conservationist organization challenging mining and timber cutting in a national forest.[45]

In England[46] the PIL movement started with the *Blackburn cases*. Blackburn, a former member of Parliament, took up many cases before the Court of Appeal which involved matters of public concern. The court granted him locus standi to challenge the governmental action relating to the joining of European Economic Common Market,[47] police inaction in prosecuting big

38. Thakker, C.K.: ADMINISTRATIVE LAW, (1992) Eastern Book Company, p. 607.

39. *Law, Justice and Underprivileged*, Keynote address at National Seminar on Unorganised Rural Labour held at New Delhi on Jan. 5-8, 1984; cited by Thakker, C.K., *Id.* p. 607.

40. *Sierra Club v. Morton*, 405 US 727 (1972).

41. *Citizens' Committee v. Volpe*, 425 F 2nd 97 (1970).

42. *Crowther v. Seaborg*, 312 F Supp 1205 (1971).

43. *Environmental Defence Fund v. Hardin*, 428 F 2nd 1093 (1970).

44. *North City Area Wide Council v. Romney*, 428 F 2nd 754 (1970).

45. *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 411 F 2nd 232 (1971)

46. *See* Denning: THE DISCIPLINE OF LAW, Part III (1979).

47. *Blackburn v. Attorney-General*, (1971) 1 WLR 1037.

gambling houses[48] and enforcing pornography law.[49] Similarly, the court allowed standing to Ross McWhirter (he was one of twin brothers who produced the Guinness Book of Records) to file petition for injunction restraining Independent Broadcasting Authority from telecasting a film which according to him was outrageous— 'a shocker, the worst ever'.[50]

The era of liberalization of the strict rule of locus standi was also heralded by the Rule of the Supreme Court, Order 53, Rule 3(5) which replaced the judiciary-created rule of "aggrieved person" with the rule of "sufficient interest".[51] However, this rule was narrowly interpreted by the House of Lords in *Inland Revenue Commissioners ex p. National Federation of Self-employed and Business Ltd.*[52] In this case about 6000 casual workers called "Fleet Street Casuals" who were doing casual work for the newspapers did not sign their true names on pay packets and thus by hiding their true identity defrauded the tax authorities to the tune of about one million pounds. After the fraud was detected a settlement was arrived at according to which arrears of past taxes were written off but they were made liable for the payment of tax on all future earnings. The settlement was challenged by the Federation of Self-Employed and Small Shopkeepers on the ground that the writing off of the tax was illegal and sought mandamus for the collection of tax according to law. The Court of Appeal held that the Federation had "sufficient interest" in the matter. Lord Denning who was a champion of the liberal rule of locus standi, held that the Federation has a genuine grievance because the 'Fleet Street Casuals' are getting out of paying their back taxes because of their industrial muscle power. However, in appeal, the House of Lords reversed for various reasons.[53]

In India until the Public Interest Litigation was developed by the Supreme Court, justice was only a remote and even theoretical proposition for the mass of illiterate, underprivileged and exploited persons in the country. They were unaware of the law or even of their legal rights, unacquainted with the niceties of procedure involved, and too impoverished to engage lawyers, file papers and bear heavy expenditure on dilatory litigation. Thus, the vested interests that exploited them were emboldened to continue with their cruel and even illegal practices with cynical contempt for the law. This

48. *R.* v. *Commr. of Police of Metropolis ex p. Blackburn*, (1968) 2 QB 118.

49. *R.* v. *Police Commr., ex p. Blackburn*, (1973) 1 QB 241.

50. *A.-G.* v. *Independent Broadcasting Authority*, (1973) QB 629.

51. *See* S.N. Jain: STANDING AND PUBLIC INTEREST LITIGATION, (Mimeographed), p. 15.

52. (1981) 2 WLR 722. See *id.*, p. 15.

53. Majority held that the Federation had not shown sufficient interest. Lord Diplock reversed on the ground that the Federation could not show that the action of the tax authorities was illegal. According to Lord Scarman, the Federation failed to show any ground for believing that the Revenue had failed to do its statutory duty. Lord Raskill reversed both on the ground of locus standi and the Federation having no case. *See* also 1978 AC 435.

vast underprivileged section of the society found themselves utterly helpless. Nor could anyone else take up their case for lack of locus standi or any direct interest in the matter.

By propounding the thesis that citizens should be enabled to enjoy the right to life and liberty guaranteed under Article 21 of the Constitution, the Supreme Court enlarged the scope of locus standi to include the rightful concern of other citizens willing to espouse the cause of their less fortunate countrymen. Understandably an increasing number of cases have come up before the Supreme Court and in some instances it has acted suo motu in converting newspaper reports and letters recounting incidents of gross exploitation and inhumanity into writs.[54] The effect of this has been quite electrifying and has truly brought justice to the last man as never before. Today justice to the 'little man' is not a teasing illusion but a reality.

At a time of crucial, social and economic transformation, the judicial process has a part to play as a midwife of change. The issue of Public Interest Litigation touches a matter of the highest importance literally affecting the quality of life of millions of Indians.[55] Besides this, it will also spread wide the canvas of judicial popular support and moral authority specially at a time when other institutions of governance are facing a legitimate crisis.[56]

In underlining the need for judicial activism to end class and ethnic exploitation, the International Workshop on 'Role of the Judiciary in Plural Societies' has echoed the emerging sentiment in favour of Public Interest Litigation. The workshop adopted a report calling upon the judiciary to give up its traditional self-restraint and passive interpretation and to take a direct and active interest to ensure human rights and socio-economic welfare for the exploited classes and ethnic and other minorities including women. The judiciary should encourage public interest bodies and social action groups to expose variegated exploitation and, as Justice P.N. Bhagwati said in his opening remarks, functionally involve itself in the process of emerging social and economic justice to the deprived and the exploited. The need for judicial activism was also stressed in the task of balancing interests of ethnic groups as both the executive and the legislature would invariably reflect the aspirations of the majority community. Judicial inaction in such circumstances could aggravate preceptions of injustice and eventually lead to violence. It

54. Justice Rajendra Sachar and Justice R.N. Aggarwal have suo motu taken notice of a news report about convicts sentenced to simple imprisonment in Tihar Jail being forced to serve rigorous imprisonment. Newspaper reported the cases of convicts who had been asked to affix their thumb impression on the convict history ticket. Below the thumb impression a jail officer had allegedly written in Hindi which on translation in English would read: "I want to get my simple imprisonment changed into rigorous imprisonment."

55. *See* Editorial, *Indian Express*, Chandigarh, December 11, 1982.

56. *See* Upendra Baxi, *op. cit.* (Mimeographed) p. 1, quoting from his book INDIAN SUPREME COURT AND THE POLITICS, (1980), pp. 246-248

was perhaps as much a recognition of these dangers as it was a response to considerations of social justice that witnessed the growth of Public Interest Litigation in India. Until it was taken up by the Supreme Court of India, justice even in its obvious and elementary form was mostly a theoretical proposition for the mass of the illiterate, dispossessed and exploited persons. Nevertheless the problems are colossal and only a more active concern on the part of the enlightened citizens and the higher judiciary can change this dispensation.[57]

It is true that independence of the judiciary is the first concern of the constitution but how far a judge can go is not without limits. Court is called upon to dispense justice according to the Constitution and the law of the land. Therefore, in activity it must not forget the limits of its power that call for self-restraint and in periods of restraint it must not be unmindful of its constitutional duty and obligation. Fact remains that the judiciary in India has performed well, lapses notwithstanding.[58]

Notable case law

1. *S.P. Gupta* v. *Union of India*[59] (popularly known as *Judges' Transfer case*).—In this case the Supreme Court entertained petitions by lawyers challenging the constitutionality of Law Minister's circular regarding transfer of judges of High Courts and non-confirmation of sitting Additional Judges of High Courts. Standing was allowed on the ground that the independence of the judiciary is a matter of grave public concern.

2. *People's Union for Democratic Rights* v. *Union of India*[60] (populary known as *Asiad case*).—In this case the Supreme Court entertained petition from a public-spirited organisation on behalf of labourers belonging to socially and economically weaker section and employed in the construction work of various projects connected with Asian Games 1982 complaining violation of various labour laws including non-payment of minimum wages and granted relief.

3. *D.S. Nakara* v. *Union of India*[61].—It was held that a registered co-operative society consisting of public-spirited citizens seeking to expouse the cause of old and retired infirm pensioners unable to seek redress through tardy and expensive judicial process can approach the court through SAL/PIL petition.

57. *See* Editorial, *Indian Express*, Chandigarh, August 26, 1983.
58. Noorani, A.G., *Judicial Activism v. Judicial Restraint*, *SPAN*, April/May, 1997, 15
59. 1981 Supp SCC 87.
60. (1982) 3 SCC 235.
61. (1983) 1 SCC 305.

4. *Bandhua Mukti Morcha* v. *Union of India*[62].—A public-spirited organisation access for the release of bonded labourers working in stone quarries.

5. *People's Union for Democratic Rights* v. *State of Bihar*[63].—The Supreme Court entertained petition by a public-spirited organisation for compensation on behalf of persons victim of unjustified police atrocities.

6. *D.C. Wadhwa* v. *State of Bihar*[64].—The Supreme Court held that a professer of political science who is deeply interested in ensuring proper implementation of the constitutional provisions can approach the court through PIL petition against the practice of issuing ordinances on large scale to bypass legislature as being a fraud on the Constitution.

7. *Sunil Batra (II)* v. *Delhi Administration*[65].—Court allowed access to a prisoner complaining about brutal attack and assault by head warden on a fellow prisoner on the ground of class standing.

8. *Municipal Council, Ratlam* v. *Vardichand*[66].—Court held that public duties are owned not by any individual but by the public, therefore, for the enforcement of any public duty any public-spirited person will be granted standing. Supreme Court issued directions to the municipal council on a PIL petition by a citizen to construct public conveniences and drains etc. and to keep the streets clean.

9. *Charan Lal Sahu* v. *Union of India*[67].—In order to provide immediate relief to the Bhopal gas tragedy, on a PIL petition, the Court upheld the validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 and the settlement arrived at between the Union of India and the Union Carbide Company.

10. *M.C. Mehta* v. *Union of India*[68].—On a PIL petition by a lawyer of the Supreme Court, the Court granted relief to the victims of gas leak from the Shriram Fertiliser and Chemical Plant at Delhi and also liberated the Indian tort law from the bondage of *Rylands* v. *Fletcher* by holding that no exception to strict liability laid down in this case will be applicable if any hazardous activity is undertaken.

11. *Parmanand Katara* v. *Union of India*[69].—On a PIL petition the Court directed the Government that every injured person brought for medical treatment should instantaneously be given medical aid without waiting for

62. (1984) 3 SCC 161.
63. (1987) 1 SCC 265.
64. (1987) 1 SCC 378.
65. (1980) 3 SCC 488.
66. (1980) 4 SCC 162.
67. (1989) 4 SCC 286.
68. (1987) 1 SCC 395.
69. (1990) 1 SCC 613.

the completion of police procedural formalities in order to avoid negligent death of an accident victim.

12. *Banwasi Seva Ashram* v. *State of U.P.*[70].—On a PIL petition the Supreme Court granted relief to Adivasis and other backward people using forest as their habitat and means of livelihood against their eviction from the forest land by the government.

13. *Sampat Singh* v. *State of Haryana*[71].—Writ petition as PIL filed by MLAs and MPs seeking direction for a CBI inquiry on the basis of FIR alleging serious charge of corruption and misuse of power by person holding cabinet rank in Central Government and for setting aside the order of the Magistrate discharging that person. Court held that since petitioners were not a party to earlier proceedings at any stage, hence they have no locus standi to file PIL petition.

14. *Indian Council for Enviro-Legal Action* v. *UOI*[72].—Where the court relied on expert reports and no objection was taken immediately regarding absence of cross-examination of the experts, the court held that no such objection can be raised at belated stage.

15. *Sudip Mazumdar* v. *State of M.P.*[73].—The court directed the government to remove inadequacies of safety precautions in Army's ammunition test firing range resulting in death and maiming of tribals who stray into the range for collection of scrap of ammunition.

16. *Vellore Citizens' Welfare Forum* v. *UOI*[74].—Court issued suitable directions to give relief to people against pollution of tanneries and asked the Madras High Court to establish a Green Bench to monitor further progress.

17. *Vishaka* v. *State of Rajasthan*[75].— In the absence of a legislation the court filled in the gap by giving wide directives to protect working women from sexual harassment.

18. *K.L. Sethia* v. *U.O.I.*[76].—Where the relief claimed is not based on any fundamental right court cannot grant relief. Thus, the court refused to issue direction to the government to include Rajasthani language in the Constitution.

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70. (1993) 2 SCC 612.
71. (1993) 1 SCC 561.
72. (1996) 3 SCC 212.
73. (1996) 5 SCC 368.
74. (1996) 5 SCC 647.
75. (1997) 6 SCC 241.
76. (1997) 6 SCC 573.

19. *Daljit Singh Dalal* v. *UOI*[77].— Court refused relief where in the petition no public interest was involved. Court held that factual disputes cannot be raised and examined under Art. 32 of the Constitution.

20. *Malik Brothers* v. *Narindra Dadhich*[78].—Court refused relief where no public interest was involved and the consequence was frustration of any law of the land.

21. *BALCO Employees' Union* v. *UOI*[79].—In this case Union had challenged the disinvestment policy and implementation thereof through PIL. The Apex Court held that the decision to disinvest and the implementation thereof is purely an administrative decision relating to economic policy of the State and challenge to the same at the instance of a busybody cannot fall within the parameters of PIL.

(B) CLASS ACTIONS

In class actions the plaintiff asks relief not only for himself but for all others similarly situated. By its nature class action asks for more than *inter partes* relief. It is far beyond the mere settlement of disputes between private parties. Class actions are governed by Section 91 and Order I, Rule 8 of the Civil Procedure Code. After the amendment of Section 91 in 1976 the courts have been given discretion to entertain suits at the instance of two or more persons against public authorities for public nuisance or other public wrongs. Before the amendment the scope of the remedy was highly restrictive, because even a suit for the removal of public nuisance could not be brought except with the consent of the Advocate-General. The Law Commission of India in its 54th Report had suggested a wide amplitude of Section 91 by doing away with the consent requirement and also by including all public wrongs besides nuisance within its scope. The government accepted the recommendation of the Law Commission and the amended section now provides that in case of a public nuisance and any other public wrong a suit for a declaration and injunction and any other appropriate relief can be filed either by the Advocate-General, or by two or more persons, with the leave of the court, even though no damage has been caused to such persons. There is also no obligation to give notice to all the persons affected by such public nuisance or wrong. The court shall grant leave for the filing of such a suit according to the well-defined principles.

Order I, Rule 8 also provides for the filing of a representative suit subject to the conditions that it must be filed by two or more persons acting on behalf of the class and that a notice to this effect must be served, at the plaintiff's expense, to the persons who are affected.

77. (1997) 4 SCC 62.
78. (1999) 6 SCC 552.
79. (2002) 2 SCC 333.

The inclusion of general class action in the Civil Procedure Code is certainly a welcome step. This is also an indication of the mood of the legislature on PIL for its continuation either as an ordinary or constitutional remedy strategy.[80]

American history of class action is not very inspiring. Some of the problems which have been created are—increase in court arrears, main beneficiaries being the attorneys and not the class, legalised blackmail by unscrupulous lawyers, difficulties in the ascertainment of a class and the disbursement of damages and adverse economic constraints. These problems may be peculiar to the United States, therefore, development of class action in India, which is in its infancy, is to be watched carefully.[81]

PROPOSED AREAS OF DISCUSSION

1. Prof. Baxi uses the term 'Social Action Litigation' in preference to the more voguish term 'Public Interest Litigation' because according to him PIL represents for America a distinctive phase of socio-legal development for which there is no counterpart in India. Students may discuss the growth of PIL concept in USA in order to appreciate the use of term SAL in the Indian situation.
2. It is now firmly established that there is a new activist of Supreme Court of India. Causes for this new role perception and performance may be discussed.
3. SAL/PIL is not an extra legal strategy as it has now a constitutional habitat. Students may discuss this constitutional habitat.
4. SAL/PIL has been possible only by lowering the threshold level of locus standi principle. Gradual lowering the level of locus standi principle may be discussed.
5. SAL/PIL in India is still in a developing state and therefore, the whole process is confronted with various personal and institutional complexities. Students may discuss their complexities.
6. There is a shade of opinion in India which does not favour judicial adventurism in an area which is a legislative and executive domain. Students may discuss the legitimacy of SAL/PIL against this backdrop.
7. "In the process (SAL) like all political institutions promises more than it could deliver and is severely exposed to the dynamics of disenchantment." Baxi: TAKING SUFFERING SERIOUSLY: SOCIAL ACTION LITIGATION IN THE SUPREME COURT OF INDIA. (Mimeographed), p. 1. Against this backdrop a socio-legal audit of judicial role performance may be made.
8. There are clear dangers in the indiscriminate use of SAL/PIL. Students may demarcate area where this strategy can be most suitably used.
9. SAL/PIL cannot solve all the problems of the poor. Therefore, unless the poor and the weak are organised and made self-reliant, there is no guarantee for the solution of their problems. Students may discuss this proposition.
10. Students may discuss the future of SAL/PIL in India.
11. Students may discuss the statement of Mukharji, C.J. which he made in the context of SAL/PIL. "Article 32 of the Indian Constitution is not the nest for all the bees in the bonnet of 'public-spirited persons' ".

80. *See* S.N. Jain: *Standing in Public Interest Litigation* (Mimeographed), p. 28.
81. *Ibid.*

12. If the concept of class action as provided in the Civil Procedure Code is encouraged and other grievance mechanism like the ombudsman is strengthened the SAL/PIL may not be necessary. Students may discuss the validity of this statement.

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10

Liability of the Administration

In any democratic country where government assumes the role of a 'Welfare and Service State', the question of government liability evokes a serious response. On the one hand the concept of an intensive form of government requires active participation of the State in welfare and service activities but on the other, the concept of governmental liability may have a chilling effect on such participation. Therefore, a very delicate balance has to be drawn.

If any person has been wronged or made to suffer any loss there may be two courses open to him. He may either proceed against the officer concerned or he may sue the government on whose behalf the officer was acting. Early common law firmly recognised the principles of liability of the officer concerned because they were treated nothing more than as ordinary citizens. With the growth of governmental powers, the shift has been from the 'officer's liability' to 'State liability', on whose behalf he acts. The main reason for such a shift could be the apprehension that the concept of 'officer's liability' may dampen the independence and initiative of the officers. However recent trend indicates a judicious mix of both these concepts.

(A) LIABILITY OF THE ADMINISTRATION IN CONTRACT

1. Constitutional provisions and the development of the concept of liability

Articles 294, 298, 299 and 300 complete the constitutional code of contractual liability of the government. Article 294 makes provision for the succession by the present governments of the Union and the States to property, assets, rights, liabilities and obligations vested in the former governments. Article 298 lays down that for the purpose of carrying out the functions of the State, government can enter into contracts. Article 299 contains essential formalities which a government contract must fulfil. Article 300 provides the manner in which suits and proceedings against or by the government may be instituted. However, the constitutional code for public contract is not complete, therefore, it is supplemented by the provisions of the Indian Contract Act, 1872. A government contract in order to be valid, besides satisfying the requirements of Article 299, must also fulfil the requirements of Section 10 of the Indian Contract Act dealing with the essentials of a valid contract.[1] In the same manner the principles for determining the quantum of damages contained in Sections 73, 74 and 75 are also applicable in case of government contracts.[2] Nevertheless all the provisions of

1. *State of Assam v. Keshab Prasad Singh*, AIR 1953 SC 309; *Kalyanpur Lime Works v. State of Bihar*, AIR 1954 SC 165; *Govt. of U.P. v. Nanhoo Mal*, AIR 1960 All 420.

the Contract Act are not applicable to government contracts. The provisions relating to capacity as to age and mind have no relevance to such contracts.

The extent of governmental liability is in direct succession of the liability of the East India Company in similar situations. Article 300 of the Constitution points out that the extent of liability of the Union of India and the States will be same as that of Dominion of India and the provinces under the Government of India Act, 1935. The Act of 1935 refers to the Act of 1915 which in turn refers back to the Government of India Act, 1858. Thus, one must refer back to the times of East India Company in order to determine the extent of liability of government today.

Before 1947, the Crown in England enjoyed immunity from being sued in its own courts. This immunity of the Crown was further fortified by the doctrine of feudalistic origin signifying that the 'King can do no wrong'. However, even during the heyday of Crown immunity, a person could seek redress against the Crown through a 'Petition of Right'.

There was never any doubt that the East India Company, which was essentially a commercial concern, was not entitled to any immunity which the Crown may enjoy from the liability arising out of contracts. In *Bank of Bengal* v. *United Co.*[3], Sir Charles Grey and Justice Franks of the Supreme Court of Bengal clearly held that the East India Company had no sovereign character to prevent it from being sued for the recovery of interest on three promissory notes on the basis of which the company borrowed money for the efficient prosecution of war for defending and extending the territories of the Crown in India.

Unfortunately a doubt was cast on the extent of liability of the East India Company in contract in *Nobin Chunder Dey* v. *Secy. of State for India*[4]. In this case, a *ganja* licence was auctioned. Nobin Chunder, the highest bidder, sued for specific performance of the contract. It was held that the suit for specific performance could not succeed because the auction of ganja licence was a method of collecting tax which was a sovereign function. It is gratifying to note that this proposition of immunity of the government from liability arising out of contract entered into in exercise of its sovereign power was not followed by the courts in India.

There is no denying the fact that government, because of its special responsibilities and position, cannot be equated with any other individual and, therefore, the Government of India Acts, 1858, 1919 and 1935 made special provisions prescribing the manner in which government contracts are

2. *Thawardas Pherumal* v. *Union of India*, AIR 1955 SC 468; *Namayya* v. *Union of India*, AIR 1958 AP 533; *Union of India* v. *Natabarbal*, AIR 1963 Ori 66.
3. (1831) 1 Bignall's Report 87-181.
4. (1876) ILR 1 Cal 11.

to be made. The formal requirements in these Acts were always considered mandatory and their non-fulfilment rendered the whole contract invalid. The mandatory character of these formal requirements is evident from the fact that in 1870, the government had to pass a special statute to validate those contracts which were deficient in these formal requirements.[5] Maintaining the same tradition, the Constitution of India also lays down certain formal requirements for contracts in Article 299(1). These requirements are mandatory. These have not been provided merely for the sake of form but to protect the government against unauthorised contracts so that the public funds may not be wasted on unauthorised contracts.

1. *The contract must be expressed to be made by the President or the Governor, as the case may be.*—This requirement is not a mere formality. In *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram*[6], the court held that the constitutional provisions were inserted not merely for the sake of form but to safeguard the government against unauthorised contracts. In this case the question which arose for consideration was whether a person who has entered into a contract with the government in violation of the form prescribed in Article 299 was disqualified to be elected to the legislature under Section 7(*b*) of the Representation of the People Act, 1951. This contract had been entered into by a person authorised in this behalf but was not expressed in the name of the President. The Court held that the contract is void. The same position was maintained by the Supreme Court in *Karamshi* v. *State of Bombay*[7]. In this case the appellant entered into a contract with the Minister of PWD for the irrigation of his landholdings. Subsequently, the contract was repudiated on the ground that it was not expressed in the name of the Governor. A suit was filed for the specific performance of the contract. The Court dismissed the appeal holding that the mandatory requirements of Article 299 had not been complied with.

Though the word "expressed" in Article 299(1) might suggest that the government contract must be in some particular form, the Supreme Court in *Union of India* v. *Rallia Ram*[8] held that no formal document need be executed. In this case the Chief Director of Purchase (Disposals), Food Department, Government of India had invited tenders for the purchase of American cigarettes. In the tender of the respondent, the agreement provided for arbitration in case of dispute between the parties. The arbitration award was challenged by the government on the ground that it was not executed in a proper manner. The Supreme Court held that the contract was entered into by an authorised person and on a fair reading of the letter of acceptance

5. 33 and 34 Vict. C 59.

6. AIR 1954 SC 236.

7. AIR 1964 SC 1714. *See* also *Govt. of U.P.* v. *Nanhoo Mal*, AIR 1960 All 420.

8. AIR 1963 SC 1685.

it would be reasonable to hold that the contract was entered into in proper manner. However, if there is any other statutory requirement for the execution of a formal deed, it must be complied with. In *State of Madras* v. *R. Ranganatham Chettiar*[9] the High Court held that in view of a statutory provision requiring formal execution of a deed, the contract as it stood was inchoate and, therefore, unenforceable. In this case the rule required that a formal contract had to be entered into by the government and the highest bidder at the auction. Though the respondent was the highest bidder and deposited the security amount, he did not execute any formal document. Later, when the suit was filed against the government to restrain it from holding another auction which became necessary owing to complaints from the public, the court refused to oblige on the ground that there was no formal contract. A contrary view has, however, been taken by the Patna High Court in *Chandra Bhan* v. *State of Bihar*[10].

Article 299 though provides that the government contracts must be expressed in the name of the President or the Governor, as the case may be yet clause 2 states that they shall not be personally liable in respect of any contract or assurance.

2. *The contract must be executed on behalf of the President or, the Governor, as the case may be.*—Another formality of Article 299(1) is that the competent authority must execute the contract on behalf of the President of India or Governor of the State, as the case may be. If such authority by mistake or otherwise does not sign on behalf of the Chief Executive the contract shall become invalid, as it also belongs to the category of mandatory conditions.[11] However, the court has mitigated the harshness of this rule by holding in *Davecos Garments Factory* v. *State of Rajasthan*[12] that in the absence of any specific rule, if the competent authority has signed the contract deed in its official capacity, the requirement of the formality of Article 299(1) shall be deemed to have been complied with. In this case, the contract for the supply of police uniforms was signed by the Inspector-General of Police who did not write after his signatures "signed on behalf of the Governor".

3. *The contract must be executed by a person authorised by the President or the Governor, as the case may be.*—The condition that government contracts must be signed by 'authorised person' only is certainly very fundamental if State is to be protected from spurious claims made on the

9. AIR 1975 Mad 292. *See* also *Union of India* v. *Uttam Singh Dugal & Co.*, AIR 1972 Del 110.
10. AIR 1976 Pat 15.
11. *C.V. Jasani* v. *Moreshwar Parashram*, AIR 1954 SC 236.
12. (1970) 3 SCC 874: AIR 1971 SC 141. *See* also *Union of India* v. *Rallia Ram*, AIR 1963 SC 1685.

strength of unauthorised contracts.[13] Article 299 does not lay down any specific mode of authorisation and, therefore, the normal governmental procedure of notification in the Official Gazette may be considered as proper authorisation. Lack of proper authority would render the contract invalid.[14] However, again in order to avoid hardship which this requirement may entail, the court has held in *State of Bihar v. Karam Chand Thapar & Bros. Ltd.*[15] that in the absence of any specific authorisation, implied authorisation may be considered as substantial compliance with this requirement of Article 299(1). In this case, the respondent-company entered into certain construction contracts with the government of Bihar. After the completion of the contract, a dispute arose in respect of certain payments and the matter was referred to arbitration by an agreement between the parties. On the basis of the award, the company filed a petition for decree in terms of the award. The suit was contested on behalf of the government on the ground that the arbitration agreement was not executed by the Secretary to the Government for PWD who was the only authorised person. The company contended that the Executive Engineer signed the document after necessary instructions from the Secretary. The whole process of correspondence and negotiations showed that the Secretary was in the picture all the time. Under these circumstances, the court came to the conclusion that the Executive Officer, though not specifically authorised, was impliedly authorised on ad hoc basis. The same approach was followed by the Supreme Court in *Bhikraj Jaipuria v. Union of India*[16]. In this case in pursuance of the order placed by the Divisional Superintendent, foodgrains were supplied to the Railways. The Divisional Superintendent was not authorised to sign the contract. The proper authority in this case was the Secretary to the Railway Board. However, the evidence showed that an officer of the Railway Board was authorised to take delivery, transport it and distribute it to railway ration shops. The Board also fixed programmes for inspection, allotted wagons, accepted RR and made payments. On the basis of these facts, the court held that the Divisional Superintendent had the implied authority from the Railway Board to execute the contract. However, in the absence of such evidence from which implied authority cannot be inferred, the court held in *Union of India v. N.K. Pvt. Ltd.*[17] that if the contract has not been signed by a person authorised by the

13. *State of W.B. v. B.K. Mondal & Sons*, AIR 1962 SC 779. *See* also *Chiranji Lal Multani R.B. Pvt. Ltd. v. Union of India*, AIR 1963 Punj 372.
14. *Thawardas Pherumal v. Union of India*, AIR 1955 SC 468. *See* also *Municipal Corpn. of Bombay v. Secy. of State*, AIR 1943 Bom 277; *K. Perumal Mudaliar v. Province of Madras*, AIR 1950 Mad 194; *Raipada Pramanik v. State of W.B.*, AIR 1977 Cal 7; *Mangalji Chhotey Lal v. State of Rajasthan*, AIR 1972 Raj 1.
15. AIR 1962 SC 110.
16. AIR 1962 SC 113.
17. (1973) 3 SCC 388: AIR 1972 SC 915. *See* also *Karamshi Jethabhai Somayya v. State of Bombay*, AIR 1964 SC 1714.

President or the Governor, as the case may be, the contract is absolutely void.

The act of entering into contract is an executive act, and therefore, if a contract has been entered into not in exercise of executive powers but statutory powers, the requirements of Article 299(1) will not apply. Consequently, if the liquor licence is to be granted by auction under excise law, the formality formulations of Article 299(1) of the Constitution shall not apply.

(4) *Ratification*.—The question whether an agreement which does not fulfil the requirements of Article 299(1) can be ratified by the government has been answered in the negative by the Supreme Court in *Mulamchand* v. *State of M.P.*[18] Therefore, the government cannot ratify a contract if it does not comply with the requirements of Article 299(1) as to enable it to enforce it against a private party. However, if the parties to the contract agree to ratification, there seems to be no reason why ratification may not be allowed.

(5) *Enforcement of liability*.—The question then arises that if a government contract is void for its non-compliance with the requirement of Article 299(1) and it cannot be ratified either, can the party claim the benefit of Sections 70, 230(*iii*) or 235 of the Contract Act. Application of Section 70 does not pose much problem. In *New Marine Coal Co.* v. *Union of India*[19], the Supreme Court held that the government must make compensation for the coal supplied which has been consumed by it, even though the contract does not comply with the requirements of Article 299 of the Constitution. Therefore, if a person has done something for government under an invalid contract without doing it gratuitously and the government has obtained any benefit out of it, government is bound to make compensation.

However, a more complicated question of liability arises in situations where a person has done something for the government under a void contract but the government has not obtained any benefit under it. In *State of U.P.* v. *Murari Lal & Bros.*[20], such a situation came before the Supreme Court. In this case an officer of the government department of agriculture who was not authorised to sign contracts on behalf of the government contracted for a space in the cold storage for potatoes from the Agriculture Department, which never came. The proprietors sued for damages which they suffered for keeping the space vacant. The Supreme Court held that since the requirements of Article 299 are not complied with, the contract was void and was also not capable of ratification, which presupposes a valid contract. Section 70 of the Contract Act was also not applicable as the government had not derived any benefit under the contract. In such a situation, the Court con-

18. AIR 1968 SC 1218; *State of U.P.* v. *Murari Lal & Bros.*, (1971) 2 SCC 449: AIR 1971 SC 2210.
19. AIR 1964 SC 152.
20. (1971) 2 SCC 449: AIR 1971 SC 2210.

sidered the question of liability of the officer concerned under Section 230(*iii*) or 235 of the Contract Act. Section 230(*iii*) provides that an agent may be personally bound under a contract in cases where the principal though disclosed, cannot be sued. The Court held that the officer concerned acting as agent on behalf of the government cannot be held personally liable under Section 230(*iii*) because the section presupposes a valid contract. However, the Supreme Court did not express any opinion as regards the applicability of Section 235 of the Contract Act in this case. But the observations of the Supreme Court seem to favour the view that even Section 235 will not be attracted because that section also presupposes a valid contract. Section 235 lays down that where a person, untruly representing himself to be the agent of the other party thereby induces a third party to deal with him, he will be liable if this alleged principal does not ratify his act to make compensation to the other party for the loss or damage suffered by him in such dealing.

Therefore, the position of the government as it emerges is that the contracts which do not comply with the requirements of Article 299 are absolutely void, not even capable of ratification, and the party shall have no claim whatsoever either against the government or the officer except where the government has taken any benefit under such contract.

The case of *Murari Lal & Bros.*[21] makes one feel that there is something wrong with the law relating to public contracts in India, because for no fault of his, a person may be compelled to suffer a loss without a remedy. In this age of an intensive form of government, it is not humanly possible for any person to keep himself uptodate with the list of government officials authorised to negotiate public contracts in various departments.

The difficulty with the law relating to public contracts in India seems to be that the separate entity of public contracts is not being fully recognised. A public contract, besides the provisions of Article 299 of the Constitution, is also governed by the general law of contract. Therefore, when the provisions of a general law governing private contracts is applied to public contracts which have a special status because of the public interest involved therein, injustice and arbitrariness is bound to arise. It is for this reason that in France the law governing public contracts is entirely different and exclusive from the law governing private contracts. In France, if the formalities of a public contract are not complied with, it is void but is capable of ratification by the administration and it is always open to the private party to question the authority of the administration to withhold ratification in a court of law. The courts in France have also developed a viable principle of 'public interest' which must always be protected even if it demands variations in the express terms of the contract. Therefore, when the administrative

21. *State of U.P.* v. *Murari Lal & Bros.*, (1971) 2 SCC 449: AIR 1971 SC 2210

law recognises the right of the administration to modify the terms of a contract or to upset the economic basis of the contract, it also recognises the right of the other party to claim compensation. Both these aspects can be equally justified on grounds of 'public interest'. In the same manner, the courts exercise power to modify the express terms of standard contracts through their power of interpretation and to allow release from the obligation of the contract under hard circumstances on the ground of public interest.

The administrative courts have further developed the doctrine of *Imprevision* which implies that if unforeseen circumstances arise which make it uneconomical for the private party to perform the contract, the court will allow action against the administration for extra cost. This doctrine is different from the common law doctrine of 'Frustration' of the contract which provides relief by determining the contract if it is physically or legally incapable of performance. The French doctrine applies even in cases where the economic contents of the contract are changed to the disadvantage of the private party by unforeseen circumstances. However, in the public interest the contract is not determined, but is made to be performed subject to compensation for extra economic burden.

It is interesting to note that in common law countries whatever law has been developed besides the ordinary law of contract governing public contracts, heavily leans in favour of the government. The doctrine of 'executive necessity' developed in England in the case of *Rederiaktiebolaget Amphitrite* v. *R.*[22] which allows the administration to rescind the contract in its discretion under certain circumstances without any remedy to the other contracting party may be cited as an illustration. The same doctrine still holds ground in England. Thus, in *Commr. of Crown Lands* v. *Page*[23], where the question was whether an implied covenant for quiet enjoyment in a lease granted by the Crown was broken when the Crown requisitioned the premises under wartime legislation, the Court of Appeal held unanimously that it was not. The judgment was based on the ground that an implied covenant would not extend to prevent the future exercise by the Crown of powers and duties imposed on it in its executive capacity by statute. Devlin, L.J. went a step further to hold that the same conclusion would follow even if such covenant is expressly laid down in unqualified terms. This doctrine has thus clearly been accepted into law and applies both to the Crown and other statutory authorities invested with discretionary powers because there is as much impingement on the 'public good' in commercial contracts as there is in such matters as the defence of the realm involved in

22. (1921) 3 KB 500. *See* also *Robertson* v. *Minister of Pensions*, (1948) 2 All ER 767: 1949-51 KB 227 doubted the rationale of the doctrine.

23. (1960) 2 QB 274. Also *see* Mitchell: THE CONTRACTS OF PUBLIC AUTHORITIES, (1954), pp. 27-32, 52-65.

the *Amphitrite case* itself. It is gratifying to note that this doctrine has no application in India.[24]

6. *Contractual obligation and the consitutional power of the government.*—A contract cannot clog the constitutional power of the government, of eminent domain. In the same manner the legislature acting within the scope of its legislative competence may vary the terms of a contract. In *Secy. to Govt. Public Works and T.D.* v. *Adoni Ginning Factory*[25], when the electricity rates were enhanced, contrary to the provision in the contract for the supply of electricity, the court held that the existence of a contract cannot foreclose the authority of the legislature to legislate on subjects within its competence. The courts in England have also held that it is not within the competence of the Crown to make a contract which would have the effect of limiting the executive power in future.[26]

7. *Government contracts and doctrine of waiver.*—'Waiver' means abandonment of right and it may be either expressed or implied from the conduct, but its basic requirement is that it must be an intentional act with knowledge. Waiver is a question of fact and it must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and a factual foundation is laid for it. In *Motilal Padampat Sugar Mills* v. *State of U.P.*[27], the court did not allow the government to raise the plea of waiver for the first time at the hearing of the writ petition because it had not been taken in its affidavits. In the case the court also held that in the absence of any substantial evidence to show that the appellant intentionally abandoned the right of a sales tax holiday, mere acceptance of the concessional rate of tax would not amount to waiver of such right.

Since the requirements of Article 299 are mandatory, these cannot be waived by the government. In *Union of India* v. *Rallia Ram*[28], the Supreme Court held that even if the contention that the arbitration agreement did not satisfy the requirements of Article 299 was not raised before the arbitrator, it can be raised in the judicial proceedings and the doctrine of waiver shall not apply.

In a welfare State the government undertakes to provide various services for the benefit of the people. A question may generally arise regarding the applicability of the Indian Contract Act in governing the relationship between an individual and a public service instrumentality. This question of far-reaching practical significance came before the Supreme Court in *Union of India*

24. *Union of India* v. *Anglo-Afghan Agencies*, AIR 1968 SC 718.
25. AIR 1959 AP 538.
26. *Rederiaktiebolaget Amphitrite* v. *R.*, (1921) 3 KB 500.
27. (1979) 2 SCC 409. AIR 1979 SC 621.
28. AIR 1963 SC 1685. *See* also *State of M.P.* v. *Gopichand Sarju Prasad (Firm)*, AIR 1972 MP 43. *State of Bihar* v. *R B Ojha*, AIR 1977 Pat 258.

v. *Mohd. Nazim*[29]. In this case an Indian resident had sent a VPP to an addressee in Pakistan. The Pakistan government though realised the amount did not remit it to the Government of India because it had suspended VPP service between the two countries. The appellant sued the Union of India for the amount. The Supreme Court ruled that the Post Office which had been established under the Post Offices Act, 1898 is not a common carrier or an agent of the sender for postal articles. It is a branch of public service providing postal service. The Pakistan Government for that matter is not a sub-agent and the money received by it cannot be said to have been received by the Government of India. Under the arrangement entered into between two sovereign powers, none of them could be said to be employed by or acting under the control of the other. This settles at least one point of public law of contract.

8. *Whether a writ can be issued for the enforcement of contractual obligation.*—The jurisdiction of the Supreme Court to issue writs under Article 32 is confined only to enforcement of fundamental rights, therefore, the Supreme Court cannot issue writ for the enforcement of a contractual obligation.[30] The power of the High Court to issue writs under Article 226 is much wider than that of the Supreme Court. High Court can issue writ for the enforcement of fundamental rights and also for the enforcement of private rights. Normally civil suit remedy is available for the enforcement of contractual obligation, therefore, High Court will not exercise its writ jurisdiction in such matters. Nevertheless in some cases where State or its instrumentalities commit a breach of contractual obligations the High Court may issue a writ.[31]

Cases involving breach of contractual obligation by the State or its authorities and agencies may be divided into three categories:

(*i*) where promissory estoppel applies against the State;

(*ii*) where breach of a statutory rule or regulation is alleged by the petitioner;

(*iii*) where breach of a contractual obligation is alleged which arises only out of the terms of the contract.

In the first two cases High Court may exercise its writ jurisdiction. The Supreme Court in *Gujarat State Financial Corpn.* v. *Lotus Hotels*[32] held that the writ of mandamus can be issued against the government or its instrumentalities for the enforcement of contractual obligation because promissory

29. (1980) 1 SCC 284: AIR 1980 SC 431.

30. *Satish Chandra* v. *Union of India*, AIR 1953 SC 250; *Premji Bhai Parmar* v. *Delhi Development Authority*, (1980) 2 SCC 129.

31. *R.K. Agarwal* v. *State of Bihar*, (1977) 3 SCC 457.

32. (1983) 3 SCC 370.

estoppel applies against the government. In this case Lotus Hotels had entered into a contract with the State Financial Corporation for a loan of Rs 30 lakhs for the construction of a hotel. On the basis of this agreement the petitioner had incurred certain liabilities. However, acting on two pseudonymous letters attacking the character of the proprietors the loan was refused which had been previously sanctioned. The Highest Bench ruled that it is too late in the day to contend that the government can commit breach of a solemn undertaking on which the other side has acted and then contend that the party may sue for damages in Civil Court and cannot compel specific performance of the contract through mandamus.[33] In the same manner the Supreme Court held in *Guruswamy v. State of Mysore*[34] that where a liquor contract has been given in violation of a statutory provision the aggrieved party can question the action through a writ petition.

In the third category of cases where neither any promissory estoppel applies against the government nor is there a violation of any statutory rule and the basis of the claim is only a term of a contract, the court held that the petitioner cannot invoke the writ jurisdiction under Article 226 for the enforcement of pure contractual obligation because the proper remedy in such cases is a civil suit. Therefore, in *Har Shanker* v. *Dy. Excise and Taxation Commr.*[35], when the liquor contractors challenged the demand made by the department through a writ petition under Article 226 the Supreme Court held that the writ jurisdiction of the High Court is not intended to facilitate avoidance of obligations voluntarily incurred. However, the recent trend of cases show that in situations where petitioner alleges arbitrariness, absence of fair play and the breach of natural justice the writ jurisdiction of the court can be invoked. Thus in *Mahavir Auto Store* v. *Indian Oil Corpn.*[36] the Apex Court observed that even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination.[37] In this case the IOC had abruptly stopped supply of material, without any notice and hearing, to the petitioner firm which was carrying on business of sale and distribution of lubricants for the last 18 years. In the same manner normally the contract of personal service cannot be enforced through writ but when the statutory bodies act

33. *Gujarat State Financial Corpn.* v. *Lotus Hotels* (1983) 3 SCC 270, 385.

34. AIR 1954 SC 592; *DFO, South Kheri* v. *Ram Sanehi Singh*, (1971) 3 SCC 864.

35. (1975) 1 SCC 737. *See* also *Divisional Forest Officer* v. *Bishwanath Tea Co.*, (1981) 3 SCC 238.

36. (1990) 3 SCC 752.

37. *Id* pp. 760-61 (*per* Mukherjee, C.J.). *See* also *Shrilekha Vidyarthi* v. *State of U.P.*, (1991) 1 SCC 212.

in breach of mandatory obligation imposed by a statute, the writ can be issued.[38]

(2) Grant of Government largess

The Government is the biggest businessman, therefore, the question arises whether the government like any private individual is absolutely free to enter into contract with any person at its own sweet will? Answering the question in the negative the courts have always held that government is still a government, hence, when it acts in the matter of granting largess it cannot act arbitrarily because it does not stand in the same position as a private individual. Therefore, when the government enters into a contract or is administering largess it cannot, without adequate reason, exclude any person from dealing with it or take away largess arbitrarily.[39] Reiterating its earlier position the Supreme Court in the case of *Union of India* v. *Hindustan Development Corpn.*[40] held that distribution of State largess should be reasonable, fair, non-arbitrary and in accordance with social and economic justice and Directive Principles. In this case the Railways had issued tenders for the supply of cast steel bogies. Tenderers included big as well as small manufacturers. Big manufacturers identically quoted lower price in order to push small manufacturers out of competition. The Railways considering such price quoted by big manufacturers as predatory and also taking the view that they have formed a cartel adopted dual pricing system giving counter-offer of a lower rate to the big manufacturers and a higher rate to the smaller manufacturers and also suitably adjusted the allotment of quantity of order to make them viable for a healthy competition. The Court held the action of the Railways as bona fide, reasonable and non-arbitrary. The Supreme Court observed that the government while entering into contract or issuing quotas is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant and must be justifiable on the basis of some policy or valid principles. Therefore, government's right to adopt dual pricing system was upheld because under the circumstances it was reasonable and in conformity with the ideal of social and economic justice which emanates from the Directive Principles of State Policy.

Elaborating the same approach further the Supreme Court in *LIC* v. *Consumer Education and Research Centre*[41] held that in the sphere of contractual relations the State, its instrumentality, public authorities whose acts bear insignia of public element, action to public duty or obligation are en-

38. *S.R. Tewari* v. *District Board, Agra*, AIR 1964 SC 1680. *See* also Thakker, C.K.: ADMINISTRATIVE LAW (1992), Eastern Book Company, pp. 486-98.
39. *R.D. Shetty* v. *International Airports Authority*, (1979) 3 SCC 489.
40. (1993) 3 SCC 500.
41. (1995) 5 SCC 482; *G.D. Zalani* v. *UOI*, 1995 Supp (2) SCC 512.

joined in a manner that is fair, just and equitable, after taking into consideration all the relevant options and in a manner that is reasonable, relevant and germane to effectuate the purpose of public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decisions. It is on this rationale that the court held that the power of the Life Insurance Corporation to enter into contract and prescribe terms and conditions for life insurance does not include power to confine its policies for salaried class from government, semi-government or reputed commercial firms. It is discriminatory offending Art. 14 of the Constitution. However, the power of judicial review on the question of awarding licences and contracts shall rest only on grounds of bad faith, irrational or irrelevant consideration, non-compliance with the prescribed procedure or violation of any constitutional or statutory provision.[42]

The law relating to government contracts is deficient in India. This deficiency arises from the fact that special significance which such contracts assume due to the element of public interest involved therein is yet to be recognised. Furthermore, when a law chiefly designed to govern the contractual relationship of private parties is applied to a public contract, the matter becomes still more complex. Therefore, the courts must aim at developing special public law doctrines to govern public contracts until the matter is taken up by the legislature.

(B) LIABILITY OF THE ADMINISTRATION IN TORT

The term 'administration' is used here synonymously with 'State' or 'Government'. To what extent the administration would be liable for the torts committed by its servants is a complex problem especially in developing countries with everwidening State activities. The liability of the government in tort is governed by the principles of public law inherited from British common law and the provisions of the Constitution.

The whole idea of vicarious liability of the State for the torts committed by its servants is based on three principles:

(*i*) *Respondeat superior* (let the principal be liable).

(*ii*) *Quifacit per alium facit per se* (he who acts through another does it himself).

(*iii*) Socialisation of compensation.

Article 300 of the Constitution of India which deals with the extent of liability of the Union of India and the government of a State, instead of laying down the liability in specific terms, refers back to Section 176 of the Government of India Act, 1935. Section 176 of the Act of 1935 refers, in turn, to Section 32 of the Government of India Act, 1915 which, in its turn,

42. *Delhi Service Forum* v. *UOI*, (1996) 2 SCC 293. *See* also *Asia Foundation & Construction Co.* v. *Trafalgar House Construction Ltd.*, (1997) 1 SCC 738.

refers to Section 65 of the Act of 1858. Section 65 of the Act of 1858 laid down that on the assumption of the Government of India by the British Crown, the Secretary of State for India-in-Council would be liable to the same extent as the East India Company was previously liable. Therefore, in order to determine the extent of liability of the government in tort, one has to find out the extent of liability of the East India Company. This is certainly a strange way of determining the liability of a State governed by a Constitution. It is because of this "strange way" with resultant confusion and complexity that the Law Commission recommended a legislation on the subject. Accepting the recommendation, the government introduced two Bills, "The Government Liability in Tort", in the Lok Sabha in 1965 and 1967, neither of which emerged as an Act. The government allowed the Bills to lapse on the ground that they would bring an element of rigidity in the determination of the question of liability of the government in tort. Consequently, one has to uncover the extent of liability of the East India Company in order to understand the liability parameters of the administration today because the liability of the administration today is in direct succession to that of the East India Company.

The East India Company launched its career in India as a purely commercial corporation but gradually acquired sovereignty. Therefore, in the beginning, the company did not enjoy the immunity of the Crown. It was only when it acquired political powers that a distinction was made between sovereign and non-sovereign functions. As a result of this, in *Bank of Bengal* v. *United Company*[43], the Supreme Court of Judicature at Calcutta rejected the Company's plea of exemption from suit on the ground of sovereignty. It was an action brought by the Bank of Bengal to recover interest due on promissory notes written by the EIC to borrow money for the prosecution of war. Likewise, in *P. and O. Steam Navigation Co.* v. *Secy. of State for India*[44], the Supreme Court allowed an action against the Secretary of State for the negligent act of the government workers. In this case, the workers employed by the Kidderpore Dockyard, which was a government dock, were carrying iron bars across a public way passing through the port, which bars they dropped on the road. The noise so created scared the horses of the carriage in which the plaintiff was sitting and he sustained injuries. Sir Barnes Peacock, C.J. who delivered the judgment of the court held that the Company had been invested with sovereign functions but this did not make it a sovereign authority. It may be noted that after 1833, the EIC was acting in a dual capacity exercising commercial functions as also the sovereign powers with respect to the newly-acquired territories as trustees of the Crown. The use of the terms 'sovereign' and 'non-sovereign' function which

43. (1831) 1 Bignall's Reports 87.
44. (1861) 5 Bom HC Report, Appendix 'A'.

created confusion in the later development of the law was made clear by Peacock, C.J. in the judgment when he said: "It is clear that the EIC would not have been liable for any act done by any of its officers or soldiers in carrying on hostilities or for the act of any of its naval officers in seizing as prize property of a subject, under the supposition that it was the property of an enemy, nor for any act done by a military or naval officer, or by any soldier or sailor whilst engaged in military or naval duty, nor for any acts of any of its officers or servants in the exercise of judicial functions."[45]

However, even after such a clear enunciation of law, the judgment in the above case was interpreted in two different ways. In *Nobin Chunder Dey* v. *Secretary of State for India*[46], the court held that the government is not liable in suit for anything done in exercise of sovereign functions. In this case the plaintiff sued the government for specific performance of the contract of sale of *ganja* licence as he was the highest bidder at the auction. The court based its decision on the rationale that since the auction of *ganja* licence was a method of raising revenue (tax), it was a sovereign function which no private individual could undertake, and hence the action was not maintainable as the government was immune from any such action.

The other interpretation of the *P. & O. Steam Navigation Co. case*[47] was that the immunity extended only to cases which may be covered within the definition of the term 'acts of State'. This line of reasoning was adopted by the court in *Secretary of State for India-in-Council* v. *Hari Bhanji*[48]. On the basis of this interpretation the government could not claim any immunity for its acts done under the colour of municipal law. In this case a suit was filed to recover the excess excise duty collected by the State on a consignment of salt. Rejecting the plea of immunity the court held that no immunity attaches to actions done under the colour of municipal laws. The same principle was confirmed in *Salaman* v. *Secretary of State-in-Council for India*[49].

The Law Commission of India also accepted the *Hari Bhanji* view as correct and recommended legislation giving effect to this view.[50] However, the court did not follow this view in later cases.

After independence, in *State of Rajasthan* v. *Vidyawati (Mst.)*[51], the Supreme Court of India held the State vicariously liable for the tort committed by its servants. The facts of this case were that in February 1952, a

45. (1861) 5 Bom HC Report, Appendix 'A', pp. 14 and 15.
46. (1876) ILR 1 Cal 11.
47. *P. & O. Steam Navigation Co.* v. *Secy. of State for India*, (1861) 5 Bom HC Report, Appendix 'A'.
48. (1882) ILR 5 Mad 273.
49. (1906) 1 KB 813.
50. First Report of the Law Commission—LIABILITY OF THE STATE IN TORT.
51. AIR 1962 SC 933.

driver of a government jeep, while driving back from the workshop, knocked down a person on the footpath, causing multiple injuries including fracture of the skull and the backbone, which resulted in his death. A suit by the widow of the deceased and her minor daughter for compensation was decreed by the trial judge against the driver but not against the State. On appeal the High Court decreed the suit against the State also. Hence the State of Rajasthan went in appeal before the Supreme Court. The main argument on behalf of the State was that it was not liable for the tortious acts of its employees for in similar circumstances the East India Company would not have been liable, as the jeep was maintained in exercise of sovereign powers and not as a part of commercial activity of the State. B.P. Sinha, C.J. dismissing the appeal by the State of Rajasthan held that the immunity rule of the Crown in England was based on the old feudalistic notions of justice. In India, ever since the time of the EIC, the sovereign had been held liable to be sued in tort or in contract and the common law immunity never operated in India. He went on to say that India has now been constituted as a socialistic State with varied welfare activities employing a large army of servants, and therefore, there is no justification in principle or in the public interest that the State should not be held liable vicariously for the tortious acts of its servants. It was thought that this decision has abolished the distinction between sovereign and non-sovereign functions for the purpose of determining the State liability and that henceforth, the government would be liable for the torts committed by its servants in all cases except 'acts of State'.

Unfortunately, only three years later, the development of law in this area suffered a setback in *Kasturi Lal* v. *State of U.P.*[52]. In this case the plaintiff was going to Meerut to sell gold, silver and other goods. As he was passing through the city, he was taken into custody by three policemen. His person was searched and all the gold and silver was taken into custody and he was put in the lock-up. On his release his gold was not returned, though silver was immediately returned. The gold had been misappropriated by the Head Constable who fled to Pakistan. Kasturi Lal filed a suit against the government of Uttar Pradesh for the return of the gold or value. There was a clear finding on record of gross negligence on the part of the police authorities in the matter of safe custody of the gold. However, Chief Justice Gajendragadkar, as he then was, reintroduced again the vague distinction of sovereign and non-sovereign functions, and held that the State is not liable because the functions of arrest and seizure of the property are sovereign functions. The court further held that if the act is sovereign, no act of negligence on part of the employees of the State would render the State liable.

52. AIR 1965 SC 1039. *See* also Alice Jacob: *Vicarious Liability of the Government in Torts*, 7 JILI 247 (1965) and Blackshield: *Tortious Liability of Government: A Jurisprudential case-note*, 8 JILI 643 (1966).

In this case the court wrongly applied the ratio of *P and O Steam Navigation Co. case.*[53] A close reading of the case shows that Sir Barnes Peacock while writing about the sovereign functions had in mind only the functions which could be technically termed as 'acts of State' and, therefore, cannot be done under the colour of municipal law. This becomes clear from the fact that "acts while carrying on hostilities" or "seizing enemy property" were the expressions used as illustrations to demonstrate 'sovereign acts'. This is also a wrong decision because by no stretch of imagination could such flagrant violation of the U.P. Police Regulations be termed as a 'sovereign function'. Facts of the case showed that the officer in charge of the police station allowed the constable to keep the gold in his private custody whereas the law required its deposit in the local government treasury.

In *State of M.P.* v. *Chironji Lal*[54], a new question came before the court relating to the payment of damages for the loss caused by the lathi-charge of the police in a situation where it was unauthorized and unwarranted by law. It was alleged that the police resorted to lathi-charge wilfully and without any reasonable cause and thus damaged the plaintiff's property. The claim was rejected on the ground that the function of the State to regulate processions and to maintain law and order is a sovereign function. It may be pointed out that under similar circumstances the government would have been liable under French jurisdiction on the ground of 'fault' and 'risk' theories. With the growing governmental lawlessness it is no denying the fact that the law in this area requires restatement.

It is heartening to note that the case of *Lala Bishambar Nath* v. *Agra Nagar Mahapalika*[55], is a pointer in the right direction. In this case the firm of Lala Bishambar Nath was in possession of 2048 bags of *atta* which was unfit for human consumption and a sign to this effect was pasted on the bags. The firm intended to sell this *atta* for the consumption of animals and for other purposes such as *lei* used in the manufacture of shoes. The Health Officer while exercising powers under Section 244(1) of the Municipalities Act took possession of the *atta* and prosecuted the appellant. Section 244(1) provided that if in the course of inspection of a place an article of food or drink for an animal appears to be intended for consumption of man and to be unfit therefor, the Board may seize and remove the same or may cause it to be destroyed or to be so disposed of as to prevent its being exposed for sale or use for such consumption. The Health Officer acted under a wrong interpretation of Section 244(1) believing that this section covers a case where an article of food is for the consumption of animals also. The lower court dismissed the suit on the ground that Section 244(1) does not admit

53. *P. and O. Steam Navigation Co.* v. *Secy. of State for India*, (1861) 5 Bom HC Report, Appendix 'A'.
54. AIR 1981 MP 65.
55. (1973) 1 SCC 788: AIR 1973 SC 1289.

such interpretation. On appeal the High Court reversed the decision of the lower court. The Supreme Court on appeal by the appellant held that the language of the section cannot be strained as to include what is not there and held the State liable for damages for the illegal acts of its servants. The court further observed that if an action is illegal the good motives of the officer cannot make it valid. It may be noted that the court while holding the State liable for the illegal acts of its servants did not bring in the vague concept of sovereign and non-sovereign functions which is responsible for all the confusion in this highly-sensitive area of law.

The trends in judicial behaviour in the direction of government accountability have become more visible in subsequent cases. In *Shyam Sunder* v. *State of Rajasthan*[56], K.K. Mathew, J. vehemently pleaded for discarding the feudalistic doctrine of government immunity in exercise of sovereign functions in view of the changed socio-economic context.

Basavva Kom Dyamangouda Patil v. *State of Mysore*[57], represents another step in the right direction. In this case a theft was committed and property worth Rs 10,000 was stolen. Five persons were arrested. The recovered property was produced before the magistrate who asked the police to keep it in safe custody. Later on the recovered property was stolen from the police station. The application to the magistrate under Section 517, CrPC for the return of the recovered property was refused on the ground that the property was not in the custody of the magistrate i.e. the Treasury. The same view was taken by the High Court on the ground that the recovered ornaments never reached court custody. On appeal the Supreme Court reversed the decision and held it wrong to suppose that once the property is not available with the court, the court would disclaim all responsibility. Where the property is stolen or destroyed and there is no prima facie defence of due care, the court can order the payment of the value of the property in order to meet the ends of justice. These trends in governmental accountability may be just straws but they are floating in the right direction.

The distinction between sovereign and non-sovereign functions is a juristic blasphemy which leads to absurd and arbitrary conclusions. A brief survey of various High Courts' decisions proves this fact beyond all reasonable doubt. In *[illegible]awati* v. *Union of India*[58], the Delhi High Court held that the carrying of a hockey team in a military truck to the Air Force Station to play a match is not a sovereign function. The Bombay High Court held in *Union of India* v. *Sugrabai*[59], that the transporting of military equipment

56. (1974) 1 SCC 690: AIR 1974 SC 890. It was a case under Fatal Accidents Act.
57. (1977) 4 SCC 358: AIR 1977 SC 1749. *See* B.B. Pande: *Perforating the Escutcheon of Sovereign Immunity*, (1974) 2 SCC (J) p. 9.
58. AIR 1967 Del 98.
59. AIR 1969 Bom 13.

from the workshop of the Artillery School is not a sovereign function. The Mysore High Court in *State of Mysore* v. *Ramchandra Gunda*[60], came to the conclusion that the construction of a reservoir by the State for the purpose of supplying drinking-water is not a sovereign function. The Allahabad High Court held in *State of U.P.* v. *Hindustan Lever Ltd.*[61], that the government sub-treasury's banking function is not a sovereign function. The Punjab High Court in *Union of India* v. *Harbans Singh*[62], came to the conclusion that the State is not liable for compensation to a person who is run over by a military truck carrying meals for military personnel on duty in the forward area as it is a sovereign function. However, the same High Court in *Union of India* v. *Jasso (Smt)*[63], came to the conclusion that the carrying of coal to the army headquarters is not a sovereign function. In view of the above facts the need for the development of a more viable principle to determine governmental accountability cannot be overemphasised. A comprehensive legislation on the subject is the only right answer.

In *Khatri (II)* v. *State of Bihar*[64] an important question was raised regarding liability of the government for wrongful arrest and detention. Moving ahead in the direction of new dimension of the right to life and personal liberty, Justice Bhagwati said: "Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental rights to life and personal property." It may be noted that the Government of India have not signed the treaty which provides for compensation for wrongful arrest and detention. This amply proves the lack of government's concern for the precious of the precious rights of the people for the sake of discounting its own inefficiency and lawlessness.

It is heartening to note that the desire of Justice Bhagwati for forging new tools to provide compensation for illegal detention was fulfilled in 1983 by Chief Justice Chandrachud who in *Rudul Sah* v. *State of Bihar*[65], laid down a most important principle of compensation against government for the wrong action of its officials. This important judgment was handed down by the Supreme Court against the Bihar Government for the wrongful and illegal detention of Rudul Sah in Muzaffarpur jail for as many as 14 years

60. AIR 1972 Bom 93.
61. AIR 1972 All 486.
62. AIR 1959 Punj 39.
63. AIR 1962 Punj 315. *See* also *Nandram Heeralal* v. *Union of India*, AIR 1978 MP 209, where the court held that bringing back officers from the place of military exercises is not a sovereign function.
64. (1981) 1 SCC 627, 630: AIR 1981 SC 928.
65. (1983) 4 SCC 141: AIR 1983 SC 1086. In another case, the Bihar Government agreed to pay Rs 300 per month to Ramchandra who was kept in jail for 30 years on the unfounded plea that he has become a criminal lunatic while in prison.

after he was acquitted by the Sessions Court in June 1968. The Court ordered compensation of Rs 30,000 for the injustice and injury done to Rudul Sah and his helpless family. In this case the Bihar Government had taken the plea that the prisoner was not released even after acquittal because he had been declared insane. Rejecting the contention as 'sordid and disturbing', the Court opined that insanity could well be the consequence rather than the cause of detention. Moving forward the Supreme Court in *Bhim Singh v. State of J&K*[66], awarded exemplary cost of Rs 50,000 on account of the authoritarian manner in which the police played with the liberty of the appellant. Similarly in *Mahavir Singh* v. *State of Rajasthan*[67], the court granted rupees one lakh for the custodial death of a young boy who had been arrested on a theft charge. In fact, these measures are not damages in the strict sense of the term, for which only the ordinary Civil Court process is the remedy. These measures are only for making the fundamental rights of the people meaningful and effective. It is now well-settled that Article 32 is not limited by a particular kind of proceedings except that it must be appropriate with reference to the purpose of enforcing fundamental rights.

Moving in the right direction the Supreme Court in *SAHELI, A Women's Resource Centre* v. *Commr. of Police*[68] the Supreme Court quoted with approval its decision in *Vidyawati case*[69] where it held that the State is responsible for the tortious acts of its servant committed within the scope of his employment like any other employer. It further clarified that the doctrines of sovereign immunity, 'King can do no wrong', 'King cannot be sued in the courts of its own creation', are feudalistic origin and hence cannot be applied to a democratic country like India. The Court further observed that ever since the time of the East India Company sovereign has been held liable to be sued in tort or contract and the common law liability never operated in India. In this case a women's organization known as SAHELI had filed a writ against the government for compensation on behalf of two poor women who had been mercilessly beaten by the landlord in collusion with the police. The Court not only awarded Rs 75,000 as compensation but also opined that the amount can be recovered from the police officers responsible for the tort. Therefore, the classification of governmental functions into sovereign and non-sovereign for the purpose of determining governmental liability in tort is no longer a valid classification.

The Apex Court reiterated the same principle of law in *N. Nagendra Rao & Co.* v. *State of A.P.*[70]. In this case the appellants were carrying on

66. (1985) 4 SCC 677: AIR 1986 SC 494
67. (1987) 2 SCC 342.
68. (1990) 1 SCC 422.
69. *State of Rajasthan* v. *Vidyawati (Mst.)*, AIR 1962 SC 933.
70. (1994) 6 SCC 205.

business in fertilizer and foodgrains. The Vigilance Cell raided the premises of the appellants and seized huge stocks. Orders were issued to dispose of the stocks pending investigations. However, no action was taken. Later on it was found that there was no irregularity except in accounting, so the stocks were to be returned to the appellants but by then the stocks had been rendered unusable. The trial court decreed the suit for compensation but the High Court of Andhra Pradesh reversed it on the basis of ratio of *Kasturi Lal* (supra). On appeal the Supreme Court upheld the trial court's decision and held that the doctrine of sovereign immunity stands diluted in the context of modern concept of sovereignity and thus the distinction between sovereign and non-sovereign functions no longer survives. The Court further observed that the State is immune from liability only in cases of acts of State like defence of the country, administration of justice, maintenance of law and order and repression of crime except when Art. 21 is breached. In this Case the Court also confirmed the principle of personal liability of the negligent officer.[71] Expounding the philosophy behind this principle of law, the Court observed that no civilized system can permit the executive to play with the people of its country and claim that it is entitled to act in any manner as sovereign. No legal or political system can place the State above the law. There is shift from the concept of sincerity, efficiency and dignity of State as juristic person to liberty, equality and rule of law. The concept of public interest has also changed with the structural change in society. Thus the Supreme Court concluded that any compartmentalization of functions of State into sovereign and non-sovereign or governmental or non-governmental is not sound as it is contrary to modern thinking.[72]

In *Common cause, A Registered Society* v. *Union of India*[73], the Supreme Court emphatically stressed that *Kasturi Lal case* has, apart from being criticised, not been followed by the Court in subsequent cases, and therefore, much of its efficacy as a binding precedent has been eroded. Same remark also made in *Chairman Rly. Board* v. *Chandrima Das*[74].

Expanding the application of the principle of vicarious liability of the State for the torts committed by its servants in *State of Maharashtra* v.

71. *See* also *Lucknow Development Authority* v. *M.K. Gupta*, (1994) 1 SCC 243. Where Supreme Court held that when public servant by mala fide, oppressive and capricious acts in performance of official duty causes injustice, harassment and agony to common man and renders the State or its instrumentality liable to pay damages to the person aggrieved from public fund, the State or its instrumentality is duty-bound to recover the amount of compensation so paid from the pubic servant concerned. In this case compliance was to be reported to the Supreme Court.

72. *N. Nagendra Rao and Co.* v. *State of A.P.*, (1994) 6 SCC 205, 235.

73. (1999) 6 SCC 667.

74. (2000) 2 SCC 465. *See* also *State of A.P.* v. *Challa Ramakrishna Reddy*, (2000) 5 SCC 712.

Kanchanmala Vijaysing Shirke[75] the Supreme Court held that even when an authorised act has been done in an unauthorised manner by the servant of the State, the State will be vicariously responsible. In this case the driver of a government vehicle had allowed another government employee, having no driving-licence, to drive the vehicle in connection with official purpose. An accident took place due to the negligence of the driver. It was held that the government is responsible. In the same manner the court has held that the government is responsible for the misfeasance and non-feasance on the part of its servants. Misfeasance is wilful, reckless, or heedless conduct in commission of a positive act lawfully done but with improper conduct. Non-feasance means non-performance of some act which ought to be performed or omission to perform a required duty or total neglect of duty.[76]

When a person died while going on a scooter in Delhi because a branch of a dead neem tree standing near the road accidently fell on him, rejecting the plea of accident/act of God in a suit for damages against Municipal Corporation, the Supreme Court held that the authority was negligent in the performance of its duties under the common law for not removing a dead tree for making road safe for the users and therefore, liable for damages to the members of the deceased family.[77] This landmark ruling if properly used may achieve the same object which legendary Ralf Nadar achieved fighting single handed to make public and private enterprises adopt zero danger norms in USA.

In yet another landmark decision, the Supreme Court in *Chairman Rly. Board* v. *Chandrima Das*[78], held that when a woman, even though a foreign national, is gang raped by railway employees in Railways Yatri Niwas, held, the Union of India which runs the Railways as a commercial activity, would be vicariously liable to pay compensation to the victim of the rape.

Several High Courts have also echoed this sentiment when faced with situations where equity demanded compensation for the victims of the State's wrongful acts, but the hangover of the British common law prevented any relief being given. So far only 'ex gratia' payments were given by the courts. What is remarkable about these cases is that the Supreme Court has used the writ jurisdiction to award compensation to victims of State's wrongful acts. Usually a victim has to start from the lower court to reach the Highest Bench. By using writ jurisdiction the remedy has been made cheap and fast. Those cases will have a salutary effect on the governments which have

75. (1995) 5 SCC 659
76. *Rajkot Municipal Corpn.* v. *Manjulben Jayantilal Nakum*, (1997) 9 SCC 552; *Shiv Sagar Tiwari* v. *UOI*, (1996) 6 SCC 558.
77. *The Tribune*, May 5, 1999, p. 10.
78. (2000) 2 SCC 465.

become immune to strictures and public condemnation, because now a new burden may be added to their already depleting resources.[79]

The government's effort in 1967 in introducing the Bill on Government Liability in Tort was a step in the right direction though abandoned before the finish. The proposed bill made the State liable in the following cases:

(1) Tort committed by an employee while acting in the course of his business.

(2) Tort committed by an employee while acting beyond the course of his employment if the act was done on behalf of the government and is ratified by it.

(3) Tort committed by an independent contractor employed by the government provided—

(*a*) the government assumes control of the act contracted to be done;

(*b*) the government has ratified the tortious act;

(*c*) reasonable care is not taken under the circumstances where though the act is lawful but is of such a nature that it may cause injury;

(*d*) the government is under a duty to do the act itself;

(*e*) the government is under an absolute duty to ensure the safety of persons or property in the doing of the act contracted to be done and there has been a failure to comply with that duty.

(4) Where there is breach of common law duties attached to the ownership, possession, occupation or control of immovable property.

(5) Where the government is in possession of any dangerous thing which when escapes causes injury.

(6) Where there is breach of duty to the employees which the government owes by reason of being the employer.

However, the bill had exempted the government from liability in the following cases:

(1) Acts done by any member of the armed or police force in discharge of his duties or which are natural consequences thereof, and acts done for the purpose of training or maintaining the efficiency of the armed forces as also the acts done for the prevention of breach of peace or damage to the public property.

(2) Acts of State.

(3) Any act done by the President or the Governor in discharge of their constitutional functions.

79. M.J. Antony: *Compensation for Illegal Detention*, Indian Express, August 8, 1983.

(4) Judicial acts and acts done in execution of judicial process or claims arising from defamation, malicious prosecution or arrest.

(5) Acts done under proclamation issued under the various provisions of the Constitution.

(6) Any claim arising from the operation of any guarantee law.

(7) Any claim arising in a foreign country.

(8) Any claim arising from injury done by doing an act authorised by law where such injury is a natural consequence of the act.

(9) Any claim arising from any act for which immunity is provided under the Telegraph Act, 1885; Indian Post Office Act, 1898 and the Indian Railways Act, 1890.

It is apparent from the above provisions of the bill that the government did not fully appreciate the significance of governmental accountability in a democratic welfare State. The escape clauses are so wide that in many cases a person would find himself without remedy in case of injury to his person or property. In a democratic welfare State the government must not fight the people like a cantankerous litigant but must have the courtesy to settle disputes outside the court in the best interests of social justice. Today, the government of India has become the biggest litigant. Deprecating this trend, Krishna Iyer, J. observed:

> "Here is a case of a widow and daughter claiming compensation for the killing of the sole breadwinner by the State Transport bus; and the Haryana Government instead of acting on social justice and generously settling the claim fights like a cantankerous litigant, even by avoiding adjudication through the device of asking for court-fee from the pathetic plaintiff."[80]

Before 1947 in Britain the old maxim that the 'King can do no wrong' was never allowed to run riot. In the beginning though the immunity of the Crown was no defence to the servant personally, yet the government adopted the practice of conducting the defence and paying the damages wherever the official was acting in the course of employment. In those cases where the actual tort-feasor was not identifiable, i.e., in accident cases, the government would supply the nominated defendant.[81]

In 1947, Britain codified the law by enacting the Crown Proceedings Act, 1947 which makes the Crown subject to all those liabilities in tort to which it would be subject if it were a private person of full age and capacity.[82]

80. *State of Haryana* v. *Darshana Devi*, (1979) 2 SCC 236, 237: AIR 1979 SC 855.

81. *Adams* v. *Naylor*, (1946) 2 All ER 241: 1946 AC 543. The House of Lords criticised the practice of government departments putting up 'nominated' or 'nominal defendants, as 'whipping-boys'. *See* also *Royster* v. *Cavey*, (1947) 1 KB 204.

82. Section 2(1), Crown Proceedings Act, 1947.

The Act makes the Crown liable for torts committed by its servants and agents and for the breach of the common law duties owed by employers and by owners or occupiers of property. The Act further provides for the liability of the Crown for the breach of statutory duty, whenever the statute binds the Crown, and for dangerous operations without negligence on the principle of strict liability. The escape clauses are few and limited. The Crown is not liable for judges, officers not appointed by the Central Government, post offices and its employees, etc. Unlike in America there is no immunity for discretionary functions. If the discretion is exercised negligently or any tort is committed while exercising discretionary functions, the government cannot escape liability. The distinction between sovereign and non-sovereign functions to which the Indian courts are so tenaciously glued has no relevance in Britain. Thus the Home Office has been held liable in negligence for allowing dangerous prisoners to escape, although only the government can keep prisoners.[83]

The liability of the United States for the torts committed by its servants is governed by the Federal Tort Claims Act, 1946. This Act makes the United States liable, respecting tort claims, in the same manner and to the same extent as a private individual under like circumstances. Though the basics of the Act are similar to the basic provisions of the Crown Proceedings Act, 1947, yet the American statute is much narrower and restrictive in its operation because of extensive escape clauses contained therein. The exceptions in the Tort Claims Act are of three kinds. First, there are exceptions for specific administrative functions or agencies, as well as for all claims arising in foreign countries. Secondly, there are exemptions for claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights. This broad category chiefly covers intentional torts. Thirdly, there are exemptions for acts or omissions of the employees exercising due care in giving effect to statutes or regulations, whether they be valid or not, and acts of discretion by government employees in the performance of their duties, whether or not the discretion is abused. This exception is a very serious flaw in American law. This exempts the government from liability in all cases where its employees exercise discretionary powers even though the act causing the damage was done negligently. This was the basis of the decision in *Dalehite* v. *United States*[84]. In this case a large cargo of ammonium nitrate fertilizer exploded on board a ship docked at Texas City in 1947. The result was a gutting of the entire dock area; more than 560 persons were killed and some 3000 injured; property damaged ran into hundreds of millions of dollars. The fertiliser itself had been manufactured in plants

83. *Dorset Yacht Co. Ltd.* v. *Home Office*, 1970 AC 1004: (1969) 2 All ER 564.
84. 346 US 15 (1953).

owned by the federal government as per its order and specifications. It was being shipped to Europe at the government's discretion under the Marshall Plan. Over 300 suits were brought against the government under the Federal Tort Claims Act on the ground of negligence in the handling of the fertilizer by the government. The lower court found negligence in the production, transportation and storage of the fertilizer. But the Supreme Court held, four to three, that this did not make the government liable since the wrong was done in exercise of discretionary authority. Therefore, in America neither the government nor the officer concerned is liable for the tort committed in exercise of his discretionary powers even in case of negligence or abuse of discretion. This exception renders it just to say that the Federal Tort Claims Act, despite a high-sounding title, in substance accomplishes very little.

Of all the developed systems of jurisprudence, perhaps the French system is the most logically satisfying in the area of governmental liability which deserves our attention.

(1) Governmental Liability in Tort: A French Model

At the time when the common law jurisdictions were still lost in the darkness of the feudal principle of governmental immunity, a progressive idea of governmental liability was flourishing in some major countries of the continent which had recognized the principle of governmental liability though on a basis comparable with that of private law. However, a gradual unfolding of this idea of liability ultimately led not only to the rationalisation of the law but also to the development of an independent public law of governmental liability. It is rather unfortunate that not only in India but in UK and USA also courts have not tried to develop any principle of public law relating to governmental liability but are still busy in stretching the private law principles to a domain for which they were not designed. This is the root cause of all confusion in this area of high social visibility and practical efficacy.

1. *Personal faults.*—Contemporary French law of State liability for tortious actions is based on the distinction between *faute de service* (service fault) and *faute personnelle* (personal fault).[85] This is construed liberally to include within *faute personnelle* [illegible] clearly outside the scope of authority[86] as the use of government vehicle for private use but also any act characterised as malicious or grossly negligent.[87] Therefore, a government official is not absolutely immune from personal liability even for acts which under common law jurisprudence are in exercise of public functions. This

85. Brown and Garner: FRENCH ADMINISTRATIVE LAW, 2nd Edn., p. 101.

86. Affaire Pastor, C.E. Nov. 28, 1947.

87. Commitment, in error, of persons to a mental instead of ordinary hospital. Waline: DROIT ADMINISTRATIF, 9th Edn., p. 199.

keeps the government officer at his best all the time because there is penalty for all his actions unworthy of public office as not to be properly attributable. For such actions he may be sued personally in the ordinary courts. It is true that in some cases it may be a worthless right against a penniless official, yet its importance in keeping the administration on tap cannot be overemphasised.[88] It is also true that the distinction between *faute personnelle* and *faute de service* is a difficult one especially in the complexities of a modern administration, however, this does not undermine the efficacy of a principle but merely illustrates the basic difficulty of applying a general principle to concrete cases.[89]

2. *Service fault.*—The liability of the administration is primarily based on *faute de service.* This consists of some defect or failure in the operation of public service. The distinction between personal fault and service fault is not an easy one. However, a service fault is one which is committed in exercise of a public function for service. Therefore the official preserves his immunity by reason of principle of separation of powers which prohibits the ordinary court receiving actions against the administration or its official. Instead, the injured party must sue the administration before the administrative courts.[90]

3. *Service-connected fault.*—Between these two extremes lies an intermediate category in French law of 'service connected torts'. The principle that responsibility for illegal interference with the protected interests of the citizen is primarily a responsibility of the public authority in whose service the officer stands rather than of the individual concerned, is firmly and irrevocably established in the continental jurisprudence.[91]

With the development of the concept of welfare and service State, the concept of faults connected with the service is expanding tremendously and courts are recognizing 'combination of faults' (*cumul*) in situations where a tort could not have been committed by the officer but for the fault of service and, therefore, the State could be held liable for the whole damages claimed.[92] The concept of *cumul* was further elaborated in Lemonnier (C.E. July 26, 1918) where the Conseil d'Etat held the State liable for the negligence of

88. Schwartz: FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD, p. 260. It may be noted that in a majority of cases, including even most cases of excess of authority, the personal liability of the individual official before ordinary courts is being replaced by State liability before administrative courts.

89. *Id.*, Chap. IX.

90. Brown and Garner, *op. cit.*, p. 101.

91. Schwartz: FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD, p. 260.

92. In August (C.E. February 3, 1911) a visitor to a post office was assaulted and had his leg broken by two members of the post office staff because he left by the staff entrance, the entrance for public having been prematurely closed. The court held that it was a combination of faults (*cumul*).

the mayor in permitting a shooting competition in which a person was hit in spite of the complaint by a person of the possible risk to life, because the mayor's negligence constituted at one and the same time a combination of personal and service fault. The concept is expressed in the oft-quoted conclusion of Leon Blum, Commissaire du Gouvernement, as he then was:

> "If the personal fault has been committed in the public service, or on the occasion of the service, if the means and instruments of the fault have been placed at the disposition of the party at fault by the service, if in short the service has provided the conditions for the commission of the fault, the administrative judge will and must then say: the fault may be severable from the service that is for the ordinary courts to decide; but the service is not severable from fault."[93]

The *cumul* doctrine was extended to its logical conclusion in the trio of cases (Mimeur, Defaux and Besthlsemer) decided on the same day (C.E. November 18, 1949). In all these cases, the complainants suffered injuries by negligent driving of the government officials. The motor cars involved belonged to the administration but were being used by officials on private and unauthorised trips. The Conseil d'Etat held the administration liable on the ground of combination of personal and service faults. Hence the accident was not deprived of all connection with the service.[94]

The doctrine of 'service fault' and 'service-connected fault', though originally limited to feasance, was progressively expanded to cover cases of non-feasance and late-feasance, as Professor Schwartz puts it. Moreover the service is held to be at the fault not only when its action is open to criticism, but a fortiori when such mishandling of public affairs has expressed itself in an illegal decision.

4. *Contribution*.—Recognising the danger inherent in holding the administration responsible on the ground of extended doctrine of *cumul* even in cases where the officer is 'on a frolic of his own', the Conseil d'Etat gradually evolved the concept of 'contribution' to check the irresponsible and reckless behaviour of the officers in dealings with the public. Consequently in Delvile (C.E. July 28, 1951) where a government vehicle was involved in an accident partly because the driver was drunk and partly because of the defective brakes, the Conseil d'Etat allowed a direct action by the administration for 50% contribution by the official.[95] The quantum of

93. Quoted in Brown and Garner, *op. cit.*, p. 102.

94. *See* also Benard (C.E. Oct. 1, 1954). If a policeman is on duty outside a bar, goes in to have a drink, becomes involved in an argument and injures a customer with his revolver, the service will be at fault and responsible. However (Litzler C.E. June 1954), service was not held responsible where a customs officer in uniform but off duty used his service revolver to commit a murder.

95. *See* also Laurell (C.E. March 12, 1948) where the Conseil d'Etat allowed a contribution suit filed by the administration against the army officer who took away the army vehicle

contribution is determined according to the official's duties and responsibilities in the particular service in which he is employed rather than by reference to the actual part played by him in the cause of the damage.

5. *Risk theory.*—The principles of State liability discussed above are still based on the principle of private law of tort where 'fault' remains a primary factor, since these principles mainly concern with the problem of adjustment of a burden between two parties, hence it is still generally a proper principle that as between two innocent parties, the burden should lie where it falls. However the Conseil d'Etat has made a significant contribution to the concept of governmental liability by developing a principle of public law of tort with far-reaching ramifications. The central idea of this principle is that damage to private persons arises often from actions taken in public interest. Therefore the prejudice caused to the private party is, in such cases, a kind of a public charge, which in accordance with the principle of equality, should not accidentally rest with one or the other persons involved, but be redistributed among the members of the community through the responsibility for compensation attached to the public authority.[96]

The jurisprudential basis for liability without fault is that of the risk theory. The activities of the State, even when conducted without fault, may in certain circumstances constitute the creation of risk; if the risk materialises and an individual has suffered injury or loss it is only just that the State should indemnify him.[97]

The moving spirit behind this "no fault liability" is perhaps the fundamental principle of equality of all citizens in bearing public burdens. Duguit was referring to the same principle when he wrote:

> "The activity of the State is carried on in the interest of the entire community; the burdens that it entails should not weigh more heavily on some than on others. If then State action results in individual damage to particular citizens, the State should make redress, whether or not there be a fault committed by the public officers concerned. The State is, in some ways, an insurer of what is often called social risk...."[98]

without authority on a private trip and knocked down a pedestrian. In its view the administration was entitled to contribution from the officer for although there was a combination of service and personal fault, it does not lie in the officer's mouth to allege the service fault since he was guilty of fraud.

96. Brown and Garner, *op. cit.*, p. 103.

97. *Id.*, p. 105.

98. *Ibid.*

This shouldering by the community of a burden which in English law lies where it falls (because even if a tort had been committed there would be lawful authority) is one of the most striking and laudable aspects of French droit administratif.[1]

State responsibility on the ground of "no fault" theory has been identified in various typical spheres of governmental activity.

(a) Responsibility for damages arising from dangerous operations or Responsabilite du fait does choses.—Where a public authority creates an abnormal risk in the neighbourhood then it must be prepared to compensate if any person suffers damage. It was on this basis that the Conseil d'Etat held the State liable when during the First World War a grenade dump in a residential neighbourhood exploded causing extensive damage to person and property. Disagreeing with the argument that the State was liable because of the negligent operating of the dump, the court held the State liable on the ground of 'risk' and in that case it was unnecessary for the victims to establish 'negligence' or 'fault'.[2]

The same principle has been extended to dangerous operations. If the operation is such which involves abnormal risk, the court would grant a right of indemnity without proof of any fault. Therefore, when a bystander suffered injuries through the use of firearms by the police, the court granted damages against the State.[3] Under English law, however, in similar circumstances 'negligence' had to be established to enable the court to find the administration liable for damages.[4] This principle has also been extended to cover the consequences of general measures justified by public necessity.

(b) Workmen's compensation principle in public law of tort or Risque Professionals.—Even before the concept of social security became a reality in France, the administrative courts had developed the principle of compensation for the workmen without the necessity of proving fault.[5] This principle was based on governmental obligation to indemnify against risk of employment. Later on this principle was extended to cover even those cases where a person is assisting in public services in a voluntary capacity. Therefore,

1. Prof. Thompson, 1968 J.S P.T.L. 470; *Id.*, p. 105.
2. Regnault—Desroziers (C.E. March 28, 1919). *See* also (Saulze, C.E. Nov. 6, 1968) where a school teacher was able to recover damages from the State because she runs a special risk when attending to her duties if any of the pupils are suffering from measles, and therefore a baby which suffered injuries because his mother had contracted the disease while she was carrying him in the womb.
3. *See* Lecomte and Daramy (C.E. June 24, 1949). In Lecomte the complainant's wife was shot dead accidentally when the police was pursuing the assailant. In Daramy, the person was hit by the bullet when police opened fire at a motorist evading a roadblock.
4. *Dorset Yacht Club Co. v. Home Office*, (1969) 2 WLR 1008.
5. Cames (C.E. June 21, 1895). Court allowed compensation to an employee who injured himself while working in the State arsenal.

in Saint-La-Plaine, the Conseil d'Etat granted compensation to a person who had injured himself while helping to set off fireworks at a village carnival without proving 'fault' on the part of the commune.[6]

The same principle of social security has been benevolently extended to cover risks arising out of 'public service actions'. Consequently if a man was injured while trying to apprehend a thief,[7] or when a person injured himself while helping an old woman out of a ditch where she had fallen accidentally, the Conseil d'Etat granted compensation.[8]

(c) *Risk from Society or Risque Social.*—Extension of 'risk without fault' liability covers also the cases of public disorders of varying magnitude. If a person suffers in person or property due to any public disorder without his fault, administrative courts allow compensation again on the principle of equality in bearing burdens.[9]

6. *Compensation for governmental refusal to protect the legal interests and rights of the people.*—To combat essential inertia of the government and to protect the principle of equality, the administrative courts in France have developed another principle of far-reaching consequences within the area of public law of governmental liability by allowing compensation to private individuals in cases where the government either refuses or delays action to protect the legal rights and interests and thereby causes loss to such persons. Therefore, in Couiteas,[10] when the government showed its inability to get the land of the plaintiff vacated by the nomadic tribes because of the fear of civil war, the Conseil d'Etat allowed damages against the government. In the same manner when the decree of ejectment against the tenant could not be executed for four years because of administrative indifference, court awarded damages.

7. *Compensation for governmental action imposing statutory unequal sacrifice.*—Generally the statute causing prejudice to the proprietary or financial interest of a person provides for compensation. However, where the statute is silent, the administrative courts again enforcing the principle of equality in bearing public burdens, award compensation.[11] Therefore, if the business interests of any person have been adversely affected because either the State has opted for State monopoly or controlled activity, the administrative courts shall award compensation.[12]

6. C.E. November 22, 1946.
7. Pinguet, C.E. April 17, 1953.
8. Gaillard, C.E. October 8, 1970.
9. 'No fault liability' in French administrative law goes much farther than the strict liability principle for animals under Animals Act, 1971 and *Rylands* v. *Fletcher*, (1868) 3 HL 330.
10. C.E. November 1, 1923.
11. Mergui (C.E. March 19, 1971).
12. La Fleurette (C.E. January 14, 1938) and Compagnie Generale D'Energie Radioelectrique

(2) Some observations for the future development of the law in India

(1) Doctrine of 'sovereign immunity' is an anachronism without any rational basis. It is amazing that even today this feudalistic and authoritarian doctrine is still persisting obscuring the proper understanding of the role and functions of a government in a welfare democratic society.

(2) Any welfare democratic society presupposes equality between the governors and the governed and the socialisation of compensation. In this context any immunity granted to the State from compensation for the harm done to its citizens would lead to an anatomical impairment of the concept of 'welfare'.

(3) The laboured distinction between 'sovereign' and 'non-sovereign' functions of the State to which the Indian courts are so tenaciously glued is based on logical fallacy and practical absurdity and derives its justification, if any exists, from extra-legal consideration of protecting the impecunious authority from liability. In view of the multitude of business like operations which are conducted by the government for the general welfare of its people, the test artificially divides and truncates the ubiquitous functions of the State.

(4) It is only desirable and equitable that an attempt to protect an 'impecunious State' from liability should be through budgetary reorganisation and not through shifting the burden to the helpless victims.

(5) The trauma of the development of law in the common law world has been that it hinges on the private law of tort which was not designed to solve problems of public law area. This created a quagmire, well illustrated by various decisions of the courts in India. Solution lies in the efforts designed to develop a public law of tort for which blueprints have been provided by the French jurisprudence.

(6) One such principle of the public law of tort relating to governmental liability may be that in a welfare democratic society damage to any private citizen arises often from actions taken in public interest, hence the prejudice caused to the private party is a kind of a public charge which in accordance with the principles of equality should not accidentally rest where it falls but be redistributed among the members of the community. Thus socialisation of compensation must be the foundation on which the infrastructure of the law relating to governmental liability in tort must be built.

(C.E. May 30, 1966). Right to compensation arises only when the activity is not injurious to public health, order or morals.

No one has any misgivings about the creativity of the Indian judiciary but this creativity has failed to develop even a single viable principle within the area of governmental liability in tort. Our courtrooms are still haunted by doctrines which are long dead. It is only hoped that the genius of the Indian judiciary would also be registered in this area of high social visibility by developing the principles of 'public law of tort' satisfying the claims of 'socialisation of compensation'.

(3) Liability of the private individual to the State for committing tort against its servants

The discussions on the liability of the government for the torts committed by its servants brings us to an inevitable question whether the government can also recover damages from any private individual for the tort committed by it against its servants? Within the realm of domestic relations, the master is entitled to an action *per quod servitium amisit* for damages when his servant has been injured. However, this principle of tort has not been firmly engrafted within the area of public law. In England, in *Inland Revenue Commrs.* v. *Hambrook*[13], Denning, L.J. was of the view that the action *per quod servitium amisit* must be confined to domestic relations and it does not lie, therefore, at the instance of the government, corporations and other employers who do not keep a household. This approach, however, has not been accepted in Australia. In *Commr. for Railways (N.S.W.)* v. *Scott*[14], the High Court held that the Commissioner could recover damages from a rider of a motor cycle whose negligence caused its engine driver to suffer a breakdown. These days it is common in welfare societies to provide for sick pay, medical expenses and other forms of compensations in their statutes, if their employees are injured in the course of employment. When apart from the action *per quod servitium amisit* the employer has no general law means of recovering the sum paid by it to its employees, this action has, therefore, assumed importance from an economic point of view, which it perhaps did not have in some earlier periods of its history. The application of the action *per quod servitium amisit* in public law is still in its ante-natal stage in India and deserves serious consideration from the Bench and the Bar.

(C) PRIVILEGES AND IMMUNITIES OF THE ADMINISTRATION IN SUITS

Though the equality clause of the Constitution envisages absence of any special privileges to anyone including government, but since government is a government in contradistinction to a private individual, law allows certain privileges to the government as a litigant. From among the numerous privi-

13. (1956) 1 All ER 807.
14. 102 CLR 392 (1959).

leges available to the government under various statutes, a few important ones may be discussed here.

(1) Privilege of notice

Section 80(1) of the Civil Procedure Code, 1908 provides that no suit shall be instituted against the government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing in the manner provided in the section has been given. The requirement of notice is mandatory and admits of no exception.[15] However, if the public officer has acted without jurisdiction the courts have held that the requirement of notice is not mandatory. Therefore, if a public officer seizes property without authority[16] or assaults a witness,[17] no notice is necessary for filing a suit against him in his official capacity. The Allahabad and Calcutta High Courts have further held that notice is unnecessary when a public officer though acts within jurisdiction but in a mala fide manner.[18] The requirement of notice may also be waived either expressly or impliedly by the government.[19]

The requirement of notice applies to all kinds of relief and forms of action, whether injunctive or otherwise. Whatever else may be the merit of the rule, it certainly creates hardships for the litigants seeking injunctive relief against the government. The plight of the litigant is well illustrated in *State of Orissa* v. *Madan Gopal*[20]. In this case the government notified to the lessees of mines, Madan Gopal and others, that their leases had become void and they should remove their assets within a fortnight. The lessees wanted to file a suit for injunction against the government, but the two months' notice rule of Section 80 proved to be an insurmountable hurdle. Therefore, they moved the High Court for the writ of mandamus. The High Court granted the writ on the ground that under the circumstances, the alternative remedy was inadequate, and restrained the State Government from disturbing the possession for three months during which the suit could be filed by the petitioners after complying with the requirement of notice. The Supreme Court reversed the decision of the High Court in appeal. Keeping in view this hardship, the Law Commission recommended the abolition of the requirement of notice as it causes great inconvenience to the litigants especially when they seek immediate relief against the government.

15. *Sawai Singhai* v. *Union of India*, AIR 1966 SC 1068.
16. *Rameshwar Prasad Singh* v. *Mohd. Ayyub*, AIR 1950 Pat 527.
17. *Dattaraya* v. *Annappa*, (1928) 52 ILR Bom 832.
18. *Mohd. Sadiq Ahmad* v. *Panna Lal*, (1904) 26 ILR All 220; *Raghubans Sahai* v. *Phool Kumari*, (1905) 32 ILR Cal 1130. The Madras HC has taken opposite view in *Wilson* v. *Nathmull*, (1930) 59 MLJ 501.
19. *P. Sivaramakrishnaiah* v. *Executive Engineer, N.C.C.*, AIR 1978 AP 389.
20. AIR 1952 SC 12

Keeping in view this hardship especially in cases where the person needs immediate and urgent relief, the Civil Procedure Code Amendment Act, 1976 added clause (2) to Section 80 which provides that the court may grant leave to a person to file a suit against the government or a public officer without serving two months' notice in cases where relief claimed is immediate or urgent. But before granting the exemption the court must satisfy itself about the immediate or urgent need. After this amendment, the hardship caused to the litigant in *State of Orissa* v. *Madan Gopal*[21] should not recur.

The real purpose behind the privilege of notice to the government is to alert the government to negotiate a just settlement or at least have the courtesy to tell the person why the claim is being resisted. If the government does not act to lessen the hardship of the individual and to save wasteful litigative expenditure of public money on long-drawn-out litigation, there seems to be no justification in allowing this privilege to the government.[22]

It is common to find in the common law world that government bodies are entitled to special notice before legal action is taken against them. A fairly typical example is Section 580 of the New South Wales Local Government Act, 1919 which requires one month's notice for filing any suit against the Council. The notice must state: the cause of action; the time and place at which the damage or injury was sustained; and the name and place of abode or business of the intended plaintiff and his attorney (if any) in the case. After the notice a representative of the council must be permitted to inspect damaged property and an authorised medical practitioner must be permitted to examine any person injured. A plaintiff will not be permitted to go into evidence of any cause of action not stated in the notice nor to proceed at all unless the notice is served. However, a judge may permit amendment of a notice and allow its non-compliance if he deems it "just or reasonable in the circumstances". In Victoria the Limitation Actions Act, 1958 requires six months' notice of similar nature.[23]

(2) Privilege to withhold documents

In India the privilege of the government to withhold documents from the courts is claimed on the basis of Section 123 of the Indian Evidence Act, 1872, which lays down that no one shall be permitted to give any evidence derived from unpublished official records relating to the affairs of the State except with the permission of the head of the department concerned, who shall give or withhold such permission as he thinks fit. Section 124 extends this privilege to confidential official communication also.

21. AIR 1952 SC 12.

22. See *State of Punjab* v. *Geeta Iron and Brass Works*, (1978) 1 SCC 68: AIR 1978 SC 1608.

23. *See* Redmond: *Notices before Action*, (1964) 37 ALJ 316.

The privilege if claimed is not conclusive in the sense that the courts can do nothing except to admit it. This proposition is based on Section 162 of the Indian Evidence Act which provides that when a witness is required to produce a document, he must bring it to the court and then may raise an objection to its production and admissibility.

In *State of Punjab* v. *Sodhi Sukhdev Singh*[24] the court had the opportunity of discussing the extent of government privilege to withhold documents where twin claims of governmental confidentiality and individual justice compete for recognition. In this case a District Judge challenged the validity of his dismissal order and wanted the production of the minutes of the meeting of the Council of Ministers and also a copy of the recommendation of the Public Service Commission to fortify his defence. The court allowed the privilege to withhold these documents. The minutes were not allowed to be produced because of the prohibition in Article 163(3) of the Constitution which lays down that the advice tendered by a Minister cannot be enquired into by any court. As regards the recommendations of the Public Service Commission, the court came to the conclusion that its disclosure would involve injury to public interest. The court further elaborated the extent of privilege by holding that the government documents can be classified into two categories, (*i*) documents relating to the affairs of the State, (*ii*) documents not relating to the affairs of the State. For the documents falling in the second category, there is no immunity. But for the documents falling in the first category, the claim of the privilege is not conclusive and the court is required to enquire into the nature of the document in the light of relevant facts and circumstances. However, the court held that in order to determine the claim of privilege, the court cannot inspect the document and the administration shall be the sole judge of the public interest involved in the disclosure.

The court was very alive to the constraints of this privilege on private defence, therefore, Gajendragadkar, J. delivering the majority judgment cautioned that care has to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provision of Section 123. In order to guard against the possible misuse of the privilege, the court also developed certain norms. First, the claim of privilege should be in the form of an affidavit which must be signed by the Minister concerned or the Secretary of the Department. Second, the affidavit must indicate within permissible limits the reasons why the disclosure would result in public injury, and that the document in question has been carefully read and considered and the authority is fully convinced that

24 AIR 1961 SC 493.

its disclosure would injure public interest. Third, that if the affidavit is found unsatisfactory, the court may summon the authority for cross-examination.

Working the formulations still further, the court in *Amar Chand* v. *Union of India*[25] disallowed the privilege where there was evidence to show that the authority did not apply its mind to the question of injury to the public interest which would be caused by the disclosure of the document. In *Indira Nehru Gandhi* v. *Raj Narain*[26], the Court compelled the production of Blue Books of the police and disallowed the claims of privilege. In *State of Orissa* v. *Jagannath Jena*[27], the Supreme Court again disallowed the privilege on the ground that the public interest aspect had not been clearly brought out in the affidavit. In this case, the plaintiff wanted to see endorsement on a file by the Deputy Chief Minister and the I.-G. of Police.

In *State* v. *Midland Rubber & Produce Co.*[28] the High Court of Kerala went a step further and reserved to itself the right even to inspect the document before allowing the claim of privilege. In this case the court came to the conclusion after inspecting the document that no public interest would suffer from its disclosure. Other High Courts have also followed the same line of reasoning in deciding upon the claims of privilege.[29] The recent trends in judicial behaviour in this area of high social visibility is most welcome.

The decision of the Supreme Court in *ADM, Jabalpur* v. *Shivakant Shukla*[30] may, however, be regarded as highly selective because of the special setting in which the case was decided. Ray, C.J. observed that Section 16-A(9) of the Maintenance of Internal Security Act, 1971 which provided that the grounds of detention be treated confidential and be deemed to refer to matters of State and to be against public interest to disclose, enacts provisions analogous to a conclusive proof of presumption. Such a provision is a genuine rule of evidence. It is in the nature of an explanation of Sections 123 and 162 of the Evidence Act. Therefore, when the detaining authority is bound by Section 16-A(9) and forbidden absolutely from disclosing such material no question can arise for adverse inference against the authority. The court cannot insist on the production of the file or hold that the case of the detenu stands unrebutted by reason of such non-disclosure. To hold otherwise would be to induce reckless averments of mala fides to force production of the file which is forbidden by law. Maintaining the same pre-Emergency tenor of judicial articulation the Supreme Court ordered the

25. AIR 1964 SC 1658.

26. 1975 Supp SCC 1: AIR 1975 SC 2299.

27. (1977) 2 SCC 165: AIR 1977 SC 2201.

28. AIR 1971 Ker 228.

29. *Mohd. Yusuf* v. *State of Madras*, AIR 1971 Mad 468; *Union of India* v. *Lalli*, AIR 1971 Pat 264; *S.K. Neogi* v. *Union of India*, AIR 1970 A & N 131.

30. (1976) 2 SCC 521, 589: AIR 1976 SC 1207.

government of Bihar to produce copies of the CID reports and other documents relating to the blinding of undertrials in Bhagalpur jail. The judges asserted that it is imperative to the proper functioning of the judicial process and satisfactory ascertainment of truth that all relevant facts must be made available to the court. It is difficult to see how the State can resist the production of these reports and their use as evidence in the proceedings before the court when the reports clearly relate to the issue as to how, in what manner and by whom the twenty-four undertrials were blinded. The court pointed out that the country has adopted the adversary system of jurisprudence in which truth emerges from the clash between contesting parties. Therefore, all facts relevant to the investigation must be brought before the court and irrelevant facts must be shut out for otherwise the court may get a distorted or incomplete picture of the facts and that might result in miscarriage of justice.[31] Similarly in *S.P. Gupta* v. *Union of India*[32] the Supreme Court rejected the government's claim of privilege over the correspondence relating to the transfer and non-extension of the terms of two judges of High Courts. After studying the documents in the chamber the judges came to the conclusion that the documents did not belong to the privileged category covering "affairs of State" and their disclosure would not jeopardise public interest. In arriving at this conclusion, the Court applied the 'balancing of interest' test. It was stressed that in the ultimate analysis the approach of the Court while deciding the question of privilege would be that it has to balance public interest in just justice and just administration of justice and State affairs and then decide which way the balance tilts. After laying down this test the Court held that in this case a disclosure in the interests of justice far outweighs the possible embarrassment felt by the government. The Court also recommended that the century-old provisions of Section 123 of the Indian Evidence Act relating to privileged documents enacted to some extent, keeping in view the needs of empire builders must change in the context of the republican form of government and the open society which the people of India have established.[33] Keeping the same tenor the Court in *Sethi Roop Lal* v. *Malti Thaper*[34], did not allow the claim of privilege by the government for the production of marked copy of electoral roll.

However, the two-Judge Bench in *State of Bihar* v. *Kirpalu Shanker*[35], expressed doubt over the decision of the court in *S.P. Gupta case* (supra) and remarked that the legal milestone in that case 'needs a retreat, a bit'. In this case of contempt, the Supreme Court held that government files are

31. *Anil Yadav* v. *State of Bihar*, (1981) 1 SCC 622.
32. *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87: AIR 1982 SC 149.
33. *Id.* pp. 700, 701 (SCC) *per* Desai, J.
34. (1994) 2 SCC 579.
35. (1987) 3 SCC 34.

privileged documents and no contempt proceedings, civil or criminal, can be initiated on the basis of notings on files as this privilege is necessary in order to maintain the independent functioning of Civil Services and fearless expression of views. Similarly the Supreme Court in *Doypack Systems Pvt. Ltd.* v. *Union of India*[36], held that it is the duty of the court to prevent disclosure of documents where Article 74(2) of the Constitution is applicable. Article 74(2) provides that the advice tendered by Ministers to the President shall not be inquired into in any court. Documents falling within this class are therefore entitled to protection in public interest as a 'class' because it is necessary for the proper functioning of the State. This class of documents may include Cabinet minutes, minutes of discussions between heads of departments, high-level interdepartment communications, despatches from the Ambassadors, papers brought into existence for the purpose of preparing a submission to Cabinet, noting of the officials leading to the Cabinet decision, and documents which relate to the framing of government policy at the high level.

However, the claim of 'class' privilege has always proved a serious obstruction in the administration of justice. It is for this reason that in the case of *R.K. Jain* v. *Union of India*[37] the Supreme Court was quick enough to circumscribe the limit of 'class' privilege under Article 74(2) of the Constitution. In this case a petition had been filed to the challenge the appointment of the President of the Central Excise Gold Appellate Tribunal by the government. Rule nisi was issued to the respondents to produce the file relating to the appointment. In the first instance government claimed privilege under Article 74(2) of the Constitution but later on agreed to the perusal of the file by the Court but claimed privilege to disclose the contents to the petitioner. After perusing the file though the Court allowed the privilege, yet the Court thought it proper to lay down the law in its correct perspective especially where the privilege claimed was a 'class' privilege under Article 74(2). The Court made it clear that Article 74(2) of the Constitution which provides that what advice was tendered by the Cabinet to the President cannot be enquired into by any court, does not allow a 'class' privilege. Immunity can be claimed in respect of those documents only the disclosure of which may result in harm to the nation or to the public interest. This may include information relating to national security, diplomatic relations, internal security or sensitive diplomatic correspondence as 'class' documents for which public interest demands complete immunity from disclosure. Bar of judicial review is confined to the factum of the advice, its extent, ambit and scope but not the record i.e. the material on which the advice is founded. While deciding the claim of privilege the Court would

36. (1988) 2 SCC 299.
37. (1993) 4 SCC 120.

give utmost consideration to the views of the government but it will not be conclusive.

The Court further amplified the law by laying down the factors to be considered in deciding the public interest immunity claims. These factors would include:

1. Interest affected by the disclosure of the document.
2. In case of 'class' protection—Whether the public interest immunity protects the class.
3. The extent to which the interests referred to have become attenuated by the passage of time or intervening events.
4. The seriousness of the issue by which production of the document is sought.
5. The likelihood that production of the document will affect the outcome of the case.
6. The likelihood of injustice if the document is not produced.

Thus the claim of a 'class' privilege under 74(2) of the Constitution was confined by the Court to its proper place.

In *Robinson* v. *South Australia*[38], the Privy Council also interpreted the privilege narrowly and the powers of the court broadly. The Privy Council held:

(1) The privilege is a narrow one, to be exercised only where there is some plain overriding principle of public policy.

(2) Only rarely can documents relating to the industrial or commercial activities of the State come within the rule, especially in times of peace.

(3) The mere fact that the production of a document might prejudice the Crown's own case is not a justification for a claim of privilege.

(4) The court is entitled to require, and should require, an actual affidavit from a responsible Minister whose mind has been directed to the questions involved.

(5) In all cases the court has in reserve its power to inspect the document in question.

In England until the Second World War it was generally recognised in the courts that the Crown's powers to forbid the disclosure of specified evidence was not absolute. However, the law took a sharp turn in the wrong direction in 1942 when the House of Lords decided *Duncan* v. *Cammell Laird and Co. Ltd.*[39]. The House of Lords ruled that if a Minister claims privilege for any document on the ground of public interest, it shall be con-

38. 1931 AC 704.

39. 1942 AC 624: (1941) 1 All ER 437.

sidered as final and conclusive. This judicial abdication, however, can be justified in view of the special circumstances attending the case. In this case a submarine sank during trials killing ninety-nine persons. One of the dependants of the killed brought an action against the builders of the submarine on the ground of negligence in the manufacture of the submarine and in order to prove negligence wanted the production of blueprints of the design of the submarine. The First Lord of Admiralty claimed privilege on the ground that the blueprints of the design of the submarine was a military secret and its disclosure would jeopardise public interest. The court allowed the claim of privilege as conclusive. This decision opened the door to all kinds of 'class' claims which proved a serious obstruction in the administration of justice. As a result the courts started breaking away from this sweeping rule.[40]

The criticism generated by the broad sweep of the privilege led in 1956 to a statement in the House of Lords by Viscount Kilmuir L.C. The statement indicated, first, that the privilege might be claimed not only on the ground that the disclosure of the particular document would injure the public interest, but also on the ground that the document was one of a particular class of documents disclosure of which would injure the public interest in that it might prejudice freedom and candour of communication with and within the public service. The statement then indicated that, as a matter of policy, privilege would not for the future be claimed in respect of certain classes of documents:

(1) In relation to road accidents, accidents involving government employees and accidents on government premises, reports of the employees involved and other eyewitnesses and subsequent report made by the foreman, superintendent or other official as to such matters as the state of the machinery, vehicle or premises involved. This class does not include reports of a government inspector, etc., investigating an industrial or mining accident.

(2) Ordinary medical reports in respect of the health of civilian emloyees. This class does not include medical reports and records in the fighting services and in the prison service, though the privilege would not be claimed in proceedings against the medical officer concerned for negligence, or in criminal proceedings.

(3) Statements made to the police (except by "informers"). These would be produced in court on subpoena or furnished earlier with the consent or at the request of the witnesses themselves.

40. *Glasgow Corpn.* v. *Central Land Board*, 1956 AC 1; *Re Grosvenor Hotel (No. 2)*, 1965 Ch 1210.

(4) In contract cases, all documents passing between the parties, other documents affecting the legal position (for example, an authority to an agent) and relevant reports on matters of fact (as distinct from comment and advice).[41]

The Lord Chancellor pointed out that, as to oral communications, the privilege was available on the same principles as in the case of written communications.[42]

It may be pointed out that in England the privilege to withhold documents cannot be referred to as Crown privilege. A private person may raise the same claim and the court itself may, of its own motion, refuse to permit disclosure. Therefore, it can be rightly called a public interest privilege.

But in 1968, the House of Lords unanimously repudiated its extreme formulation of 1942 and regained judicial control in *Conway* v. *Rimmer*[43]. In this case, a junior police officer who had been prosecuted for theft of an electric torch and acquitted had brought an action for malicious prosecution against a superior officer and desired to see the report made on him in the police service. The Home Secretary intervened with a claim of 'class' privilege. The House of Lords disallowed the claim, inspected the document themselves and ordered its disclosure. The House of Lords made it clear that though the courts would naturally respect claims based on genuine secrets of State, they would not allow any claims unless the public interest in secrecy clearly outweighs the public interest in doing justice to the litigant; and that was a matter to be determined by the court and not by the executive.

In England now, Section 28 of the Crown Proceedings Act, 1947 specifically recognises the right of the Crown to withhold documents if in the opinion of the relevant Minister it would be injurious to the public interest to disclose them. However, the claim of privilege is to be decided by the judge and not by the executives and for this purpose unless the document relates to national security, diplomatic relations or State secrets of high importance, the court shall have power to inspect the document. In *Burmah Oil Co.* v. *Bank of England*[44], the Court of Appeal allowed privilege relating to a commercial document on the ground of possible far-reaching political repercussions. But the House of Lords after inspecting the document found that it contained nothing of substantial evidentiary value and thus dismissed the appeal.[45]

41. *See* 197 HL Deb, Cols. 741 and 237; HL Deb, Col. 1063.
42. *Coonan* v. *Richardson*, 1947 QWN No. 19.
43. 1968 AC 910: (1967) 2 All ER 1260. *See* also *Burmah Oil Co.* v. *Bank of England*, (1979) 3 All ER 300. House of Lords did not allow absolute protection even to the Cabinet proceedings.
44. (1977) 1 WLR 473.
45. (1979) 3 WLR 722. *See* also Administration of Justice Act, 1970.

The American term for government privilege is 'executive privilege'. In America the courts never abdicated their control over the claims of the executive for privilege. The leading case is *United States* v. *Reynolds*[46], which arose out of the crash of a military airplane on a flight to test secret electronic equipment. Three civilian observers aboard were killed and their widows sued the government under the Federal Tort Claims Act. The plaintiffs moved for the production of the Air Force's accident investigation report, but the government claimed privilege and refused to produce the report. The court rejected the view that the assertion of the executive privilege was conclusive on the question of production. It recognised that there are State secrets which need not be disclosed. But the determination of whether such secrets are involved is a judicial function.

In case of other 'official information' not involving State secrets, Rule 228 of the Model Code of Evidence Rules clearly lays down that the disclosure of such information must be made and the alternative for the government is one to the case.

The refusal of the American courts to pass executive privilege to suppress information as conclusive received a striking confirmation in *New York Times Co.* v. *United States*[47], popularly known as the *Pentagon Papers case*. In this case the United States sought an injunction against the New York Times and Washington Post prohibiting them from publishing the contents of a classified study entitled 'History of U.S. Decision-Making Process on Vietnam Policy'. The history was prepared within the Defence Department and had been classified as 'Top Secret'. The government contended that its disclosure would jeopardise national security and national defence. The Supreme Court denied injunction. Though the Court was divided six to three and each of the justices wrote a separate opinion, one can, nevertheless, identify two broad common formulations: (1) that the Constitution bars any restraint upon newspaper publication, regardless of the nature of material published, except under special circumstances where it would result in direct, immediate and irreparable damage to the nation; (2) that the 'damage to the nation' from the publication is primarily for the executive to determine and the courts should defer to the executive determination.

The difference in English and American approaches may be due to the theory of separation of powers, in general, and to the judiciary in particular. For the US Supreme Court in *U.S.* v. *Reynolds*[48] held, having distinguished *Duncan* v. *Cammell Laird & Co.*[49]:

> "But we do not regard the [*Duncan*] *case* as controlling in any event. For whatever may be true in Great Britain, the Government of

46. 345 US 1 (1952).
47. 403 US 713 (1971).
48. 345 US 1 (1952).
49. 1942 AC 624

the United States is one of checks and balances. One of the principal checks is furnished by the independent judiciary which the Constitution established. Neither the executive nor the legislative branch of the government may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases of controversies submitted to the judicial branch for decision. Nor is there any danger to the public interest in submitting the question of privilege to the decision of the courts. The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments."

At this point it is pertinent to point out that in America there is a legally enforceable right to know. In 1966 the Congress passed the Freedom of Information Act which gives to every citizen a legally enforceable right of access to government files and documents generally. The government cannot refuse information unless it is covered in any of the nine specific exceptions given in the Act. The Indian and English law are diametrically opposed to the American law because of the prohibitions of the Official Secrets Acts in both the countries.

The power of the court to compel production of the document for which privilege is claimed by the government has recently thrown up an interesting issue regarding the possible use of such document by the party which asked for its production. This issue came up before the Supreme Court when the Union Government asked the Court to take action against the former additional judge of the Delhi High Court, Mr S.N. Kumar, for contempt. Mr Kumar had filed a suit against the Chief Justice of the Delhi High Court, Mr Prakash Narain, seeking damages worth Rs 2 lakhs for defaming him in a letter the Chief Justice wrote to the then Law Minister. The confidential letter had alleged that Mr Kumar probably took bribes, was slow at work and his conduct was not becoming of a judge.[50] The Court had compelled the production of this letter in an earlier case, *S.P. Gupta* v. *Union of India*[51], popularly known as the *Judges' Transfer case*, at the instance of the plaintiff. The contention of the government was that the letter disclosed at the instance of the Court cannot be used for any 'collateral' purposes and thereby the government put forward the doctrine of implied undertaking according to which there is an implied obligation on the party which got the document not to make improper use of it in other proceedings. This doctrine is not in much use in England now. The decision of the Court would lay down a new rule in India.[52]

50. *Indian Express*, October 26, 1982.

51. 1981 Supp SCC 87; AIR 1982 SC 149.

52. The case is still pending before the Supreme Court and therefore, any comment at this stage is not possible.

(D) IMMUNITY FROM STATUTE OPERATION

The general principle of the common law is that the King is not bound by a statute unless a clear intention appears to that effect from the statute or from the express terms of the Crown Proceedings Act, 1947 or by necessary implication. This principle is based on two well-known maxims: (*i*) The King can do no wrong; and (*ii*) the King cannot be tried in the courts of his own creation. Applying the same principle in India the Privy Council held in *Province of Bombay* v. *Municipal Corpn. of Bombay*[53] that the government is not bound by the statute. In this case the government had agreed to the proposal of the Municipality to lay down water-pipes through government land. Under the provisions of the Municipalities Act the municipality had the power 'to carry water-mains within and without the city'. The question was whether the government was bound by the Municipalities Act? The Privy Council answered it in the negative.

Applying the doctrine of English law which envisages that the Crown is not bound by its own law unless so bound either expressly or by necessary implication, the Supreme Court of India held in a much debated judgment delivered in *Director of Rationing and Distribution* v. *Corpn. of Calcutta*[54]; that the State in India is not bound by its own statutes unless they are made applicable to it expressly or by necessary implication. In this case, Section 386(1)(*a*) of the Calcutta Municipalities Act, 1923 as substituted by the later Act 33 of 1951 provided that every person storing rice within the municipal limits can do so only under a licence issued by the Corporation. This measure was adopted to avoid the spread of epidemics through rats. The Director of Rationing and Distribution as representative of the Food Department of Government of West Bengal when prosecuted for a violation of this provision pleaded that the State is not bound by a law of its own creation unless expressly mentioned therein or, by necessary implication, extended to it. The Supreme Court, by a majority, held that the common law principle will be adopted as a rule of interpretation, and therefore the State shall not be bound by its own statute unless made applicable to it either expressly or by necessary implication. The main criticism of the case was that it engrafted a common law immunity rule which had its roots in feudalistic society in a democratic and welfare society. The decision also missed the point which even the common law immunity rule recognises as an exception where the statute is for the public benefit. This was a seven-Judge decision wherein Justice Subba Rao recorded his dissent.

53. AIR 1947 PC 34
54. AIR 1960 SC 1355.

Shortly after this decision Justice Subba Rao became the Chief Justice of the Supreme Court and constituted a Bench of 11 Judges to reconsider this decision in *Supdt. and Remembrancer of Legal Affairs* v. *Corpn. of Calcutta*[55]. He persuaded eight of his colleagues on the Bench that the English common law theory 'King can do no wrong' was subversive of the Rule of Law and that it had been given up in England after the Crown Proceedings Act, 1947, hence it cannot be permitted under the Constitution of India. Thus the earlier case was overruled. In this case Section 218 of the Calcutta Municipalities Act, 1951 provided that any person carrying on the business of running a market can do so only under a licence issued by the Corporation. The State of West Bengal which was running a daily market was prosecuted for not obtaining a licence under the provisions of the Act. The Supreme Court, overruling its earlier decision, held that the State is bound by its own law unless excluded either expressly or by necessary implication. This case has another message that "Howsoever high you may be, the law is above you". This message had a great influence on the later course of development of administrative law and on the supremacy of the judiciary in testing the validity of all executive and legislative actions.

The principle was affirmed in *Union of India* v. *Jubbi*[56]. In this case the statute provided that the tenants can acquire proprietary rights in the land by paying compensation to the landowner in the manner laid down in the statute. The question was whether the benefit of this statute can be availed of by tenants holding land owned by the State. The Supreme Court held that the statute binds the State because the State is not excluded from its operation either expressly or by necessary implication.

It is not difficult to ascertain if the State has been expressly exempted from the operation of a statute, but where it has been exempted by 'necessary implication', it may pose a problem. Nevertheless, it may be mentioned that in cases where a statute provides for criminal prosecution involving imprisonment, or in cases where a penalty of fine if imposed, the money would go to the same coffer, the State is excluded by necessary implication.

In *State of Maharashtra* v. *Indian Medical Assn.*[57] the Apex Court came to the conclusion that Section 64 of Maharashtra University of Health Sciences Act, 1998 which provided that all applications for permission to open a medical college should be routed through the University to the State Government does not bind the government, if it intends to open a government run medical college. The Court pointed out that expression "management"

55. AIR 1967 SC 997. *See* also *State of Madras* v. *Employees' State Insurance Corpn.*, AIR 1967 Mad 372.
56. AIR 1968 SC 360.
57. (2002) 1 SCC 589.

occurring in Section 64 refers to private management and hence state is not bound by law by any necessary implication.

(E) IMMUNITY FROM ESTOPPEL (PROMISSORY ESTOPPEL)

Estoppel is a rule whereby a party is precluded from denying the existence of some state of facts which he had previously asserted and on which the other party has relied or is entitled to rely on. The doctrine of promissory estoppel has been evolved by courts, on the principle of equity, to avoid injustice. A person who himself misled the authority by making a false statement, cannot invoke this principle, if his representation misled the authority into taking a decision which on discovery of misrepresentation is sought to be cancelled. Doctrine of promissory estoppel applies also to Government and public authorities however it would yield where equity so demands.[58] 'Estoppel' in BLACK'S DICTIONARY is indicated to mean that a party is prevented by his own acts from claiming a right to the detriment of the other party who was entitled to rely on such conduct and has acted accordingly. In other words the principle of promissory estoppel is that where one party has by his words or conduct made to the other a clear and unequivocal promise or representation which is intended to create legal solutions or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise or representation is made and it in fact so acted upon by the other party, the promise or representation would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings which have taken place between the parties. This doctrine is now well established in the field of administrative law.[59] Section 115 of the Evidence Act is also more or less, couched in a language which conveys the same expression.[60] However even where the case does not fall under Section 115, promissory estoppel can still be invoked. A man should keep his words, all the more so when the promise is not a bare promise but is made with the intention that the other party should act upon it.[61] Therefore, a promise intended to be binding, intended to be acted upon, and in fact acted upon is binding.[62] It is now settled that the doctrine of promissory estoppel applies equally to government and public authorities. But it is equally settled that this doctrine cannot be used to compel the government or public authority to carry out a representation or promise which is prohibited by law or which was beyond the power of the officer making

58. *Central Airmen Selection Board* v. *Surinder Kumar Das*, (2003) 1 SCC 152.

59. *Sharma Transport* v. *Govt. of A.P.*, (2002) 2 SCC 188.

60. *Ashok Kumar Maheshwari (Dr)* v. *State of U.P.*, (1998) 2 SCC 502.

61. *Ibid.*, Lord Denning: *Recent Developments in the Doctrine of Consideration*, Modern Law Review, Vol. 15.

62. *Central London Property Trust* v. *High Trees House Ltd.*, 1947 KB 130.

it. It will also not apply to government or public authority if a larger public interest so demands. In order to resist the liability under this doctrine, government or public authority would disclose to the Court the various events insisting its claim to be exempt from liability and it would be for the Court to decide whether those events are such as to render it inequitable to enforce the liability against the government or public authority.[63] Judicial behaviour clearly indicated that, in India, estoppel would not be available against the government in violation of a statute. In *Amar Singhji* v. *State of Rajasthan*[64], the Supreme Court refused to apply estoppel against the government where the Collector had given an assurance that the jagir of the petitioner would not be acquired during his lifetime under the Rajasthan Land Reforms Act, 1952, because the assurance was in clear violation of the provisions of the statute. In the same manner in ***Mathra Parsad & Sons*** v. *State of Punjab*[65] and *Narinder Chand* v. *Union Territory of H.P.*[66], the Supreme Court held that estoppel is not available against the government if the representation is in violation of a tax law. The same opinion was reaffirmed in *K. Ramadas Shenoy* v. *Chief Officer, Town Municipal Council*[67]. The facts of this case were that the Madras Legislature passed the Madras Planning Act, 1945 which marked areas for business and residential purposes. The area marked for residential purposes included social and community hall as well. A person applied for the construction of a social-cum-lecture hall, which was permissible and therefore allowed in the residential area. Later, he applied to convert the hall into a picture palace. The municipality by a resolution allowed the conversion even in the face of Section 15 of the Act which prohibited any commercial building in the residential area except with the permission of a competent authority under the Town Planning Act. The defendant started work on the cinema. This was challenged by a resident of the area. Among other grounds, the plea of estoppel was also taken. The Court held that the resolution sanctioning the plea for conversion of a lecture hall into a cinema was in violation of the Town Planning Act and, therefore, an excess of statutory power and cannot be validated by the operation of the principle of estoppel. The Supreme Court further remarked that the Court declines to interfere for the assistance of persons who seek its aid to relieve them against express statutory provisions.

Judicial behaviour in India further indicates that estoppel cannot be applied against the government if it jeopardises the constitutional powers of

63. *Sharma Transport* v. *Govt. of A.P.*, (2002) 2 SCC 188.
64. AIR 1955 SC 504.
65. AIR 1962 SC 745.
66. (1971) 2 SCC 747: AIR 1971 SC 2399.
67. (1974) 2 SCC 506: AIR 1976 SC 2177.

the government. In *C. Sankaranarayanan* v. *State of Kerala*[68], as a result of an understanding between the employees and the government, a notification was issued under Article 309 of the Constitution raising the age for retirement, but by a subsequent notification it was brought down to 55 years. Rejecting the contention of estoppel, the court held that the power conferred by Article 309 of the Constitution cannot be curtailed by any agreement. Similarly in *Ramanatha Pillai* v. *State of Kerala*[69], the Supreme Court held that a contract appointment will not operate as estoppel against the government acting in a public or sovereign capacity. In this case the government created the post of Vigilance Commissioner and appointed Sri Pillai for a period of 5 years. However, the post was abolished before the expiry of this period. The same opinion was reaffirmed with greater vigour in *State of Kerala* v. *Gwalior Rayon and Silk Mfg. Co.*[70]. The facts of this case were that the Gwalior Rayon Company established its factory in Kerala with the understanding that the government would supply the raw material i.e. pulp. Later when the government showed its inability to supply the necessary raw material, it entered into an agreement with the company to the effect that the company could purchase its own forest land for drawing raw material and that the government would not interfere with such land for a period of 60 years. Acting on this agreement, the company invested 5 lakhs of rupees and purchased 30,000 acres of land. Later on, acting in pursuance of a law passed by the State legislature, the government acquired the land for agrarian reforms before the expiry of 60 years. The Supreme Court summarily dismissed the plea of estoppel against the government on the ground that the government cannot abdicate their legislative powers by mere agreement.

The court also did not allow the plea of estoppel against the government if it had the effect of repealing any provision of the Constitution. In *Mulamchand* v. *State of M.P.*[71], the Supreme Court did not apply estoppel against the government in cases of contracts not entered into in accordance with the form prescribed in Article 299 of the Constitution. The court held that if the estoppel is allowed it would mean the repeal of an important constitutional provision intended for the protection of the general public.

Cases like those depicted in *Gwalior Rayon & Silk Mfg. Co.*[72] are not difficult to imagine, where non-application of estoppel against the government creates real hardship for the persons who act on its advice or representation. Therefore, in such situations, the court on the basis of equity

68. (1971) 2 SCC 361: AIR 1971 SC 1997.
69. (1973) 2 SCC 650: AIR 1973 SC 2641.
70. (1973) 2 SCC 713: AIR 1973 SC 2734.
71. AIR 1968 SC 1218.
72. *State of Kerala* v. *Gwalior Rayon and Silk Mfg. Co.*, (1973) 2 SCC 713: AIR 1973 SC 2734.

may grant relief. The most significant judicial decision in which the strict rule of non-availability of estoppel against the government was relaxed is *Union of India* v. *Indo-Afghan Agencies Ltd.*[73]. The facts of this case were that the Textile Commissioner published a scheme of export promotion and represented to the exporters of woollen goods that they would be entitled to import raw material of the total amount equal to 100 per cent of the F.O.B. value of exports. In the instant case, the respondent exported goods worth Rs 5 lakhs but the Commissioner issued an import licence for Rs 1.99 lakhs only. On the order being challenged, the government took the plea that the scheme is merely administrative in character and, therefore, not binding on the government. The Supreme Court rejected the contention and held that even if the scheme has no statutory force the government is not entitled to break promises at their whim. The Court observed that the government on some undefined and undisclosed ground of necessity or expediency can neither refuse to carry out the promise solemnly made by it, nor it can claim to be the judge of its own obligations to the citizen on an ex parte appraisement of the circumstances. However, if the government wants to resile from the promise or assurance on the ground that the concessions promised by it are being misused it may be allowed to resile from it if misuse is well established by the government before the court.[74]

The softening of the legalistic attitude of the court under the impact of fairness and justice becomes further evident in *Century Spg. and Mfg. Co.* v. *Ulhasnagar Municipality*[75]. In this case the municipality agreed to exempt existing industrial concerns in the area from octroi duty for a period of seven years. Acting on the representation of the municipality the industrial concerns expanded their business. However, later on the municipality sought to impose duty. This was challenged by the industrial concern. The Supreme Court while remanding the case to the High Court, held that where a private party has acted upon the representation of a public authority, it could be enforced against the authority on the ground of equity in appropriate cases even though the representation did not result in a contract owing to the lack of proper form.

The whole law relating to the application of promissory or equitable estoppel against the government was discussed afresh by the Supreme Court in *Motilal Padampat Sugar Mills* v. *State of U.P.*[76] In this case the appellant was a limited company. On October 10, 1968, a news item appeared stating

73. AIR 1968 SC 718. *See* also *Municipal Corpn. of the City of Bombay* v. *Secy. of State*, (1905) 29 ILR Bom 580; *Collector of Bombay* v. *Bombay Municipal Corpn.*, AIR 1951 SC 469.

74. *Asstt. CCT* v. *Dharmendra Trading Co.*, (1988) 3 SCC 570.

75. (1970) 1 SCC 582: AIR 1971 SC 1021.

76. (1979) 2 SCC 409: AIR 1979 SC 621.

that the respondent-State had decided to give exemption from sales tax for a period of three years under Section 4-A, Uttar Pradesh Sales Tax Act, 1948 to all new industrial units in the State. On October 11, 1968 the appellant wrote to the Director of Industries stating that in view of the sales tax holiday announced by the government, the appellant desired to set up a plant for the manufacture of vanaspati and sought confirmation of the exemption. The Director of Industries confirmed the position. An assurance to the same effect was given by the Chief Secretary, Government of Uttar Pradesh. In view of these assurances the appellant went ahead with the setting up of the factory. In May 1969, the State Government had second thoughts on the question of exemption and requested the appellant to attend a meeting. At the meeting the appellant's representative reiterated that the respondent-government had already granted exemption from sales tax and that on the basis of the assurance, the appellant had proceeded with the work of setting up the factory. The State Government, however, on January 20, 1970, took a policy decision that new vanaspati units which went into commercial production by September 30, 1970, would be given partial concession of sales tax. The appellant's factory went into production on July 2, 1970 but the State Government once again changed its policy and on August 12, 1970 intimated its decision to rescind the concessions. The High Court dismissed the writ and rejected the plea of promissory estoppel against the government. The Supreme Court, allowing the appeal, held that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made, and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not. Of course, the basic requirement for invoking the principle must be present, namely, that the factual situation should be such that "injustice can be avoided only by the enforcement of the promise".

The doctrine of promissory estoppel is not really based on the principle of estoppel, but it is a doctrine evolved by equity in order to prevent injustice. There is no reason why it should be given only a limited application by way of defence. It can be the basis of cause of action.[77]

For attracting the doctrine of promissory estoppel what is necessary is only that the promisee should have altered his position in relying on the

77. *Motilal Padampat Sugar Mills* v. *State of U.P.*, (1979) 2 SCC 409; AIR 1979 SC 621,

promise. It is not necessary that he should suffer any detriment as well. The law of consideration as applicable in contracts cannot be attracted in this area. No doubt, under English law, still the doctrine of consideration continues to inhabit the judicial mind which has thwarted the full development of this new equitable principle and realisation of its vast potential as a juristic technique for doing justice.[78]

Thus the decision of the court in *Motilal*[79] which marks a significant development in the law relating to the doctrine of promissory estoppel stands for the propositions: (*i*) The doctrine could be used as a shield or as a sword, (*ii*) the doctrine is not based on any contract and, therefore, even when government contract is void for non-compliance with Article 299, the government could still be bound by estoppel, and (*iii*) the doctrine cannot be defeated on the plea of executive necessity or freedom of future executive action.

However in *Jit Ram Shiv Kumar* v. *State of Haryana*[80] Kailasam, J. tried to cast some shadow on the *Motilal* decision (*supra*) where he held that doctrine of estoppel is not available against the exercise of executive function of the State and the State cannot be prevented from exercising its functions under the law.

It is gratifying that this doubt was soon removed by the Supreme Court in *Union of India* v. *Godfrey Phillips India Ltd.*[81] when it held that the law laid down in *Motilal case* represents the correct law on promissory estoppel. This view was further reinforced in *Express Newspapers Pvt. Ltd.* v. *Union of India*[82], wherein the doctrine was used to preclude the government from quashing the action of the Minister for approval of a lease as it was within the scope of his authority to grant such permission. Thus the fraud on the exercise of power was checked.

The same point was further explained by the Court in *Delhi Cloth and General Mills* v. *Union of India*[83] when it held that alteration in position by acting on the assurance or representation is enough and consequent detriment, damage or prejudice to the promisee is not to be proved. It is also immaterial whether such representation was wholly or partially responsible for such alteration in the position. The Supreme Court rightly observed that the concept of detriment now is not monetary loss but whether it appears unjust, unreasonable or inequitable that the promisor should be allowed to resile

78. *Motilal Padampat Sugar Mills* v. *State of U.P.*, (1979) 2 SCC 409: AIR 1979 SC 621.
79. *Ibid.*
80. (1981) 1 SCC 11: AIR 1980 SC 1285.
81. (1985) 4 SCC 369: AIR 1986 SC 806.
82. (1986) 1 SCC 133: AIR 1986 SC 872.
83. (1988) 1 SCC 86.

from the assurance or representation having regard to what the promisee has done or refrained from dong in reliance on the assurance or representation.

Applying the above principles the Supreme Court in *Bhim Singh* v. *State of Haryana*[84] estopped the government from going back on its promises made to the employees on the basis of which they shifted to another department. The court held that the appellants having believed the representation made by the State and having further acted upon cannot be defeated of their hopes which have crystallised into rights by virtue of the doctrine of promissory estoppel and, therefore, the State is bound to confer such rights and benefits as were promised by it in entirety. Extending the doctrine of promissory estoppel further into the area of service jurisprudence the Supreme Court in *Surya Narain Yadav* v. *Bihar State Electricity Board*[85] held that repeated representations made by the Board to its ex cadre trainee engineers that they would be permanently absorbed and encadered without taking any examinations are binding on the Board because relying on the representation some trainees did not seek employment elsewhere.

However, as the doctrine of promissory estoppel is an equitable doctrine, it must yield when equity so requires. If it can be shown by the government that, having regard to the facts, as they have transpired, it would be inequitable to hold the government to the promise made by it, the court will not raise an equity in favour of the promisee and enforce the promise against the government.[86] Therefore if the promise is statutorily prohibited or is against public policy the Court will not enforce it against the government. Thus the doctrine of promissory estoppel cannot be invoked to enforce a promise contrary to law. Where prescribed mode of recruitment is only through direct recruitment any promise of appointment by promotion if given by the administrative authority cannot be enforced against it.[87] In the same manner if the representation made by the government though bona fide but is not legally enforceable, the court would not enforce it. *Amrit Banaspati Co.* v. *State of Punjab*[88] is a case on this point. In this case a brochure had been issued by the Punjab Government announcing its 'New Policy' declaring that incentives, one of them being refund of sales tax, would be available to industrialist who would set up industries in focal points. The question was whether the government is bound by promissory estoppel to refund sales tax for a period of three years to the company which it had already transferred to the consumers and which now cannot be refunded to any individual consumers? The Court held that refund of sales tax to the company is statutorily

84. (1981) 2 SCC 673: AIR 1980 SC 768.

85. (1985) 3 SCC 38: AIR 1985 SC 941.

86. *Motilal Padampat Sugar Mills* v. *State of U.P.*, (1979) 2 SCC 409: AIR 1979 SC 621.

87. *Ashok Kumar Maheshwari (Dr)* v. *State of U.P.*, (1998) 2 SCC 502.

88. (1992) 2 SCC 411.

prohibited and against the public policy because being an indirect tax the company has already collected it from the people which cannot be refunded by the company to individual consumers.

The doctrine of promissory estoppel cannot be availed to permit or condone a breach of law. The doctrine cannot be invoked to compel the government or a private party to do an act prohibited by law. There can also be no promissory estoppel against the exercise of legislative power. The legislature can never be precluded from exercising its legislative functions by reverting to the doctrine of promissory estoppel. Therefore, if the U.P. Sales Tax Act, 1948 did not contain a provision like Section 4-A enabling the government to grant exemption, it would not be possible to enforce the representation against the government because the government cannot be compelled to act contrary to the statute.[89] In the same manner the Court held that allotment of land contrary to rules cannot be protected by the doctrine of promissory estoppel.[90]

There seems to be no other reason for excluding the legislature from the operation of promissory estoppel except that the legislature cannot be estopped from exercising its legitimate powers in the public interest.[91] It also implies a presumption and rightly so, that the legislature always acts in the public interest. If this is the basis of such exclusion, there seems to be no reason why it cannot be invoked in favour of executive policy decisions? The ratio of *Motilal Padampat Sugar Mills*[92] is that the executive cannot be so exempted from the rule of promissory estoppel. In fact, what is needed is not so much the pinning down of the government on its policies because some people have relied on it as the protection of the people from irresponsible or indifferent bureaucrats who may mislead them in their official dealings,[93] and in this respect the law still requires more rationalisation. This process of rationalisation unfolded itself in *Sales Tax Officer* v. *Shree Durga Oil Mills*[94] wherein the Supreme Court held that the government is competent to change its policy in the public interest on such basis as resource crunch and that would be sufficient for non-applicability of the doctrine of promissory estoppel. The fact remains that public interest can always override consideration of private loss or gain. Against this backdrop the Apex Court allowed the change in the government's medical reimbursement policy wherein reimbursement had been restricted in case of retired employees.[95]

89. *Ibid.* See also *Asstt. Excise Commr.* v. *Issac Peter*, (1994) 4 SCC 104.
90. *Jalandhar Improvement Trust* v. *Sampuran Singh*, (1999) 3 SCC 494.
91. *State of Kerala* v. *Gwalior Rayon Silk Mfg. (Wvg.) Co.*, (1973) 2 SCC 713: AIR 1973 SC 2734.
92. *Motilal Padampat Sugar Mills* v. *State of U.P.*, (1979) 2 SCC 409: AIR 1979 SC 621.
93. *See* M.P. Singh: *Estoppel against the Government: Is Equity Running Wild*, (1978-79) Delhi Law Review 154.
94. (1998) 1 SCC 572.
95. *State of Punjab* v. *Ram Lubhayya Bagga*, (1998) 4 SCC 117.

The trend in all the important jurisdictions is that the doctrine of promissory estoppel is enforceable against the government. In England the judicially favoured view is that the Crown is not immune from liability under the doctrine of promissory estoppel.[96] In America, though there is no express decision of the US Supreme Court regarding the enforceability of this doctrine against the government, however, the trend in the State courts is strongly in favour of application of the doctrine against the government and public bodies where the interests of justice, morality and common fairness clearly dictate such a course.[97]

In applying this doctrine, no distinction can be made between exercise of a sovereign or governmental function and a trading or business activity of the government. Whatever be the nature of the function which the government is discharging, the government is subject to the rule of promissory estoppel and if the essential ingredients of this rule are satisfied, the government can be compelled to carry out the promise made by it.[98]

Besides the application of promissory estoppel based on equity which creates substantive rights in favour of the person who acts on the representation as to the existing facts or to the future course of conduct, estoppel may also arise against the government under Section 115 of the Indian Evidence Act which contains a rule of evidence and relates to existing facts only. In *Union of India* v. *Rasul Ahmed*[99], the court allowed the plea of estoppel against the railway authorities who represented to the consignee that his goods had not been received by the Parcel Office.

In a democratic society, governed by the rule of law, every government which claims to be inspired by ethical and moral values must do what is fair and just to the citizens regardless of legal technicalities. In this context the judicial behaviour in the area of estoppel against the government is highly decisive.

(F) OTHER PRIVILEGES

Besides the privileges and immunities mentioned above, the government enjoys various other privileges through the medium of statutes. Section 46(2) of the Indian Income Tax Act allows precedence to State claims for arrears of income tax over private debts. The Limitation Act, 1963 provides for a longer period of 30 years under Article 112 for government suits. The same Act denies the benefit of Section 6 to a person who has been dispossessed of immovable property against the government. Section 82 of the Civil Procedure Code makes special provision for the State by laying down that a

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96. *Robertson* v. *Minister of Pensions*, (1949) 1 KB 227: (1948) 2 All ER 767.
97. *Drennan* v. *Star Paving Co.*, (1958) 31 Cal 2d 409.
98. *Motilal Padampat Sugar Mills* v. *State of U.P.*, (1979) 2 SCC 409, 410-15: AIR 1979 SC 621.
99. AIR 1970 Ori 157. *See* also *Delhi University* v. *Ashok Kumar*, AIR 1968 Del 131.

time shall be specified in the decree within which it shall be satisfied, and if it remains unsatisfied within this period, the court shall report the same for the orders of the government. In the same manner Rule 5-B of Order 27 of Civil Procedure Code casts a duty upon the court to assist in arriving at a settlement in suits against the government and Rule 8-A of Order 27 provides that no security shall be required from the government.

These privileges and immunities of the government have a social function to perform. These privileges are not so much for the protection of the government as for the benefit of the people. Therefore, an organic and not pedantic approach of interpretation in this area must guide judicial behaviour.

PROPOSED AREAS OF DISCUSSION

1. Development of the concept of State liability in its historical perspective may be discussed with the aim of evolving a viable principle on which governmental liability in a democratic and welfare State can be based.
2. The real problem with the development of law relating to governmental liability in contracts in India is that the courts try to apply the principles of private law of contracts to the public law area. What new principles of public law of contracts can be suggested on which the liability of the government in contracts can be based in an age of intensive form of government?
3. In the area of governmental liability in India, the principle of sovereign and non-sovereign functions of the State is a justice blasphemy which leads to absurd and arbitrary results. What other principles can be suggested to bring an ideal equilibrium between governmental accountability and individual justice? 'Fault theory' and 'risk theory' developed by the French Administrative Law may be discussed
4. Desirability and the efficacy of a comprehensive legislation on governmental liability in torts and contract and the basic philosophy of such legislation which suits Indian conditions may be discussed.
5. Today when public officers come into contact with private individuals very frequently and at various angles of life, would it not be desirable to allow action by the government for loss of service of its servants? In the light of this fact the desirability of importing private law action *per quod servitium amisit* into public law be discussed.
6. Krishna Iyer, J. observed: 'A government which revels in secrecy...not only acts against democratic decency but busies itself with its own burial.' [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248.] In the light of this observation would it be desirable to abolish government privilege to withhold official information except in cases of 'State secrets'? Even in this situation who should decide, what is a 'State secret'?
7. Application of promissory estoppel against the government is a welcome step but it is argued that the application of this principle in a developing country like India would dampen a viable governmental initiative and action which is necessary if the lot of the poor masses is to be improved. What should be the correct approach?
8. Is there a justification for applying the doctrine of promissory estoppel to administrative decision-making while exempting legislative decision-making on the ground of public interest? What is the solution?
9. Students may discuss the basis of public law of tort on which governmental liability in a welfare society may be based.

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