CHAPTER 11

COMMISSIONS OF INQUIRY

The need for administrative inquiry.

Statutory inquiry.

A. Many administrative and *quasi-judicial* authorities exercising *statutory powers* are required to make some preliminary inquiry as a condition precedent to the exercise of such power, e.g., hearing objections at a local inquiry before making an order of compulsory acquisition of land, under the Acquisition of Land (Authorisation Procedure) Act, 1946, in England,[1] or under s. 5A of the Land Acquisition Act, 1894,[2-3] in India.

The need for such inquiry, broadly speaking, is to collect the views of the parties to be affected by the exercise of the statutory power, together with the relevant facts, and to place them before the Government or other authority for its consideration in exercising the power, though, of course, the statutory authority is not bound to act according to the inquiry report but must exercise his independent view.[4] The procedure to be followed at these inquiries is laid down in the statute itself or in statutory rules.[5] Generally speaking, the party affected by the resulting statutory order must be given notice of the inquiry.[6]

England.

In England, the Council on Tribunals, set up under the Tribunals and Inquiries Act, 1958, has been empowered to report on matters relating to the administrative procedure for holding statutory inquiries and to make such investigations as may be necessary for this purpose. The Council is also to be consulted by the Lord Chancellor before making rules laying down the procedure to be followed for making statutory inquiries.

Ad hoc inquiry.

B. In the present Chapter, however, we are not concerned with inquiries of the preceding type which are needed for the purpose of coming to a decision as to the exercise of a statutory power. In this Chapter we are concerned with inquiries which are held, *ad hoc,* to make some investigation as to any administrative matter of public importance, in order to enable the Government to obtain facts and other materials involved in such matter.

England

In England, administrative inquiries of the present type are not governed by the Tribunals and Inquiries Act, 1958, referred to aboved. In general, any public inquiry may be ordered

1. Similar provisions exist under the (English) Town & Country Planning Act, 1962; the New Town Act, 1946; the Pipelines Act, 1962; the Local Government Act, 1958 (s. 23); the Housing Act, 1957 (Part III).

2. Cf. *Nandeswar Prasad* v. *U.P. Govt.,* A. 1964 S.C. 1217 (1220).

3. See also s. 9 of the Factories Act, 1948; s. 8 of the Indian Boilers Act, 1923; s. 13 of of the Employees Provident Fund Act, 1952.

4. *Nelsovil* v. *Minister of Housing,* (1962) 1 All E.R. 423 (426).

5. E.g., Rules made under s. 7A of the (Eng.) Tribunals & Inquiries Act, 1958; the Town & Country Planning Appeal (Inquiries Procedure) Rules, 1962.

6. *Brown* v. *Minister of Housing,* (1953) 2 All E.R. 1385.

by the Government or a Minister, without any statutory provision, to inquire into and report on any matter of public importance, say, the conduct of officials involved in the disposal of certain lands (as in the *'Crichel Down' case*), and any person may be authorised to hold such inquiry. But, apart from this, there is provision for setting up a regular tribunal for making inquiries, under the Tribunals of Inquiry (Evidence) Act, 1921. Since the provisions of *our* Commissions of Inquiry Act, 1952, are similar, it would be convenient to deal with tribunals or commissions of inquiry separately.

Functions of Commissions of Inquiry.

England.

(A) *England.*—A Tribunal may be set up under the Tribunals of Inquiry (Evidence) Act, 1921, when both Houses of Parliament resolve that it is expedient so to do to inquire into "a definite matter of urgent public importance". In the past, such tribunals have been constituted to investigate into complaints against the police; budget disclosure; loss of a submarine while on diving trials; corruption in municipal administration, operation of a spy in the Admiralty;[7] misconduct of a Minister.[8] No separate statutory authority is necessary for constituting such a Tribunal, and it is not governed by the provisions of the Tribunals and Inquiries Act, 1958.

A Tribunal appointed under the foregoing Act has to sit in public, unless it would in the opinion of the Tribunal be against the public interest to do so. The Tribunal has all the powers of the High Court in the matter of attendance of witnesses, production of documents and the like and witnesses appearing before the Tribunals have the same privileges and immunities as in a court of law.

But a tribunal of inquiry differs from a judicial tribunal in that—

(a) While a judicial tribunal decides only on evidence presented to it by the parties to the litigation, a tribunal of inquiry makes its own inquiries to find out the truth on the matter referred to it.

(b) A tribunal of inquiry has no power to make any self-executing judicial order, such as the imposition of any penalty or any award of damages; its only function is to report its findings to the authority who created it.

(c) The procedure adopted by such tribunal is not necessarily judicial but may be inquisitorial in character.

(d) The object of setting up a tribunal or commission of inquiry is to investigate into facts, to collect evidence and to make its findings available to the Government.[9]

India.

(B) *India.*—In India, similarly, provision for the setting up of a Commission of Inquiry[10] to make investigation into any matter of public importance has been made by enacting the Commissions of Inquiry Act, 1952. Either the Government of India or

7. *The Vassall case.*
8. *The Profumo Scandal* or *the Keeler case.*
9. Cf. *Ram Krishna* v. *Tendolkar,* A. 1958 S.C. 538.
10. A Commission of Inquiry set up under the above Act is to be distinguished from specific administrative Commissions which are created by statutes for the purposes of those Acts, e.g., the Tariff Commission under the Tariff Commission Act, 1951, to inquire into and report on matters relating to tariff protection to industries: the Income-tax Investigation, set up under the Income-tax Investigation Commission Act, 1947, to report on taxation on income, with particular reference to evasion; a commission

the Government of a State can avail itself of the provisions of this Act, provided the conditions prescribed by s. 3 of this Act are satisfied.

The relevant portion of s. 3(1) of this Act is—

"(1) The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the House of the People or, as the case may be, the Legislative Assembly of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly."

It is evident from the foregoing provision that when a resolution in that behalf is made by the Legislature, the appropriate Government is bound to appoint a Commission of Inquiry under this Act.[11] Even in the absence of such resolution, the appropriate Government may appoint such Commission to make an inquiry into a matter of public importance within its own jurisdiction.[12]

There is nothing to bar a succeeding Ministry from advising the Governor to order inquiry against an outgoing Ministry.[12-13] Nor is there any legal bar to the appointment of an inquiry during the pendency of a suit or prosecution where the subject-matter before the Commission is different from that before the Commission.[12a]

Scope of the functions of a Commission of Inquiry.

1. The inquiry made by a Commission of Inquiry under the Act of 1952 is not a judicial or *quasi-judicial* inquiry.[11,4] Its only function is to investigate facts and record its findings thereon and then to report to the Government in order to enable it to make up its mind as to what legislative or administrative measures should be adopted to eradicate the evil found or to implement the beneficial objects it has in view.[9]

2. The Commission has no power of adjudication in the sense of passing an order which can be enforced *proprio vigore*.[9] For the same reason, even though the Commission may make recommendation to the Government as to what measures may be adopted, including punishment for future action

to inquire into production in any industry under the Industries (Development & Regulation) Act, 1951 [cf. *Kamala Prasad* v. *Union of India*, A. 1957 S.C. 676]; a Board of Marine Inquiry, under the Merchant Shipping Act, 1958, to investigate into complaints on matters taking place on board an Indian ship; a court of investigation under the Inland Steam Vessels Act, 1917, for investigating into damage caused to inland vessels or misconduct of its crew. The Indian Aircraft Act, 1934, and the Indian Railways Act, 1890, similarly provide for inquiries into air and railway accidents, respectively; a Commission of Inquiry under the Dentists Act, 1948 (s. 54); Inspectors under the Companies Act, 1956 (ss. 235-236), 239, 247, 249).

Not being appointed under the Commissions of Inquiry Act, all such tribunals must follow the principles of natural justice [*Kiran* v. *Committee of Inquiry*, A. 1989 S.C. 714].

11. Notable examples of such Commissions are the Chagla Commission to inquire into the affairs of Mundhra; the Tendolkar Commission to inquire into the affairs of Dalmia; the Bose Commission regarding the Allenberry Co.; the Ayyangar Commission regarding the conduct of Bakshi Ghulam Mohammad.

12. Cf. *Jagannath* v. *State of Orissa*, A. 1969 S.C. 215 (218), for an instance of a Governor appointing a Commission without a resolution in the State Legislature.

12a. *Jagannath Rao* v. *State of Orissa*, A. 1969 S.C. 215; *Shambhu* v. *Kedar* AIR 1972 S.C. 1515.

13. *Krishna Ballah* v. *Commn. of Inquiry*, A. 1969 S.C. 258 (261).

as a deterrent for delinquents in future, yet, not being a court, it cannot recommend the taking of action by *way of punishment* of the wrongdoer for *past* acts, for punishment for wrongs already committed can be imposed only by a court of law.[9]

3. The purpose of the inquiry may be (a) to ascertain facts so as to enable the appropriate Legislature to undertake *legislation* relating to a matter of public importance; or (b) to make an *administrative* investigation into certain facts, e.g., an inquiry into wrongs alleged to have been committed by an individual or a group of individuals, so that appropriate action may be taken in the matter[12] to eradicate the evil, or by way of a preventive in future cases.[13] It is legitimate to hold an inquiry for investigation of facts for the purpose of taking appropriate legislative or administrative measures to maintian the purity and integrity of political administration in the State.[14-15]

4. A matter does not cease to be of public importance merely because the Minister who is involved has ceased to hold his office,[15] or because there has been no public agitation over it.[15]

5. In order that a Commission may effectively carry out the foregong powers, it may exercise ancillary powers,[9] e.g.—

(i) to collect materials;

(ii) to record its findings on the facts investigated;

(iii) to express its views on the facts so found;

(iv) to recommend future action, as an advisory body;

(v) to permit inspection of documents produced before it, to a party appearing in the matter.[16]

6. On the other hand,—

The Legislature or the Executive cannot usurp *judicial* powers belonging to the Courts by setting up a Commission of Inquiry.[17] Hence, a Commission of Inquiry cannot be set up with power "to recommend the action which should be taken as and by way of securing *redress* or *punishment*",[17] the latter being functions of a court of law.[17]

7. The Supreme Court has held[18] (6 : 1) that allegations into the conduct of Ministers of a State Government (say, of corruption) is a matter of public importance which the Union Government would be competent to inquire into, as the 'appropriate Government' under s. 3(1) of the Commissions of Inquiry Act, 1952. If so, in such a matter both the Union and State Governments would be entitled to exercise the power under this Act, to appoint parallel Commissions. The argument that it would affect the responsibility of the State Ministers to the State Legislative Assembly was turned down on the ground, *inter alia*, that the *collection of facts* through a Commission would not affect such responsibility. At the same time, the majority observed that such power should be used by the Union Government sparingly and not to interfere with the day-to-day working of the State Government, or in a manner vitiated by *mala fides*.[18-19] The result of this decision is somewhat intriguing and may be expected to be clarified in some future decision.

14. *Jagannath* v. *State of Orissa*, A. 1969 S.C. 215 (222); Cf. *Brajnandan* v. *Jyoti*, A. 1956 S.C. 66.

15. *State of J.&K.* v. *Ghulam Mohammad*, A. 1967 S.C. 122 (127).

16. *State* v. *Beri*, A. 1968 Raj. 77 (78).

17. *Ramkrishna* v. *Tendolkar*, A. 1958 S.C. 538 (545).

18. *State of Karnataka* v. *Union of India*, A. 1978 S.C. 68 (pp. 138, 170, 171, 174); *State of J.&K.* v. *Ghulam Mohammad*, A. 1967 S.C. 122 (para. 3).

19. *State of Gujarat* v. *Consumer Research Centre*, A. 1984 S.C. 652.

8. Under s. 7(1)(a), the Government has the discretion to discontinue a Commission if at any time it is of the opinion that the inquiry was necessary; and the Court cannot quash such order in the absence of *mala fides.*[19]

Since the Commission is simply a fact-finding body, without any power of adjudication, there is no bar to its appointment pending any litigation.[14,20]

Procedure of the Commission.

1. Subject to any rules made by the appropriate Government in this behalf, the Commission of Inquiry may regulate its own procedure and to decide whether it will sit in private or in public (s. 8). The Commission has the powers of a civil court in respect of summoning of witnesses, production of documents, receiving evidence on affiadvits and such other powers as may be specified in the notification creating the Commission (ss. 4-5).

2. Since a Commission of Inquiry is an administrative body and not a judicial or *quasi-judicial* tribunal,[19,21] it is not bound by the rules of evidence. It is not trying any cause between contesting parties and its proceedings are not as formal as in a judicial inquiry. Nevertheless, it must be fair and impartial.

3. The Commission may proceed on affidavits and there is no scope for cross-examination of any witness by a party likely to be affected by the proceedings of the Commission unless a witness gives oral evidence.[20]

4. Since the proceedings before the Commission is *not* a *quasi-judicial*[18] procedure, and the Commission is a purely fact-finding body,[18] there is no question of invoking the rules of natural justice,[15] except in so far as they are incorporated in the Act itself, e.g., in ss. 8B-8C of the Act,[18-19] or in the Rules made thereunder.

Legal status of the Commission.

1. Not being a quasi-judicial body, the members of a Commission of Inquiry cannot claim that absolute privilege from defamation which belongs to judicial and *quasi-judicial* authorities.[21]

2. Similarly, not being a court, the members of a Commission of Inquiry cannot, in the absence of statutory protection, claim immunity from contempt of court. But they cannot be held guilty for contempt merely by reason of the fact that the Commission has been set up for inquiry into some matter relating to which a suit or other proceeding is pending in a court of law, because the scope of the Commission and the court are altogether different.[22]

3. Conversely, the law of contempt being applicable only to courts of justice and to the judges of such courts,[23] and a Commission of Inquiry not being a court, a person cannot be convicted for the offence of contempt of court for offending utterances against a Commission of Inquiry, in the absence of statutory provision in that behalf.[24]

4. It follows that a Commission of Inquiry, in *India,* cannot punish anybody under the Contempt of Courts Act, for violating its own orders.[25]

20. *Ibrahim* v. *Susheel,* A. 1984 A.P. 69 (paras. 7-8, 28, 43, 47, 53).
21. *O'Connor* v. *Waldron,* (1935) A.C. 76 (81).
22. *Jagannath* v. *State of Orissa,* A. 1969 S.C. 215 (226).
23. *A.G.* v. *B.B.C.,* (1980) 3 All E.R. 161 (H.L.).
24. *Badry* v. *D.P.P.,* (1983) 2 W.L.R. 161 (170) P.C.
25. *Brajnandan* v. *Jyoti Narain,* (1955) 2 S.C.R. 955.

A Commission of Inquiry is not a 'Court' for the purpose of section 195(1)(b), Code of Criminal Procedure, 1973 (complaint by 'Court in respect of certain offences).

6. As a statutory body, a Commission of Inquiry is subject to the writ jurisdiction of the High Court under Arts. 226[26] and 227.[26]

7. On the other hand, the Commission being a temporary body, not having continuous sittings, where a High Court Judge is appointed as a Commission of Inquiry, he does not demit his office as a Judge or cease to have the power to sit and act as a Judge of the High Court whenever he has time to do so.[27]

Judicial review of orders of a Commission of Inquiry.

U.K.

1. In the *U.K.*, it has been held that where a Commission of Inquiry is set up by statute, its acts and orders would be subject to judicial review on grounds which are applicable to all statutory authorities, e.g., *ultra vires.*[28] Thus, the Court can and will intervene in the interests of the public if it exceeds its powers as conferred by the statute, by doing something or refraining from doing something not intended by the Legislature.[28] It is the business of the Court to interpret the statute and to enforce it against the statutory body.[28]

2. The Court can also intervene on the ground that the exercise of its statutory power has been *unreasonable.* Since, however, the function of a statutory Commission of Inquiry is only to make *recommendations* as distinguished from any final decision or executive order, the Court would be slow to interfere with any recommendation made by such Commission, on the merits, i.e., on the ground that the Court might have made different recommendations.[28] The Court might, of course, intervene if it is shown that, on the materials before it, no 'reasonable commission' could have come to such conclusion. But the onus lies upon the applicant *heavily,* to establish such unreasonableness.[28]

3. Another limitation upon the power of judicial review in such cases is that since the final decision in the matter referred to a Commission lies with the Parliament itself the court cannot take up the function of Parliament, to interfere with the conclusions of the Commission on the merits; it can only interfere where the Commission has failed to carry out the instructions given by Parliament while creating the statutory Commission.[28]

India.

4. In *India,* too, it has been held that the appointment of a Commission of Inquiry can be challenged on the ground of *ultra vires* or *mala fides.*[18]

5. S. 3(1) of the Commissions of Inquiry Act, 1952, has come up before the courts for interpretation of the conditions specified in the above provision, and it has been held that when an *order constituting a Commission* under this Act is made, the party into whose affairs the investigation is directed may challenge the validity of the order on the following grounds, *inter alia*—

(a) That the conditions specified in s. 3(1) have not been fulfilled;[29]

(b) That the order is *mala fide*;[26,29] but mere existence of political rivalry is not enough;[26,29]

26. Cf. *Jagannath* v. *State of Orissa,* A. 1969 S.C. 215 (217); *Ramkrishna* v. *Tendolkar,* A. 1958 S.C. 538 (541).

27. *Alok* v. *Sarma,* A. 1968 S.C. 453 (455).

28. *R.* v. *Boundary Commn.,* (1983) 2 W.L.R. 458 (465, 474-75, 481, 483) C.A.

29. Cf. *State of J. & K.* v. *Ghulam Mohammad,* A. 1967 S.C. 122 (130).

(c) That the order is unconstitutional, having violated Art. 14[26] of the Constitution.

(d) That the Act is itself unconstitutional.[26]

(e) That the order is *ultra vires*,[26,29] e.g., where the charges are vague, in which case the reference cannot be said to relate to a 'definite' matter of public importance.[30]

The conditions specified in s. 3(1) are :

(i) In order to be a matter of public importance, it is not necessary to appoint a Commission for making an inquiry under this Act or the popular House of the Legislature concerned has passed a resolution to that effect. The Government has no discretion in the matter where such resolution has been passed by the Legislature.

II. That the matter into which the inquiry is to be directed must be one of *public importance*.[26]

(i) In order to be a matter of public importance, it is not necessary that there must be a public agitation in respect of it or a public demand for inquiry.[29]

A charge of failure of duty against a responsible public official is itself of public importance :[29]

"It was of public importance that public men failing in their duty should be called upon to face the consequences of their acts. It was certainly a matter of importance to the public that lapses on the part of Ministers should be exposed and the cleanliness of public life, in which the public must be vitally interested, was a matter of public importance. The people were entitled to know whether they had entrusted their affairs to an unworthy man."[29]

"A Minister held a public office, his acts were necessarily public acts and, if they were grave enough, they were matters of public importance. It was alleged that the Minister had acquired vast wealth for himself, his relations and friends by abuse of his official position and there could be no question that the matter was of public importance."[29]

(ii) Nor does 'public importance' necessarily mean that the matter must involve the public benefit or advantage in the abstract, e.g., public health, sanitation or the like or some public evil or prejudice, e.g., floods, famine or pestilence or the like.[26]

Quite conceivably the conduct of an individual person or company may assume such a dangerous proportion and may so prejudicially affect or threaten to affect the public well-being as to make such conduct a definite matter of public importance urgently calling for a full inquiry.[26]

III. The matter or the allegation into which the inquiry is to be directed must be *definite*, as distinguished from being vague.[29-30]

IV. The party affected may also contend that he should not have been singled out for the purpose of the inquiry, where there were other people against whom similar allegations existed.[29-30]

This contention will not stand if there is a differentia for classification. Thus,

(i) If there is an allegation of corruption against a particular Minister, he cannot contend that an order directing inquiry into those allegations is discriminatory because the acts of the Minister were supported by the collective decisions of the Council of Ministers.[30]

30. *Krishna Ballabh* v. *Commission of Inquiry*, A. 1969 S.C. 258 (261).

(ii) A Minister who is charged with corruption constitutes a class by himself.[30]

National Commission for Scheduled Castes and Scheduled Tribes. Under Article 338(1) of the Constitution as amended by the Constitution (65th Amendment) Act, 1990,[31] there has been set up a National Commission for the Scheduled Castes and Scheduled Tribes. Its principal functions will be to investigate and monitor matters relating to safeguards provided for the Scheduled Castes and Scheduled Tribes under the Constitution or any other law and to discharge certain other functions laid down in Article 338(5) of the Constitution.[31]

31. See p. 390 of the Author's *Constitutional Law of India*, 6th Ed., 1991; 11 Sh. 1151-52.

CHAPTER 12

STATUTORY DOMESTIC TRIBUNALS

Scope of Administrative Law, in relation to domestic tribunals.

The phrase 'domestic tribunal' is used to refer to committees of associations like trade unions, social clubs, professional bodies, who have a right to adjudicate upon the rights of or disputes between their members.

Since Administrative Law is a branch of public law, as stated at the outset, a domestic tribunal which deals with private individuals, such as a club or sports association, would prima facie fall outside the province of public law. But, when such a tribunal acquires its jurisdiction from, and is regulated by, statute, it acquires authority from the State, as distinguished from the agreement of its members, and in view of that, a statutory domestic tribunal ranks with other administrative tribunals, created by statute, as a part of Administrative Law.

Contractual and statutory tribunals.

1. When a tribunal exercising jurisdiction is set up by statute, e.g., the Medical Council,[1] it should strictly be called a statutory tribunal rather than domestic tribunal. In the case of statutory tribunal, the jurisdiction of the tribunal rests on the statute or the rules framed thereunder, but the jurisdiction of a non-statutory 'domestic tribunal', such as a club, or a trade union is founded on the contract of its members, express or implied.[2] The Rules of the association, subscribed by all the members, constitute the contract between the members and create the jurisdiction of the tribunal.[3]

2. A material difference follows from this :

(a) In the case of a non-statutory domestic tribunal, *prohibition, certiorari*[4] or *mandamus* cannot lie,[5] though other remedies, such as declaration,[6-7] injunction[8] or damages[8-9] may be available in proper cases,[6-7] on the ground that the rules of the association have been violated,[10-11] going to the root of

1. *Leeson* v. *General Council of Medical Education*, (1889) 43 Ch. D. 366; *General Medical Council* v. *Spackman*, (1943) A.C. 627.
2. *Abbott* v. *Sullivan*, (1952) 1 All E.R. 226 (C.A.).
3. *Lee* v. *Showman's Guild*, (1952) 1 All E.R. 1175 (1180, 1183); *Faramas* v. *Film Assocn.*, (1964) 1 All E.R. 25 (28, 33) H.L.
4. *R.* v. *National Jt. Council of Dental Technicians*, (1953) 1 Q.B. 704.
5. *R.* v. *Disputes Committee*, (1953) 1 All E.R. 327.
6. *Andrews* v. *Mitchell*, (1905) H.C. 78; *Byrne* v. *Kinematograph Renters Society* (1958) 2 All E.R. 579 C.A.; *Annamunthodo* v. *Oilfield Workers' Union*, (1961) 3 W.L.R 650 (P.C.).
7. In *India*, relief under Art. 227 of the Constitution has been granted against a non-statutory domestic tribunal [*Cochin Devaswom Bd.* v. *Akhileswara*, A. 1961 Ker. 282 (287)]. It is, however, questionable whether the word 'tribunal' in Arts. 136 and 227 would include non-statutory tribunals.
8. *Bonsor* v. *Musicians' Union*, (1955) 3 All E.R. 518 (H.L.).
9. *Huntby* v. *Thornton*, (1957) 1 All E.R. 234.
10. *Young* v. *Ladies Imperial Club*, (1920) 2 K.B. 523.
11. *Andrews* v. *Mitchell*, (1905) A.C. 78 (H.L.).

the tribunal's jurisdiction as distinguished irregularity,[11] e.g., that the hearing *required* by the contractual rules has been denied,[12] or that the principles of natural justice have been violated, for parties cannot even contract, stipulate for a power to condemn a man unheard, particularly, in the matter of terminating his membership,[3,11,13] and any such contract would be void, being contrary to public policy,[11] or that the decision has been actuated by malice.[12]

Apart from the above grounds, there is no judicial review upon the decision of a non-statutory domestic tribunal.[14]

(b) Where, however, a domestic tribunal is created by statute, *certiorari* would lie against it in the same manner as in the case of other statutory tribunals,[15] e.g.—

(i) On the ground of defect of jurisdiction,[16] or *ultra vires.*

(ii) On the ground of violation of the principles of natural justice.[15]

In the absence of a statutory provision, it is free to adopt any procedure,[15] but it cannot use any material which was not disclosed to a party and to rebut which he was given no opportunity.[9]

But, apart from observing the rules of natural justice, a domestic tribunal, even when statutory, is not bound by the rules of evidence.[17] Thus, while in a court of law the record of another judicial proceeding is admissible only to the extent of the statements of *fact* contained in it, so that a charge to the jury would be inadmissible, a disciplinary body, having the statutory duty to inquire into an alleged unprofessional conduct, is entitled to look into the *entire* record of a criminal court, including the Judge's charge to the jury,[17] where the unprofessional conduct alleged is on the same ground as led to the criminal prosecution.[15]

But, though not bound by the rules of evidence, mere suspicion cannot take the place of proof even in domestic inquiries.[18]

(iii) On the ground that the finding is perverse or vitiated by an error of law apparent on the face of the record.[19] But in the absence of such exceptional grounds, a finding of fact by a domestic tribunal cannot be interfered with under Art. 226.[19]

3. In India, a statutory domestic inquiry of this type is to be found in the disciplinary inquiry held by an employer to terminate the services of an employee in the sphere governed by the Industrial Disputes Act, 1947, and the Standing Orders made under the Industrial Employment (Standing Orders) Act, 1946. Even though the relationship between an employer and employee is otherwise governed by the common law of master and servant, owing to the foregoing statutory provisions, it has been held that the domestic inquiry for the termination of services of an industrial employee must be in consonance with the principles of natural justice[20] and must not be actuated by *mala fides*[20] or victimisation.

12. *Dawkins* v. *Antobus*, (1881) 17 Ch. D. 615.
13. *Cheall* v. *Apex*, (1982) 3 All E.R. 855 (879, 880, 885) C.A.
14. *Lawlor* v. *Union of Post Office*, (1956) 1 All E.R. 353.
15. *General Medical Council* v. *Spackman*, (1943) A.C. 627.
16. *R.* v. *Architects' Registration Tribunal*, (1945) 2 All E.R. 131 (135).
17. *Ong Bak Hin* v. *General Medical Council*, (1956) 2 All E.R. 257 (P.C.).
18. Cf. *Union of India* v. *Goel*, A. 1964 S.C. 364 (370).
19. *Mukunda* v. *Bangshidhar*, A. 1980 S.C. 1524.
20. *Tata Oil Mills* v. *Workmen*, A. 1965 S.C. 155 (158-59); *Associated Cement Co.* v. *Workmen*, (1964) 3 S.C.R. 652.

Similar instances of domestic inquiry which have come to the forefront in recent years are to be found in the inquiries held against examinees for misconduct at examinations, under the statutory provisions of University Acts.[21] Though the High Court, in exercise of its jurisdiction to issue prerogative writs, does not sit as a Court of appeal over such tribunals,[21] it may interfere if such tribunal violates the principles of natural justice,[21-22] or acts *ultra vires*, or without any evidence at all.[21] But the scope of review under the principles of natural justice does not seem to be very wide,[23] and the principles relating to a criminal trial cannot be imported.[21]

(These principles will be elaborately discussed in Chapter 17 on 'Judicial Control of Administrative Action', *post*.)

21. *Board of High School* v. *Bagleswar*, A. 1966 S.C. 875 (878).
22. *Ceylon University* v. *Fernando*, (1960) 1 All E.R. 631 P.C.
23. *Suresh* v. *University of Kerala*, A. 1969 S.C. 198.

CHAPTER 13

STATUTORY AND PUBLIC CORPORATIONS

Nature of a statutory corporation.

1. Though the theme of the present Chapter is 'Statutory and Public Corporations', it is not possible to appreciate the legal incidents of public corporations unless the general features of a corporation are understood.

2. In *England*, a corporation can be created by Royal Charter as well as by statute and the incidents of two kinds of corporations differ in some respects. But, in *India*, corporations can be created only by laws made under Entries 43-44 of List I and Entry 32 of List II of the 7th Schedule to the Constitution. There are some *unincorporated* societies or associations, registered *under* the Societies Registration Act, 1860, or the Co-operative Societies Act,[1-2] which should be distinguished from statutory corporations.

3. In the present Chapter, we are primarily concerned with corporations created *by* statute,[2] such as the Air Transport Corporations Act, 1953, the Life Insurance Corporation Act, 1956[3]; or a University.[4] (See, further, under 'Public Corporations', *post*).

4. Apart from corporations created by *statute*,[5] there may be corporations incorporated *under* a statute, such as a company registered under the Companies Act, 1956. Such company, however, does not come within the purview of public law, unless it acts as an agency or instrumentality of the Government, thus falling under Art. 12 of the Constitution;[2] or, the majority or whole of its share capital is owned by the Government, in which case it becomes a 'Government company'[6] [see *post*].

5. Corporations, whether created *by* or *under* a statute have certain common characteristics, which may be discussed at the outset :

(i) A corporation is an artificial person established for preserving in perpetual succession certain rights, which being conferred on natural persons only would fail in the process of time.[7]

(ii) A corporation is an artificial person, existing only in contemplation of law and possessing only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.[8] A corporation *sole* consists of only one member at a time. A corporation *aggregate* consists of a number of persons, having in the aggregate an existence, rights

1. E.g., the Executive Committee of a Degree College, *Executive Committee* v. *Lakshmi Narayan*, A. 1976 S.C. 888 (892).
2. Cf. *Ramana* v. *I.A.A.I.*, A. 1979 S.C. 1628 (1639); *Ajoy* v. *Khalid*, A. 1981 S.C. 487 (para. 11).
3. *Sukhdev* v. *Bhagatram*, A. 1975 S.C. 1330 (para. 67).
4. *Gauri* v. *State*, A. 1982 P.&H. 100.
5. E.g., a State Electricity Board, A. 1967 S.C. 1857 (paras. 1, 9).
6. *Sukhdev* v. *Bhagatram*, A. 1975 S.C. 1331 (see s. 617, Companies Act, 1956).
7. Wharton's *Law Lexicon*.
8. *Dartmouth College case*, (1919) 17 U.S. 518.

and duties distinct from those of the individual members who compose it at any time.[9] It has a perpetual succession, a name and a common seal, e.g., a corporation formed for the purpose of carrrying on a business for profit and incorporated by an act of the Legislature.

(iii) It has power to make bye-laws for its own government and transacts its business under the authority of a common seal. Such bye-laws are binding, unless (a) contrary to law, (b) unreasonable, or (c) against the common benefit.[10]

(iv) It has no soul nor tangible form, but enjoys a legal entity, sues and is sued by its corporate name and holds and enjoys property by such name.

(v) The several members of a corporation and their successors constitute but one person in law. The law knows only the body corporate and not the individuals constituting it,[7] and the juristic perrsonality of a corporation is different from the personality of its shareholders or other members.[8]

(vi) A corporation created *by* statute is limited in its capacity by the terms of the statute creating it.[11]

This is known as the doctrine of *ultra vires* (see *ante*), which arises thus :

A corporation, having neither soul nor body, can act only through the agency of some natural person or persons. Now, when a natural person acts through an *agent, the* principal is, in general, bound only by those acts of the agent which are within the scope of the authority conferred by the principal. In the case of a corporation, the limits or the authority of its agents are determined by the instrument which created it, e.g., the articles of association, in the case of a company incorporated under the Companies Act; or the statute,[12] in the case of a statutory corporation.

In either case, any act done by a corporation, i.e., by its agents, which transgresses the limits imposed by the instrument creating it, is said to be *ultra vires* and, therefore, null and void.

Disabilities of a Corporation in Torts.

1. A corporation being a fictitious person, it cannot in the nature of things be brought into hatred, ridicule or contempt by any manner of falsehood, When a libel has been made against a corporation, it is in fact the individuals composing it and not the corporation in its aggregate capacity whose reputation has been injured. A corporation, therefore, *cannot sue for defamation affecting personal reputation only*. It is the individual members only who have a cause of action. Thus, a suit would not lie at the instance of a municipal corporation for libel charging it with bribery and corruption in the administration of municipal affairs.[13]

2. But a corporation can sue for defamation *when it affects its business and property,* and even though the charge is levelled against individual members.[14] In order that a corporation may sue for a defamation two conditions

9. *Solomon* v. *Soloman & Co. Ltd.,* (1897) A.C. 22 (51).
10. *Kruse* v. *Johnson,* (1898) 2 Q.B. 91.
11. *Ashbury Ry. Co.* v. *Riche,* (1875) L.R. 7 H.L. 653.
12. *Mann* v. *Edinburgh Tramways Co.,* (1893) A.C. 69 (79-80) H.L.
13. *Mayor of Manchester* v. *Williams,* (1891) 1 Q.B. 94.
14. *Morris* v. *Prott,* (1945) All E.R. 567 (C.A.).

must exist : (a) The statement must be of such a nature that it would be defamatory if directed against an individual. (b) It must also be of such a nature that its tendency is to cause actual damage to the corporation in respect of its *property and business.* Thus, a libel charging a trading corporation with insolvency or with dishonest or incompetent management is actionable at the suit of the corporation.[15]

Liability of a Corporation in Torts.

At one time it was thought that no action for tort would lie against a corporation; for as an artificial person it is incapable of acting either rightfully or wrongfully. The acts of of a corporation, however, are in reality the acts of its agents and servants; and it is now settled that an action lies against a corporation where the act done (a) is within the powers and purposes of its incorporation, and (b) has been done in such manner that it would be actionable if done by a private individual. And the liability of a corporation for torts of its agents and servants extends to wrongs of malice or fraud no less than to wrongs of other descriptions.[16] Thus, it may become libel, malicious prosecution of deceit, though it has no mind of its own and is, therefore, incapable of malice or fraud.[17] The same principles which govern the *vicarious liability* of a principal for torts of his agents or of a master for torts of his servants, govern the liability of a corporation for the torts of its agents and officials. Consequently, a corporation is liable for all torts committed by its servants in the course of their employment. This broad statement is, however, to be qualified by the following considerations—

(i) A corporation, as distinguished from a private person, is liable only for those acts of its agents or servants as are *ultra vires*, i.e., within the limits allowed by law to the corporate action of that particular body.[18]

In other words, a corporation would not be liable for an act done by a servant if the act be such that it could under no circumstances have authorised its servant to commit.[18]

For acts which are *ultra vires*, the agents or servants of the corporation who committed or authorised the wrong can only be sued.

(ii) Where a corporation has been created by statute, it is subject only to the liabilities which the legislature intended to impose upon it, and its liability must be determined upon a true interpretation of the statute under which it has been created. For instance, the liability of a corporation to pay compensation from its corporate funds for wrongs done by its officers may be limited by the statute of incorporation.

(iii) An authority from the corporation cannot be *implied* if the act done is outside the statutory powers of the corporation.[19]

Liability of a corporation for crimes.

I. A corporation, being an artificial person, has certain exemptions in criminal liability.

(i) It cannot be punished with death or imprisonment. Hence, it cannot

15. *South Hetton Coal Co.* v. *N.E. News Assocn.*, (1894) 1 Q.B. 133 (C.A.).
16. *Percy* v. *Glasgow Corpn.*, (1922) 2 A.C. 299 (H.L.).
17. *Lennards' Carrying Co.* v. *Asiatic Petroleum Co.*, (1915) A.C. 705 (H.L.).
18. *Poulton* v. *L.&S. W. Ry.*, (1867) 2 Q.B. 534.
19. *Campbell* v. *Paddington Corpn.*, (1911) 1 K.B. 869 (878).

be found guilty of a crime where the only punishment is death or imprisonment,[20] e.g., murder.[20]

(ii) Not being a natural person, a corporation cannot be indicted for an offence which could be committed only by a natural person, e.g., bigamy, perjury.[20]

II. But since a corporation acts through its agents and servants, it may be liable for those crimes which may be committed vicariously. On this principle, a corporation has been held liable for offences committed by its agents such as a director[20] who is the 'organ' of the corporation. This liability extends to a statutory as well as a common law offence, including those which involve *mens rea*,[21-22] e.g.—

(a) Criminal libel;[21]
(b) Fraud;[20]
(c) Public nuisance, e.g., obstructing a highway;[23]
(d) Contempt of court;[24]

Special features of a statutory corporation.

When a corporation is created *by* statute, it is impressed with the rights and obligations of a statutory body, together with the incidents attaching to it as a 'corporation'. A corporation may be created by statute for various purposes, e.g., municipal corporations and similar local authorities; universities; national corporations, such as the Air Corporations, Life Insurance Corporation.

I. The first characteristic of a statutory corporation is that its rights, duties and obligations are as provided in the statute by which it is created[25] and that it can have only such rights and can do only such acts as are authorised by that statute, either expressly[26] or by necessary implication, i.e., what are necessary for carrying into effect the purposes of its incorporation,[27] and not expressly prohibited;[28] or what follows is incidental to or consequent upon what the Legislature has authorised.[29]

In the result, whatever is not expressly or impliedly authorised by the statute of incorporation is prohibited to a statutory corporation.[30]

This is known as the doctrine of *ultra vires*, which has already been dealt with.

II. It follows from the doctrine of *ultra vires* that if the subject-matter of a contract made by a statutory corporation be beyond the scope of the objects of its incorporation, it is void *ab initio* and cannot be made valid even by ratification,[30] or by any other means,[31] such as estoppel, acquiescence or lapse of time.[32]

---

20. *R.* v. *I.C.R. Haulage*, (1944) 1 All E.R. 691 (693) C.C.A.
21. *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass Co.*, (1939) 2 All E.R. 613 (C.C.A.)
22. *D.P.P.* v. *Kent & Sussex Contractors*, (1944) 1 All E.R. 119 (C.C.A.).
23. *Campbell* v. *Paddington Corpn.*, (1911) 1 K.B. 869.
24. *R.* v. *Hammond & Co.*, (1914) 2 K.B. 866.
25. *Mann* v. *Edinburgh Northern Tramways Co.*, (1893) A.C. 69 (79-80).
26. *Wenlock* v. *River Dee Co.*, (1885) 10 App. Cas. 354 H.L.
27. *Dundee Harbour Trustees* v. *Nicol*, (1915) A.C. 550 (H.L.).
28. *Galsworthy* v. *Selby Dam Drainage Commrs.*, (1892) 1 Q.B. 348 (354) C.A.
29. *A.G.* v. *Great Eastern Ry. Co.*, (1880) 5 App. Cas. 473 (478) H.L.
30. *Ashbury Ry. Co.* v. *Riche*, (1875) 7 H.L. 653 (672).
31. *G.N.W. Ry.* v. *Charlesbois*, (1899) A.C. 114 (124) P.C.
32. *York Corpn.* v. *Leetham & Sons*, (1924) 1 Ch. 573.

III. Consequently, a statutory corporation cannot be held liable for breach of contract where the contract is *ultra vires*.[33] Even a judgment, obtained by its consent, upon an *ultra vires* contract cannot be enforced against the corporation.[31]

IV. Where formalities for making contracts by a corporation are laid down by statute, such formalities must be strictly carried out.[34]

V. Whatever is inconsistent with the objects of its incorporation as expressed in the statute is *ultra vires*.[35]

It follows that—

(a) A statutory corporation cannot grant or dedicate a public right of way over a land if such user of the land by the public is incompatible with the statutory objects of the corporation.[35]

In other words, if land is vested in a corporation or other public body by statute to be used for some special purpose, which is inconsistent with its use by the public as a highway, the corporation would be incompetent to dedicate the right of way to the public over such land.[36]

On the other hand, there is nothing to debar the corporation from dedicating, expressly or impliedly, if the public use as a highway is *not inconsistent* with the purpose for which the land is vested in, or acquired by, the public body.[35]

(b) A statutory corporation, if authorised by statute to compulsorily acquire land for a specific purpose, cannot acquire any land for a different purpose.[37]

(c) A statutory corporation which holds land for the purposes of a special Act cannot alienate land except for the purposes of that Act, even for valuable consideration.[38]

(d) While under common law, a non-statutory corporation has the power to grant or accept leases, subject to statutory restrictions, if any, a statutory corporation shall have no such power unless expressly empowered by the statute constituting it.[39]

VI. Like other statutory authorities, a statutory corporation is liable to be sued in torts for damages for—

(a) Breach of statutory duties;[40]

(b) A statutory body cannot divest itself of its statutory powers or fetter itself in the use of such powers.[41] Hence, a contract binding such a body not to exercise its statutory powers would be void.[42]

VII. The limitations which are imposed on the powers of a statutory corporation cannot be waived or modified by any agreement or consent of the members of the corporation.[26]

Thus, a corporation which is authorised to raise money for a specific

33. *William Cory* v. *City of London*, (1951) 2 All E.R. 85 (88).
34. *Cope* v. *Thames Haven Ry. Co.*, (1849) 3 Exch. 841.
35. *British Transport Corpn.* v. *Westmortand C.C.*, (1957) 2 All E.R. 353. (358, 361) H.L.
36. *R.* v. *Inhabitants of Leake*, (1833) 5 B. & Ad. 469.
37. *Galloway* v. *London Corpn.*, (1866) 1 H.L. 34 (43).
38. *Mulliner* v. *Midland Rail Co.*, (1879) 11 Ch. D. 611.
39. *Kent Coast Ry. Co.* v. *London Ry. Co.*, (1868) 3 Ch. App. 656.
40. *Liptrot* v. *Br. Ry. Board*, (1966) 2 All E.R. 247 (C.A.).
41. *Birkdale Dt. E.S.C.* v. *Southport Corpn.*, (1926) A.C. 355 (372) H.L.
42. *Ayr Harbour Trustees* v. *Oswald*, (1883) 8 App. Cas. 623 (H.L.).

purpose cannot apply that money for any other purpose, even by the consent of all its members.[43]

VIII. A statutory corporation, having been constituted by an Act of Parliament, everybody is presumed to know the nature and extent of its powers.[44]

The result of this is that no plea of *bona fides*[45] can be raised by a party who deals with the corporation where (i) the powers of the corporation have been exceeded;[46] (ii) the conditions for the exercise of the statutory powers by the corporation have not been fulfilled;[47] (iii) the mandatory procedural requirements, such as need for quorum.[48]

IX. While every corporation has the power to make bye-laws to regulate its government for the purposes for which it was constituted, such bye-laws are not binding upon persons other than its members, unless the power to make bye-laws has been conferred by statute.[49]

In other words, bye-laws made by a statutory corporation are binding upon the world at large, provided they are *intra vires*.

When a bye-law is made under statutory power, a repeal of the Act which conferred the power abrogates the bye-law, unless it is preserved by some provision in the repealing Act.[50]

Contracts by statutory corporations.

At *English* common law, contracts by and with corporations could be made only under seal. This rule has now been changed by the Corporate Bodies' Contracts Act, 1960, under which corporations have been placed on the same footing as private individuals in this respect. A contract by seal or in writing would be required in the case of a corporation where it would be required under the law in respect of contracts between private individuals.

While the general principles relating to *ultra vires* have been fully discussed earlier, the results of its application to statutory corporations, in particular, may be noted in this Chapter :

I. A contract made by a statutory corporation in relation to a matter which is *ultra vires is void*.[30]

II. A corollary from the doctrine of *ultra vires* contracts is that a local authority cannot enter into any agreement to forbear from carrying out its statutory duties[51] or to fetter the future exercise of its statutory powers.[33]

III. Nor can a statutory duty be avoided on the ground of estoppel[52] or mistake.[52]

43. *Bagshaw* v. *Eastern Union Rail Co.*, (1850) 2 Mac. & G. 389.
44. *McGregor* v. *Dover & Deal Ry. Co.*, (1852) 18 Q.B. 618 (631).
45. As in the case of a non-statutory corporation [*Country of Gloucester Bank* v. *Rudry Colliery Co.*, (1895) 1 Ch. 629 (C.A.)].
46. *Irvine* v. *Union Bank of Australasia*, (1877) 2 App. Cas. 366 (P.C.).
47. *Pacific Coast Coal Mines* v. *Arbuthnot*, (1917) A.C. 607 (616).
48. *D'Arcy* v. *Tamar Ry. Co.*, (1866) L.R. 2 Exch. 158.
49. *River Tone Conservators* v. *Ash*. (1829) 10 B. & C. 349 (379).
50. *Watson* v. *Winch*. (1916) 1 K.B. 688.
51. *Maritime Electric Co.* v. *General Diaries*, (1937) 1 All E.R. 748 (H.L.).
52. *Southend-on-Sea Corpn.* v. *Hodgson*, (1961) 2 All E.R. 46.

IV. The exercise of a statutory discretion, too, cannot be fettered by contract or barred by estoppel.[52-53]

V. A statutory corporation cannot apply any of its properties in an undertaking which is *ultra vires*.

Public corporations, what are.

A modern growth. Apart from the normal pattern of governmental organisation, Central, State (in federal countries), and local, an intermediate type of organisation has come into being during the last century[54] because of the expansion of the administrative burden and the need for relieving the formal administrative machinery from those activities of a Welfare State which partake of the character of a *business enterprise*. Such activities are given to statutory corporations which do not form part of the governmental machinery and yet carry on administrative functions in a business-like manner like private companies but subject to statutory limitations.

In *India*, the growth of public corporations dates from April, 1948, when the Government of India, by its resolution on Industrial Policy, announced that—

"management of State enterprise will, as a rule, be through the public corporation under the *statutory control* of the Central Government ...."

Such public corporations, so far created in India, may be grouped under the following heads :

(i) *Industrial or Commercial.* (1) The Industrial Finance Corporation Act (XV of 1948) has set up an Industrial Finance Corporation for the purpose of making medium- and long-term credits more readily available to industrial concerns in India.[55] (2) The State Financial Corporations Act (LXIII of 1951) empowers the State Governments to set up State Financial Corporations with similar purposes.

(ii) *Economic Development.* (1) The Damodar Valley Corporation Act (XIV of 1948) sets up a Corporation called the Damodar Valley Corporation which will be an autonomous body within the framework of the Act. The objects and functions of the Corporation are— (a) to control flood in the Damodar river; (b) to utilise its water for irrigation, generation of electrical energy, navigation; (c) to promote sanitation and economic and social welfare of the Damodar Valley, and the like. Its legal personality makes itself liable to income tax as well as State taxes on its transaction, such as sales tax.[56]

(iii) The Oil and Natural Gas Commission, set up by the Oil and Natural Gas Commission Act, 1959, for the development of petroleum resources.[55]

(iv) The State Bank of India, created by the State Bank of India Act, 1955, to carry on banking business under Government control.

(v) The Central Silk Board Act (LXI of 1948), set up a Central Silk Board for the development of the raw silk industry under Central control.

(vi) A State Financial Corporation set up under the State Financial Corporation Act, 1951, for promoting industrial development.[57]

53. *Ayr Harbour Trustees* v. *Oswald*, (1883) 8 App. Cas. 623 (634).

54. Wade, *Administrative Law* (1978), pp. 140ff.; Hood Phillips, *Constitutional & Administrative Law* (1978), pp. 547ff.; de Smith, *Constitutional & Administrative Law* (1973), pp. 215ff.

55. *Sukhdev* v. *Bhagatram*, A. 1975 S.C. 1331 (paras. 59, 61, 62, 67).

56. *Damodar Valley Corpn.* v. *State of Bihar*, A. 1961 S.C. 440.

57. *Gujarat State Financial Corpn.* v. *Lotus Hotels*, A. 1983 S.C. 848 (para. 3).

(vii) A Warehousing Corporation created by a State Act.[58]

(viii) *Public Service.* (1) The Road Transport Corporation Act (LXIV of 1950) empowers State Governments for the incorporation of Road Transport Corporations in which the Central and Provincial Governments shall be properly represented, for the purpose of improving road transport facilities.[59]

(2) The Life Insurance Corporation has been established by the Life Insurance Corporation Act, 1956, to carry on the business of life insurance which has been nationalised.[55]

(3) The Air Corporations Act, 1953, similarly set up two corporations for the carrying on of the business of air transport, after acquiring the assets of the existing air companies.[60]

(4) The Food Corporation of India, set up by the Food Corporation Act, 1964.[61]

When trading or public service functions are carried on by the Government through a corporation or Government company,[62] it is sometime called a *'public undertaking'*, e.g., the State Trading Corporation, State Electricity Board.

Features of a public corporation.

1. Since a public corporation is created *by* statute, it is a statutory corporation and has all the incidents of a statutory corporation as stated in the preceding pages. Besides, it has certain special incidents of its own, being controlled by the Government, as will appear from below.

2. 'Public corporations' differ from ordinary trading or commercial corporations in that though they are not Departments of the Government, and mostly rest on private capital and management, they act under the control of the Government, on matters of policy and the like and the Government has, in general, the power to supersede their Board of Directors in case of failure to carry out the instructions issued by the Government.

In short, it may be stated that a public corporation is a statutory corporation which has the features of a 'public authority'.[63] An individual may constitute a public authority when public duties are imposed upon it by statute; when such duties are imposed upon a corporation, it is called a 'public corporation'.

In this connection it would be profitable to understand what is known as a 'public authority'. In Halsbury's *Laws of England*,[64] the following statement appears :

"A public authority is a body, not necessarily a country council, municipal corporation or other local authority, which has *public or statutory duties to perform*,[65] and which performs those duties and carries out its transactions *for the benefit of the public and not for private profits.* Such an authority is not precluded from making a profit for the public benefit but commercial undertakings acting for profit and trading

58. *U.P. Warehousing* v. *Vijay*, A. 1980 S.C. 840 (paras. 10, 14).
59. Cf. *A.P.S.R.T.C.* v. *I.T.O.*, A. 1964 S.C. 1486.
60. *Ramana* v. *I.A.A.I.*, A. 1979 S.C. 1628.
61. *State of Punjab* v. *Raja Ram*, A. 1981 S.C. 1694 (paras. 4-5).
62. Cf. *State Trading Corpn.* v. *C.T.O.*, A. [redacted] S.C. 1811 (paras. 6, 8, 27).
63. *Bradford Corpn.* v. *Myers*, (1916) 1 A.C. 242 (247).
64. 3rd Ed., Vol. 30. p. 682; 4th Ed., Vol. 1, para. 6.
65. *Welch* v. *Bank of England*, (1955) 1 All E.R. 811 (827).

corporations making profits, for their corporations are not public authorities, even if conducting undertakings of public utility."[66]

3. (i) A public authority does not cease to be so merely because *in addition to* its public function, it undertakes some trading activity of a profit-making or non-public character. A Harbour Board was thus held by the Privy Council[66] to be a public authority because it levied rates for the wharfage and storage of goods in its warehouses. The public function of the Board was—

"supplying facilities essential to the shipping community in one of the ways authorised by the ordinance by which there were created a harbour board and charged with the management and control of the port ...."[66]

They did not cease to be public authority by choosing to levy rates for the wharfage of goods in its warehouses because it was the function of a 'subsidiary activity'.[66]

(ii) Similarly, the mere fact that in the discharge of its duty or the exercise of its authority the public authority may have made a contract does not of itself deprive the duty or authority of its public quality.[66]

But a duty founded solely on contract cannot be said to be a public duty.[66]

4. On the other hand, a public corporation, even though owned or controlled by the Government, does not become a "Department' of the Government. A Government Department, as the Supreme Court has pointed out,[67] is an organisation which is not only completely controlled and financed by the Government but has also *no identity of its own*. The money earned by such a Department goes to the exchequer of the Government and losses incurred by the Department are losses of the Government. A corporation (including a public corporation), on the other hand, is an *autonomous* body capable of acquiring, holding and disposing of property and having the power to contract. It may also sue or be sued in its own name and the Government *does not figure* in any litigation to which the corporation is a party. A public corporation, controlled by the Government, may be an agency or instrumentality of the Government but yet not a 'Government Department'.[67]

5. A public corporation, thus, is a hybrid organism, combining the features of a business company and a Government Department. A public corporation is created by a statute whenever it is intended to take over some industry or social service from private enterprise, and to run it in the public interest. Instead of giving over the function to a Government Department, it is assigned to a public corporation which has a separate legal entity and can carry on the function with autonomy subject to the ultimate control of Parliament and the Government, mainly on policy matters, so as to safeguard the interests of the public. Their powers are set out in the Acts which created them and they are empowered to make regulations (subject to the doctrine of *ultra vires*).

6. A public corporation which acts as an agency or instrumentality of the Government in exercising governmental power or function shall be subject to the same constitutional limitations as the Government itself.[60]

66. *Firestone Tyre Co.* v. *Singapore Harbour Bd.*, (1952) 2 All E.R. 219 (P.C.).
67. *State of Punjab* v. *Raja Ram*, A. 1981 S.C. 1694 (para. 5).

Juristic status of a public corporation : Is it a Government agency?

(A) *England.*—In England, some special questions have arisen with respect to public corporations in view of the nature of their functions which distinguish them from other statutory corporations.

England.

The foremost of these questions, for instance, are—(a) whether a public corporation would be bound by a statute, (b) whether it can claim Crown privilege in litigation. Broadly speaking, the answers to both the questions depend upon whether a particular public corporation, in view of its functions, can properly be regarded as a *servant or agent*[68-69] of the Crown.

(i) Of course, if the statute which created the corporation expressly states that it shall act on behalf of the Crown, no difficulty arises.[70]

(ii) Where, however, the statute does not expressly say so, the question has to be answered with reference to the functions or purposes of the public corporation :

(a) If it is a merely commercial corporation, it cannot claim Crown immunity or privilege, even though it may be controlled by the Government.[71-72]

(b) If, however, the corporation exercises governmental functions[73] or carries out the public service of the Crown,[74] such as a Hospital Board or Committee, set up under the National Service Act, 1946,[75] or a Territorial Force Association, set up by statute,[76] it would be entitled to Crown immunity.

(B) *India.*—Though the question of the status and ability of non-governmental bodies which have an impact upon the rights of private individuals has arisen in recent times in England as in India on account of the nature of their functions in a Welfare State, there is, however, a marked difference in the manner and extent in which this question has been raised in these two countries :

India.

(i) While in England, the question has presented itself in connection with *statutory* corporations and not in respect of non-statutory companies, in *India*, cases have come up in relation to both[77] and it is, therefore, necessary to remember the essential juristic differences between these two kinds of corporate bodies.

(ii) While in *England*, the question has arisen from the point of view of Crown privileges,—as to whether these could be claimed by statutory corporations, in *India*, it is in the context of the *liabilities* of such bodies that the question has mostly come up before the Courts, namely, whether their action should be regarded as 'State action' for the purpose of enforcement of fundamental rights; whether their servants may be regarded as civil servants for the application of the procedural safeguards under Art. 311.

---

68. *International Ry. Co.* v. *Niagara Parks Commn.*, (1941) 2 All E.R. 456 (H.L.).
69. *Tamlin* v. *Hannaford*, (1949) 2 All E.R. 327 (C.A.).
70. E.g., the Central Land Board, set up by the Town and Country Planning Act, 1947 [s. 3(3)]; *Pfizer Corpn.* v. *Ministry of Health*, (1965) 1 All E.R. 450 (H.L.).
71. *Central Control Board* v. *Cannoh Brewery*, (1919) A.C. 757.
72. *Broadcasting Corpn.* v. *Johns*, (1965) Ch. 32.
73. *Bank Voor* v. *Hungarian Administrator*, (1954) 1 All E.R. 969 (983) H.L.
74. *Mersey Docks* v. *Cameron*, (1865) 11 H.L.C. 443 (504) H.L.
75. Nottingham Hospital Management Committee, (1957) 3 All E.R. 358; *Pfizer Corpn.* v. *Ministry of Health*, (1965) 1 All E.R. 450 H.L.
76. *Territorial & Auxiliary Forces Assocn.* v. *Nichols*, (1948) 2 All E.R. 432.
77. The case of non-statutory Government companies is being dealt with separately.

I. As has been pointed out by the Supreme Court,[78] the Legislature has already been obliged to make certain exceptions to the doctrine of separate personality[79-80] of a corporation as a result of the impact of complex economic factors, and these may grow in number in course of time. The Courts have, similarly, aided this progress of assimilation in the following respects :

(i) A statutory corporation (such as a State Electricity Board), which exercises *statutory powers*,[81] even though it may be carrying on commercial functions, should be held to be 'State' for the purpose of enforcing fundamental rights against them, under Art. 12 of the Constitution.[81-82]

(ii) When an employee of a statutory corporation is subject to the control of Government in the matter of appointment and removal, he would disqualify himself for membership of the Legislature under Art. 102 or Art. 191 of the Constitution, upon the footing that he holds an 'office of profit under the Government' within the meaning of that expression in those Articles.[83]

II. On the other hand, Courts have refused to identify a statutory corporation with the State in all respects. The patent reason for this is the juristic principle that, by reason of its incorporation a corporation acquires a separate legal personality, which cannot be wiped off by the fact that such corporation is controlled by the State or that it carries on public functions.[79,84] Thus, it has been held that—

(a) The fact that since the amendment of Art. 298 of the Constitution by the Seventh Amendment Act, 1956, a State may carry on a business by virtue of its 'executive power' does not convert the commercial function of the State Government into its 'governmental function' so as to render immune from Union taxation, without a declaration by Parliament, under Art. 289(3).[85]

(b) It will also be bound by a statute, such as Sales Tax Act, like a private individual.[80]

(c) As to whether the employees of a public corporation would be treated as Government employees for the purposes of Arts. 309-311, there has been a change of opinion in the Supreme Court.

i. The earlier view[86-87] was that an employee of a statutory corporation, even where it may carry on governmental functions, and is managed almost like a Government department, did not become an employee *under* the Government, so as to attract the protection of Art. 311 of the Constitution.[86] The test for the application of Art. 311 being the existence of a relationship of master and servant between the Government and such employee.[86-87]

The result was somewhat anomalous, namely, that when the Government carries on a business departmentally, as in the case of a Railway, its employees hold posts under the Government, so as to attract Art. 311,[88] because a

78. *Tata Engineering Co.* v. *State of Bihar*, A. 1965 S.C. 40 (48).
79. Cf. *State Trading Corpn.* v. *C.T.O.*, A. 1963 S.C. 1811 (paras. 29, 113).
80. *Damodar Valley Corpn.* v. *State of Bihar*, A. 1961 S.C. 440.
81. *Rajasthan State Electricity Board* v. *Mohan Lal*, A. 1967 S.C. 1856 (1861-63).
82. *Ajay* v. *Khalid*, A. 1981 S.C. 487 (493).
83. *Guru Govinda* v. *Sankari Prasad*, A. 1964 S.C. 254 (258).
84. *Valjibhai* v. *State of Bombay*, A. 1963 S.C. 1890 (1894).
85. *A.P. State Road Transport Corpn.* v. *I.T.O.*, A. 1964 S.C. 1486 (1492).
86. *Mafatlal* v. *Divisional Commr.*, A. 1966 S.C. 1364 (1365).
87. *State of Assam* v. *Kanak*, A. 1967 S.C. 884.
88. Cf. *Moti Ram* v. *N.E.F. Ry.*, A. 1964 S.C. 600.

Department of the Government is a limb of the Government and cannot be treated as a separate legal entity. If, however, the business is carried on through a statutory corporation, the employees of the latter could not claim to be employees of the State but are employees of the corporation, which is a separate legal entity.[86]

ii. After the foregoing comment which appeared at p. 273 of the 1st Edition of this book, *our* Supreme Court has changed its view.

Since 1980, the view taken is that whether or not the employee of a public corporation or a Government company comes under the category of persons 'holding office *under* the Government' within the meaning of Art. 311, the principles underlying Art. 311 should be applied in the matter of disciplinary proceedings against employees of public corporations, either as principles of natural justice[89] or under the principle of equality under Arts. 14 and 16, read with Art. 12.[90] The fact that Art. 12 appears in Part III and Art. 311 appears in Part XIV of the Constitution should not make any difference in substance from the standpoint of the guarantees under Arts. 12, 14 and 16.[90]

It should be noted, however, that the pre-1980 decisions[86-88] have not and could not have been overruled by the later Division Benches.[89-90]

Disabilities of a Public Corporation.

In so far as a public corporation is a statutory body, it is subject to the following disabilities which flow from its statutory incorporation :

I. It is subject to the rule of *ultra vires*.[91]

But the terms of statutes creating public corporations are usually so wide that it is difficult to sustain a charge of *ultra vires*.

II. The general principle is that when a corporation is created by a statute to do things which could have been done by a private individual,[92] e.g., the maintenance of a dock[93] or a canal[94] or a lighthouse,[95] the ownership of railways, or the carriage of passengers and goods,[92] then, in the absence of anything to the contrary in the statute, it shall "be subject to the same liabilities as the general law would impose on a private person doing the same things".[93]

It follows that—

(i) It must pay damages for injury caused to any person occasioned by its failure to keep the works in proper repair,[93] or by negligence in making repairs, or by negligent use of their property.[95]

In such cases, it is immaterial whether the corporation is earning profit from the works, not for its own benefit but for the benefit of the public as trustees,[96] or even without profit.[93]

(ii) A public corporation would be liable for wrongful acts done not

89. *U.P. Warehousing Corpn.* v. *Vijay*, A. 1980 S.C. 840 (845-46), Sarkaria & Chinnappa Reddy, JJ.).
90. *Kalra* v. *P.&E. Corpn.*, A. 1984 S.C. 1361 (para. 20) (Desai, Chinnappa Reddy & Varadarajan, JJ.).
91. *Ashbury Ry. Carriage & Iron Co.* v. *Riche*, (1875) L.R. 7 H.L. 653.
92. *Tamlin* v. *Hannaford*, (1949) 2 All E.R. 327 (C.A.).
93. *Mersey Docks & Harbour Bd.* v. *Gibbs*, (1866) L.R. 1 H.L. 93 (110; 122-23).
94. *Parnaby* v. *Lancaster Canal Co.*, (1839) 11 Ad. & El. 223.
95. *Romney Marsh* v. *Trinity House Corpn.*, (1872) L.R. 7 Ex. 207.
96. *Gilbert* v. *Trinity House Corpn.*, (1886) 17 Q.B.D. 795 (799-801).

only by itself but also by its servants,[96] just as a master would be liable in torts for the wrongs done by its servants in private law.

But a public authority would not be liable in torts for acts done by its servants where the acts are done by the servant in the discharge of a duty imposed upon the servant himself by statute,—as distinguished from a duty imposed upon the authority itself, to be performed through servants.[97]

(iii) It must be subject to any statute applicable to a private person undertaking that work, e.g., the Rent Restriction Acts, where the corporation lets out its property.[92]

Rights and privileges of a Public Corporation.

I. From the premise that the rights and obligations of a public corporation are created by a statute, certain special incidents follow, e.g. :

(a) When a statutory corporation is under a duty to supply to the public any commodity on payment of certain charges, e.g., electricity[98] in the case of an Electricity Supply Corporation, drugs[100] in the case of a National Health Service hospital, or water in the case of a municipal corporation,[1] there is no 'sale' because the right of the public to get the commodity is statutory and does not depend on any consensus or agreement. The corporation is bound to supply it to any consumer who chooses to exercise his statutory right and demands it, on payment of the statutory charge.[100]

The consumer cannot, in such cases, obtain any remedy on a *contractual* basis against the corporation. His remedy would be confined to the statutory penalty[98] or other remedy as may be prescribed by the statute itself or in tort on the ground of negligence or breach of statutory duty.

Conversely, however, the freedom of contract of a public corporation cannot be interfered with unless there is any infirmity based on a specific provision of the Constitution.[99]

(b) When a public corporation is created not for the purpose of undertaking commercial enterprises but for the performance of some *governmental function,* it may be entitled to certain rights or privileges which a private individual would not be entitled to[2] (see p. 320, *ante*).

(c) When the profits earned by a public undertaking go to the public revenue, its employees may be rationally classified apart form the employees of a private corporation, so that benefits conferred upon the employees of the public undertaking will not constitute discriminations under Art. 14.[3]

---

97. *Stanbury* v. *Exeter Corpn.*, (1905) 2 K.B. 838.
98. *Willmore* v. *S.E. Electricity Bd.*, (1957) 2 Lloyd's Rep. 375.
99. *O.N.G.C.* v. *Association*, A. 1990 S.C. 1851 (para. 6) - 3 Judges.
100. *Pfizer Corpn.* v. *Ministry of Health*, (1965) 1 All E.R. 450 (455, 461, 463, 466, 478) H.L.
1. *Read* v. *Croydon Corpn.*, (1938) 4 All E.R. 631.
2. *Nottingham Hospital Committee* v. *Owen*, (1957) 3 All E.R. 358; *Pfizer Corpn.* v. *Minister of Health*, (1965) 1 All E.R. 450 H.L.
3. *Shashikant* v. *Union of India*, A. 1990 S.C. 2114 (para. 35).

CHAPTER 14

GOVERNMENT COMPANIES AND NON-STATUTORY PUBLIC UNDERTAKINGS

The problem of 'Government Companies'.

1. Apart from corporations created by statute, a number of non-statutory companies have sprung up with the advent of the State into the commercial sphere. These are, to all intents and purposes, limited liability companies registered under the Companies Act. But owing to the fact that the Government is the owner of the share capital or the major portion thereof,[1] these companies raise the question whether they should be treated as governmental or public bodies for any purposes.

2. S. 617 of the Companies Act, 1956, defines a 'Government company' as follows—

> "For the purposes of this Act, 'Government company' means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a Government company thus defined."

Being a company registered under the Companies Act, it has undoubtedly a juristic personality apart from that of its shareholders,[2] notwithstanding that the ownership of its shares belongs exclusively to the Government or its officers or that it is controlled by the Government,[3] e.g., the State Trading Corporation,[4] the Hindustan Steel Ltd.[5]

3. Because of this distinct juristic personality of a Government company, it has been held that—

Art. 226 of the Constitution.

(a) Unless entrusted with any *public duties*, by statute,[6] or it is constituted an 'agency' of the Government,[7] no relief can be had against a Government company, in a proceeding under Art. 226 of the Constitution.[6]

Art. 311(2)

(b) Art. 311(2) of the Constitution cannot be invoked by the employees of a Government company.[8] The reason is that there is no relationship of master and servant between these employees and the *Government*. Notwithstanding a predominant Government

1. Hindustan Shipyard Ltd. [*In re Hariharan*, A. 1960 A.P. 518]; *Neyveli Lignite Corpn.* [*Lakshmi* v. *Neyveli Lignite Corpn.*, A. 1966 Mad. 399].
2. *Tata Engineering Co.* v. *C.T.O.*, A. 1965 S.C. 40.
3. *Heavy Engineering Mazdoor Union* v. *State of Bihar*, A. 1970 S.C. 82.
4. Cf. *S.T. Corpn.* v. *C.T.O.*, A. 1963 S.C. 1811 (para. 27).
5. Cf. *Guru Gobinda* v. *Sankari Prasad*, A. 1964 S.C. 254.
6. *Praga Tool Corpn.* v. *Immanuel*, A. 1969 S.C. 1306.
7. *Ramana* v. *I.A.A.I.*, A. 1979 S.C. 1628 (para. 28).
8. *Agarwal* v. *Hindustan Steel*, A. 1970 S.C. 1150 (para. 10), approved in *Ramana* v. *I.A.A.I.*, A. 1979 S.C. 1628 (para. 30); *Heavy Engineering* v. *State of Bihar*, A. 1970 S.C. 1150.

control, such a company does not become identified with the Government and does not forfeit its separate legal entity.[8] It is called a 'Government company, in s. 617 of the Companies Act *only for the purposes of that Act*, namely, to confer upon it certain special rights and obligations.[9]

4. The case would, of course, be otherwise when a non-statutory company may be required by statute to carry on duties of a public nature, e.g., a public utility service.[10]

It is obvious that the theory of a separate juristic personality of a corporation is likely to cause hardship[11] to the employees of such Government undertakings as well as other private individuals who are affected by their acts, which are, in substance, nothing but the acts of the Government or its officials. Judicial sentiments have, therefore, been roused from time to time, urging that the 'veil' of these corporations and companies should be 'pierced'[11] so that their real nature may be revealed and they may be saddled with the same liabilities as if they were limbs or agents of the State. It is, however, impossible for the Courts to create a 'new jurisprudence' so long as the juristic theory of a separate personality of a corporation or company remains. It has just been pointed out that that theory has been upheld by the Supreme Court up to the latest decisions of 1969. The veil can be pierced only by the Legislature.

It is, therefore, high time that the Legislature should intervene to equate the liabilities of statutory corporations and Government companies with those of the Government as far as possible. Thus, it may be provided that their employees shall be deemed to be holders of civil posts for the purposes of Art. 311(2), or procedural safeguards in their favour may be provided for in some suitable legislation.[12]

It is to be noted that in recent cases[13-14] the Supreme Court has, through the backdoor responded to the foregoing sentiment by holding that even though Art. 311(2) may not be attracted to a Government company, yet, when a Government company or a public corporation constitutes an 'agency' or instrumentality of the State for the purposes of Art. 12 of the Constitution, the principles underlying Art. 311(2) should be applicable to employees of this category of Government companies, as principles of natural justice, read with Art. 12.

As regards Art. 12 of the Constitution, too, the consensus of opinion in the High Courts was that notwithstanding the share or management control by the Government, a Government company did not lose its juristic entity as a company registered under the Companies Act so as to be identified with the 'State' under Art. 12.

Art. 12.

But the three-Judge decision of the Supreme Court in *Ramana's case*[15] has opened up a new vista in this wood. The decision, in short, was that any body or authority, whether constituted by statute or not (paras. 27, 29),[15] may come within the definition of 'State' under Art. 12, if it acts as an *'agent*

9. *Valjibhai* v. *State of Bombay*, A. 1963 S.C. 1890 (1894).
10. *Sudhir* v. *Calcutta Tramways Co.*, A. 1960 Cal. 396; *Nagpur Corpn.* v. *Nagpur E.L.&P. Co.*, A. 1958 Bom. 498.
11. Cf. *Verghese* v. *Union of India*, A. 1963 Cal. 421 (427).
12. *Ranjit* v. *Union of India*, A. 1969 Cal. 95 (103).
13. *U.P. Warehousing Corpn.* v. *Vinay*, A. 1980 S.C. 840 (845-46).
14. *Kalra* v. *P.&E. Corpn.*, A. 1984 S.C. 1361 (para. 20).
15. *Ramana* v. *I.A.A.I.*, A. 1979 S.C. 1628 (para. 29).

or instrumentality' of the Government. This 'agency' does not mean the relationship between a principal and agent under the law of contract, according to which acts of the agent are binding upon the principal (para. 29),[15] but the factum of such body exercising governmental powers or functions, so that its acts may be treated, under constitutional law, to be 'State action' (paras. 14-15, 16).[15,2]

For the application of the doctrine of 'State agency', it is immaterial whether a corporation has been created by or *under* a statute. Hence, a Government company or an ordinary company or society registered under the Societies Registration Act[16] would be regarded as an agency of the Government for the application of Art. 12 if the tests of State control over it are satisfied.[16-17] Nor is it necessary that there should be a relationship of principal and agent between the Government and such company or association.[15] What is essential is that the company is exercising some function of the Government and is acting on behalf of the Government and not on its own behalf.[15]

5. Again, the situation would be different if the undertaking of a non-statutory body is subsequently taken over by a statutory Board, acting *on behalf of* the Government, and exercising powers *delegated* by the Government, in which case the erstwhile employees of the non-statutory Board may become employees of the Government, subject to the provisions of the statute (e.g., the Punjab Reorganisation Act, 1966).[18]

Sometimes the Government acquires the assets and liabilities of a Government company and thereafter transfers the undertaking to a public corporation, such as the Bharat Petroleum Corporation,[19] in which case the protection of Arts. 12, 14 and 16 may be attracted to employees of such corporation (see *below*).[19] The situation is the same when a registered society, such as the Indian Council of Agricultural Research, is treated as an integral part of the Government.[20]

A Government Company as distinguished from a Public Corporation.

A Government company differs from a public corporation in that while a public corporation is created by a specific statute, e.g., the Food Corporation Act, 1964,[21] a Government company is a company incorporated under the Companies Act, and has been given a specific status in the Companies Act, 1956 (ss. 617-619A). A public corporation is a statutory corporation and its powers are derived from and limited by the provisions of the Act which created it; it is, therefore, subject to the doctrine of *ultra vires*.[22] No such question arises in the case of a Government company, because its powers are not derived from any specific statute but from the memorandum of association like other companies, so that its acts would be *ultra vires* only if they transgress the terms of its memorandum of association,[23] subject to the provisions of the Companies Act.

16. *Minhas* v. *Indian Statistical Institute*, A. 1984 S.C. 363 (para. 21); *Ramchandra* v. *Union of India*, A. 1984 S.C. 541 (paras. 12-13) [Contrary view in *Sabhajit* v. *Union of India*, A. 1975 S.C. 1329, though not yet overruled, has been discredited by these later decisions].
17. *Ajay* v. *Khalid*, A. 1981 S.C. 487 (paras. 11-12, 15).
18. *Jaswant* v. *Union of India*, A. 1980 S.C. 115 (paras. 24-26, 28).
19. *Som Prakash* v. *Union of India*, A. 1981 S.C. 212 (para. 32).
20. *Ramachandra* v. *Union of India*, A. 1984 S.C. 541 (paras. 11, 14).
21. Cf. *State of Punjab* v. *Raja Ram*, A. 1981 S.C. 1694 (para. 5).
22. *Khanzode* v. *Reserve Bank of India*, A. 1982 S.C. 917 (para. 21).
23. Cf. *Lakshmanaswami* v. *L.I.C.*, A. 1963 S.C. 1185 (paras. 12-13).

CHAPTER 15

THE OMBUDSMAN

Inadequacy of judicial control over the administration.

In a purely administrative sphere, governed by no statute, as is evident from the foregoing pages, the opportunity and scope for judicial review of an administrative decision is very meagre, except in the few cases where there is statutory provision for an appeal to an administrative tribunal.[1] Quite a bulk of administrative decisions, again, are taken by the official heads of Departments without even a reference to the Minister-in-charge.[2]

Even in the sphere where judicial review arises out of constitutional or statutory limitations, judicial review is limited to ensuring the minimum standards of justice or fair hearing and there is no means of correcting an erroneous decision on facts, or investigating into complaints of misconduct, inefficiency, delay, negligence or the like against officials.

The only remedy of an aggrieved citizen, in such cases, is to persuade the Minister, if he is accessible to the aggrieved citizen, or to draw his attention by raising questions in Parliament to which he is responsible. But it is not easy to compel an unwilling Minister to disclose all facts nor is it possible to suggest a course of action through questions, adjournment motions and the like. Parliamentary remedies, in short, are not adequate in cases of perverse decisions which do not go to the length of bringing the Minister-in-charge through a motion of want of confidence. The channel of making an inquiry into an allegation of perversity or misconduct against a Minister himself, where he belongs to a party commanding a strong majority in Parliament, is also not clear.

The foregoing deficiencies of the parliamentary system of administration and judicial review of the traditional English pattern have led the world to think of alternative or additional institutions to control wrong decisions, maladministration or corruption of public officials and the two principal alternatives so far devised are—

(i) The *Conseil d'Etat* under the French system of *Droit Administratif* (see pp. 13-14, *ante*).

(ii) The *Ombudsman* in the Scandinavian system.

France.

The French system provides for bringing all administrative acts before an administrative tribunal called the *Conseil d'Etat*. Though it is not a judicial body, being composed of experienced members of the civil service, it has got both advisory and judicial powers, including the power to quash an administrative decision and to award compensation to the aggrieved citizen. It has not only the power to advise

1. Cf. The Report of British section of the International Commission of Jurists, known as the *Whyatt Report, 1962*,—after the name of the Chairman of the Committee (Sir John Whyatt), set up in 1960.

2. In *India*, this is made possible by Standing Orders made under Rules of Business issued under Arts. 77 and 166.

the Government on questions of policy and the administration, generally, but to entertain complaints against the administration direct from the aggrieved citizens. On receipt of such complaint, the *Conseil* can require the official or Minister concerned to justify his act. The *Conseil* is entitled to see not only that the administration observes the highest standards of behaviour but also that they arrive at a correct decision or a decision which appears to be reasonable to the *Conseil* and that they observe a fair and formal procedure, e.g., after complying with the requirements of natural justice. If the action complained of fails in satisfying any of these standards, the *Conseil* may quash it and award compensation to the citizen aggrieved.

Office of the Ombudsman.

The other alternative is the Swedish system of Ombudsman (which means 'the grievance man' or a commissioner of the administration). It does not go to the length of reviewing all administrative actions by an administrative tribunal after the French *Conseil d'Etat* having power to enforce its decisions, but sets up an independent advisory authority, which cannot quash administrative decisions nor enforce its own decisions, but can make *investigation* and recommend action to Parliament not only against public officials but also against Ministers, against whom complaints may be made to the Ombudsman by aggrieved citizens.

Sweden.

The office of Ombudsman was set up in Sweden over one and a half century ago (1809) and since then it has been adopted in many countries, such as Finland (1919), Denmark (1954), Norway (1960), New Zealand (1962), Mauritius (1966), Guyana (1966) and United Kingdom (1967).

As stated earlier, the origin of the office of Ombudsman was in Sweden, being provided by the Constitution (1809) itself (Arts. 96 *et seq*). There are two officers of this status, one for the civil and other for the military administration. They are nominees of Parliament, having been chosen by Parliament from experienced Judges.

The function of the Ombudsman is not only to supervise the observance of the laws as a representative of Parliament and to report to Parliament, but also to institute proceedings (in the manner of a Public Prosecutor) against those officials who have acted contrary to law or with partiality or negligence. He can, in similar cases, impeach any Judge,[3] including those of the Supreme Court, before the Court of Impeachment. But, curiously, the Ombudsman has power to deal with the Ministers themselves, who can be impeached only by motion in Parliament.

Anybody can complain to Ombudsman, be he a private citizen, an official or a Judge. The Ombudsman can also investigate a case *suo motu,* but he cannot quash or review any administrative decision. His jurisdiction has recently been extended to local administration as well.

The Danish Ombudsman has comprehensive powers, under a statute of 1954, to 'supervise all State administration'—civil and military—and to keep himself informed as to whether any person (including Ministers) pursues *unlawful ends,* takes *arbitrary* or *unreasonable* decisions or otherwise commits *mistakes* or acts of *negligence* in the discharge of his duties. The Ombudsman can receive complaints direct

Denmark.

3. Actions of Judges are outside the jurisdiction of the Ombudsman except in Sweden and Finland.

from the aggrieved citizens, and, on being satisfied that there is a *prima facie* case made out by a complainant, may call for any information from the Departments, *including confidential* matters (though confidential information is not disclosed to the complainant). But the Ombudsman has no power to quash a decision or give any other remedy to the complainant. His substantial function is only to publish a report, calling attention of the Government and the public to the need for rectifying the error found by it,[4] or for instituting legal or disciplinary proceedings.

Norway.

Norway has created the office of a Commissioner for the Civil Administration by legislation in 1960.[5] A Military Commissioner had been created, earlier, in 1952.

The function of the Norwegian Ombudsman is "to ensure that the individual citizen suffers no wrong through decisions made by administrative authorities, and that they, and all persons, exercising power in the service of the State do not make *mistakes* or *neglect* of their duties". Unlike his Swedish counterpart, the Norwegian Ombudsman has no general responsibility for the supervision of the administration. He can only investigate into *individual cases,* either on the complaint of an aggrieved citizen or *suo motu,* after the decisions have already been made by the administrative authorities. He has no power to institute criminal or disciplinary proceedings or to demand that they are instituted. His only function is to investigate the facts and make his own findings for the information of the public and guidance of the administration.

New Zealand.

The office of Ombudsman was created in New Zealand[6] in the year 1962, by enacting the Parliamentary Commissioner (Ombudsman) Act, 1962. Any person, other than a Member of Parliament may be appointed Ombudsman, for the term of each Parliament. He is independent of the Executive inasmuch as his appointment depends on the recommendation of Parliament, as in Denmark. Once appointed, he is practically independent also of Parliament, since his salary cannot be diminished and he is not subject to the superintendence of Parliament, but is removable on the advice of Parliament for specified causes.

The Ombudsman's principal function is "to *investigate* any decision or recommendation made, or any act done or omitted, relating to a matter of *administration* and affecting any person or body of persons in his or its personal capacity, and to report to Parliament. This includes the acts of Ministers also but omits administrative tribunals and appeal authorities and local authorities, and any matter which is justiciable in the courts or any matter relating to members of the Armed Forces.

The scope of the jurisdiction of the New Zealand Ombudsman is wider than that of his Swedish counterpart inasmuch as the former can interfere not only in cases of maladministration, but also in cases of wrong decision, *ultra vires,* unreasonable, oppressive or discriminatory acts, or decisions without reason. He can, in his report to Parliament, recommend suitable action on his findings. Besides, he can draw the attention of Parliament to the desirability of *reconsidering* any law he believes to have produced unreasonable or unjust results.

4. See Articles on 'the Danish Parliamentary Commissioner' in *Public Law,* (1958), p. 236: (1959), p. 115.

5. First appointed in 1963.

6. See Gelhorn, *The Ombudsman in New Zealand,* (1965) 53; *California Law Review* (No. 5); 'Ombudsman in New Zealand', 5 J.I.L.I. 307.

Anybody, including public officials themselves (regarding their own conditions of service) may complain in writing to the Ombudsman. He can also make any investigation *suo motu*. The Ombudsman conducts his investigation in private. He has the power to call for evidence except a disclosure of Cabinet deliberations. Apart from sending reports to Parliament in individual cases, he must submit an annual report to Parliament on the exercise of his functions under the Act.

The Ombudsman and his staff have been given immunity from judicial proceedings and no decision or proceeding of the Ombudsman can be called in question before a court of law except on the ground of lack of jurisdiction.

England.

In *England,* suggestions to introduce the French system of *droit administratif* had been rejected by the Franks Committee [(1957) Cmd. 218 (para. 408)] and the suggestion for the appointment of a Parliamentary Commissioner of the Scandinavian type which had initially been made by jurists [*vide* Public Law, 1959, p. 115; 1960, p. 145; 1962, p. 15; Justice (1961), The Citizen and the Administration] was turned down by the Government (1960) 640 H.C. Deb. (1693-1756), but eventually the office of the Parliamentary Commissioner for Administration has been created by legislation, namely, the Parliamentary Commissioner Act, 1967.[7] He has got an independent status like the Comptroller and Auditor-General and has statutory powers. He is appointed by the Crown and cannot be dismissed except by a motion in Parliament. His salary and pension are also charged on the Consolidated Fund. He is an *ex-officio* member of the Council on Tribunals, set up under the Tribunals and Inquiries Act, 1958.

The Commissioner has the power to entertain any complaint of a subject as regards his relationship with the Central Government, excluding certain specified matters, such as those relating to the diplomatic officers, foreign affairs, matters affecting the security of the State or the personnel in the Civil Services or the Armed Forces, investigation of crimes and matters which are justiciable and redress through the courts is available. The Commissioner cannot, however, entertain a complaint direct from a citizen; it must come through a member of the House of Commons.

The procedure before the Commissioner is informal, but he has the power to call for oral or documentary evidence from anybody, excluding Cabinet documents and to take evidence on oath. But he has no power to punish anybody for contempt in refusing to comply with his orders; in such cases, he has to refer the matter for consideration of the High Court. The Commissioner's jurisdiction is confined to *faults in the administration,* as distinguished from questions of policy and he has no power to implement his finding. His only function is to report to Parliament and it is for Parliament to decide what action should be taken on his report. His jurisdiction extends to ministers but certain matters are excluded, such as matters affecting foreign affairs, extradition, investigation of crimes. Barring these exceptions, the Parliamentary Commissioner may investigate into allegations of 'maladministration', i.e., injustice caused by action taken in the exercise of 'administrative functions'.

7. Adopting the recommendations of the Whyatt Report, 1962.

The Lokpal.

India.

In *India*, the creation of the office of a Lokpal, similar to that of the Ombudsman, was recommended by the Interim Report of the Administrative Reforms Commission,[8] for the following reasons, *inter alia*—

(i) Since a democratic government is a 'government of the people, by the people and for the people', it has an obligation to satisfy the citizens about its functioning and to offer them adequate means for the ventilation and redress of their grievances.

(ii) The existing institutions of judicial review and Parliamentary control are inadequate in view of the ever-expanding range of governmental activities, most of which are discretionary.

The institution of Ombudsman is, therefore, considered by the Commission as an easy, quick and inexpensive machinery for the redress of individual grievances of the citizens, in the light of the experience of other countries where such office has already been set up. Before laying down detailed provisions as to this office, the Commission has formulated the following principles which should be borne in mind in setting up such institution in India :

(a) He should be demonstrably independent and impartial.

(b) His investigations and proceedings should be conducted in private and should be informal in character.

(c) His appointment should, as far as possible, be non-political.

(d) His status should compare with the highest judicial functionary in the country.

(e) He should deal with matters in the discretionary field involving acts of injustice, corruption or favouritism.

(f) His proceedings should not be subject to judicial interference and he should have the maximum latitude and powers in obtaining information relevant to his duties.

(g) He should not look forward to any benefit or pecuniary advantage from the executive Government.

Since a draft Bill was appended to the Interim Report of the Commission, it would be convenient to refer to the provisions of that Bill for summarising the features of the institution as proposed in India :

Lokpal

The Lokpal shall be appointed by the President, on the advice of the Prime Minister who is to consult the Chief Justice of India and the Leader of the Opposition in the Lok Sabha (i.e., the House of the People). Before a person is appointed Lokpal, he must sever his connection, if any, with any political party, his membership of Parliament or the Legislature of a State or any office of profit. The term of the office shall be five years with eligibility for re-election. He shall not be removable except by the procedure of impeachment, as in the case of the Supreme Court Judges. His status and salary shall be the same as that of the Chief Justice of India.

The Lokpal may *investigate* into any administrative action taken by or with the approval of a Minister or Secretary of the Union or a State Government, either on receipt of a written complaint made by an aggrieved person (within 12 months from the date of the action complained of) or *suo motu*, relating to maladministration, undue favour or corruption.

8. Submitted by the then Chairman, Morarji Desai, on 20-10-1966.

But the Lokpal shall not undertake investigation into any matter in respect of which the aggrieved person has any remedy before a court of law or statutory tribunal.

There are also certain other matters excluded from the jurisdiction of the Lokpal—

(i) Action relating to a foreign Government and certified by a Union Minister as such;

(ii) Action taken under the Foreigners' Act or the Extradition Act;

(iii) Action taken for the investigation of a crime;

(iv) Action taken with respect to passports;

(v) Exercise of power to determine whether a matter shall go to a court or not;

(vi) Action relating to commercial relations governed by contract, except where harassment or gross delay in meeting contractual obligations is alleged;

(vii) Action taken relating to appointments, removals, etc., of personnel;

(viii) A discretionary action, except where there has been no exercise of discretion at all.

The investigation shall be conducted in private and the Minister or Secretary against whom maladministration is alleged shall have an opportunity to comment on the allegations so made. The Lokpal shall have the powers of a civil court for the purpose of summoning witnesses etc. for securing evidence. But he shall have no power to punish for contempt. Where an act would have constituted a contempt of court if the proceeding had taken place in a court of law instead of before the Lokpal, the Lokpal shall send a certificate to this effect to the Supreme Court which will then deal with the matter as if it were a contempt of the Supreme Court itself.

The Lokpal may refuse to proceed with an investigation if he finds that there are no sufficient grounds for an investigation or the complaint is trivial or *mala fide* or there is an alternative remedy open to the complainant.

Where, on the other hand, the Lokpal is satisfied that injustice has been caused to an individual in consequence of maladministration, he shall first ask the Minister or Secretary concerned to remedy it; in default, he may bring the matter to the notice of the Prime Minister or the Chief Minister, as the case may be. If the Lokpal is still not satisfied with the action taken, he shall submit a special report to the Lok Sabha or the Legislative Assembly of the State concerned.

Where undue favour or corruption is established against a Minister or a Secretary, the Lokpal shall bring it to the notice of the Prime Minister or Chief Minister concerned.

Apart from this, the Lokpal shall submit annual reports of his functions to the Parliament or the State Legislature concerned.

The primary feature of the proposed office of the Lokpal to be noticed is that while the English Parliamentary Commissioner cannot act except when a complaint is received through a Member of Parliament, the Lokpal can act on direct complaint. On the other hand, the Lokpal shall have no power to institute any proceedings (or to take any other action) to remedy the mischief as the Swedish Ombudsman has. The only function of the Lokpal, in cases where the Government does not voluntarily remove the defects pointed out, would be to report to Parliament. It is a purely fact-finding body. It is next to be seen that the word 'maladministration' is quite vague and wide.

Maladministration may be due to faulty policy-making as well. If, therefore, a person who is outside the Cabinet is empowered to enquire into questions of policy not only at the instance of a complainant but also on his own initiative, it is evident that the working of the office of Lokpal is bound to bring him into conflict with the Cabinet and also to undermine the principle of Cabinet responsibility if the Lokpal were to exercise his functions independently, regardless of other considerations.

One of the recommendations of the Commission regarding the office of Lokpal deserves special comment. The Commission desires that the proceedings before the Lokpal shall "not be subject to judicial interference". With this end in view, Clause 13 has been adopted in the Draft Bill submitted with the Interim Report, as follows—

"No suit, prosecution, or other proceeding shall lie against the Lokpal or any of his officers in respect of anything which is in good faith done or intended to be done under this Act."

The object of this provision is to make the Lokpal immune from judicial control. It should be pointed out, however, that this provision may exclude the jurisdiction of the inferior courts only but not the jurisdiction of the High Courts under Arts. 226-227 or of the Supreme Court under Arts. 32 and 136, unless the Constitution itself is amended to that effect, because the constitutional powers of the Supreme Court or the High Courts cannot be taken away or curtailed by ordinary legislation. If and so long as such constitutional amendment is made, the Lokpal will be subject to the supervisory jurisdiction of the Supreme Court or the High Courts in the same way as any other administrative authority and proceedings are bound to crop up in these Courts against the Lokpal at the instance of persons aggrieved if the Lokpal refuses to exercise his statutory powers or exceeds his jurisdiction, in any case. If that happens, the object of making the Lokpal immune from judicial interference will be defeated.

If, on the other hand, the Constitution itself is amended to exclude the Lokpal from the supervisory jurisdiction of the Supreme Court and the High Courts, there will be a patent breach of the Rule of Law which has been characterised as a basic feature of *our* Constitution. It is to be remembered that even though a high judicial dignitary, such as an ex-Chief Justice of India is appointed as the Lokpal, his functions as a Lokpal will not be judicial but administrative and cannot, therefore, be endowed with that finality which attaches to a judicial decision of the Supreme Court. Benevolent despotism is not covetable in place of the Rule of Law; no amendment of the Constitution for the aforesaid purpose can, therefore, be commended by anybody who appreciates the spirit of freedom which inspires *our* Republican Constitution.

It is regrettable that no office of *Lokpal* has so far been installed owing to the chequered career of the Lokpal Bill. Shortly after the Interim Report of the Administrative Reforms Commission a private Member (Sri P. K. Deo) brought before Parliament a Lokpal Bill in 1967. It was left out because the Union Government brought a Lokpal and Lokayukts Bill, 1968. Before the Bill could be passed, the Lok Sabha was dissolved, so that this Bill lapsed. In 1971, a fresh Bill was reintroduced, but it met with a similar fate, owing to the dissolution of Parliament in January, 1977. During the Janata regime which followed, a fresh Lokpal Bill, 1977, was introduced in Parliament (reproduced in the Appendices, *post*). The Bill has excluded the

office of a Lokayukt, which has been left for State legislation. That Bill also lapsed and a fresh Bill was introduced on 29-12-89[10] and that, too, had a similar fate.

Lokayukt.

It is interesting to note that while in a period of 16 years, the Union has failed to bring on the statute book a Lokpal Act, obviously owing to lack of enthusiasm of the Union Government over the measure, quite a number of States have, by this time, enacted Lokayukt laws, e.g., Uttar Pradesh Lokayukt and Up-Lokayukt Act, 1975; Madhya Pradesh Lokayukt evam Up-Lokayukt Adhiniyam, 1981;[9] Kerala Public Men (Prevention of Corruption) Act, 1983; Himachal Pradesh Lokayukt Act, 1983; Karnataka Lok Ayukt Act, 1984.

The provisions of all these Acts, with some variations, conform to the following pattern :

The functions of the Lokayukt will be confined only to actions taken by a Minister or a Secretary of the State Government, excluding the Chief Minister.

The nature of allegations against any of such persons which may be inquired into by the Lokayukt is of a wide range, including not only abuse of official position but also corruption, viz., that he—

"(i) has abused his position as such to obtain any gain or favour to himself or to any other person or to cause undue harm to any person;

(ii) was actuated in the discharge of his functions as such public servant by improper or corrupt motives;

(iii) is guilty of corruption; or

(iv) is in possession of pecuniary resources or property disproportionate to his known source of income and such pecuniary resources or property is held by the public servant personally or by any member of his family or by some other person on his behalf."

By an amendment of 1983, the Madhya Pradesh Legislature has inserted s. 12A[9] in the Lokayukt Act, as a result of which the Lokayukt may report upon a complaint against the Chief Minister as well, but the procedure prescribed as regards such report is somewhat odd and will hardly be effective unless the Chief Minister in question is so valiant as to be willing to sign his own death warrant. That procedure is that the report of the Lokayukt against the Chief Minister shall have to be forwarded to the Chief Minister himself, who shall forward it with his note to the Governor. It is not understood why the Legislature did not authorise the Lokayukt to forward his report direct to the Governor, in this special case, for such action as he deemed fit after obtaining the Chief Minister's explanation upon it.

The Lokayukt is appointed by the Governor after consultation with the leader of the Opposition, while the Up-Lokayukt shall be appointed in consultation with the Lokayukt. The Up-Lokayukt can inquire into complaints against officers other than Ministers.

The Madhya Pradesh Act has conferred upon both of them the status of a 'court' within the meaning of the Contempt of Courts Act, 1971.

On the other hand, a retrograde picture is presented by the State of Orissa which, having enacted a Lokpal Act, in 1990, has repealed that Act and abolished the office of Lokpal in 1992.[11]

9. Reproduced in Appendix VI, *post*.
10. *The Statesman*, Calcutta, 30-12-89.
11. *The Statesman*, Calcutta, 18-7-92.

CHAPTER 16

LIABILITY OF THE STATE AND PUBLIC SERVANTS

Nature of the questions involved.

In the modern State, whatever be the form of government, the individual is affected in his everyday life and in the exercise of his civil rights by acts of the State and its officials in various spheres and in different ways. Some of these acts are done by the State as the sovereign while others are done by the State in trading and other capacities in the same manner as a private individual does. Hence arises the question whether the State and its officials should be liable to an individual who is so affected and who suffers injury; if so, to what extent and what remedies are available at law.

Of course, the answers to these questions would differ under different legal systems. But in the present Chapter we would deal with these questions mainly from the standpoint of the U.K. and India, which has adopted English common law, subject to legislation, if any. It would be convenient to deal with the law under two heads :

I. Proceedings against the State itself;

II. Proceedings against officers or servants of the State.

I. PROCEEDINGS BY OR AGAINST THE STATE.

Corporate personality of the State.

At common law, only a legal person can sue or be sued in a court of law. The question of suability of the State, therefore, begs the question whether the State is a juristic person or a legal entity.

There is little controversy amongst the different systems of law that a corporation is a legal person. To all intents and purposes, the State is a 'corporation aggregate'. There are countries on the Continent where this private law concept of a corporation aggregate has been imported, subject to exceptions, into the field of public law and the State has been treated as a *fiscus* or corporation for the purposes of suing as well as being sued.

Roman Law, however, propounded the theory of irresponsibility of the State, as the sovereign, to be sued in its own courts. This doctrine gave rise to the English monarchical principle that the 'Sovereign can do no wrong', which, of course, has been modified by legislation, namely, the Crown Proceedings Act, 1947. This doctrine of unsuability of the State in its own courts was also adopted in the United States, and maintained even after it became a republic and monarchy, until it has been modified by statute, viz., the Federal Tort Claims Act, 1946.

U.K.

In *India,* the suability of the State as a body corporate dates from the days of the East India Company, which was, in fact, incorporated by the Royal Charter. This concept was maintained when the governance of the country was taken over by the British Crown from the Company, and in the Government of India Acts

India.

since 1858, it was explicitly laid down that the Government of India could sue or be sued in the name of the Secretary of State in Council for India, which was to be treated as a body corporate.

There being no Secretary of State under the Constitution of India, it has been clearly laid down in Art. 300 of the Constitution that either the Government of India or the Government of a State is suable directly, which means that these Governments have been treated as juristic persons. Of course, as to the cases where any suit will lie against any such Government, the law is still linked up with the position as regards the good old East India Company.

The foregoing general observations may now be examined in detail.

Proceedings against the State.

(A) *England.*

U.K.

I. At common law, the immunity of the State (which, in England, is identified with the Crown) from legal proceedings at the instance of a subject was based on two maxims :

(a) "The King by his writ cannot command itself."[1] The result is that no legal process can issue against the Crown and no legal proceedings can, accordingly, be brought against it.

Hence, except in some cases where action was available against a Government Department (by statute[2]) or the Attorney-General,[3] the subject could get relief against the Crown, not as of right, but only by a 'petition of right'. The petition is a document in which the suppliant sets out his right and its infringement and prays the King to do him right and justice. A petition of right lay against the Crown in the following cases only—(1) to recover lands, goods or moneys wrongfully gone into the possession of the Crown, where the suppliant demands either restitution or compensation; (2) to recover liquidated or unliquidated damages for breach of contract by the Crown; (3) for moneys payable to the suppliant under a grant of the Crown; and (4) to enforce a statutory duty.

Petition of right did not lie (i) where a remedy is provided by statute;[4] (ii) with regard to Acts of State; or (iii) for torts.[5]

(b) "The King can do no wrong." This maxim, says *Broom,* has a double meaning—

(i) *Firstly,* it means that the King is not *personally* answerable to any earthly tribunal. He cannot, therefore, be prosecuted criminally, or sued civilly in any court of the land.

Hence, though the immunity of the sovereign did not incapacitate the sovereign from entering into *contracts,* no action lay against the Crown or its officials for breach of contract, and the only remedy was by *a petition of right.*[6]

(ii) *Secondly,* it means that the prerogative of the Crown extends not to any injury, because being created for the benefit of the people, it cannot be exercised to their prejudice. Hence, no one can plead the royal order in

1. Sadlers' Company Cases, (1588) 4 Rep. 54b.
2. *Minister of Supply* v. *Thompson-Houston Co.,* (1943) K.B. 478 (C.A.).
3. *Dyson* v. *A.G.,* (1912) 1 Ch. 158 (C.A.).
4. *Baron de Bode's case,* (1846) 8 Q.B. 208.
5. *Feather* v. *The Queen,* (1865) 6 B.&S. 257.
6. *Macbeth* v. *Haldimand,* (1786) 1 T.R. 172.

justification of a wrongful act. "As the King can do no wrong, it follows that he *cannot authorise a wrong;* for, to authorise a wrong to be done is to do a wrong. As he cannot authorise a wrong, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown."[5]

The result was that even a petition of right was not available against the Crown for *torts* committed against a subject by a servant of the Crown, i.e., a public official.[7]

Nor were the public officials or their departments liable in their *public capacity* for wrongs committed by subordinate officials, for, the wrongs of a servant, at common law, are the wrongs of his master and so the immunity of the Crown prevented any action also against the public officials in their official capacity or the Departments,[8] but the official himself would be *personally* liable for torts committed in the discharge of his official duties on the principle that "the civil irresponsibility of the supreme power to tortious acts could not be maintained with any show of justice if its agents were not personally responsible for them".[5] So, under the common law, a subject who was injured by some wrongful act committed by a public servant or some department of the State, had to be contented with whatever relief he could get in a personal action brought against the particular official or officials who were directly responsible for that wrongful act.[9] The State had no liability at all for any negligence or default committed by the Government and its members against the subject.

II. Inroads on both the maxims have been made by statute.

(a) The procedure by petition of right has been abolished by the Crown Proceedings Act, 1947, which provides that in all cases, where previously remedy lay by petition of right, a subject shall be entitled to bring a regular action, without the fiat of the Crown, against the appropriate Government department of the Attorney General.

It follows, therefore, that regular proceedings now lie against the Crown for breach of contract, in those cases in which petition of right lay.[10] The only cases where petition of right lay on contract or *quasi-contract* were[10]—

(a) Where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money; or

(b) Where the claim arises out of contract, as for goods supplied to the Crown or to the public service.

Even prior to the Crown Proceedings Act, Government departments were separately treated. Where a Government department was made liable to be sued by a statute, either expressly[11] or impliedly (by reason of being made a juristic entity by incorporation),[12] the courts held them liable to be sued even though no action lay against the Crown. This position remains unaffected by the Crown Proceedings Act.

---

7. *A.G.* v. *De Keysers Royal Hotel,* (1920) A.C. 508 (530-31)
8. *Bainbridge* v. *Postmaster-General,* (1906) 1 K.B. 178.
9. The limitations of such remedy would be evident from cases like *Adams* v. *Naylor,* (1946) 2 All E.R. 241 (H.L.); *Royster* v. *Cavey,* (1946) 2 All E.R. 642 (C.A.).
10. *Windsor & Annapolus Ry. Co.* v. *Counties Ry. Co.,* (1886) 11 App. Cas. 607.
11. *Minister of Supply* v. *Thomson-Houston Co.,* (1943) K.B. 478 (C.A.).
12. *International Ry. Co.* v. *Niagara Commn.,* (1941) A.C. 328 (P.C.).

It has been held, however, that no action *ex contractu* is maintainable either against the Crown or the Postal Department for negligence in the carrying on of the postal service,[13] on the ground that it is a sovereign function and not a commercial enterprise like that of a common carrier. In this case, even liability in tort has been excluded by s. 9 of the Crown Proceedings Act, 1947.

(b) The immunity of the Crown (i.e., non-suability) for the torts of its servants has also been abolished by the Crown Proceedings Act, 1947 [10 and 11 Geo. VI, c. 44], which makes the Crown liable for the torts of its officers in the same way as a private employer. Of course, this liability is of the Crown as the head of the State and not personally. The passing of this Act practically introduced into England the Continental theory of State liability for wrongs committed against the subject by the officers of the State. It is also to be noted that the remedy available under this Act is not by a petition of right but by a regular action as in the case of a private wrongdoer, and in the ordinary courts.

But no proceedings would lie against the Crown under this Act—

(a) for any act or omission of a servant or agent of the Crown unless the act or omission would, apart from this Act, have given rise to a cause of action in tort against the Crown [Proviso to s. 2(1)]. It follows that no action will lie in cases of 'Acts of State' even after this statute;

(b) for anything done or omitted by a person exercising judicial functions [s. 2(5)];

(c) for injury sustained by a member of the Armed Forces while on duty [s. 10];

(d) for anything properly done or omitted in the exercise of the prerogative or statutory powers of the Crown [s. 11(1)].

The immunity of the Postal Department for negligence in the delivery of postal articles has already been noted (see *above*).

Where a statutory corporation is created as a juristic entity, it will be liable to be sued for torts committed by its servants as any other private employer even though governmental functions are exercised by such corporation. Such liability is sometimes expressly laid down in the relevant statute.

(B) *Australia*—S. 78 of the Constitution lays down:—

Australia.

"The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power."

The Judiciary Act, 1963, as amended, lays down the law relating to governmental liability, as follows :

(a) An action lies against the Commonwealth in contract or tort, in the ordinary manner, by a subject or a State.[14] Thus, money realised without authority may be recovered by action.[14] But the Commonwealth would not be liable for wrongful arrest by a constable, because this is done in discharge of a duty imposed by law,[15] nor would action lie where the officer has done the wrong in the performance of a *quasi-judicial* duty, e.g., the refusal of Collector of Customs to pass certain entries, even if the refusal be *mala fide*.[16]

13. *Whitfield* v. *Le Despencre*, (1778) 2 Cowp. 754; *Triefus* v. *Post Office*, (1957) 2 All E.R. 387 (394).

14. *Sargood Bros.* v *Commonwealth*, (1910) 18 C.L.R. 258.

15. *Enever* v. *The King*, 3 C.L.R. 969; *Field* v. *Nott*, (1939) 62 C.L.R. 660.

16. *Baume* v. *Commonwealth*, (1906) 4 C.L.R. 97.

(b) Similarly, a State may be sued in contract or in tort without its consent.[17]

The maxim "The King can do no wrong." *has not been* applied in Australia,[18] by reason of secs. 75-78 of the Constitution Act.

The position in *Australia* has been explained by the Australian High Court[18] as follows—

"In English law, the Crown was not liable for the wrongful acts of its officers; the remedy was against the person who actually committed the wrongful act .... In Australia, the Constitution and the Judiciary Act, 1903-1940, ss. 56 and 64, enable any person making any claim against the Commonwealth whether in contract or in tort to bring a suit against the Commonwealth. The Commonwealth is thus made responsible for the acts, neglects or defaults of its officers *in the course of their service* as in a suit between subject and subject unless the officer is executing some *independent duty* cast upon him *by law*."[18]

(C) *Canada*.—Under the Petition of Right Act, 1927, the Crown in Canada is suable in a separate court, viz., the Court of Exchequer, but the action has to be initiated by a petition of right.[18]

(a) The jurisdiction of this court is founded on s. 19(c) of the Exchequer Court Act (R.S.C. 1927, c. 34) which confers upon the court exclusive original jurisdiction to hear and determine—

"every claim against the Crown arising out of any death or injury to the person or property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment".

The liability of the Crown, under this statute, has been held to be the same as that of a subject, subject, of course, to statutory exceptions, if any.[19-20]

It has been held[21] that apart from the above provision, the Crown is not liable for torts in Canada. The basis of liability under the section being negligence, the plaintiff must prove that (i) the servant of the Crown had a duty to take care towards him, (ii) the servant failed to take that care, and (iii) the injury was caused by that failure.

(b) S. 50A, inserted in 1938, provides—

"For the purpose of determining liability in any action or other proceeding against His Majesty, a person who was at any time since the 24th June, 1938, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown."

The result is that the Crown will be liable for injury or death caused by the *negligence* of a member of the Armed Forces.

It has been held that in order to determine whether the Crown servant was negligent, the law of negligence in force in the Province where that tort was committed, shall be applied.[22]

(D) *U.S.A.*—In the United States, the principle of immunity of the State as a sovereign power was imported from England even though the Constitution was republican. The principle has been explained thus—

U.S.A.

"It is an established principle of jurisprudence in all civilised nations that a sovereign State cannot be sued in its own Courts or in any other without its *consent*

17. *Commonwealth* v. *New South Wales*, (1923) 32 C.L.R. 200.
18. *Shaw Savill Ltd.* v. *Commonwealth*, (1940) 66 C.L.R. 344 (352); *Parker* v. *Commonwealth*, (1965) 112 C.L.R. 295 (300).
19. Cf. *Palmer* v. *Rex*, (1952) 1 D.L.R. 259 (Can.).
20. *Nisbet Shipping Co.* v. *R.*, (1955) 3 All E.R. 161 (163) P.C.
21. *Farthing* v. *The King*, (1948) 1 D.L.R. 385 (393) Can.
22. *Arial* v. *King*, (1946) Ex. C.R. 540.

and permission; but it may, if it thinks fit, waive its privilege and permit itself to be made a defendant in a suit by individuals or by another State and as this permission is altogether voluntary on the part of the sovereign, it follows that it may prescribe the *terms and conditions* on which it consents to be sued and the manner in which the suit shall be conducted and may *withdraw* its consent whenever it may suppose that justice to the public requires it."[23]

(I) *Immunity of Federal Government from suits by individuals.* It is according to this principle that, until recently, no action lay against the Federal Government for torts committed against citizens without its consent,—though actions on contractual or *quasi-contractual* claims were permitted by statute.

The rule of immunity, it was said, rests on public policy[24] and not on any obsolete theory.[25]

"It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen and, consequently, controlled in the use and disposition of means required for the proper administration of the government....."[25]

Consent to be sued could be given only by a statute and not by an executive act.[26] But, not being founded on any provision of the Constitution, the doctrine of sovereign immunity in the *United States* was an importation made by the Judges and the inequity resulting from the doctrine in deserving cases, soon led the Judges and jurists to plead for exceptions.

It is this climate which led Congress to enact the Federal Tort Claims Act, 1946, to abrogate, largely, the immunity of the Federal Government from tortious liability, subject to specified exceptions. The Federal Tort Claims Act, 1946, lays down that—

Federal Tort Claims Act, 1946.

"the United States shall be liable, respecting the provisions of his title relating to tort claims, in the same manner and to the same extent as a *private individual under* like circumstances".

The liability under this statute is, however, limited to—

"damage to *or loss of property* or on account of *personal injury or death* caused by the *negligent* or *wrongful* act or omission of an employee of the Government while acting *within the scope of his office or employment,* under circumstances where the United States, if a private person, would be liable to the claimant for such damage....".

The liability under this statute (as amended) does *not* apply to—

(i) claims arising out of wrongs, such as libel, slander, misrepresentation, deceit; interference with contractual rights;

(ii) claims arising out of an act or omission of a Government official 'exercising due care' in the execution of a statute, whether valid or not;

(iii) claims founded on alleged exercise or failure to exercise a *discretionary* function of an official, 'whether or not the discretion involved be abused';

(iv) claims arising in respect of taxation or regulation of the monetary system;

(v) claims arising out of military operations *during the time of war.* The exceptions now constitute the cases where Government does not consent to be sued in torts.

23. *Jossep* v. *Arkansas,* 20 How. 527; *Railroad Co.* v. *Tennessee,* (1879) 101 U.S.
24. The Siren, (1869) 7 Wall 152 (153-54).
25. *Kawanankoa* v. *Polybank,* (1907) 205 U.S. 349 (533).
26. *U.S.* v. *Sherwood,* (1941) 312 U.S. 584.

The Government must be liable in damages caused by the negligence of Government fire-fighters[27] or by the negligence of the coastguard personnel in keeping a lighthouse in repair.[28]

In *Dalehite* v. *U.S.*[29] the Supreme Court, in fact, enunciated the doctrine that the Government was not liable for the negligent exercise of a *governmental* function or a discretionary power vested in a public official. Upon this theory the Government was held not liable for damage to lands caused by the negligent performance of flood control,[30] for loss resulting from failure to operate a mine lawfully seized by the Government,[31] or for damage caused by the Texas City fertilizer explosion,[29] because the act or omission complained of was governmental or discretionary.

But in later cases,[27-28] the Supreme Court laid down that the Federal Tort Claims Act does not incorporate any distinction between governmental and non-governmental functions and that the words "in the same manner and to the same extent as a private individual under like circumstances" are not to be read as excluding liability for negligent conduct in the operation of an enterprise in which private persons are not engaged.[28] Thus, though the coastguard had a discretion to operate a lighthouse at a certain place, once it undertook to operate it at a certain place, it had a duty to keep it under repair and to give warning if it was not functioning at any time and that Government would be liable for damage done to a vessel for negligence of the coastguard personnel to give such warning.[28] Nor is the liability of the Government under the statute to be equated to that of a municipal corporation. Hence, the Federal Government would be liable for damage caused by the negligence of Forest Service fire-fighters, though a municipal corporation might not be liable for similar negligence.[27]

The application of the Act has been further liberalised by holding that the Act imposes liability on the Government for 'negligent' as well as 'wrongful' acts done without negligence, e.g., a trespass,[32] provided it is done by a Federal employee or agent acting within the scope of his employment.

On the other hand, the court would not admit any exception to liability save those that fall under the exceptions specified in the statute. As the Supreme Court has observed—

> "The exemption of the Sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigour by *refinement of construction*, where consent has been announced."[33]

Thus, the United States has been held liable for injuries caused by members of the armed forces otherwise than during performance of their duties.[34] But a military servant has no right of action for injuries sustained during performance of his duties.[35]

The decision in the *Dalehite* case[29] has, however, been affirmed by the Supreme Court[36] in 1972, to hold that the Federal Government was not liable

27. *Rayonier* v. *U.S.*, (1956) 352 U.S. 315 (319).
28. *Indian Towing Co.* v. *U.S.*, (1955) 350 U.S. 61.
29. *Dalehite* v. *U.S.*, (1953) 346 U.S. 15.
30. *Coates* v. *U.S.*, (1950) 181 F. 2d. 816.
31. *Old King Coal Co.* v. *U.S.*, (1949) 88 F. Supp. 124.
32. *Hathley* v. *U.S.*, (1956) 351 U.S. 173 (181).
33. *U.S.* v *Aetna Casualty Co.*, (1949) 338 U.S. 366.
34. *Brooks* v. *U.S.*, (1949) 337 U.S. 49.
35. *Feres* v. *U.S.*, (1951) 71 S.C. 153.
36. *Laird* v. *Nelms*, (1972) 406 U.S. 797.

for sonic booms caused by military planes, unless negligence was proved in the planning or operation of the flights.

(II) *Immunity of Federal Government from suits by States.* In the *United States,* the Federal Government enjoys an additional immunity, viz., from suits by any State, without its consent. It has been laid down that though the Federal Government may sue a State without the latter's consent (in the Original jurisdiction of the Supreme Court),[37] the Federal Government cannot be sued by a State without the consent of the Federal Government.[38] The rule has been justified on ground of public policy.[38]

(III) *Immunity of a State from suits by its citizens.* The common law immunity of the Government from being sued by individuals without its consent (p. 356, *ante*) extends to State Government[39] and, obviously, the Federal Tort Claims Act, 1946, does not affect this immunity of a State Government.

It is, however, competent for a State to give its consent by legislation and some States have passed such legislation.[40]

(IV) *Immunity of a State from suits by citizens of another State or of any foreign State.* According to the Constitution, this immunity is absolute. The 11th Amendment says—

"The judicial power of the United States shall not be construed to extend to any suit .... commenced or prosecuted against one of the United States by citizens of another State, or by citizens of any foreign State."

The immunity conferred by this amendment has been held applicable not only where the State is actually named as a party defendant but also where a proceeding though nominally against an officer is, in substance, an action against the State itself.[40]

"No suit, therefore, can be maintained against a public officer, which seeks to compel him to exercise the State's power of taxation, or to pay out its money in his possession on the State's obligations or to execute a contract, or to do any affirmative act which affects the State's political or property rights."[41]

(E) *France.*—It is striking that notwithstanding the uncompromising case made by *Dicey* to demonstrate the superiority of the English system of constitutional law over the French, modern jurists both in England and in the United States have found it possible to take up the other side and the very trend of legislation in both countries shows that the drift is towards abandonment of the Anglo-American doctrine of immunity of the State from actions by individuals, at least in stages.

France.

The French doctrine of liability of the State for damage done to an individual by administrative action may be said to rest on the following broad principles :

(a) While the English common law doctrine of immunity of the State rests on the theory that "the King can do no wrong", the French theory of liability has been said to rest on the theory that "the State is an honest man"[42]

37. Cf. *Georgia* v. *Pennsylvania Railroad Co.*, (1907) 206 U.S. 230.
38. *Kansas* v. *U.S.* (1907) 204 U.S. 331 (342).
39. *Hans* v. *Louisiana,* (1890) 134 U.S. 1.
40. See Swenson, *Federal Administrative Law,* 1952, pp. 177-78.
41. *Hopkins* v. *Clemson Agricultural College,* (1911) 221 U.S. 636 (642).
42. See Schwartz, *French Administrative Liability and the Common-Law World,* 1954, pp. 270; 276-77; 284-85.

and will not try to avoid responsibility to its citizens for damage done by wrongful or improper acts by raising the shield of immunity which rests on the legalistic view of absolute sovereignty of the State.

(b) While English common law made no distinction between the 'personal faults' of a public official (i.e., those done outside the scope of his employment or done maliciously and wilfully) and faults committed by acts done within the scope of his employment and, in either case, the only remedy available to the aggrieved citizen was to proceed against the public official personally, the French system makes a distinction between the two classes of faults and makes the State responsible for the 'service-connected faults' of public officials,—leaving it to the official to answer for his personal faults 'personally'.

(c) But in making the State liable for the service-connected faults of public officials, the French system even goes beyond the provisions adopted in England in the Crown Proceedings Act, 1947. For, the liability of the State under that Act as well as under the (American) Federal Tort Claims Act, 1946, is based on the principles of liability of a private employer. The State is liable under these Acts only where a private employer would have been liable for the torts committed by his servants, in like circumstances.

Under the French *Droit Administratif,* on the other hand,—

(i) The State is liable for damage due to any act done by a public official within the scope of his official functions, whether done negligently or wilfully.[42] The State is immune only where the act done by the official is wholly unconnected with his official functions.

(ii) The French conception of 'service-connected fault' is much wider than the English conception of the 'scope of employment'. It comprises any irregularity or impropriety in the administration apart from the fault of any particular officer and it also includes *improper* acts as distinguished from 'wrongful' acts.[42] Thus,

> "Service-connected faults are multiform. There is such a fault whenever the administrative service has functioned improperly, has functioned too early or late, or has not functioned at all; whenever its officers have failed to conform to the limits of their jurisdictions, or to the rules governing its functioning, or have committed wrongful or negligent acts."[42]

In short, once the damage done is found to be due to an 'administrative' act, the State would be liable even though the act was left by the Legislature to the discretion or subjective satisfaction of the administrative authority concerned.[43] At any rate, the State is liable in damages where the act of the administrative authority is—(a) *ultra vires,* or (b) based on an error of law, or (c) constitutes an abuse of power, or (d) violates the procedures required by the law or rules of natural justice.

(iii) While in *England*, in cases where the State is liable under the Crown Proceedings Act, the principles of liability of the State are the same as if it were a private individual,—in *France,* the principles of liability of the State are different from those of an individual, so much so, that there is a category of 'administrative torts',[44] apart from the wrongs known to the ordinary law of torts. Not only is the State held liable where the injury has been caused by the fault of the public official concerned, but also where the injury has been due to some defect in the machinery provided by the

43. Cf. Hamson, *Executive Discretion and Judicial Control,* 1954, pp. 154, 156, 160, 189, 210.

44. Cf. Brown and Garner, *French Administrative Law* (1967), pp. 78-80; 94.

administration or where the operation in question involved special risk to the citizens, irrespective of any question of negligence or defect, e.g., for damage caused by the dumping in a locality of military munitions, injury caused to an innocent third party by the police while chasing offenders; injury caused by a lunatic escaping from an asylum; damage caused by a riot. The French Administrative Law makes the State liable in such cases as an insurer against 'social risks', on the principle of equal distribution amongst the community of such risks.[44]

(iv) The State would not, however, be liable where the impugned act is not administrative but 'political'. This exception, however, refers to acts relating to international or diplomatic relations or parliamentary proceedings or relation between the Executive and the Legislature, and does not comprehend anything like a 'reason of State' or 'Act of State'.[43]

(F) *India.*—Article 300 of the Indian Constitution provides that the Union of India and the Governments of States shall be juristic personalities for purposes of suits of proceedings (just as the Secretary of State in Council was, prior to the Government of India Act, 1935). This Article embodies the principle that, in India, the State consents to being sued in its own courts, subject to certain principles relating to liability. Thus, neither the American doctrine of immunity of State from being sued without its consent nor the English common law doctrine of absolute immunity of the State from being sued is applicable in India. Owing to historical reasons, however, there are vestiges of the English doctrine of immunity of the Sovereign in the principles of liability for torts, which we shall presently see.

India.

Though the Union and the Government of a State are empowered to sue or be sued by this Article, the Constitution itself does not lay down the circumstances in which such actions lie. The power to provide them is left to the Legislatures of the Union and the respective States, and, subject to such legislation, the existing law relating to this matter will continue, as "if this Constitution had not been enacted". Like s. 65 of the Government of India Act, 1858 or s. 32(2) of the Government of India Act, 1915 or s. 176(1) of the Government of India Act, 1935, Art. 300 is a provision relating to 'parties and procedure' where the plaintiff has otherwise a right enforceable by action.[45] In short, Art. 300 does not lay down the substantive law relating to liability of the State.

The basis of State liability in India is historical.

The words 'had not this Constitution been enacted' in Art. 300(1) indicate that the basis of the suability of the State in India is historical. In order to appreciate the significance of these words, we must trace the history of the Indian administration from the time of the East India Company.

In 1765, the East India Company acquired the Dewani from the Moghul emperor, and from that time up to 1858, the Company had a dual character, viz., that of a trader as well as of a Sovereign inasmuch as it obtained the right of fiscal and general administration of the country from the grant of the Dewani. By the Charter Act of 1833, the Company came to hold the Government of India in trust for the British Crown. In 1858, the Crown assumed sovereignty over India

Prior to the Constitution.

45. Cf. *Venkata* v. *Secy. of State*, A. 1937 P.C. 31.

and took over the administration of India from the hands of the East India Company. S. 65 of the Government of India Act, 1858, declared the Secretary of State in Council to be a "body corporate" for the purposes of suing and being sued and provided—

"..... all persons shall and may have .... the same proceeding against the Secretary of State in Council in India *as they could have done against the said Company.*"

S. 32(2) of the Government of India Act, 1915, paraphrased the foregoing proposition with clarity—

"Every person shall have the same remedies against the Secretary of State in Council *as he might have had against the East India Company, if the Government of India Act, 1858, and this Act had not been passed.*"

S. 176(1) of the Government of India Act, 1935, also reproduced the same provision with two points of difference—(a) Instead of the Secretary of State in Council, the Federation of India,[46] and the Provincial Governments[47] themselves were made liable to be sued in like cases where the Secretary of State might be sued under the previous Acts. (b) The liability of the Governments was 'subject to any provisions' of any. Act that might be passed by the Federal Legislature or the Provincial Legislature, as the case might be.

So, whether prior to the Constitution or under the Constitution, in order to make the Government liable in a suit brought by a citizen (where there is no statutory provision relating to the matter), the question that has got to be answered is—

"Would such a suit lie against the East India Company, had the case arisen prior to 1858?"[48]

Before entering into the particular heads of liability, it is necessary to appreciate the dual status of the East India Company. As has been already stated, they started their career in India as a trading corporation but acquired sovereign functions of administration over extensive territories by the grant of the Dewani by the Moghul emperor. The British Parliament allowed the Company to exercise these governmental functions "subject to the undoubted sovereignty of the Crown ..... in and over the same", by enacting the East India Company Act, 1813 (53 Geo. III, c. 155). The Company thus came to exercise trading as well as governmental functions, subject to the prerogative of the British Crown (until the sovereignty was assumed by the Crown in 1858). From this dual capacity of the Company arose the dual principle of liability of the Company—

(a) The Company was subject to the jurisdiction of the municipal courts in all matters and proceedings undertaken by them as a private trading company.[49]

(b) The Company was not so subject in matters undertaken by them in their character of territorial sovereign.[50]

---

46. Substituted by the expression of "Dominion of India" by India (Provisional Constitution) Order, 1947.

47. Cf. *Prov. of Bombay* v. *Khusaldas*, (1950) S.C.J. 621 (694).

48. Even as regards the territories included in the erstwhile Indian States, the same conclusion has been arrived at by the Supreme Court in *State of Rajasthan* v. *Vidyawati*, A. 1962 S.C. 933 (939-40). The reason is that whatever might have been the immunity of the Ruler of an Indian State, when the State acceded to the territory prior to the commencement of the Constitution, the liability of the State under the pre-Constitution law was immediately attracted to the acceding territory and that was sufficient to make Art. 300 of the Constitution applicable to such territory as to the rest of India.

49. *Moodalay* v. *E.I. Co.*, (1785) 1 Bro. C.C. 469.

50. *Gibson* v. *E.I. Co.*, (1839) 5 Bing. (N.S.) 262.

It follows that when the suability of the Company was substituted by the suability of the Secretary of State in Council by s. 65 of the Government of India Act, 1858, the twofold propositions, as formulated above, were to be applied in order the determine the liability of the Secretary of State and in each case before the Court it had to determine whether the act complained of was done in the conduct of undertakings which might be carried on by a trading company or private individuals, without sovereign power or could be done only by a sovereign authority,[51] or, in short, whether the East India Company could have been sued for the act complained of.[52]

I. *Contract.*

1. In *India,* direct suit had been allowed against the East India Company, the Secretary of State or the existing Governments in matters of contract, instead of a petition of right.[53]

The fact that the East India Company also exercised sovereign functions "did not constitute them sovereigns"[54] and did not extend the doctrine of immunity of the British Crown from being sued in its own courts to the Company. This was made clear in the early case of *Moodalay*[49]—

"It has been said that the East India Company have a sovereign power; be it so, but they may contract in a civil capacity; it cannot be denied that in a civil capacity they may be sued; in the case now before the Court, they entered into a private contract; if they break their contract, they are liable to answer for it."[49]

In the earliest enactment of the subject, the British Parliament indicated that it was not intended that the doctrine of immunity of the Crown from being sued in its own courts was to be extended to the East India Company even after they ceased to carry on trading operations. The Government of India Act, 1833 (otherwise known as the 'Charter Act'), which directed the Company to close its trading operations and to hold its territorial acquisitions in trust for the British Crown, laid down in s. 10—

"That so long as the possession and government of the said territories shall be continued to the said Company, all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the said Company in trust as aforesaid shall be subject and liable to the same manner and form respectively as if the said property were hereby continued to the said Company to their own use."

The suability of the East India Company, as outlined above, was transferred to the Secretary of State for India in Council by s. 65 of the Government of India Act, 1858, as already noted. Once the doctrine of immunity of the Sovereign from being sued in its own Courts was removed from the way, it was clear that contractual liability of the Company would not depend upon the question whether the function was sovereign or non-sovereign inasmuch as the maxim 'The King can do no wrong,' upon which the non-suability of the British Crown was founded was confined to tortious liability.

Nevertheless, in the *P. & O. case,*[55] it was observed by the Supreme Court at Calcutta that "where a contract is entered into in the exercise of powers usually called sovereign powers ...., no action will lie" against the

51. *P. & O. Co.* v. *Secy. of State,* (1861) 5 Bom. H.C.R. App. A.
52. *Kinloch* v. *R.,* (1882) W.N. 164.
53. Cf. *Rangachari* v. *Secretary of State,* (1937) 64 I.A. 40; *Venkata* v. *Secretary of State,* (1937) 64 I.A. 55.
54. *Bank of Bengal* v. *E.I. Co.,* (1831) Bignell Rep. 120.
55. *P. & O. Steam Navigation Co.* v. *Secy. of State,* (1861) 5 Bom. H.C.R. (App. A).

Government, and this observation was followed by the Calcutta High Court in *Nobin* v. *Secy. of State*[56] to hold that the Government was not liable in damages for breach of contract for refusing to grant a licence to the plaintiff for the sale of *ganja* as agreed because the sale of *ganja* related to a sovereign function, namely, the imposition of a licence duty and its collection.

But the later decisions[57] have refused to follow *Nobin* v. *Secy. of State*[56] on the ground that the *P. & O. case*[55] was a case of torts, that the point for decision in that case was whether the Government was liable for a tort committed by its servants in the course of a commercial undertaking, and that no question on contractual or other liability was involved. It may be stated generally that as to contracts, the consensus of judicial opinion on the eve of the Constitution was that (provided a valid contract was established) the State was liable in the same way as a private individual, irrespective of the question whether the contract was entered into in relation to sovereign or non-sovereign functions.

The Government of India Acts (s. 30 of the Act of 1915 and s. 175 of the Act of 1935) expressly empowered the Government to enter into contracts with private individuals and the corresponding provision in the Constitution is Art. 299(1). And in all these Acts, it was provided that the person making the contract on behalf of the Government shall not be personally liable in respect thereof [*vide* s. 175(4) of the Act of 1935, and Art. 299(2) of the Constitution].

Subject to the formalities prescribed by Art. 299 and to statutory conditions of limits, thus, the contractual liability of the State, under *our* Constitution, is the same as that of an individual under the ordinary law of contract.[58]

Thus,

While in *England,* arrears of salary due for services rendered to the Crown on the basis of the contractual doctrine of *quantum meruit* could be recovered only by a petition of right,[59] in *India,* it is recoverable by an ordinary action against the Government both before and after the Constitution.[60]

2. The Post Office was established in India by a statute—the Indian Post Office Act, 1898. It is a department of the Government and its liabilities are not the same as a common carrier, but are governed by the statute.[61]

There may, however, be circumstances in which the post office would be regarded as an agent of the sender;[62] but not when a value-payable article is sent to a foreign State.[61]

II. *Torts.*

The liability of the State under the existing law, for actionable wrongs committed by its servants, cannot be so simply stated as in the case of contracts. As will appear from below, the state of the law is unnecessarily

56. *Nobin* v. *Secy. of State,* (1875) 1 Cal. 11.

57. *Secy. of State* v. *Hari,* (1882) 5 Mad. 273; *Krishan Chand* v. *Secy. of State,* (1881) 3 All. 829; *Ross* v. *Secy. of State,* A. 1915 Mad. 434. See also *Venkata* v. *Secy. of State,* A. 1937 P.C. 31.

58. *P.C. Biswas* v. *Union of India,* A. 1956 Assam 85 (90).

59. *Bushe* v. *R.,* (1869) *Times News,* May 29, quoted in Robertson, *Civil Proceedings by and against the Crown,* 1908, p. 338.

60. *State of Bihar* v. *Majid,* (1954) S.C.R. 786 (801-02).

61. *Union of India* v *Nazim,* A. 1980 S.C. 431 (para. B)

62. *C.I.T.* v *Rathod,* (1960) 1 S.C.R. 401.

complicated by reason of its being founded on the position of the British Crown under the Common Law and of the East India Company upon its supposed representation (in its governmental capacity) of the sovereignty of the Crown, both of which have become archaic, owing to changes in history and in law.

We have already seen (p. 348, *ante*) that under the *Common Law of England,* "the King can do no wrong" and, accordingly, no action lay against the Crown for tortious acts of its servants,—the public officials. So, under the common law, a subject who was injured by some wrongful act committed by a public servant or some department of the State, had to be contented with whatever relief he could get in an action brought against the particular official or officials who were directly responsible for that wrongful act.

The above doctrine of immunity of the Sovereign was extended to the *East India Company* in respect of its "sovereign acts". It has been pointed out at the outset (p. 336, *ante*) that since 1765 the East India Company had a dual character, viz., the character of a trader and that of a Sovereign. Hence, the East India Company was held to be not liable for acts done by the Company or its servants, in the exercise of its 'sovereign powers', and, consequently, the Company's successor, the Secretary of State in Council was also not liable in like cases. The liability lay only for acts which could be done by the Company in its trading capacity, i.e., in the course of transactions in which any private person (not being a Sovereign) could engage. This was laid down by the Supreme Court at Calcutta in the leading case of *P. & O. Steam Navigation Co.* v. *Secretary of State.*[55]

In this case, brought before the Calcutta High Court, shortly after the enactment of the Government of India Act, 1858, the point for decision was whether the Government was liable in tort for injury caused to the plaintiff by the negligence of workmen employed in the Government dockyard. The court, speaking through Peacock, C.J., held that the maintenance of the dockyard was an undertaking which could have been undertaken by any private individual without any delegation of powers from the Sovereign and that, accordingly, the East India Company would have been held liable for the wrong complained of and, hence, the plaintiff should succeed against the Government. In this context, the Chief Justice explained the distinction between the sovereign and non-sovereign function[55] of the East India Company in these words—

".....the East India Company were not Sovereigns, and therefore *could not claim all the exemptions* of a Sovereign;.....but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions *partly for the purpose of government, and partly on their own account,* which, without any delegation of sovereign *rights, might be carried on by private individuals*.....

".....where an act is done.....*in the exercise* of powers usually called *sovereign powers,* by which we mean powers which cannot be lawfully exercised except by a Sovereign, or a priave individual delegated by a Sovereign to exercise them, no action will lie.....

"It is clear that the East India Company would not have been liable for any act done by its officers or soliders 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 while engaged in military or naval duty,

nor for any acts of any of its officers and servants in the exercise of judicial functions."[55]

Law under the Constitution.

The existing law is built up of a body of subsequent cases decided on the authority of this leading case. In short, so long as Parliament or the State Legislature does not legislate in the matter, the liability of the Union or a State Government to be sued is to be determined with reference to the law as it stood at the commencement of the Constitution.[63] Owing to the historical developments, again, the pre-Constitution law, relating to the subject, related back to the position of the East India Company prior to the Government of India Act, 1935.[55,63]

Shorn of these technicalities, the liability of the Government to be sued under the existing law may be summarised as follows :

(A) No action lies against the Government for injury done to an individual in the course of exercise of the *sovereign functions* of the Government, such as the following :

(i) Commandeering goods during war;[64] (ii) making or repairing a military road; (ii) administration of justice; (iv) improper arrests,[65] negligence[66] or trespass by Police Officers;[67] (v) wrongful refusal by officers of a Revenue Department to issue licence to the plaintiff, causing him damage;[56] (vi) negligence of officers of the Court of Wards in the administration of an estate under its charge;[68] (vii) wrongs committed by officers in the performance of duties imposed upon them by the Legislature unless, of course, the statute itself prescribes the limits or conditions under which the executive acts are to be performed,[57] or the wrongful act was expressly authorised or ratified by the State;[69] (vii) loss of movables from Government custody owing to negligence of officers;[63,69-70] (ix) payment of money in custody of Government to a person other than the rightful owner, owing to negligence of an officer in the exercise of statutory powers, where the Government does not derive any benefit from transaction,[71] e.g., by a Treasury Officer paying money to a wrong person on a forged cheque owing to negligence in performing his statutory duty to compare the signature;[72] (x) wrongful seizure or confiscation of goods, in the purported exercise of statutory powers; (xi) injury caused by the driver of a military car on duty.[73]

The Supreme Court has, however, laid down[74] that in order to claim immunity for a tortious act committed by its servant, the State must show not only that it was done in the course of his employment but that the

63. *Kasturi Lal* v. *State of U.P.*, A. 1965 S.C. 1039.
64. *Kesoram* v. *Secretary of State*, (1926) 54 Cal. 969.
65. *Secretary of State* v. *Cockraft*, (1914) 39 Mad. 351.
66. *Mata Prasad* v. *Secretary of State*, (1929) 5 Luck, 157; *Baleswari Prasad* v. *Secy. of State*, A. 1937 All. 158; *Gurucharan* v. *Prov. of Madras*, A. 1944 F.C. 41.
67. *Shivabhajan* v. *Secretary of State*, (1904) 28 Bom. 314; *Ross* v. *Secretary of State*, (1913) 37 Mad. 55.
68. *Secretary of State* v. *Sreegovinda*, (1932) 36 C.W.N. 606.
69. *Sewkissendas* v. *Dominion of India*, A. 1957 Cal. 617 (623).
70. *Secretary of State* v. *Ram*, (1933) 37 C.W.N. 957; *Ross* v. *Secretary of State*, (1913) 37 Mad. 55; *Shivabhajan* v. *Secretary of State*, (1904) 28 Bom. 314 (325); *Dist. Board* v. *Prov. of Bihar*, A. 1954 Pat. 529.
71. *Ram Ghulam* v. *U.P. Government*, A. 1950 All. 206; *Uday Chand* v. *Prov. of Bengal*, (1947) 2 Cal. 141; *Dt. Board* v. *Prov. of Bihar*, A. 1954 Pat. 529.
72. *Union of India* v. *Ayed Ram*, A. 1958 Pat. 439; *Dt. Board of Bhagalpur* v. *Prov. of Bihar*, A. 1954 Pat. 529.
73. *Union of India* v. *Harbans Singh*, A. 1959 Punj. 39.
74. *State of Rajasthan* v. *Vidyawati*, A. 1962 S.C. 933 (935).

particular act which caused the injury was done in the course of exercise of 'sovereign' functions. In this case,[74] it was held that the State could claim immunity for injury caused to an individual by the negligent driving of a Government jeep not merely on the ground that the jeep was owned by the Government but also on showing that when the occurrence took place the car was *being* used for the performance of a sovereign function. Since it was established that at that time the car was *returning from a garage after repairs,* it could not be said that the injury was caused in connection with the exercise of sovereign powers or functions and, accordingly, the State would be liable in damages.[74]

(B) On the other hand, a suit lies against the Government for wrongs done by public servants in the course of business[75] or transactions which a trading company or a private person could engage in,[75] such as the following:

(i) Inquiry due to the negligence of servants of the Government employed in a dockyard[75] or a railway;[76] (ii) trespass upon or damage done to private property in the course of a dispute as to a right to land between Government and the private owner, even though committed in the course of a colourable exercise of statutory powers;[77] (iii) whenever the State has benefitted by the wrongful act of its servants whether done under statutory powers or not, the State is liable to be sued for restitution of the profits unalwfully made, just as a private owner,[76] e.g., where the Government retains property or moneys unlawfully seized by its officers,[78] a suit lies against the Government for its recovery,[79] with interest;[80] (iv) defamation contained in a resolution issued by the Government;[81] (v) injury done by vehicles maintained for the service of its employees;[82] or engaged in famine relief work.[83]

The standard of liability is the same as that of a private employer. It is clear that even where the Government would be liable under the existing law on the footing that the wrong complained of was done by a public official in the course of 'non-sovereign' functions of the Government so that the East India Company would have been liable for the same, the Government would be liable only if the liability is established under the ordinary law of master and servant,[84] namely,

(a) that the wrongdoer was a servant or agent of the Government;[85]

(b) that the wrong was committed 'in the course of employment' of the servant; or

---

75. *Union of India* v. *Ladu,* A. 1963 S.C. 1681.

76. *P. & O. Stream Navigation Co.* v. *Secy. of State,* (1861) 5 Bom. H.C.R. App. A.

77. *P.C. Biswas* v. *Union of India,* A. 1956 Assam 85 (90).

78. Unlawful detention of goods by Government Railway [*Rambrahma* v *Dominion of India,* A. 1958 Cal. 183].

79. *Kailas* v. *Secretary of State,* (1912) 40 Cal. 452; *Shivabhajan* v. *Secretary of State,* (1904) 28 Bom. 314.

80. *Wasappa* v. *Secretary of State,* (1915) 40 Bom. 200.

81. *Jehangir* v. *Secretary of State,* 6 Bom. L.R. 131; *Vidyawati* v. *Lahumal,* A. 1957 Raj. 305.

82. *Union of India* v. *Sugrabai,* A. 1969 Bom. 13.

83. *Shyam Sundar* v. *State of Rajasthan,* A. 1974 S.C. 890 (para. 21).

84. Cf. *Cassidy* v. *Minister of Health,* (1951) 1 All E.R. 574.

85. In *India,* the Post Office has been held liable for loss caused by servants of an Indian Railway, but not for loss caused by a foreign State which cannot be said to be an agent of the Government of India [*Union of India* v. *Nazim,* A. 1980 S.C. 431.]

(c) that where the wrong had been done by a person without or in excess of the authority conferred by the Government or outside the scope of employment of the servant, the act complained of was ratified by the Government.[86-87]

But the Government would not be liable for an act done by a servant outside the sphere of his employment, e.g. :

Where the act done is so *foreign* to the nature of the servant's employment that it cannot be regarded as a mode of performing that employment.

To claim immunity, the wrongful act must be done in the exercise of sovereign functions. The Supreme Court has laid down[88] that in order to claim immunity for a tortious act committed by its servant, the State must show not only that it was done in the course of his employment but that the particular act which caused the injury was done in the course of exercise of 'sovereign' functions. In this case, it was held that the State could claim immunity for injury caused to an individual by the negligent driving of a Government jeep not merely on the ground that the jeep was owned by the Government or that the injury was caused by the car while it was being driven for the purposes of the Collector for whose use the car had been maintained but also that when the occurrence took place the car was *being used* for the performance of a sovereign function. Since it was established that at that time the car was *returning from a garage after repairs,* it could not be said that the injury was caused in connection with the exercise of sovereign power or functions and, accordingly, the State would be liable in damages.[88]

If the above principle be pushed to its logical extreme, the State should be made liable even for damages caused by military vehicles while on similar trips not connected with any operations for defence, for the time being. Thus,

The State would be immune where a military vehicle caused the injury while on its duty of delivering ration to military personnel[89] but not while carrying coal from some depot to the headquarters for heating rooms.[90]

The case for a more liberal outlook. A little reflection will show that the pre-Constitution law as to State liability in torts, based on the *P. & O. case,*[91] is neither certain nor satisfactory.

As Seshagiri Ayyar, J., observed in *Secretary of State* v. *Cockraft,*[92] there is no authoritative definition of what are 'sovereign functions'. No doubt, the constitution and control of various departments of the State are instances of the exercise of sovereign powers. But as to other functions, it is difficult to determine in individual instances, whether they were done in the exercise of sovereign functions or not, as Sir Barnes Peacock himself recognised in *P. & O. Steam Navigation Co.'s case.*[91] "Sovereign powers", according to his Lordship "are powers which *cannot be lawfully exercised except by a Sovereign power.*"[91-92] But this is a negative definition and itself begs the question "what are the powers which can be exercised by a Sovereign or by a private individual".

To say that the Government would be liable only for commercial acts

86. *Collector of Masulipatam* v. *Cavaly,* (1860) 8 M.I.A. 529.
87. *Chandani* v. *State of Rajasthan,* A. 1962 Raj. 36.
88. *State of Rajasthan* v. *Vidyawati,* A. 1962 S.C. 933 (935).
89. *Union of India* v. *Harbans Singh,* A. 1959 Punj. 39.
90. *Union of India* v. *Jasso,* A. 1962 Punj. 316 (318).
91. *P.&O. Navigation Co.* v. *Secretary of State,* (1861) 5 Bom. H.C.R. App. A. p.1.
92. *Secretary of State* v. *Cockraft,* (1914) 39 Mad. 351.

done by its employees might leave a wide gap, because there may be acts which are neither commercial nor 'sovereign' in the true sense of that term. In the present world of expansion of governmental activities, the State is undertaking many functions which were never undertaken by any sovereign State in the past and yet they may not be undertaken by private individuals. It would be taking a too narrow view to leave the State immune even where its sovereign functions would be left unimpaired if it undertook to indemnify the aggrieved individual for a particular wrongful act. There has, therefore, been a current of judicial opinion protesting against the application of the *P. & O. case*[91] to make the State immune in respect of *every* act that is non-commercial.

In *Secy. of State* v. *Srigobinda,*[93] Rankin, C.J., asserted that the *P. & O. case*[91] is not an authority for that extreme proposition :

"In the *P. & O. case*[91]....., the only question was whether in the case of a tort committed in the conduct of a business the Secretary of State in Council could be sued. Whether he could be sued in cases not connected with the conduct of a business or commercial undertaking was not really a substantive question before the Court."

This view was echoed by the Privy Council in *Venkata* v. *Secy. of State,*[91] when Sir George Rankin became its member—

"..... It would not be too much to assume that if the *Peninsular case*[91] laid down that the right of the subject to sue Government was limited to any consideration as to whether the East India Company could or could not have been sued *as a trading corporation,* that was not the correct statement of the law....."[94]

As to s. 32 of the Government of India Act, 1915, their Lordships observed[94] that it merely dealt with parties and procedure, and that if an action lay against the Government, s. 32 did not take away that right simply because an identical right of action did not exist against the East India Company. Following these observations, the Bombay High Court held[95] that s. 176 of the Government of India Act, 1935, is merely *procedural* and that the Government cannot claim immunity from illegal acts under the above section, e.g., an illegal requisition under the Bombay Land Requisition Ordinance.[96]

In affirming this Bombay decision, Mukherjea, J., observed in the Supreme Court case of *Prov. of Bombay* v. *Khusaldas* :[96]

"Much importance cannot, in my opinion, be attached to the observations of Sir B. Peacock in *Peninsular and Oriental Stream Navigation Co.* v. *The Secy. of State.*[91] In that case the only point for consideration was whether in the case of a tort committed in the conduct of a business the Secretary of State for India could be sued. The question was anwered in the affirmative. Whether he could be used in cases *not connected* with the conduct of a business or commercial undertaking was not really a question for the court to decide."[96]

The Supreme Court[96] held that in the instant case *certiorari* could not be refused against the Provincial Government simply because such relief would not have been available against the East India Company inasmuch as requisitioning was not a commercial function.

This much is clear from the observations of the Privy Council and the Supreme Court :

93. *Secy. of State* v. *Srigobinda,* (1932) 36 C.W.N. 606.
94. *Venkata* v. *Secy. of State,* A. 1937 P.C. 31.
95. *Rao* v. *Khusalchand,* A. 1949 Bom. 277.
96. *Prov. of Bombay* v. *Khusaldas,* (1950) S.C.J. 621 (696, Mukherjea, J.).

The liability of the State to-day is not to be confined to commercial operations or functions which could be done only by a trading corporation. There may be other acts which may be non-commercial and could not have been undertaken by a private person, and yet the State should be held liable, because the function is not 'strictly governmental'.

The test of 'commercial functions' being an unsatisfactory one, Courts in India have been led to an inquiry as to some other alternative test.

(a) The test of 'profit' has been put forward in some cases.

In *Secy. of State* v. *Cockraft*,[97] Seshagiri, J., sought to draw the line with reference to *profit* when his Lordship observed that the mere fact that a function or duty is undertaken by the State for interests of the public will not make it a sovereign act, particularly, if some profit is derived by the State from the undertaking, as in the case of a Railway.[97]

But even that test, it is submitted, is not a fully satisfactory test, for there are many acts which may be undertaken by the State simply for the public benefit, without any idea of profit, e.g., the construction of civil roads, tanks and wells and other amenities for the citizens, which can as well be provided by private individuals, so that it cannot be said that "these acts could not be done except by a private individual".

(b) The other test is whether the act complained of falls within the class of an 'Act of State' or has been done under sanction of municipal law. In *Secy. of State* v. *Hari*,[98] the Madras High Court held that the Government should be liable, at the suit of a subject, for every wrongful act done by its servants which could not technically be said to be an 'Act of State'.

> "Where an act complained of is professedly done under the sanction of municipal law, and *in the exercise of powers conferred by that law*, the fact that it is done by the sovereign power and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the civil courts."[98]

According to this view, it is highly artificial to hold that the State would not be liable for wrongs done in the course of construction or repair of a military road,[97] but would be liable for similar acts done in the course of construction or repair of non-military roads, made for the use of the public.[99] Nor is the principle quite clear when the local authorities are held liable for acts done in connection with municipal or other local roads on the ground that "Municipalities do not exercise purely sovereign functions". According to *Secy. of State* v. *Hari*,[98] thus, the Government should be held liable for all acts which are purported to be done under the sanction of or in the exercise of powers conferred by the municipal law. But the other High Courts have not been able to agree. Thus, in *McInerny* v. *Secretary of State*,[100] Fletcher, J., held that an individual had no remedy against the Government for injury suffered by him in colliding with a post negligently put up at the edge of the Calcutta *maidan*, while he was lawfully walking by the adjoining road. The reason given was that in putting up the post, the Government was not carrying on a commercial or trading operation.

The embarrassment of *our* Courts in this field has been due to the fact that the maxim 'The King can do no wrong' was available to shield the Government from tortious liability arising out of its 'sovereign' functions prior

97. *Secy. of State* v. *Cockraft*, (1914) 39 Mad. 351.
98. *Secy. of State* v. *Hari*, (1882) 5 Mad. 273.
99. *Rup Ram* v. *State of Punjab*, A. 1961 Punj. 336.
100. *McInerny* v. *Secy. of State*, (1911) 38 Cal. 707.

to the Constitution and this still enures until the appropriate Legislature legislates, in exercise of the power conferred by the words 'subject to any provisions .....' in Art. 300, to enact a measure similar to the English Crown Proceedings Act, 1947. But even so long as the Legislature does not launch into this arena, it is possible for the courts to take a freer breath in view of changes in the historical background upon which the doctrine of immunity was founded, and this has been encouraged by the Supreme Court itself by its observations in *State of Rajasthan* v. *Vidyawati*[1]—

"It was impossible, by reason of the maxim "The King can do no wrong', to sue the Crown for tortious act of its servant. But it was realised in the United Kingdom that the rule had become outmoded in the context of modern developments in statecraft, and Parliament intervened by enacting the Crown Proceedings Act, 1947, which came into force on January 1, 1948. Hence, *the very citadel of the absolute rule of immunity of the sovereign has now been blown up*..... As already pointed out, the law applicable to India in respect of torts committed by a servant of the Government was very much in advance of the common law, before the enactment of the Crown Proceedings Act, 1947, which has revolutionised the law in the United Kingdom, also ..... When the rule of immunity in favour of the Crown, based on common law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution."[1]

In explaining the reason why the courts should take a broader outlook, the Supreme Court appears to have endorsed the views expressed by the Rajasthan High Court in the judgment appealed from :[2]

"..... the State is no longer a mere police State.....Ours is now a Welfare State and it is in the process of becoming a full-fledged socialistic State. Everyday it is engaging itself in numerous activities in which any ordinary person or group of persons can engage himself or themselves. Under the circumstances there is all the more reason that it should not be treated differently from other ordinary employers when it is engaging itself in activities in which any private person could engage himself."[2]

And so observed the Supreme Court[1]—

"Now that we have, by *our* Constitution, established a republican form of Government, and one of the objectives is to establish a socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for the tortious act of its servant."

An instance of the broader outlook is to be found in the decision of the Allahabad High Court in *Prem Lal* v. *U.P. Govt.*[3] In this case, a motor vehicle had been requisitioned by an order under the U.P. Requisition of Motor Vehicles Act, 1947. The Court held that the order was *mala fide* and, hence, invalid and awarded damages for the injury caused to the vehicle during the period of requisition. Obviously, compulsory requisitioning of property under statutory powers is an act which a private person could never do and it is a patent instance of exercise of the sovereign powers of the State. According to the *P.&O. dictum*[91] (p. 358, *ante*), the suit could not be decreed. Nevertheless, the Court (Dhawan, J.) decreed the suit on the ground that—

".....Judicial authority and public policy demand that the State to-day cannot claim immunity from the tortious liability in respect of the tortious acts of its servants and agents."

The task of the High Courts and the subordinate courts would, of course, have been easier if the Supreme Court had said in *Vidyawati's case*[1] that it was *Secy. of State* v. *Hari*[98] and not the *P.&O. case*[91] which laid

1. *State of Rajasthan* v. *Vidyawati*, A. 1962 S.C. 933 (940).
2. *Vidyawati* v. *Lokumal*, A. 1957 Raj. 305.
3. *Prem Lal* v. *U.P. Govt.*, A. 1962 All. 233.

down the correct law to be followed in India. So long as this is not done, the litigant, the Bench and Bar would be swinging in the balance between the exploded pillar of absolute immunity and the not-yet-certain post of absolute liability for all acts done under colour of the municipal law. It is discouraging to note that in the later case of *Kasturi Lal,*[4] the Supreme Court has reiterated that so long as the Legislature does not take up the matter, we have no other alternative than to apply the dictum in the *P.&O. case.*[91]

Imperative need for legislation. The foregoing survey shows that the law relating to liability of the State for torts committed by its servants is an unsatisfactory state. In fact, there are conflicting observations in the two decisions of the Supreme Court itself, which call for early legislation relating to the subject, as envisaged by Art. 300(1).

In *State of Rajasthan* v. *Vidyawati,*[5] the Constitution Bench, speaking through Sinha, C.J., rightly observed—

"When the rule of immunity in favour of the Crown, based on common law in the United Kingdom, has disappeared from the land of its birth, there is *no legal warrant* for holding that it has any validity in this country, particularly after the Constitution."[5]

In the subsequent Constitution Bench in the case of *Kasturi Lal,*[4] speaking through Gajendragadkar, C.J., the Court seemed to justify the pre-Constitution distinction between sovereign and non-sovereign functions of the State in these words—

"It is not difficult to realise the significance and *importance* of making such a distinction particularly at the present time when, in pursuit of their welfare ideal, the Government...naturally and legitimately enter into many *commercial* and other undertakings and activities which have no relation with the traditional concept of governmental activities in which the exercise of sovereign power is involved...."[4]

On the other hand, the Supreme Court has evinced its intention to make the State liable to compensate the citizen of a democratic system, in two ways—

(a) By holding that the custody of the individual's property, including judicial custody, is that of a bailee, so that the State is liable to return the goods or its value as soon as the justification for such custody is over.[6]

(b) By compensating the individual or his dependants in case of injury or death owing to any unlawful act done by the servants of the State, or even accident.[7]

In view of this uncertainty in the law as well as the ever-increasing impact of governmental functions upon the life and property of an individual, it is imperative that the State should, without delay, come forward with legislation indicating precisely for what wrongful acts of its agents and servants the Government should be liable. It is true that there are specified exceptions to State liability even in the (Eng.) Crown Proceedings Act or the (American) Federal Tort Claims Act, and such exceptions may be engrafted in the proposed legislation in India, e.g., acts done by members of the Armed Forces while on duty or acts done for the purpose of their training or maintaining the efficiency of the Armed Forces. But it is a different thing

4. *Kasturi Lal* v. *State of U.P.,* A. 1965 S.C. 1039 (paras. 28, 30).

5. *State of Rajasthan* v. *Vidyawati* A. 1962 S.C. 933 (para. 15).

6. *State of Gujarat* v. *Mamon,* A. 1961 S.C 1885 (para. 5); *Basava* v. *State of Mysore,* A. 1977 S.C. 1749 (para. 6)

7. *Rudul* v. *State of Bihar,* A. 1983 S.C. 1086; *Sebastian* v. *Union of India,* A. 1986 S.C. 1199; *Saheli* v. *Police Commr.,* A. 1990 S.C. 513; *Shyam* v. *State of Rajasthan,* A. 1974 S.C. 890; *R.S.R.T.C.* v. *Narain,* A. 1980 S.C. 695.

for a Welfare State to take shield in the name of 'sovereign functions' which is a most vague and nebulous expression in the present-day world when many of the functions which were carried on by private persons the other day are now being carried on by the State while, conversely, many erstwhile governmental functions are now being authorised to be done by private individuals and corporations. The test of liability should, therefore, be not the origin of the functions, but the nature of the activity carried on by the modern State.[8]

It is a pity, however, that notwithstanding the clear mandate for legislation in Art. 300(1) of the Constitution, nothing in this behalf has been done in India for over three decades. It is more deplorable in view of the fact that as early as 1956, the Law Commission examined the subject threadbare and submitted its first Report on 'the Liability of the State in Tort'. In fact, in 1967, the Government of India introduced in Parliament the Government (Liability in Tort) Bill, 1967 [see Appendix]. This Bill was circulated for public opinion but it could not so long be passed as the State Governments resisted on the ground of their financial inability to meet the numerous claims that could be laid under the law, if passed.

This, however, is a lame excuse which has been advanced against much that is beneficial in the Constitution of the independent Republic, such as delay in introducing compulsory primary education; failure to introduce 'prohibition'; failure to define the limits of the immunity of the State for acts which cause injury to the citizen. What good would Independence, for which the people of the country suffered so much, bring to them excepting power politics, if such beneficial measures cannot be undertaken for want of money when we can spend limitless money for sports, colour TV, international conferences and the like. It seems hypocritical to say that the poor should be offered free legal aid to fight for their just claims, without enacting the substantive law upon which just claims could be founded.

It may reasonably be expected that some active steps for reviving the Bill and enacting the Bill should be taken ere long.

Formality of contracts on behalf of the State.

(A) *England.*—In the absence of specific statutory provision, English law does not lay down any special formality for contracts with the Government or public authorities, and, under the Crown Proceedings Act, 1947, the Crown is now under the same liability for a contract as if it were a private individual, provided the person who acted on behalf of the Crown had authority, express or implied, to enter into a contract on behalf of the Crown.[9]

(B) *India.*—Cl. (1) of Art. 299[10] of the Constitution of India prescribed a special formality for contracts in order to be binding upon the Government of India or of a State, as the case may be. It says—

"All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power, shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise."

Hence, in India, contracts by the Government raise some problems which do not or cannot possibly arise in the case of contracts entered into by private persons. Thus, there should be a definite procedure according to

8. 1st Rep. of the Law Commission of India, pp. 35-35.
9. *A.G. for Ceylon* v. *Silva,* (1953) A.C. 461 P.C.
10. See 11 Sh. 919 ff, for fuller treatment.

which contracts must be made by its agents, in order to bind the Government; otherwise public funds may be depleted by clandestine contracts made by any and every public servant.[11]

That is why it has been provided that the State should not be saddled with liability for contracts which do not show on their face that they are made on behalf of the State.[12]

The issues in Administrative Law mainly arise where, notwithstanding the constitutional mandate in Art. 299(1), the Departmental authorities and public officials, owing to their inertia or ignorance, enter into informal contracts which do not comply with the requirements of Art. 299(1).[13] There has been a plethora of Supreme Court decisions on this subject, but the law is not yet settled on all the relevant points, owing to conflicting decisions.

There were certain observations in the early *case of Chaturbhuj*[11] which led to the belief in some quarters that the court was inclined to sanction the practice of informal contracts in 'petty' matters and this notion, together with the other theory or 'ratification' suggested in *Chaturbhuj's case*[11] led to the perpetuation of the administrative practice which was in plain contravention of the constitutional mandate.

In 1962, however, the Court repelled the foregoing view taken in *Chaturbhuj, case*[11] and came to lay down in *Bhikraj's case*[14] that the provisions of Art. 299(1) are *mandatory* and that a contravention thereof rendered the contract *void*. If so, the pettiness of the contract or the administrative practice was of no avail. So observed the Court[14]—

"In any event, inadvertence of an officer of the State executing a contract in a manner violative of the express statutory provision, the other contracting party acquiescing in such violation out of ignorance or negligence, will not justify the court in not giving effect to the intention of the Legislature, the provision having been made in the interest of the public ...."[14]

It would follow that an oral contract or a contract carried on by correspondence[15] or a written contract, which does not fulfil the requirements of Art. 299(1),[16] would be void and would not form the basis of any suit on the contract either by or against the Government.[17]

At the same time, in one case the court has upheld contract by the acceptance of a tender by a duly authorised officer.[18] This decision, however, has to be reconsidered in view of subsequent decisions which have held that a contract in contravention of Art. 299(1) shall be void.[14,17]

Exceptions to the rule that a contract in contravention of Art. 299 is void.[10]

Even though a contract would be void and unenforceable against the Government if it does not comply with the requirements of Art. 299(1), it

11. *Chaturbhuj* v. *Moreswar*, (1964) S.C.R. 817 (835).
12. *Bhikraj* v. *Union of India*, A. 1962 S.C. 113.
13. As to these requirements, in detail, see Author's *Shorter Constitution of India*, 9th Ed. (1984), pp. 657-58.
14. *Bhikraj* v. *Union of India*, A. 1962 S.C. 113 (119); *State of Bihar* v. *Karam Chand*, A. 1962 S.C. 110 (111); *State of W.B.* v. *B.K. Mandal*, A. 1962 S.C. 779 (783); *Mulamchand* v. *State of M.P.*, A. 1968 S.C. 1218.
15. *Karamshi* v. *State of Bombay*, A. 1964 S.C. 1714 (1721).
16. *Chowdhury* v. *State of M.P.*, A. 1967 S.C. 203.
17. *New Marine Coal Co.* v. *Union of India*, A. 1964 S.C. 152 (155); *State of U.P.* v. *Murari*, (1971) 2 S.C.C. 449 (451).
18. *Union of India* v. *Rallia Ram*, A. 1963 S.C. 1685.

has been held that it would not stand in the way of consequences which are independent of the formality of contracts as laid down in Art. 299(1).[19] Thus,

(a) There are certain provisions of the Contract Act which provide for some relief to either party even where the contract is void, e.g., ss. 65, 70.[17,19] Reliefs under these sections are not barred by Art. 299(1), as will be explained presently.

(b) The invalidity of a contract for contravention of Art. 299(1) cannot be set up to nullify the provisions of statutes relating to collateral matters.[5]

But though such contract is not void for collateral matters,[11] it cannot be treated as a contract even for collateral purposes where the Government has, in fact, refused to ratify it.[20]

(c) The private party may be estopped from questioning the validity of the conditions imposed by an invalid contract, when he has obtained benefit under it.[21]

Applicability of s. 65 of the Contract Act.

S. 65 of the Contract Act, 1872, says—

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

The principle underlying this section is that—

"a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation".[22]

This section may be invoked either by the private party[23] or the Government.[24]

S. 65 is not, however, applicable—

(a) Where the party who seeks to invoke it has already received sufficient compensation for the benefit or advantage received by the other party under the disputed contract.[23]

(b) Where the benefit in respect of which compensation or restoration is claimed has been received *after* the agreement is discovered to be void by the party who seeks compensation.[24]

Applicability of s. 70, Contract Act.

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

This section, in short, provides for payment of *compensation* or restoration of a thing by a person who has enjoyed the benefit, irrespective of the validity or otherwise of the contract between the parties, if the following conditions[19] are established—

(i) that the plaintiff has made a payment or delivered a thing to the defendant;

---

19. *State of W.B.* v. *B.K. Mandal*, A. 1962 S.C. 779 (787,790); *Damodaran* v. *State of Kerala*, A. 1976 S.C. 1533 (paras. 7-8).
20. *Laliteswar* v. *Bateswar*, A. 1966 S.C. 580 (585).
21. *Timber Kashmir* v. *Conservator*, A. 1977 S.C. 151.
22. *Mohan Manucha* v. *Manzoor Ahmad*, (1942) 70 I.A. 1.
23. *Prov. of W.B.* v. *Mohanlal*, (1957) 63 C.W.N. 907 (914).
24. *Purkayastha* v. *Union of India*, A. 1955 Assam 33 (43).

(ii) that the plaintiff was acting lawfully when he made the payment or delivered the thing to the defendant;

(iii) that the plaintiff did *not* intend to do that gratuitously;

(iv) that the defendant *did enjoy that benefit.*

If the above conditions are satisfied, either the private party[19] or the Government[19] is entitled to sue under this section. The word 'lawfully' in s. 70 does not imply that it cannot be invoked in a case where the contract is invalid, being in contravention of statutory formalities. There is a lawful relationship where a benefit offered by the plaintiff has been accepted and enjoyed by the defendant.[25]

S. 70 is not, however, applicable—

(a) Where the party who seeks to invoke the section has already received sufficient compensation for the benefit or advantage received by the other party under the disputed contract.[24]

(b) Where the claim of the plaintiff is not for the value of a thing done or given but for compensation for the loss of future profits.[25]

Applicability of the doctrine of Promissory Estoppel.

The principle of promissory estoppel is based on equitable principle. It is neither in the realm of contract nor in the realm of estoppel. The doctrine has been extended to government and public authorities. But the principle cannot be used to compel the government or a public authority to carry out a representation or promise which is prohibited by law or which was devoid of authority or power of the officer of Government or public authority to make. If public interest requires or it would be inequitable to enforce the principle it would not be enforced. There cannot be estoppel against statute. To invoke the doctrine clear, sound and positive foundation must be laid in the petition. Bald expression without supporting material is insufficient.[25a] A person who has misled the authority by a false statement cannot invoke the doctrine.[25b]

Promisee must show that there was a declaration or promise made to him which induced him alter his position to his disadvantage. He need not show that he suffered detriment as a respect of acting in reliance on the promise. The detriment in such a case is not some prejudice supposed by him by acting on the promise, but the prejudice which would be caused to the promisee if the promisor were allowed to go back on the promise. The promise need not be recorded in the form of a formal contract.[25c]

State must be held bound by its promise. But if public interest requires State can shift from its promise. The benefit can be withdrawn even during the period of the scheme. Even if a party has acted on the promise the state can withdraw the benefit in the event of supervening public interest. State granted a concession in expectation of a certain result. The result was not achieved on the contrary the scheme affected the existing state. Promise is thus withdrawn.[25d]

A person who has misled the authority by making a fake statement cannot invoke the principle.[25e]

25. *Kamalia Mills* v. *State of Bihar,* A. 1963 Pat. 153.

25a. *Sharma Transport* v. *Govt. of A.P.* AIR 2002 SC 322: (2002) 2 SCC 188.

25b. *Central Airman Selection Board* v. *Surendra Kumar* (2003)1 SCC 152.

25c. *Ashok Kumar* v. *State,* (1998)2 SCC 502.

25d. *State* v. *Mahaveer Oil Industries,* (1999)4 SCC 357: AIR 1999 SC 2302.

25e. *Central Airman Selection Board* v. *Surender Kumar,* (2003)1 SCC 152: AIR 2003 SC 240.

Government assured but subsequently curtailed. The terms of contract was revised from a back date. The respondent, however, could not revise his price from a back date to recover the price from innumerable customers. Principle applies.[25f]

Legitimate expectation.

During the pendency of an application for sanction by the Corporation State Government in exercise of rule making power amended the building rules. The expectation of the party was thereby rendered impossible. The party cannot claim the sanction of building plan on the basis of "vested right" or "settled expectation". "Settled expectation" or "legitimate expectation" cannot be set up against statutory provision which was brought into force by the State Government and not by the Corporation against whom the vested right or settled expectation is claimed. A settled expectation or legitimate expectation cannot be countenanced against public interest.[25g]

There are certain observations of the Supreme Court in the *Afghan Agency case*,[26] which suggest that even where a contract is not formally recorded according to law, e.g., Art. 299(1), it can still be enforced against the Government on the basis of 'promissory estoppel' arising from the representations of the public servant who negotiated the transaction with the private party.

In order to attract the doctrine of promissory estoppel no contract in writing is necessary. State Government persuaded the respondent to establish an industry. The respondent acted on the solemn promise of the State Government. Now the State Government cannot be permitted to revise the terms of contract retrospectively to the detriment of the respondent.[26a]

There has been much judicial controversy on the doctrine of promissory estoppel and also confusion of issues, but in the present context we should be confined to the question—

Whether a contract which is void for non-compliance with Art. 299(1) can still be enforced *against the Government* on the footing of the representation made by the officers of the Government.

The answer to this question should be in the *negative*[27], for the following reasons :

i. In the *Afghan Agency case*,[26] reliance was made upon the decision of Lord Denning in *Robertson's case*,[28] which has been overruled by the House of Lords.[29] This fact has been noted in subsequent decisions of the Supreme Court.[30-32]

ii. On principle, it is now settled both in England[29-30] and in India[30-32] that an equitable doctrine like promissory estoppel *cannot* be invoked to compel the Government or even a private party to do an act prohibited by

---

25f. *State* v. *Mangalam Timber Products*, (2004)1 SCC 139.
25g. *Howrah Municipal Corporation* v. *Ganges Rope Co.* (2004)1 SCC 663.
26. *Union of India* v. *Anglo-Afghan Agencies*, A. 1968 S.C. 718 (paras. 18, 20, 23).
26a. *State* v. *Mangalam Timber Products*, (2004)1 SCC 139.
27. See, further, 11 Sh. 921 ff.
28. *Robertson* v. *Min. of Pensions*, (1949) 1 K.B. 227 (231).
29. *Howell* v. *Falmouth Boat Construction Co.*, (1951) A.C. 837 (845, 849).
30. *Asstt. Custodian* v. *Agarwala*, A. 1974 S.C. 2325 (2327).
31. *Excise Commr.* v. *Ram Kumar*, A. 1976 S.C. 2237 (2241).
32. *M.P. Sugar Mills* v. *State of U.P.*, A. 1979 S.C. 621 (paras. 15, 28).

law or, to commit a breach of the law.[33] To hold that a contract would be void if it does not comply with the requirements of Art. 299[14] and would yet be enforceable against the Government would be practically to delete Art. 299, for its object, as we have explained earlier, was to protect the Government from clandestine or irresponsible acts of its servants. There is an implied (if not express) prohibition in Art. 299 that the contract with the Government should not be made in any other manner. It is a prohibition imposed by the Constitution on the ground of policy. No estoppel can be raised in case of non-compliance with such a provision.[33-34]

Of course, an exception has been acknowledged (para. 50)[34] that the Government should be bound by the act or representation of its officer where there were special circumstances for which he was unable, in the *public interest,* to comply with his constitutional obligation. Such special considerations must be exceptional and difficult to establish.

Legitimate expectation : change in policy.

The question is whether the decision maker can sustain the change in policy by resorting to Wednesbury principles of rationality and whether the court can go into the question whether the decision maker has properly balanced. The legitimate expectation as against the need for a change. The court can examine the proportionality of the change in the policy. A change in policy can defeat a substantive legitimate expectation if it can be justified on Wednesbury reasonableness. The judgment whether public interest overrides the substantive legitimate expectation of individuals will be for decision-maker who has made the change in policy. The court can only see whether the change in policy which is the cause for defeating the legislative expectation is irrational or perverse or the one which a reasonable man could not make.[34a]

General principles relating to contractual liability of Government.

It is to be noted that Art. 299 of the Constitution only lays down the *formality* which must be complied with in order to bind the Government with contractual liability. It does not deal with the substantive law relating to contractual liability of the Government or the liability of the Government for the acts and representations of the servants of the Government, which is to be found in the ordinary law of the land. Hence, even though a contract may be formally valid under Art. 299, it may nevertheless fail to bind the Government if it is void or unenforceable under the general provisions of the law. Some of the special features of a contract with the Government may be pointed out in this context.

(i) *Executive authority cannot be fettered by contract.*

(A) *England.*—Neither the Crown nor any of its servants can, by any contract[35] or representation,[36] fetter its future executive authority in the

33. Halsbury, 4th Ed., Vol. 16, paras, 1514-15; *Kok Hoong* v. *Leong,* (1964) A.C. 993 (1016); *Maritime Electric Co.* v. *Dairies,* (1937) A.C. 610.

34. *Jit Ram* v. *State of Haryana,* A. 1980 S.C. 1285 (paras. 12-14, 20, 27, 38, 44, 46, 50). [The foregoing view of the Author is now affirmed by a Three-Judge Bench in *Amrit* v. *State of Punjab,* (1992) 2 SCC 411 (para. 12)].

34a. *Punjab Communications Ltd.* v. *Union of India,* AIR 1999 SC 1801: (1999)4 SCC 727.

35. *Rederiaktiebolaget* v. *R.,* (1921) 3 K.B. 500; *Buttigieg* v. *Stephen,* A. 1947 P.C. 29; Halsbury, 4th Ed., Vol. 9, para. 302.

36. *Terrell* v. *Secy. of State,* (1953) 2 All E.R. 490.

performance of its governmental functions,[37] or functions affecting the public good, either under common law or statute.[37]

In the *Rederiaktiebolaget case,*[37] it was observed—

"No doubt the Government can bind itself through its officers by a *commercial* contract and if it does so it must perform it like anybody else or pay damages for the breach. But...it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. *It cannot by contract hamper its freedom of action in matters which concern the welfare of the State*"[35]

Though the soundness of the above proposition to its fullest length has been questioned from time to time by jurists, it has been restated and affirmed in *Commr. of Crown Lands* v. *Page.*[37] Thus, a governmental authority cannot bargain away its statutory powers in the matter of planning[38] or regulation of health[39] or public safety[37] by a private contract. A lessee from the Government cannot, accordingly, claim exemption from requisition under statutory powers.[37]

"When the Crown, or any other person,[40] is entrusted, whether by virtue of the prerogative or by statute with discretionary powers to be exercised for the public good, it does not, when making a private contract in general terms undertake (and it may be that it could not even with the use of specific language validly undertake) to fetter itself in the use of those powers and in the exercise of its discretion ... When the Crown, in dealing with one of its subjects, is dealing as if it too were a private person, and is granting leases or buying and selling as ordinary persons do, it is absurd to suppose that it is making any promises about the way it will conduct the affairs of the nation."[37]

Any such contract would be *ultra vires*[39] where the power is statutory, because of

"the incapacity of a body charged with statutory powers for public purposes to divest itself of such powers or to fetter itself in the use of such powers".[40]

At any rate, in such cases, courts would be slow to construe a binding contract[41] or an implied term[37] binding the State.

(B) *India.*—Though there is no question of any royal prerogative in India, this principle seems to be applicable here inasmuch as such a contract would be against public policy.[35,42]

(ii) *Legislative authority cannot be fettered by contract.*

(A) *England.*—It has also been held[43] that the Crown cannot, by any grant or other contractual or executive act, fetter its legislative authority.

(B) *India.*—Contractual rights of individuals are not guaranteed against the State by *our* Constitution (as in the *U.S.A.*).[44]

It is, accordingly, competent for the State to supersede by legislation contractual rights and obligations, including those arising under contracts made by the Government itself under Arts. 298-299.[45] The President, acting in the exercise of his executive power, cannot fetter the legislative authority

37. *Commr. of Crown Lands* v. *Page,* (1960) 2 All E.R. 726 (732, 734, 735); *Southend-on-Sea Corpn.* v. *Hodson,* (1961) 2 All E.R. 46.
38. *Ranson* v. *Surbiton,* (1949) 1 All E.R. 185 (C.A.)
39. *Cory & Sons* v. *City of London Crown,* (1951) 2 All E.R. 85 (C.A.).
40. *York Corpn.* v. *Henry Leetham,* (1924) 1 Ch. 557; *Ayr Harbour Trustees* v. *Oswald,* (1883) 8 App. Cas. 623.
41. *Australian Woollen Mills* v. *Commonwealth,* (1955) 3 All E.R. 711 (717) P.C.
42. It is to be noted that all the English cases noted above have been relied upon in *Jit Ram's case* [A. 1980 S.C. 1285 (paras. 21-24)].
43. *N. Charterland Exploration Co.* v. *King,* (1903) 1 Ch. 169 (185).
44. *Dodge* v. *Board of Education,* (1937) 302 U.S. 74.
45. *Secy. to Govt.* v. *A.G. Factory,* A. 1959 A.P. 538 (541, 544).

of Parliament. Thus, a grant made by the State cannot deprive the Legislature of its power to vary the terms of the grant or to derogate from it.[46] Nor is the State debarred from controlling prices by legislation on the ground that it would affect the incidents of Government contracts,[47] or from interfering with contractual wages[48] or conditions of work;[45] or from providing for compulsory settlement of labour disputes, contrary to the terms of agreement between the employer and the employee.[49]

In short, there cannot be any estoppel against the sovereign legislative capacity of the State.[50]

(iii) *Right to prosecute cannot be barred by contract.*

(A) *England.*—No officer of the Crown can by any conduct or representation bar the Crown from enforcing a statutory prohibition or from prosecuting for its breach.[51]

Thus, if a Government officer grants a licence to do an act which is prohibited by law, the licensee cannot maintain that there has been no breach of the law, because he has got a licence from the Government to do that act.[51] In other words, this rule is an exception[52] to the general law of agency under which the representations made by the agent are, generally, binding on the principal.

(B) *India*—There is no reason why this principle should not apply in *India,* for there cannot be estoppel against a statute laying down a public policy or a positive *duty.*[53] As Lords Simonds observed[51] :

"The question is whether the character of an act done in the face of a statutory prohibition is affected by the fact that it has been induced by a misleading assumption of authority.....the answer is clearly 'No'.[51]

To put otherwise—A contract to do a thing, which cannot be done without a violation of the law, is clearly void.[54]

The principle is, in fact, wider and is not confined to the Crown or a public authority. The principle is that estoppel cannot prevent or hinder the performance of a positive *statutory duty.*[53]

"Where a statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstances that an estoppel is a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part ..... The duty of each party is to obey the law."[54]

The principle has been extended to the case where a public authority has the statutory duty to exercise a discretion.[54]

---

46. *State of Bihar* v. *Kameshwar,* A. 1952 S.C. 252; *Jagannath* v. *Govt. of U.P.,* (1946) 73 I.A. 123 (132).
47. *Bijay Cotton Mills* v. *State of Ajmer,* (1955) 1 S.C.R. 752 (755).
48. Cf. *Manohar* v. *State,* (1951) S.C.R. 671 (675).
49. *Sarathy* v. *State of Madras,* A. 1951 Mad. 191; *D.S.M. Assocn.* v. *Industrial Tribunal,* A. 1953 Mad. 102.
50. *Jit Ram* v. *State of Haryana,* A. 1980 S.C. 1285 (para. 30); *Bihar Co-op. Society* v. *Sipahi,* A. 1977 S.C. 2149 (para. 13); *State of Kerala* v. *Gwalior Rayon Co.,* A. 1973 S.C. 2734 (para. 23).
51. *Howell* v. *Falmouth Boat Construction,* (1951) 2 All E.R. 278 (280) H.L.
52. *A.G. for Ceylon* v. *Silva,* (1937) A.C. 610.
53. *Southend-on-Sea Corpn.* v. *Hodgson,* (1961) 2 W.L.R. 806.
54. *Maritime Electric Co.* v. *General Dairies,* (1937) A.C. 610.

(iv) *Statutory power cannot be bartered away.*

When a public authority is vested with a *statutory* power, even though its exercise be discretionary, it cannot bargain away the power by entering into an agreement not to exercise it[29,35] or to exercise it only subject to restrictions imposed by such agreement.[56] Such an agreement would be invalid.[56] The power can be exercised only for the public purpose for which it was conferred by the statute and the authority cannot bind itself and its successors not to use the power for the statutory purpose.[57]

An engineer employed by the planning authority informed a builder that certain land had an existing user as a builder's yard, and the builder thereupon bought the land and so used it. The planning authority later considered that the land had no such existing user and served an enforcement notice on the builder, who appealed to the Magistrates. The Magistrates refused the planning authority to give evidence that the existing user was not that of a builder's yard.

Held, the planning authority was not estopped by the engineer's representation against the exercise of their statutory power and the Magistrates were directed to receive the evidence of the planning authority.[53]

The rule, however, does not prevent a public authority from binding itself by a perpetual contract relating to a *commercial* undertaking provided the contract is not otherwise *ultra vires,*[58] i.e., incompatible with the purposes of the statute.[58-59]

(v) *Estoppel does not operate against the Government in certain matters.*

There are cases in *England,* where it has been widely stated that though the Crown can take advantage of estoppel, it is not bound by estoppel, in any case.[60]

Though later cases in England[61] and in India[62] suggest that such a broad proposition cannot be supported, there are certain particular spheres where the plea of estoppel has been held not to be available against the Crown, and these decisions have been considered applicable in India, unless otherwise stated :

(a) *The rule of estoppel by deed does not apply against the Crown.*[63]

This means that the Crown is not debarred from questioning the correctness of the recitals made in a deed to which it is a party or from pleading want of title to make a grant.

The doctrines of estoppel by record and of *equitable* estoppel have, however, been applied against the Crown.[64] In this case, the Crown requested the plaintiff to extend a wharf which he used and thereafter plaintiff's interest

55. *Br. Transport Commn.* v. *Westmoreland C.C.,* (1957) 2 All E.R. 353 (H.R.).
56. *Ranson & Luck* v. *Surbiton Borough Council,* (1949) 1 All E.R. 185 (188) C.A.
57. *Ayr Harbour Trustees* v. *Oswald,* (1883) 8 App. Cas. 623; *Cory* v. *London Corpn.,* (1951) 2 All E.R. 85 (C.A.).
58. *Southport Corpn.* v. *Birkdale Dt. E.S.C.,* (1926) A.C. 355 (371-72) H.L.
59. *Stringer* v. *Union of Housing,* (1970) 1 W.L.R. 1281; *R.* v. *Liverpool Corpn.,* (1972) 2 Q.B. 299.
60. *Sheffield* v. *Ratcliffe,* (1924) Hob. 334 (393); *R.* v. *Delme,* (1714) 10 Mod. 199 (200).
61. *Minister of Agriculture* v. *Mathews,* (1949) 2 All E.R. 724 (729); *Denton Road, in re,* (1952) 2 All E.R. 799 (802); *Wells* v. *Min. of Housing,* (1967) 1 W.L.R. 1000 (1007).
62. *Municipal Corpn.* v. *Secy. of State,* 29 Bom. 580; *Motilal* v. *State of U.P.,* A. 1979 S.C. 621.
63. *Att. Gen.* v. *Collom,* (1916) 2 K.B. 193 (204); Halsbury, 2nd Ed., Vol. VI, p. 483.
64. *Plimmer* v. *Mayor of Wellington,* (1884) 9 App. Cas. 699.

was compulsorily acquired by the Crown. When the plaintiff claimed compensation, the Crown was held estopped from denying the plaintiff's interest in the property.[64]

(b) *Administrative advice not binding on the Government.*

The doubts caused on this point by the observations of Denning, L.J., in *Robertson* v. *Minister of Pensions*[65] and *Howell* v. *Falmouth*[65] have been dispelled by the House of Lords,[66] and it is now settled that it is no defence to an unlawful[66] or *ultra vires* act that the wrongdoer has been misled by the representation made or instructions[67] given by public officials, except in a criminal prosecution where *mens rea* is requisite for liability.[66] Thus,—

(i) The interpretation given by an administrative officer to a statute or statutory instrument is not binding upon the State on the analogy of the principle of estoppel. To interpret the law is the exclusive function of the courts[57] and an individual who acts upon an official advice relating to such interpretation acts at his risk,[68-69] even though the official instructions represent the views of those charged with the administration of the statute.[69]

(ii) Statutory rules are to be interpreted by the Courts like other instruments, regardless of the interpretation given in executive instructions.[70]

An exception to this general rule arises where a contract (say, relating to service) expressly provides that a specified authority shall have the power to interpret the Rules, in which case, the administrative interpretation becomes binding upon the parties by the terms of the contract, and the Courts would be bound to give effect, unless, of course, it violates any provisions of the Constitution itself.[71]

(c) *Ultra vires contract not binding even by way of estoppel.*

Even though a contract made by a Government servant is formally valid under Art. 299(1), Government would not be bound by such contract unless it is shown that—

(a) The Government servant, in making the contract, was acting in the discharge of his duty and within the limits of his authority;[72] or

(b) If he has exceeded his authority, and the Government has ratified the excess.[72]

In such cases, the aggrieved individual cannot contend that he had a right to assume that the public official knew the limits of his authority.[73] An *ultra vires* act is a nullity and estoppel cannot be pleaded so as to enable a public official to do an act which is *ultra vires*.[74] Thus,

---

65. *Robertson* v. *Minister of Pensions*, (1948) 2 All E.R. 767 (770); *Howell* v. *Falmouth*, (1950) 1 All E.R. 538 (542).

66. *Howell* v. *Falmouth Boat Construction*, (1951) 2 All E.R. 278 (280) H.L.

67. *Asst. Custodian* v. *Agarwala*, A. 1974 S.C. 2325; *Motilal* v. *State of U.P.*, A. 1979 S.C. 621.

68. *L.C.C.* v. *Central Land Board*, (1958) 3 All E.R. 676 (678) C.A.

69. *Fed. Ins. Corp.* v. *Merrill*, (1947) 332 U.S. 380.

70. *Brijnandan* v. *State of Bihar*, A. 1955 Pat. 353; *Keshava* v. *Director of P.&T.*, A. 1958 A.P. 697 (703).

71. *Basanta* v. *C.E. Engineer*, A. 1958 Cal. 657 (660).

72. *Collector of Masulipatam* v. *Venkata*, (1861) 8 M.I.A. 629; *Bhikraj* v. *Union of India*, A. 1962 S.C. 113.

73. *Howell* v. *Falmouth Boat Construction*, (1951) 2 All E.R. 278 (280, 285) H.L.

74. *Minister of Agriculture* v. *Mathews*, (1949) 2 All E.R. 724 (729); *Cong & Sons* v. *City of London Corpn.*, (1951) 2 All E.R. 85 (88); *Rhyl U.D.C.* v *Amusements*, (1959) 1 All E.R. 257.

Where the Government, while in possession of requisitioned premises had no statutory right to grant a tenancy, did in fact enter into an agreement for lease, *held*, that the lessee under such agreement could not sue the Government in damages for breach of such agreement inasmuch as the agreement was *ultra vires* and void.[74]

(d) *Declaration of administrative policy not binding.*

While contracts may be made with the Government, as with private persons, by correspondence, in the case of Government a new factor is introduced by the fact that where the Government makes a statement of its administrative policy or a scheme under which particular contracts would be made, the party who may have acted upon such statement has no remedy on the basis of contract.[75]

This also follows from the general proposition (p. 355, *ante*) that Government cannot fetter its executive authority by contract.

Privileges of the State as a litigant.

A perfect system of equality before the law might not admit of any special privilege in favour of the State when it comes before the Court as a litigant against a private individual, and professes to mete out justice to the individual.[76] Since, however, the State represents the collective interests, it has been found necessary under every political system that the State should have certain privileges and immunities simply for the protection of the larger interests of the public. But, as in the matter of non-suability, so in the matter of such privileges, the origin of the claim of the State lies in the feudal theory of sovereignty, and modern developments even in the *United Kingdom* show that not every one of such privileges is essential for the protection of the legitimate interests of the public, and that it is possible for the State to give up some of the vestiges of the feudal regime without detriment to the collective interests. In any case, there has been a growing pressure for a reassessment of the need for such privileges and immunities as against the disadvantage caused to a private litigant in the pursuit of his legal rights before a court of law.

In *India*, we have these privileges codified in *our* laws since the British days, and an examination of the merits of these privileges and exceptions is necessary in order to come to a proper conclusion as to how far they may be discarded in a democratic regime, freed from any feudal obsession.

I. Privilege to withhold evidence, oral or documentary.

(A) *England.*—1. Stated broadly, the State claims this privilege in respect of two classes of evidence :

(a) Where a particular document *contains* materials which it would not be to the public interest[77] to disclose, e.g., materials relating to the construction of a submarine vessel,[78] or some like specific matter relating to national security.

This category of cases is usually referred to as embodying the *contents* claim[70] for objection to production.

(b) Certain *classes* of documents (not relating to the security of the

75. *Australian Woollen Mills* v. *Commonwealth*, (1955) 3 All E.R. 711 (717) P.C.

76. Cf. *Re Mitchell*, (1954) 2 All E.R. 246 [right of the Crown to succeed to estate of an intestate under s. 46(1) of the Administration of Estates Act, 1925].

77. Cf. *Air Canada* v. *Secy. of State*, (1983) 2 W.L.R. 494 (524, 532, 534) H.L.

78. *Duncan* v. *Cammell Laird*, (1942) A.C. 624 (629).

State) which are regarded as fit to be withheld although a *particular* document belonging to that class may not contain anything of a serious nature.[79] To this class belong advice given by legal advisers of the State; the source of information as to the commission of a crime upon which the police takes action for its detection;[80] official communications.

This category is usually referred to as embodying the *class* claim[77] against production.

One of the grounds of justification for the non-disclosure of documents belonging to this class is that nobody will be willing to give full and proper information or advice if he was liable to be exposed to the public.[79,81]

This is referred to as the *'candour'* argument against production.[81]

2. Though the Crown Proceedings Act, 1947, made the Crown compellable to discovery and interrogatories, it left unaffected the privilege of the Crown[82] to withhold documents or other evidence the disclosure of which would be injurious to the public interest (s. 28). Though it refers to particular documents which are injurious and not to a class, the pre-existing law as to this privilege continued to be followed, until public attention to the question was focussed by the decision in *Ellis* v. *Home Office,*[83] where a prisoner who was injured by a fellow-prisoner sued the Crown for damages for negligence in not taking sufficient care in guarding the fellow-prisoner who was mentally defective, but failed to obtain production of the medical report relating to the fellow-prisoner which was withheld on the ground of privilege. The Court of Appeal, affirming the dismissal of the action on other grounds, observed that in the particular instance the production of the document could *not* have been injurious in any way.

3. This decision[83] accentuated the public criticism that the Crown privilege was not justified merely because a document (not being a security document) belonged to a class of documents supposed to affect the public interest. Government conceded to this criticism to some extent and the announcement of the Lord Chancellor in the House of Lords in June, 1956[84] acknowledged that it was possible for the State to give up its privilege in respect of at least *some* of the classes of such documents which were hitherto regarded as properly deserving such protection. According to this announcement, the State in the United Kingdom will not, in future, claim the privilege of non-disclosure in respect of medical reports regarding civilians and certain reports of Government employees which are relevant to actions for negligence or to the defence in criminal proceedings.

4. Side by side with this official concession,[84] the House of Lords has, by a number of decisions, circumscribed the Crown privilege so much so that it has become misleading to refer to this ground for withholding documents as a 'Crown privilege', because the sole test by which the Court now scrutinises the objection against production of such documents is 'public interest'.[85] The

79. *Conway* v. *Rimmer,* (1968) 1 All E.R. 874 (880, 888, 901, 911, 914) H.L.
80. *Rogers* v. *Secy. of State,* (1972) 2 All E.R. 1057 (H.L.).
81. *Burma Oil Co.* v. *Bank of England,* (1979) 3 All E.R. 700 (707) H.L.
82. *Air Canada* v. *Secy. of State,* (1983) 2 W.L.R. 494 (507) C.A.
83. *Ellis* v. *Home Office,* (1953) 2 All E.R. 149 (C.A.).
84. (1957) *Public Law,* p. 36; Mac-Dermott, *Protection from Power,* (1957) p. 102; (197) H.L. Deb., C. 741.
85. *R.* v. *Lewes JJ; Rogers* v. *Secy. of State,* (1972) 2 All E.R. 1057 (1060-61, 1064-65, 1066-67, 1069, 1071) H.L.

following propositions may be formulated from these decisions of the highest tribunal :

i. Whenever an objection to the production of any document by the State is properly raised, the court has to balance two competing interests:[77]

(a) that the document belongs to such a class as should be withheld in the public interest in the proper and efficient administration, e.g., 'for the proper functioning of the public service'[78] (which needs confidentiality[85]), or to enable a statutory authority to perform its statutory duties,[85] or to protect an informant in a matter of public complaint,[85] sources of police information;[85] the efficient working of a law of Parliament relating to customs;[86] the interests of national security[85] or diplomatic negotiations or despatches from ambassadors abroad;[85] Cabinet minutes,[79,85] or documents concerned with policy-making within the department.[79]

It is not possible to exhaust such classes of documents by enumeration.[87] But any new claim must be analogous to those existing.[88]

(b) The public interest in the proper administration of justice, buttressed by the ordinary right of a litigant 'that he shall be able to lay before a court of justice all relevant evidence'.[89]

The court will allow the objection only in a case where the public interest in non-disclosure 'overrides' the right of the private litigant,[77,90] or that the document in question is not essential for proving the plaintiff's case on the issue which must be decided in order to fairly dispose of the case.[88]

On the other hand, even Cabinet minutes are not completely immune but may require production, in the public interest where, for example, the issue in a litigation involves serious misconduct by a Cabinet minister.[88] But, in the absence of such rare litigation, they should not be disclosed until they have become of purely *historical* interest.[88-91]

ii. Even in a litigation between two private litigants, objection may be raised by either party that the document called for by the other party belongs to this class, and the Crown has no right to waive its objection to produce such document;[85,88] for, it is the duty rather than the privilege of the Government to refuse the disclosure of a document or information the disclosure of which would be prejudicial to the public interest,[85] and the *duty* of the court to see that such documents are not made public.[87-88]

iii. On the other hand, the Minister's certificate that the production of a document would be prejudicial to the public interest is not conclusive[91-93] (as was supposed prior to 1968); before accepting the Minister's certificate, the Court is entitled to *inspect* and examine (privately)[92] the document in question as to whether the principle of public interest against non-production is applicable to it.[91] The private inspection by the judge should be distinguished from its being shown to the parties.[91]

86. *Alfred* v. *Customs Commr.*, (1973) 2 All E.R. 1169 (H.L.).
87. *D.* v *National Society*, (1977) 1 All E.R. 589 (605) H.L.
88. *Science Research Council* v. *Nasse*, (1979) 3 All E.R. 673 (692, 698) H.L.
89. *Glasgow Corpn.* v. *Central Lands Bd.*, (1956) S.C. (H.L.) 1 (18-19).
90. *Burma Oil Co.* v. *Bank of England*, (1979) 3 All E.R. 700 (708) H.L.
91. *Conway* v. *Rimmer*, (1968) 1 All E.R. 874 (888-89, 915-16) H.L.
92. *Burmah Oil* v. *Bank of England*, (1979) 3 All E.R. 700 (711, 716, 721, 732, 736) H.L.
93. *Air Canada* v. *Secy. of State*, (1983) 2 W.L.R. 494 (526, 535, 538) H.L. [*Duncan* v. *Cammell Laird*, (1942) A.C. 624 (H.L.) is no longer good law on this point.].

iv. The power to inspect, however, should be exercised with caution.[93] Where the Crown objects to the production of a class of documents on the ground of 'public interest' immunity, the Judge should not inspect the documents until he was satisfied that the documents contained material which would give *substantial support* to the contention of the party seeking disclosure on an *issue* which *arose* in the case or which was necessary for disposing fairly of the cause or matter.[93] Only if the Judge were so satisfied that he should examine the documents privately; no such inspection should therefore be made where the material likely to be contained in the documents has already been published by the Government in a White Paper or in a statement in Parliament.[93]

v. Inspection by the court is a step previous to ordering production and should not therefore be ordered unless the court is satisfied that inspection is *likely* to satisfy itself that it ought to take the further step of ordering production.[94] It follows that if, upon inspection, the court is satisfied that the documents did not contain material necessary for disposing fairly of the case before the court, it would uphold the Government's objection to production.[92] If, however, the court is satisfied that the document contains materials which are necessary for fairly disposing of the case before the court, and the public interest in confidentiality is not strong enough to prevail over the public interest in justice, the Court will order production,[95] allow the other party to inspect the document and to use it in evidence (pp. 538-39).[94]

The weight of the public interest against disclosure will, of course, vary according to the nature of the documents in question; for example, it will in general be stronger where the documents are Cabinet papers than when they are at a lower level (p. 526).[94]

On the other hand, the balance has been found to be in favour of the proper administration of justice and production has been ordered in cases such as the following :

i. The probationary report of a police constable, made by a superior of the probationer constable, in an action for malicious prosecution against the superior officer who had prosecuted the constable on a charge of theft, of which he was eventually acquitted.[95]

ii. The disclosure of names of importers by the Customs authorities, in an action for infringement of patent rights against importers of a chemical compound.[96]

The above summary of the recent decisions of the House of Lords demonstrates that the trend of judicial opinion in England is to uphold the popular agitation for 'open government'[97] and that

"the House's decision in *Conway* v. *Rimmer* was the beginning, but not the end, of a chapter in the law's development in this branch of the law".[97]

(B) *India.*—In *India,* the law relating to the privilege to withhold evidence is contained in ss. 123-125 of the Evidence Act, 1872.

S. 123, which relates to 'affairs of State, says—

"No one shall be permitted to give any evidence derived from unpublished official

94. *Air Canada* v. *Secy. of State,* (1983) 2 W.L.R. 494 (523, Lord Fraser) H.L.
95. *Conway* v. *Rimmer,* (1968) 1 All E.R. 847 (889, 901, 906, 912, 916) H.L.
96. *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.,* (1974) A.C. 133 (190) H.L.
97. *Air Canada* v. *Secy. of State,* (1983) 2 W.L.R. 494 (499) H.L.

records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

The general principle of evidence is that each party must produce all the relevant and material evidence in his possession or power and that if a party fails to produce such evidence relating to a point as regards which the onus of proof is upon himself, the court may, under s. 114 of the Evidence Act, draw the adverse inference against such party that the material, if produced, would have proved the point against the withholding party. Ss. 123-125 offer exceptions to the above principle in so far as no such adverse inference can be drawn against the State or public officer when the claim of privilege to withhold a piece of evidence is upheld by the court.

Evidence Act : S. 123.

The Supreme Court[98] has refused to give an exhaustive definition of 'affairs of State', the only essential feature of documents falling within this expression being that they contain matters of a public nature which cannot be disclosed without prejudice to the public interest. The expression would obviously include documents relating to 'State secrets', i.e., documents relating to public security, defence and foreign relations.[99] But documents relating to commercial and contractual activities[100] of the State may also partake of this character in special circumstances,[98] though cases of this nature in time of peace must 'be rare indeed'. Minutes of the meeting of Council of Ministers may thus be withheld under s. 123.[99]

But, following the trend in the decisions of the House of Lords in England, the Indian Supreme Court, too, has been narrowing down the scope of the plea of the privilege of the Government to withhold documents, and it has been held that the following documents would *not* be protected by s. 123 of the Evidence Act—

(a) Report of the Public Service Commission in accordane with which the Council of Ministers take a decision.[1]

(b) Even as regards documents in respect of which 'class immunity' was accorded by earlier decisions, such as the minutes of Cabinet proceedings, the Supreme Court has come to hold that even as regards this class of documents the immunity is not absolute (para. 72)[1] and that whenever any claim for privilege is raised on behalf of the Government as regards such documents, the court has to act upon the following principles :

i. The burden of establishing a class immunity is heavily upon the Government or other person raising such claim (para. 79).[1]

ii. The court has to weigh between two conflicting public interests, as applied to the documents in question, viz., (a) that their disclosure would impair the efficiency of the public administration or the public services, and (b) that their non-disclosure would thwart the administration of justice and violate the principle that justice shall not be denied to anyone by withholding relevant evidence (para. 72).[1]

iii. By reason of s. 162 of the Evidence Act, the decision as to whether a particular document relates to 'affairs of State', even in cases where class

98. *State of Punjab* v. *Sodhi Singh*, A. 1961 S.C. 493
99. *State of U.P.* v. *Raj Narain*, A. 1975 S.C. 865 (para. 41).
100. *Robinson* v. *State of South Australia*, A. 1931 P.C. 254.
1. *Gupta* v. *Union of India*, A. 1982 S.C. 149 (paras. 61, 68), overruling the majority view, on this point, in *State of Punjab* v. *Sodhi*, A. 1961 S.C. 493.

immunity is claimed, must always be with the court (para. 68) and the court is not bound by the affidavits filed on behalf of the Government (paras. 69, 77).[1]

Hence, the following documents cannot claim absolute immunity under s. 123 :

(a) Cabinet minutes or high level policy decisions, when they have become old enough to be only of historical interest (para. 72),[1] so that the likelihood of injury to the public administration from their disclosure would be remote.

(b) Correspondence between the Law Minister, the Chief Justice or India and the Chief Justices of High Courts regarding the transfer of certain High Court Judges (paras. 76, 79, 80)[1] when such correspondence is a relevant evidence in a judicial proceeding where the validity of such transfer has been challenged, and the question of *mala fides* or the like cannot be decided without looking into such evidence (paras. 81, 85).[1]

(c) When parts of an official record have been published, but the rest has been withheld, the court is to determine whether the unpublished part is innocuous or its publication or disclosure cannot be ordered without prejudice to the national interest.[99]

(d) Confidential notings on official files are not immune from production except when it is demonstrated that their disclosure would be prejudicial to the public interest,[2] or when they led to Cabinet decisions.[3]

But until such noting culminates in an order under Art. 166(2), no charge of defamation, or contempt of court can be founded on it.[4]

S. 162.

As to the power of the court to decide the question of privilege, the court has held that the law in India differs from the English law in view of the provisions of S. 162 of the Evidence Act which says—

"A witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court.

"The court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility."

In *England,* there has been a difference of opinon between the Privy Council on appeal from Australia[5] and the House of Lords.[6-7] In the Australian case, the Privy Council held that Judges should not be powerless whenever the Government chooses to claim privilege and they always had the reserve power to inquire into the nature of the document and to require some indication of the nature of the injury to the State which would follow from its production. The Privy Council also held that under the Australian law of procedure, the court had the power to inspect such documents, "provided, of course,[4] that such power be exercised so as not to destroy the protection of the privilege in any case in which it is found to exist".

2. *State of Orissa* v. *Jagannath,* A. 1977 S.C. 2201.
3. *Daypack Systems* v. *Union of India,* (1988) 2 S.C.C. 299.
4. *State of Bihar* v. *Kripalu Shankar,* A. 1987 S.C. 1554.
5. *Robinson* v. *State of S. Australia,* A. 1931 P.C. 254.
6. *Duncan* v. *Commell Laird,* (1942) A.C. 624.
7. The House of Lords decision has been followed in Canada, (1954) 4 D.L.R. 483 (Can.).

The House of Lords[6] dissented from the above view of the Privy Council, primarily on the ground that (as the law then stood) discovery of documents could not be demanded from the Crown. The court could not, according to this decision,[6] inspect the document or take other evidence to determine the validity of the claim of privilege. A valid certificate from the Minister-in-charge that the production of a particular document would be detrimental to the public interest was *conclusive*.

In *India*, on this point, too, the Supreme Court has changed its view: In 1982, the court has come to hold,[1] overruling its earlier view[71] that even where the document in question be a 'class immunity' document, regardless of its nature, the Government is bound to produce it for inspection of the Court, so that the court may decide whether it should be disclosed to the other party or not (para. 68).[1] If the court finds that that *particular* document is of such a nature that its disclosure would be prejudicial to the public interest, it shall reject the claim for its production; if, on the other hand, the court comes to hold that the document does not relate to affairs of State or that its production would not be injurious to the public interest and further that it is relevant for properly deciding the litigation before it, the court shall reject the claim for 'privilege' (paras. 68,72).[1]

II. Plea of confidentiality for withholding production.

It is to be noted in this context that while the plea of 'public interest' immunity against production of documents is available exclusively in respect of documents of the State or its agencies or public bodies exercising statutory duties or functions, there is an analogous immunity which is available (under common law) to the State in common with private litigants, viz., that the document in question is 'confidential'[8] and should not, therefore, be ordered to be produced unless the court thought it to be necessary in the interest of justice.[10] This plea for withholding confidential documents is founded on the general law of evidence and in respect of documents which are *not* protected by the 'public interest' immunity. In exercising its *discretion* to allow or refuse production of documents of this nature, the court should have regard to the following considerations—

U.K.

(a) That the order of disclosure would involve a breach of confidence[11] and affect third parties; and, on the other hand.

(b) Whether disclosure is necessary for fairly disposing of the case before the court.[9]

It would not order discovery if the information sought from the documents could be had from other sources.[9] If, however, production of the document was necessary for fairly disposing of the case, the court must order discovery, notwithstanding the document's confidentiality.[9]

For the purpose of exercising this discretion, the court should first inspect the document and then determine whether an order of discovery should be made.[9]

---

8. *D.* v *National Society*, (1977) 1 All E.R. 589 (H.L.); *Alfred* v. *Customs & Excise Commrs.*, (1973) 2 All E.R. 1169 (1184) H.L.
9. *Science Research Council* v. *Nasse*, (1979) 3 All E.R. 673 (679-81, 684-85, 687, 695, 697-98) H.L.
10. See *Jain* v. *U.O.I.*, (1993) 4 SCC 119 (*137-39*).
11. *Br. Steel Corpn.* v. *Granada Television*, (1981) 1 All E.R. 417 (H.L.).

While in the case of 'public interest' immunity, the court has to balance between two competing public interests, namely, that of safety of the nation or efficiency of the public service and that of proper administration of justice,[9,12] in the case of confidential documents, it is the interest of private individuals in information given in confidence which the court is to weigh while exercising its discretion to allow or refuse discovery of the document in the interest of justice.[9]

India.

In *India,* there is no general law justifying non-production of evidence on the ground of mere confidentiality,[1] apart from the codified provisions of the Evidence Act, of which ss. 124 and 125 are relevant on this point.

S. 124 relates to official communications and provides—

"No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure."

S. 125 deals with the privilege relating to information to the police or a Revenue Officer relating to the commission of offences :

"No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue."

It is evident from s. 162 that it is wide enough to include objections under ss. 124-125[10] as well, so that even where Government claims privilege under either of these two sections, it is bound to produce the documents for inspection of the court.[1]

Some procedural privileges of the Government as defendant.

In *India,* the Government has certain privileges under the law of procedure as regards actions brought against it. Thus,

I. S. 80 of the C.P. Code provides that no suit can be brought against the Government unless two months' notice is given before institution of the suit. The provision has been held to be imperative.[13]

The provision also includes suits against public officers in their official capacity, or when the act is purporting to be done in his official capacity.[14]

The object of this provision is to give the Government an opportunity to settle the dispute, if possible, instead of involving the State in unnecessary litigation.[15]

An amendment of 1976 has inserted sub-section (2) to enable a plaintiff to *institute* a plaint before issuing such notice in cases where immediate interim relief is necessary.

II. S. 82 gives similar privilege to the Government or a public officer as a judgment-debtor., A decree against the Government or a public officer in his official capacity shall not be executed unless—

(a) it has not been satisfied within the time to be specified in the decree in this behalf; or

12. *Air Canada* v. *Secy. of State,* (1983) 2 W.L.R. 494 (536) H.L.; *D.* v. *National Society,* (1977) 1 All E.R. 589 (605, 618) H.L.
13. *State of A.P.* v. *Suryanarayana,* A. 1965 S.C. 11.
14. *State of Maharashtra* v. *Chander Kant,* A. 1977 S.C. 148 (paras. 14-15).
15. *State of Punjab* v. *Geeta Iron Ltd.,* A. 1978 S.C. 1608.

(b) where no time is specified in the decree, three months have elapsed since the date of the decree.

No such privilege belongs to a private person.

Whether statutes are binding against the State.

(A) *England.*—In *Engalnd,* the Crown is not bound by a statute unless expressly named therein,[16] or by necessary implication.[17] The foundation of this rule is the presumption that Parliament does not intend to deprive the Crown of its prerogative, unless it expresses its intention explicitly, or makes the inference irresistible, and also that the law made by the Crown, with the assent of the Lords and the Commons, is for the subjects and not for the Crown.[18] Though the Crown is made liable in actions as if it were a private person, by the Crown Proceedings Act, the Act [s. 40(2)(f)] saves the plea of the Crown that the statute upon whch the wrong complained of is founded does not bind the Crown, and the common law presumption, as stated above, is retained.

The privilege is enjoyed not only by the Crown but also by other bodies which act in the pursuit of *Crown purposes* (or hold property for such purposes),[17,19] such as an association for raising the Territorial Army,[20] but not by statutory corporations which carry on functions which were previously performed by private *commercial bodies.*[21] In considering whether any subordinate body is entitled to this Crown privilege the question is not so much whether it is an 'emanation of the Crown' but whether it is properly to be regarded as the *servant or agent* of the Crown,[22] and whether the subordinate is acting as the servant or agent of the Crown is to be determined from the provisions of the statute by which the subordinate body was created.[22] Thus, a statutory corporation which has a legal entity of its own and is responsible for its own acts, e.g., the British Transport Commission,[22] is not entitled to this Crown privilege even though a Minister exercises *control* over it.[23] If, however, it is a Government department and its employees are civil servants, e.g., the Post Office,[22] it is entitled to the privilege of immunity from statutory obligation.

The general rule of statutory construction relating to the immunity of the Crown is—

"General words in a statute shall not bind the Crown *to its* prejudice, unless by express provision or necessary implication."[24]

Or, as *Chitty*[25] has formulated it—

"Acts of Parliament which would divest or abridge the King of his prerogatives,

16. E.g., Law Reforms (Personal Injuries) Act, 1948; Highways (Miscellaneous Provisions) Act, 1961; Factories Act, 1937; Law Reform (Contributory Negligence) Act, 1948; Occupiers Liability Act, 1957.

17. Halsbury, 4th Ed., Vol. 44, paras, 930-31; *Town Investments* v. *Dept. of Environment,* (1977) 1 All E.R. 813 (H.L.).

18. *Wheaton* v. *Maple,* (1893) 3 Ch. 48 (64); *Prov. of Bombay* v. *Bombay Corpn.,* (1947) A.C. 58 (61) P.C.

19. *R.* v. *Kent Justices,* (1890) 24 Q.B.D. 181; *Hornsy Council* v. *Hennell,* (1902) 2 K.B. 73; *Cooper* v. *Hawkins,* (1904) 2 K.B. 164.

20. *London Territorial Assocn.* v. *Nichols,* (1948) 2 All E.R. 432 (C.A.); The Brabo, (1949) 1 All E.R. 295 (H.L.).

21. *Mersey Docks* v. *Cameron,* (1864) 11 H.L.C. 443.

22. *Tomlin* v. *Hannaford,* (1949) 2 All E.R. 327.

23. *Central Control Board* v. *Cannon Brewery,* (1919) A.C. 757.

24. *Madras Electric Corpn.* v. *Boarland,* (1955) 1 All E.R. 753 (759) H.L.

25. Prerogative of the Crown, 383.

his interests or his remedies, in the slightest degree, do not in general extend to, or bind, the King, unless there be express words to that effect."

It follows from the above that, unless expressly named therein, the Crown is *not bound* by—

(a) A statute imposing a tax[26] or other charge[24] upon the Crown or its property, such as a poor rate,[27] tolls[28] or harbour dues,[29] whether imposed by the Legislature itself or by any local authority.[30]

(b) A statute creating a penalty[31] or forfeiture.[32]

(c) A statute of limitation, general[33] or special,[34] e.g., the Maritime Conventions Act, 1911, which limits the time during which actions for damage to ships must be brought.[34]

(d) A statute imposing a liability on property owned or occupied by the Crown or its agents.[35]

The rule that the Crown is not bound by a statute unless named therein is subject to the following exceptions :

(e) A statute affecting the priority of Crown debts.[36]

(i) The Crown is sufficiently named when an intention to include it is manifest from the provisions of the statute.[37] The Crown may be bound by 'necessary implication' where it is not expressly named.[38] In other words, if it is manifest from the very terms of the statute that it was the intention that the Crown should be bound, then the result would be the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.[39]

"There are many cases in which such implication does necessarily arise, because otherwise the legislation would be unmeaning."[40]

The Privy Council[39] has expressed the test of necessary implication thus—

"If it can be affirmed that, at the time when the statute was passed, it was apparent from its terms that its beneficient purpose must be *wholly frustrated* unless the Crown were bound, then it must be inferred that the Crown agreed to be bound."[39]

But where the Crown is named in certain sections of a statute, its operation is not necessarily extended to other parts thereof.[41]

(ii) When a statute is passed empowering the Crown to do a certain thing which was so long being done by virtue of the prerogative, the prerogative

26. *I. R. Commrs.* v. *Whitworth Park Coal Co.*, (1958) 2 All E.R. 91 (108) C.A.
27. *Jones* v. *Mersey Docks Board*, (1864) 11 H.L.C. 443 (508).
28. *Cooper* v. *Hawkins*, (1904) 2 K.B. 164.
29. *Mayor of Weymouth* v. *Nugent*, (1865) 6 B. & S. 22 (34).
30. *Coomber* v. *Berks JJ.*, (1883) 2 Tax Cas. 1 (21).
31. *Bradlaugh* v. *Clarke*, (1883) 8 App. Cas. 354.
32. *R.* v. *Kent Justices*, (1889) 24 Q.B.D. 181.
33. *R.* v. *Bayly*, (1841) 1 Dr. & War. 213 (222).
34. The Loredano, (1922), p. 209.
35. *Wheaton* v. *Maple*, (1893) 3 Ch. 48 (C.A.).
36. Ex parte *Postmaster-General*, (1879) 10 Ch. D. 595.
37. *Tennant* v. *Union Bank of Canada*, (1894) A.C. 31; *Moses* v. *Parker*, (1896) A.C. 245.
38. *Stewart* v. *Thames Conservancy*, (1908) 1 K.B. 893.
39. *Prov. of Bombay* v. *Municipal Corpn. of Bombay*, (1946) 73 I.A. 271 (274).
40. *Gorton Local Board* v. *Prison Commrs.*, (1904) 2 K.B. 165 (176n).
41. Ex parte *Postmaster-General*, (1879) 10 Ch. D. 595.

remains in abeyance so long as that statute remains in force, and the Crown can then do that thing only in accordance with the provisions of that statute.[42]

The result is that, though in the generality of cases, an intention to bind the Crown by implication will not be readily made,[43] such implication will be made where the right of the Crown affected by the statute is a prerogative right and statutory provisions have been made by the Legislature relating to such matter, furnishing new *means* to secure the same result.[44,45] Thus, it has been held that—

Where a statutory authority has been set up (cf. Children Act, 1948;[44] Education Act, 1944[46]) to look into the welfare of children the prerogative of the Crown to act as *parens patriae* is *pro tanto* restricted by such statute, so that the courts, exercising the prerogative of the Crown, cannot inquire into the *wisdom* of the decisions of the statutory authority so long as it is acting within the limits of its statutory powers.[44] In other words, so long as it is not *ultra vires* or *mala fide*, the courts cannot interfere with the duties or discretions vested in the statutory authority.[47]

At any rate, the court cannot give any direction at variance with the provisions of the Act.[46]

(iii) The rule does not apply to statutes made for the public good, the advancement of religion and justice, the prevention of fraud, or the suppression of injury and wrong, "for religion, justice and truth are the sure supporters of the Crown and diadems of Kings".[48] The expression 'public good' has, however, been strictly construed, on the ground that all public statutes are, in theory at least, directed to the welfare of the public[49] and, thus, the Income-tax Act, the Public Health Acts[50] or the Rent Restriction Acts are not binding on the Crown even though these Acts are made for the public good.[50]

The theory of 'public good' has been definitely narrowed down by the Judicial Committee in *Province of Bombay* v. *Municipal Corporation of Bombay*,[51] where the following propositions have been laid down :

"The earlier view that whenever a statute is enacted for the 'public good' the Crown, though not expressly named, must be held to be bound by its provision, cannot now be regarded as sound except in a limited sense.

"If it can be affirmed that, at the time when the statute was passed, it was apparent from its terms that its beneficient purpose must be *wholly frustrated* unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound .....

"The fact that at a time which is long after the passing of the Act, the Act cannot, in the Court's opinion, operate with 'reasonable efficiency' unless the Crown is bound, is not a sufficient reason for saying that the Crown is bound by necessary implication."[51]

(a) Where a statute does not bind the Crown, the plea is available also to the servants and agents of the Crown,[51] provided the servants or

42. *A.G.* v. *De Keyser's Royal Hotel*, (1920) A.C. 508 (539).
43. *Wheaton* v. *Maple & Co.*, (1893) 3 Ch. 48 (64).
44. Re *M.*, (1961) 1 All E.R. 788 (791) C.A.
45. *A.G.* v. *De Keyser's Royal Hotel*, (1920) A.C. 508 (561).
46. Re *Baker*, (1961) 2 All E.R. 250.
47. Re *A.B.*, (1954) 2 All E.R. 287.
48. *Case of Ecclesiastical Persons*, (1861) 5 Co. Rep. 14.
49. *London Country Territorial Assocn.* v. *Nichols*, (1948) 2 All E.R. 432 (C.A.).
50. *Gorton Local Board* v. *Prison Commrs.*, (1904) 2 K.B. 165 (168).
51. *Prov. of Bombay* v. *Municipal Corpn. of Bombay*, (1946) 73 I.A. 271.
[This decision of the Judicial Committee has also been followed by the House of Lords in *The Brabo*, (1949) 1 All E.R. 294 (H.L.).]

agents are acting for Crown purposes,[52] even though the Crown may not obtain any financial benefit from such function.[53]

A public purpose may be said to be a Crown purpose when such purpose is "required and created by the Government of the country" and is "therefore to be deemed part of the use and service of the Crown".[54]

(b) This principle has been applied to hold that property which is used for any purposes of the Government, such as the following, is exempt from rates imposed by the Poor Relief Act, even though the occupiers of the property may not, strictly speaking, be servants of the Crown: police, administration of justice, admiralty, post office, jail, accommodation of judges,[52] functions under the National Health Service Act.[55]

In these cases, though the persons who claim the immunity are not Crown servants, they are deemed to be in a *similar* position and the immunity is extended to the property which is used for the purposes of Government.[53] This principle has thus been extended to exempt an army driver from liability for exceeding the speed limit imposed by a statute on the ground that he had exceeded the limit for Crown purposes but that he would have been liable had he done it simply because he liked to drive fast.[56]

The question to be answered in such cases is whether any purpose of the executive government[54] would be prejudiced if the statute were applied against the Crown.[57]

(c) Where an authority is not a Crown servant but an independent statutory body or corporation,[58] it can claim immunity from a statute only if it exercises functions of a strictly governmental character.[59]

(B) *Australia.*—In Australia, the English rule that the Crown (i.e. the Government) is not bound by a statute unless this is provided for expressly or by necessary implication, has been followed.[60] The immunity extends to the instrumentalities which represent the Crown as its agent or servant.[61] But where a statutory body or a corporation, having an independent existence and a substantial measure of independent discretion in the exercise of its functions, is invested with public rights and duties, it cannot be said that the body or corporation is a mere agent of the Crown.[62] Where the body has discretionary powers of its own, it is not identified with the Crown even if a Minister has power to interfere with the decisions of the body, for, in law, the final act remains that of the statutory body and not that of the Government.[63] A company, acting as an independent contractor for the supply of certain services on behalf of the Government (which are not 'essential functions' of Government), cannot claim immunity from price-fixing legislation.[64]

The presumption against a statutory liability to bind the Crown has been pushed to its logical extreme in an *Australian* case[65] where the statute,

52. *Coomber* v. *Berkshire Justices,* (1883) 9 App. Cas. 61 (72).
53. *Bank Voor* v. *Hungarian Administrator,* (1954) 1 H.L. 969 (983).
54. *Mersey Docks* v. *Cameron,* (1865) 11 H.L.C. 443 (504).
55. *Nottingham Hospital* v. *Owen,* (1957) 3 All E.R. 358.
56. *Cooper* v. *Hawkins,* (1904) 2 K.B. 164.
57. *Tomlin* v. *Hannaford,* (1949) 2 All E.R. 327.
58. E.g., the British Broadcasting Corpn. [*B.B.C.* v. *Johns,* (1964) 1 All E.R. 923].
59. *Pfizer Corpn.* v. *Min. of Health,* (1965) 1 All E.R. 450 (H.L.).
60. *Minister for Works* v. *Gulson,* (1944) 69 C.L.R. 338 (358).
61. *Repatriation Commn.* v. *Kirkland,* (1923) 32 C.L.R. 1.
62. *Grain Elevators* v. *Dunmunkle Corpn.,* (1946) 73 C.L.R. 70.
63. Cf. *Metropolitan Meat Industry Board* v. *Sheedy,* (1927) A.C. 899 (905).
64. *Commonwealth* v. *Bogle,* (1953) 89 C.L.R. 229 (256).
65. *Cain* v. *Doyle,* (1946) 72 C.L.R. 409.

to all intents and purposes, appeared to include the Crown. S. 18(1) of the Commonwealth Re-establishment and Employment Act, 1945, provides—

"When an employer has reinstated a former employee ..... he shall not, without reasonable cause, terminate the employment of that employee: Penalty £ 100."

An "employer" was defined as including the Crown "unless the contrary intention appears".

It was held by the majority of the High Court[65] that though the directive provision in s. 18(1) was binding upon the Crown as an employer, but not the penalty, because the Crown was not subject to the criminal jurisdiction of any court, except with its consent.

"There is ..... the strongest presumption against attaching to a statutory provision a meaning which would amount to attempt to impose upon the Crown a liability of a criminal nature. It is opposed to all our conceptions, constitutional, legal and historical."

The court, however, conceded that the presumption "*was not immutable* and we would beware of giving effect to the strong presumption .... in the face of some *clear expression* of a valid intention to infringe upon them."

The decision[65] would be of interest in a country like *ours* where the personal immunity of the head of the State does not stand in the way of appropriate proceedings against the Government [Art. 361(1), Prov., *post*], particularly with respect to statutory offences.[66]

(C) *India.*—As regards the applicability of a municipal statute to a governmental duty, such as the distribution and rationing of goods, the Supreme Court, in an earlier case,[67] refused to hold by implication that the Government was also bound by the statute. It was accordingly held that the Director of Rationing could not be prosecuted for failure to obtain a licence for storing rice etc. But this decision has been *overruled* by 8 : 1 majority in the *State of West Bengal* v. *Corporation of Calcutta*,[68] and the law established is that, in republican India, the State will be bound by a statute *unless expressly excluded.*[68-69] The Government was accordingly held liable to be prosecuted under the Calcutta Municipal Act for running a market without obtaining a trade licence.[68]

The use of words such as 'persons', 'residing', and the like is not conclusive to exclude the State.[69-70]

On this principle the following provisions have been held to be binding upon the Government—

(i) O. 39, r. 2(3) of the C.P. Code—For, where a court is empowered by statute to issue an injunction against any defendant even if the defendant be the State—the provision would be frustrated and the power rendered ineffective and unmeaning if the machinery for enforcement of statute specially enacted did not extend to everyone against whom the order of injunction is directed.[71]

(ii) S. 13 of the Displaced Persons (Debts Adjustment) Act, 1951, which provides—

"Claims by displaced persons against who are not *displaced* debtors.—

At any time ..... any displaced creditor claiming a debt from any *other person who is not a displaced person* may make an application ..... to the Tribunal ....."

Held, a claim under the above provisions could be made against the Government of the Union or of a State, for otherwise the object would be defeated.[70]

66. In the U.S.A., the Government is liable to statutory penalties in respect of the exercise of non-sovereign functions [see *U.S.* v. *California,* (1936) 297 U.S. 175, below].

67. *Director of Rationing* v. *Corpn. of Calcutta,* A. 1960 S.C. 1355.

68. *State of W.B.* v. *Corpn. of Calcutta,* A. 1967 S.C. 977.

69. *Union of India* v. *Jubbi,* A. 1968 S.C. 360 (364).

70. *State of Punjab* v. *O.G.B. Syndicate,* A. 1964 S.C. 669 (679).

71. *State of Bihar* v. *Sonabati,* A. 1961 S.C. 221 (230).

The State can take advantage of a statute, though not bound by it.

In *England*, it has been held that even where the Crown is not bound by a statute because it is not expressly or impliedly named therein, the Crown can take advantage of that statute against a private suitor,[72] except where the statute expressly exacts that it will not apply to the Crown.[73]

Thus, the Crown can apply a statute of limitation against the subject even when the statute could not be used against it.[74]

The position in *India* should not be otherwise (see next caption).

Whether the State is a 'person' for statutory interpretation.

A 'person' is defined in s. 3(42) of the General Clauses Act as follows:

"A 'person' shall include any company or association or body of individuals, whether incorporated or not."

In the High Courts, there was a controversy as to whether the State may be said to be a 'person' within the meaning of the above definition.

The Calcutta view[75] must be now taken to prevail by reason of the Supreme Court decisions in *Legal Remembrancer* v. *Corporation of Calcutta*[76] and *Union of India* v. *Jubbi*,[69] where it has been held that a statute shall apply to the State, unless the State is excluded from its operation expressly or by implication e.g., the subject-matter or object of the legislation is such that the Legislature could have intended to apply it only to citizens.

Hence, the mere fact that the statute uses the word 'person' would not exclude the State by implication, except where there is anything in the context which suggests that the word 'person' was used to refer only to a natural person.[77]

(a) Where there is no question of imposing any charge or liability upon the State, the word 'person' should include a reference to the State, unless that word, in its context, can refer only to a natural person.[78]

(b) Even where a statute is not binding upon the State because it imposes a charge,—

(i) there may be provisions in the statute which may be applicable to the State as a 'person' if such provisions do not impose any charge or liability;[77]

(ii) the Crown can take advantage of the statute as a 'person'.[78]

II. PROCEEDINGS AGAINST PUBLIC OFFICIALS

Personal Liability of Public Officials in Discharge of Official Duties.

In Contracts.

(A) *England.*—Public officers cannot be sued personally (or in the official capacity), upon *contracts* made by them in their official capacity[79] (the remedy being by petition of right).

72. *The Magdalene College case*, (1616) 11 Rep. 66b; *Willion* v. *Berkley*, (1562) Plowd. 223 (243); *A.G. for N.S.W.* v. *Curator*, (1907) A.C. 519.

73. Cf. *Nisbet Shipping Co.* v. *R.*, (1955) 1 All E.R. 753, 759 (764) H.L.

74. *R.* v. *Cruise*, (1851) 2 Ir. Ch. R. 65.

75. *Calcutta Corpn.* v. *Dir. of Rationing*, A. 1955 Cal. 282.

76. *Legal Remembrancer* v. *Corpn. of Calcutta*, A. 1967 S.C. 997; (1967) 2 S.C.R. 170.

77. *State Trading Corpn.* v. *C.T.O.*, A. 1963 S.C. 1811 (1817); *B.I.S.N. Co.* v. *Jasjit*, A. 1964 S.C. 1451 (1454).

78. *State of W.B.* v. *Union of India*, A. 1963 S.C. 1241 (1249).

79. *Macbeath* v. *Haldimand*, (1786) 1 T.R. 172.

As regards *torts,* however, all servants of the Crown and public officials are *personally* responsible for wrongs committed by them in their official capacity.[80] The command of the Crown[81] or of a superior officer, or *bona fides,* is no defence to an illegal act.[82] In fact, the Rule of Law has been evolved as a necessary condition for maintaining the immunity of the Sovereign. This liability for torts will extend even to the exercise of statutory powers in cases where the Act constituting the act is *ultra vires* so that statutory authority is not available in defence.[83]

In Torts.

Since subordinate officers are not servants of the head of the department or other administrative superior but are fellow servants of the Crown, a superior officer is not liable for torts committed by subordinate officers unless the superior officer has either expressly directed the commission of the wrong or so specifically authorised it as to make it substantially his own act.[84]

As regards *crimes,* there is no distinction between officials and ordinary citizens; they are subject to the *same liability.*[85] The relationship of principal and agent is unknown to criminal law and even though an agent commits a crime under the orders of his principal, both are liable as criminals.[86]

For Crimes.

Judicial officers, however, enjoy a special immunity for acts done or omitted to be done by them in their judicial capacity. The object of this rule is to secure the independence of the judges and to maintain their authority which is indispensable for the due administration of justice. In order to discharge their functions properly, they must be free from liability to harassing and vexatious actions at the instance of discontented parties. (i) No action will lie against a judge for what he does judicially though *erroneously.*[87] (ii) No action will lie for judicial acts or omissions even if the motive of the judge has been *malicious,* and the acts or words have *not* been *done or spoken in the honest exercise* of his office.[88] The above two immunities extend equally to judges of the superior and inferior courts. (iii) In *Calder* v. *Halket,*[89] the Privy Council has laid down that a judge will not be liable even if he *exceeds his jurisdiction* unless he knew, or ought to have known, the absence of jurisdiction. In the case of *inferior* courts, however, there is no such presumption of jurisdiction, and the judge must know the limits of his jurisdiction. In the latter case, the burden lies upon him to prove jurisdiction. Magistrates and justices of the peace are even liable for acts done within their jurisdiction, but *maliciously and without reasonable cause.*[90]

80. For statutory exceptions, see ss. 9(1), 10(1)-(2), Crown Proceedings Act, 1947.
81. *Tobin* v. *The Queen,* (1864) 16 C.B. (N.S.) 310 (354).
82. *Madrazo* v. *Willes,* (1820) 3 B. and Ald. 353; *Walker* v. *Baird,* (1892) A.C. 491.
83. Cf. *Harper* v. *Secy. of State,* (1955) 1 All E.R. 331 (340) C.A.
84. *Lane* v. *Cotton,* (1701) 1 Raym. 646. But local authorities, statutory corporations and public authorities other than Government Departments are liable for wrongs committed by their employees under the ordinary rule of *respondent superior* [*Mersey Docks* v. *Gibbs,* (1866) 1 H.L. 93].
85. *R.* v. *Eyre,* (1868) 3 Q.B. 487; *Mostyn* v. *Fabrigas,* (1774) Cowp. 161.
86. *Woodgate* v. *Knatchbull,* 2 T.R. 148.
87. *Hammond* v. *Howell,* (1677) 2 Mod. 219.
88. *Anderson* v. *Gorrie,* (1895) 1 Q.B. 670; *Scott* v. *Stansfield,* (1868) L.R. 3 Ex. 220.
89. *Calder* v. *Halket,* (1839) 3 Moo. P.C. 28; *Houlden* v. *Smith,* (1850) 14 Q.B. 850.
90. *Peacock* v. *Bell,* (1666) 1 Wms. 74; *Dawkins* v. *Paulet,* (1869) 5 Q.B. 96; *Haggard* v. *Pelicier,* (1892) A.C. 61.

As regards the liability of officers acting in execution of a warrant or order issued by a court of law, the English law proceeds on the following principles :

(i) Where an officer acts under an order of court which is within the jurisdiction of the court, and the officer executes the order 'accurately', that is to say, not exceeding the power conferred by the warrant[91] and no unnecessary force or violence is used in executing it,[92] the officer is absolutely protected from liability for any injury caused by the execution of the warrant or order.[93]

(ii) Even when a judgment is subsequently reversed, it affords immunity for all parties acting under it until it is reversed.[94]

(iii) Where, however, the order is clearly beyond the jurisdiction of the court issuing it, the officer executing it cannot derive any shelter from what is practically a piece of waste paper.[91]

But in this respect, a distinction is drawn between superior and inferior courts. In the case of superior courts, there is a presumption in favour of jurisdiction and anybody who challenges its order will have to establish that it is without jurisdiction. In the case of inferior courts, however, there is no such presumption and it is for a person who relies on the order of such court to show that it was within the jurisdiction of such court.[95]

(B) *India*.—The Constitution of India contains no provision prescribing immunity of officials for anything done in the discharge of official duties, save in the matter of *contracts* (for which see *below*). In the result, the position of officers, under *our* Constitution, will be the same as that of private individuals except in so far as exceptions may be engrafted by *legislation* within the permissible limits. The immunity of judicial officers and officers executing judicial warrants or orders will be discussed under the next head.

Statutory modifications of the above general principles.

In *India*, the principal statutory provisions, under the *existing* law, which give officers a special protection, may be referred to, as follows :

I. The Judicial Officers' Protection Act (XVIII of 1850) provides—

"For the greater protection of Magistrates and others acting judicially; it is enacted as follows:—

1. No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any *Civil Court* for any act done or ordered to be done by him in the discharge of his official duty, whether or not without the limits of his jurisdiction: provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

In comparison with the English law discussed at pp. 390-91, *ante*, these points are to be noted—

(a) While in *England* the immunity of these officers rests on common law, in *India* it is governed by statutory provisions.

91. *Carratt* v. *Morley*, 1 Q.B. 28.
92. *Howard* v. *Gossett*, (1845) 10 Q.B. 359.
93. *Leach* v. *Money*, (1765) 19 St. Tr. 1001.
94. *Williams* v. *Smith*, 14 C.B. N.S. 596.
95. *Stanton* v. *Styles*, 5 Ex. 383; *Foster* v. *Dodd*, 3 Q.B. 76.

(b) The distinction between superior and inferior courts as regards jurisdiction does not obtain in India.

(c) This Act makes no distinction between acts done within and without jurisdiction, provided the officer, in *good faith,* believed that he had jurisdiction. The only condition for immunity under this Act is that "the act is done or ordered to be done by him *in the discharge of his official duty*".

(d) The Act confers immunity upon the person who executes (whether an officer or a private person) on the following conditions—

(i) the executing person must be bound in law to execute such process;

(ii) the process must be issued by a "person *acting judicially*";

(iii) the act of issuing the process in question is within the jurisdiction of the person acting judicially.

It is to be noted that so far as the executing person is concerned, under the foregoing provision there would be immunity even though the act of issuing the process in question is an *illegal or irregular* exercise of jurisdiction.

This protection is not available to the police or a Magistrate, acting in the exercise of police powers.[96]

II. Apart from the above, there is no protection to officers in general in respect of civil liability for torts or illegal acts, unless he is acting *bona fide,* in the discharge of some *statutory powers.* 'Good faith' in this context includes an act done by an officer under a *mistaken*[97] but honest belief as to his duty. But there is no question of good faith when an officer acts in plain contravention of a statute, e.g., where he seizes the plaintiff's goods, purporting to act under r. 81(4) of the Defence of India Rules even though the plaintiff produced his licence.[98] In such a case, the officer must answer in damages.[98]

Some statutes make express provision, barring action against the officers for anything done or purported to be done under such statute. But even then action will lie on proof of *malice.*[99]

III. But all civil action against a "public officer in respect of any act purporting to be done by such public officer in his official capacity" is subject to the procedural limitations laid down in ss. 80-82 of the Code of Civil Procedure, 1908. S. 80, in short, requires a two months' notice before institution of the suit. This provision is imperative and admits of no exception if the act is *purported* to be done in the officer's 'official capacity'.[100]

It follows that when the officer is not acting within the *scope* of his duties, no notice under s. 80 need be given,[1] as for example, when he commits an assault, or otherwise acts as a private individual.

IV. As to *criminal* liability, the following provisions of the Indian Penal Code may be referred to :

"76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

96. *Sinclair* v. *Broughton,* (1882) 9 Cal. 341 (P.C.).

97. *Gurucharan* v. *Prov. of Madras,* A. 1944 F.C. 41.

98. *Babulal* v. *Prov. of Orissa,* I.L.R. (1954) Cuttack 171 (191).

99. *Spooner* v. *Juddoo,* (1848) 4 M.I.A. 353 (379); *Rogers* v. *Rajendra,* (1860) 8 M.I.A. 103 (134).

100. *Bhagchand* v. *Secretary of State,* A. 1927 P.C. 176; *Province of Bombay* v. *Pestonji,* A. 1949 P.C. 143.

1. *Rebati* v. *Jatindra,* A. 1934 P.C. 96; *Amalgamated Electricity* v. *Ajmer Municipality,* A 1969 S.C. 277.

(a) *A*, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. *A* has committed no offence.

(b) *A*, an officer of a Court of Justice, being ordered by that Court to arrest *Y*, and, after due enquiry believing *Z* to be *Y*, arrests *Z*. *A* has committed no offence.

77. Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law."

V. A more serious limitation as to prosecution of a public officer for any official act is provided by s. 197 of the Code of Criminal Procedure, 1898, as follows :

"(1) Where any person who is a Judge within the meaning of s. 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a State Government or some higher authority, is accused of any offence alleged to have been committed by him while *acting or purporting to act in the discharge of his official duty*, no court shall take cognizance of such offence except with the *previous sanction*—

(a) in the case of a person employed in connection with the affairs of the Union, of the President; and (b) in the case of a person employed in connection with the affairs of a State, of the Governor of that State ...."

VI. There are various statutes[2] which, instead of allowing a total immunity, impose a shorter period of limitation for actions and prosecutions against public servants for offences committed or injury caused by an act 'done or intended to be done' under any of the provisions of the relevant statute or an act 'done under colour' of the official duties of such public servant.

In all such cases, the interpretation of the expression 'colour of the duty' or intended or purported to be done under the statute is called for. The principle laid down by the Supreme Court[3] in this context is—

"an act is not done under colour of an office merely because the point of time at which it is done coincides with the point of time the accused is invested with the powers or duty of the office. To be able to say that an act was done under the colour of an office one must discover a reasonable connection between the act alleged and the duty or authority imposed on the accused by the Bombay Police Act or other statutory enactment. Unless there is a reasonable connection between the act complained of and the powers and duties of the office, it is difficult to say that the act was done by the accused officer under the colour of his office.[3]

Thus—

A. The following have been held to be done under the statutory or official duty—

The submission of a false *panchannama* in connection with a seizure.[4]

(B) On the other hand, the following have been held as *not* done under colour of the official duty and not accordingly covered by the immunity or limitation provision :

(i) Taking bribe in course of an investigation;[3]

(ii) Wrongly confining a suspect[5] and/or causing him injury[6] in course of an investigation.[5]

---

2. E.g., s. 161(1) of the Bombay Police Act, 1951 [*State of Maharashtra* v. *Narhar Rao*, A. 1966 S.C. 1783; s. 53 of the Madras District Police Act, 1859 [*State of A.P.* v. *Venugopal*, A. 1964 S.C. 33].

3. *State of Maharashtra* v. *Narhar Rao*, A. 1966 S.C. 1783.

4. *Virupayappa* v. *State of Mysore*, A. 1963 S.C. 849.

5. *State of A.P.* v. *Venugopal*, A. 1964 S.C. 33.

6. *State of Maharashtra* v. *Atmaram*, A. 1966 S.C. 1786.

Personal immunity of Officers for Government contracts.

(A) *England.*—The general law of agency has been applied to hold that a public servant is not personally liable on contracts made by him in his official capacity,[7] unless the circumstances make it clear that he intended to make himself personally liable.[8] Such an inference, however, is rarely made.[9]

It follows that the common law principle that an agent who acts without authority of his principal is liable to be sued for breach of warranty of authority does not apply to Crown servants, even where the Crown expressly refuses to ratify the unauthorised act.[10]

(B) *India.*—In India, Art. 299(2) of the Constitution says—

> Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing such contract or assurance on behalf of any of them be personally liable in respect thereof.

This provision, however, is confined to the President and the Governor and to Government officials for contracts executed 'for purposes of the Constitution'. But excepting the present clause, there is no provision in *our* Constitution to exempt officials from personal liability for acts done or *purported to be done* in the exercise of the official duties. The present clause, following English law, exempts officials as well as the Executive heads from personal liability for contracts made or executed 'for the purposes of this Constitution', or under any of the Government of India Acts. The words 'purporting to be' which occur in Cls. (1) and (4) of Art. 361, *post*, are absent from Art. 299(2). In the result, in cases of excess of jurisdiction,[11] where it is proved that the purpose for which the contract was made is not within the 'purposes of this Constitution', the officer will be personally liable, notwithstanding his *bona fides*.

It is also to be noted that the officer will be personally immune only if the contract duly complies with the formalities laid down in Cl. (1) of Art. 299. In short, where the Government is *not bound* for want of due compliance with Art. 299(1), the personal liability of the officer who executed the contract remains. The liability of the officer in such a case is founded on s. 230(3) of the Contract Act, which says—

> "In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.
>
> Such a contract shall be presumed to exist in the following cases:—
>
> .....(3) where the principal, though disclosed, cannot be sued.

Hence, a Government servant, executing a contract on behalf of the Government does not take care to comply with the formality prescribed by Art. 299(1) of the Constitution, must be personally liable because in such a case "the principal cannot be sued" for non-compliance with Art. 299(1).[11-12]

---

7. *Macbeath* v. *Haldimand,* (1786) 1 T.R. 172.
8. *Samuel Bros.* v. *Whetherley,* (1908) 1 K.B. 184 (C.A.).
9. *Palmer* v. *Hutchinson,* (1881) 6 App. Cas. 619.
10. The Prometheus, (1949) 82 Ll.L. Reo. 859; *Dunn* v. *Macdonald,* (1897) 1 Q.B. 555.
11. *Chaturbhuj* v. *Moreshwar,* (1954) S.C.R. 817 (834-35).
12. *Lakshmisankar* v. *Motiram,* 6 Bom. L.R. 1106.

Public authority : Exercise of discretion

Public authority is presumed to and expected to act consistent with public interest and interest of law.[13] Authority exercising discretionary power cannot claim that the discretion is unfettered.[14] Public authorities have to make specific regulations or valid guidelines to exercise their discretionary power.[15] Discretion conferred upon a public authority by statute has to be exercised on the basis of rules of reason and justice and not arbitrarily.[16]

Public element

Every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest. Actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. If actions bear insignia of public law element or public character they are amenable to judicial review and the validity of such action would be tested on the anvil of Art. 14. Distinction between public law and private law remedy is now narrowed down.[17]

Person holding high public office must exercise his power in public interest and for public good.[18]

Misuse of power and corruption

'Misuse' means doing something improperly. Impropriety is committed if a public motive is used for a private one. Misuse becomes corruption when a duty is performed for mutual gain. The holder of a public office is said to have misused his position when in pursuit of a private satisfaction as distinguished from public interest, he has done something which he ought not to have done.[19]

---

13. *State* v. *Krishnachand*, (1996)4 S.C.C. 472.
14. *Shiv Sagar* v. *Union of India*, (1997)1 S.C.C. 444; *Union of India* v *Jesus Sales Corporation*, (1996) 4 S.C.C. 69 : A. 1996 S.C. 1509.
15. *New India Public School* v. *HUDA*, (1996)5 S.C.C. 510.
16. *Gajraj Singh* v. *STAT*, (1997)1 S.C.C. 650.
17. *L.I.C.* v. *Consumer Education and Research Centre*, (1995)5 S.C.C. 482 : A. 1995 S.C. 1811.
18. *State* v. *P.C. Mishra*, 1995 Supp (4) S.C.C. 139.
19. *Secretary, Jaipur Development Authority* v. *Daulat Mal Jain*, (1997)1 S.C.C. 35.

CHAPTER 17

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION

Need for judicial control.

It has been stated at the very outset that owing to the complexity of modern conditions, the delegation of *quasi-legislative* and *quasi-judicial* functions to a number of administrative authorities and tribunals has become unavoidable. But, if the Rule of Law and conformity to the provisions of the Constitution of the land are to be maintained, these multitudinous administrative authorities must be brought under the control of the courts of law, so that the authorities may be kept within the powers and jurisdictions conferred upon them by statutes as well as to ensure that, even in their non-statutory functions, they do not violate any of the mandates of the Constitution.

The foregoing power of the courts is comprehensively described as the power of 'judicial review'.

Judicial review and Appeal.

It should always be remembered that the object and scope of judicial review of administrative action is different from that of appeal. The object of judicial review of administrative action by the ordinary courts, as has been stated earlier, is to keep the administrative authorities *within the bounds of their powers under the law.*[1] Appeal, on the other hand, means that the superior administrative tribunal or court to whom appeal lies under the law, has the power to reconsider the decision of the inferior tribunal *on the merits.* Appeal, however, is a creature of statute and there is no right of appeal unless there is a specific statutory provision creating that right.

Irrespective of a right of appeal, however, the courts of law may exercise a power of judicial review over the acts and decisions of administrative authorities on questions relating to jurisdiction. Except in the narrow sphere of 'error apparent on the face of the record', the correctness or otherwise of the administrative decision is not within the scope of judicial review.[2]

In all the modes of judicial review, thus, the jurisdiction of the court, whether in a declaratory action[3] or in a writ proceeding,[4-5] is simply to set aside the unlawful order and not to substitute its own decision for that of the statutory authority, for that would be exercising a power of appeal where none exists.[3-4] In other words, the superior court, exercising its supervisory

1. *Waryam* v. *Amar,* A. 1954 S.C. 215; *Vice-Chancellor* v. *Ghosh,* A. 1954 S.C. 217 (219).
2. *Satyanarayana* v. *Mallikarjuna,* A. 1960 S.C. 137 (142); *Basappa* v. *Nagappa,* A. 1954 S.C. 440; *Sadhu* v. *D.T.C.,* A. 1984 S.C. 1467 (para. 3).
3. *Healey* v. *Ministry of Health,* (1954) 3 All E.R. 449 (453) C.A.
4. *R.* v. *Northumberland Compensation Appeal Tribunal,* (1952) 1 All E.R. 122 (126).
5. *Kochunni* v. *State of Madras,* A. 1959 S.C. 725; *Election Commr.* v. *State of Haryana,* A. 1984 S.C. 1406 (para. 10).

jurisdiction over the administrative decision, cannot enter into the question whether such decision is *wrong* on its merits, even on a question of law (except where that is apparent on the face of the record).[6-7]

The primary scope of judicial review of administrative action by Court is to see whether there has been any infirmity in the 'decision-making process',[8] such as *ultra vires, mala fides* or guided by irrelevant or extraneous[9] considerations [para. 28][8] or violative of natural justice.

Where the administrative authority constitutes 'State within the meaning of Art. 12, it the Court, exercising power of judicial review' has the further obligation to ensure that the impugned order does not violate a fundamental right in Part III of the Constitution [para. 14].[8]

Thus, if the administrative decision is arbitrary, unreasonable, unfair, unjust or contrary to public interest[10] in which case it will be struck down as violative of Art. 14 [paras. 14, 18].[8]

On the other hand,—

In exercising power of judicial review, the Court cannot—

(a) Enter into the *merits* of the conclusion arrived at by the authority or interfere with his decision, as if sitting in appeal [para. 18].[8] In short, the Court cannot substitute its own decision for the administrative decisions.[11]

(b) Interfere with the *policy* laid down by the Government, unless it appears to be *plainly* arbitrary or *mala fide* [para. 22][8, 12] or violative of fundamental rights.[13]

It is not for the Court to question the *wisdom* of the Government's policy[15] particularly if the policy relates to economic matters.[14]

Administrative review.

Judicial review should be distinguished from administrative review. Many statutes set up a hierarchy of administrative authorities, with provision for appeal or revision, from the orders of the inferior authorities to the superior authorities. Though this is in addition to the remedies of judicial review as are available under the general law, courts may sometimes have to interfere even in the area of statutory administrative review.[15]

Administrative revision.

The power of revision is usually placed at the hands of the highest authority, e.g., the State Government, to correct any illegality or irregularity in the proceedings before the inferior authorities.

---

6. *Gillingham Corpn.* v. *Kent County Council,* (1952) 2 All E.R. 1109.
7. See also *Lakhanpal* v. *Union of India,* A. 1967 S.C. 908 (915-16).
8. *Sterling Computers* v. *M.N.P.,* (1993) 1 S.C.C. 445 (paras. 14-22).
9. *Jain* v. *Union of India,* A. 1993 S.C. 1769.
10. *Sachidanand* v. *State of W.B.,* (1987) 2 S.C.C. 295 (para. 40).
11. *Harpal* v. *State of U.P.,* A. 1993 S.C. 2436 (para. 17).
12. *State of M.P.* v. *Nandlal,* (1986) 4 S.C.C. 566 (para. 34).
13. *Narayanan* v. *State of Karnataka,* (1994) Supp. (I) S.C.C. 44 (*53*).
14. *Subhash* v. *Union of India,* (1993) Supp. (3) S.C.C. 323 (*331*).

14a. *I.S.M.E.A.* v. *I.R.T.S.A.,* (1993) Supp. (4) S.C.C. 473; *Union of India* v. *Reddappa,* (1993) 4 S.C.C. 269 (274).

15. Cf. *Nagendra* v. *Commr.,* (1958) S.C.R. 1240 (1253); *Harinagar Mills* v. *Shyamsundar,* A. 1961 S.C. 1669 (1678).

(a) Sometimes the statute expressly states that the power of revision may be exercised *suo motu* as well as on the application of the party aggrieved.

(b) Sometimes the statute only authorises the superior authority to use his power of revision *suo motu* or of his own motion, e.g., original s. 33 of the Income-tax Act, 1922. In such a case the party aggrieved has no *right* to relief and the revisional authority has no *duty* to perform, on the application of such party.[16]

(c) Difficulty of interpretation arises where neither the words *'suo motu'*, nor 'on application' are used by the statute, e.g.—

S. 154 of the Maharashtra Co-operative Societies Act, 1960, says—

"The State Government ..... may call for and examine the record of any inquiry or proceedings of any other matter of any officer subordinate to them, except those referred to in sub-sec. (9) of section 149 for the purpose of satisfying himself as to the legality or propriety of any decision or order passed ..... If, in any case, it appears to the State Government ..... that any decision or order or proceedings so called for should be modified, annulled or reversed, the State Government ..... may after giving persons affected thereby an opportunity of being heard pass such order thereon as to it ..... may seem just."

In such a case, it has been held that though the party aggrieved may not have any right to relief as in a judicial appeal or revision, it cannot be said that the revisional authority, i.e., the State Government, has no jurisdiction to exercise its powers on the application of a party. The words of the section being general, the State Government has the jurisdiction to proceed either *suo motu* or on application. Where, therefore, the State Government refuses to entertain an application for revision on the ground that it has no jurisdiction to act on an application, *mandamus* would issue to compel it to entertain and dispose of the application according to law.[17]

Scope of review of administrative action.

The difficulty of making general statements under this head is due to the fact that administrative decisions are of different categories and that their functions also vary according to the provisions of the statutes which govern them. Thus, some decisions are purely administrative whereas others are *quasi-judicial,* owing to a duty to inquire judicially having been imposed by the statute itself or, sometimes, by the very nature of the function involved. In both classes of cases, the extent of the scope of judicial review cannot be the same.

The scope of review also changes with the form of review elected by the aggrieved person. Under common law or under statutory provisions, certain peculiar incidents attach to the different forms of actions and proceedings in every country. For instance, the scope of review in a proceeding for *certiorari* cannot be co-extensive with that in a declaratory action.

In this work, therefore, I shall deal with the scope of judicial review both according to the different classes of administrative function and the different forms of judicial review.

From the functional standpoint, we must pursue the threefold classification which I have made at the outset (pp. 6-7, *ante*), namely, (a)

16. *Commr. of I.T.* v. *Tribune Trust,* (1948) 16 I.T.R. 214 P.C.
17. *Everest Apartments Society* v. *State of Maharashtra,* A. 1966 S.C. 1449.

quasi-legislative action; (b) purely administrative action, statutory or non-statutory; and (c) *quasi-judicial* function.

Of these, the scope of review over *quasi-legislative* function has already been dealt with (pp. 89 *et seq.*). *Quasi-legislative* function, to recount, means the function of making subordinate legislation, or, the function of making rules, bye-laws, schemes, etc., to fill in the details of legislative enactments, by administrative authorities in exercise of power conferred by the enactments themselves. It has been pointed out that there are certain general conditions for the validity of all kinds of subordinate legislation and that the primary of such conditions are—

(a) that they must not be *ultra vires* or in excess of the power conferred by the relevant statute;

(b) that they must not violate any provision of the Constitution.

In the present Chapter, we shall deal with the judicial review of purely administrative and *quasi-judicial* actions, in particular.

Judicial review : Court's power briefly stated

Where question of compliance with principles of natural justice arises there is scope of judicial review both in writ under Art. 226 of the Constitution and in civil suit.[17a]

Judicial review is generally permissible in cases of irrationality, illegality and procedural impropriety.[17b] It is permissible to strike down an action if there are *mala fides*, bias, arbitrariness bordering on perversity or such unreasonableness as no reasonable man will contemplate.[17c] The power is exercised to rein in any unbridled executive functioning. Restraint has two contemporary manifestations, viz., one is the ambit of judicial intervention and other covers the scope of the court's ability to quash an administrative decision on its merits.[17d]

Untrammelled judicial review is not desirable.[17c] Arbitrariness based on doctrine of proportionality is still no ground.[17b] It is also no ground that the administrative action is not justified on merit.[17e] Court has to confine itself with manner in which decision was made or order was passed. It is not at all concerned with merits of the decision.[17f] Court cannot enquire into public policy or investigate into questions of political wisdom or pronounce upon motive of legislature in enacting a law which is otherwise within its legislative competence.[17g] Court cannot determine whether a particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken.[17d] By judicial review court cannot substitute decision of the executive by its own decision. Judicial review is intended to keep the public body within the limits of its authority.[17h]

17a. *State Bank of Patiala* v. *S.K. Sharma*, (1996)3 S.C.C. 364 : A. 1996 S.C. 1669 : (1996)2 LLJ 296.

17b. *State of A.P.* v. *McDowell & Co.*, (1996)3 S.C.C. 709 : A. 1996 S.C. 1627.

17c. *Paharpur Cooling Towers Ltd.* v. *Bangaigaon Refinery and Petrochemicals Ltd.*, A. 1994 Del 322.

17d. *Tata Cellular* v. *Union of India*, (1994)6 S.C.C. 651 : 1994 S.C.C. (Lab.) 1317; *Progoty Supply & Co-op. Society Ltd.* v. *State*, A. 1996 Gau 67, 75.

17e. *K. L. Trading Co. Pvt. Ltd.* v. *State*, A. 1996 Gau 17.

17f. *S. R. Bommai* v. *U.O.I.*, A. 1994 S.C. 1918.

17g. *Bhandra District Central Co-op. Bank Ltd.* v. *State*, A. 1993 SC 59.

17h. *Ramdas* v. *U.O.I.*, A. 1995 Bom 235.

Court cannot review a decision maker's evaluation of facts. Court intervenes if facts taken as a whole would not logically warrant the conclusion of the decision maker.[17d] There is a limited scope of judicial review of Government contracts. Court will only see whether there is any infirmity in decision-making process.[17i]

Judicial review : Generally

Judicial review is the basic feature of the Constitution.[17f] Judicial review is applicable both to administrative law and constitutional law.[17f] Administrative action is subject to judicial review in cases of illegality, irrationality or procedural impropriety.[17d] Judicial review of administrative action is permissible only when action suffers from vice of arbitrariness, unreasonableness or unfairness. That the administrative action is not justified on merit is no ground for judicial review.[17e]

Court does not sit as a court of appeal but merely reviews the manner in which the decision was made, particularly as the court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision which itself may be fallibe. The duty of the court is to confine itself to the question of legality. Its concern should be (1) whether the decision-making authority exceeded its power, (2) committed an error of law, (3) committed a breach of the rules of natural justice, (4) reached a decision which no reasonable tribunal would have reached, (5) abused its powers.[17j]

Fixation of tariff by S.E.B. including grant of rebate to new industries is a quasi-legislative function. But while new industry acted on promise of S.E.B. it cannot be contended that the act of S.E.B. cannot be assailed only on the ground of unreasonableness or arbitrariness and that principle of promissory estoppel cannot be invoked.[17k] On account of crudities and inequities in complicated experimental economic legislation a piece of legislation cannot be struck down.[17-l] The courts cannot be converted into tribunals for relief from such crudities and inequities. There may be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation.[17-l]

A. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

High Court's power under Art. 226 of the Constitution to judicially review a finding of an administrative or departmental authority is for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principle of natural justice which vitiated the entire proceeding or that the authority exercising the jurisdiction had not been vested with the jurisdiction under the Act.[17m] Judicial review is impermissible to see

17i. *Sterling Computers* v. *M. & N. Publications*, A. 1996 S.C. 51.
17j. *Mansukhlal* v. *State*, (1997)7 S.C.C. 622.
17k. *Pawan Alloys* v. *U.P.S.E.B.*, (1997)7 S.C.C. 251.
17-l. *R. K. Garg* v. *Union of India*, (1981)4 S.C.C. 675, 690–691 : 1982 S.C.C. (Tax) 30 : A. 1981 S.C. 2138; *Mafatlal Industries* v. *Union of India*, (1997)5 S.C.C. 536, 618; *T.N. Education etc.* v. *State*, (1980)3 S.C.C. 97 : (1980)1 S.C.R. 1026; *Collector of Customs* v. *Nathella Sampathu Chetty*, (1962)3 S.C.R. 786 : A. 1962 S.C. 316.
17m. *Union of India* v. *Himmat Singh*, (1999)4 SCC 521: AIR 1999 SC 1980.

correctness of administrative decision. Court can examine decision making process, viz., that the established principles of law, rules of natural justice have been followed. It is also impermissible to substitute its opinion for that of the administrative authority.[17n]

Under Art. 226 the court is vested with power of judicial review. But in the matter of departmental enquiry the court will not normally interfere with the finding of guilt unless the finding is based on no evidence or the finding could not be reached by an ordinary prudent man or is perverse or is made at the dictates of a superior authority.[17-o] Finding based on an uncontroverted material cannot be held to be perverse.[17p] If finding is based on some evidence judicial interference is impermissible. Finding cannot be interfered with on the ground of insufficiency of evidence.[17q]

Power of judicial review under Art. 226 of the Constitution does not confer power on the High Court to reappreciate evidence, to judge adequacy at evidence. High Court cannot act as an appellate authority.[17r]

Administrative decision or action is taken in public interest in its discretion. In absence of challenge to the decision-making process court cannot substitute its own views in the matter to that opinion formed by the State.[17s] Every decision of an authority except the judicial decision is amenable to judicial review. Judicial review is permissible if the impugned action is against law or in violation of prescribed procedure or is unreasonable, irrational or *mala fide*. Decision to confer undue benefit in the matter of construction on a certain firm smacks of illegality, arbitrariness, unreasonableness and irrationality. Court with interfere by way of judicial review.[17t]

Court cannot visualise various factors e.g., commercial, technical aspect of a contract, prevailing market conditions, both national and international and immediate needs of the country. In such a case court will not look to fairness or reasonableness. It will only see *mala fides* or extraneous considerations.[17u]

Unless there are *mala fides* court will not interfere with the assessment made by an authority in regard to merit or fitness for promotion. Court will interfere if the assessment is *mala fide* or based on inadmissible irrelevant, insignificant, trivial material or if position aspects of one's career has been ignored.[17v]

If an administrative order does not take into account statutory requirements or the order goes beyond the scope of the statute such administrative order can be subjected to judicial review.[17w]

Instruction to bidders permits correction of clerical and mechanical

---

17n. *Apparel Export Promotion Council* v. *A.K. Chopra*, AIR 1999 SC 625: (1999)1 SCC 759.

17-o. *Kuldeep Singh* v. *Commissioner of Police*, AIR 1999 SC 677: (1999)2 SCC 10; *Yoginath* v. *State*, (1999)7 SCC 739.

17p. *U.P.S.R.T.C.* v. *Musai Ram*, (1999)3 SCC 372.

17q. *R.S. Saini* v. *State*, (1999)8 SCC 90.

17r. *Union of India* v. *Himmat Singh*, (1999)4 SCC 521: AIR 1999 SC 1980.

17s. *State* v. *Aravind Ramakant*, (1999)7 SCC 400: AIR 1999 SC 2970.

17t. *M.I. Builders (P) Ltd.* v. *Radhey Shyam*, (1999)6 SCC 464: AIR 1999 SC 2468.

17u. *Centre for Public Interest Litigation* v. *Union of India*, (2000)8 SCC 606.

17v. *Badrinath* v. *Govt. of I.N.*, (2000)8 SCC 395.

17w. *Nedungali Bank Ltd.* v. *K.P. Madhavankutty*, AIR 2000 SC 839: (2000)2 SCC 455.

errors. But the rule does not permit correction of unit rate and the item total. High Court cannot ask the party to permit the bidder to correct the bid documents by way of judicial review.[17x]

The power of judicial review of administrative action cannot be larger than in the case of quasi-judicial action. High Court cannot sit as an appellate authority over the decision of quasi-judicial authority and that of administrative authority. If more than one choice is open to administrative authority he can exercise some amount of discretion. Court cannot substitute its judgment for the judgment of the administrative authority court will interfere only if the action of the administrative authority is so unfair and unreasonable that no reasonable person would have taken the action.[17y]

Decision by National Council for Teacher Education Court will not ordinarily interfere without giving due weightage to the conclusion of such expert body.[17z]

It is true that judiciary will not ordinarily interfere. Still even highly reputed educational institution is not immune from judicial interference.[17za]

If Government action is wanting in fairness court will interfere.[17zb]

Once the statutory provision and the rules framed thereunder are found to be *intra vires* the jurisdiction of the Supreme Court as to whether exercise of such powers should be held to be invalid is very limited Judicial review in such matters is impermissible unless it is found that the formation of belief by the statutory authority suffers from *mala fides*, dishonesty or corrupt practice. The order can be set aside if it is held to be beyond the limits for which the power has been conferred upon the authorities by the legislature or is based on grounds extraneous to the legislation and if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction required thereunder.[17zc]

The broad principles of judicial review as have been stated in the speech of Lord Diplock in *Council of Civil Service Unions* v. *Minister for the Civil Service*[17zd] i.e. illegality, irrationality and procedural impropriety, have greatly been overtaken by other developments.

The scope of judicial review varies from case to case. The court is exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizens' right of life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kind.[17ze]

The conclusion of fact arrived at by an expert body shall not be interfered with by court.[17zf] Pay fixation requires examination of various aspects of the posts held in various services and nature of duties of the employees. So the decision of expert body is not amenable to judicial review.[17zg]

17x. *W.B.S.E.B.* v. *Patel Eng. Co. Ltd.*, AIR 2001 SC 682: (2001)2 SCC 451.

17y. *Haryana Financial Corpn.* v. *Jagadamba Oil Mills*, (2002)3 SCC 496: AIR 2002 SC 834.

17z. *Union of India* v. *Shah Goverdhan L. Kabra Teachers' College* (2002)8 SCC 228.

17za. *K. Shekar* v. *Indiramma*, (2002)3 SCC 586: AIR 2002 SC 1230.

17zb. *Anil Ratan* v. *Hirak*, (2002)4 SCC 21: AIR 2002 SC 1405.

17zc. *People's Union for Civil Liberties* v. *Union of India*, (2004)2 SCC 476.

17zd. 1985 AC 374: (1984)3 All ER 935.

17ze. *Union of India* v. *S.B. Vohra*, (2004)2 SCC 150.

17zf. *U.P.S.C.* v. *Jagannath*, (2003)9 SCC 237.

17zg. *State* v. *U.P. Sales Tax Officers Association*, (2003)6 SCC 250: AIR 2003 SC 2305.

Power of judicial review of penalty or punishment is very limited. Court will not interfere unless the same is shockingly disproportionate.[17zh]

Administrative action is referable to the broad area of governmental activities. The repository of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial in nature. Discretion is vested with a discretion. He must exercise it to which he is committed. He will not act under the dictates of another authority. He must not do what he has forbidden to do or what he has not been authorized to do. Exercise of discretion may be granted in two classes (*a*) failure to exercise the discretion (*b*) excess or abuse of discretionary power. Administrative action is subject to judicial review on three grounds viz., (i) illegality, (2) irrationality and (3) procedural impropriety. Non-consideration or non-application of mind to relevant factors renders exercise of discretion erroneous warranting judicial interference. Discretion must be exercised reasonably. A party must establish *mala fides* bad faith or misuse of power.[17zi]

Decision making process is amenable to judicial review. Court will only see whether the process in reaching the decision has been correctly observed. The decision itself cannot be subjected to judicial review. Court cannot act as an appellate authority unless the exercise of power is shown to violate any provision of the constitution or any existing statutory rules the matter is not justiciable.[17zj] Similarly judicial review is impermissible in proceedings and decisions taken in administrative matters. Judicial review is confined to the decision-making process. Court cannot examine the merits of the decision.[17zk]

If relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and no relevant aspect has been ignored and the administration decisions have nexus with the facts on record court will not interfere to see the merit. Judicial review is permissible to see whether the process in reaching decision has been correctly observed.[17zl]

B. JUDICIAL REVIEW OF NON-STATUTORY ADMINISTRATIVE ACTION.

1. Where an administrative act is done, not in the purported exercise of a statutory power, but in the exercise of the executive power of the State, it is patent that the doctrine of *ultra vires* is inapplicable to it. Thus, if it is an executive instruction to subordinate officers, it creates no legal rights[18] and it is not enforceable in the courts of law[19] (see pp. 144ff, *ante*) and courts have no supervision and control over such instructions, though they may be binding on the subordinate officials, *departmentally*.[19] If, therefore, a subordinate authority acts in violation of such non-statutory order or instruction, the aggrieved person can have no relief from a court of law.[18]

17zh. *Mithilesh* v. *Union of India*, (2003)3 SCC 309: AIR 2003 SC 1145.

17zi. *Indian Railway Construction Co. Ltd.* v. *Ajay Kumar* (2003)4 SCC 579: AIR 2003 SC 1843.

17zj. *Syed T.A. Naqshbandi* v. *State*, (2003)9 SCC 592.

17zk. *K. Vinod Kumar* v. *S. Palanisamy*, AIR 2003 SC 3171: (2003)10 SCC 681.

17zl. *Union of India* v. *Lt. Genl. Rajendra Singh*, (2000)6 SCC 698: AIR 2000 SC 2513.

18. *Rowther* v. *S.T.A. Tribunal*, A. 1959 S.C. 894 (899).

19. *Hasanji* v. *State of M.P.*, A. 1965 S.C. 470 (471); *Fernandez* v. *State of Mysore*, A. 1967 S.C. 1753 (para. 12).

It may also take the form of Departmental non-statutory rules,[19] or regulations,[20] e.g., a G.O., containing rules for admission to educational institutions,[21] an Education Code,[22] or other Departmental Code.

2. There is no formality, such as publication, for making them[23] and they can be reviewed,[24] revoked or modified at any time, without any formality, regardless of the fact that they may have created certain privileges in favour of individuals, e.g., a certificate granted by the Government that a person is fit to act as a tourists' guide.[25]

3. Non-compliance with any such non-statutory rule or regulation cannot vitiate any trial.[20]

4. In the absence of statutory requirement, an administrative authority need not hold any public inquiry to collect information[26] or to follow any particular procedure in coming to a decision.

5. The question is whether the courts can interfere with a non-statutory administrative order on the ground that it was 'unfair' or 'arbitrary'. In *Radheshyam* v. *State of M.P.*,[27] Das, C.J., observed that though the rules of natural justice do not apply to a purely administrative action, it must not be 'unfair'. But that observation was made with reference to *statutory* action (under s. 53A of the C.P. & Berar Municipalities Act, 1922). It was a case where an opportunity for representation is implied by the courts because civil rights are going to be affected by action under a statute which is silent about the procedure, as happened in *Cooper* v. *Wandsworth*.[28]

It would seem that there is little scope for a judicial review of a non-statutory administrative order except on a 'constitutional'[29] ground (see p. 10, *ante* or p. 40f. *post*); or on the ground of 'promissory estoppel'.[30]

But there are cases where it has been said that the decision of *any public authority* would be vitiated by arbitrariness and *mala fides*.[31] No doubt now remains on this point.

6. Apart from the foregoing grounds, a court cannot review the actual exercise of a non-statutory administrative power, and no writ under Art. 226 is available to enforce a non-statutory rule.[32] The reason is that such powers are left to be exercised by the Administrative authorities in the exercise of their discretion, without any legal limitations or standards to guide the exercise of such subjective powers. Thus, where a service is transferable, in the absence of statutory guidelines, the Court cannot interfere with an order of transfer[32a] unless it is arbitrary or improper, attracting Art. 14 of the Constitution.

20. *Niranjan Singh* v. *State of U.P.*, (1956) S.C.R. 734 (742); *State of Assam* v. *Ajit*, A. 1965 S.C. 1196 (paras. 11-12).
21. *State of Bombay* v. *Education Society*, (1955) 1 S.C.R. 568; *State of Madras* v. *Champakam*, (1951) S.C.R. 525; *Joshi* v. *State of M.P.*, (1955) 1 S.C.R. 1215.
22. *Dwarka* v. *State of Bihar*, A. 1950 S.C. 249 (253).
23. Cf. *Rajagopala* v. *S.T.A. Tribunal*, A. 1964 S.C 1573 (1580).
24. *Sundara* v. *State*, A. 1966 A.P. 11 (13).
25. *Jagadamba Prasad* v. *Supdt. of Police*, A. 1959 All. 573; *Suryanarayana* v. *State of Madras*, A. 1959 A.P. 487 (490).
26. Cf. *Hearts of Oak Assce. Co* v. *A.G.*, (1932) A.C. 392.
27. *Radheshyam* v. *State of M.P.*, A. 1959 S.C. 107 (119).
28. *Cooper* v. *Wandsworth*, (1863) 14 C.B. 180.
29. *Bidi Supply Co.* v. *Union of India*, A. 1956 S.C. 479.
30. *Union of India* v. *Indo-Afghan Agencies*, A. 1968 S.C. 718.
31. *Election Commn.* v. *State of Haryana*, A. 1984 S.C. 1406 (para. 8).
32. *State of Assam* v. *Ajit Kumar*, A. 1965 S.C. 1196 (1199).
32a. *C.G.M.* v. *Rajendra*, (1995) 2 S.C.C. 532 (para. 7).

Whether an order issued in exercise of statutory power can be treated as having no force of law.

Some aspects of this question have already been answered. Even though the Author's arguments at pp. 281-82 of the first Edition have been largely accepted by the Supreme Court in later cases, it would be worthwhile to examine it further from the standpoint of juristic principles.

It has been held[33] that orders and directions issued under s. 43A of the Motor Vehicles Act, 1939, as introduced by the Madras Act 20 of 1948, are administrative orders having no force of law. This section says—

"43A. *Power of State Government to issue orders and directions to Transport Authorities.*—The State Government may issue such orders and directions of a general character as it may consider necessary, in respect of any matter relating to road transport, to the State Transport Authority; and such Transport Authority shall give effect to all such orders and directions."

The Supreme Court was of the opinion that the orders issued under the above provision do not create any rights in the parties; they are administrative instructions issued upon the Transport Tribunals in their *administrative* sphere of action and that, accordingly, if such Tribunal complies with the statutory provisions in s. 47 of the Act, its orders cannot be challenged on the ground of non-compliance with the orders issued by the State Government under s. 43A.[23, 33]

The majority in *Raman's case*[33] opined that it was not the *source* of the power but the nature of the directions issued in exercise of the power which was to determine whether the directions were 'legal' or 'extralegal'. No authority for this proposition was cited except some decisions of the Madras High Court, and the decision of the Supreme Court in *Nagendra* v. *Commr.*, A. 1958 S.C. 398. But, as Sarkar, J., rightly pointed out, *Nagendra's case* was clearly distinguishable, for, in that case, the instructions contained in the Excise Manual were *not* issued in exercise of any statutory power. There was no provision in the Excise Act in question in that case, comparable to s. 43A of the Motor Vehicles Act, 1939. The directions were, therefore, unauthorised by the Statute and they could not, patently, claim any statutory force. What happens, however, where the statute specifically authorises the Executive to issue binding directions upon the subordinate authority?

From the standpoint of juristic principles, it is submitted, it is difficult to see why such directions should not be regarded as statutory instruments. Directions issued under the Defence Regulation 51 and similar provisions were, in fact, in question in *England,* in cases such as *Blackpool Corpn.* v. *Locker,* (1948) 1 All E.R. 85 (91); *Jackson* v. *Butterworth,* (1948) 2 All E.R. 558 (565); *Allingham* v. *Minister of Agriculture,* (1948) 1 All E.R. 780. Of course, the question was discussed in those cases from the standpoint of sub-delegation. It was held that where the directions were *general* in nature, they assumed a legislative character and that, accordingly, the power to issue such directions could not be delegated by the authority specified by the statute. Apart from the controversy as to the circumstances which made a direction administrative or legislative in nature, which was relevant from the standpoint of delegation, no question was raised as to the binding nature of the statutory directions. At least so far as *general* directions are concerned, they were pronounced as *legislative* in character and the Court of Appeal

33. *Raman & Raman* v *State of Madras,* A. 1959 S.C. 694 (700).

insisted upon their publication as a condition precedent to their validity, because they affected 'individual rights'. It is to be noted that s. 43A of *our* Motor Vehicles Act, 1939, authorises the issue of directions "of a *general* nature".

Even if such directions were to be taken as 'administrative', as distinguished from 'legislative', in nature, as Denning, L.J., would have it in *Lewisham B.C.* v. *Roberts,* (1949) 1 All E.R. 815 (824), such directions are subject to the rule of *ultra vires* and are liable to be set aside if they do not "fall within the four corners of the powers given by the Legislature" (*ibid*). In the English decisions, a distinction has, of course, been drawn between statutory and extrastatutory directions and all modern text-book writers have noticed that there has been an alarming extension of the practice of issuing extrastatutory directions and circulars. But in the context of s. 43A of the Motor Vehicles Act, 1939, we are not concerned with extrastatutory directions. There is none in *England* to question the proposition that when a direction has been issued in exercise of a statutory power, it shall have the force of law and that they are enforceable in a court of law [cf. S.A. de Smith, *Judicial Review of Administrative Action,* 1968, pp. 59-60]. It would also be classified as a 'statutory instrument' under the Statutory Instruments Act.[34]

How could then the principles laid down in the English cases, just cited, be avoided? It is unfortunate that no light can be had on this point from *our* Supreme Court decisions on s. 43A, because neither the English decisions nor the words 'of a general character' were discussed or commented upon.

It hardly requires any authority for the proposition that any act done or instrument made in exercise of a statutory power is open to judicial review on the ground of *vires,*[35] but this is so because the act or the instrument has a legal force derived from the Legislature and that the force, being a delegated one, cannot exceed the limits of the power that has been delegated by the statute. To say that an instrument issued in exercise of a statutory power has no legal force, it is submitted, goes against this basic principle. It is interesting to note that the *vires* of a direction under s. 43A of the Motor Vehicles Act was, in fact, raised in the later case of *Rajagopala* v. *S.T.A. Tribunal*[23] and the anomalous position resulting from the earlier holding that the orders issued under s. 43A had no force of law became apparent. The Court was obliged to hold that if any such order purported to give directions in the matter of the exercise by the Tribunals of their *quasi-judicial* power, such order would be invalid being "outside the purview of 43A". Is it not the same thing as to say that an order under 43A which seeks to lay down anything as to *quasi-judicial* matters would be *ultra vires*? But, then, such a conclusion would be inconsistent with the view that an order under s. 43A has no force of law. If it is an administrative instruction, not having the force of law, no question of *vires* would arise at all, because whether *intra vires* or *ultra vires,* it would have no legal force of any case. All this anomaly could have been avoided by holding that an order under s. 43A, in so far as it is of a 'general character', amounts to a statutory order of a legislative character. If it is issued in the form of *ad hoc* orders, it would be *ultra vires* because the section authorises the State Government

34. Halsbury, 4th Ed., Vol. 44, para. 984.
35. *Rameshwar* v. *State of U.P.,* A. 1983 S.C. 383 (paras. 19, 22).

only to issue 'general orders'. Again, if the statute does not provide for the publication of such orders, that would also nullify such orders either according to the principle laid down in England in *Blackpool's case,*[36] or, in India in *Harla's case.*[37]

From the standpoint of constitutional jurisprudence also, the decision in *Raman's case*[33] deserves a reconsideration. There is no apparent reason why the court should struggle to uphold the constitutionality of s. 43A itself after the interpretation it has given as to its scope and utility. Admittedly, the order issued by the subordinate authority under the Motor Vehicles Act affected the fundamental rights of citizens. The subordinate authority was bound to comply with the directions issued under s. 43A. Whether the sanction for enforcement of the directions as between the superior and the subordinate authority is departmental or not should not blur the issue as to the effect such directions have upon the fundamental rights of the citizen. Such directions, having been issued by the State under statutory authority, constituted 'law' and 'State action' within the meaning of Arts. 12-13 of the Constitution and, hence, their constitutionality was open to challenge. As I have submitted, the *vires* of the directions was also open to challenge. Once it is held that such directions have no force of law, the result will be that the section seeks to affect the fundamental rights of citizens by *ad hoc* orders or instructions not having the force of law. Such a provision cannot be upheld as a reasonable restriction upon a fundamental right guaranteed by Art. 19.[38]

The court has already conceded[39] that a statutory direction, which affects a fundamental right, would be invalid. It has also been held that such direction lays down the *principles* intended for the guidance of the statutory authority in exercising the statutory power.[39] If, therefore, so long as it is not superseded by a more formal statutory rule or a valid notification,[35] the direction contains the law which the statutory authority is bound to apply and affect the rights of the persons concerned thereby. At least they constitute representations on the basis of which the public are entitled to act. In these circumstances, it would be unreasonable to hold that they are not enforceable[40] at the instance of an individual who has been aggrieved by their non-application, particularly in a matter affecting his fundamental rights.

It should be noted, in this context, that in the *U.S.A.*, it is established that statutory administrative instructions affecting the public should be enforced on the ground than "executive agency must be rigorously held to the standards which it professes".[41] In *England,* too, there are decisions to the same trend.

Constitutional ground.

Whether the administrative order is statutory or non-statutory, it

36. *Blackpool Corpn.* v. *Locker,* (1948) 1 All E.R. 85 (91) C.A.
37. *Harla* v. *State of Rajasthan,* (1952) S.C.R. 110.
38. Cf. *Kharak Singh* v. *State of U.P.,* A. 1963 S.C. 1225 (1305).
39. *Rajagopala* v. *S.T.A. Tribunal,* A. 1964 S.C. 1573 (para. 19).
40. Cf. de Smith, *Judicial Review* (2nd Ed.), p. 60; *R.* v. *Criminal Injuries Comp. Bd.,* (1971) 2 All E.R. 1011 (1013; 1014) : (1977) 3 All E.R. 808 (C.A.); *R.* v. *Immigration Officer,* (1982) 2 All E.R. 264 (267-68).
41. *Vitarelli* v. *Seaton,* (1959) 359 U.S. 535 (546); *Hall* v. *Schwiker,* (1981) 660 F. 2d. 116.

is 'State action'. Hence, in *India,* as in the *United States,* there is an additional ground upon which the Courts can interfere namely, that the order violates a fundamental right or other mandatory provision of the Constitution.

Thus, an order containing instructions for admission to educational institutions may be invalid on the ground of contravention of Art. 29(1),[42] (2);[43] 30(1).[42] It may also offend against those Articles which provide that the State can act in those matters only by enacting a law made by the Legislature, e.g., Arts. 19;[38] 21;[44] 265;[45] 300.[46]

The applicability of Art. 14 does not appear to stand on any separate footing. If it is State action, Art. 14 would be attracted even though the action was non-statutory. The decision of the Supreme Court in *Bidi Supply Co.* v. *Union of India*[47] is an authority in support of this proposition. There, the Income-tax department made an omnibus order of transfer of certain cases from one jurisdiction to another, purporting to exercise the power under s. 5(7A) of the Income-tax Act, 1922, which, however, conferred the power to transfer particular cases. The Supreme Court held the impugned order to be *ultra vires* and, therefore, "not founded on any law". It was further held that, "not being founded on any law", "no question of reasonable classification for purposes of legislation can arise". In the result, the impugned order was a State action which was obviously discriminatory and was annulled.

A non-statutory rule or executive instruction or circular may be struck down for contravention of Art. 16, e.g., a rule of weightage in the matter of promotion[48] or seniority.[48]

C. JUDICIAL REVIEW OF STATUTORY DISCRETIONARY ACTION.

It has been stated earlier that whenever any power is conferred upon an administrative authority by *statute,* the act of the authority in exercise of such power shall be *ultra vires* and invalid in case the act done by the authority transgresses the bounds set forth by the statute which conferred that power, and that it is the duty of the court to see that the statutory authority keeps within such bounds.

This doctrine of *ultra vires* applies even where the statute authorises the authority to act in his discretion or 'upon his subjective satisfaction'. As will be explained elsewhere, in the case of such discretionary power, the court cannot question the *propriety* of the discretionary decision or the *manner* of exercise of the discretionary power (except in the case of *mala fides*);[49] nevertheless, it would be the duty of the court to strike down the act done by the authority in exercise of the discretionary power if it exceeds the statutory limits, whether substantively or procedurally.

---

42. *State of Bombay* v. *Education Society,* (1955) 1 S.C.R. 568.
43. *State of Madras* v. *Champakam,* (1951) S.C.R. 525.
44. *Ram Narayan* v. *State of Delhi,* (1953) S.C.R. 652.
45. *State of Kerala* v. *Joseph,* A. 1958 S.C. 296; *Ghulam* v. *State of Rajasthan,* A. 1963 S.C. 379 (382).
46. *Virendra* v. *State of U.P.,* (1955) 1 S.C.R. 415.
47. *Bidi Supply Co.* v. *Union of India,* (1956) S.C.R. 267 (275-77); *Fernandez* v. *State of Mysore,* A. 1967 S.C. 1753 (1758); *Pradeep* v. *Union of India,* A. 1984 S.C. 1420 (paras. 9, 20).
48. Cf. *Mervyn* v. *Collector of Customs,* A. 1967 S.C. 53 (56-57).
49. *State of Gujarat* v. *Jamnadas,* A. 1974 S.C. 2283 (para. 12).

I. Substantive *ultra vires.*

The administrative authority must abide by the condition precedent[50] laid down by the statute as to the time, occasion or circumstances[49] when the discretionary act may be done. Thus,

(i) The power to appoint a Commission of Inquiry under the Commissions of Inquiry Act, 1952, can be exercised only when the appropriate Government is satisfied that there is a 'definite matter of public importance into which an inquiry is, in the opinion of the Government, necessary'. Hence, in the absence of any resolution of the Legislature in this behalf (in which case the appointment is obligatory), it is open to the Court to determine whether, on the facts relied upon by the Government, there was a definite matter of *public importance;* if the Court comes to answer this question in the negative, the order of appointment made by the Government must be struck down.[50]

(ii) Land acquisition proceedings may be set aside on the ground of *ultra vires.* Where—

(a) There is no public purpose for the acquisition;[51] or

(b) The purpose originally notified is changed;[52] or

(c) The purpose originally notified ceases to exist before the land is vested in the State;[53]

(iii) S. 303A of the Gujarat Panchayats Act, 1962, empowers the State Government, "if, at any time, it is satisfied that a situation exists by reason of disturbances in .... the State of Gujarat" by reason of which "it is not possible or expedient to hold elections .... the State Government may make a declaration to that effect".

Held, the Court could inquire whether the condition precedent as to the existence of disturbances in the State, being an objective fact, existed; but from the affidavits before the court it came to the finding that a situation of violent disturbances was continuing at the time of the impugned declaration.[49]

In short, unless the statute or the constitutional provision which confers discretionary power on the Executive authority makes the decision of the Executive *final,* it is open to the court to inquire whether circumstances upon which the Executive formed its subjective satisfaction did exist, objectively, and to strike down the discretionary order if the Court finds that such circumstances did *not* exist.[54]

II. Procedural *ultra vires.*

If the statute which confers the discretionary power lays down any procedure as to how the power is to be exercised, the court would strike down the discretionary action if the procedural requirement is disregarded.[55]

Thus, if the statute lays down factors which the authority has to take into consideration while exercising the power, the court would nullify the discretionary decision if it is actuated by *extraneous* considerations or *mala fides.*[55-56]

---

50. *Ram Krishna* v. *Tendolkar,* A. 1958 S.C. 538 (para. 5); *State of Karnataka* v. *Union of India,* A. 1978 S.C. 68 (paras. 170, 268, 277).

51. *R.L. Arora* v. *State of U.P.,* A. 1962 S.C. 764.

52. *Union of India,* v. *Naval Kishore,* A. 1982 Del. 462.

53. *Industrial Development, etc., Co.* v. *State,* A. 1989 Bom 156.

54. *Cooper* v. *Union of India,* A. 1970 S.C. 564 (paras. 21-22) (10 : 1 judgment); *Barium Chemicals* v. *Company Law Bd.,* A. 1967 S.C. 295; *Rohtas Industries* v. *Agarwal,* A. 1969 S.C. 707.

55. *Maneka* v. *Union of India,* A. 1978 S.C. 597 (para. 27); *Chandrika* v. *State of Bihar,* (1984) 2 S.C.C. 41.

56. *Tamil Nadu Services Assocn.* v. *State of T.N.,* A. 1980 S.C. 379 (paras. 8, 9); *Jawaharlal Nehru University* v. *Narewal,* A. 1980 S.C. 1666; *Tuka Ram* v. *Shukla,* A. 1968 S.C. 1050.

III. Constitutional ground.

As in the case of all administrative action, so in the case of exercise of discretionary power vested by statute, the discretionary action will be invalid if it is arbitrary[57] or discriminatory and thus violates Art. 14 or 19.[55]

Thus, making or omission to make a reference is a matter in the Government's discretion;[58] but, if the discretion is arbitrarily exercised, the Court may interfere.[59]

The Court may also interfere on the ground of violation of natural justice where the discretionary action involves civil consequences.[55]

D. JUDICIAL REVIEW OF DECISIONS OF STATUTORY TRIBUNALS.

1. A statutory tribunal having been endowed by statute with the power to decide, or to make any inquiry,[60] it will be subject to judicial control on all the grounds upon which statutory power, in general (pp. 181ff, *ante*), is subjected to judicial control,[61] viz. :

(a) That the decision has been arrived at without any evidence at all;[62]

(b) That the tribunal has reached a conclusion of fact which "no person acting judicially and properly instructed as to the relevant law"[62] could have arrived at; or, in other words, the tribunal has decided "on a view of the facts which could *not* be *reasonably* entertained",[62] in short, where its decision is perverse;[63]

(c) That the tribunal, in coming to its decision, has failed to consider those matters which it was bound to consider according to the provisions of the statute which conferred the power or taken into account matters which are irrelevant to what he has to consider.[64-65] This principle is, in fact, a corollary from the doctrine of *ultra vires,*[57] as well as the duty of all statutory authorities to exercise the power *reasonably*.[64]

2. Besides the foregoing general grounds, the decision of a statutory tribunal may be challenged before a court of law when it violates the obligations of a *quasi-judicial* authority, which is authorised by statute to decide the rights of parties or to impose civil consequences upon them, on some additional grounds (these will be fully dealt with under the next sub-head), e.g. :

(a) That the decision of the tribunal is vitiated by bias or procedural unfairness.[66] These are called rules of 'natural justice'[67] which are attracted because a statutory tribunal has to proceed *judicially;*[66] it is because of this obligation that its decision is termed *'quasi-judicial'*. It would be better to deal with this aspect separately;

(b) That the tribunal or authority has given a wrong interpretation to

---

57. *Ramana* v. *I.A.A.I.*, A. 1979 S.C. 1628 (paras. 11-12; 21-23); *Asif* v. *State of J.&K.*, A. 1989 S.C. 1889.
58. *Mahabir Jute Mills* v. *Shibbanlal*, A. 1975 S.C. 2057.
59. *Telco Convoy Drivers Mazdoor Sangh* v. *State of Bihar*, (1989) 3 S.C.C. 275.
60. *Ostreicher* v. *Environment Secy.*, (1978) 1 W.L.R. 810 (815) C.A.
61. *Cocks* v. *Thanet*, (1982) 3 All E.R. 1135 (1138) H.L.
62. *P.T. Services* v. *S.I. Court*, A. 1963 S.C. 114; *Roshan* v. *I.T.C.*, A. 1977 S.C. 1605.
63. *Kartar Singh* v. *Union of India*, (1967) S.C. [dt. 18.10.1967].
64. *Associated Picture Houses* v. *Wednesbury Corpn.*, (1947) 2 All E.R. 680 (682-83) C.A.
65. *Bharat Bank* v. *Employees*, A. 1950 S.C. 188.
66. *O'Reilly* v. *Mackman*, (1982) 3 All E.R. 1124 (1127) H.L.
67. *Collector* v. *Sanwarmal*, (1968) S.C. [dt. 16.2.1968].

the words of the statute or has otherwise gone wrong in law[68] so as to have gone outside the powers conferred by the Act;[68] in other words, the decision is vitiated by an 'error (of law) apparent on the face of the record';[69]

(c) That the tribunal has declined to exercise its jurisdiction by taking an erroneous view on a preliminary point,[70] e.g., upon a question of *res judicata* or as to the applicability of an Act[71] or *locus standi*[72] or defect of parties or notice which would give jurisdiction to the Court, there is a non-exercise of jurisdiction;[73]

Even in the matter of a discretion, there may be a refusal to exercise jurisdiction if the tribunal refuses to exercise the discretion on an extraneous or irrelevant consideration, e.g., that it disapproves of the policy of the statute which conferred the jurisdiction or has omitted to consider such aspects of the question as would constitute no exercise of the discretion at all;[74] or mechanically exercises the discretion without weighing the relevant circumstances.[75]

3. But, subject to the foregoing grounds for judicial review, the court has no jurisdiction to substitute its own opinion, on the merits, for the opinion of the authority upon whom the power to decide the matter has been vested by statute.[76] The Court cannot sit in appeal to correct an erroneous decision of a tribunal, within its jurisdiction,[77] where there is *some* evidence to support it.[78]

E. JUDICIAL REVIEW OF QUASI-JUDICIAL DECISIONS.

It has been stated earlier that, apart from the general limitation of *ultra vires* common to all statutory action, a *quasi-judicial* decision is subject to some other limitations, so that there is a scope for judicial review on the additional grounds also. These additional grounds, primarily, are—

(i) Jurisdictional (comprising absence and excess of, and refusal to exercise, jurisdiction);

(ii) Erroneous exercise of jurisdiction on a point of law which is apparent on the face of the record;

(iii) Contravention of the principles of natural justice;

(iv) General ground of fraud;

(v) Constitutional ground.

These will now be discussed in detail.

I. Absence and excess of jurisdiction and erroneous exercise of jurisdiction.

Speaking briefly, 'jurisdiction' means the conditions on which the right or power of a tribunal to determine a matter depends.

68. *Ashbridge Investments* v. *Min. of Housing*, (1965) 3 All E.R. 371 (374).
69. *Chockalingam* v. *Manickavasagam*, (1978) 1 S.C.C (para. 18); *Swarn* v *State of Punjab*, A. 1976 S.C. 232 (paras. 12-13).
70. *Harish* v. *Dy. L.A. Officer*, (1962) 1 S.C.R. 676 (687).
71. *Joychandlal* v. *Kamalakshe*, A. 1919 P.C. 239.
72. *Bognor U.D.C.* v. *Boldero*, (1962) 3 W.L.R. 330.
73. *Jagannath* v. *Dt. Magistrate*, A. 1951 All. 710.
74. *K.D. Co.* v. *K.N. Singh*. A. 1956 S.C. 446 (452).
75. *Hindustan Steel* v. *Roy*, (1969) 3 S.C.C. 513 (paras. 14, 16).
76. *R.* v. *Birmingham C.C.*, (1983) 2 W.L.R. 189 (199) H.L.
77. *Hari Vishnu* v. *Ahmad*, (1955) 1 S.C.R. 1104 (1123).
78. *Patiala Bus.* v. *S.T.A.T.*, A. 1974 SC 1174.

"These conditions may be founded either on the character or constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry."[79]

It follows, therefore, that a tribunal may be acting without or in excess of jurisdiction if any of these conditions are lacking and, in any such case, no agreement or consent of parties can give the tribunal jurisdiction.[80]

The remedies for abuse or excess of jurisdiction are the writs of *prohibition* and *certiorari* and a declaratory action.

The cases of absence or excess of jurisdiction, collectively known as 'defect of jurisdiction', should be distinguished from an irregular or erroneous exercise of jurisdiction. The distinction lies in this :

"In the former case (defect of jurisdiction), the whole proceeding is *coram non judice* and void; in the latter, the proceeding cannot be impugned in a collateral action, even though it be erroneous upon its face, and even though it relates to a fact which in a former stage of the proceeding might have been essential to confer jurisdiction. It is examinable only on a direct proceeding as by an appeal or by a proceeding in the nature of an appeal, and where there is no remedy of that kind, it concludes for ever".[81]

"Whatever power is conferred may be exercised, and, if it be exercised *injudiciously, erroneously* or *irregularly*, it amounts to *error* merely and not to a usurpation or excess of jurisdiction. In such a case, however gross the error, irregularity or mistake, the writ of *certiorari*) does not lie ....."[82]

Where a tribunal acts without or in excess of jurisdiction, its decision or order is a nullity, so that it can be quashed collaterally. But where having jurisdiction, the tribunal makes an erroneous decision, the error can be corrected only by appeal, but not collaterally.[83] Hence, neither *certiorari* nor a declaration lies on the ground that the decision is erroneous.

The only exception to this is an error of law, which is apparent on the face of the record, for which *certiorari* is available (see *below*).

It should also be noted that the extraordinary jurisdiction of *our* Supreme Court under Art. 136 of the Constitution being appellate, it is open to the Supreme Court to quash the decision of a tribunal on the mere ground that it is erroneous.[84]

Onus.

When the decision of an inferior tribunal is challenged on the ground of absence or excess of jurisdiction by way of an application for a writ[85] or declaratory action, the burden of proving the defect of jurisdiction is upon the party who makes the challenge.

If however, the decision of an inferior tribunal is pleaded in *defence* of an action or proceeding, the defendant must show that the tribunal had jurisdiction to make the decision, because the presumption of jurisdiction does not extend to an inferior tribunal.[86]

---

79. *Colonial Bank of Australasia* v. *Willan*, (1874) L.R. 5 P.C. 417 (433).
80. *R.* v. *Wimbledon, JJ.*, (1953) 1 All E.R. 390 (393).
81. Hawes on *Jurisdiction.*
82. Ferris, *Extraordinary Remedies*, 1926, p. 440.
83. Cf. *Yusofalli* v. *King*, A. 1949 P.C. 264.
84. Cf. *Chattanatha* v. *Ramachandra*, (1955) 1 S.C.R. 477 (481); *Burn & Co.* v. *Employees*, A. 1957 S.C. 376; *Macropollo* v. *Marcopollo*, A. 1958 S.C. 1012.
85. *R.* v. *Fulham Rent Tribunal*, (1951) 1 All E.R. 482.
86. *R.* v. *Pugh*, (1951) 2 All E.R. 307.

But, in the case of a statutory tribunal,[87] as in the case of a court, the jurisdiction is to be derived from the statute which created it and no consent of the parties can confer any power to act beyond that jurisdiction nor estop the consenting party from subsequently maintaining that the tribunal has acted without jurisdiction.[88]

***Ultra vires* and Absence of Jurisdiction.**

Earlier, it has been stated that the doctrine of *ultra vires* is the principal instrument for judicial control of all administrative authorities. But, though it embraces all kinds administrative acts done 'in excess of power', the term *ultra vires* is generally used in relation to *quasi-legislative* and administrative statutory powers, while in the case of *quasi-judicial* authorities and tribunals, the expression 'absence of jurisdiction' is commonly used to denote the same situation, namely, that the tribunal has exercised a power which it does not possess under the statute which created it.

Effects of.

Absence of jurisdiction is thus a species of *ultra vires*,[89] and in either case, the resultant act will be a nullity.[90]

Where an inferior tribunal lacks initial jurisdiction, e.g., where the existence of a primary fact was a condition precedent for exercising a statutory jurisdiction, the nullity of the resultant order is not cured by the mere fact that the order was affirmed by an appellate or revisional authority, unless it is established that the higher authority applied its mind to the basic infirmities of the order.[91]

It has been stated at the outset that a *quasi-judicial* authority, having been set up by a statute, is subject to the same limitations as any other statutory body. When the *quasi-judicial* tribunal proceeds to entertain and decide a matter which it has not been empowered by the statute to decide, it is a case of 'defect of jurisdiction' as has been just explained.

But even though the absence of authority may not go to its jurisdiction, the decision of a *quasi-judicial* tribunal may still be *ultra vires* if it has transgressed the substantive or procedural limits imposed by the statute upon the exercise of its jurisdiction. The limitation may be substantive or procedural.

An illustration or substantive *ultra vires* in the case of a *quasi-judicial* decision is to be found in the case of *Express Newspapers* v. *Union of India*.[92]

S. 9(1) of the Working Journalists (Conditions of Service) & Miscellaneous Provisions Act, 1956, provides—

"In fixing rates of wages in respect of working journalists, the Board shall have regard to the cost of living, the prevalent rates of wages for comparable employment, *the circumstances relating to the newspaper industry in different regions of the country*, and to any other circumstances which to the Board may seem relevant."

The Supreme Court held that a consideration of 'the circumstances relating to the newspaper industry in different regions of the country' was a mandatory condition

87. *Essex C.C.* v. *Essex Church Union*, (1963) 1 All E.R. 326 (330) H.L.

88. *Ledgard* v. *Bull*, 13 I.A. 134 (145); Halsbury, 3rd Ed., Vol. 9, p. 352; de Smith (3rd Ed.), p. 105.

89. *Ridge* v. *Baldwin*, (1964) A.C. 40.

90. *Anisminic* v. *Foreign Compensation Bd.*, (1969) 2 A.C. 147 (195).

91. *Union of India* v. *Reddappa*, (1993) 4 S.C.C. 269 (para. 5).

92. *Express Newspapers* v. *Union of India*, A. 1958 S.C. 578 (642). It may be noted, however, that where a *quasi-judicial* tribunal fails to take into account a relevant statutory consideration for the exercise of its power, it is regarded as a case of 'excess of jurisdiction' [Cf. *Baldwin* v. *Patents Tribunal*, (1959) 2 All E.R. 433 (447-78) H.L.].

for the fixation of wage structure by the Board and this condition included the capacity of the industry to pay. Hence, where the Wage Board made a decision under s. 9(1) ignoring the capacity of the industry to pay, the decision of the Board was *ultra vires.*[92]

Refusal to exercise jurisdiction.

Refusal to exercise a jurisdiction which an authority undoubtedly possesses has to be distinguished from absence or excess of jurisdiction.

Mandamus is the proper remedy where a tribunal refuses to exercise a jurisdiction which has been vested in it by law. Refusal to exercise jurisdiction is practically an application of the principle of *ultra vires,* discussed earlier, namely, to decide upon a consideration foreign to the statute, or to decide without taking into consideration a matter which the statute says should be considered by the tribunal.

(a) When the tribunal acts upon extraneous considerations or decides a point other than that brought before them, the tribunal is deemed to have declined jurisdiction and *mandamus* lies.[93-94] In other words—

"A tribunal will be held to have refused to hear and determine when it has in substance shut its ears to the application which was made to it and has determined an application which was not made to it;" or

"where the (licensing) justices so far departed from the plain words of the Act—deciding upon some extraneous consideration—that they could not be said to have heard and determined according to law".[95]

There is also a refusal of jurisdiction where the tribunal refuses to hear such evidence as would prove the fact[96] or to issue summons, upon *extraneous* considerations,[97] or upon an erroneous view of its jurisdiction.[96]

(b) Conversely, there is a refusal to exercise jurisdiction where the tribunal fails to apply its mind to the *material issue* under the statute which is applicable.[98]

(c) Judicial or *quasi-judicial* tribunals are bound to hear each case on its merit. In other words, they must apply their minds to the circumstances of each particular case.[99] They may, of course, make certain general rules or lay down a policy for their guidance but they are bound to consider whether such policy is applicable to the facts of the particular case before them.[100] They cannot make a rule to be applied in every case without a hearing.[1]

But—

"A tribunal does not decline jurisdiction where in the honest exercise of its discretion it has adopted a policy, and, without refusing to hear the applicant, intimates to him what its policy is and that after hearing him it will decide against him in accordance with that policy, unless there is something exceptional in his case."[2]

(d) It follows that there is a refusal to exercise jurisdiction where, instead

93. *R.* v. *Port of London Authority,* (1919) 2 K.B. 176; *R.* v. *Evans,* (1890) 62 L.T. 570; *R.* v. *Board of Education,* (1910) 2 K.B. 165 (179).
94. *Bharat Bank* v. *Employees,* A. 1950 S.C. 188; *Tukaram* v. *Shukla,* A. 1968 S.C. 1050.
95. *R.* v. *Cotham,* (1898) 1 Q.B. 802 (807).
96. *R.* v. *Marsham,* (1892) 1 Q.B. 371 (C.A.).
97. *R.* v. *Adamson,* (1875) 1 Q.B.D. 201; *R.* v. *Evans,* (1890) 62 L.T. 570.
98. *L.D. Sugar Mills* v. *Ram Sarup,* A. 1957 S.C. 82.
99. *E.* v. *Holborn Licensing JJ.,* (1926) 136 L.T. 278 (281); *R.* v. *Walsall JJ.,* (1854) 18 J.P. Jo. 757.
100. *R.* v. *Rotherham Licensing JJ.,* (1939) 2 All E.R. 710.
1. *R.* v. *Torquay Licensing JJ.,* (1951) 2 All E.R. 656.
2. *R.* v. *Port of London Authority,* (1919) 1 K.B. 176; Halsbury, 4th Ed., Vol. I, paras. 33, 59.

of applying its own mind to its statutory duty, it acts according to the dictates of a superior authority or other extraneous body[3-4] or it delegates its *quasi-judicial* function to another body where the statute does not authorise such delegation.[5]

Where any person is vested with judicial powers, the *decision* must be his;[6] but there is no bar to his consulting his clerk on a point of information.[7]

As in the case of the other writs, the Court, issuing *mandamus*, cannot act as a Court of Appeal. Its only purpose is to compel performance where the tribunal has refused to perform its duty. The superior Court's power to intervene in cases of refusal to exercise jurisdiction is thus subject to the following limitations :

(i) *Mandamus* goes to *set a tribunal in motion* but not to prescribe the way in which it shall do any particular act, unless it is quite plain that what it has to do is purely ministerial, and not judicial.[8] In other words, a *mandamus* may be issued to command a tribunal to hear and decide a particular matter, but no direction would be given as to the manner in which it is to decide.[9] Thus, an administrative tribunal may be compelled to hear and determine an appeal;[10] but the Court cannot, by *mandamus*, dictate the judgment that the tribunal shall give.[11]

(ii) Nor would *mandamus* be issued *directing* a tribunal to review its *decision*, where the tribunal has exercised its jurisdiction, even though its decision be *erroneous* and there is no other way of having the duty performed.[8]

(iii) Nor will *mandamus* issue where a tribunal has dismissed a matter on hearing a preliminary objection relating to *facts*,[12] or on the ground that he has disbelieved certain evidence,[13] or refused to receive some evidence as incompetent.[14]

(iv) *Mandamus* will not issue to interfere with the decisions of inferior courts or tribunals in matters which lie within their *discretion* (e.g., in the matter of granting or refusing adjournment),[15] unless the discretion is exercised arbitrarily or *mala fide*,[16] or it amounts to a refusal to exercise the discretion at all.[17]

II. 'Error apparent on the face of the record'.

It has already been stated that where an inferior tribunal acts within its jurisdiction, but *erroneously*, whether on fact or on law, it may corrected by appeal, if there be any; but its decision cannot be challenged collaterally, whether by way of a proceeding for *certiorari* or an action for declaration, or otherwise.

---

3. *R.* v. *Stepney Corpn.*, (1902) 1 K.B. 317.
4. Cf. *Commr. of Police* v. *Gordhandas*, (1952) S.C.R. 135 (148).
5. *Vine* v. *National Dock Labour Board*, (1957) A.C. 488 (499, 502).
6. *R.* v. *East Kerrier*, (1952) 2 All E.R. 144.
7. *R.* v. *Minister of Agriculture*, (1955) 2 All E.R. 129 (135) C.A.
8. *R.* v. *Justices of Kingston*, (1902) 86 L.T. 590.
9. Ex parte *Cook*, (1860) 29 Q.B. 68.
10. *R.* v. *Housing Tribunal*, (1920) 3 K.B. 334.
11. *R.* v. *Justices of Middlesex*, (1839) 9 Ad. & E. 540 (546).
12. *R.* v. *Kesteven Justices*, (1844) 3 Q.B. 810.
13. *R.* v. *Bowman*, (1898) 1 Q.B. 663.
14. Ex parte *Gill*, (1885) 53 L.T. 728.
15. Ex parte *Booke*, (1832) 2 B. & A. 704.
16. *R.* v. *Marshland Commrs.*, (1920) 1 K.B. 155 (165).
17. *R.* v. *Port of London Authority*, (1919) 1 K.B. 176; *K.D. Co.* v. *Singh*, A. 1956 S.C. 446 (452).

The only exception to this general rule is that where the decision of an inferior tribunal, though it has acted within its jurisdiction, is vitiated by (a) an error of law,[18] (b) which is 'apparent on the face of the record'.[19] In such a case, the remedy of *certiorari* is available to quash such decision.[20]

England

(A) *England.*—Even where an inferior tribunal has acted within its jurisdiction, *certiorari* will issue if there is an 'error apparent on the face of the record',[19] which, or course, means an 'error of law'.[20]

(B) *India*—When the decision of an inferior tribunal is vitiated by error 'apparent on the face of the record', it is liable to be quashed by *certiorari*,[19] even though the court may have acted within its jurisdiction.[21] This is an exception to the general principle that the Court issuing *certiorari* cannot act as a Court of Appeal to review findings either of fact[17] or of law, which are within the jurisdiction of the inferior tribunal.

'Error', in this context, means 'error of *law*'.[21] When the tribunal states on the face of the order the grounds on which it was made and it appears that in law these grounds were not such as to warrant the decision to which it had come, *certiorari* would issue to quash the decision.[21]

An 'error of *fact*' apparent on the face of the record may be a ground for review under O. 47, r. 1 of the C.P. Code but not for interference by means of *certiorari*, however gross the error may be.[21-22]

A. *What is an error of law.*

An error 'apparent on the face of the record' does not mean a mere accidental or formal error[23] which could be set aright by amendment. It must be a *substantial*[24-25] error, which goes to the root of the matter Thus—

"Where upon the face of the proceedings themselves it appears that the determination of the inferior court is wrong in law, *certiorari* to quash will be granted." Thus, *certiorari* to quash will be granted where the charge laid before the magistrates ... does not constitute an offence triable by the magistrates, or where it does not amount in law to the offence of which the defendant is convicted, or where an order is made which is unauthorised by the findings of the magistrates."[25]

The purpose of *certiorari* on the ground of error apparent on the face of the record is to determine, on an examination of the record, whether the inferior tribunal has not proceeded in accordance with the *essential* requirements of the law which it was meant to administer.[26] In order to interfere on this ground, the court must find that (a) there is a legal proposition which forms the basis of the order[26] and (b) such proposition is patently erroneous.[27]

(A) The court will not, by *certiorari*, interfere with—

(a) Mere formal or technical errors, even though of law,[25] e.g., errors

18. *Nagendra* v. *Commr.*, A. 1958 S.C. 398 (412); *Prem Singh* v. *Dy. Custodian General*, (1958) S.C.A. 24.
19. *Hari Vishnu* v. *Ahmad*, (1955) 1 S.C.R. 1104 (1123).
20. *R.* v. *Northumberland Tribunal*, (1952) 1 All E.R. 122 (126, 131) C.A.
21. *Nagendra* v. *Commr.*, A. 1958 S.C. 398 (412).
22. *Ambica Mills* v. *Bhatt*, A. 1961 S.C. 970 (973); *Custodian* v. *Abdul Shakoor*, A. 1961 S.C. 1087 (1094).
23. *R.* v. *Kay*, (1873) 8 Q.B. 324; *R.* v. *Wood*, (1918) 87 L.J. K.B. 913.
24. *R.* v. *Cridland*, (1857) 7 E. & B. 853; *Basappa* v. *Nagappa*, (1955) 1 S.C.R. 250.
25. *Prem Singh* v. *Deputy Custodian General*, A. 1957 S.C. 804.
26. *Champsey* v. *Jivraj Spinning Co.*, A. 1923 P.C. 66.
27. *Bharat Barrel Co.* v. *Bose*, A. 1967 S.C. 361 (368).

in appreciation of documentary evidence[27] or errors in drawing inferences from facts.[24]

(b) A decision on a question of law where two views are possible on such question.[22]

(c) A wrong decision on a question of fact, owing to an erroneous appreciation of evidence,[28] drawing of inferences from facts.[29]

(d) A finding of fact, on the ground that the evidence is insufficient or inadequate to sustain it.[28]

(B) But it will be issued where there is a *patent* error of law, manifest on the record, which goes to the root of the matter, e.g.—

(a) A patent error in the *construction* of a statute,[29] whether relating to its jurisdiction[30] or to the merits.[31]

(b) An erroneous conclusion based upon an incorrect *application*[32] of a statute which is patent.[33]

A tribunal falls into an error in point of law when it comes to a conclusion which could not reasonably be entertained by it if it properly understood the relevant enactment[34] and when appears from the record itself, there is an error apparent on the face of the record.[35]

Under S. 19(1)(a) of the (Eng.) Town and Country Planning Act, 1947, the Minister shall confirm a purchase notice if he is satisfied that "the land has become *incapable of reasonably beneficial use in its existing state*". The Minister confirmed a purchase notice on the ground that "the land in its existing state ..... is of substantially *less use* and value to its owner than it would be *if planning permission had been granted*".

The Minister's decision was quashed by *certiorari* because the ground stated on the Minister's order, which was a 'speaking order', was not a valid ground under the statute for confirming a purchase notice.[36]

(c) A clear disregard of the provisions of law,[37-38]

where the charge laid before a Magistrate, as stated in the information, does not constitute an offence punishable by the Magistrate or where it does not amount in law to the offence of which the defendant is convicted or where an order is made which is unauthorised by the findings of the Magistrate;[39] or where the decision of the tribunal, on the very face of it, is not warranted by the findings arrived at;[33,37] or where the penalty awarded exceeds the penalty prescribed by the statute;[40] or where a material provision of law is overlooked;[41] e.g., s. 228 of the Companies Act in setting off outstanding dues against a claim for refund of income-tax.[42]

'Law', in this context, includes statutory rules having the force of law[41]

---

28. *Syed Yakoob* v. *Radhakrishna*, A. 1964 S.C. 477 (479).
29. *Kaushalya* v. *Bachittar*, A. 1960 S.C. 1168 (1171); *Rohtas Industries* v. *R.I.S.U.*, A. 1976 SC 425.
30. *R.* v. *Tottenham Rent Tribunal*, (1956) 2 All E.R. 863.
31. *R.* v. *Medical Appeal Tribunal*, (1957) 2 All E.R. 704.
32. *R.* v. *Patents Appeal Tribunal*, (1958) 2 W.L.R. 1010 (1012) C.A.
33. *Basappa* v. *Nagappa*, (1955) 1 S.C.R. 250.
34. *Edwards* v. *Bairstow*, (1955) 3 All E.R. 48 (H.L.).
35. Re Gilmore's Application, (1957) 1 All E.R. 796 (800) C.A.
36. *R.* v. *Minister of Housing*, (1960) 2 All E.R. 407.
37. *Hari Vishnu* v. *Ahmad*, (1955) S.C.R. 1104.
38. *Venkatachalam* v. *Bombay Dyeing Co.*, A. 1958 S.C. 875 (879).
39. *Junwansinji* v. *Tribunal*, A. 1957 Bom. 182 (185).
40. *R.* v. *Willesden JJ.*, (1948) 1 K.B. 397 (399).
41. *Satyanarayan* v. *Mallikarjun*, A. 1960 S.C. 137 (142), reversing *Mallikarjun* v. *Satyanarayan*, A. 1953 Bom. 207.
42. *Union of India* v. *India Fisheries*, A. 1966 S.C. 35.

but not mere executive or administrative directions of a superior authority upon the inferior tribunal.[41]

(d) A manifest misconstruction of a *document* which initiated the proceedings and thus *formed part of the recored.*[43]

Apart from an error of law consisting of a misrepresentation or misapplication of a statute, *certiorari* will lie where it appears from the face of the decision that the court has plainly misconstrued the document which initiated the proceedings and gave the tribunal jurisdiction,[43] or upon which the decision rests,[44] no two views being possible as to its meaning.[45]

(e) Where the decision is, on the face of the record, based on *no* evidence at all[46] on a material point,[47] or is based on conjectures.[48]

The court has thus interfered where a taxing authority evidently made an assessment on mere guess-work, without any basis whatever.[49]

(f) Where, in arriving at a finding of fact, the Tribunal has refused to admit any material evidence, or admitted inadmissible evidence which has influenced the impugned finding.[46]

(g) Where, in determining a mixed question of fact and law, the tribunal has applied a patently erroneous legal test.[50]

(h) Where the tribunal has exercised its discretion arbitrarily or on extraneous considerations,[51] e.g., where a Labour Court has, after a finding that the termination of employment was illegal, awarded compensation instead of reinstatement-- in the absence of any unusual or exceptional circumstances.[51]

(i) Where in exercising its statutory discretion, the tribunal has ignored a relevant consideration, e.g., a consideration prescribed in s. 47 of the Motor Vehicles Act, for granting a permit.[52]

B. *When can an error be said to be 'apparent' on the face of the record.*

It is obvious from what has been said already, that the scope of interference by *certiorari* on the ground of 'error of law apparent on the face of the record' is materially different from the case of defect of jurisdiction, for, in the latter case, the superior court looks at affidavit evidence to determine whether the inferior court or tribunal had jurisdiction or not. But where the allegation is that the inferior tribunal has erred in law while acting within jurisdiction, the superior court can interfere only if it can see that error on the *face of the record;*[53] it will not go behind the record to see if the decision of the tribunal is erroneous.[54]

Where the conclusion of the tribunal has been reached on the basis of

43. *Baldwin* v. *Patents Appeal Tribunal,* (1959) 2 All E.R. 433 (438) H.L.
44. *Ambica Mills* v. *Bhatt,* A. 1961 S.C. 970 (974) [Agreement].
45. *Kaushalya* v. *Bachittar,* A. 1960 S.C. 1168 (1171).
46. *Crompton* v. *Workmen,* A. 1959 S.C. 1089; *R.* v. *Smith,* (1800) 8 T.R. 588; *Union of India* v. *Goel,* A. 1964 S.C. 364 (369-70).
47. *R.* v. *Birmingham Compensation Tribunal,* (1952) 2 All E.R. 100.
48. *State of W.B.* v. *Atul,* (1991) Supp. (I) S.C.C. 414 (para. 11).
49. *D.C. Mills* v. *Commr. of I.T.,* A. 1955 S.C. 65; *Raghubar* v. *State of Bihar,* A. 1957 S.C. 810.
50. *Prem Sagar* v. *Standard Vacuum Oil Co.,* A. 1965 S.C. 111.
51. *Sant* v. *Singha,* (1985) 2 S.C.C. 349 (paras. 4-5).
52. *Shanmugam* v. *S.R.V.S.,* A. 1963 S.C. 1626 (1631).
53. *R.* v. *Agricultural Land Tribunal,* (1960) 2 All E.R. 518 (520).
54. *R.* v. *Patents Appeal Tribunal,* (1958) 2 W.L.R. 1010 (1013) C.A.

a *patent* error of law which goes to the root of the matter, the case is not merely of an erroneous decision but of an error on the face of the record.[55]

If the inferior court, while *acting within its jurisdiction*, makes an error of law, the remedy is by appeal if the decision is appealable. In such cases, if the inferior court has stated no reasons for its conclusion of law in the order, the superior court cannot entertain an application for *certiorari* because it cannot take evidence or affidavits to go behind the order to discover the erroneous reasoning.[56] But, if the order of the inferior Court be a *speaking order*, that is to say, an order which sets out the grounds of the decision and it appears that in law the grounds so stated were not such as to warrant the decision to which the inferior court had come, *certiorari* would issue to remove the order into the superior court to be quashed.[57]

Though *certiorari* does not lie on the mere ground of incorrectness of decisions, and though it may not be necessary, in all cases, to set out the facts in the judgment or order,— where facts are actually recited in the order and it appears that a conclusion has been drawn from those very facts, which is not warranted by law, there is a 'speaking order' and an error apparent on the face of the record[58] :

> "If that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court of Queen's Bench to remove by *certiorari*, and, when so removed, to pass judgment upon it whether it should or should not be quashed."[58]

In quashing an order which is, *on the face of it*, contrary to law, the superior court is acting in its supervisory capacity, and not as an appellate court.[57] An error apparent on the face of the record should be distinguished from a *wrong* decision which can be corrected only by an appellate court upon a hearing on the merits.[59]

I. It is not easy to define how far the court would be entitled to go for the purpose of determining whether there has been an 'error apparent on the face of the record'.[60] It must always depend upon the facts and circumstances of each case.[52,55]

II. Broadly speaking, *certiorari* is available on the present ground only when the impugned order is a 'speaking order', i.e., an order which *sets out the grounds*[58] or the basis[61] of the decision and it appears that the grounds so stated were not such as to warrant the decision to which the inferior court had come.[62]

Hence, in the majority of cases, an error could not be said to be apparent on the face of the record where it was not self-evident[63] on the face of the record and required argument[64] or evidence to establish it.[60,65]

---

55. *Syed Yakoob* v. *Radhakrishnan*, A. 1964 S.C. 477 (480).
56. *R.* v. *Sheffield Rent Tribunal*, (1957) 121 I.P. 553.
57. *R.* v. *Nat Bell Liquors*, (1922) 2 A.C. 128 (154); *R.* v. *Northumberland Tribunal*, (1952) 1 All E.R. 122 (127, 132).
58. *Overseers of the Poor* v. *N.W. Ry. Co.*, (1879) 4 A.C. 30.
59. *Basappa* v. *Nagappa*, A. 1954 S.C. 440.
60. *Hari Vishnu* v. *Ahmad*, (1955) S.C.R. 1104 (1123).
61. *Alopi Parshad* v. *Union of India*, A. 1960 S.C. 588 (592).
62. *R.* v. *Northumberland Compensation Tribunal*, (1952) 1 K.B. 338 (352).
63. *Ambica Mills* v. *Bhatt*, A. 1961 S.C. 970.
64. *Satyanarayan* v. *Mallikarjun*, A. 1960 S.C. 137 (142).
65. *Baldwin* v. *Patents Appellate Tribunal*, (1958) 2 All E.R. 368 (C.A.).

Thus,

The Bombay Revenue Tribunal rejected a landlord's application for possession on the ground that a previous notice required by s. 14 of the Bombay Tenancy and Agricultural Lands Act, 1948, had not been given. The order was challenged as being vitiated by an error of law. The Supreme Court refused *certiorari* holding that the question whether such notice would be required in the facts of the case was a controversial one and required arguments to establish the error, if any. There might have been erroneous decision on a point of law, but it was *not apparent* on the face of the record.[64]

(i) But there may be cases where this test would break down and the question whether there has been an error apparent on the face of the record must be left to be determined on the facts of each case.[65] Thus, where the order incorporates or relies upon other documents, the court is not prevented from looking into them to determine whether there has been an error.[64-66]

(ii) There are decisions both in *England*[67] and in *India*[68] which show that where the error alleged is one of construction of the relevant statute, argument as to the proper construction or meaning thereof is permissible.

(iii) The 'speaking order' may be an oral order, supplementing the order recorded in the court's register.[69] Thus,

Where the Court delivers an oral order and gives reasons for its decisions, such oral order is taken as the 'speaking order' and if there be any error of law on the face of such oral order, *certiorari* to quash lies, even though the written entry of the order in the court's register does not give reasons.[69]

Under s. 24(3) of the Town and Country Planning Act, 1947, upon a second conviction for use of the land in contravention of notice, the court has the power to impose a fine up to £20 "for every day on which the use is so continued".

The applicant was convicted for such illegal user for a period of 446 days. The court's register recorded an order directing the applicant to pay a "fine of £1,338 and costs". This amount was within the jurisdiction of the court to award under s. 24(3) of the Act.

But the court had announced its decision orally in these words—"We find the case proved and we shall impose a fine of £3 a *day* from the date of last conviction to date, that is, 446 days."

Under s. 104 of the Magistrates' Courts Act, 1952, no Magistrate had the jurisdiction to convict a person of an offence which had been committed more than 6 months before the date of the information or complaint.

On application for *certiorari*, it was held that from the oral order it was apparent that the court had convicted for some part of the offence, committed from day to day, which was beyond six months. Since in a proceeding for *certiorari*, the High Court had no power to alter the fine, there was no other alternative than to quash the conviction *in toto*.[53]

(iv) An error which is admitted in open court is treated on the same footing as an error 'apparent on the face of the record'.[62]

The services of the applicant under a hospital board were terminated in consequence of the passing of the National Health Service Act, 1946. He applied to the compensating authority for compensation for loss of office under the Regulations made under the Act. The authority made an award, giving the grounds for their determination, but omitted to take into consideration the service of the applicant under the urban district council which should have been taken into account for determining the compensation under the Regulations. *Held*, there was an error apparent on the face of the record since from

66. *R.* v. *Medical Appeal Tribunal.* (1959) 2 All E.R. 704.
67. *R.* v. *Medical Appeal Tribunal,* (1959) 3 All E.R. 40 (46).
68. *Rajkrushna* v. *Binod,* A. 1954 S.C. 202.
69. *R.* v. *Cherstey JJ.,* (1961) 1 All E.R. 825 (829).

the grounds stated in the order of the compensating authority it appeared that in law those grounds were not such as to warrant the decision to which they had come. Hence, the order was liable to be quashed by *certiorari* even though the authority was within his jurisdiction.[62]

III. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior tribunal, its conclusion may not necessarily be open to correction by *certiorari*.[70]

In general, where there may conceivably be two opinions as regards the error complained of, it cannot be said that there is an error apparent on the face of the record.[64]

IV. The onus is upon the petitioner to satisfy the court that there is an error apparent on the face of the record.[71]

V. Where an order is vitiated by an error of law apparent on the face of the record, it is liable to be quashed and no further question of any hardship of any of the parties would arise.[72]

C. *What constitutes the record.*

For the purpose of application of this principle, a record consists of the pleadings,[62] if any, or the document which initiates the proceedings,[73] and the adjudication, but not the evidence.[74] It would not include other subsidiary records, if any, called for by the court itself, or any document which does not initiate the proceedings but comes into existence on the reference to the tribunal being made,[75] and which is not prepared by either party to the proceeding.[76]

Though the evidence does not form part of the record, if the decision of the tribunal relies upon a document and sets out an extract from that document, it becomes a part of the record, so that a misconstruction of that document becomes an error apparent on the face of the record.[77-78]

In 1936, a colliery workman sustained an *injury* to both eyes while at work, his right eye being rendered almost blind. In 1953 he suffered a further injury on his left eye as a result of which he became almost totally blind. On the question of the degree of aggravation for disablement benefit under the National Insurance (Industrial Injuries) Act, 1946, the workman appealed to the Medical Appeal Tribunal which incorporated in its award an extract of the specialist's report on the state of both eyes of the workman, but in making its award the tribunal assessed the aggravation at only 20%. On application for *certiorari*, the workman contended that the assessment at 20% was not correct under the provisions of the Act. *Held*, that but for the medical specialist's report, it could not be said that the error alleged was apparent on the face of the record. But the facts disclosed in the specialist's report, which the tribunal had incorporated in its report, were sufficient to show that the award of 20% was wrong under the Act. *Certiorari* was accordingly issued, quashing the award.[77]

Similarly, where the tribunal does not state the reasons for its decision, the court cannot travel beyond the record to find out what those reasons

70. *Syed Yakoob* v. *Radhakrishnan*, A. 1964 S.C. 477 (480); *Satyanarayan* v. *Mallikarjun*, A. 1960 S.C. 137.

71. *Davies* v. *Price*, (1958) 1 All E.R. 671 (675).

72. *Shafi* v. *A.D. & S. Judge*, A. 1947 S.C. 936 (para. 5).

73. *Baldwin* v. *Patents Appeal Tribunal*, (1958) 2 All E.R. 368 (C.A.).

74. *Baldwin* v. *Patents Appeal Tribunal*, (1959) 2 All E.R. 433 (H.L.). [The majority in the House of Lords kept the question open.]

75. *R.* v. *Hendon*, (1933) 2 K.B. 696; *R.* v. *Wandsworth JJ.*, (1942) 1 All E.R. 56.

76. *Davies* v. *Price*, (1958) 1 W.L.R. 434 (441) C.A.

77. Re Gilmore's *Application*, (1957) 1 All E.R. 796 (800) C.A.

78. *General Medical Council* v. *Spackman*, (1943) A.C. 627.

might have been, but if the reasons are stated in the order and those reasons are wrong in law or are insufficient to meet the requirements of the statute,[79] there is an error on the face of the record for which the court can interfere.[62]

III. BREACH OF NATURAL JUSTICE.

Violation of the principles of natural justice.

It has been pointed out earlier that though breach of natural justice is sometimes treated as a species of defect of jurisdiction, it is recognised as an independent ground for issue of *certiorari*.[75] *Certiorari* will lie where a judicial or *quasi-judicial* authority has violated the principles of natural justice even though the authority has acted within its jurisdiction.[80]

If the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of justice.[78]

In *India*, natural justice has entered into the constitutional area because of the recent holding that Art. 14 of the Constitution bans all arbitrary action; and to deprive a person of his life or property without giving him an opportunity to defend himself is patently an arbitrary action.[81]

The requirements of natural justice have been fully dealt with in Chapter VIII.

IV. FRAUD.

Fraud as a ground for certiorari.

In *England*.—Fraud is regarded as an additional ground for *certiorari* from early times,[82] though it is not specifically mentioned in Atkin, L.J.,'s observation in *R.* v. *Electricity Commrs.*[83]

Since fraud vitiates the most solemn of transactions and a superior court possesses an inherent jurisdiction to set aside orders of inferior courts vitiated by fraud and collusion,[84] the superior court would issue *certiorari* in such cases,[84] even where a statute precludes judicial review,[85] provided the fraud is manifest on the record.[85]

In *India*, no such case has come up in reported decisions.

V. UNCONSTITUTIONALITY.

Certiorari on constitutional grounds.

In India, *certiorari* is available against a *quasi-judicial* decision on the additional ground that the decision is unconstitutional, e.g.—

(i) Where the decision offends a fundamental right.[86]

---

79. Re Poyser & Mills Arbitration, (1964) 2 Q.B. 467; *R.* v. *Southampton, JJ.*, (1976) Q.B. 11 (22).
80. *N.T.W. Union* v. *Ramakrishnan*, A. 1983 S.C. 75 (paras. 7, 15).
81. *D.T.C.* v. *Mazdoor Congress*, (1991) Supp. (1) S.C.C. 600 (paras. 202, 229).
82. *R.* v. *Anonymous*, (1816) 2 Chit. 137.
83. *R.* v. *Electricity Commrs.*, (1924) 1 K.B. 171 (C.A.).
84. *R.* v. *Fulham Rent Tribunal*, (1951) 2 All E.R. 1030 (1034).
85. *Colonial Bank of Australasia* v. *Willan*, (1874) 5 P.C. 417 (442).
86. *Ujjam Bai* v. *State of U.P.*, A. 1962 S.C. 1621 (1627-29).

This may happen in several ways—

(a) Where the decision affects a fundamental right and the law under which the tribunal has made the decision is *ultra vires*[87] or violative of a fundamental right[88] or some mandatory provision of the Constitution.[89]

(b) Where the law itself is valid but the impugned decision violates a fundamental right, e.g., that under Art. 14;[90]

(ii) The tribunal acts without or in excess of jurisdiction, and its decision afffects a fundamental right.[91]

(iii) The tribunal acts in violation of the principles of natural justice and its decision affects a fundamental right.[92]

(iv) Where the order which initiates the proceedings is unconstitutional.[90]

(v) Where the decision of the tribunal, in the exercise of an admitted power, is discriminatory[93] or arbitrary.[94]

Review of decisions of a Tribunal under the Administrative Tribunal Act, 1985.—See under pp. 464 ff., *post.*

87. Cf. *Jagannath* v. *State of U.P.*, A. 1962 S.C. 1563 (1569).
88. *Himatlal* v. *State of M.P.*, (1954) S.C.R. 1122; *Express Newspapers* v. *Union of India*, A. 1958 S.C. 578 (643).
89. *Bengal Immunity Co.* v. *State of Bihar*, (1955) 2 S.C.R. 603.
90. *Bidi Supply Co.* v. *Union of India*, (1956) S.C.R. 267.
91. *Madan Lal* v. *Excise & Taxation Officer*, A. 1961 S.C. 1565.
92. *Sinha Govindji* v. *Dy. Controller*, (1962) 1 S.C.R. 540.
93. *Uthandi* v. *Krishnaswami*, (1967) S.C. [dt. 5.10.1967].
94. *Tukaram* v. *Shukla*, A. 1968 S.C. 1050.

CHAPTER 18

LIMITS OF JUDICIAL REVIEW

Need for limitations.

As in the case of judicial review of legislative action,[1-2] courts in the Anglo-American world have laid down certain self-imposed limitations for the exercise of their power of judicial review over administrative action inasmuch as, in the absence of such self-imposed limitations where there are no statutory guides, there might have been an undesirable interference with the administration which is not the business of the courts. The courts would not, therefore, interfere with administrative action unless a proper case is presented before it by a person aggrieved, and the matter relates to a justifiable right of the petitioner, as distinguished from a political or non-justifiable question.

These various limitations may be enumerated as follows :

I. The Petitioner or Plaintiff must have a 'standing'.

Even though the other conditions for judicial review are present, a court will not review an administrative act unless the person who moves the court has *locus standi* or 'standing' to challenge the administrative act or decision.

Judicial decisions on this point, however, show a progressive trend in the U.S.A., England and India, in recent years, so much so, that the orthodox view as to standing has been eaten into by a considerable mass of exceptions under the category of 'public interest litigation'. It would, therefore, be proper to discuss the law under two heads : I. Orthodox view, relating to the generality of cases, and II. Public interest litigation.

I. ORTHODOX VIEW.

(A) *U.S.A.*—As in the case of a proceeding for judicial review of a legislative act, so also in the case of an administrative act, a person shall have no standing to sue unless he is "interested in and affected adversely"[3] by the decision of which review is sought and also establishes that the act complained of will inflict irreparable injury upon him.[4]

U.S.A.

The following general propositions may be formulated :

(i) It is only when a complainant possesses something *more than a general interest* in the proper execution of the laws that he is in a position to secure judicial intervention. He must show an interest *personal* to him

1. *Ashwander* v. *T.V.A.*, (1936) 297 U.S. 288 (745).
2. *State of Bihar* v. *Hurdut Mills*, A. 1960 S.C. 378; *Atiabari Tea Co.* v. *State of Assam*, A. 1961 S.C. 232 (251).
3. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, (1951) 341 U.S. 123 (151).
4. *United Fuel Gas Co.* v. *Railroad Commn.*, 278 U.S. 300 (310).

and not possessed by the public generally[5] (e.g., the public interest in the proper administration of the law).[6]

The following have been held to constitute a personal interest, in the present context :

Injury to one's economic interest,[7] e.g., the injury to a businessman from competition.[7]

On the other hand, there cannot be any personal interest—

(a) Where the interest alleged to have been affected is only a 'privilege'[8] as distinguished from a justiciable or legal right.[9] But when a statute relating to a non-justiciable privilege contains mandatory provisions, review lies for the purpose of their enforcement.[10]

(b) Where the injury alleged is due to an act relating to 'political question'.[11] [As to what is a political question, see *post*.]

(ii) The party seeking judicial review must be 'immediately, substantially and adversely' affected by the order complained of,[12] — the injury complained of being a 'legal injury'.[13]

Administrative orders are not, generally, reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.[11]

(iii) Where a corporation is primarily affected by the administrative action, a stockholder can challenge it only if he has a 'substantial financial or economic interest *distinct* from that of the corporation which is directly and adversely affected'.[14]

(B) *U.K.*—Prior to 1978, different rules of standing were followed by the courts according to the relief prayed for in the proceeding.

U.K.

As regards prerogative writs, the general rule was, of course, that it would lie only at the instance of a 'person aggrieved' by the order or decision complained of, i.e., upon his showing that he has a particular grievance or injury caused by it.[15]

But, in the case of *certiorari* or *prohibition*, the court had a discretion to issue it at the instance even of a stranger, to remedy a public grievance, unless he was a mere busybody.[15-16]

(C) *India*.—The remedies of declaratory suit and injunction being governed by statutory provisions, the answer to the present question is to be had from those provisions.

---

5. *Stark* v. *Wickard*, (1944) 321 U.S. 288.
6. *Perkins* v. *Lukens Steel Co.*, (1940) 310 U.S. 113 (125); *Valley Forge College* v. *Americans*, (1982) 454 U.S. 464 (472-75).
7. *F.C.C.* v. *Sanders Brothers Radio Station*. (1940) 309 U.S. 470.
8. *General Committee* v. *M.K.T.R. Co.*, (1943) 320 U.S. 323; *Switchmen's Union* v. *National Mediation Board*, (1943) 320 U.S. 297.
9. *Perkins* v. *Lukens Steel Co.*, (1940) 310 U.S. 113.
10. *Texas & N.O.R. Co.* v. *Brotherhood of R. & S.S. Clerks*, (1929) 281 U.S. 548.
11. *C. & S. Airlines* v. *Waterman Steamship Corpn.*, (1948) 333 U.S. 103 (114).
12. *Parker* v. *Fleming*, (1947) 329 U.S. 531.
13. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, (1951) 341 U.S. 123.
14. *American Power & Light Co.*, v. *S.E.C.*, (1945) 325 U.S. 385.
15. *R.* v. *Thames Magistrate*, (1957) 55 L.G.R. 129; *London Corpn.* v. *Cox*, (1867) 2 H.L. 239 (279).
16. *Arsenal Football Club* v. *Ende*, (1977) 2 W.L.R. 974 H.L.

(i) Under s. 34, of the Specific Relief Act, 1963, a person may sue for a *declaration* only if—

"he is entitled to any legal character or to any right as to any property which the other party has denied or is interested to deny".

India.

It is to be noted that the words 'legal character' have been widely interpreted to include a person's right to be elected a municipal councillor;[17] or his right to remain in service against an illegal order of dismissal.[18]

(ii) Under ss. 38-39 of the same Act, an *injunction* may be obtained only—

(a) if the defendant is committing or threatening to commit a breach of an obligation existing in favour of the applicant; or

(b) if the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, subject to certain conditions.

The plaintiff must show his legal right and then show an actual or threatened invasion of his right.[19]

(iii) In the case of *mandamus*, similarly, it has been held that it is only a person whose rights have been infringed may apply for *mandamus*. Thus, where an individual seeks to enforce a right belonging to an institution, the petition must disclose the facts to show how he was entitled to act on behalf of the institution.[20]

The rule of infringement of a right belonging to the petitioner does now, however, mean that the right must belong to the petitioner alone and not to anybody else. He may have the right in common with others. But in every case he must show that he has been personally aggrieved by the impugned State action.[21]

In the case of violation of a statutory duty or abuse of a statutory power, anybody who is affected by the illegal order is entitled to apply for *mandamus* to quash such order,[22] even though he may not have a substantive enforceable right, e.g., in the case of a liquor licence.[22]

(iv) A wider rule prevails in the case of *certiorari* by reason of the function to which it relates being *quasi-judicial* in nature. The general rule is, of course, that only a party to the proceeding which is impugned may apply for *certiorari*.

But where the matter to be reviewed affects the public *generally*, any member of the public, who has not disentitled himself by his conduct, may draw the attention of a superior Court to an order passed by a subordinate tribunal being manifestly illegal or *ultra vires*,[23] for it is the duty of the superior court to quash such order.[24]

On this principle, an elector may apply for *certiorari* to quash an order

17. *Satnarain* v. *Hanumanprasad*, A. 1946 Lah. 85; *Sabhapat* v. *Abdul*, (1896) 24 Cal. 107.
18. *State of Bihar* v. *Abdul Majid*, (1954) S.C.R. 786.
19. *Mahomed* v. *Chandan*, 63 I.C. 728 (All.).
20. *Kalyan Singh* v. *State of U.P.*, A. 1962 S.C. 1183.
21. *Governing Body* v. *Gauhati University*, (1973) 1 S.C.C. 192; *Desai* v. *Roshan*, A. 1976 S.C. 578.
22. *Guruswami* v. *State of Mysore*, A. 1954 S.C. 592.
23. *Asst. Collector* v. *Soorajmull*, (1952) 56 C.W.N. 452 (469)
24. *R.* v. *Surrey JJ.*, (1870) 5 Q.B. 466.

of an Election Tribunal on the ground that it is without jurisdiction even though the unsuccessful candidate makes no complaint.[25]

But a distinction is still made between a case where an application is made by a stranger and a case where the application is made by the party aggrieved. Where the party aggrieved is the applicant, the court will grant the writ *ex debito justitiae,* but where the applicant is a stranger who is not personally interested, the court may exercise its *discretion* whether to issue the writ or not.[26]

II. PUBLIC INTEREST LITIGATION.[27]

As has been stated at the outset, recent decisions in all countries where the Anglo-American system of justice has been adopted have taken the view that where State action has caused injury to the general public as distinguished from particular individuals, it would be the *duty* of the State, under a democratic system, to afford relief against maladministration, in litigation brought by any member of the public, without insisting that the petitioner must be one who has been particularly affected by the public wrong in question.

A. *U.S.A.*— Though the decisions are not always uniform, in a number of cases it has been held that where the complaint is as regards the supply of a commodity or service, any 'consumer'[28] can move for judicial review against the administrative action; so also where the complaint is as regards injury to 'environments',[29] any resident of the locality may apply for relief.

B. *U.K.*—Prior to 1978, Lord Denning had, in several cases, laid down the proposition that where a public authority is guilty of a misuse of power, *any* citizen is competent to draw the attention of the court in order to remedy such public injury.[30] This conclusion was reached by a liberal interpretation of the expression 'person aggrieved' which was used in the relevant statute.

In 1978, the Rules of the Supreme Court were revised, to insert O. 53 relating to 'judicial review', and it was provided that an application for judicial review (for any of the reliefs against a public authority) could be brought by any person having 'sufficient interest in the matter to which the application relates'. According to Lord Denning,[31] this substituted expression, using 'interest' in place of 'aggrieved', would entitle *any* citizen to enforce the law against public authorities in respect of their statutory duties. This view is likely to receive the approval of the House of Lords which has had no opportunity of interpreting this expression as yet.

C. *India.*— Since 1979,[32] it has come to be established[33] that where there has been a breach of a public duty or breach of some constitutional

25. *Damodar* v. *Naranarayan*, A. 1955 Assam 164 (169); *Sasamusa Sugar Works* v. *State*, A. 1955 Pat. 49.
26. *Sinha* v. *Lal & Co.*, A. 1973 S.C. 2720.
27. See further discussion at 11 sh. 291 ff.
28. *Watt* v. *Energy Foundation*, (1982) 454 U.S. 151 (161).
29. *Assocn. of Data Processing* v. *Camp*, (1970) 397 U.S. 150 (154); *U.S.* v. *Students*, (1973) 412 U.S. 669.
30. *Blackburn* v. *A.G.*, (1971) 2 All E.R. 1830 (1833); *R.* v. *G.L.C.*, (1976) 3 All E.R. 184 (C.A.).
31. Lord Denning, *Discipline of the Law* (1979), p. 133.
32. *Ramana* v. *I.A.A.I.*, A. 1979 S.C. 1628 (1651).
33. *Gupta* v. *Union of India*, A. 1982 S.C. 149 (194); *Bandhua* v. *Union of India*, A. 1984 S.C. 802.

provision, causing injury to the general public, any person, who is not a mere busybody, would be allowed to bring a petition under Art. 32 or 226 to seek enforcement of such public duty, prevention of some public injury[34] or such provision of the Constitution.[33-34]

Thus, a rate-payer of a local authority is entitled to challenge an illegal action of the local authority;[33,35] or member of the Bar may be allowed to challenge the constitutionality of orders of transfer of Judges.[36]

In other words, in a public interest litigation some public-spirited individual or group or some person *other than* the person aggrieved, may move a writ petition, provided such other person is unable to approach the court for redress owing to—

(a) such person being in custody;[45] or

(b) such person belongs to a class or group of persons who are in a disadvantaged position on account of poverty, disability or other social or economic impediment.

II. The special features of a public interest litigation as distinguished from a private litigation are—

(a) Once the court is satisfied as to the public mischief to be remedied, it would not insist on the *locus standi* of the petitioners, who may not have any personal interest in the matter. Even a person who has benefitted by the act of a public body is entitled to urge that that body was not lawfully constituted, say, by reason of bias.[44]

(b) In a public interest litigation, the court has to strike a balance between two conflicting interests : (a) Nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (b) avoidance of public mischief and to prevent publicly mischievous executive actions.[41] Where public mischief is predominant, the court may not only restrain executive action, but may also give appropriate affirmative action,[37] e.g., in the matter of construction of proper roads in hilly areas.[37]

But at the same time, the court must be extremely careful to see that under the guise of redressing a public grievance it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature.[42] Thus, it cannot direct the State Government to initiate legislation.[42]

---

34. *Nakara* v. *Union of India*, A. 1983 S.C. 130 (para. 64) D.B. [an association of pensioners, who had been affected by a Pension Rule]; *Sanjit* v. *State of Rajasthan*, (1983) U.J.S.C. 161 (para. 1) [Director of Social Work and Research Centre, challenging the system of payment of wages to famine relief workers; *Gupta* v *Union of India*, A. 1982 S.C. 149 (*re.* Independence of the Judiciary].

35. *Ratlam Municipality* v. *Vardhichand*, A. 1980 S.C. 1622.

36. *Fertilizer* v. *Union of India*, A. 1981 S.C. 344 (paras. 41, 44, 48); *People's Union* v. *Union of India*, A. 1982 S.C. 1473 (para. 1); *Veera* v. *State of Bihar*, A. 1983 S.C. 339 (para. 1); *Sheela* v. *State of Maharashtra*, A. 1983 S.C. 378 (para. 1).

37. *State of H.P.* v. *Umed*, A. 1986 S.C. 847 (para. 29).

38. *Lakshmi Kant* v. *Union of India*, (1984) 2 S.C.C. 244.

39. *Sheela* v. *State of Maharashtra*. A. 1983 S.C. 378; *Veera* v. *State of Bihar*, A. 1983 S.C. 339 (para. 1); *Mukesh* v. *State of M.P.*, (1986) 1 U.J.S.C. 90 (para. 3); *Lakshmi Kant* v. *Union of India* (II), (1985) Supp. 701 (para. 1).

40. *State of W.B.* v. *Sampat*, A. 1985 S.C. 195 (para. 10).

41. *Chaitanya* v *State of Karnataka*, A. 1986 S.C. 825 (para. 10).

42. *State of H.P.* v. *Parent*, (1985) 3 S.C.C. 169 (paras. 2, 4, 5).

43. *Lakshmi* v. *Hassan Uzaman*, (1985) 4 S.C.C. 689 (para. 16).

44. *Mohapatra* v. *State of Orissa*, (1984) 4 S.C.C. 103 (para. 7).

45. *Sunil* v *Delhi Adm.*, A. 1980 S.C. 1579.

(c) The court may direct inquiry, without determining the respondents' preliminary objection that no fundamental rights have been affected.[46]

(d) The court may not be bound by the technicalities of an adversarial procedure in such litigation.[46]

(e) The court may award costs to the petitioner even where the petition fails (see under 'Costs', *below*)

(f) A private litigant may abandon his claim. But in a public interest litigation, the court may refuse the petitioner to withdraw his petition where such withdrawal may be prejudicial to the public weal.[47]

III. The question must be 'justiciable'.

Even though the action of the Executive be unlawful or 'unconstitutional' and causes injury to an individual, he may not obtain redress from a court of law if the matter to which the action relates is 'non-justiciable' or 'political'. In the *U.S.A.*, this limitation is deduced from the doctrine of Separation of Powers but, elsewhere, the limitation has been deduced from the very nature of the judicial function. It should be noted that the question whether a particular function is political or not rests with the court and not the Executive.[48]

This list of such non-justiciable matters in the executive sphere is more or less the same in the Anglo-American world. These may be classified as follows :

A. *Conduct of foreign affairs.*

The municipal courts will not question the correctness or validity of the decision of the Executive on the following questions—

(i) Whether a foreign State shall be recognised for the purposes of international law and dealings.

(ii) Whether a person shall be recognised as the sovereign[49-50] or accredited agent[51] of a foreign government.

(iii) Whether a treaty or agreement has been sufficiently ratified by a foreign government.[52]

(iv) Whether a foreign air carrier should be permitted to operate in the country, even where the power of the Executive in the matter of air navigation is regulated by legislation.[53]

(v) The implementation of the State's obligations under an international treaty of obligation.[54]

(vi) Whether a territory belongs to its State or to a foreign State.[55]

In another context it will be shown that the sovereignty or discretionary authority of the Government in international affairs or in its relation with

46. *Bandhua Morcha* v. *Union of India*, A. 1984 S.C. 802 (paras. 9, 14, 75).
47. *Sheila* v. *Union of India*, (1988) 4 S.C.C. 226 (paras. 26, 36).
48. Cf. *Colegrove* v. *Green*, (1946) U.S. 549.
49. *Jones* v. *U.S.*, (1890) 137 U.S. 20; *U.S.* v. *Pink*, (1942) 331 U.S. 503.
50. *Duff Development* v. *Kelantan*, (1924) A.C. 797 (H.L.); *Sultan of Johore* v. *Bendahara*, (1952) 1 All E.R. 1261 (1266).
51. Ex parte *Baiz*, (1890) 135 U.S. 403.
52. *Terlinden* v. *Ames*, (1902) 184 U.S. 270.
53. *C. & S. Airlines* v. *W.S. Corpn.*, (1948) 333 U.S. 103 (109).
54. *U.S.* v. *Pink*, (1947) 331 U.S. 503 (514).
55. *Foster* v. *Neilson*, (1829) 2 Pet. 253.

foreign States cannot be limited even by a contract or agreement. Thus, during the First World War, when the British Government seized a Swedish ship notwithstanding an undertaking given by the British Legation at Stockholm that a ship carrying at least 60% of approved cargo would not be seized, and the ship claimed damages, it was held that no such undertaking could fetter the sovereignty of the British Government or sustain an action.[56]

B. *Act of State.*

As has been settled in *England*[57] and in *India*,[58] an Act of State is no defence to any illegal act committed by a Sovereign against his own subjects.

But a sovereign act, done under colour of State policy, in relation to a foreign State[59] or foreign subject,[60] cannot be questioned in a municipal court. The matter is one for diplomatic representation, if redress is to be claimed.

As defined by Stephen, an Act of State is—

"An act injurious to the person or property of some person who is not at the time of that act a *subject of Her Majesty*, which act is done by a representative of Her Majesty's authority, and is either sanctioned or subsequently ratified by Her Majesty."

Thus, an Act of State is an injury (a) *done against an alien* outside the realm, (b) by a servant of the Crown, (c) and either previously authorised or subsequently ratified by the Crown on *State Policy*, (d) which would otherwise constitute a wrong, but being done under *State policy*, is not cognizable by any municipal court, e.g., the seizure or annexation of foreign property, in the right of conquest. In short, it is an arbitrary act, which is done not under colour of any title, but in the exercise of sovereign power, intending that no remedy should lie.

Whether a particular act has been done in exercise of the sovereign power[59] or under colour of title,[60] is a question of fact.

This rule has an impact not only upon the sovereign of the foreign State against whom the Act of State is committed but also against his subjects, even though such subjects subsequently become the subjects of the latter, by annexation, conquest or cession.

Acquisition of foreign territory.

Upon the acquisition by a State of a foreign territory, the inhabitants of such territory cannot enforce in the municipal courts any rights against the new Sovereign other than those which that Sovereign has recognised. The fact that the Sovereign allows the inhabitants to retain their old laws and customs does not make the Sovereign subject to them and all rights under those laws are held at the pleasure of the Sovereign. It is only when the Sovereign purports to act within such laws that the plea of Act of State ceases to be a defence. But before that stage is reached, the new Sovereign may be influenced by the existing laws, but is not governed or bound by

56. *Rederiaktiebolaget* v. *The King*, (1921) 3 K.B. 500.

57. *Entick* v. *Carrington*, (1765) 19 St. Tr. 1029; *Commercial & Estates Co.* v. *Board of Trade*, (1925) 1 K.B. 271 (290).

58. *Virendra* v. *State of U.P.*, (1955) 1 S.C.R. 415 (436); *Promod* v. *State of Orissa*, A 1962 SC 1288.

59. *Nabob* v. *E.I. Co.*, (1793) 2 Ves. Jt. 56; *Soloman* v. *Secy. of State*, (1906) 1 K.B. 613 (640); *Secy. of State* v. *Kamachee*, (1859) 13 Moo. P.C. 22.

60. *R.* v. *Bottrill*, (1947) 1 K.B. 41 (C.A.); *Bansidhar* v. *State of Rajasthan*, A. 1967 S.C. 48.

them.[61] The burden of showing that the new Sovereign has recognised the existing laws or has acted under it is upon the party who asserts it.

After the lapse of paramountcy, by reason of s. 7 of the Indian Independence Act, 1947, the Nawab of Junagadh became a sovereign but he did not accede to the Dominion of India like other Indian States, and left his country for Pakistan. At the request of the Nawab's Council, the administration of the State was taken up by the Government of India and placed in charge of an 'Administrator'. This was, obviously, an Act of State. The inhabitants of this territory did not become Indian citizens until the people of the territory, by a referendum, acceded to India and obtained citizenship under the Constitution of India. Till then, they were aliens to India even though they desired union with India.

In 1948, the 'Administrator' cancelled, by his Secretariat Order, a gift of immovable property which had been made by the Nawab in favour of the respondents. A suit brought by the respondents for a declaration that the cancellation was illegal was dismissed on the ground that the act of cancellation by the Administrator was an Act of State, even though the Administrator had allowed the existing laws to remain in operation. It was not done under colour of legal title and the courts had no jurisdiction in the matter.[62]

Virendra v. *State of U.P.*[58] illustrates that the plea ceased to be of avail *after* the Constitution came into force and the subjects of the ex-Ruler became *citizens* of India. In this case, the Government of India resumed certain grants of land similarly made by certain Indian Rulers. But the act of resumption was made in 1952, after the Constitution came into force, by an executive act, without legislative sanction. *Held,* that the plea of 'Act of State' was of no avail as the administrative act, being without the authority of law, offended Art. 31(1) of the Constitution and a writ was issued restraining the State of U.P. from giving effect to the orders complained of and directing it to restore possession to the petitioners if possession had been taken.[58]

C. *Political Questions.*

There are certain questions which are supposed to be 'political' and appertaining to the determination of the Executive which are not fit for judicial review, e.g., whether there was in fact an emergency which justified a Proclamation of Emergency[63]; or the justification of dissolving a State Legislative Assembly on the advice of the Union Government.[64]

The court has, however, the sole constitutional authority and obligation to interpret the Constitution (paras. 35, 129, 143, 179)[64-65] and if a question arises whether, in making the impugned administrative order, the authority exceeded the powers vested in it by the Constitution, the court would strike it down, if the order is found to be *ultra vires* or *mala fide,*[64] even though it pertains to a subject usually known to be 'political'[63]. Thus, though the question of satisfaction of the President in issuing a Proclamation of Emergency under Act. 352 is subjective, the court may interfere where— (a) there was no satisfaction at all; or (b) it was founded on an irrelevant ground or consideration; or (c) on the materials before the President, his satisfaction was evidently perverse or *mala fide.*

---

61. *Forestar* v. *Secy. of State,* (1872) 18 W.R. 349 (P.C.)
62. *State of Saurashtra* v. *Menon,* A. 1960 S.C. 1383.
63. *Bhutnath* v. *State of W.B.,* A. 1974 S.C. 806
64. *State of Rajasthan* v. *Union of India,* A. 1977 S.C. 1361.
65. *Minerva Mills* v. *Union of India,* A. 1980 S.C 1789 (1838); *A.K. Roy* v. *Union of India,* A. 1982 S.C. 710 (723-24).

Policy decision : How far amenable to judicial review.

A matter of policy decision for the executive must be left to the consideration of the State Government. The wisdom in a policy decision of the Government, as such, is not justiciable unless whether such policy decision is capricious, arbitrary, whimsical so as to offend Art. 14 of the Constitution or any statutory or constitutional provision.[65a] Judicial review is impermissible if policy decision is neither unfair nor *mala fide*.[65b] So normally policy matter of Government shall not be interfered with in writ.[65c] In an earlier decision Supreme Court held that interference in policy decision of the Government is impermissible unless rule-making authority has acted arbitrarily or in violation of fundamental right.[65d] It is a matter for the executive to decide the quantum and shape of benefit to be extended to the employees. Such policy matter can be interfered with by court only on ground of illegality, irrationality or procedural impropriety.[65e] Court cannot find fault with discrimination based on policy.[65f]

There must be justifiable reasons for non-implementation of policy.[65fa] State has right to change its policy from time to time according to change of circumstances. Supreme Court in this case upheld the change of policy although it departed from the decision of the Supreme Court.[65fb] State can formulate its policy having regard to its financial constraint. Art. 41 of the Constitution recognizes this power of the State.[65fb] A policy decision of the State cannot be subjected to judicial review. Court of course can see whether the policy is arbitrary or violative of law.[65fb]

Court or Tribunal cannot examine the wisdom of making a rule since it is a matter of policy and therefore is not debatable in a judicial forum.[65fc]

It is true that court will not interfere where the question is a matter of policy. Nevertheless the courts will not abdicate their right to scrutinize whether the policy had taken into account all relevant facts and whether the said policy can be held to be beyond the pale of discrimination or unreasonableness on the basis of the material on record.[65fd]

Prescription of minimum qualification for admission to a course or treating other qualification as equivalent to the former is a matter of policy decision. Court cannot opine whether a particular educational qualification of a candidate is equivalent to the prescribed qualification. Court can only examine whether the policy decision is based on a fair rational and reasonable ground. Whether decision has been taken on consideration of relevant aspects of matter, whether exercise of the power is obtained with *mala fide* intention,

---

65a. *State* v. *Sevanivatra Karmachari Hitkari Samity*, (1995)2 S.C.C. 117 : (1995) 29 A.T.C. 199.

65b. *Sher Singh* v. *U.O.I.*, (1995)6 S.C.C. 515 : (1995) 31 A.T.C. 746 : (1995)5 Serv. L.R. 654.

65c. *All Deupt. Authority* v. *State*, A. 1994 N.O.C. 388 (All).

65d. *K. Narayana* v. *State*, (1993)5 Serv. L.R. 290 : 1994 Supp. (1) S.C.C. 44, 53.

65e. *All-India Ex-Emergency Commissioned Officers and Short Commissioned Officers' Welfare Association* v. *Union of India*, 1995 Supp. (1) S.C.C. 78 : 1995 S.C.C. (L&S) 258.

65f. *Assam Madhyamik Sikshak Aru Karmachari Santha* v. *State*, (1996)9 S.C.C. 186.

65fa. *Rameshwar Prasad* v. *M.D., U.P. Rajkiya Nirman Nigam Ltd.* (1999)8 SCC 381.

65fb. *State* v. *Ram Lubhaya Bagga*, (1998)4 SCC 117: AIR 1998 SC 1703.

65fc. *Sumangala Naganath* v. *Union of India*, 1999 SCC (L&S) 1318.

65fd. *Union of India* v. *Dinesh Engineering Corporation*, (2001)8 SCC 491.

whether the decision serves the purpose or it is based on irrelevant or irrational considerations or intended to benefit an individual or a group of candidates.[65fe]

Policy decision or any decision by a statutory authority taken pursuant to or in furtherance of a provision in statute cannot ordinarily be subjected to judicial review unless the same is made in violation of mandatory provision thereof or taken for unauthorized or illegal purposes.[65ff]

Reasonableness of a policy of the State in the matter of reservation of seats is always subject to judicial scrutiny. Right of a meritorious student to get admission in a post-graduate course is a fundamental and human right which is required to be protected. Such a valuable right cannot be permitted to be whittled down at the instance of less meritorious student.[65fg]

A policy decision of the State unless affects somebody's legal right cannot be questioned.[65fh]

Policy decision has to be reasonable. Reasonableness of restriction has to be determined in an objective manner and from the stand point of interests of general public. Restriction is not unreasonable because it is harsh.[65fi]

There were sufficient vacancies to accommodate the petitioners. But the Gramin Bank had taken a policy decision not to add to the existing man power on account of heavy losses. Court cannot direct the bank to change its policy and make appointment in violation of policy.[65fj]

If policy decision is found to be not in accordance with law court can only issue direction that matter should be reconsidered. Court itself cannot make the decision.[65fk]

Deviation of departure from policy decision violates Art. 14 of the Constitution.[65fl]

Appointment or renewal to the post of Public Prosecutor is in the nature of professional engagement. Governed by relevant execution instruction. Appointment to such post by following the procedure contained in Cr PC and adopting a reasonable or fair procedure shall not be subjected to judicial review unless it is tainted with arbitrariness or malice. Power of judicial review is not intended to assume a supervisory role. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the suprema lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a court. The limited scope of judicial review is (1) courts while exercising power of judicial review, do not sit in appeal over the decisions of administrative bodies, (2) a discretionary order passed by an administrative authority in exercise of its vested power cannot be interfered in judicial review unless it is shown to by perverse or illegal, (3) a mere wrong decision cannot be subjected to judicial review. Court can only see that the Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice, (4) court will

65fe. *State* v. *Lata Arun*, (2002)6 SCC 252: AIR 2002 SC 2642.
65ff. *Chairman & M.D.B.P.L. Ltd.* v. *S.P. Gururaja*, (2003)8 SCC 567.
65fg. *Saurabh* v. *Union of India*, (2004)5 SCC 618.
65fh. *Union of India* v. *Manu Dev Arya*, (2004)5 SCC 232.
65fi. *Union of India* v. *International Trading Co.* (2003)5 SCC 437.
65fj. *Ramrao* v. *A.I.B.C. Bank Employees' Welfare Assn.* (2004)2 SCC 76.
65fk. *Union of India* v. *Kannadapara Sanghatanegala Okkuta*, (2002)10 SCC 226.
65fl. *Indian Charge Chrome Ltd.* v. *Union of India*, (2003)2 SCC 533: AIR 2003 SC 953.

not undertake the government duties and functions. Court will not ordinarily interfere with a policy decision of State. Social and economic belief of a judge should not be invoked as a substitute for the judgment of the legislative bodies.

While exercising the power of judicial review the court is more concerned with the decision-making process than the merit of the decision itself.[65fm]

Judicial review of transfer of an employee is impermissible in absence of a legal or statutory right of the transferee.[65g] Policy decision to offer preference to Co-operative Societies in the matter of appointment as fair price shops, is not discriminatory.[65h] Policy decision of the Government that a certain article would be purchased only from Small Scale Industrial Units does not offend Art. 14 or 19(1)(g) of the Constitution.[65i] Maharashtra Policy of Prohibition statute empowers collector to cancel liquor licence. Cancellation for no cause is not violative of Art. 14 of the Constitution.[65j] Prohibition policy. Right to trade in intoxicant is no fundamental right.[65j] System of country liquor given up earlier is reintroduced. It is challenged on ground that it is unhygienic and harmful to health. It was held that policy decision cannot be challenged unless it violates constitutional prohibition or it is against public interest.[65k] Government policy to prohibit concentration of economic power and control monopolies to secure economic and social justice is not justiciable.[65l] Government Company is debarred from bidding in view of policy to encourage private sector involvement is no discrimination to offend Constitution.[65m] Policy decision of the Government to substitute old panel by new panel and pursuant thereto vesting of power in State Government to terminate appointment of Government Counsel at any time is not open to judicial scrutiny.[65n]

Executive authority is within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere *ipse dixit* of the Executive thereby offending Art. 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision. Court will not interfere.[65-o]

D. *Questions of Policy.*

(A) Though the subject-matter be not 'political', if it appertains to the administrative policy[66] of the Government, e.g., import policy,[67] opening new schools,[68] fixing the prices of essential commodities,[69] the Court would not interfere.[70]

65fm. *State of U.P.* v *Jahri Mal*, (2004)4 SCC 714.

65g. *Chief General Manager (Telecom)* v. *Rajendra Chandra*, (1995)2 S.C.C. 532 : 1995 S.C.C. (L&S) 533 : A. 1995 S.C. 813.

65h. *Sarkari Sasta Anaj Vikreta Sangh* v. *State*, A. 1981 S.C. 2030.

65i. *Asbestos* v *State*, A. 1990 Bom 201.

65j. *S. M. Mallewar* v. *State*, A. 1993 Bom 327.

65k. *Anukul Chandra* v. *State*, A. 1996 Ori 36.

65l. *U.O.I.* v. *Hindustan Development Corporation*, A. 1994 S.C. 988.

65m. *Delhi Science Forum* v. *U.O.I.*, A. 1996 S.C. 1356.

65n. *Triloki Nath Pandey* v. *State*, A. 1990 All 143.

65-o. *M.P. Oil Extraction* v *State*, (1997)7 S.C.C. 592.

66. *Madhav Rao* v. *Union of India*, A. 1971 S.C. 530 (565, 619).

67. *Bennett* v. *Union of India*, A. 1973 S.C. 106; *I.R.S.* v. *I.R.T.S.A.*, (1993) 2 UJSC 257 (para. 17); *Union of India* v. *Tejram*, (1991) 3 S.C.C. 1; *Asif* v. *State of J. & K.*, A. 1989 S.C. 1899 (para. 9); *Union of India* v. *S.L. Datta*, (1991) 1 S.C.C. 505.

68. *State of Maharashtra* v. *Lok S.S.*, A. 1973 S.C. 588 (592); *State of Mysore* v. *Srinivasamurthy*, A. 1976 S.C. 1104 (1108-09).

69. *Sitaram* v. *Union of India*, A 1970 S.C. 1277.

70. *Sitaram Co.* v. *Union of India*, A. 1990 S.C. 1277 (paras. 57-59) C.B.

(B) But the court may interfere if—

(a) some fundamental right, e.g., Act 14 has been offended[68]; or

(b) the principles of natural justice are violated;[68] or

Policy decisions.

(c) the constitutional or statutory[71] powers of the authority are exceeded or

(d) the conclusions or findings of fact arrived at by such authority are not based on any evidence, or there is no rational basis for them, or they are made on extraneous considerations; or they are inconsistent with the law of the land.[70]

(C) The Court would not interfere also where the Court does not possess the *expertise* required to determine a matter, and the determination has been made by *experts* appointed by the Government.[70]

(D) Having enunciated a policy of general application and having communicated it to all concerned, the Administration is bound by it.[72] Of course, the policy may be changed subject to procedural limitations; but until that is done, the Administration is bound to adhere to it.[72]

E. *Subjective satisfaction.*

It has already been pointed out that where the Constitution commits a function to the subjective satisfaction of the Executive, e.g., under Art. 352(1), 356(1), judicial review is excluded except on some special grounds.

Similar principles are applicable when such subjective power is vested by statute, e.g., the National Security Act, 1980 or the COFEPOSA, 1974. Hence, the detention order passed under such Acts can be questioned by a court only when the subjective satisfaction has been arrived at arbitrarily, irrationally or *mala fide;*[73] or any of the ingredients of Art. 21 or 22 have been violated.[74]

F. *Non-statutory discretionary matter.*

Nothing but a legal right is justiciable in a court of law. Hence, where no legal right is created but a privilege or benefit is conferred by the administrative authority in the exercise of its discretion, it is not enforceable in a court. For instance,

(i) In *India,* R. 44 of the Fundamental Rules confers a discretionary power on the Government to grant compensatory dearness allowance (as a matter of grace or bounty) to its employees. It confers no legal right upon the employees; hence, they cannot compel the Government to grant it or to grant it at a particular rate, through any legal process.[75] The right to recover arrears, after they have accrued by service, rests on a different principle.[76]

(ii) Where a person's name is included in a Departmental list for appointment to a service under the Government or for promotion, no legal right is conferred upon such person by such enlistment so that he cannot enforce his claim to be appointed or promoted by legal action.[77]

But even in these cases, the court can interfere where the exercise of

---

71. *Asif* v. *State of J. & K.,* A 1989 S.C. 1899.
72. *Home Secy.* v. *Darshjit,* (1993) 4 S.C.C. 25 (para. 14).
73. *Dhananjay* v. *D.M.,* A 1982 S.C. 1315.
74. 10 sh. 171-72.
75. *State of M.P.* v. *Mandawar,* A. 1954 S.C. 493.
76. Cf. *State of Bihar* v. *Abdul Majid,* (1954) S.C.R. 606 (791-93).
77. *Nagarajan* v. *State of Mysore,* A. 1966 S.C. 1942; *Karkhanis* v. *Union of India,* A. 1974 S.C. 2302 (para. 4); *Nim* v. *Union of India,* A. 1967 S.C. 1301 [*vide* Author's *Shorter Constitution of India* (1984); pp. 698-99].

the discretionary power is arbitrary or unreasonable, so that there is a violation of Art. 14,[78] or the order is *ultra vires*.[79]

[See next Chapter, under *Mandamus*.]

G. *Statutory exclusion*

S. 4 of *our* Pensions Act, 1871, takes away the jurisdiction of the Civil Court to entertain a suit[80] to enforce the right of a person to any Government pension :

"Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and, whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted."

Any such claim must be presented to the specified Revenue Officer (s. 5), who may, of course, grant a certificate for determination of the question by a Civil Court, but then the Civil Court cannot make any decree or order against the Government, to saddle it with liability. In other words, notwithstanding such determination by the Court, it is open to the Government to refuse or withhold the claim. S. 6 provides—

"A Civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner, or other officer authorized in that behalf, that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."[81]

Pension of Government servants.

As regards pension due to retired Government servants under the Service Rules, a distinction has been made by the Supreme Court as between (a) Government's right to forfeit or reduce the quantum of pension and (b) the pensioner's right to recover arrears of pension which have already accrued:

A. 1. Pension after retirement is granted at the discretion of the Government and the Service Rules usually lay down that "full pension admissible under the Rules is not to be given as a matter of course" and that the sanctioning authority has the discretionary power to reduce the pension as it thinks proper where the service of the Government servant "has not been thoroughly satisfactory". Hence, if this discretionary power is exercised and the pension is reduced, the Government servant has no legal remedy, even though the Rules laying down the mode of computation of the pension are statutory.[82]

2. Where, however, the power to reduce or forfeit[83] the pension is not exercised according to the Rules, the pension already due according to the Rules is recoverable by suit[84] or a direction for payment may be obtained in a proceeding under Art. 226.[83] Under the Civil Service Regulations, no order of forfeiture of pension can be made without resorting to disciplinary proceedings, in compliance with the principles of natural justice.[84]

78. *Fertilizer Corpn.* v. *Union of India*, A. 1981 S.C. 344.
79. *Sitaram* v. *Union of India*, A. 1990 S.C. 1277
80. *Damodar* v. *Satyabhama*, (1907) 31 Bom. 512.
81. See also, s. 4, Bombay Revenue Jurisdiction Act, 1876 [*Bhujangrao* v. *Malojirao*, A. 1952 S.C. 138].
82. E.g., Civil Service Regulations.
83. *Dayal* v. *Union of India*, (1980) U.J.S.C. 509; *Deokinandan* v. *State of Bihar*, A. 1971 S.C. 1409; *Devaki Nandan* v. *State of Bihar*, (II) A. 1953 S.C. 1134 (para. 10).
84. *Gurdip* v. *Union of India*, A. 1962 Punj. 8.

3. Where forfeiture or reduction of pension is the result of dismissal or compulsory retirement, Art. 311(2) must be complied with.[85] If disciplinary proceedings against an employee for misconduct cannot be completed before his retirement, it would be open to the Government to take proceedings in accordance with the Rules for reduction of his pension.[86] But, if the charges of misconduct are not established at such proceedings or the proceedings are quashed by the court, it would not be open to the Government to direct reduction of pension on the same allegations.[86]

B. 1. *Arrears of pension* which have thus *accrued* are a valuable right and property in the hands of the pensioner and not a matter of bounty.[87-88] If, therefore, it is wrongfully withheld owing to the culpable negligence of an employee, otherwise than in accordance with the Rules, that employee as well as the Government may be liable to answer in damages or penal interest for such negligence.[87]

2. In granting enhancement, Art. 64 must be observed as between the pensioners of the new category.[88-89]

E. There the statutes which set up a statutory machinery for determining the questions specified therein and then bar the jurisdiction of the Civil Courts. In such cases, the party aggrieved cannot be allowed to resort to a suit for the determination of such questions, e.g.—

Whether a property is an 'evacuee property' within the meaning of the Administration of Evacuee Property Act, 1950.[90]

This topic will be pursued more fully hereafter.

F. *Questions excluded by the Constitution.*

There are provisions in *our* Constitution which, expressly or by implication, exclude the jurisdiction of the courts to decide certain questions, thus making the Executive the sole arbiter of such questions, e.g.,—

(a) Disputes arising out of Covenants entered into with Rulers of Indian States [Art. 363] even where a private person has a privilege arising out of such Covenant.[91]

(b) Recognition of a person as the 'Ruler' of an Indian State [Art. 366(22)].

(c) There are certain matters which are committed to the subjective satisfaction of the Executive head, the propriety of which cannot be questioned by the courts, e.g.,—

(i) The nomination of members to the Legislative Council by a Governor, under Art. 171(5);[92] or to the Council of States by the President, under Art. 80(3).

(ii) The decision of a question as to disqualification of a member of Parliament by the President under Art. 103(1); and of a member of the State Legislature by a Governor under Art. 192(1).[93]

85. *Madan* v. *State of Bihar*, (1973) 1 S.C.W.R. 444.
86. *State of U.P.* v. *Brahm Datt*, A. 1987 S.C. 943 (para. 5).
87. *State of Kerala* v. *Padmanabhan*, A. 1985 S.C. 356.
88. *Nakara* v. *Union of India*, A. 1983 S.C. 130; *Deokinandan* v. *State of Bihar* (I), A. 1971 S.C. 1409; (II) A. 1983 S.C. 1134; (III) A. 1984 S.C. 1560; *Dayal* v. *Union of India*, A. 1980 S.C. 554 (para. 2).
89. *B.P.M.S.P.* v. *B.P.C.I.*, A 1990 S.C. 1128.
90. *Ram Gopal* v. *Addl. Custodian*, (1966) 3 S.C.R. 214; *Custodian* v. *Jafran Begum*, A. 1968 S.C. 169.
91. *Umesh Singh* v. *State of Bombay*, A. 1955 S.C. 540.
92. In re *Ramamoorthi*, A. 1952 Mad. 94; *Bimanchandra* v. *Dr. Mookherjee*, A. 1952 Cal. 799.
93. *Brindaban* v. *Election Commn.*, A. 1965 S.C. 1892.

III. The question must be raised at the proper stage.

(A) U.S.A.—As in the case of review of legislative acts, so in the case of administrative acts, the court does not entertain a move for review until the action impugned is 'ripe for review'.

I. The general principle is that the court will not interfere where the challenged administrative act or order has not by itself affected the petitioner as yet, but is likely to affect his interests on the contingency of some other future administrative action.[94] In such cases, the complaint is premature until such contingency takes place.[94] This follows from the still broader principle that only one whose interests have been affected by an act can complain of it.

Thus, review will be premature—

(a) Where the impugned order does not determine any right or obligation or change the plaintiff's future status or condition, but merely makes a formal record of conclusions reached after a study of data, in the exercise of the investigatory function of the administrative authority.[94]

U.S.A.

(b) Where the administrative intention is expressed but not yet come to fruition[95-96] or where that intention is unknown[96] or where the adverse consequence laid down in advance by the administrative order will injure the plaintiff only if certain contingent events happen.[97]

But it is not possible to formulate abstract rules as to the stage of an administrative proceeding at which a court should be prepared to interfere.[98] The court will have to weigh the circumstances of each case and the sole test for its interference is the need to protect the complainant from 'irreparable injury'.[99] The court has thus interfered with actions which would apparently seem to be contingent or interlocutory, but whose *effect* was immediate loss or injury upon the party. A determination in advance which may not be self-executing may yet cause injury upon a party with immediate effect.[99]

(i) The Federal Communications Commission made certain regulations requiring itself to cancel or refuse licence to any broadcasting station which entered into certain defined types of contracts with any broadcasting network organisation. The plaintiff, a network organisation, sued for injunction to restrain the Commission from enforcing its regulations on the ground that the regulations were *ultra vires* and the statute under which they were made was itself *ultra vires*. The Supreme Court rejected the Commission's contention that the suit was premature until the plaintiff's application for licence was actually refused, on the ground that the knowledge that the contracts as those they had with the plaintiff would entail loss of their licence would lead to the broadcasting stations to repudiate their contracts with the plaintiff rather than lose their licences, and also to stop such transactions with the plaintiff as were aimed by the regulations which were alleged to be invalid. The determination in advance of the illegality of such contracts thus, in effect, imposed a penalty as soon as the regulations were promulgated.[99]

(ii) The Attorney General included the plaintiff charitable association as a 'subversive organisation' in a list to be circulated amongst executive departments to guide them in employing and discharging undesirable employees. In a suit for injunction brought by the plaintiff association it was contended that the association had no cause of complaint until any of its members was actually discharged from employment by reason of his membership of the association. Rejecting this contention, the Supreme

94. *Rochester Tel. Corpn.* v. *U.S.*, (1939) 307 U.S. 125; *U.S.* v. *Los Angeles & S.L.R.R.*, (1927) 273 U.S. 299.

95. *Ashwander* v. *T.V.A.*, (1936) 297 U.S. 288 (324).

96. *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, (1937) 301 U.S. 412 (249-50).

97. *Eccles.* v. *People's Bank*, (1947) 333 U.S. 426.

98. *Republic Gas Co.* v. *Oklahoma*, (1948) 334 U.S. 62 (67).

99. *Columbia Broadcasting System* v. *U.S.*, (1942) 316 U.S. 407.

Court held that there was an adverse effect upon the association by the defamatory statement made in the list which gave rise to an immediate cause for review.[100]

II. Another counterpart of this principle is that judicial relief is available until the administrative agency has given its *final* decision.

Under the Administrative Procedure Act, 1946 [see Appendix I, *post*], this rule has been deduced[1] from s. 10(c) which says—

".....and every *final* agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action."

It is otherwise known as the doctrine of 'prior resort' or 'primary jurisdiction',[2] which requires that the administrative tribunal must be resorted to for determination of the issues before going to the courts and that the tribunal must be allowed to come to its *final*[3] decision before the court can interfere.

This rule is founded upon the principle that an administrative authority which has been entrusted with the determination of administrative or technical questions, because the courts are not better fitted to decide such questions,[71] should be free to dispose of them without interference from the courts *until* some legal or constitutional question presents itself for a judicial determination. Even if the administrative authority commits an error at an intermediate stage, there is no reason to presume that it will not correct itself before the proceedings are completed.[4]

The rule applies even when the contention is that the administrative authority lacks jurisdiction over a particular matter.[5] Where it has a *general* jurisdiction over a subject-matter, it should be entitled to proceed to a conclusion without judicial interference. After the decision is pronounced, it will be open to judicial review on the ground that it is based upon an erroneous assumption of jurisdiction.[5] The rule of primary resort cannot be avoided on the plea that the case before the administrative tribunal is groundless or that a hearing before the tribunal will result in irreparable damage.[5]

But, where the administrative authority refuses to make the order or to do the act necessary to complete the proceedings, the party aggrieved cannot be asked to wait till the finality of the proceedings,[6] provided, of course, the injury to the party is imminent.[7]

(B) *England and India.*—In England and in India, the stage at which the review can be sought depends upon the particular remedy that is asked for. A detailed discussion must, therefore, be postponed till Chapter XVIII on the Forms of Review. Certain broad principles may, however, be mentioned by way of illustrating the principle that the courts cannot interfere at a premature stage.

India.

(a) In *mandamus*, the general rule is that the court cannot issue the writ until something contrary to law, affecting the legal right of the applicant, has actually been done by the administrative authority.[8]

100. *Joint Anti-Fascist Committee* v. *McGrath*, (1951) 341 U.S. 123.
1. Cf. *Cadillac Public Co.* v. *Summerfield*, (1955) 350 U.S. 901.
2. *Rochester Tel. Corp.* v. *U.S.*, (1939) 307 U.S. 125 (139).
3. *Fed. Power Commn.* v. *Metropolitan Edison Co.*, (1938) 304 U.S. 375 (383).
4. *Delaware & Hudson Co.* v. *U.S.*, (1925) 266 U.S. 438 (448-49).
5. *Myers* v. *Bethlehem Corpn.*, (1938) 303 U.S. 41.
6. *City Bank Farmers Trusts Co.* v. *Schnader*, (1954) 291 U.S. 24 (34).
7. *Gilchrist* v. *I.R.T. Co.*, (1929) 279 U.S. 159 (209).
8. *Tirlok* v. *D.M.*, A. 1976 S.C. 1988 (para. 13); *Chanan* v. *Registrar*, A. 1976 S.C. 1821 (paras. 5-6).

This proposition is, however, subject to several important qualifications:

(i) Where the law under which the authority proposes to act offends the applicant's fundamental right by its very enactment, he may come to court even before some overt act has been taken for its enforcement.[9]

(ii) If the order or notice directs him to do or to forbear from doing something contrary to law, he can at once come to court to challenge the validity of the order or notice, without waiting for imposition of the penalty for not complying with it.[10]

(iii) Where a person has been served with a notice to charge him with a tax, he is entitled to come to court at once to challenge the constitutionality of the tax, without waiting for its actual levy.[11] Rejecting a contention to the contrary, in the *Bengal Immunity case*,[11] *our* Supreme Court observed:

".....it ignores the plain fact that this notice, calling upon the appellant company to forthwith get itself registered as a dealer, and to submit a return and to deposit the tax in a treasury in Bihar, places upon it considerable hardship, harassment and liability which, if the Act is void under Article 265 read with Article 286, constitute, *in praesenti*, an encroachment on and an infringement of its right which entitles it to immediately appeal to the appropriate court for redress,"

and issued an order that "the State of Bihar do forbear and abstain *from imposing* sales tax on out-of-State dealers...."[11]

(b) As regards *certiorari* also, the general rule is that there is nothing to quash by means of this writ until there is a *determination* by the *quasi-judicial* authority, affecting the applicant's rights which are in excess of the jurisdiction of the authority or which violates a rule of natural justice or which is vitiated by an error of law apparent on its face.[12]

But a decision may itself affect a person's legal rights even though the proceeding in which it is made has not yet been finally disposed of, or such decision may not be self-executory.[13]

IV. Presumption of constitutionality of administrative action.

In the *United States*, the presumption of constitutionality of statutes has been applied to *intra vires* administrative acts as well.[12] Thus, where a regulatory administrative order is challenged as violative of 'due process', the existence of facts sufficient to justify the exertion of the police power will be presumed until the contrary is established by sufficient pleading and proof.[15] The presumption is further strengthened where the order was adopted after notice and hearing.[14] The observations of the court in the *Pacific States Box case*[14] deserve to be noticed :

"Every exertion of the police power, either by the Legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the Legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the Legislature. The question of law may, of course, always be raised whether the Legislature had power to delegate the authority exercised. ..... But where the regulation is *within the scope of authority* legally delegated, the presumption of the existence of facts justifying its *specific exercise* attaches alike to statutes, to municipal ordinances, and to *orders of administrative bodies*"[14]

9. *Kochunni* v. *State of Madras*, A. 1959 S.C. 725 (731).
10. *Commr. of Police* v. *Gordhandas*, (1952) S.C.R. 135 (148-49).
11. *Bengal Immunity Co.* v. *State of Bihar*, (1955) 2 S.C.R. 603 (619-20).
12. *Hari Vishnu* v. *Syed Ahmed*, (1955) 1 S.C.R. 1104.
13. *R.* v. *Postmaster-General*, (1928) 1 K.B. 291; *R.* v. *Boycott*, (1939) 2 K.B. 651.
14. *Pacific States Box* v. *White*, (1935) 296 U.S. 176 (185-86).

In *India*, too, the presumption has been extended to statutory administrative action, e.g., a notification under s. 51 of the Motor Vehicles Act, 1939, inviting applications for permits from 'baby' taxis only.[15]

V. Presumption of legality of official acts.

Analogous to the presumption of constitutionality is the presumption or regularity of an official act. According to this presumption, when an administrative act is challenged as *ultra vires*, it is presumed, until the contrary is shown, that it has been done according to the formalities[16] and conditions laid down by the statute for the validity or promulgation[17] of such order and the onus lies on the party who challenges its *vires*, to establish the contrary.

The presumption is applied in the *U.S.A.*,[18] in *England*[19] and in *India*:[16]

"Where any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that *formal requisites* for its validity were complied with."[19]

In *India*, the presumption is deduced from s. 114 of the Evidence Act, 1872, which embodies the maxim *"Omnia praesumuntur rite et solemniter esse acta"* :

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

Of course, the presumption is rebuttable.[20] It is to be noted, however, that the presumption attaches only with respect to formal or procedural[16] *ultra vires*; it has no application with respect to substantive *ultra vires*. Hence, the presumption does not arise unless it is shown by the party relying on the administrative order that it is, on the face of it, within the terms of the statutory provision under which it has been made.[21] In other words, the presumption is of *no avail* where the act is wholly without jurisdiction.

VI. Presumption against mala fides or abuse of power.

As will be seen presently, the exercise of a statutory power may be challenged on the ground that it is *mala fide* or that it has been used for purposes extraneous to the Government statute.[22]

But the presumption is that officials will discharge their duties *honestly*[23] and this presumption is heightened when the law vests a discretion in high officials or authorities,[24] as distinguished from minor officials, or in the Government itself.[25]

Onus.

Hence, where a person alleges *mala fides*, the onus lies heavily on him to prove it.[26] He must, therefore, give full particulars of his charge in his pleading[27] and establish the charge by proper evidence or affidavit.[26] It is because of such heavy onus that there

16. *Jitendra* v. *Manmohan*, (1930) 57 I.A. 214; *Jai Dutt* v. *State of U.P.*, A. 1979 S.C. 1303.
17. *Srinivas Mall* v. *R.*, (1947) 51 C.W.N. 900 P.C.
18. *People* v. *John*, (1905) 199 U.S. 552.
19. Stephen's *Digest*, Art. 101.
20. *Puwada* v. *Chidamana*, A. 1976 S.C. 869.
21. *R.* v. *Sibnath*, A. 1943 P.C. 75.
22. *Gopalan* v. *State of Madras*, (1950) S.C.R. 88 (233); *Gupta* v. *Union of India*, A. 1982 S.C. 149 (para. 1244).
23. *Pannalal* v. *Union of India*, A. 1957 S.C. 397 (408).
24. *Matajog* v. *Bhari*, (1955) 2 S.C.R. 925 (930).
25. *Ramakrishna* v. *Tendolkar*, A. 1958 S.C. 538 (551).
26. *Sukhwinder* v. *State of Punjab*. A. 1982 S.C. 65 (para. 12).
27. *Sharma* v. *Sri Krishna*, A. 1959 S.C. 395 (412); *Shivajirao* v. *Mahesh*, A. 1987 S.C. 294 (307).

are few cases in which a person alleging *mala fides* against an administrative authority has seldom succeeded.[28] Of course, the court should take all the obligations together in determining the question;[29] and the court should not dismiss a writ petition summarily when a *prima facie* case of *mala fides* has been made out.[30]

***Mala fides* : Allegation against a party**

Person against whom *mala fides* are alleged must be made a party to the proceeding. In his absence one cannot raise the allegation of *mala fides*.

Express malice and malice in law.

Malice which vitiates the exercise of a statutory power may be of two kinds[31]:

(I) *Express malice* means an act committed because of personal ill-will, corrupt motive, or other improper purpose.[32]

An instance of express malice or *improper motive* is to be found in the case of *Pratap Singh* v. *State of Punjab*[33] in which the Supreme Court has, by a majority judgment, set aside an order of suspension and departmental proceedings against a Civil Surgeon on the ground that the order of the Government was made at the instance of the Chief Minister who had grudge against the appellant. The court observed—

"We are satisfied that the dominant motive which induced the Government to take action against the appellant was not to take disciplinary proceedings against him for misconduct which it *bona fide* believed he had committed, but to wreak vengeance on him by incurring the wrath and for the discredit he had brought on the Chief Minister by the allegations he had made in the article which appeared in *Blitz* in its issue dated January 15, 1961, followed by the communication to the same weekly by the appellant's wife, in which these allegations were affirmed and which in large part we have found true. We, therefore, hold that the impugned orders were vitiated by *mala fides*, in that they were motivated by an improper purpose which was outside that for which the power or discretion was conferred on Government and the said orders should therefore be set aside."[33]

But express malice must be proved by factual evidence, and cannot be inferred from insinuations, conjectures or surmises.[34]

(II) *Malice in law* is malice which is implied by *law* in certain circumstances even in the absence of a malicious intention[35] or improper motive.

Thus, even though there is no corrupt motive or absence of good faith, an act done in exercise of a statutory power will be set aside if the power has been exercised for a purpose other than the purpose for which the power was conferred by the Legislature,[36-37] or on irrelevant grounds. Where the purposes sought to be achieved are mixed, the court applies the test of the

---

28. *Royappa* v. *State of T.N.*, A. 1974 S.C. 555 (586); *Kedar* v. *State of Punjab*, A. 1979 S.C. 220 (227).
29. *State of Haryana* v. *Rajendra*, A. 1972 S.C. 1004 (1016).
30. *Suri* v. *Baren*, A. 1971 S.C. 175 (177-78).
30a. *All-India State Bank Officers' Federation* v *Union of India*, (1997)9 S.C.C. 151.
31. *State of Maharashtra* v. *Budhikota*, (1993) 3 S.C.C. 71 (para. 7).
32. *Eddington* v. *Fitzmaurice*, (1884) 29 Ch. D. 459; *Short* v. *Poole*, (1926) Ch. 66.
33. *Pratap Singh* v. *State of Punjab*, A. 1954 S.C. 72 (82-84) [per Ayyangar, J.]; *Rowjee* v. *State of A.P.*, A. 1964 S.C. 962 (970, 972).
34. *Sankaranarayanan* v. *State of Karnataka*, (1993) 23 A.T.C. 412 (para. 12) S.C.
35. *Shearer* v. *Shields*, (1914) A.C. 808.
36. *Municipal Council of Sydney* v. *Campbell*, (1925) A.C. 338 (343).
37. *Vatcher* v. *Paul*, (1915) A.C. 372 (378).

'dominant purpose' and if that dominant purpose is outside the statute, the resultant act would be invalidated.[38]

It is sometimes spoken of as a 'fraud on power' or 'fraud on the statute'[40] and sometimes referred to as a species of *ultra vires*.[36]

An administrative order, even where discretionary,[41-42] may, thus, be vitiated by *mala fides* in the following circumstances :

(i) Where a statutory power is used for a purpose other than that for which it was conferred by the Legislature,[36,43] which means a purpose other than "the purpose of carrying into effect in the best way the provisions of the Act"[44] including the "spirit and purpose of the statute".[45]

The principle was laid down by the Lord Chancellor in *Galloway* v. *Mayor of London*[46] thus :

> "..... a principle ..... founded on the soundest principles of justice ..... is this, that when persons embarking on great undertakings for the accomplishment of which those engaged in them have received *authority from the Legislature* to take compulsorily the lands of others, making the latter proper compensation, the persons so authorised cannot be allowed to exercise the powers conferred on them for any *collateral object*, that is, for any purposes except those for which the Legislature has invested them with extraordinary powers."[46]

Use of power for a collateral purpose.

Thus, where a statute authorises an authority to compulsorily acquire private lands for a *specified* purpose, such power cannot be utilised to take the lands for a collateral purpose,[47] e.g., where the power is conferred for 'carrying out improvements in or remodelling any portion of the city', the power cannot be used merely for a financial purpose, namely, to secure a betterment value, without considering whether the acquisition of the particular land would be conducive to the improvement of the city area in question.[46]

In such a case it is not necessary further to establish that the respondent was actuated by a bad motive.[48]

Of course, the question whether the purpose for which the power is sought to be exercised is covered by the authorised power, is a question of construction of the statute.[38]

(ii) Where an order has, in fact, been made for a purpose or upon a ground other than what is mentioned in the face of the order.[43]

(iii) Where the authority has passed the order without applying its mind[49] as to the relevant facts, e.g., as to the guilt of the person charged[50]

38. *Fitzwilliam's Wentworthy Estate* v. *Minister of Town & Country Planning*, (1951) 2 K.B. 284 (307).
39. Cf. *State of W.B.* v. *Talukdar*, (1965) 1 S.C.R. 593 (605); *Chartered Bank* v. *Employees' Union*. A. 1960 S.C. 919 (922).
40. *Somawanti* v. *State of Punjab*. A. 1963 S.C. 151 (164-65).
41. *Rohtas Industries* v. *Agarwal*, A. 1969 S.C. 701 (para. 16).
42. *Barium Chemicals* v. *Company Law Bd.*, A. 1967 S.C. 295 (para. 60).
43. *Khetan* v. *Union of India*, A. 1957 S.C. 676 (686); *Collector* v. *Raja*, A 1985 S.C. 1622; *Express Newspapers* v. *Union of India*, A. 1986 S.C. 872.
44. *Local Govt. Board* v. *Arlidge*, (1915) A.C. 120 (147) H.L.
45. *Leeds Corpn.* v. *Ryder*, (1907) A.C. 420 (423).
46. *Galloway* v. *Mayor of London*, (1866) 1 H.L. 344 (43).
47. *Short* v. *Poole Corpn.*, (1926) 1 Ch. 66.
48. *Venkataraman* v. *Union of India*, A. 1979 S.C. 49.
49. Cf. *D'Souza* v. *State of Bombay*, (1956) S.C.R. 382 (387); *Sukhbans* v. *State of Punjab*, A. 1962 S.C. 1711 (1716) [see the comments in *Jagdish* v. *Union of India*, A. 1964 S.C. 449, as to the *ratio decidendi* in Sukhbans's case].
50. *Ross-Clunis* v. *Papadapoullos*, (1958) 2 All E.R. 23 (33) H.L.

or the penalty to be imposed[51] or the statutory conditions,[52] e.g., where different alternative purposes[53] or grounds are mechanically recited.

(iv) Where the order has been made upon extraneous considerations, e.g., the directives issued by a superior administrative authority which were not disclosed to the delinquent Government servant;[54] or it was made for a purpose or upon a ground other than what is mentioned in the face of the order,[55] or which is foreign to the statute under which order is made.[56]

(a) The order of reversion of the petitioner from his higher post held on probation, to his substantive post, which was alleged as *mala fide*, was sought to be justified by the State on the ground that it had been made in the bona fide exercise of the Government's right to revert a probationer because of his *unsuitability* for the post. The petitioner showed from the materials on the record that his service career was extremely satisfactory and had so been accepted by the authorities until the order of reversion was made. *Held*, that the order was vitiated by *mala fides* because it was issued by the Government without applying its mind to the question of suitability of the officer, upon which the order had been purported to have been made.[49]

(b) An officer was reverted from his officiating higher appointment, after a departmental proceeding had been started, with formal charges on the ground of misconduct, with a view to facilitate the departmental proceedings after such reversion. The order of reversion was quashed on the ground of *mala fides* even though it purported to have been made on the ground of unsuitability of the officer for the higher post. The *ratio ecidendi* for this view seems to be that the order of reversion was made not because of unsuitability for the higher post as it professed but because the Government wanted to punish him for an offence.[57]

(V) For the foregoing reasons, the doctrin of malice in law is also known as the doctrine against colourable excise of power or 'fraud on power'.[58]

The Court will not hesitate to strike down a proceeding which is actuated by a colourable exercise of power.[59]

VII. Postponement of judicial review by administrative remedies.

(A) *U.S.A.*—The general rule is that no one is entitled to judicial relief for a supposed or threatened injury until all the available remedies at the hands of the administrative authorities have been exhausted,[60] including appeal to an administrative superior or administrative appellate tribunal.

Subject to the exceptions to be mentioned hereafter, the 'exhaustion' rule cannot be avoided on the ground of 'irreparable injury'[60] or expeditiousness of judicial remedy.[61]

This rule has not been changed by the Administrative Procedure Act, 1964.[62]

The rule of exhaustion of administrative remedies is particularly adhered

51. *State of Orissa* v. *Govind Das*, (1958) S.C. [C.A. 288/58].
52. *State of W. Bengal* v. *Talukdar*. (1965) 1 S.C.A. 593 (605).
53. *Jagannath* v. *State of Orissa*, (1966) 3 S.C.R. 134 (138).
54. *Ramrao* v. *Accountant-General*, A. 1963 Bom. 121 (133).
55. Cf. *Puranlal* v. *Union of India*. A. 1958 S.C. 163 (172).
56. *R.* v. *Cotham*, (1898) 1 Q.B. 802.
57. *Wadhwa* v. *Union of India*, A. 1964 S.C. 423.
58. *Wadhwa* v. *State of Bihar*, A. 1987 S.C. 579; *Vora* v. *State of Maharashtra*, A. 1984 S.C. 866.
59. *Hansraj* v. *State of Maharashtra*, (1993) 3 S.C.C. 634 (para. 29).
60. *Myers* v. *Bethlehem Corpn.*, (1938) 303 U.S. 41.
61. *Macaulay* v. *Waterman*, (1946) 327 U.S. 540.
62. Parker, *Administrative Law*, 1952, p. 119; *McKart* v. *U.S.*, (1969) 395 U.S. 185 (193).

to whenever the decision depends upon the determination of issues of *fact* which require technical knowledge[63] or the exercise of administrative experience or discretion.[64] It has been even extended to questions of law the answers of which are aided by or depend in a large degree upon technical knowledge,[65] e.g., whether the rate charged by a public carrier shall be deemed to be 'reasonable'.[65] In such cases, the ultimate question involved was one of fact, because the determination of the question before the court required "acquaintance with many intricate facts of transportation" and the like.[66]

It follows that the rule will not be applicable if the question in dispute is not of the foregoing nature. The following exceptions to the rule are, accordingly, acknowledged.

(a) If the only question involved is not of fact but of 'general law' which is for a judicial tribunal to decide, resort to the court lies without initial resort to the administrative revisional authority.[67]

Such questions, for instance, are—

(i) The question of constitutionality of the statute itself,[68] under which the administrative act purports to have been done, for the constitutionality of a statute can be determined only by a court of law.[68] If, however, the statute *specifically requires* that an administrative reconsideration or rehearing should be sought before going to court, the administrative rehearing must be resorted to before the unconstitutionality of the statute can be challenged in court.[69]

(ii) The question is similar where the constitutionality of the action of the administrative agency or tribunal is challenged,[70] which the administrative authorities are incompetent to determine.[71]

(iii) A question of construction of a statute which does not depend upon the preliminary ascertainment of any facts,[67] particularly, one relating to the jurisdiction of the administrative authority.[72] But the application of statutory terms or concepts to a particular state of facts is regarded as a question of fact (see *post*).[73]

(iv) Criminal prosecution for violation of a statute need not be postponed until the allegation of violation is determined by the administrative tribunal.[74]

(v) Nor is an action postponed for such relief, such as damages,[75] or injunction against a trade conspiracy,[76] for it is not within the competence of the administrative tribunal to grant.[76] Such action would not, however, be

63. *U.S. Navigation Co.* v. *Cunard S.S. Co.*, (1932) 284 U.S. 474.
64. *Far East Conference* v. *U.S.*, (1952) 342 U.S. 570.
65. *Texas & Pacific R. Co.* v. *American Tie & Timber Co.*, (1914) 234 U.S. 138.
66. *Great Northern R. Co.* v. *Merchants Elevator Co.*, (1922) 259 U.S. 285.
67. *Great Northern R. Co.* v. *Elevator Co.*, (1922) 259 U.S. 285.
68. *Engineers Public Service Co.* v. *Securities Exchange Commn.*, (1947) 332 U.S. 96.
69. *Holmes* v. *U.S.*, (1950) 339 U.S. 927; *Allen* v. *Grand Central Aircraft Co.*, (1954) 347 U.S. 535.
70. *California Commn.* v. *U.S.*, (1957) 355 U.S. 534 (539).
71. *Montana-Dakota Utilities* v. *North-Western Public Service Co.*, (1951) 341 U.S. 246.
72. *Order of Ry. Conductors* v. *Swan*, (1947) 329 U.S. 520.
73. *Gray* v. *Powell*, (1941) 314 U.S. 402; *N.L.R.B.* v. *Hearst Publications*, (1944) 322 U.S. 111.
74. *U.S. Alkali Assocn.* v. *U.S.*, (1945) 325 U.S. 196.
75. *International Longshoremen's Union* v. *Juneau Spruce Corpn.*, (1952) 342 U.S. 237.
76. *Georgia* v. *Pennsylvania R.R.*, (1945) 324 U.S. 439.

maintainable where the common law remedy is superseded by the statutory remedy, which is intended to be exhaustive.[77]

(b) Where the administrative review prescribed by the statute is at the discretion[78] of the authority concerned, judicial review can be had without resorting to the administrative remedy.

(c) Where a tentative rate which is fixed and imposed is confiscatory, the rate-payer may sue for injunction at once, without waiting for a completion of the assessment proceedings, where the statute does not prescribe any administrative remedy against the tentative assessment.[79] The same view has been taken where owing to unreasonable administrative delay in completing the proceedings, the rate-payer was suffering irreparable injury from the liability to pay confiscatory rates.[80]

(d) Where the existence of the statute itself injures the party without more, he can challenge the validity of the administrative act in court without exhausting the administrative remedies.[81]

(e) Where the constitution of the administrative authority is unlawful, owing to personal interest in the cause of the like.[82]

(B) *India.*—The question whether judicial review can altogether be *precluded* by the provision of a special machinery for relief under the governing remedy will be discussed hereafter. The question under the present head is whether the aggrieved party will be required to *exhaust* his statutory remedies before approaching the court for judicial review under the general law or the Constitution. The present question is one of *postponement* of the judicial review.

India.

The rule has special application when the right or liability is created by a statute which also prescribes the remedy for its enforcement.[83]

The principle of exhaustion of statutory remedies is applied, as a general rule, in the matter of issuing *certiorari,* and the superior Court will ordinarily decline to interfere until the aggrieved party has exhausted his statutory remedies.[84]

But this rule requiring the exhaustion of statutory remedies before the writ may be granted is a rule of policy, convenience and discretion, rather than a rule of law,[84] and the court would interfere notwithstanding the fact that the party has not resorted to his statutory remedy, e.g., administrative appeal, where—

(a) It appears *on the face of the proceedings* that the inferior tribunal has acted without jurisdiction or in excess of jurisdiction,[83] or contrary to the fundamental principles of justice.[85]

(b) Where fundamental rights are affected.[86]

"If an inferior court or tribunal of first instance acts wholly without jurisdiction

77. *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, (1907) 204 U.S. 426.
78. *Levers* v. *Anderson*, (1945) 325 U.S. 219.
79. *Oklahoma Natural Gas Co.* v. *Russell*, (1923) 261 U.S. 290.
80. *Smith* v. *Illinois Bell Tel. Co.*, (1926) 270 U.S. 587.
81. *Pennsylvania* v. *West Virginia*, (1923) 262 U.S. 553.
82. *Gibson* v. *Berryhill*, (1973) 411 U.S. 564.
83. *Abraham* v. *I.T.O.*, A. 1961 S.C. 609; *T.P.M.* v. *State of Orissa*, (1983) U.J.S.C. 503 (paras. 6, 11); *Sarana* v. *Lucknow University*, A. 1976 S.C. 2428 (para. 16).
84. *State of U.P.* v. *Nooh*, A. 1958 S.C. 86 (93-94); *Abraham* v. *I.T.O.*, A. 1961 S.C. 609; *S.T.O.* v. *Shivratan*, A. 1966 S.C. 142 (145).
85. *Venkateswaran* v. *Ramchand*, A. 1961 S.C. 1506.
86. *Kochunni* v. *State of Madras*, A. 1959 S.C. 725 (731); *Shivram* v. *I.T.O.*, A. 1964 S.C. 1095 (1099).

or patently in excess of jurisdiction or *manifestly* conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play, the superior court may, we think, quite properly exercise its power to issue the prerogative writ of *certiorari* to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what *ex facie* was a nullity for reasons aforementioned. This would be so all the more if the tribunals holding the original trial and the tribunals hearing the appeal or revision were merely departmental tribunals composed of persons belonging to the departmental hierarchy without adequate legal training and background and whose glaring lapses occasionally come to our notice."[84]

(c) Where the proceedings have been taken under a law which is *ultra vires*.[87]

(i) Where the right to obtain the statutory remedy has been lost or barred by no fault of the petitioner;[84]

(ii) Where it is evident from the acts of the statutory appellate or revisional authority that it would be futile to approach him for revising the impugned order;[85] or where the statutory remedy would give no effective remedy against the order complained of.[88]

It is evident that the jurisdiction under Art. 136 of the Constitution is not fettered by any such technical considerations.[89]

A large scope for application of this rule is to be found in the case of the remedies under the ordinary law, e.g., a suit for declaration.[90] In the *Raleigh Investment case* there was a specific provision in the Act before their Lordships (s. 67, Income-tax Act, 1922), barring a civil suit, and their Lordships held that a civil suit would be barred even where the statutory authority's action was *ultra vires* and that the party aggrieved must pursue the statutory remedy which, of course, included a 'case stated' to the High Court itself. But it is clear that a declaration, being a discretionary remedy, may be refused where the plaintiff had a statutory remedy which he has not availed of. But, as will be presently seen, even where there is a total ouster of the jurisdiction of the Civil Court, a suit will lie if the decision of the statutory authority is *ultra vires*, without jurisdiction[87] or contrary to the fundamental principles of natural justice.[91] It follows that in such cases the Civil Court may give relief without insisting upon the party to resort to the superior administrative authorities in appeal or revision.

VIII. Exclusion of judicial review.

Apart from the self-imposed limitations which the courts themselves have evolved, to exclude from judicial review certain kinds of administrative action (just discussed), judicial review may be curtailed or altogether excluded by legislation. Needless to say, any judicial review of administrative action is bound to delay or to impede the prompt execution of legislative policy, and also that, as human beings, the administrators must be intolerant of any interference from the Judiciary which is not responsible for the administration of the country. Where, therefore, as under the Parliamentary system of government, it is the Executive which initiates legislation, it is no

87. Cf. *Carl Still* v. *State of Bihar*, A. 1961 S.C. 1615 (1621).
88. *Ganpat* v. *A.D.M.*, (1985) 2 S.C.C 307.
89. *E.I. Navigation Co.* v. *Jasjit*, A. 1964 S.C. 1451 (1453).
90. *Raleigh Investment Co.* v. *Governor-General in Council*, A. 1947 P.C. 78.
91. *Secy. of State* v. *Mask*, A. 1940 P.C. 105.

wonder that the Executive would endeavour to secure from the Legislature exclusionary provisions in the relevant statutes so as to keep the courts off as much as possible. A countercheck against this pernicious move towards arbitrary power under legislative sanction is, however, offered by constitutional safeguards which would invalidate such exclusionary provisions, in countries having written Constitutions, such as the *U.S.A.* or *India.* Parliamentary exclusion would, of course, triumph in a country like the *United Kingdom* where the only resort to get rid of the exclusionary bar is to *interpret* the statutory provision in such manner as not to exclude the court,[92] where that is possible without offending the canons of interpretation.

The usual modes of statutory exclusion are twofold—

(a) Some provisions positively clothe the administrative act or determination as 'final' or 'conclusive', so as to exclude challenge in the courts.

(b) Sometimes the same result is sought to be achieved more directly, by a negative provision barring particular remedies or providing that the administrative decision shall not be liable to be questioned "in any court" or "in any legal proceedings".[93]

(c) Instead of such express provisions, the statute may simply create a right and also provide a remedy for it. It then becomes a question for the court to determine whether its jurisdiction has been taken away by the Legislature by implication.

A. Finality conferred upon executive or quasi-judicial acts by statute.

(A) *England. I.*—In the days of Cromwell, the sovereignty of Parliament was considered to be the panacea against executive tyranny. By an irony of fate, the problem in the 20th century England was how to save the individual from the Executive armoured by Parliament itself; for, not only does the modern Parliament authorise the Executive to affect the individual's liberty or property by acts done in the exercise of its unfettered discretion, but, furthermore, it shields those acts and determinations from judicial review by laying down in the statute that such acts of the administrative authority or determination of the statutory tribunal 'shall be *final*',[94] or 'shall be *final and conclusive*'.[95]

Statutory finality of administrative decision.

Evidently, such provisions preclude an *appeal* against the decision, for a right of appeal can be created only by an express statutory provision.[93] But the courts have saved the individual from an abuse of such uncharted power by holding that by expressions of the above nature Parliament intended nothing more than to save *intra vires* orders of the Executive from being questioned in a court of law, and that, accordingly, the jurisdiction of the courts to quash an unlawful order or decision made under such a statute, in a declaratory action[96] or in a proceeding for an appropriate writ[95] in the supervisory jurisdiction of the superior courts, is not barred by the finality clauses in the statute, in the following circumstances—

92. Cf. *Chester* v. *Bateson,* (1920) 1 K.B. 829.
93. *Healey* v. *Min. of Health,* (1954) 3 All E.R. 449 (453) C.A.
94. *R.* v. *Medical Appeal Tribunal,* (1957) 1 All E.R. 796 (C.A.).
95. *Pearlman* v. *Harrow School,* (1979) 1 All E.R. 365 (370-71) C.A.
96. *Pyx Granite Co.* v. *Min. of Housing,* (1959) 3 All E.R. 1 (H.L.).

(a) Where the executive[97] or *quasi-judicial*[98] order is *ultra vires* the statute under which the authority purported to act,[94] or the act is done by an authority which is not empowered by the statute.[99]

U.K.

(b) Where the act in question is vitiated by fraud or *mala fides*,[100] that is, where the authority, in making the order, was guided by a motive or purpose other than that for which the statute was made. According to some decisions, this is also another instance of *ultra vires*.[1] For, when the authority is actuated by a consideration alien to the statute, he cannot be said to have acted *under* it.

Smith v. *East Elloe R.D.C.*: a critique.

In a much debated case,[2] the House of Lords, by a three-to-two majority, took the view that the expression "shall not be questioned in any legal proceedings" is comprehensive enough to oust judicial proceedings where the order is *prima facie intra vires the statute*. The court's jurisdiction to go behind the *intra vires* order to discover whether it was actuated by *any ulterior motive or extraneous consideration*, is taken away by the plain words of Parliament.

The dangers of such a conclusion did not escape the attention of serious thinkers,[3] and the situation has now been partially relieved by the enactment of the Tribunals and Inquiries Act, 1958, s. 11 of which says that the High Court's power to issue the prerogative writs of *certiorari* and *mandamus* shall not be barred by any statutory language excluding such jurisdiction (except in the solitary case of s. 26 of the British Nationality Act, 1948).[4] This statute thus puts an end to the long-standing uncertainty as to how far the remedy of *certiorari* can be excluded by legislation. Even the writ of *mandamus* can no longer be barred by any statutory provision.

It is submitted that the innovation introduced by the House of Lords in this case[2] is *not* a sound precedent to be followed in *India*.[5]

When fraud vitiates the most solemn of transactions,[6] in the absence of express words barring judicial inquiry into an allegation of fraud, the intention that the Legislature intended to make such exclusion should not be implied by the courts. Malice, in the sense of ill-will, is no less reprehensible than fraud, strictly so-called, and no court should lend its aid to such transactions, even by denying itself the jurisdiction to enquire into it.

(c) Where the decision is *quasi-judicial*, there are additional grounds for interference, e.g., that it has violated the principles of natural justice;[7]

97. *Taylor* v. *National Assistance Board*, (1957) 1 All E.R. 183 (185).
98. *Vine* v. *National Dock Labour Board*, (1956) 3 All E.R. 939 (943).
99. *Walter* v. *Eton R.D.C.*, (1950) 2 All E.R. 588 (C.A.).
100. *Demetriades* v. *Glasgow Corp.*, (1951) 1 All E.R. 457 (461) H.L.; *Calder* v. *Halker*, (1839) 3 Moo. P.C. 28.
1. *Short* v. *Poole Corp.*, (1926) Ch. 66 (91); *Associated Picture Houses* v. *Wednesbury Corp.*, (1947) 2 All E.R. 680.
2. *Smith* v. *East Elloe R.D.C.*, (1956) 1 All E.R. 855 (H.L.).
3. *Vide* MacDermott, *Protection from Power*, 1957. p. 66.
4. On this point, the Tribunals & Inquiries Act, 1958, leaves undisturbed the decision in cases like *R.* v. *Home Secy.*, (1917) 1 K.B. 933: *R.* v. *Leman*, (1920) 3 K.B. 72, that this is a matter of executive policy over which Courts have no control.
5. Cf. *Union of India* v. *Narasimhalu*, (1970) 2 S.C.R. 145 (150); *Jagadambika* v. *C.B.R.*, A. 1975 S.C. 1816 (paras. 12-13).
6. *Lazarus Estates* v. *Beasby*, (1956) 1 All E.R. 341.
7. *Cooper* v. *Wilson*, (1937) 2 All E.R. 726.

or that there is an error of law apparent on the face of the record;[95,8] or that the statutory authority had delegated its *quasi-judicial* power;[9] or that its decision is vitiated by a 'jurisdictional error.'[10]

II. Instead of totally barring judicial remedy, the statute may exclude such remedy after the lapse of a specified period. The result of such a provision is that unless the administrative act is challenged in the manner provided within the specified period, say, six months, its validity cannot be challenged in any collateral proceeding thereafter.[11-12]

It would seem, however, that *certiorari* and *mandamus* cannot be barred even by such provisions, in view of the Tribunals and Inquiries Act, 1958, though *other proceedings* shall not lie after the lapse of the prescribed period, even on the ground of fraud.[12]

III. Another indirect method of excluding judicial review is to empower an administrative authority to determine certain facts, and sometimes, facts constituting his own jurisdiction, on his *subjective* satisfaction.[13] In such cases, the scope of judicial review in respect of such determination is either altogether eliminated or extremely narrowed down.

This topic will be elaborately dealt with, separately, under the caption 'non-interference with subjective satisfaction', p. 508, *post.*

(B) *U.S.A.*—In the United States, a distinction has been made between cases where the power of the Legislature is limited by the guarantee of 'due process' and cases where it is not.

U.S.A.

I. As to the right to judicial review derived from the 'Due Process' clause, it is evident that it cannot be taken away or restricted, even indirectly,[14] by legislation. Hence, where the 'Due Process' clause is applicable, the court will interpret the finality clause in a statute as not to preclude a review as to whether 'due process' has been violated.[15]

II. Outside the sphere of Due Process, judicial review can be taken away by legislation.[16] Thus, the decision of a Labour Mediation Board, under the Railway Labour Act, relating to the election of representatives of unions for collective bargaining, is not open to judicial review.[17]

S. 10 of the Administrative Procedure Act, 1949, accordingly, provides for judicial review against an administrative act *except in so far as* it is precluded by statute. The cases where the court has upheld the exclusion of judicial review by statute, subsequent to the passing of this Act, appear to be cases outside the sphere of Due Process, e.g.,—

(i) An order to deport an alien under the Enemy Alien Act, during war;[18]

8. *R.* v. *Medical Tribunal,* (1957) 1 All E.R. 796 (C.A.).
9. *Barnard* v. *National Dock Labour Board,* (1953) 1 All. 1113 (C.A.).
10. *Anisminic* v. *Foreign Compensation Commn.,* (1969) 1 All E.R. 208 (244) H.L.
11. *Uttoxeter U.D.C.* v. *Clarke,* (1952) 1 All E.R. 1318 (1321); *Woollet* v. *Minister of Agriculture,* (1955) 1 Q.B. 103; Cf. *Smith* v. *East Elloe R.D.C.,* (1956) 1 All E.R. 855 (H.L.).
12. *Our* superior Courts, having constitutional powers, cannot be barred by such a limitation clause [*I.G.N. Ry.* v. *Their Workmen,* A. 1960 S.C. 219 (224)].
13. Cf. *R.* v. *Ludlow,* (1947) 1 All E.R. 880.
14. *Oklahoma Operating Co.* v. *Pennsylvania,* (1920) 252 U.S. 331.
15. *Wong Yang* v. *McGrath,* (1950) 338 U.S. 33 (94).
16. *Plymouth Coal Co.* v. *Pennsylvania,* (1914) 232 U.S. 531 (547).
17. *Switchmen's Union* v. *National Mediation Bd.,* (1943) 320 U.S. 297.
18. *Ludecke* v. *Watkins,* (1948) 335 U.S. 160.

(ii) An order of discharge from the Army;[19]

(iii) Matters relating to foreign affairs,[19] e.g., granting of certificates for foreign transportation.[20]

(iv) Sometimes the exclusion is only *partial.* Thus, the Civil Service Act permits a Federal Government employee who is aggrieved by an order of wrongful dismissal only to question whether the procedure laid down by the Act has been followed.[21]

(v) In cases where a 'privilege',[22] as distinguished from a vested right, is created by a statute, the statute may withhold all remedy or provide an exclusive administrative remedy,[22] e.g., the privilege of becoming a Government contractor.[23]

(a) It is interesting to note that while in some earlier cases the court was carried by the conservative view that the Administrative Procedure Act created no new jurisdiction, it has taken a liberal view in the later case of *Shaughnessy* v. *Pedreiro*,[24] to override the finality provision of a peacetime deportation statute (Immigration Act, 1952), holding that the word 'final' in the statute only meant finality *within the administrative* process and did not preclude judicial review. At any rate, a finality clause would not be so construed as to exclude judicial review against administrative decisions which are *ultra vires* the statute under which they purport to have been made.[25]

(b) It is hardly necessary to point out that even in cases where judicial review is held precluded by legislation, questions as to the constitutional validity of the statute itself[26] can never be barred.

(C) *India.*— *Our* Constitution itself confers 'final' power on the President [Art. 103(1)] or other administrative authority [Act. 31(3)], to decide specified questions. Where the Constitution itself excludes such questions, the courts lose their jurisdiction to entertain those questions altogether because they have no power to override the Constitution and the questions, accordingly, become non-justiciable.

India.

A different situation arises where a *statute* confers 'final' power upon some administrative authority or tribunal, because the constitutional jurisdiction of *our* superior Courts cannot be taken away by statutory provisions. Even the jurisdiction of the inferior courts has been saved by the judicial construction that such statutory provisions are intended to exclude the jurisdiction of the courts of law only where the decision of the administrative authority is *intra vires*, so that the courts retain their jurisdiction to determine whether the decision or order of the statutory authority is *ultra vires* or without jurisdiction.[27] Under the present head, we are to examine that aspect of the problem.

Statutory finality.

The number of statutes which seek to confer such final authority on statutory bodies is legion and different formulae are adopted by the draftsman

19. *Gentila* v. *Pace,* (1952) 342 U.S. 943.
20. *C. & S. Airlines* v. *Waterman Corpn.* (1948) 333 U.S. 103.
21. *Levine* v. *Farley,* (1939) 308 U.S. 622.
22. *U.S.* v. *Wunderlich,* (1951) 342 U.S. 98.
23. *Dismuke* v. *U.S.,* (1936) 297 U.S. 167 (171).
24. *Shaughnessy* v. *Pedreiro,* (1955) 349 U.S. 48 (51).
25. *Estep* v. *U.S.,* (1946) 327 U.S. 114.
26. *Ludecke* v. *Watkins,* (1948) 335 U.S. 160; *Barlow* v. *Collins,* (1970) 397 U.S. 159 (166).
27. *Secy. of State* v. *Mask,* A. 1940 P.C. 105.

to achieve the same purpose, e.g., that the order or decision shall be 'final',[28] sometimes with the words "and shall not be called in question in any Court" superadded.[29] Sometimes the constitutional jurisdiction of the superior courts is sought to leave untouched by saying "shall not be questioned in any court by way of an appeal or revision or in any original suit, application or execution proceedings".[30] In some cases, the bar is more limited, e.g., that "no suit shall be brought in any civil court to set aside or modify any assessment made under this Act".[31] [As to a 'conclusive evidence' clause, see pp. 455ff, *post*.]

At the back of the different formulae lies the same jealousy of the modern Legislature against the judicial power to interfere with statutory administrative acts. (a) As stated above, the effects of such finality provisions have to be examined with reference to the different courts :

I. *Supreme Court.*—(a) So far as the jurisdiction under Art. 32 is concerned, the remedy itself being a fundamental right cannot be taken away by any legislation.[32] The scope of this jurisdiction is, however, limited by the fact that it can be invoked only where the administrative decision has affected a fundamental right.[33]

(b) It is equally clear that the jurisdiction of the Supreme Court under Art. 136 being provided by the Constitution cannot be taken away directly or indirectly,[34] by the Legislature by any device short of an amendment of the Constitution.[34]

Under ss. 17-17A of the Industrial Disputes Act, 1947, an award becomes enforceable on the expiry of 30 days from the date of its publication and thereupon it shall become "final and shall not be called in question by any court in any manner whatsoever". *Held*, it could not be contended that the jurisdiction of the Supreme Court was barred by the above provision or that it can be exercised only within the 30 days specified therein.[34]

II. *High Court.*—The same view has been taken as regards the constitutional powers of the High Court under Art. 226[35] and Art. 227.[36] Of course, the jurisdiction under Art. 227 is limited to 'tribunal' as distinguished from purely administrative authorities. In all such cases, the court should so construe the statutory provision, if possible, as will not affect the constitutional jurisdiction of the Supreme Court or the High Court;[35] but where no such construction is possible, the court is bound to strike down the offensive provision as void.[37]

The reasoning by which the Supreme Court interprets a 'finality' clause in a statute in relation to these constitutional remedies can be explained in the words of the court in *Durgashankar* v. *Raghuraj*[35] where the finality of the decision of an Election Tribunal was in question. Section 105 of the Representation of the People Act says—

"Every order of the Tribunal (i.e., an Election Tribunal) made under this Act shall be *final* and *conclusive*."

28. S. 17(2). Industrial Disputes Act, 1947; s. 23E(3), Foreign Exchange (Regulation) Act, 1947; s. 10, Rice Milling Industry (Regulation) Act, 1958; s. 18, Forest Act, 1927.

29. E.g., s. 21, Indian Boilers Act, 1923; s. (2), Foreigners Act, 1946; s. 38, Pharmacy Act, 1948.

30. S. 18, Evacuee Interest (Separation) Act, 1951; s. 28, Administration of Evacuee Property Act, 1950.

31. S. 67, Indian Income-tax Act, 1922.

32. *Yasin* v. *Town Area Committee*, (1952) S.C.R. 572; *Kochunni* v. *State of Madras*, A. 1959 S.C. 725.

33. *Bengal Immunity* v. *State of Bihar*, (1955) 2 S.C.R. 603.

34. *I.G.N. & Ry.* v. *Their Workmen*, A. 1960 S.C. 219 (224).

35. *Durgashankar* v. *Raghuraj*, (1955) 1 S.C.R. 267; Ref. on the Kerala Education Bill, A. 1958 S.C. 956; *Rajkrushna* v. *Binod*, (1954) S.C.R. 913.

36. *Jodhey* v. *State*, A. 1952 All. 788.

37. *Basappa* v. *Nagappa*, A. 1954 S.C. 440.

The Supreme Court, in holding that the above statutory provision would not affect the powers of the Supreme Court over the decisions of Election Tribunals under Art. 136, observed—

"We agree ..... that the right of seeking election and sitting in Parliament or in a State Legislature is a creature of the Constitution and when the Constitution provides a special remedy for enforcing that right, no other remedy by ordinary action in a court of law is available to a person in regard to election disputes. The jurisdiction with which the Election Tribunal is endowed is undoubtedly a special jurisdiction; but once it is held that it is a judicial tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of this court to grant special leave, in proper cases, would certainly be attracted and this power cannot be excluded by any Parliamentary legislation.....

But once that tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised.... S. 105 of the Representation of the People Act certainly gives finality to the decision of the Election Tribunal so far as that Act is concerned and does not provide for any further appeal but that cannot in any way cut down or affect the overriding powers which this court can exercise in the matter of granting special leave under Article 136 of the Constitution."[35]

Thus, while in the U.S.A., outside the field of 'Due Process', the right to judicial review may be taken away by the Legislature, in *India* the right does not depend on the nature of the subject-matter to which the decision of the Administrative Tribunal relates, but upon the nature of the jurisdiction under which relief is sought.

III. *Civil Courts.*—The jurisdiction of civil courts to try 'suits of a civil nature' is non-constitutional, being governed by s. 9 of the Code of Civil Procedure, 1908, which says—

"The Courts shall .... have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

It is clear that when a person's legal rights are affected by an administrative order, he is entitled to bring a suit in the civil court unless such action is barred by law, expressly[38] or impliedly.[39]

In this context, several propositions have to be considered :

A. A provision barring the jurisdiction of the civil courts is strictly construed,[40] and there is a presumption against the ouster of the jurisdiction of the civil courts by statute.[41]

(A) *England.*—It is competent for the Legislature to exclude any matter from the competence of the ordinary courts and assign that to some other authority or tribunal.[42] The courts are, however, slow to imply such exclusion of any matter from its jurisdiction.

England.

The principle behind the rule of construction adopted by the courts is nothing but the English notion of the judicial function and the application of the doctrine of Separation of Powers in so far as that is acknowledged in the common law world. In short, it is the doctrine that the function of the Courts is to adjudicate legal disputes, and that if Parliament wants to oust this jurisdiction of the courts, it must say so in clear words.[42-43]

38. *Desika Charyulu* v. *State of A.P.*, A. 1904 S.C. 807 (815, 816) [s. 9(4)(c) of the Madras Estates (Reduction of Rent) Act, 1947].

39. *Radha Kishan* v. *Municipal Committee,* A. 1963 S.C. 1947 [s. 86, Punjab Municipal Act, 1911].

40. *Raichand* v. *Union of India,* A. 1964 S.C. 1268 (1270).

41. *Abdul Waheed* v. *Bhawani,* (1966) S.C. [C.A. 1039/63)].

42. *London Hospital* v. *Jacobs,* (1956) 2 All E.R. 603 (606-07) C.A.

43. *Pyx Granite Co.* v. *Ministry of Housing,* (1953) 3 All E.R. 1 (6) H.L.

"The proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience and assisted by properly qualified advocates, are fitted for the task."[44]

The courts, therefore, act upon the presumption against the ouster of jurisdiction of the courts in the absence of express and clear provisions,[43] and this presumption is enhanced where the question to be determined is one of *private right*[42] and the authority who is alleged to have been empowered by Parliament to determine the question exclusively is an *administrative*[42] or other than judicial authority.

From the above principle the courts derive their power to determine whether a *particular* transaction was, in fact, excluded from the jurisdiction of the courts by a statute which, *prima facie,* appears to have this object.[45] In other words, even when certain questions appear to have been taken away, they might insist that their jurisdiction to entertain other questions relating to the same matter remain unaffected.[45]

A subordinate legislation which seeks to curtail or oust the jurisdiction of the courts would be *ultra vires* if the statute under which it is purported to have been made does not expressly authorise such provision.[46]

(B) *India.*—In *India,* the above position results from statutory provision. Under the law of civil procedure,[47] the ordinary civil courts have jurisdiction to try suits of a civil nature, excepting only those suits of which cognizance is expressly[48] or impliedly[49] barred. The exclusion of the jurisdiction of the civil courts is not to be readily inferred and[50-51] the burden of proof is clearly on the part of those who maintain an exception to the general rule.[52-53] The legal right to bring a suit cannot be barred by considerations of policy or expediency.[54]

India.

As to how far the jurisdiction of the civil court would be barred by a statute by necessary implication, the courts have made a distinction between two classes of cases, according to the nature of the rights involved :

I. If a new tribunal is created for the enforcement of a common law right which *was in existence* before the statute creating the tribunal was made, the jurisdiction of the civil courts relating to the enforcement of such right is not ousted, unless it is taken away by the statute expressly.[55]

The right to bring a suit to set aside an illegal assessment is not barred merely because the taxing statute provides a special machinery and makes the determination of the statutory authority 'final'. The Supreme Court observed—

44. *Lee* v. *Showmen's Guild,* (1952) 1 All E.R. 1175 (C.A.).
45. *Goldsack* v. *Shore,* (1950) 1 All E.R. 276 (277) C.A.
46. *Chester* v. *Bateson,* (1920) 1 K.B. 829; Re *Kellner's Will Trusts,* (1949) 2 All E.R. 43.
47. Section 9, Code of Civil Procedure.
48. *Annamreddi* v. *Lakanarapie,* (1985) U.J.S.C. 130; *Muddada* v. *Kamam,* (1973) 3 S.C.R. 201; *Hazi* v. *Union of India,* A. 1983 S.C. 259 (paras. 16, 20); *Custodian* v. *Jafrain,* A. 1968 S.C. 169; *Shyam* v. *Kusum,* A. 1979 S.C. 1547 (para. 3).
49. *Akbar* v. *Union of India,* A. 1962 S.C. 70; *Desika Charyulu* v. *State of A.P.,* A. 1964 S.C. 807 (814); *Bata Shoe Co.* v. *Jabalpur Municipality,* A. 1977 S.C. 955 (para. 10).
50. *Secretary of State* v. *Mask,* A. 1940 P.C. 105 (110).
51. *Magite* v. *Panjab,* A. 1962 S.C. 547 (549); *Jyotish* v. *Tarakant,* A. 1963 S.C. 605 (611); *Durga Singh* v. *Tholu,* A. 1962 S.C. 36; *Brij Lal* v. *Laxman,* A. 1961 S.C. 149 (153).
52. *Ramavya* v. *Lakshminarayana,* A. 1934 P.C. 84 (86).
53. *Devagiri Temple* v. *Pattabhirami,* A. 1967 S.C. 781 (785).
54. *Maharaja of Jeypore* v. *Patnaik,* (1905) 28 Mad. 42 (P.C.).
55. *Pyx Granite Co.* v. *Ministry of Housing,* (1959) 3 All E.R. 1 (6) H.L.

The right to bring a suit to set aside an illegal assessment is not barred merely because the taxing statute provides a special machinery and makes the determination of the statutory authority 'final'. The Supreme Court observed—

"In dealing with the question whether civil courts' jurisdiction to entertain a suit is barred or not, it is necessary to bear in mind the fact that there is a general presumption that there must be a remedy in the ordinary civil courts to a citizen claiming that an amount has been recovered from him illegally and that such a remedy can be held to be barred only on very clear and unmistakable indications to the contrary. The exclusion of the jurisdiction of civil courts to entertain civil causes will not be assumed unless the relavent statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature. The mere fact that a special statute provides for certain remedies may not by itself necessarily exclude the jurisdiction of the civil courts to deal with a case brought before it in respect of some of the matters covered by the said statute."[56]

Statutes conferring judicial powers on administrative authorities, are, accordingly, strictly construed.

S. 17 of the Working Journalists (Conditions of Service & Miscellaneous Provisions) Act, 1955, provides :

"Where any money is *due* to a newspaper employee ..... under this Act, the newspaper employee may make an application to the State Government for the recovery of the money due to him, and if the State Government or such authority as the State Government may specify in this behalf *is satisfied that any money is so due*, it shall issue a certificate for that amount ..... and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue."

Held, the section provides for a special procedure to *recover* the amount due to the employee under a decree of a court or award of a competent authority, and not for the determination of the question as to what amount was due. The State Government or the authority specified by it has, therefore, no authority to determine the merits of the claim of an employee against the employer. In the absence of specific provisions in the Act conferring the relevant powers for holding a formal inquiry, it could not be inferred that the Legislature intended that the authority should have the jurisdiction to make such a *quasi-judicial* inquiry.[57]

The civil court retains its jurisdiction on any matter on which the statute is silent.[58]

II. But where a statute *creates* a liability not existing[55] at common law and also given a specific remedy for enforcing it, the party must adopt the form of the remedy given by that statute.[59-60] In other words, when a special tribunal[61] is appointed by an Act to determine questions as to rights which are the *creation* of that Act,[62] then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. In such a case—

"The right and the remedy are given *uno flatu* and the one cannot be dissociated from the other."[55]

In such a case there is no ouster of the jurisdiction of the ordinary courts for they never had any—the rights having been created by a statute which set up the tribunal. For the same reason, in such a case, the parties

56. *Illuri Subhayya* v. *State of A.P.*, A. 1964 S.C. 322.
57. *Express Newspapers* v. *Union of India*, A. 1958 S.C. 578.
58. *Kanhaiyalal* v. *Banaji*, A. 1958 S.C. 725; *Vedagiri Temple* v. *Pattabhirami*, A. 1967 S.C. 781 (785, 787, 788).
59. *Pasmore* v. *Urban Dt. Council*, (1898) A.C. 387.
60. *Radhakrishnan* v. *Ludhiana Municipality*, A. 1963 S.C. 1547.
61. *Secy. of State* v. *Mask*, A. 1940 P.C. 105.
62. *Barraclongh* v. *Brown*, (1897) A.C. 615 (622) H.L.

cannot, by their own acts, i.e., by voluntarily submitting to it, create a jurisdiction in a tribunal which it did not possess.[63]

But even in such cases—

(i) If a statute creates a special jurisdiction but sets up no machinery for the exercise of that jurisdiction, the general jurisdiction of the civil courts is not lost and no wider interpretation will be given to the terms of any special law so as to limit the powers of the ordinary Courts.[64]

(ii) The civil court never loses its jurisdiction to determine whether the statute creating the special forum applies to any particular transaction or not, for the special machinery will be applicable only if the transaction in question comes within the purview of the statute,[65] and whether the fundamental provisions of the statute have been complied with.[61] In other words, the power of the civil court to interfere with *ultra vires* administrative action is never excluded.[61]

(iii) The rule of ouster of the general jurisdiction would not apply where the statute creates a right or liability[66] but does not provide a remedy or the plaintiff in general jurisdiction (say, a declaratory action) does not seek the enforcement of a statutory right,[55] but seeks some other remedy, e.g., a declaration as to the invalidity of the proceedings before the statutory tribunals,[67] on the ground of lack of jurisdiction[68] or contravention of the principles of natural justice[68-70] or *ultra vires*,[71] or unconstitutionality.[72]

But the Court cannot entertain any action or proceeding which would amount to an *appeal*[71] or *review*[73] of the determination of the statutory tribunal, where the statute has not provided for it.[68]

(iv) Nor would the general jurisdiction be excluded where the statute, after creating a *liability*, provides a penalty for breach of that liability, in *addition* to the ordinary remedy available to the person affected by the breach.[74]

As to the principles according to which the court is to determine whether the remedy provided by the statute, in such cases, is exclusive or additional, see under 'Breach of statutory duties' at pp. 445ff., *ante*.

III. Even where there is an express bar or exclusion of the jurisdiction of the civil courts, or the decision of an administrative tribunal is made 'final', the bar does not operate—

(i) Where the action is *ultra vires*, either from the substantive[75] or from the procedural[76] point of view.

63. *Wilkinson* v. *Barking Corpn.* (1948) 1 All E.R. 564 (567) C.A.
64. *Bhagwan* v. *Secretary of State*, A. 1940 P.C. 82 (86).
65. *Goldsack* v. *Shore*, (1950) 1 All E.R. 276 (278) C.A.
66. *Cutler* v. *Wandsworth Stadium*, (1949) 1 All E.R. 544 (549) H.L.
67. *Barnard* v. *National Dock Labour Bd.*, (1953) 1 All E.R. 1113.
68. *Healey* v. *Ministry of Health*, (1954) 3 All E.R. 449 (451, 453) C.A.
69. *Cooper* v. *Wilson*, (1937) 2 All E.R. 726.
70. *District Collector* v. *Basappa*, (1963) S.C. [C.A. 494/62]; *Mohammad Din* v. *Iman*, A. 1948 P.C. 33; *Secy. of State* v. *Mask*, A. 1940 P.C. 105 (110).
71. *Venkataraman* v. *State of Madras*, (1965) 17 S.T.C. 418 (S.C.).
72. *State of Bombay* v. *Jagmohandas*, (1965) S.C. [C.A. 219/64].
73. *East Midlands Gas Bd.* v. *Donoaster Corpn.*, (1953) 1 All E.R. 54 (C.A.).
74. *Cutler* v. *Wandsworth Stadium*, (1949) 1 All E.R. 544 (548-49) H.L.; *Black* v. *Fife Coal Co.*, (1912) A.C. 149 (H.L.)
75. *Secy. of State* v. *Mask*, A. 1940 P.C. 105; *Hubli Electricity Co.* v. *Prov. of Bombay*, A. 1949 P.C. 136; *Srinivasa* v. *State of A.P.*, A. 1971 SC 71.
76. *Secy. of State* v. *Jatindra*, A. 1924 P.C. 175.

But the scope of interference on the ground of *ultra vires* or absence of jurisdiction is limited by a rule of construction which holds that in some cases where the statute has set up a complete statutory machinery for the enforcement of statutory rights and liabilities, the statute has conferred final jurisdiction upon the statutory authority to determine 'jurisdictional questions' as well.[77] In such cases, the courts will be powerless to interfere even though the authority has given itself jurisdiction by an erroneous decision on the 'jurisdictional question'.[77] This rule will be explained more fully hereafter.

(ii) The court's jurisdiction to enter into the jurisdictional question cannot be taken away by a 'finality clause' even where the determination which is made final is *subjective*.[78] Thus,

S. 3(1) of a Ceylon Land Redemption Ordinance authorised the Land Commissioner to acquire a land if he was satisfied that it had been sold or mortgaged in satisfaction of debt during a specified period.

Sub-sec. (2) of the section then provided—

"The question whether any land which the Land Commissioner is authorised to acquire under sub-sec. (1) should or should not be acquired shall ..... be determined by the Land Commissioner in this individual judgment; and every determination of the Land Commissioner shall be final."

The Judicial Committee held that what was made final by sub-sec. (2) was the subjective determination of the Land Commissioner whether or not he should acquire a land which *was covered by sub-sec. (1). But* "the *antecedent* question whether any particular land *is land* which the Land Commissioner is authorized to acquire under the provisions of sub-sec. (1) is not for his final decision but is one which, if necessary, must be decided by the courts of law."[78]

(iii) Where the tribunal abuses its powers under the statute[79-80] or does not act 'under the Act' but in violation of its provisions.[79]

(iv) Where it violates the principles of natural justice.[75, 81]

(v) Where the proceedings of the tribunal which are made final by the Legislature are vitiated by fraud, dishonesty or caprice on the part of the tribunal itself.[82]

(vi) Where the statute itself is unconstitutional.[81]

Of course, there will be no scope for an action at all if the subject-matter be 'non-justiciable', e.g., a political grant.[83]

(vii) Where the finding of a tribunal is made final on questions of fact, the decision of the tribunal is not immune from judicial review on questions of law and such questions arise—

(a) Where the Tribunal arrives at its decision by considering a material which is irrelevant to the inquiry, wholly or in part.

(b) Where the Tribunal bases it decision partly on conjectures, surmises and suspicions,[84] or on no evidence at all.[85]

77. *Custodian* v. *Jafran Begum*, A. 1968 S.C. 169 (173); *Kamala Mills* v. *State of Bombay*, A. 1965 S.C. 1942.

78. *Land Commr.* v. *Pillai*, (1960) New L.R. (Ceylon) 169 (P.C.).

79. *Radha Kishan* v. *Municipal Committee*, A. 1963 S.C. 1547 (1551); *Union of India* v. *Tarachand*, A. 1966 S.C. 249.

80. *Gaekwad of Baroda* v. *Gandhi*, (1903) 277 Bom. 344 (P.C.)

81. *Dhulabhai* v. *State of M.P.*, A. 1969 S.C. 78 (para. 32).

82. *I.T. Commr.* v. *Badridas*, A. 1937 P.C. 133 (138).

83. *Bhujangarao* v. *Malojirao*, A. 1952 S.C. 138 [s. 4(a) of the Bombay Revenue Jurisdiction Act. 1876].

84. *Dhirajlal* v. *Commr. of I.T.*, A. 1955 S.C. 271; *Gheesta* v. *I.T. Commr.*, A. 1961 S.C. 1135.

85. *Chandra* v. *Bar Council*, A. 1983 S.C. 1012.

But whether the decision of the Tribunal is so vitiated is to be determined upon an examination of the entire order of the Tribunal, without scanning it sentence by sentence in order to find out lapses.[71]

(c) Where there has been a miscarriage of justice owing to an error on a substantial question of law.[86]

(viii) Where the question raised before the civil court is beyond the competence of the administrative tribunal, e.g., a question of title.[87]

B. Even in the case of an express provision excluding the jurisdiction of the civil courts, the bar will not be extended beyond what is expressly provided.[88]

(i) S. 199(b) of the Ajmer Land and Land Revenue Regulation, 1877, provides—

"No civil court shall entertain a suit or application instituted or presented with a view to obtaining any order or decision which the Central Government or a Revenue Officer is under this Regulation empowered to make."

It has been held that though the Central Government is empowered by the Act to confirm an adoption, a suit to declare an adoption invalid is not barred by the section because the validity of the adoption is not a matter in which the decision of the Central Government has been made conclusive by the Act.[88]

(ii) S. 11 of the Assam (Requisition and Acquisition) Act, 1948, says—

"Save as otherwise expressly provided in this Act, no decision or order made in exercise of any powers conferred by or under this Act shall be called in question in any Court."

S. 4 of this Act provides that where any land has been requisitioned under s. 3 of this Act, it may be acquired in the manner provided therein. Hence, where there has not been any previous order of requisition of a land under this Act, the order of acquisition cannot be said to be 'an order made in exercise of the powers conferred by or under the Act'. Hence, the jurisdiction of the courts is not barred by s. 11 to challenge the validity of such an order of acquisition.[89]

On the other hand, if a particular remedy is barred, e.g., a suit for injunction,[78] the court would not allow the plaintiff to circumvent that bar by asking for the same relief, in effect under a different form.[90]

But together with the foregoing is to be read a contrary proposition, namely, that though ordinarily a tribunal cannot give itself jurisdiction by wrongly deciding certain facts to exist,[89] the Legislature may confer upon a tribunal the *final* jurisdiction to determine whether the preliminary state of facts, upon which its jurisdiction depends,[91] exists, in which case the bar of the civil court's jurisdiction would extend also to inquire into the jurisdiction of the inferior tribunal.[92]

The same statute may confer upon a tribunal final power to determine certain facts, leaving its determination on other facts open to judicial review. Thus, in the Supreme Court case of *Desika Charyulu* v. *State of A.P.*,[92] it has been held that though the civil court's jurisdiction to question the *decisions* of a Settlement Officer is impliedly barred by the provisions of the Madras Estates (Reduction of Rent) Act, 1947, the Settlement Officer has, under the

86. *D.C.M.* v. *C.I.T.*, (1955) 1 S.C.R. 941.

87. *Abdul Waheed* v. *Bhawani*, (1966) S.C. [C.A. 1039/63].

88. *Brij Lal* v. *Laxman Singh*, A. 1961 S.C. 149 (154); *Vedagiri Temple* v. *Pattabhirami*, A. 1967 S.C. 781 (785-86) [s. 93 of the Madras Hindu Religious and Charitable Endowments Act, 1951]; *Kanhaiyalal* v. *Banaji*, A. 1958 S.C. 725 (730).

89. *Collector of Kamrup* v. *Kamakshya*, A. 1965 S.C. 1301.

90. *Lakhinarayana* v. *State of A.P.*, (1963) Supp. 1 S.C.R. 308 (318).

91. *R.* v. *Commr. for Special Purposes*, (1888) 21 Q.B.D. 313 (319-20).

92. *Desika Charyulu* v. *State of A.P.*, A. 1964 S.C. 807 (817).

Act, final jurisdiction to determine whether an imam village is an imam estate, but he has no final jurisdiction to determine the preliminary question whether the property in question is an imam village, and, therefore, the civil court has jurisdiction to see whether the determination by the Settlement Officer upon the latter question is correct.

Taxation.

An instance of an express exclusionary provision of this type is to be found in s. 67 of the Income-tax Act, 1922 (s. 293 of the Act of 1961) which says—

"No suit shall be brought in any civil court to set aside or modify any *assessment order* made under this Act."[93]

It has been held that since the Act provides for an appeal against an order of assessment, the assessee cannot bring a suit to set aside or modify an assessment or where the relief sought is substantially to the same effect[94] on any of the following grounds—

(a) An error[95] or irregularity in the order of assessment or in the procedure followed in making that order,[96] or owing to an erroneous finding of fact.[96]

But a suit will lie—

(i) Where the proceedings before the taxing authority are without jurisdiction *ab initio,* or where the jurisdiction is taken away by non-compliance with the fundamental provisions of the Act going to the root of his jurisdiction,[96] e.g., where an exempted transaction is sought to be taxed.[95]

If, however, the administrative tribunal has been vested with final power to determine its own jurisdiction, e.g., by determining whether a transaction is of such a nature as to come within the purview of the charging section of the relevant statute,[95] an erroneous determination of this question cannot render the eventual assessment without jurisdiction so as to lift the bar against a civil suit.[95]

(ii) Where the relief sought is not directed against 'assessment', e.g, a suit for refund of tax paid under a mistake of law.[97]

(iii) Where no assessment order has yet been made.[98]

(iv) Where the constitutionality of the exclusionary statutory provision is challenged, it is evident that the bar cannot operate against a suit or other proceeding where such challenge is properly made.[95]

Where a statute makes the decision of a tribunal 'final', judicial review would not ordinarily lie against a decision which is within its jurisdiction, if there is an adequate remedy against an erroneous decision, e.g., by way of appeal.[99]

---

93. Of the same nature are the provisions in s. 19 of the Bengal Finance (Sales Tax) Act, 1941; s. 20 of the Bombay Sales Tax Act, 1946 [*Kamala Mills* v. *State of Bombay,* A. 1965 S.C. 1942 (1947)]; Madras General Sales Tax Act [*Venkataraman* v. *State of Madras,* (1965) 17 S.T.C. 418 (S.C.)].

94. *Kalwa* v. *Union of India,* (1964) 2 S.C.R. 191 (203); *Munshi* v. *Chheharia Municipality,* A. 1979 S.C. 1250 (paras. 24, 28).

95. *Kamala Mills* v. *State of Bombay,* A. 1965 S.C. 1942 (1947).

96. Cf. *Illuri Subbaya* v. *State of A.P.,* A. 1964 S.C. 322.

97. *Radha Kishan* v. *Municipal Committee,* A. 1963 S.C. 1547; *Venkataraman* v. *State of Madras,* (1965) 17 S.T.C. 418 (S.C.).

98. *State of Bombay* v. *Jagmohandas,* (1965) 17 S.T.C. 529 (S.C.).

99. *Bata Shoe Co.* v. *Jabalpur Municipality,* A. 1977 S.C. 955; *State of W.B.* v. *Indian Iron etc.,* A. 1970 S.C. 1298.

Where fundamental right is affected.

In *India*, owing to constitutional provisions, the efficacy of such 'finality clauses' in barring judicial review is reduced by the constitutional source of review in determining the reasonableness of restriction imposed on a fundamental right guaranteed by Art. 19.

It has been held[100] that if any law makes the subjective opinion of an administrative authority 'final and conclusive' so as to affect the fundamental right of an individual, say, relating to property,[100] or business,[100] such law shall be struck down as an unreasonable restriction on such right, because it leaves the fundamental right of the individual to the absolute mercy of the opinion of the administrative authority, however arbitrary or capricious it may be. Any administrative act done in pursuance of such statutory provision must also fail, accordingly.

On this ground, the Supreme Court struck down[100] the following provision in s. 437(1) of the Calcutta Municipal Act, 1951, as unconstitutional—

"No person shall use or permit or suffer to be used premises for any of the following purposes.....

(b) any purpose which is, in the opinion of the Corporation (*which opinion shall be conclusive and shall not be challenged* in any court) dangerous to life, health or property, or likely to create a nuisance."[100]

Finality conferred by the Constitution.

Finality has been conferred on certain specified authorities by some Constitution Amendment Acts.

Thus,—

(i) By Cl. (3), inserted in Art. 217, by the Constitution 15th Amendment Act, 1963, finality has been conferred on the decision of the President as to the disputed age of a High Court Judge.

(ii) By para. 6 of the 10th Sch., introduced by the Constitution (52nd Amendment) Act, 1985, finality has been conferred on the decision of the Speaker as to whether a Member has been disqualified on the ground of 'defection' and the jurisdiction of all Courts thereon is barred by para. 7 thereof.

The Supreme Court has held that notwithstanding such finality clauses, the decisions of these non-judicial authorities are subject to judicial review by the Supreme Court under Arts. 32, 136; and by the High Courts under Arts. 226, 227 because the doctrine of judicial review, as enshrined in these Articles, is a 'basic feature' of the Constitution so that it cannot be taken even by amending the Constitution.[1]

Hence, notwithstanding such finality and exclusionary provisions, the said 'final' decision is open to be challenged before the Supreme Court or a High Court on the following grounds—

(a) Violation of any of the mandates of the Constitution;[2]

(b) Violation of the rules of natural justice;[2-3]

(c) *Mala fides*;[2]

(d) Perversity,[2] e.g., lack of any evidence;[3]

100. *Corporation of Calcutta* v. *Calcutta Tramways*, A. 1964 S.C. 1279 (1282).

1. *Minerva Mills* v. *Union of India*, A. 1980 S.C. 1789 (paras. 26, 78, 91, 93); *Sampath* v. *Union of India*, A. 1987 S.C. 386 (para. 2).

2. *Kihota* v. *Zachilhu*, (1992) 1 S.C.C. 309 [para. 4(H)] C.B. →

3. *Union of India* v. *Jyoti Prakash*, A. 1971 S.C. 1093 (paras. 23, 31).

(e) Founded on collateral considerations;[3]
(f) Influenced by an extraneous authority, such as executive advice;[4]
(g) Non-compliance with a condition precedent.[4]

B. The 'Conclusive Evidence' Clause.

As has been already stated, the attempt to preclude judicial review may be direct as well as indirect. One of the indirect devices we have already seen, namely, that where the Legislature makes the administrative decision reviewable within a prescribed period of time and non-reviewable thereafter (see *below*).

Another indirect device is to confer finality on the decisions of an administrative authority on particular issues, by making it 'conclusive evidence' that the statutory provisions have been complied with.

(A) *England.*—Prior to the Tribunals and Inquiries Act, 1958, it was held that a 'conclusive evidence' clause precludes judicial review as to *vires* of the relevant administrative act or decision.

England.

But, as far as the *certiorari* and *mandamas* jurisdiction of the superior Courts is concerned, s. 11(1) of the Tribunals and Inquiries Act has superseded the above view, so that the *vires* of the impugned order can now be questioned by the courts on a motion for *certiorari* or *mandamus*, notwithstanding the 'conclusive evidence' clause.[5]

(B) *India.*—S. 35 of *our* Companies Act, 1956, provides—

"A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act have been complied with in respect of registration and matters precedent and incidental thereto, and that the association is a company authorised to be registered and duly registered under this Act."

India.

A corresponding provision under the previous Companies Act of 1913 came up for consideration before the Judicial Committee[6] and it was held that any question as to the legal validity of the registration was barred from judicial review by the above provision, whether such question required a factual or a legal determination. Of course, if the certificate was vitiated by *fraud* or *mala fides*, the certificate would be liable to be annulled by a court of law, because fraud vitiates all transactions.[7]

After the Constitution, the above position shall hold good only as regards non-constitutional modes of judicial review and inferior courts.

The cases which have so far come before the Supreme Court or the High Courts demonstrate that the jurisdiction under Art. 32 or 226 cannot be altogether barred by such clause, though the court would seek to give effect to the clause so far as it is possible, consistent with other constitutional principles.

1. Some of these cases relate to conclusiveness as to the *procedural vires* of statutory action. Thus,

S. 67(8) of the C.P. & Berar Municipality Act, 1922,[8] provides—

"A notification of the imposition of a tax under this section shall be conclusive evidence that the tax has been imposed in accordance with the provisions of this Act."

4. *Jyoti Prakash* v. *Chief Justice,* A. 1965 S.C. 961 (paras. 21, 26, 27, 29).
5. *R.* v. *Preston Appeal Tribunal,* (1975) 1 W.L.R. 624 (628) C.A..
6. *Moosa* v. *Ebrahim,* 39 I.A. 237 (243).
7. *Mohsinali* v. *State,* A. 1951 Bom. 303.
8. Similar provision in s. 135(3) of the M.P. Municipalities Act, 1916 [*Hapur Municipality* v. *Raghuvendra,* A. 1966 S.C. 693].

Similar is the provision in s. 135(3) of the U.P. Municipalities Act, 1916.[9]

2. Though the position is not yet settled as regards all aspects of the question as to how far such a clause would preclude judicial review by the superior Courts, the following propositions may be said to result from the decisions so far :

A. Judicial review would be precluded—

To challenge the validity of the imposition on the ground that the necessary procedural *steps* prescribed by the Act had not been taken in *imposing*[10] the tax in question, as soon as the imposition is notified by the appropriate Government.[11]

B. But any question which goes to the root of the jurisdiction of the authority imposing the tax would not be immune from judicial review, e.g.—

(i) Whether the tax imposed is one which the authority has been empowered by the statute to impose.[11]

(ii) Whether the Municipality has at all made a resolution giving the State Government the jurisdiction to make the notification imposing the tax.[11]

(iii) Whether the tax is one which the State Legislature itself could impose.[12]

C. Upon the question whether the conclusive evidence clause would itself be unconstitutional because of the exclusion of judicial review,—

It has been held that there is no contravention of Art. 14 on the ground that the tax-payers of a Municipality are denied that right to judicial review which all other litigants have got, because the conclusive evidence provided by the statute after a number of safeguards for the protection of the rate-payers are laid down, such as the right to object to the tax and to have such objection heard.[9]

The question is, how far shall such statutory provision fetter the constitutional remedies when even a direct exclusion by the Legislature does not bind the court. The answer is that though the court would not question the correctness of the factual determination, it shall have its powers unfettered as to questions of *vires*,[12] including questions of law involved in the determination which affect its *vires*,[13] at least those which go to the root of the jurisdiction.

But, as has been stated already, the power of a superior Court to interfere on the ground of absence of jurisdiction has been fettered by a self-imposed limitation where the Court construes a statute as conferring upon a statutory tribunal the final jurisdiction to determine its own jurisdiction, by holding its finding upon the 'jurisdictional fact' final, e.g., the question of 'vacancy' under s. 5(2) of the Bombay Land Acquisition Act, 1948, which says—

"Where any building ..... is to be requisitioned ..... the State Government shall make such inquiry as it deems fit and make a declaration ..... that the owner ..... has not resided therein for a continuous period of six months immediately preceding the date of the order and such declaration shall be *conclusive evidence* that the owner ..... has not so resided."

The Supreme Court,[12] holding that it could not review the finding as

9. *Municipal Bd.* v. *Kirpal,* (1966) 1 S.C.A. 964 (974).
10. *Hapur Municipality* v. *Raghuvendra,* A. 1966 S.C. 693 (696).
11. *Berar Swadeshi Vanaspati* v. *Shegaon Municipality,* A. 1962 S.C. 420 (422).
12. *Lilavati* v. *State of Bombay,* A. 1957 S.C. 521 (528).
13. *Hubli Electricity Co.* v. *Prov. of Bombay,* A. 1949 P.C. 136.

to the vacancy in view of the above provision, even though the jurisdiction of the State Government depended upon that finding, observed—

"The Act has made a specific provision to the effect that the determination on the question referred to in ss. 5 and 6 of the Act by the State Government shall be conclusive evidence of the declaration so made. But that does not mean that the jurisdiction of the High Court under Art. 226 or of this Court under Art. 32 or on appeal has been impaired. In a proper case the High Court or this Court in the exercise of its special jurisdiction under the Constitution has the power to determine how far the provisions of the statute have or have not been complied with. But the special powers aforesaid of this Court or of the High Court cannot extend to reopening a finding by the State Government under s. 5 of the Act that the tenant has not actually resided in the premises for a continuous period of six months immediately preceding the date of the order or under s. 6 that the premises had become vacant at about the time indicated in the order impugned. Those are not collateral matters which could on proper evidence be reopened by the courts of law. The Legislature in its wisdom has made those declarations conclusive and it is not for this Court to question that wisdom".[12]

But the superior Courts would be entitled to determine whether such a provision would offend any provision of the Constitution.[12]

The 'conclusive evidence' clause is also liable to be struck down as an unreasonable restriction upon a fundamental right guaranteed by Art. 19, inasmuch as it would preclude the court from examining the *procedural*[14] reasonableness of the administrative decision. Commenting on the Supreme Court decision in the two cases referred to earlier, the Author expressed the folowing view at p. 342 of Vol. I of the Fifth Edition of his *Commentary on the Constitution of India*—

"It is to be noted that both in *Lilavati's case* and *Brij Raj* v. *Shaw*, (1951) S.C.R. 145, the Supreme Court relied upon the English decisions where no question of unconstitutionality could possibly arise. It has not so far been considered by the Supreme Court whether the very conferment of a final jurisdiction upon a jurisdictional question would offend against the constitutional remedies under Art. 32, 136 or 226 or whether it would constitute an unreasonable restriction upon some fundamental right guaranteed by Art. 19(1). We have already seen that in the *U.S.A.*, any finality clause in a statute would offend the constitutional guarantee of 'Due Process' where that is attracted."

This view now finds support from the later decision in *Corporation of Calcutta* v. *Calcutta Tramways*,[14] that a law which contained such a finality clause imposed an unreasonable restriction upon the fundamental right guaranteed by Art. 19(1)(g). If the law itself is struck down, it is clear that judicial review of the administrative decision cannot be barred, for the Court would, after annulling the law, remit the case to the lower court for examining the reasonableness or validity of the administrative decision, freed of the conclusive evidence clause.

D. The 'Conclusive Evidence' clause does not involve the exercise of judicial functions by the Legislature, by shutting out judicial inquiry after a stage. The American doctrine of rigid Separation of Powers does not apply in India.[15]

2. S. 6(3) of the Land Acquisition Act, 1894, provides that the declaration of the State Government under this provision shall be 'conclusive evidence' that the land is required for a *public purpose*.

The Supreme Court has held that notwithstanding this exclusionary clause, a land acquisition proceeding can be challenged on the grounds—

14. Cf. *Corporation of Calcutta* v. *Calcutta Tramways*, A. 1964 S.C. 1279 (1281).
15. *Hapur Municipality* v. *Raghuvendra*, A. 1966 S.C. 693 (699).

(a) That the declaration is *ultra vires*;[16]
(b) That it constitutes a colourable exercise of the power;[17]
(c) That some procedural provision has been violated;[18]
(d) That it is vitiated by *mala fides*;[19]

C. Other clauses excluding judicial review.

I. In one case, the Supreme Court has held that where Municipal Act provides that—

"No act done or proceeding taken under this Act shall be questioned *merely* on the ground of any defect or irregularity in such act or proceeding, not affecting the merits of the case."

The provision validates not only any defect in the matter of the publication of a resolution of the municipal corporation but even defects in the constitution of the corporation itself or any of its committees, which do not go to the root of the jurisdiction of the corporation and the validity of an imposition made by the corporation cannot be challenged on this ground.[20]

II. After enumerating several heads, the statute may confer authority to do "any other matter which is likely to promote the carrying out of the Act".[21]

D. Special limitation.

Sometimes instead of wholly excluding judicial remedy, a special limitation is laid down by the statute, after which no such remedy would be available.

For instance, s. 13 of the Bombay Sales Tax Act, 1946, provided—

"The Commissioner shall, in the prescribed manner, refund to a registered dealer applying in this behalf the amount of tax paid by such dealer in excess of the amount due from him under this Act,.....

Provided that no claim to refund of any tax paid under this Act shall be allowed unless it is made within twenty-four months from the date on which the order of assessment was passed or within twelve months of the final order passed on appeal, revision or reference in respect of the order of assessment, whichever period is later."

It has been held that though the Proviso is wide enough to exclude a suit for refund after the period specified, it would not exclude a suit on the grounds—

(i) that the taxing statute itself was constitutional or *ultra vires*,[22]

(ii) that the assessment was without the authority of law or *ultra vires* the statute.[23]

E. How far judicial review can be precluded by statutory remedy.

Instead of directly excluding judicial review, the Legislature may intend to exclude judicial review by laying down an *exclusive* machinery for the

16. *State of Mysore* v. *Abdul*, A. 1973 S.C. 2361.
17. *Jage* v. *State of Haryana*, A. 1971 S.C. 1033.
18. *State of U.P.* v. *Radhey*, A. 1989 S.C. 682 (paras. 14-15); *G.B.M.C.* v. *Hakimwadi*, A. 1988 S.C. 233 (para. 7).
19. *State of Punjab* v. *Gurdial*, A. 1980 S.C. 319; *Collector* v. *Raja*, A. 1985 S.C. 1622.
20. *Bangalore Mills* v. *Bangalore Corpn.*, A. 1962 S.C. 562 (564).
21. Cf. *Amulya* v. *Corpn. of Calcutta*, A. 1922 P.C. 333.
22. *State of Bombay* v. *Jagmohandas*, (1966) 17 S.T.C. 529 (535) S.C.
23. *Venkataraman* v. *State of Madras*, A. 1966 SC 10 (paras. 24).

enforcement of the rights created by it. Whether it has done so in a particular case is, however, itself a question for the courts to determine. The question is, whether the court may, in the exercise of its discretionary jurisdiction, refuse to interfere on the ground that the statute which created a right also provided a complete remedy.

(A) *England.*—The answer to the question posed is determined by the application of several principles :

England.

(i) The presumption being against the exclusion of access to the *ordinary* courts, which are the 'proper tribunals for the determination of legal disputes',[24] the jurisdiction of the courts is not ousted in every case a special tribunal or a statutory remedy is prescribed.

On this question, a distinction is made on the basis of the nature of the right involved :

(a) If the right in question did not exist at common law, but was *created by the statute,* it could not be said that the ordinary courts had, normally, a jurisdiction to adjudicate the dispute. If, in such a case, the statute also provides for a specific remedy or sets up a special tribunal, a party seeking to enforce the statutory right must resort to the statutory remedy or tribunal and not to the courts.[25]

(b) If, on the other hand, the right involved was a common law right (e.g, the right to deal with one's land in any manner one likes[26]) which existed prior to the statute which prescribed the remedy and the jurisdiction of the courts extended to such right, 'the subject's recourse] to the courts for the determination of his rights is not to be excluded except by clear words.[26]

The substantive question of liability of a property to taxation is one of such question. In *Bennett's*[27] *case,* the Judicial Committee observed—

".....a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question *whether he is taxable* in respect of that property unless his right to do so has been *clearly* and *validly* taken away by some enactment, and that the fact that the statute which authorises assessment allows an appeal or a series of appeals against assessments to *other tribunals* is not sufficient to deprive the taxpayer of that right."[27]

In the result, if the language of the statute is open to a construction that leaves open the right of access to the courts, the court will not construe the decision of the special tribunal as *res judicata.*[27] If, however, there is no such ambiguity, the decision of a special tribunal, if *intra vires,* operates as *res judicata,*[28] and the party aggrieved cannot seek his remedy in the courts instead of before the special tribunal.

(ii) Even where the special tribunal has exclusive final authority, that extends only to decisions which are *intra vires* the statute which created it. The courts are not precluded from investigating whether the tribunal had the jurisdiction to make the impugned decision. Thus, the courts have jurisdiction to decide—

(a) Whether the authority which determined the matter was the proper authority to decide the matter according to the statute;[29]

24. *Lee* v. *Showmen's Guild,* (1952) 1 All E.R. 1175 (1188).
25. *Pasmore* v. *Oswaldtwistle Urban Council,* (1898) A.C. 394; *Wilkinson* v. *Barking Corpn.,* (1948) 1 All E.R. 564 (567) C.A.
26. *Pyx Granite Co.* v. *Ministry of Housing,* (1959) 3 All E.R. 1 (H.L.).
27. *Bennett* v. *Municipal District of Sugar City,* (1951) A.C. 786.
28. Re *Birkenhead Corporation's Resolution,* (1952) 1 All E.R. 262.
29. *Walter* v. *Eton Rural Dt. Council,* (1950) 2 All E.R. 588 (594) C.A.

(b) Whether the issue was one which the special tribunal had jurisdiction to determine under the statute;[30]

(c) Whether the tribunal did in fact address itself to the matters committed to it[31] or came to its decision on extraneous considerations;

(d) Whether it complied with the rules of natural justice;

(e) Whether the decision of the tribunal was obtained by *fraud*,[32]— the reason being that fraud vitiates "judgments, contracts and all transactions whatsoever" and "no court in this land will allow a person to keep an advantage which he has obtained by fraud".[32]

S. 25(1) of the (Eng.) Housing Repairs & Rents Act, 1954, provides that a landlord who seeks to increase the rent of premises shall serve on the tenant a declaration as to the work which he has carried out by way of repair, and the statute gives the tenant 28 days within which he may challenge the validity of the declaration by making an application to the country court. A tenant who had not made such application within the specified period of 28 days, in a suit for arrears of rent at the increased rate, took the plea in defence that the statement made by the landlord in the declaration that he had carried out certain works was false and fraudulent to the knowledge of the landlord. The country court refused to take evidence on the plea of the tenant on the ground that the jurisdiction of the court to entertain the question after 28 days was barred by the statute. *Held*, by the Court of Appeal, that the statute could not exclude the defence of fraud because fraud, if established, would render the declaration a nullity and no increase of rent could be recoverable on its basis; the country court was, therefore, bound to decide the plea of fraud, on taking evidence.[32]

(f) Not only fraud, but also any other ground which renders the impugned order or decision a nullity (e.g., that the statutory authority had delegated his powers where he had *no power to delegate it*),[33] can be agitated in the court notwithstanding that the statutory remedy has not been availed of or failed.

(g) *India.*—I. As to the powers of the Supreme Court under Art. 136, *India.* it is clear that since this power is not subject to any statutory limitation and cannot be excluded even by 'finality' clauses in a statute,[34] the court would not allow itself to be fettered by the consideration that the statute has afforded a remedy, where the court is satisfied that it should exercise this power to prevent gross injustice.

II. Art. 32 being concerned with the enforcement of fundamental rights, it has been definitely ruled by a unanimous court,[35] that the court cannot decline to entertain a petition under Art. 32 on the ground that there is a statutory or other remedy available to the petitioner, for the simple reason that the right to approach the Supreme Court for the enforcement of a fundamental right is itself guaranteed by the Constitution.

III. The same view has been taken as regards proceedings under Art. 226, where *fundamental rights* are involved. Thus, where a sales tax is found

30. *Goldsack* v. *Shore*, (1950) 1 All E.R. 276 (279) C.A.

31. *Board of Education* v. *Rice*, (1911) A.C. 179.

32. *Lazarus Estates* v. *Beaseley*, (1956) 1 All E.R. 341 (345) C.A.

33. *Vine* v. *National Dock Labour Board*, (1956) 3 All E.R. 393 (943).

34. *I.G.N. & Ry. Co.* v. *Their Workmen*, A. 1960 S.C. 219 (224). [The question of exhaustion of statutory remedy was raised in this case, but not decided because s. 17A of the Industrial Disputes Act, 1947, which was pleaded in bar, was not attracted by the facts of the case].

35. *Kochunni* v. *State of Madras*, A. 1959 S.C. 725 (730). [See also *Zafar Ali* v. *Asst. Custodian*, A. 1967 S.C. 106 (107)]

to offend Art. 19(1)(g) or Art. 286, it cannot be contended that the petition under Art. 226 should be rejected and that the petitioner should resort to his relief, if any, under the machinery set up by the Act.[36]

IV. The question is, how far the doctrine of alternative statutory remedy should be applied under Art. 226, in cases where the right which is alleged to be infringed is *not* a fundamental right but an ordinary legal right.

The general rule in these cases is that though the existence of an alternative remedy is not an absolute bar, it is a circumstance which the court has to take into consideration in exercising its *discretionary* power to issue the writs.[37] But the application of the rule is not all alike in the case of the different writs.

(i) In the cases of *prohibition* and *certiorari* its application is narrowed down by the rule that the existence of an alternative remedy is no ground for refusing *prohibition* or *certiorari* where—

(a) the absence or excess of jurisdiction is patent and the application is made by the party aggrieved;[38] or

(b) there is an error apparent on the face of the records;[39] or

(c) there has been a violation of the rules of natural justice.[39-40]

The bar of statutory remedy is, therefore, applicable in the case of these two writs only where the defect of jurisdiction is *not patent* on the face of the record,[39] or where the petitioner has already taken resort to the statutory machinery and that proceeding is pending.[37]

The petitioners, who complained of the jurisdiction of the Income-tax Investigation Commission and applied for writs of *prohibition* and *certiorari*, had already availed themselves of the remedy provided by s. (5) of the Taxation of Income (Investigation Commission) Act, 1947, and a reference under that section was pending before the High Court when the petition under Art. 226 was made. *Held*, in the circumstances, it was proper for the High Court to refuse the writs.[37]

(d) Where fundamental rights are affected.[41]

(ii) It has, of course, a larger application in the case of *mandamus* because this writ is not as a rule issued if there is another alternative which is 'not less convenient, beneficial and effective' than *mandamus*.[42]

But, in applying this rule in a case where the alternative remedy is a statutory remedy, *our* courts would distinguish, as in *England*, between two classes of cases according to the nature of the right involved: (a) Where the right was created by the statute which set up the machinery for redress; (b) Where the right for the enforcement of which a statutory remedy has been provided existed at common law, antecedent to the statute.

Where the statute which creates the duty itself prescribes a particular procedure for obtaining redress, *mandamus* is not, as a rule, granted. Thus,

---

36. *State of Bombay* v. *United Motors*, (1953) S.C.R. 1069; *Himmatlal* v. *State of M.P.*, (1954) S.C.R. 1122; *Kailash Nath* v. *State of U.P.*, A. 1957 S.C. 790; *Ujjam Bai* v. *State of U.P.*, A. 1962 S.C. 1621 (1627).

37. Cf. *Rashid Ahmed* v. *Municipal Board*, (1950) S.C.R. 566; *State of U.P.* v. *Nooh*, A. 1958 S.C. 86.

38. *Venkateswaran* v. *Ramchand*, A. 1961 S.C. 1506; *Carl Still* v. *State of Bihar*, A. 1961 S.C. 1615; *Calcutta Discount Co.* v. *I.T.O.*, A. 1961 S.C. 273 (380).

39. *Bengal Immunity Co.* v. *State of Bihar*, (1955) 2 S.C.R. 603 (764).

40. *Veluswami* v. *Raja*, A. 1961 S.C. 422 (429).

41. *Himmatlal* v. *State of M.P.*, (1954) S.C.R. 1122; *Shivram* v. *I.T.O.*, A. 1964 S.C. 1095.

42. Halsbury, 2nd Ed., Vol. IX, para. 1269.

the statute may prescribe appeal to the Government or administrative tribunal[43] or some special tribunal set up by the statute, for the redress of grievances or the correction of errors arising out of the administration of the statute. In such a case, the aggrieved party must ordinarily resort to that statutory remedy and *mandamus* will not lie.

Thus, in refusing *mandamus* to compel the authorities under the Motor Vehicles Act, 1939, to issue permits to the petitioners, where the authorities had refused the permits upon the wrong assumption that the issue of a permit was dependent upon the ownership of the vehicle, *our* Supreme Court held[43] that it was a case of erroneous exercise of discretion and not an act without jurisdiction, and that remedy must be sought from the "hierarchy of administrative bodies established by the Act' and not by a writ of *mandamus* from the court :

"We have before us a complete and precise scheme for regulating the issue of permits, providing what matters are to be taken into consideration as relevant, and prescribing appeals and revisions from subordinate bodies to higher authorities. The remedies for the redress of grievances or the corrections of errors are found in the statute itself and it is to these remedies that resort must generally be had."[43]

But even in cases of this class, *mandamus* would issue, notwithstanding the existence of the statutory remedy—

(a) Where the authority had no jurisdiction to act under the statute at all,[44] or to decide the question which is agitated in the petition under Art. 226;[45]

(b) Where the specific remedy is so *onerous* that it cannot be described as an *adequate* alternative remedy,[41] e.g., where the right of administrative appeal can be availed of only on depositing the entire amount of the tax alleged to have been illegally assessed;[41]

(c) Where the statutory authority has violated the rules of natural justice;[46]

(d) Where the statute which provides the alternative remedy is itself *ultra vires*;[47]

(e) Where, owing to the delay involved in a suit, the remedy would be ineffective or inadequate.[48]

(iii) As regards *quo warranto,* too, the consensus of opinion is that it cannot be barred by statute.[49]

V. As has been explained earlier (pp. 438-39, *ante*), even as to a non-constitutional jurisdiction, in the inferior courts, it has been held that the setting up of a statutory machinery by itself[50] does not bar access to the courts for the enforcement of a right which exists under the general law, apart from the statute, e.g., a suit to obtain refund of an illegal levy, notwithstanding the machinery set up by the Act.[51]

But, where a statute *creates* a right or liability[50] and prescribes the

43. *Veerappa* v. *Raman & Raman Ltd.,* (1952) S.C.R. 583.
44. *Madhavakrishnaiah* v. *I.T. Officer,* (1954) S.C.R. 537 (539).
45. *Indian Metal Corpn.* v. *Industrial Tribunal,* A. 1953 Mad. 98.
46. *S.C. Prashar* v. *Dwarkadas,* A. 1956 Bom. 530 (534).
47. *B.I. Co.* v. *State of Bihar,* (1955) 2 S.C.R. 603 (620, 672).
48. *Commr. of Police* v. *Gordhandas,* (1952) S.C.R. 135 (150).
49. *State of Haryana* v. *Haryana Transport,* A. 1977 S.C. 237 (para. 15). [Observations to the contrary in *Statesman* v. *H.R. Deb.,* A. 1968 S.C. 1495 (1499), it is submitted, are not sound].
50. *Radhakishen* v. *Administrator.* A. 1963 S.C. 1547.
51. *Illuri Subbayya* v. *State of A.P.,* A. 1964 S.C. 322.

exclusive remedy therefor, no suit lies under the general law to enforce that right, except where the decision of the special tribunal set up by the statute is without jurisdiction[51-52] or is contrary to the fundamental principles of natural justice,[51] or the tribunal abuses its statutory powers.[50]

Judicial powers may be vested only by express provisions.

Jurisdiction of ordinary courts. How far excluded by Statutory Tribunals

Notwithstanding the increasing trend towards the creation of administrative tribunals in all countries, the authority of the ordinary courts of law is sought to be maintained in the Anglo-American world by the operation of several doctrines pursued by the courts themselves, e.g.—

(a) The courts will not construe a statute as conferring judicial powers on any authority other than the courts established by law unless there are specific provisions to that effect.

(b) Even where an alternative forum is created by a statute for the determination of certain disputes or questions, the ouster of the jurisdiction of the ordinary courts is not readily inferred by the courts and the courts act upon the presumption that that jurisdiction has not been ousted.

Presumption against ouster of jurisdiction of the Civil Courts.

England.

(A) *England.*—It is competent for the Legislature to exclude any matter from the competence of the ordinary courts and assign that to some other authority or tribunal.[53] The courts are, however, slow to imply such exclusion of any matter from their jurisdiction.

The principle behind the rule of construction adopted by the courts is nothing but the English notion of the judicial function and the application of the doctrine of Separation of Powers in so far as that is acknowledged in the common law world. In short, it is the doctrine that the function of the courts is to adjudicate legal disputes, and that if Parliament wants to oust this jurisdiction of the courts, it must say so in clear words.[53]

"The proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience and assisted by properly qualified advocates, are fitted for the task."[54]

The courts, therefore, act upon the presumption against the ouster of the jurisdiction of the courts in the absence of express and clear provisions.[55]

India.

(B) *India.*—In India, the foregoing principles have been adopted in s. 9 of the C.P. Code and other specific amendments, the result of which has been fully discussed at pp. 429ff., *ante*.

II. In the present context, it should be pointed out that in India, the jurisdiction of ordinary courts may be excluded not only by statutes, but also by the Constitution itself.

Among such provisions may be mentioned :

Arts. 103(2), 192(2) : Election Commission;

Art. 217(9) : President deciding in consultation with the Chief Justice of India;

52. *Provincial Govt.* v. *Basappa*, A. 1964 S.C. 1873.
53. *London Hospital* v. *Jacobs*, (1956) 2 All E.R. 603 (606-07) C.A.
54. *Lee* v. *Showmen's Guild*, (1952) 1 All E R. 1175 (C.A.).
55. *Pyx Granite Co.* v. *Ministry of Housing*, (1958) 1 All E R. 625 (629) C.A.

Art. 262(2) : Statutory tribunal regarding disputes relating to inter-State rivers.

Special mention is, however, to be made of the provisions in Arts. 323A and 323B, which have been inserted by the Constitution (42nd Amendment) Act, 1976. These two Articles empower the appropriate Legislature to set up Administrative Tribunals to adjudicate certain disputes, to the exclusion of the ordinary courts.

Administrative Tribunals.

A. Art. 323A(1) confers power on Parliament to set up Administrative Tribunals to decide all disputes, relating to the severe conditions of Government employees or employees of other authorities under the control of the Government and to exclude the jurisdiction of all courts as regards such disputes excepting the jurisdiction of the Supreme Court under Art. 131, to hear appeals from the decisions of these tribunals, by special leave.

In exercise of this power, Parliament has enacted the Administrative Tribunals Act, 1985, to establish the Central Administrative Tribunal and also empowers the Government of India, on request by a State Government, to establish an Administrative Tribunal for that State [s. 4].

This Act has been fully annotated in App. II, *post.*

The provisions of this Act shall override any contrary provisions 'contained in any other law' [s. 33].

B. Art. 323B of the Constitution empowers the 'appropriate Legislature' to set up administrative Tribunals relating to the following matters :

(a) levy, assessment, collection and enforcement of any tax;

(b) foreign exchange, import and export across customs frontiers;

(c) industrial and labour disputes;

(d) land reforms by way of acquisition by the State of any estate as defined in Art. 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;

(e) ceiling on urban property;

(f) Elections to either House of Parliament or the House or either House of the Legislature of the State, but excluding the matters referred to in Art. 329 and Art. 329A;

(g) production, procurement, supply and distribution of foodstuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods.

(h) offences against laws with respect to any of the matters specified in sub-cls. (a) to (g) and fees in respect of any of these matters.

In exercise of the power conferred by Art. 323A (1)(d) in s. 14(1) of the Act (as amended in 1986), it has been provided that all courts, *excepting the Supreme Court,* shall have no jurisdiction to adjudicate any of the matters specified in this section, over which the Central Administrative Tribunal shall exercise exclusive jurisdiction.

This will be convenient to the Government as well as the employee in so far as the relief available from the Tribunal shall be expeditious and its procedure shall be free from interference by interlocutory orders from the courts by way of injunction, or writ of *prohibition* or *certiorari,* issued by the High Court under Art. 226, or revision under Art. 227.[56]

56. *Sampat* v. *Union of India,* (1987) 1 S.C.C. 124 (131); *Rajendra* v. *State of U.P.,* (1990) 2 S.C.C. 763 (paras. 4, 6).

The Supreme Court may, however, set aside the order of a Tribunal on the following grounds, *inter alia*—

(a) That the order *transgressed* the *jurisdiction* of the tribunal, e.g.,—

(i) Where the tribunal directs the State Government to make Rules in exercise of its power under Art. 309.[57]

(ii) Where the tribunal has granted interim relief, having no such power.[58]

(iii) Where the tribunal has no jurisdiction to deal with service matters of teachers of unapproved schools.[59]

(b) That it declined jurisdiction upon an erroneous finding.[60]

(c) That the tribunal was not properly constituted.[61]

(d) That it went into the merits of the determination of an administrative authority in the absence of lack of jurisdiction, *mala fides* or colourable exercise of jurisdiction.

Jurisdiction of statutory Tribunals.

I. A distinction has been made on this question between tribunals of (a) limited, and (b) final jurisdiction. What jurisdiction belongs to a particular statutory tribunal is to be determined from the provisions of the relevant statute by which that tribunal had been created.

(a) Ordinarily, a tribunal is created by the Legislature subject to certain limits as to its powers. In such cases, the jurisdiction of the tribunal is *limited* by the conditions so imposed by the statute and such tribunal cannot give itself jurisdiction by wrongly deciding the facts and conditions upon which the jurisdiction depends, according to the terms of the statute.[62-63]

(b) On the other hand, there are some special tribunals which are vested by the Legislature with *final* jurisdiction to determine whether the preliminary state of facts exists for the assumption of the jurisdiction under the statute. Tribunals of this class, thus, form an exception to the general principles that a tribunal cannot give itself jurisdiction by wrongly deciding the preliminary, collateral or jurisdictional facts upon which its jurisdiction depends.[62-63]

The distinction between these two classes of tribunals was highlighted in the *English* decision in *R.* v. *Commrs. for Special Purposes*,[64] in the following observations which have been adopted by *our* Supreme Court[65-66]:

"When an inferior court or tribunal or body, which has to exercise the power of dealing with facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body.

(a) It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things it shall have jurisdiction to do such things, but *not otherwise*. There it is not for them conclusively to decide

57. *Mallikarjuna* v. *State of A.P.*, A. 1990 S.C. 1251 (para. 12).
58. *Union of India* v. *Tejender*, (1991) 4 S.C.C. 129 (para. 4).
59. *Union of India* v. *Tejram*, (1991) 3 S.C.C. 11 (para. 6).
60. *Vikram* v. *Union of India*, (1991) 4 S.C.C 32 (para. 4).
61. *Amulya* v. *Union of India*, (1991) 1 S.C.C. 181 (para. 4).
62. *R.* v. *Bloomsbury Commrs.* (1915) 3 K.B. 768 (789).
63. The above two paragraphs at s. 444 of the 2nd Ed. of this book, are reproduced in the Supreme Court judgment in *Vatticherukuru* v. *Nori*, (1991) Supp. (2) S.C.C. 228 (para. 2j).
64. *R.* v. *Commrs. for Special Purposes*, (1889) 21 Q.B.D. 313 (319).
65. *Chaube* v. *Ganga*, A. 1959 S.C. 492.
66. *Hasnuddin* v. *State of Maharashtra*, A. 1979 S.C. 404 (paras. 22-23).

whether that state of facts exists, and, if they exercise that jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction.

(b) But there is another state of things which may exist. The Legislature may trust the tribunal or body with a jurisdiction, which *includes* the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on the finding that it does exist, to proceed further or do something more. When the Legislatures are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases ..... it is an erroneous application of the formula to say that the tribunals cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to decide *all* the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends....."[64]

II. The incidents of the two classes of tribunals may now be analysed.

A. Tribunal of limited jurisdiction.

As stated earlier, the general rule applicable to such tribunals is that it cannot give itself jurisdiction by wrongly deciding those very facts upon the existence of which its jurisdiction depends.[67]

In other words, where a tribunal has initial jurisdiction over a subject-matter, it has jurisdiction to decide it "rightly or wrongly", so that its initial jurisdiction by reason of the fact that its conclusion has been wrong.[68] This general rule is, however, not applicable where the wrong decision relates to a *collateral fact* upon which the *limit of its jurisdiction depends,* and the statute has not vested the tribunal with final power to determine such jurisdictional fact, the determination of which fact by the tribunal is open to judicial review and is liable to be quashed by a superior Court if it is wrong in fact or in law, for, the tribunal cannot give itself jurisdiction by wrongly deciding that very question upon which its jurisdiction depends.[63,69]

The jurisdiction of an Industrial Tribunal under the Industrial Disputes Act, 1947, is dependent upon the dispute being an 'industrial dispute' as defined in the Act. Though the factual existence of a dispute may not be questioned either by the tribunal or by the superior Court in a proceeding for *certiorari,* the tribunal has, before exercising jurisdiction, to determine whether the dispute is an industrial dispute and this finding is liable to be challenged in a proceeding for *prohibition* or *certiorari,* and where the decision of the tribunal is wrong, the proceedings before it are liable to be quashed.[70]

B. Tribunal of final jurisdiction.

Parliament may entrust a tribunal with the final power of deciding whether or not it has jurisdiction, by *empowering* it to decide the *preliminary facts* which alone will give it jurisdiction.[71] The superior Court cannot interfere in such cases because Parliament has made the inferior tribunal an absolute judge of the jurisdictional fact.[71] This, as pointed out in *R.* v. *Commrs, for Special Purposes.*[64] is not really an exception to the proposition that a tribunal cannot give itself jurisdiction by wrongly deciding certain facts to exist, because in this case, "the Legislature gave them jurisdiction to determine *all the facts,* including the existence of the preliminary facts on which the further exercise of their jurisdiction depends".[64]

67. *Basappa* v. *Nagappa,* A. 1954 S.C. 440 (444).
68. *R.* v. *Rent Tribunal,* (1947) 1 All E.R. 449.
69. *Pease* v. *Chaytor,* (1863) 32 L.J. M.C. 121.
70. *Newspapers Ltd.* v. *State Industrial Tribunal,* A. 1957 S.C. 532 (539).
71. *R.* v. *Ludlow,* (1947) 1 All E.R. 880.

1. The Bihar Buildings' Lease (Rent and Eviction) Control Act (III) of 1947, sets up a complete machinery for eviction of a tenant on certain grounds, including non-payment of rent, and makes the decision of the Controller final, subject only to appeal to the Commissioner. The Act empowers the Controller to determine whether or not there has been non-payment of rent, and, upon that finding, to order eviction of the tenant. *Held,* that the case falls under the second category mentioned by Lord Esher in *R.* v. *Commissioner for Special Purposes,*[64] and that the impugned Act confers upon the Controller final jurisdiction to determine the preliminary question whether there has been non-payment of rent, as well as the final question of eviction, so that his decision cannot be challenged in the courts on the ground that the preliminary question has been wrongly decided.[72]

2. S. 63A of the Motor Vehicles Act, 1939, as amended in Madras, provides that "the State Government may, of its own motion or on application made to it, call for the records of any order passed or proceedings taken under this Chapter by any authority or officer subordinate to it, for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceedings and after examining such records, may pass such order in reference thereto as it thinks fit". *Held,* that in enacting this section, the Legislature clearly intended that the State Government was to decide the issue as to whether *any* order in question was illegal, irregular or improper and then pass such order as it thought fit. Hence, it would not be open to a Court exercising *certiorari* to intervene merely because it might be of the opinion that the view taken by the State Government as to the impropriety of the order was erroneous.[73]

3. S. 5 of the Bombay Land Requisition Act, 1948, which empowers the State Government to requisition a premises which has remained vacant for a particular period provides that the declaration of such vacancy by the State Government, after such enquiry as it deems fit, shall be 'conclusive evidence' of the fact of vacancy. *Held,* the finding of the State Government on the question of vacancy cannot be challenged in a proceeding for *certiorari,* because the Legislature had conferred final power upon the Government to determine this question.[74]

As to the jurisdiction of the Civil Court being excluded by the finality conferred upon a statutory tribunal, the following propositions have been laid down by a Constitution Bench[75] :

"(1) Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is *adequate remedy* to do what the civil courts normally do in a suit. Such provision, however, does not exclude those cases where the *provisions* of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the *fundamental principles* of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is *no* express exclusion of the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a *special right* or a *liability* and provides for the determination of the right or liability and further lays down that *all* questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

72. *Brij Raj* v. *Shaw & Bros.,* (1951) S.C.R. 145.
73. *Raman & Raman* v. *State of Madras.,* A. 1956 S.C. 463 (467).
74. *Lilavati* v. *State of Bombay,* A. 1957 S.C. 521 (528).
75. *Dhulabhai* v. *State of U.P.,* A. 1969 S.C. 78, followed in *Vatticherukuru* v. *Nori,* (1991) Supp. (2) S.C.C. 228 (para. 25).

IX. Non-interference with the exercise of discretionary power.

Whether in the *United States,* in *England* or in *India*, it has been established that in the exercise of its power of judicial review, the Court will not interfere with the exercise of a *discretionary power* vested in the executive or administrative agencies, except on limited grounds.

England.

(A) *England and India.*—Broadly speaking, a court would be slow to interfere with the exercise of a discretionary power by an administrative authority who has special knowledge of the circumstances in relation to which the power has to be exercised.[76-77]

According to *Dicey,*[78] the vesting of 'wide discretionary authority' in the Government was incompatible with the Rule of Law. But the change in economic, social and even scientific conditions has made government a business for the experts, so that the vesting of discretionary powers in the experts has become a necessity. The new concept of the Rule of Law is contented if the courts retain the power to prevent the discretionary power being transformed into arbitrary power. The court would not substitute its discretion for that of the expert, but would interfere with its exercise if it is sought to be exercised in an arbitrary manner, or in matters *outside the limits* of the discretionary authority conferred by the Legislature, or on consideration *extraneous* to those laid down by the Legislature.[79]

The position in *England* has thus been summarised by the House of Lords—

"Broadly speaking, the courts will investigate and give relief in respect of acts of the executive which are shown to be *bad in law* or to have been done *without* or in excess of authority, or in *bad faith,* or because of *irrelevant* or extraneous considerations; but they will not revise decisions lawfully taken or *interfere* by *substituting* one view of the merits for another."[80]

I. Where a *duty* to exercise a discretionary power is imposed upon a public authority by common law or statute, such authority may be compelled to exercise such discretion, by *mandamus.*

Where such *duty* exists, the authority shall also be liable for failure to exercise the discretion, in an action for damages, for breach of the statutory duty,[80] at the instance of a person who has been injured by the failure to perform the duty.

II. There may, however, be cases where there is no independent duty which can be enforced by *mandamus,* but a duty is provided by the Legislature merely as a limitation or condition for the exercise of a power.[81] Thus,

Reg. 16(1) of the Emergency Powers Regulations, 1956, of Northern Rhodesia provides—

"Whenever the Governor is satisfied that for the purposes of maintaining public order it is necessary to exercise control over any person, he may make an order ..... directing that such person be detained."

Reg. 47 provided that "The Governor may .... depute any person .... to exercise all or any of the powers conferred on the Governor by these Regulations".

76. *Liversidge* v. *Anderson,* (1941) 3 All E.R. 338 (H.L.); *Healey* v. *Ministry of Health,* (1954) 3 All E.R. 449 (C.A.).

77. *K.E.* v. *Benoari Lal,* (1945) 1 All E.R. 210 (P.C.); *T.N. Ed. Dept.* v. *State of T.N.,* A. 1980 S.C. 379 (paras. 7-8); *State of U.P.* v. *Vijay,* A. 1982 S.C. 872 (para. 13).

78. Dicey, *Law of the Constitution,* 9th Ed., Ch. IV.

79. Cf. MacDermott, *Protection from Power,* (1957), p. 81.

80. *Caswell* v. *Powell Associated Collieries,* (1939) 3 All E.R. 722 (H.L.).

81. *Mungoni* v. *A.G. for Northern Rhodesia,* (1960) 2 W.L.R. 389 (397) P.C.

The Governor deputed his powers under Reg. 16(1), *in toto*, to the Provincial Commissioner, who issued a detention order against the appellant, on being satisfied that such order was necessary for maintaining public order.

The appellant brought this suit for damages for wrongful arrest and detention on the ground that the Governor could not delegate his *duty to be satisfied*, under Reg. 16(1) and that Reg. 47 only authorised a delegation of the *power* to issue an order of detention.

The Judicial Committee negatived this contention by holding that the duty and the power were in this case so interwoven that the Governor could split them in delegating the power to another and keeping the duty to himself. There was no independent duty, apart from the power, which could be enforced by *mandamus*, or for the non-performance of which legal liability could arise. Reg. 47 authorised the Governor to delegate the power together with the conditions and limitations attaching to it, even though they were also duties. The satisfaction was a condition for the exercise of the power, and could, therefore, be delegated.[81]

III. (a) Where an authority has a discretionary *power* (as distinguished from a duty to exercise a discretion), nobody can complain of the *non-exercise* of the power.[82]

Where a statute confers upon an authority a *general* discretion to take an action if certain conditions as specified in the statute are fulfilled, in a permissive language, the authority is competent to refuse to exercise the discretionary power even though the statutory conditions are fulfilled.[83] Thus,—

In *India*, similarly, it has been held that a Transport Authority under the Motor Vehicles Act, 1939, has general discretion to refuse a permit even where an applicant complies with the conditions specified in s. 42 of the Act,[84] and if his order is within jurisdiction, the court would not interfere merely on the ground that it is erroneous.[84]

India.

But in *India*, there is an additional consideration which does not obtain in *England*, namely, the impact of the exercise of such discretionary power on *fundamental rights*. As has been pointed out by the Allahabad High Court,[85] the question was not considered in the Supreme Court decision[84] with reference to Art. 19(1)(g) of the Constitution. According to this view, the granting of a licence with respect to a trade which is not inherently dangerous[86] cannot be regarded merely as a privilege. A citizen has the right to carry on such trade subject to such restrictions as may be imposed by the State, provided they are reasonable, and a law which empowers an administrative authority to refuse a licence, at his discretion, even though the applicant has complied with the conditions specified in the statute, must be regarded as unreasonable. The power to decide whether the statutory conditions have been fulfilled must necessarily be given to that authority,[87] and this discretion is wider where (as in s. 47 of the Motor Vehicles Act) the authority is empowered to take into account certain administrative considerations, apart from certain specified conditions,— such as objections from a police or other local authority.[88] But, apart from this, if the licensing authority is guided by considerations *extraneous* to the

82. *East Suffolk Rivers Catchment Board* v. *Kent*, (1941) A.C. 74.
83. Re *Electrical & Industrial Trust*, (1956) 1 All E.R. 162 (169).
84. *Veerappa* v. *Raman*, (1952) S.C.R. 583.
85. *Iqbal* v. *Municipal Board*, A. 1959 All. 186 (189).
86. Cf. *Cooverjee* v. *Excise Commr.*, (1954) S.C.R. 873.
87. Cf. *Dwarka Prasad* v. *State of U.P.* (1954) S.C.R. 803 (811).
88. The observations of the Supreme Court in *Veerappa* v. *Raman*, (1952) S.C.R. 583 appear to have been made in view of the above provisions in the statute.

statute,[89] or omits to consider *relevant* circumstances,[90] his action would be *ultra vires*,[91] in the same manner as it would be *ultra vires* if he acts in contravention of a statutory condition,[92] or without taking into consideration the conditions specified in s. 47.[92]

(b) Even where an authority, in the exercise of its discretion, embarks upon an execution of the *power*, nobody can claim damages for injury caused thereby by reason of a *negligent or unreasonable* execution, provided it has been done honestly.[82]

IV. In general, in exercise of its power of judicial review, a court would be slow to interfere with the *bona fide* exercise of discretion, upon relevant consideration[93] by an authority in matters which lie within its expert knowledge, e.g., selection for appointment;[94] price fixation[95]; quota for transport permits.[96]

V. As to the *manner* of exercise of the discretionary power, the general rule is that the court cannot interfere, except in cases[97] :

(a) Where the authority exercising the discretion has not complied with the conditions provided by the statute for the exercise of the discretionary power, or, in other words, violated the statutory basis of the power.[97]

This is commonly known as a case of '*Excess* of power'.

(b) Where the power has not been exercised judicially.[97]

'Judicially', in this context, means that the power must be exercised for the purpose for which it was conferred. If it is used for any other purpose or on considerations extraneous to the legislation which conferred the power, it is a case of '*Abuse* of power'.

(c) Where the order is obtained by fraud.[98-99]

These exceptional classes of cases should be analysed separately.

(A) *Ultra vires exercise of discretion or excess of power.*

The exercise of the discretionary power may be *ultra vires*—

(i) If the *condition precedent* to its exercise is non-existent, in which case the authority lacks the jurisdiction to act at all.[100-1]

Such facts which are a condition precedent to the exercise of a statutory power are known as 'jurisdictional facts'.

Thus, the court may invalidate the administrative action if an enforcement notice under the (Eng.) Town and Country Planning Act, 1947, has been issued where there

89. *Arora* v. *State of U.P.*, A. 1962 SC 764; *Rohtas* v. *Agrawal*, A. 1969 S.C. 707 (719); *State of M.P.* v. *Ramshanker*, A. 1983 S.C. 374 (376).

90. *Dharamdas* v. *Police Commr.*, A, 1989 S.C. 1282 (1286).

91. *Ram Vilas Service* v. *Chandrasekaran*, A. 1965 S.C. 107 (109); *Shanmugam* v. *S.R.V.S.*, (1964) 1 S.C.R. 809 (821, 829); *Samarth Transport* v. *R.T.A.*, A. 1961 S.C. 93 (96-97).

92. *Shrinivasa* v. *State of Mysore*, A. 1960 S.C. 350 (352); *Sheriff* v. *S.T.A.*, A. 1960 S.C. 21 (326).

93. *F.A.I.C.* v. *Union of India*, (1988) 3 S.C.C. 91.

94. *Ajit Singh* v. *C.E.C.*, (1989) 4 S.C.C. 704; *State Bank* v. *Mynuddin*, (1987) 4 S.C.C. 486.

95. *Sitaram Sugar* v. *Union of India*, A. 1990 S.C. 1277.

96. *Yogeshwar* v. *S.I.A.T.*, (1985) 1 S.C.C. 725.

97. *I.R.C.* v. *Bladnoch Distillery*, (1948) 1 All E.R. 616 (629) H.L.

98. *Lazarus Estates* v. *Beasley*, (1956) 1 All E.R. 341 (345)

99. *Partap Singh* v. *State of Punjab*, A. 1964 S.C. 72 (81).

100. *Eastbourne Corpn.* v. *Fortes*, (1959) 2 All E.R 102 (C.A.).

1. *State of Madras* v. *Sarathy*, (1953) S.C.R. 334 (346).

has been no 'development': or a reference under s. 10(1) of the (Indian) Industrial Disputes Act, 1947, has been made where the dispute referred to is not an 'industrial dispute'.[1]

(ii) Where, in the exercise of the discretion, the authority, having a *quasi-judicial* duty, commits such a procedural irregularity as amounts to a breach of the principles of *natural justice.*[2]

(B) *Abuse of discretionary power.*

In *Sharp* v. *Wakefield,*[3] Lord Halsbury observed—

"When it is said that something is to be done within the *discretion* of the authorities,..... that something is to be done according to the rules of *reason and justice, not* according to private opinion .... It is to be, *not arbitrary, vague, fanciful,* but legal and regular."[3]

The exercise of a discretionary power may be arbitrary in several ways—

(i) Where the power is exercised for an 'improper purpose',[4] i.e. for a purpose other than "the purpose of carrying into effect in the best way the provisions of the Act",[5] including the "spirit and purpose of the statute".[6] This is sometimes otherwise expressed, namely, that the exercise of a power must be in good faith[7] (see under next caption).

This principle was highlighted by the House of Lords in the celebrated case of *Padfield.*[8]

A regional marketing committee made a complaint to the Minister that the price for sale of milk, fixed by the Milk Marketing Board was discriminatory. The statute empowered the Minister, on receipt of such complaint, with an unfettered discretion to refer the complaint to a committee of investigation, which, 'in his opinion', should be so investigated. In the exercise of this discretion, the Minister *refused* to refer the complaint in this case to the investigating committee.

This majority of the House of Lords remitted the case to the Minister for exercising his discretion properly 'according to law', laying down that—

Even where a statute confers unfettered discretion upon an authority to exercise or not to exercise a power and even it did not require him to state any reasons for declining to exercise the power, the exercise of his discretion was still subject to the doctrine of *ultra vires,* upon which the court could interfere :

i. If he, whether by misconstruction of the statute or other reasons so exercised or declined to exercise his power as to *frustrate* the objects of the statute which conferred the power.[8]

ii. If he misdirected himself in law, by omitting to take into account relevant matters or by taking into consideration irrelevant matters, in the matter of exercise of his discretionary power.[8]

(ii) Even where the authority exercises his discretionary power for the purposes of the statute, there will be an abuse of the power if, in exercising the discretion—

(a) the authority acts on *extraneous* considerations, that is to say, takes into account matters which ought not to have been taken into account[8-9] according to the provisions of the statute; or, conversely,

---

2. Cf. *D.C. Mills* v. *Commr. of I.T.*, A. 1955 S.C. 65.
3. *Sharp* v. *Wakefield,* (1891) A.C. 173 (179).
4. Cf. *Partap Singh* v. *State of Punjab,* A. 1964 S.C. 72 (82).
5. *Local Govt. Board* v. *Arlidge,* (1915) A.C. 120 (147) H.L.
6. *Leeds Corpn.* v. *Ryder,* (1907) A.C. 420 (423).
7. *Demetriades* v. *Glasgow Corpn.,* (1951) 1 All E.R. 457 (460) H.L.
8. *Padfield* v. *Min. of Agriculture,* (1968) 1 All E.R. 694 (699, 702, 714, 717) H.L.
9. *Irani* v. *State of Madras,* A. 1961 S.C. 1731 (1740).

(b) the authority *refuses* or neglects[10] to take into account relevant matters or material considerations;[9] or,

(c) the authority imposes a condition patently unrelated to or inconsistent with the purposes or policy of the statute.[11]

(iii) Where, in the exercise of a discretionary power, the authority acts *mala fide*[4] or on extraneous or irrelevant considerations,[12] the authority may be compelled to act in accordance with the law, e.g., where the State Government, in exercise of its discretionary power to grant exemption from a Rent Control Act, makes an exemption on considerations irrelevant to the policy of the Act;[12] or acts *ultra vires* or without jurisdiction.[13]

V. An authority who is vested with a discretionary power must exercise his independent discretion and cannot act according to the directions[14] or instructions[14] of his departmental superior, without exercising his independent judgement. Any action or order so taken or made will be invalid.

A typical *Indian* case on this point is *Commr. of Police* v. *Gordhandas:*[14]

Under r. 250 of the Rules framed under the City of Bombay Police Act, 1902, the Commissioner is bound to exercise his own independent judgment and to decide for himself with reference to the facts and circumstances of the case, whether to cancel the licence or not. Where the Commissioner cancelled a licence 'as directed by the Commissioner', the Supreme Court issued a *mandamus* directing the Commissioner to make a proper order.[14]

An *exception* to the above principle is provided by some of *our* statutes which confer power on the Government or some superior administrative authority to issue administrative *directions* and *instructions* for the guidance of their subordinate authorities in the administration of the statutes concerned, e.g., s. 43A of the Motor Vehicles Act, 1939;[15] s. 53 of the Administration of Evacuee Property Act, 1950.[16]

(i) S. 43A of the Motor Vehicles Act, inserted by the Madras Amendment Act, 1949, says—

"The State Government may issue such orders and directions of a general character *as it may consider necessary*, in respect of any matter relating to road transport to the State Transport Authority ..... and such Authority *shall* give effect to all such orders and directions."

Though such 'orders and directions' are issued under statutory authority and though the subordinate authority 'shall' give effect to them, it has been held that such orders and directions have no force of law and do not confer upon the public any legally enforceable rights, so that if the subordinate authority fails to apply or misapplies or misconstrues such directions, a superior Court cannot interfere by issuing *certiorari* or *mandamus*.[17]

The constitutionality of such a statutory provision has also been upheld.[15]

If such statutory directions have no 'force of law',[15] the exercise of this

10. *Associated Picture Theatres* v. *Wednesbury Corpn.*, (1947) 2 All E.R. 680.
11. *Fawcett Properties* v. *Buckingham C.C.*, (1959) 2 All E.R. 322 (326-27) C.A.
12. Cf. *Sheriff* v. *Mysore S.T.A.*, A. 1960 S.C. 321 (327); *Express Newspapers* v. *Union of India*, A. 1986 S.C. 872; *Collector* v. *Raja*, A. 1985 S.C. 1622.
13. *Gupta* v. *Union of India*, A. 1982 S.C. 149 (para. 45).
14. *Commr. of Police* v. *Gordhandas*, (1952) S.C.R. 135 (148); *T.N.E.D. Assocn.* v. *State of T.N.*, A. 1980 S.C. 379; *State of U.P.* v. *Vijay*, A. 1982 S.C. 1234 (para. 3).
15. *Raman* v. *State of Madras*, A. 1959 S.C. 694; *Rowther* v. *S.T.A. Tribunal*, A. 1959 S.C. 896 (899).
16. *Dunichand* v. *Dy. Commr.*, (1954) S.C.R. 578 (586).
17. *Nagendra* v. *Commr.*, A. 1958 S.C. 398 (413).

discretionary power by the Government could not be challenged on the ground that the directions are not published or even on the ground that they are *ultra vires*. It has, however, been held that where a direction is *ultra vires* s. 43A itself it would be liable to be quashed together with the decision of the Transport Authority which is based on it.[18]

(ii) S. 53 of the Administration of Evacuee Property Act, 1950, says—

"The Central Government may give directions to any State Government as to the carrying into execution in the State of any of the provisions contained in this Act or of any rules or orders made thereunder."

The Supreme Court has held that the directions issued under this provision have no statutory force, unless they are embodied in Rules framed by the Central Government in exercise of the power conferred by s. 56 of the Act.[16]

The peculiarity of this provision, however, lies in the fact that it is not self-executory and does not *per se* affect the rights of individuals. It is issued by one Government to another in the same manner as directions are issued under Art. 256 or 257 of the Constitution, relating to the administrative policy to be followed in the application of the Act. From this standpoint, the subject-matter of the direction is lifted out of the realm of judicial review by the doctrine of 'non-justiciability', and in this respect, this direction may be said to stand on a different footing from the cases on s. 43A, Motor Vehicles Act, 1939.

VI. *Any* statutory authority is under a disability to bind itself by any agreement or contract, not to exercise its statutory discretion or power.[19] Any such contract would be *ultra vires* its powers and, hence, void,[20] in so far as it takes away its power to perform the statutory *duties* imposed upon it.[19]

VII. When the discretion relates to a *quasi-judicial* function, it must be exercised according to the merits of each case, on its own facts and circumstances, and the authority must apply its mind to the circumstances of each particular case.[21] It may, of course, make certain *general rules* or lay down a policy[22] for its own guidance but it is bound to consider whether such policy is applicable to the facts of the particular case before it.[23]

It cannot make a rule to be applied in every case without a hearing.[22] Thus, an authority empowered to grant licences for selling literature in public parks cannot adopt a resolution that it will not grant any more licences in future.[24]

The policy so laid down must not be based on a consideration extraneous to the statute.[23] Thus, the authority cannot refuse to consider the merits of the case before it, for the sake of being consistent with the determination in a previous case,[25] or of adherence to its general rule of practice.[25]

VIII. In general, in the absence of a specific statutory provision, a statutory power cannot be delegated if the function is *quasi-judicial* in nature or the function is such that it involves the exercise of a *personal* direction. (This topic will be treated separately.)

18. *Rajagopala* v. *S.T.A.*, A. 1964 S.C. 1573.
19. *Ayr Harbour Trustees* v. *Oswald*, (1883) 8 App. Cas. 623.
20. *Cory* v. *City of London Corpn.*, (1951) 2 All E.R. 85 (89).
21. *E.* v. *Halborn Licensing JJ.*, (1926) 136 L.T. 278 (281); *R.* v. *Walsall JJ.*, (1854) 18 J.P. Jo. 757.
22. *R.* v. *Torquay Licensing JJ.*, (1951) 2 All E.R. 656.
23. *R.* v. *Rotherham Licensing JJ.*, (1939) 2 All E.R. 710.
24. *R.* v. *L.C.C.*, (1918) 1 K.B. 68.
25. *R.* v. *Licensing Committee*, (1957) 1 All E.R. 112 (122) C.A.

IX. In *India*, as in the *U.S.A.*, there is an additional constitutional ground of judicial review in the sphere of discretionary power, namely, whether the *statute itself* is unconstitutional because it vests such discretionary power in an administrative agency, e.g., by reason of contravention of Art. 14[26] or Art. 19;[27] the act done in exercise of the discretionary power similarly violates a constitutional limitation.[28]

(B) *U.S.A.*—In the United States, this limitation of non-interference with discretionary power of the Executive was deduced from Art. III of the Constitution that the judicial power shall be exercised only in *'cases or controversies'* before the courts. Hence, it has been held that the court will interfere only on questions of law.[29] Thus, the court would not review the question whether an existing broadcasting licence should be renewed.[30]

U.S.A.

The court would interfere only where the administrative agency has failed to perform a *non-discretionary* legal duty.[31]

S. 10 of the Administrative Procedure Act, 1946, now specifically excludes judicial review where "agency action is by law committed to agency discretion". It would seem that the courts are not going to make any liberal interpretation of this Exception clause, particularly in view of the fact that the same provision [s. 10(e)] enjoins the court to interfere with "abuse of discretion".[32]

The court will thus construe a matter as committed to agency discretion only where its decision requires technical or expert knowledge.[33] Subject to the limits of *ultra vires* and unconstitutionality, the court also considers the choice of remedies for the enforcement of the policies of the relevant statute as a matter for the discretion of the administrative agency.[34]

But even when it is held that a statute has committed a matter to agency discretion,—

(a) The court would test the propriety of the administrative action by a minimum standard of rationality, having regard to the circumstances of each case in which the power has been exercised,[35] apart from its power to interfere in a case of 'clear abuse' of the discretion.[36]

Thus,

Under the National Labour Relations Act, the National Labour Relations Board has the power to redress unfair practices by taking "*such* affirmative action *as will effectuate* the policies of this Act". The Supreme Court has held that though the Board has under this provision a wide choice as to the remedy, the court will interfere where the remedy adopted by the Board is not *appropriate* to the situation which calls for redress[37] or where the Board has applied a remedy which,

26. *State of W.B.* v. *Anwar Ali*, (1952) S.C.R. 234; *Suraj Mall* v. *I.T.I. Commn.*, A. 1954 S.C. 545.

27. *Cooverjee* v. *Excise Commr.*, (1954) S.C.R. 873; *Dwarka Prasad* v. *State of U.P.*, A. 1954 S.C. 224; *State of Madras* v. *Row*, (1952) S.C.R. 597.

28. *Indira* v. *Rajnarain*, A. 1975 S.C. 2299 (para. 232); *Parashram* v. *Ram*, A. 1982 S.C. 872 (para. 13).

29. *Federal Radio Commn.* v. *G.E.G.*, (1930) 281 U.S. 464; *F.C.C.* v. *Pottsville Broadcasting Co.*, (1940) 309 U.S. 134.

30. *Federal Radio Commn.* v. *Nelson Bros. Co.*, (1933) 289 U.S. 266.

31. *Kendall* v. *U.S.*, (1838) 12 Pet. 524.

32. Cf. *Sterling* v. *Constantin*, (1932) 287 U.S. 378 (401).

33. *Dobson* v. *Commr.*, (1943) 320 U.S. 489; *Radio Corp.* v. *U.S.*, (1951) 341 U.S. 412.

34. *N.L.R.B.* v. *Gullett Gin Co.*, (1951) 340 U.S. 361.

35. *N.L.R.B.* v. *Mine Workers*, (1957) 355 U.S. 453 (458).

36. *Carlson* v. *London*, (1952) 342 U.S. 524.

37. *N.L.R.B.* v. *Mackay*, (1938) 304 U.S. 333 (348).

"it has worked out on the basis of its experience, *without regard to circumstances* which may make its application in a particular situation oppressive and therefore not calculated to effectuate a policy of the Act".[38]

(b) It is for the court to determine whether the statutory discretion has been exercised in strict conformity with the procedure laid down by the statute[39] or the resulting act is *ultra vires* or unconstitutional.[40]

In *Federal Radio Commn.* v. *Nelson Bros.*,[30] the Supreme Court observed—

"Where the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision."[30]

(c) The vesting of discretionary power, needless to say, precludes review of the administrative exercise of the discretion but cannot preclude judicial review of the validity of the statute itself.[40]

(d) The court also retains the power of construction of the statute as to whether a particular question is one of 'law' or committed to 'administrative discretion'.[41]

X. Non-interference with subjective satisfaction.

As has been already pointed out, one of the indirect devices to exclude judicial review of administrative action is to empower the administrative authority to act on his subjective satisfaction. Since the essence of the judicial process is to arrive at a decision by applying objective standards,[42] the courts are powerless to review a determination which cannot be subjected to an objective test.[43]

But even in such cases, there is a narrow strip which the courts have secured for themselves to *quash* a subjective determination without substituting its own judgment for that of the authority empowered by the Legislature. The numerous decisions relating to this topic are by no means uniform; nevertheless, certain principles may be gathered, if they are analysed into logical groups. Thus, broadly speaking, emergency legislation is treated by the courts with more leniency than peacetime legislation.

The various situations under which the Legislature usually confers powers of subjective determination may be analysed as follows :

I. Power to determine *the existence of facts which give jurisdiction* to the administrative authority to exercise the statutory power.

A. *Emergency legislation.*

(A) *England.*—By the (Eng.) Emergency Powers (Defence) Act, 1939, the Secretary of State was empowered to make such Regulations *"as appear to him to be necessary or expedient"*. It was held that

"It is not open to His Majesty's courts to investigate the question whether or not the making of any particular regulation was in fact necessary or expedient for the specified purposes."[44]

38. *Labour Board* v. *Seven-Up Bottling Co.*, (1953) 344 U.S. 344 (349).
39. *C.A.B.* v. *State Airlines*, (1950) 338 U.S. 572.
40. *Ludecke* v. *Watkins*, (1948) 335 U.S. 160.
41. Cf. *Costley* v. *U.S.*, (1950) 181 F. 2d. 723; *Indian Towing Co.* v. *U.S.*, (1955) 350 U.S. 61.
42. *Sharp* v. *Wakefield*, (1891) A.C. 173 (179).
43. *Hubli Electricity Co.* v. *Prov. of Bombay*, A. 1949 P.C. 136.
44. *R.* v. *Comptroller-General*, (1941) 2 All E.R. 677 (C.A.); *Carltona* v. *Commr. of Works*, (1943) 2 All E.R. 560.

Similar power to make regulations was conferred, in a Canadian War Measures Act, by the words "as he may deem *necessary or advisable*". Lord Radcliffe, delivering the opinion of the Privy Council[45] approved of the following observation of Duff, C.J.—

England.

"I cannot agree that it is competent to any court to canvas the considerations which have, or may have, led him to deem such regulations necessary or advisable for the transcendent objects set forth .... the measures authorised are such as the Governor General in Council (not the courts) deem necessary or advisable."

Of course, the words did not allow him to do "whatever he may feel inclined" and the courts were entitled to see whether what he does was "capable of *being related to one of the prescribed purposes*". This means that the words in question did not exclude the doctrine of *ultra vires* but excluded the review of the subjective satisfaction within the purposes prescribed by the statute.[45]

By the Emergency Powers (Defence) Act, 1939, Parliament had authorised the Government to make defence regulations under the Act "for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of *public safety or the defence of the realm*" Regulation 18-B, made accordingly, authorised the Secretary of State, to detain without trial any person whom the Secretary of State has *reasonable cause to believe* to be of hostile origin ..." *Held*, by the House of Lords, Courts of Justice had no jurisdiction to examine in any case whether the grounds of belief of the Secretary of State were reasonable or not, and that the Act of Parliament and the Regulation made under it only required the Secretary of State himself to be reasonably satisfied. In short, it was not subject to judicial review.[46]

The same view has been taken with respect to *statutory instruments* made under Emergency legislation. Thus, in interpreting the words "as that authority *thinks expedient*" in the Defence (Generel) Regulations, 1939, in the matter of requisitioning land, the House of Lords held that "in the absence of bad *faith* or *ulterior motive* the jurisdiction of the courts is excluded and the competent authority is the judge of the *use* which it should make of the land and of what it should do in connection with such use for the purposes of the requisition,"[47] or of the need for requisitioning any particular land.[48]

On the the latter point, Lord Greene[48] observed—

"..... in construing regulations of this character expressed in this particular form of language, it is for the competent authority ..... to decide as to whether or not a case for the exercise of powers has arisen."

Another case of non-interference with power conferred by Emergency legislation is *Mungoni* v. *A.G. for Northern Rhodesia*,[49] which has been already discussed, *ante*. In this case, the reasonableness of the satisfaction was not at issue; the decision went beyond that and upheld the delegation of the duty, of the authority upon whom the power was conferred, to be satisfied, before the power could be exercised.

Before closing this topic, it should be pointed out that in the *Liversidge case*[46] even the use of the word 'reasonable' in the statutory provision failed

45. *A.G. for Canada* v. *Hallet*, (1952) A.C. 427.
46. *Liversidge* v. *Anderson*, (1942) A.C. 206 (Lord Atkin, dissenting).
47. *Demetriades* v. *Glasgow Corpn.*, (1951) 1 All E.R. 457 (460) H.L.
48. *Point of Ayr Collieries* v. *Llyod-George*, (1943) 2 All E.R. 547 (C.A.).
49. *Mungoni* v. *A.G. for Northern Rhodesia*, (1960) 2 W.L.R. 389 (397) P.C.

to attract judicial review, according to the majority. The only ground on which such construction can be justified is the 'emergency' nature of the legislation. There is a strong current of opinion in England that such construction would not be legitimate with respect to a *peacetime* legislation,[50] and this view is supported by the observations of the Judicial Committee in *Nakkuda* v. *Jayaratne,* (1951) A.C. 66 and of Lord Denning in *D.P.P.* v. *Head,* (1958) 1 All E.R. 679 (691) H.L.

No less important is it to note that even as regards an emergency legislation, the Privy Council has later[51] made observations relaxing from the *Liversidge* majority[46] stand.

The Cyprus Emergency Powers (Collective Punishment) Regulations, 1955, empowered the Commissioner to impose a collective fine after making an inquiry. Reg. 5(2) provided—

"In making inquiries under these Regulations the Commissioner shall *satisfy himself* that the inhabitants of the said area are given adequate opportunity of understanding the subject-matter of the inquiry....."

On the facts, the Privy Council held that the evidence disclosed ample grounds on which the Commissioner could feel 'satisfied' on the matter required by the Regulations, but added that the applicants could challenge the Commissioner's order not only by alleging and proving *bad faith* but also by showing that

"there were *no grounds* on which the appellant could be so satisfied",

from which

"a court might *infer* either that he did not honestly form that view or that, in forming it, he could not have *applied* his mind to the relevant facts".[51]

(B) *India.*—1. Under s. 3 of the Preventive Detention Act, 1950, the specified authority, "if satisfied" that it is necessary to detain a person with a view to preventing him from acting in any manner prejudicial to the defence of India, security of the State etc., may make an order directing that such person be detained.

It has been held that the sufficiency of the grounds upon which the *satisfaction* of the authority issuing the order of detention purports to be based, provided they have a rational probative value and are *not* extraneous to the scope or purpose of the legislative provision, cannot be challenged in a court of law, except on the ground of *mala fides.*[52]

2. Similarly, it has been held under r. 30 of the Defence of India Rules, 1962. It provides—

(i) The Central Government or the State Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India or the efficient conduct of military operations, it is necessary so to do, may make an order—

(ii) directing that he be detained..."

It has been held that the reasonableness of the satisfaction of the

50. Allen, *Law & Order,* 1956, pp. 293, 418.

51. *Ross-Clunis* v. *Papadapoullos,* (1958) 2 All E.R. 23 (33). [Lord Morton, Lord Somervell & Lord Denning], partially adopting Lord Denning's view in *D.P.P.* v. *Head,* (1958) 1 All E.R. 679 (691) H.L.

52. *Gopalan* v. *State of Madras,* (1950) S.C.R. 88 (218, Sastri J.); *Shibanlal* v. *State of H.P.,* (1954) S.C.R. 418; *Bhim Sen* v. *State of Punjab,* (1952) S.C.R. 18.

detaining authority or the sufficiency[53-54] of the materials or grounds for arriving at such satisfaction cannot be challenged in a court of law.

But the order or the recital of satisfaction in it[54] can be challenged on the following grounds—

(i) That the order is *mala fide*,[52] e.g., by showing—

(a) That the authority who issued the order did not apply his mind[54,55], to the relevant considerations,[56] e.g., where the order mentions all the grounds specified in the Act and in the affidavit of the authority only two of them are relied upon[56] or mentions 'law and order' instead of 'public order' as the ground;[53]

(b) That the authority was actuated by *improper motives*.[53]

But an order of detention cannot be held to be *mala fide merely on the grounds*—

(i) That after intending to prosecute a person under the criminal law, the authorities drop the criminal proceedings and then make the order of detention because they do not find sufficient evidence to obtain a conviction.[57]

(ii) That a fresh order of detention has been passed during the pendency of *habeas corpus* proceeding against a previous order,[54] which may have been defective.

But it may be challenged as *mala fide* by other facts showing malice.[58]

(ii) That numerous orders of detention were made on the same date, where it is established that the cases were under consideration for quite some time before the orders were actually made.[59]

(iii) That any of the grounds given in the detention order is invalid or irrelevant, that is to say, it has no proximate connection with the object which the Legislature had in view,[60] even though there may have been other grounds which are valid.[53]

If, on the face of the order, a ground is irrelevant, the Government will not be allowed to adduce extraneous evidence to show that it was relevant.[53]

(iv) That it has been served against a person who is already in jail custody as an undertrial prisoner or as a convict,[53,61] and the period of his sentence is to run for some length of time.[62]

But—

(i) There is nothing wrong in making an order under r. 30(1) against a person who is going to be released from jail in a short time, provided such order is served only after he is released.[61]

(ii) Where the person is not a prisoner in jail but a detenu under the Preventive Detention Act or under the Defence of India Rules, there is nothing wrong for the Government to revoke an earlier order to be replaced by a fresh order of detention, without releasing the detenu, for the duration

53. *Rameshwar* v. *D.M.*, A. 1964 S.C. 334; *Ram Manohar* v. *State of Bihar*, A. 1966 S.C. 740 (746).
54. *Jaichand* v. *State of West Bengal*, A. 1967 S.C. 483 (486).
55. *Khudiram* v. *State of W. B.*, A. 1975 S.C 550.
56. *Jagannath* v. *State of Orissa*, A. 1966 S.C. 1140 (1142).
57. *Sahib Singh* v. *Union of India*, A. 1966 S.C. 340.
58. *Godavari* v. *State of Maharashtra* (No. 2), A. 1966 S.C. 1404.
59. *Gopalan* v. *Govt. of India*, A. 1966 S.C. 816 (818).
60. *Durgadas Shirali* v. *Union of India*, A. 1966 S.C. 1078.
61. *Makhan Singh* v. *State of Punjab*, A. 1964 S.C. 361.
62. *Godavari* v. *State of Maharashtra* (No. 1), A. 1964 S.C. 1128.

of the previous detention is dependent upon the will of the Government itself and the fresh order made was also directed towards the same purpose.[63]

(iii) Similarly, where the person was in jail as an undertrial prisoner for three months only when the order of detention was made, it cannot be held that the conduct of the person before this period of three months was not *proximate* enough to justify an order of detention based on that conduct.[57]

(iv) Even where the person is in jail custody as an undertrial prisoner, it is not incompetent for the authority to make an order of detention under the D.I.R. replacing an earlier order of detention which was defective and based on his satisfaction as to the necessity of detaining such person, which was arrived at before he was put into jail custody.[64]

(c) That there was no satisfaction at all; or that it was founded on no materials at all or on wholly irrelevant or extraneous considerations.[64]

(i) Where the authority has been actuated by *mala fides*, i.e., bad faith in coming to his determination.[65] 'Bad faith', in this context, as has been explained elsewhere, means little more than acting upon extraneous considerations or considerations irrelevant to the statute which confers the power,[66] even though with the best of intentions.[69]

(ii) Where there was no evidence at all before the authority under which he could possibly act under the statute.[65,68]

(iii) Where the authority had not applied his mind to the matter or the relevant facts,[69] or had no opportunity of exercising his mind.[70]

(d) Where the authority has come to a conclusion to which, on the evidence, he could not *reasonably come*.[65] *India.*

(iv) Where he has taken into consideration matters which he ought not to have taken into account or *vice versa*.[65]

(v) Where he has given a wrong interpretation to the words of the statute or otherwise gone wrong in law.[65]

(vi) Where the exercise of the power is not reasonably[67,71] *related* to any of the purposes prescribed by the statute which confers the power.[72-73] In such a case, it cannot be said that the action is 'within the four corners of the powers given by the Legislature'.[74]

It is open to the person aggrieved to establish the above contentions by extraneous evidence.[11] Or in other words, to this extent, the formation of the subjective satisfaction becomes subject to an objective test.[70,75]

---

63. *Shamrao* v. *State of Maharashtra*, (1965) 1 S.C.A. 390 (397).
64. *State of Rajasthan* v. *Union of India*, A. 1977 S.C. 1361 (para. 144); *Minerva Mills* v. *Union of India*, A. 1980 S.C. 1789 (paras 103-105).
65. *Point of Ayr Collieries* v. *Lloyd George*, (1943) 2 All E.R. 547 (C.A.); *Carltona Ltd.* v. *Works Commrs.*, (1943) 2 All E.R. 563 (C.A.).
66. *Demetriades* v. *Glasgow Corpn.*, (1951) 1 All E.R. 457 (460) H.L.; *Jaichand* v. *State of W.B.*, A. 1967 S.C. 483 (485).
67. *Barium Chemicals* v. *Company Law Board*, A. 1967 S.C. 255.
68. *Thornloe & Clarkson* v. *Board of Trade*, (1950) 2 All E.R. 245 (249).
69. *Ross-Clunis* v. *Papadopoullos*, (1958) 1 W.L.R. 546 P.C.
70. *Emp.* v. *Sibnath*, (1944) F.C.R. 1 (P.C.).
71. *Shibban Lal* v. *State of U.P.*, (1954) S.C.R. 418; *State of Bombay* v. *Krishnan*, (1961) 1 S.C.R. 227.
72. *A.G. for Canada* v. *Hallet*, (1952) A.C. 427 (450) P.C.
73. *Somawanti* v. *State of Punjab*, A. 1963 S.C. 151 (164).
74. *Carltona Ltd.* v. *Works Commrs.*, (1943) 2 All E.R. 563 (C.A.); *Ashbridge* v. *Minister of Housing*, (1965) 3 All E.R. 371 (374) C.A.
75. *Ridge* v. *Baldwin*, (1964) A.C. 40 (73).

"Apart from that, the courts have no power to inquire into the *reasonableness, the policy, the sense,* or any other aspect of the transaction."[71]

But not many reported decisions are so far available where a challenge on any of these exceptional grounds has actually succeeded in the courts,[76] where the discretionary power is 'subjective' and, in such cases, 'the reservation for the case of bad faith is hardly more than a formality".[77]

A question arises whether and how far extraneous evidence is admissible to show that there was no evidence to support the determination of the authority or that his conclusion was perverse. It has been laid down by the court of appeal.[74]

(a) That the court before which such challenge is made can receive evidence to show *what material* was before the authority.

(b) But that the Court cannot receive *fresh* evidence on the merits to show that the conclusion of the authority was not justified; the error of law or perversity of conclusion must be established from the materials on the record.[77]

B. *Reference to a Commission of Inquiry.*

S. 3(1) of the (Indian) Commissions of Inquiry Act, 1952, provides :

"The appropriate Government may, if it is of opinion that it is necessary so to do ... appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance..."

The court held that the Legislature had left to the subjective determination of the Government not only the necessity for constituting a Commission of Inquiry but also the existence of a definite matter of public importance with reference to a particular subject.[78-79] The court could not interfere with the selection made by the Government unless it was *mala fide* :

"It is true that the notification primarily or even solely affects the petitioners and their companies but it cannot be overlooked that Parliament having left the selective application of the Act to the discretion of the appropriate Government, the latter must of necessity take its decision on the materials available to it and the opinion it forms thereon. The appropriate Government cannot in such matters be expected to sit down and hold a judicial inquiry into the truth of the materials brought before it, and examine the informants on oath in the presence of the parties who are or may be likely to be affected by its decision. In matters of this kind the appropriate Government has of necessity to act upon the information available to it. It is the best judge of the reliability of its source of information and if it acts in good faith on the materials brought to its notice and honestly comes to the conclusion that the act and conduct of the petititoners and the affairs of their companies constitute a definite matter of public importance calling for an inquiry with a view to devise measures for preventing the recurrence of such evil, this court, not being in possession of all the facts, will, we apprehend, be slow to adjudge the executive action to be bad and illegal. We are not unmindful of the fact that a very wide discretionary power has been conferred on the Government and, indeed, the contemplation that such wide powers in the hands of the executive may in some cases be misused or abused and turned into an engine of oppression has caused considerable anxiety in our mind. Nevertheless, the bare possibility that the powers may be misused or abused cannot *per se* induce the court to deny the existence of the powers ..... We feel sure, however, that if this law is administered by the Government "with an evil eye and an unequal hand" or for an oblique or unworthy

76. Cf. Allen, *Law & Orders,* 1956, p. 294; 'impossible to prove' (Allen, *Law in the Making,* 1951, pp. 541, 542).

77. *Nakkuda Ali* v. *Jayaratne,* (1951) A.C. 66 (77).

78. *Ramakrishna* v. *Tendolkar,* A. 1958 S.C. 538 (551).

79. *Jagannath* v. *State of Orissa,* A. 1969 S.C. 215 (224).

purpose the arms of this court will be long enough to reach it and to strike down such abuse with a heavy hand."[78]

Of course, the court can also interfere where the order constituting the Commission is *ultra vires*[79] or unconstitutional or the Act itself is unconstitutional.[78]

C. *Reference of industrial dispute to Industrial Tribunal.*

In *India,* it has been held that the courts have got no jurisdiction to question the reasonableness or propriety of a reference made by the Government under s. 10(1) of the Industrial Disputes Act, 1947, *even where there is no material* before the Government from which it could come to its opinion that there was an 'industrial dispute'.[80] The only ground upon which the Court could interfere was that of *ultra vires,* i.e. where the dispute referred to was shown not to be an 'industrial dispute' within the meaning of the statute. The relevant words of s. 10(1) are—

"If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing....."

It is to be noted that words indicating opinion, satisfaction and the like are not used in this Act and, on the contrary, the words 'exists or is apprehended' were used by the Legislature. Nevertheless, the Supreme Court observed :

"In making a reference under s. 10(1) of the Industrial Disputes Act, 1947, Government does not perform an administrative act and the fact that it was to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an 'industrial dispute' within the meaning of the Act,[80] and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on these matters."[81]

The Court, in short, will interfere—

(a) Where the Government has exercised its discretion contrary to the provisions of the Act;[82] or

(b) Where it has refused to exercise its discretion on extraneous or irrelevant considerations.[81,83]

II. *Where finality is given to the subjective determination.*

A. Where a statute empowers an authority to make a determination on its subjective 'opinion' and expressly makes that determination final and conclusive, the court cannot interfere[84] except where the authority applies an irrelevant principle or test in arriving at his opinion, in which case his determination becomes *ultra vires.*[84-85]

The principle has been applied in *India,* in the case of a statutory

80. *Express Newspapers* v. *Industrial Tribunal,* A. 1957 S.C. 107 (128).

81. *State of Madras* v. *Sarathy,* (1953) S.C.R. 334 (346).

82. *State of Bombay* v. *Krishnan,* A. 1960 S.C. 1223; *State of Bihar* v. *Ganguly,* A. 1958 S.C. 1018.

83. *Bombay Union* v. *State of Bombay,* A. 1964 S.C. 1617 (1622).

84. *Att.-Gen.* v. *Gamage,* (1949) 2 All E.R. 732 (735).

85. *Pyx Granite Co.* v. *Min. of Housing,* (1960) A.C. 261; *Ridge* v. *Baldwin,* (1964) A.C. 40.

provision under which the subjective satisfaction of the authority as to the existence of a fact gives rise to a presumption against the individual concerned:

S. 178A(1) of the Sea Customs Act, 1878, provided—

"Where any goods to which this section applies are seized .... in the *reasonable belief* that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized."

The Supreme Court held that the reasonable belief was the *subjective* belief of the Customs Officer that the goods were smuggled and that as soon as the Customs Officer had such belief, a very heavy onus was thrown upon the person from whose possession the goods were *seized.*[86]

The reasonableness of the restrictions imposed by this provision upon the fundamental rights guaranteed by Art. 19(1)(f)-(g) has been upheld having regard to the social mischief which the provision was intended to combat.[87]

B. On the other hand—

There are cases where the courts have inserted the wedge of judicial review, inventing the doctrine of "what can *reasonably* be regarded as authorised by the discretionry power",[88-89] vested by the Legislature :

(a) *Public corporations.*—As regards statutory corporations (as distinguished from executive authorities) having public duties, the courts even read things into a statute in order to circumscribe the discretionary authority of the statutory body by supplying a standard where the Legislature has supplied none. Thus,

(i) A Local Authority had the statutory power "to fix wages (of its employees) *as they think fit*". The Authority fixed a minimum wage for all employees, without distinction of sex. The House of Lords held that the power must be exercised by the Authority "*reasonably*" and that the fixation of a minimum wage for both sexes regardless of the work produced was an unreasonable exercise of the power which was influenced by "eccentric principles of socialist philanthropy or by a feminist ambition to secure equality of the sexes in the world of labour", rather than by a consideration of those matters which an employer, acting reasonably, would take into account.[90]

(ii) A Municipal Corporation was authorised "to charge such fares *as it thought fit*". With the consent of the licensing authority, the Corporation decided to provide free travel at certain hours for a limited class of aged people, *to be financed out of the general rate fund.* In a suit by a rate-payer, the Court of Appeal held that the decision of the Corporation was *ultra vires,* since the statutory power had not been exercised in accordance with business principles as intended by the Legislature. "..... It is clearly *implicit* in the legislation that while it was left to the defendants to decide what fares should be charged within any prescribed statutory maximum for the time being in force, the undertaking was to be run as a business venture, or in other words, that fares fixed by the defendants at their *discretion, in accordance with ordinary business principles,* were to be charged."[88]

(b) *Taxation.*—It has been held[91-92] that the dicta made in relation to emergency legislation and legislation calling for administrative decisions, such as in relation to planning, will not be applicable in relation to taxation and that, accordingly, the revenue authority could not be considered to have final powers to determine the extent of his own powers under the following statutory provision.[92]

86. *Babulal* v. *Collector of Customs,* A. 1957 S.C. 877 (880).
87. *Collector of Customs* v. *Samapathu,* A. 1962 S.C. 316 (331-34).
88. *Prescott* v. *Birmingham Corpn.,* (1954) 3 All E.R. 698 (C.A.).
89. *Associated Prov. Pictures* v. *Wednesbury Corpn.,* (1947) 2 All E.R. 680 (683) C.A.
90. *Roberts* v. *Hopwood,* (1925) A.C. 578 (H.L.).
91. *Asst. Collector* v. *Ramakrishnan,* A. 1989 S.C. 1829 (para. 21)
92. *Stepney B.C.* v. *Joffe,* (1949) 1 All E.R. 256.

"The Commissioners may make regulations providing for any matter for which provision *appears to them to be necessary* for the purpose of giving effect to the provisions of ..... this Act and of enabling them to discharge their functions thereunder."

The charging section of the statute imposed a liability to pay such tax as in law is due. But under the aforesaid power to make regulations, the Commissioners made Regulation 12 which rendered the subject to pay such tax as the Commissioners *believed to be due*, immune from the jurisdiction of the courts to determine the legality of the tax :

"If any person fails to furnish a return .... the Commissioners may .... determine the amount of the tax appearing to them to be due from such person .... which amount shall be *deemed to be the proper tax* due from such person ....."

The result is that the courts could not examine whether the tax determined by the Commissioners was the amount *due in law*, as the statute provided.

It was held that though the statute conferred upon the Commissioner the power to make such regulations as appeared to them to be *necessary*, it did not go to the length of empowering the Commissioners to make *ultra vires* regulations by making their determination final which, according to the statute, was justiciable. Reg. 18 was, accordingly, declared to be *ultra vires*.[91]

III. *Where the function is of a quasi-judicial nature.*—Where an unrestricted appeal[92] or other form of review is provided, then notwithstanding the use of expressions indicating subjective satisfaction, the courts get a better scope in going into the merits of the determination with reference to the scope and object of the statute.[93] Cases of this nature relate mainly to licensing and similar functions which are regarded as *quasi-judicial*,[94] or cases where the authority possesses *some* of the characteristics of a tribunal[95] and has, therefore, a public duty to act fairly and reasonably.[95]

Thus,

(a) Where Justices of the Peace were empowered to issue "warrants" "if they shall think fit", the court interfered where they were improperly issued.[86]

(b) Where a licensing authority, original[96] or appellate,[97] is empowered to impose 'such *conditions* as it thinks fit' on the licence, the court has interfered—

(i) Where there was no relevant connection between the *ground* upon which the condition was imposed, say, the welfare of young children, and the subject-matter of the licence and the use to which the premises was to be put.[96]

(ii) Where the condition was irrelevant to the purpose of the Act.[93] Even where the statute itself has not furnished any guide for the imposition of conditions, the court has imported the standard of "a decision that *no reasonable* body could have come to".[96]

In *India*, there is a pre-Constitution case where a contrary decision was taken.[98] Thus,

S. 4(1) of the Indian Electricity Act, 1910, provided : "The Provincial Government may, *if in its opinion* the public interests, require, revoke a licence in the following cases :

(a) Where the licensee, in the *opinion* of the Provincial Government, makes wilful and *unreasonably prolonged default* ....."

93. Cf. *Middlesex C.C.* v. *Miller*, (1948) 1 All E.R. 192.
94. Cf. *R.* v. *Adamson*, (1875) 1 Q.B.D. 201.
95. *I.R.C.* v. *National Federation*, (1981) 2 All E.R. 93 (III-12) H.L.
96. *Associated Prov. Pictures* v. *Wednesbury Corpn.*, (1947) 2 All E.R. 680 (C.A.).
97. *R.* v. *Minister of Transport*, (1934) 1 K.B. 277.
98. *Hubli Electricity Co.* v. *Prov. of Bombay*, A. 1949 P.C. 136.

Held, there was nothing in this section to suggest that the opinion of the Government could be subjected to objective tests. "In terms the relevant matter is the opinion of the Government—not the grounds on which the opinion is based. The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which Government acted in forming an opinion."[98]

If such a case comes before the court *after* the Constitution, it will have to determine whether the statutory power in such case[99] should be considered to be of the policy-making nature because it is vested in the Government or the court would enter into the reasonableness of the opinion of the Government, taking hold of the expression '*unreasonably* prolonged default".

With the above decision we may contrast another decision of the Privy Council,—*Estate & Trust Agencies* v. *Singapore Improvement.*[99] In this case,—

The Improvement Trust had the power to declare a dwelling-place as insanitary if it 'appeared' to the Board that it was 'unfit for human habitation'. The Privy Council held that the test applied by the Board to determine the unfitness in the case before it was wrong.[99]

It is to be noted that the question of unfitness was not a collateral fact but the very issue that the Board had to determine under the statute.[40]

The broad ground upon which the court interferes in such cases is that the condition imposed by the authority in the exercise of its discretion is *ultra vires.*[100] Once the relationship of the condition with the statute is established, the court would not go to substitute its own judgment for that of the authority endowed with discretionary power by the Legislature.[96]

1. S. 14(1) of the (Eng.) Town & Country Planning Act, 1947, says—

"Where application is made to the local planning authority for permission to develop land, that authority may grant permission ..... subject to such conditions *as they think fit* ....."

The local authority granted permission for the erection of farm workers' cottages subject to the condition that the "occupation of the houses shall be limited to persons whose employment .... is ..... agriculture (as defined in the Act), or forestry....."

At the time, there was no 'development plan' relating to the land but its inclusion in a plan was being contemplated. Rejecting a contention that the condition did not relate to the building of the structures but to the persons who could occupy it, *held,* that it could not be said that the condition was unrelated to the planning legislation or that, in imposing the condition the authority had taken into consideration matters irrelevant to the statute. Hence, the court would not interfere, however unreasonable it might seem to the court.[91]

2. Though the foregoing illustration relates to a purely administrative function, the same principle has been applied to *quasi-judicial* function :

(i) S. 1(1) of the Sunday Entertainments Act, 1932, provided—

"The Authority having power ..... to grant licences under the Cinematograph Act, 1909, may ..... allow places ... licensed under the said Act to be opened and used on Sundays .... subject to *such conditions as the authority think fit to impose* ....."

The defendant Authority granted permission to open cinema performances within its area on Sundays, provided "children under the age of 15 were excluded". The court rejected the contention that the condition was unreasonable', with the observation :

"Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country .... on a thing of that sort honest and sincere people hold different views. The effect of the legislation

99. *Estate & Trust Agencies* v. *Singapore Improvement Trust,* (1937) A.C. 898.

100. *Fawcett Properties* v. *Buckingham C.C.,* (1959) 2 All E.R. 321 (C.A.); *Middlesex C.C.* v. *Miller,* (1948) 1 All E.R. 192.

is not to set up the court as an *arbiter of the correctness* of one view over another. It is the *local authority* that are set in that position, and, provided they act as they have acted, within the four corners of their jurisdiction, the court .... cannot interfere."[96]

In *India*, similarly, it has been held that in exercise of his authority to grant a stage carriage permit [s. 48(1) of the Motor Vehicles Act, 1839], "in accordance with the application or with such modifications as *it deems fit*", the Transport Authority cannot impose a condition which is *ultra vires*.[1]

(c) An appellate function being *per se quasi-judicial*, even where an administrative appellate authority has the power to make such order 'as it thinks fit',[2] it is expected to be exercised in the same way as if it were a judicial discretion, so that the superior court may interfere if the administrative authority takes into consideration irrelevant matters in exercising his discretionary power,[3] or disregards some mandatory provisions of the law relating to the exercise of the jurisdiction.[3]

The principle has been extended to the power of *revision* vested in a superior administrative authority.[2]

IV. *Jurisdictional fact.*

A. Where expressions denoting subjective satisfaction are used with respect to the powers of a *quasi-judicial* tribunal which has *not been* vested by the Legislature with a conclusive power to determine its own jurisdiction, the courts are competent to review the determination of the jurisdictional fact on its merits, notwithstanding the expressions referred to.

U.K.

Thus,

(i) Where a Rent Tribunal was empowered to fix the rent equivalent of a premium "where *it appears* to the tribunal that a premium has been paid", it has been *held* that it must not merely appear to the tribunal that a premium has been paid, but a premium must *actually* have been paid in order to found the jurisdiction of the tribunal to determine the rent equivalent of a premium.[4]

(ii) S. 9 of the Mental Deficiency Act, 1913, says —"Where the Secretary of State is *satisfied* from the certificate of two duly qualified medical practitioners that any person.... is a (mental) defective, the Secretary of State may order that .... he be sent to an institution for defectives." *Held* (*per* Lord Denning) that the word 'satisfied' in the Act means "reasonably satisfied". If, on reading the medical certificates, *no reasonable person* would have been satisfied that she was defective, the order is liable to be quashed. It was found that the two doctors gave different grounds in the certificate, which, again, were based on *insufficient* facts and that the Secretary of State should not, therefore, act on such certificate.[5]

(iii) In the *Hubli Electricity case*,[98] the Judicial Committee held that though the determination of the question whether the licensee has made 'a wilful and unreasonably prolonged default' was left to the subjective opinion of the Provincial Government, the final power to determine the *legal* question as to what constituted a 'default' under the Act belonged to the court and not to be administrative authority. The Privy Council observed :

"The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming an opinion. Further, the question on which the opinion of the Government is relevant is not whether

1. *Sheriff* v. *Mysore R.T.A.*, A. 1960 S.C. 321.
2. *Nagendra* v. *Commr.*, A. 1958 S.C. 398 (405-06; 413).
3. *R.* v. *Minister of Transport*, (1927) 2 K.B. 401; *R.* v. *Minister of Transport*, (1934) 1 K.B. 277.
4. *R.* v. *Fulham Rent Tribunal*, (1950) 2 All E.R. 211.
5. *D.P.P.* v. *Head*, (1958) 1 All E.R. 679 (691) H.L.

a default has been wilful and unreasonably prolonged but whether there has been a wilful and unreasonably prolonged default. Upon that point the opinion is the determining matter. *But there the area of opinion ceases.* The phrase 'anything required under the Act' means "anything which is required under the Act". The question what obligations are imposed on licensees by or under the Act is a question of law. Their Lordships do not read the section *as making the Government the arbiter on the construction of the Act or as to the obligations it imposes.* Doubtless the Government must, in expressing an opinion for the purpose of the section, also entertain a view as to the question of law. But its view on law is not *decisive.* If in arriving at a conclusion it appeared that the Government had given effect to a wrong apprehension of the obligations imposed on the licensee by or under the Act the result would be that the Government had not expressed such an opinion as is referred to in the section."[98]

A recent summary of the law in the U.K. on judicial review of subjective satisfaction is to be found in the observations of Lord Wilberforce in the *Tameside case* [6] :

"The section is framed in a 'subjective' form ..... Section in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment.

But I do not think that they go further than that, if a judgment requires, *before it can be made,* the existence of some facts, then, although the *evaluation* of those facts is for the Secretary of State alone, the court must inquire, whether those facts *exist,* and have been *taken into account,* whether the judgment has been made on a proper self-direction as to those facts, whether the judgment has not been made on other facts which *ought not to have been taken into account.* If these requirements are not met, then the exercise of judgment, however *bona fide* it may be, becomes capable of challenge."[6]

B. On the other hand, the courts shall have no such power of review where the administrative authority[7-8] or tribunal has conclusive powers[7-8] under the statute, to determine the jurisdictional fact as well.

(i) A Reinstatement Committee, under the Reinstatement in Civil Employment Act, 1944, was given the power to determine the question as to the persons to whom the Act shall apply and to make any of the orders specified by the statute "where the Committee is *satisfied* that default has been made by the former employer or the applicant in the discharge of his obligations under this Act". The Act provided for an appeal to the Deputy Umpire. *Held,* that the Deputy Umpire had final power to determine whether default had been committed by the former employer and that the Courts could not review the determination on its merits.[7]

(ii) The Bihar Buildings' Lease (Rent and Eviction) Control Act (III) of 1947 sets up a complete machinery for eviction of a tenant on certain grounds, including non-payment of rent, and makes the decision of the Controller *final,* subject only to appeal to the Commissioner. The Act empowers the Controller to determine whether or not there has been non-payment of rent, and upon that finding, to order eviction of the tenant. *Held,* that the impugned Act confers upon the Controller final jurisdiction to determine the preliminary question whether there has been non-payment of rent, as well as the final question of eviction, so that his decision cannot be challenged in the courts on the ground that the preliminary question has been wrongly decided.[9]

(iii) S. 5 of the Bombay Land Requisition Act, 1948, provided—

"(1) If in the *opinion* of the State Government it is expedient so to do, the State Government may ..... requisition any land .....

(2) Where any building or part thereof is to be requisitioned under sub-sec. (1), the State Government shall make such inquiry *as it deems fit* and make a declaration.... that the owner ... has not actually resided therein for a continuous period of six months immediately preceding the date of the order and such declaration shall be *conclusive evidence* that the owner .... has not so resided."

6. *Secy. of State* v. *Tameside B.C.* (1976) 3 All E.R. 665 (681-82) H.L.
7. *R.* v. *Ludlow,* (1947) 1 All E.R. 880 (882).
8. *Lilavati* v. *State of Bombay,* A. 1957 S.C. 521.
9. *Brij Raj* v. *Shaw & Bros.,* (1951) S.C.R. 145.

Held, the State Government had been vested with final power to determine the question of vacancy of a land for the purpose of exercising jurisdiction under the Act and that it was not open to an aggrieved person to challenge the correctness of the declaration made by the State Government.[100]

But, the question of constitutionality of such provisions, in India, does not appear to have so far been decided.

(B) *U.S.A.*—In the *United States*, similarly, it has been held that where Congress has authorised a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for action is not subject to judicial review.[10]

U.S.A.

Under the Administrative Procedure Act [s. 10(e)], the reviewing court may, however, interfere with a finding on jurisdictional fact, where it is not founded on 'substantive evidence'.[11]

V. *Obligation to recite existence of condition precedent.*

1. It has already been stated that even where a power is subjective or discretionary, but the statute lays down that it can be exercised only if some condition precedent exists, the courts can interfere where the condition precedent did not exist in fact,[12-13] which is an objective question.[14]

2. The question which next arises is whether it is necessary for the statutory authority to recite in its order that the condition precedent exists, e.g., that it has been satisfied that the state of affairs referred to in the statute for the exercise of the power exists in the given case.

The general rule is that even in the absence of a recital it is open to the person relying on the power to show by independent evidence that it was satisfied as to the existence of the condition precedent before exercising the power,[15] and that where there is a recital of such satisfaction, it is not necessary further to recite that all the various provisions of the statute or all the facts necessary to be considered for arriving at such satisfaction have, in fact, been considered.[15a]

Judicial review of Policy decision.

Judicial review of a policy evolved by the Government is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise the court would leave the matter for decision of those who are qualified to address the issue. Unless the policy or action is inconsistent with the Constitution and the laws, or arbitrary or irrational or abuse of power, the court will not interfere.[15b]

---

10. *U.S.* v. *Bush & Co.*, (1940) 310 U.S. 371.
11. *Universal Camera Corpn.* v. *N.L.R.B.*, (1951) 340 U.S. 474 (478).
12. *Eastbourne Corpn.* v. *Fortes*, (1959) 2 All E.R. 102 (C.A.).
13. *State of Madras* v. *Sarathy*, (1963) S.C.R. 334 (346).
14. *Barium Chemicals* v. *Company Law Board*, (1966) 1 S.C.A. 747.
15. *Swadeshi Cotton Mills* v. *S.I. Tribunal*, A. 1961 S.C. 1381.

15a. *Godavari* v. *State of Maharashtra*, A. 1964 S.C. 1128 (1134-35).

15b. *Federation of Rly. Officers Association* v. *Union of India*, (2003)4 SCC 289: AIR 2003 SC 1344.

The court, however, exercises its power of restraint in relation to interference of policy. "The role of courts in a democracy, carries high risks for the judges and for the public. Courts may interfere inadvisedly in public administration." A distinction should be drawn "between areas where the subject-matter lies within the expertise of the courts and those which were more appropriate for decision by democratically elected and accountable bodies". Courts should not step outside the area of their institutional competence.[15c]

Since arbitrariness, irrationality, perversity and *mala fide* renders a policy unconstitutional it calls for judicial interference. If the policy cannot be faulted on any of the grounds judicial interference is impermissible even if it hurts the business interest of a party. Court cannot dictate either that a certain policy ought to have been adopted nor it can opine that a policy should be changed or remain static. An executive policy is not open to impeachment unless it infringes constitutional or statutory provision. In tax and economic regulation cases judicial restraint is necessary. Judgment of the executive should not be normally interfered with.[15d]

Relevant considerations have been taken note of irrelevant aspects have been eschewed from consideration and no relevant aspect has been ignored. Administrative decision has nexus with the facts on record. Judicial review is impermissible. It is permissible only to the extent of finding whether the process in reaching the decision has been correctly observed. The decision as such cannot be attacked.[15e]

Three stages with regard to undertaking of an infrastructual project—(1) conception or planning, (2) decision to undertake the project, (3) execution of the project. The first two are a policy decision. When it has put a system in place for the execution of a project and such a system cannot be said to be arbitrary the court can only see that the system works in the manner it was envisaged. Court cannot transgress into the field of policy decision. The court cannot run the Government nor the administration can indulge in abuse or non-use of power. Court will act within its judicially permissible limitations to uphold in rule of law and harness its power in public interest.[15f]

Parliament only has the authority to test the correctness of an economic policy. In taking economic decision Government has a right to "trial and error" which must be *bona fide* and within limits of authority. Wisdom and availability of economic policies are ordinarily amenable to judicial review unless it is shown that the policy is contrary to any statutory provision or constitution.

Parliament only will decide about the merit of National Educational policy. Court will not.[15g]

Fixation of electricity tariff is a policy matter. Court will not interfere unless it is shown that the power exercised is arbitrary or *ex facie* bad in law.[15h]

Land was leased out to a private company without floating tenders or holding public auction. By itself such lease cannot be held to be illegal,

---

15c. *Union of India* v. *S.B. Vohra,* (2004)2 SCC 150.

15d. *Ugar Sugar Works Ltd.* v. *Delhi Admn.* AIR 2001 SC 1449: (2001)3 SCC 635.

15e. *Union of India* v. *Lt. Genl. Rajendra Singh* AIR 2000 SC 2513: (2000)6 SCC 698.

15f. *Narmoda Bachao Andolan* v. *Union of India,* (2000)10 SCC 664.

15g. *Aruna Roy* v. *Union of India,* (2002)7 SCC 368.

15h. *Assn. of I.E. Users* v. *State,* AIR 2002 SC 1361: (2002)3 SCC 711.

arbitrary or *mala fide*. The test is whether the transaction was against public interest or was actuated by extraneous considerations or opposed to fair play or conferred undue benefit upon undeserving party. Court can examine only the fairness of the decision-making process and cannot interfere with the ultimate policy decision on the ground that another decision would have been better.[15-i]

Supreme Court cannot issue direction which would compel the Government to amend its existing policy.[15j]

Courts should not normally interfere with matters relating to law and order which is primarily the domain of administrative authorities. They are by and large the best to assess and to handle the situation depending upon the peculiar needs and necessities within their special knowledge. At some grave situation at least the decision as to the need and necessity to take prohibitory actions must be left to the discretion of administration authorities. Courts will not interfere unless an order passed by the administrative authority is patently illegal or without jurisdiction or with ulterior motive or on extraneous consideration of political victimization.[15-k]

Authority is entitled to set the terms of tender. The court will not interfere with the terms of the tender notice unless it is shown to be arbitrary or discriminatory or actuated by malice.[15l]

XI. Non-interference with policy decisions.

1. In the absence of any statutory provision, the Government in the exercise of its executive power, may take any policy decision as may be required to meet administrative exigencies.

A Court would not interfere with such policy decisions except when[16a]

(a) it offends any statutory provision; or

(b) it offends any provision of the Constitution; or

(c) it is so arbitrary or capricious or discriminatory[16b] as to attract Art. 14 of the constituion.[16a]

2. Where no such exceptional case exists, the Court would not interfere with a public policy which is conducive to public interest, merely because some individual has been affected thereby.[16c]

XI. Doctrine of Severability.

Both in *England*[17] and in *India*,[17-18] the doctrine of severability has been applied to administrative[19-20] and *quasi-judicial*[18] orders.

(i) Para. 81(1) of the Potato Marketing Scheme (Approval) Order, 1955, made under the Agricultural Marketing Acts, 1931-49, provides—

15-i. *Netai Bag* v. *State*, (2000)8 SCC 262.

15j. *Principal, Mahadev Institute of Technology* v. *Rajendra Singh*, (2000)6 SCC 608: AIR 2000 SC 2487.

15-k. *State* v. *Dr. Praveen*, (2004)4 SCC 684.

15l. *Directorate of Education* v. *Educomp Datamatics Ltd.*, (2004)4 SCC 19.

16a. *State of Rajasthan* v. *Sevanivatra* (1995) 2 SCC 167 (paras. 24).

16b. *Ashok* v. *Union Territory*, (1995) 1 S.C.C. 631 (para. 8).

16c. *State of Orissa* v. *Radheshyam* (1995) 1 S.C.C. 653 (para. 6).

17. *Potato Marketing Board* v. *Merricks*, (1958) 3 W.L.R. 135 (147); *Kingsway Investments* v. *Kent C.C.*, (1971) A.C. 72 H.L.

18. *Shewpujanrai* v. *Collector of Customs*, (1959) S.C.R. 821 (847).

19. *Sheriff* v. *R.T.A.*, (1960) S.C.J. 402 (408-09).

20. *Bidi Merchants' Assocn.* v. *State of Bombay*, A. 1962 S.C. 486 (496).

"The board may ..... serve on any registered producer a *demand* in writing requiring him to furnish to them such .... information *relating* to potatoes; as may be specified in the demand."

The board served a demand upon Merricks, requiring him to inform them of the (a) acreage of each variety of potato; (b) the acreage of all the potatoes and (c) the total acreage of the farm.

Held, that in the absence of anything to connect the total acreage of the farm with the cultivation of potatoes, the demand was *ultra vires* so far as demand (c) was concerned. The Order made a person who refused to comply with a demand liable to a fine not exceeding £ 200. But though the demand was composite, the invalid part as to total acreage was severable, and it could be held that Merricks was liable to the statutory penalty for not complying with the demand so far as it related to the first two parts.[17]

(ii) In confiscating smuggled gold under s. 167(8) of the Sea Customs Act, the court ordered that the gold might be released if a fine was paid and two other conditions were complied with within the specified period. It was found that the two conditions were not authorised by the statute. It was urged on behalf of the appellant that the order being a composite one, it should be quashed *in toto. Held*, that the invalid conditions were severable and that confiscation and fine having been valid, the court dismissed the writ application "in so far as it seeks to quash the impugned order of confiscation ..... and the payment of fine in lieu thereof" but allowed it by issuing a direction upon the Controller of Customs not to enforce the two valid conditions, which he had no jurisdiction to impose.[18]

(iii) Under s. 58(1)(a) read with sub-sec. (2) of the Motor Vehicles Act, 1939, the renewal of a permit could not be for a period less than 3 years. The competent Authority renewed the petitioners' permit for a period of one year only. From the record, the court came to hold that the Authority had decided to renew the Petitioners' permit considering the relevant circumstances but imposed an *ultra vires* limit as to duration and that the *ultra vires* part was severable. Hence, the court quashed that part of the order which limited the renewal only for one year and directed the Authority to comply with the requirements of the statute in the order of renewal made by it in favour of the petitioners.[19]

Severability of Assessment Orders.

The doctrine of severability is also applicable in the case of invalidity or unconstitutionality of orders relating to taxation.

I. When an assessment is not for an entire sum, but for separate sums, dissected and earmarked, each of them, to a separate assessable item, a court can sever the items and cut one or more along with the sum attributed to it, while affirming the residue.[21]

II. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable and when one component (not dismissible as '*de minimis*') as on any view not assessable and wrongly included, it would seem clear that such a procedure is barred and the assessment is bad wholly.[22-23]

Thus, when an assessment consists of a single undivided sum in respect of the totality of the property treated as assessable, the wrongful inclusion in it of certain items of property which by virtue of a provision of law were expressly exempted from taxation renders the assessment invalid *in toto.*[24]

21. *R.* v. *National Tribunal,* (1947) 2 All E.R. 693 (698) [*see* under Art. 226; Certiorari, *post*].
22. *Bennett & White Ltd.* v. *Municipal Dt.,* (1931) A.C. 786 (816).
23. *Montreal Light, Heat & Power* v. *Westmont,* (1926) S.C.R. 515 (Can).
24. *Ram Narain* v. *Asst. Commr.,* (1955) 2 S.C.R. 483.

In *District Collector* v. *Basappa*,[25] the Supreme Court observed—

".....in those cases where the assessment of many matters results in amounts of tax which, though parts of the whole assessment, stand completely separate. There the court can declare the "separate, dissected and earmarked" items illegal and excise them from the levy. In doing so, the court does not arrogate to itself the functions of the taxing authorities; but where the tax is a composite one and to separate the good part from the bad, proceedings in the nature of assessment have to be undertaken, the civil court lacks the jurisdiction. Here, the amount of tax is a percentage of the turnover and the turnover is a mixed one and it is thus not merely a question of cutting off some items which are separate but of entering upon the function of assessment which only the authorities under the Sales-tax Act can undertake. Cases of assessment based upon gross valuation such as the case from Canada referred to by the Judicial Committee[7] afford a parallel to a case of assessment of a composite turnover such as we have here. Just as in the Canadian case[23] it was not possible to separate the valuation of movable properties from that of immovable properties, embraced in a gross valuation roll, so also here, it is not possible to separate from the composite turnover transactions which are validly taxed, from those which are not, for that must pertain to the domain of tax officers and the courts have no power within that domain. In our opinion, the High Court was right in declaring the total assessment to be affected by the portion which was illegal and void."

25. *District Collector* v. *Basappa*, (1963) S.C. [C.A. 494/62].