CHAPTER 5

PURELY ADMINISTRATIVE FUNCTIONS

Meaning of the expression.

At the very outset (pp. 3,10), it has been pointed that the expression administrative 'act' or 'function' is a comprehensive expression, comprising three different categories, namely, *quasi-legislative, quasi-judicial* and 'purely administrative'. The expression 'purely administrative', as used in this work, therefore, refers to those acts or functions of administrative authorities,[1] which are neither legislative nor adjudicative in character (p. 6 *ante*).

(a) While a *quasi-legislative* act done by the Administration consists in making rules, regulations, bye-laws and the like, having general application which simulate a statute made by the Legislature itself, a purely administrative act is concerned with the treatment of a particular situation.

(b) A purely administrative act or function is distinguished from a *quasi-judicial* function in that in the latter, there is an obligation, express or implied, to adopt a judicial approach to the question to be decided,[2] whereas there is no such obligation in the case of a purely administrative function which is exercised solely on considerations of policy or expediency, or in the exercise of the discretion of the authority in whom the administrative power is vested.[3] In short, while a *quasi-judicial* determination is *objective*, an administrative determination is *subjective*.[4-5]

(c) A purely administrative authority has *no procedural obligation*, unless specifically imposed by statute.[3]

(d) An administrative act may *affect*[6] the rights of individuals but it cannot *decide* their rights with any finality, or binding force.[7]

Purely administrative acts, thus, form the residuary[8] subject-matter of administrative law and, therefore, involve a variety of functions, e.g.—

(i) The issuing of rules or directions having no force of law, for the guidance of subordinate administrative authorities.[9]

The distinction between a statutory and a non-statutory rule is that while a Rule issued in exercise of a statutory power (if *intra vires*) must be treated for all purposes as if they were enacted in that statute itself, and must be construed in the same manner as a statutory provision and must

1. As to who are 'administrative authorities', see p. 4, *ante*.
2. *Ridge* v. *Baldwin*, (1963) 2 All E.R. 66 (H.L.).
3. *Franklin* v. *Minister of Town Planning*, (1948) A.C. 87: (1947) 2 All E.R. 289 (H.L.); *Patterson* v. *Dt. Commr.*, (1948) A.C. 341 (350).
4. *R.* v. *L.C.C.*, (1931) 2 K.B. 215 (233) C.A.
5. *Radheshyam* v. *State of M.P.*, A. 1959 S.C. 107 (115-16).
6. *Dwarka* v. *State of Bihar*, A. 1959 S.C. 249.
7. *R.* v. *Dublin Corpn.*, (1878) 2 Ir. 371 (376); *Brijnandan* v. *Jyoti Narayan*, (1955) 3 S.C.R. 955 (962).
8. See p. 6, *ante*.
9. Cf. *State of Assam* v. *Ajit Kumar*, A. 1965 S.C. 1196 (1200): *Nagarajan* v. *State of Mysore*, A. 1966 S.C. 1942 (1944, 1948).

be given the same effect,[10] a rule which is issued by the Government without the authority of any statute[11] or otherwise than in exercise of the power conferred by Art. 309 of the Indian Constitution, is to be treated as a mere administrative direction or instruction, so that no person can have a legal remedy, either for its enforcement or non-enforcement.[11] Of course, such rule, having been issued in pursuance of the executive power conferred by Art. 73 or 162, may affect the rights of the parties unless it contravenes the provisions of any statute or statutory rule or of the Constitution.[12]

(ii) Making of investigations into facts in order to take another administrative action.[13]

(iii) Setting up a Commission of Inquiry for the preceding purpose, or simply for the purpose of collecting information;[14] and the functions of such a body itself, which are non-judicial in character.[15]

(iv) Making reference to a Tribunal for adjudication, e.g., under s. 10 of the Industrial Disputes Act, 1947.[16]

(v) An order of acquisition or requisition[17] of property or its allotment[17] to a person or to take possession on behalf of the State[17]

(vi) An order of preventive detention,[18] externment or deportation.

(vii) Issue of licences and permits to allow a person to carry on some activity or business which is controlled or regulated by law;[19] but the function of cancellation or revocation of a licence would be saddled with a *quasi-judicial* obligation.[20]

(viii) Appointment, control and punishment of public servants, subject to constitutional and statutory provisions, if any.

Rule, regulation, notification, administrative instruction or order and circular.

In order to run the administrative the Government has to frame rules, regulation and issue notification, administrative instruction and circular. They are not absolutely unrelated. Sometimes one supplement the other. They dispense with the necessity of legislation in minor or detail matters. Rules and regulations are all comprised in delegated legislation. The legislature is overburdened and the need of modern society is complex. The legislature cannot foresee every administrative difficulty. So it lays down the policy and confer discretion on administrative agency to execute the policy.

Rule framed in exercise of power under the Act is legislative in character

10. *State of U.P.* v. *Baburam*, A. 1961 S.C. 751 (para. 23).
11. *State of Assam* v. *Ajit*, A. 1965 S.C. 1196 (paras. 11-12)
12. *Nagarajan* v. *State of Mysore*, A. 1966 S.C. 1942 (paras. 3-5, 7, 19); *J.K. Mills* v. *State of U.P.*, A. 1961 S.C. 1170 (1174).
13. Cf. *Narayanlal* v. *Mistry*, A. 1961 S.C. 29.
14. Cf. *Ram Krishna* v. *Tendolkar*, A. 1958 S.C. 538 (544, 549).
15. *Allen Berry* v. *Vivian Bose*, A. 1960 Punj. 86.
16. *State of Mysore* v. *Sarathy*, (1958) S.C.R. 334; *State of Bombay* v. *Krishnan*, A. 1960 S.C. 1223.
17. *Province of Bombay* v. *Khusaldas*, (1950) S.C.R. 621.
18. Cf. *Gopalan* v. *State of Madras*, (1950) S.C.R. 88; *Ashutosh* v. *State of Delhi*, (1950) S.C.J. 433; *Ram Singh* v. *State of Delhi*, (1951) S.C.R. 451.
19. Cf. *Nabhirajiah* v. *State of Mysore*, (1952) S.C.R. 744 (748); *Dwarka Prasad* v. *State of U.P.*, (1954) S.C.R. 803.
20. *State of Punjab* v. *Ajudhia*, A. 1981 S.C. 1374; *North Bihar Agency* v. *State of Bihar*, A. 1981 S.C. 1758; *City Corner* v. *Personal Assistant*, A. 1976 S.C. 143.

and will have the force as if state legislature had framed the rules.[20a] Rules framed under Art. 309 of the Constitution can be given retrospective effect.[20b] Service rules framed under the statutory provision has the force of law.[20c]

A field is fully covered by the provisions of the Act and Rules. There is no provision in the Act empowering the Government to supplement the Rules by executive instructions. If the Act had empowered the Government to issue administrative instructions to supplement the Rules the Government could fill up the gaps in the Rules by issuing administrative instructions provided the Rules are silent on the subject and the same is not inconsistent with the Rules. In absence of such provision in the Act the Government cannot supplement the Rules by executive order.[20d]

By means of administrative instruction Government can fill up the gaps of rule provided the rule is silent on the subject and they are not inconsistent with the rule.[20e] Administrative instructions not inconsistent with rules can be issued. It can also be issued to cover a field not covered by the rules. Administrative instructions can supplement the rules.[20f] In absence of provisions in the rules administrative instruction may apply.[20g] By means of administrative instructions Government can fill up the gaps of rule provided the rules is silent on the subject and they are not inconsistent with the rule.[20e]

An administrative order will survive unless it is qualified or ceases to operate for any other reason.[20h] Administrative order to create a post can be issued unless it is inconsistent with the rules.[20-i]

Notes or administrative instruction cannot supplement or supersede statutory rules.[20j] A writ shall not lie for enforcement of an administrative instruction.[20k]

In the absence of statutory rule executive instruction or decision will operate.[20-l]

Notification contrary to rule is invalid and inoperative.[20m] Statutory notification cannot be superseded by non-statutory executive order.[20n]

Notification implies of formal announcement of a legally relevant fact. A notification published in official gazette means a notification published by the authority of law. It is on formal declaration and publication of an order and shall have to be in accordance with the declared policies.

Administrative instruction cannot possibly be a substitute for a notification.[20-o]

20a. *State* v. *B. Suvarna Malini*, AIR 2001 SC 606: (2001)1 SCC 728.

20b. *G. Nagendra* v. *State*, (1998)9 SCC 439.

20c. *U.P. State Co-operative Land Development Bank Ltd.* v. *Chandra Bhan*, (1999)1 SCC 741: AIR 1999 SC 753; see *Mewa Singh* v. *Shiromoni Gurudwara*, AIR 1999 SC 688: (1999)2 SCC 60.

20d. *Laxman Dundappa* v. *Vishwa Bharata Seva Samity*, AIR 2001 SC 2836: (2001)8 SCC 378.

20e. *Union of India* v. *Chiranjit*, (2000)5 SCC 742.

20f. *State* v. *Mamatarani*, (1998)8 SCC 753.

20g. *R.C. Sahi* v. *Union of India*, (1999)1 SCC 482.

20h. *State* v. *Sidharth*, (2003)9 SCC 336.

20-i. *C. Rangaswamaiah* v. *Karnataka Lokayukta*, (1998)6 SCC 66: AIR 1998 SC 2496.

20j. *Union of India* v. *Chiranjit*, (2000)5 SCC 742.

20k. *Suresh Chandra* v. *Fertilizer Corporation*, (2004)1 SCC 592.

20-l. *Nagpur Improvement Trust* v. *Yadaorao Jagannath*, (1999)8 SCC 99: AIR 1999 SC 3084.

20m. *Gudur Kishan* v. *Sutvitha*, (1998)4 SCC 189: AIR 1998 SC 1242.

20n. *Union of India* v. *Daljit Singh*, (1999)2 SCC 672: AIR 1999 SC 1052.

20-o. *Subhash Ramkumar* v. *State*, (2003)1 SCC 506: AIR 2003 SC 269.

Regulation has a statutory sanction and force if they play an essential and integral role in the sphere of operation.[20p] Power to make regulation is confined to certain limits. If they are not made outside the limits courts will ignore them. That the regulation has legal status is of no avail.[20q]

Circular issued persuant to policy decision must pass the test of Arts. 14, 15, 16 of the Constitution of India.[20r]

Hand book for returning officers cannot overrule the provisions of statute, rules or order.[20s]

A noting in the office file will not confer any right upon a person.[20t]

An executive decision can be taken when statutory rules are silent.[20u] Entire Act read as a whole indicates a purpose. If the said purpose is carried out by the rules the said rules cannot be stated to be *ultra vires* of the provisions of the Act.[20v]

If an entry in the rule is manifestly printed erroneously court can correct it to make a sense.[20w]

A. NON-STATUTORY ADMINISTRATIVE ACTION

A purely administrative act may be statutory or non-statutory.

Source of non-statutory administrative power.

I. While the modern trend is towards an ever-increasing expansion of legislation and the bulk of administrative powers of the Executive and its agencies is derived from statutes and statutory instruments, there is still a vast field where the administrative authorities exercise powers unfettered or unregulated by any statute.

Thus, though a matter like the making of grants-in-aid to educational institutions by the State may be regulated by statute or rules made thereunder, there is nothing to prevent the State from prescribing the conditions of such grants by mere executive instructions or formulating rules which have no statutory authority and have, therefore, no force of law.[12] Similar view has been taken as regards the power of the Government to regulate methods of recruitment,[12] promotion,[21] etc., of Government servants, by non-statutory rules or executive instructions, so long as rules under Art. 309 of the Constitution have not been made. It cannot be urged that Government is powerless to act in such matters without making rules under Art. 309.[11-12]

II. The reason is that in *India,* though the executive powers of the Union and State Governments are, in general, co-extensive with their respective legislative powers under Arts. 73 and 162[3] of the Constitution,[12] it has been held that, except in matters where legislative authority for an action is required by the Constitution, for instance, for incurring expenditure [Art. 266(3); levying taxes [Art. 265]; enroaching upon the legal rights of citizens

20p. *G.B. Pant University* v. *State,* (2000)7 SCC 109: AIR 2000 SC 2695.

20q. *Bharathidasan University* v. *All India Council for Technical Education,* AIR 2001 SC 2861: (2001)8 SCC 676.

20r. *Kailash Chand* v. *State,* (2002)6 SCC 562: AIR 2002 SC 2877.

20s. *Ramphal* v. *Kamal,* (2004)2 SCC 759.

20t. *Bachhittar Singh* v. *State,* AIR 1963 SC 395; *Bahadursingh Lakhumbhai* v. *Jagdishbhai,* (2004)2 SCC 65.

20u. *Sandhya Jain* v. *Subhas Garg,* (1999)8 SCC 449.

20v. *C.C.E.* v. *Venus Castings (P) Ltd.,* AIR 2000 SC 1568.

20w. *Gujarat Composite Ltd.* v. *Ranip Nagarpalika,* (1999)8 SCC 625.

21. *Sant Ram* v. *State of Rajasthan,* A. 1967 S.C. 1910 (1914).

or imposing restrictions upon them under Articles such as 19 or 304(b), no prior legislative sanction or authority is required for either Government to exercise its executive power.[22] Thus, it is competent for the appropriate Government, by its non-statutory administrative action—

(a) To regulate admission into educational institutions, if that can be done without violating any statutory or constitutional provision.[23]

(b) To fix the dearness allowance payable to its employees, by a resolution.[24]

(c) To regulate the granting of Government permission to open a new school in a local area[25] or granting of Government recognition or aid to an educational institution.[11]

III. Once, however, statutory rules are made by the Government, Government must abide by the mandates of such rules,[24] so that it can no longer issue executive instructions on matters covered by the statutory rules, if they are inconsistent with such statutory rules.[12] The statutory rules cannot be amended or suspended by issuing administrative instructions, but if the statutory rules are *silent* on the point, Government can fill up the gaps or supplement[26] the rules or to implement the policy behind the rules[27] by issuing instructions not inconsistent with the rules already framed.[21]

IV. It is further to be noted in the present context that even though Rules made in exercise of the executive power under Art. 73 or 162 of the Constitution of India have no statutory force, Rules made by the President and the Governor, in exercise of the power conferred by the Proviso to Art. 309 have statutory force, for, as that Proviso indicates, such rule-making power is of a legislative character and is available as a substitute so long as the appropriate Legislature is not in a position to make an Act relating to the subject. Hence, unless such Rule contravenes some other provision of the Constitution, it shall have the same force as a statute passed by the appropriate Legislature.[28] If, however, the Rules made by the President or Governor do not profess to have been made in exercise of the power conferred by Art. 309 or they are not made in the *form* of statutory rules,[29] they will have no statutory force and will operate merely as executive or administrative instructions.[29]

It follows that even after Rules under Art. 309 have been issued, there is nothing to prevent the President or the Governor to issue such administrative rules or directions on matters upon which the Rules made under Art. 309 are silent,[28] provided such administrative directions are not inconsistent with the Rules made under Art. 309[30] or amount to an amendment thereof.[31]

In other words, supplementary administrative instructions will be valid so long us they are not *ultra vires* the statutory Rules.[30]

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22. *Ram Jawayya* v. *State of Punjab.* (1955) 2 S.C.R. 225 (*236*).
23. *State of Madras* v. *Champakam,* (1951) S.C.R. 525.
24. Cf. *State of M.P.* v. *Mandawar,* A. 1954 S.C. 493.
25. *State of Maharashtra* v. *Lok Sikshan Sanstha,* A. 1973 S.C. 588 (para. 9).
26. *C.&A.G.* v. *Mohan,* (1992) 1 S.C.C. 20 (para. 12).
27. *A.B.S.K.S.* v. *Union of India,* (1981) 1 S.C.C. 246.
28. *State of Mysore* v. *Bellary,* A. 1965 S.C. 868; *Shukla* v. *State of Gujarat.* (1970) 1 S.C.C. 419 (*425*).
29. *Saksena* v. *State of M.P.,* A. 1967 S.C. 1264 (1266-67); *Prabhakar* v. *State of Maharashtra,* (1969) 3 S..C.C. 134.
30. *Union of India* v. *Amrik,* (1994) 1 S.C.C. 269 (paras. 6-8).
31. *Sachdev* v. *Union of India,* (1980) U.J.S.C. 983 (para. 13).

Non-statutory administrative rules and instructions are not enforceable in a court of law.

1. Administrative instructions, rules or manuals,[32] which have no statutory force, are not enforceable in a court of law. Though for breach of such instructions, the public servant may be held liable by the State[33] and disciplinary action may be taken against him, a member of the public who is aggrieved by the breach of such instructions cannot seek any remedy in the courts.[34] The reason is that, not having the force of law, they cannot confer any *legal* right upon anybody, and cannot, therefore, be enforced even by writs under Art. 226.[35]

2. Even a complaint of discrimination cannot be made for non-compliance with such guidelines.[36]

3. It follows that Government is free to enter into a contract in violation of such non-statutory Rules.[29]

4. Conversely, if the Government seeks to enforce a non-statutory resolution or circular to defeat the rights of an employee under a Rule made under Art. 309 of the Constitution, such action of the Government would be *ultra vires,*[29] until such non-statutory instruction is adopted as a Rule or amendment thereto.[37]

5. A statutory authority cannot disregard his statutory obligations and considerations in view of administrative instructions to the contrary.[38]

6. Even an authority having statutory power to make notifications or orders may issue administrative instructions to its subordinates, which cannot have statutory force, because they are not made either in the form of such statutory rule,[29] notification or order[39] or because the formalities prescribed for exercising the statutory power have not been complied with.[39] In either case, such administrative order or instruction is not enforceable in a court.

Thus, though a Rule made in exercise of the power conferred by Art. 309 is enforceable as a statutory rule, there is nothing to prevent the Government from granting a concession or privilege by a non-statutory notification or memorandum, without violating any statutory provision.[40] In such a case, the non-statutory concession cannot be enforced.

6. Where an order or notification, purported to have been made in exercise of statutory power, does not comply with the procedural requirements prescribed by the statute, e.g., publication, such order or notification may be treated as an administrative instruction[41] which is binding inter-departmentally, but it would not have the force of law. Hence,

Where an impost is laid down by such unpublished order of the

32. *Fernandez* v. *State of Mysore,* A. 1967 S.C. 1753 (para. 12); *State of Maharashtra* v. *Lok Sikshan Sanstha,* A. 1973 S.C. 588 (para. 27); *Union of India* v. *Maiji,* A. 1977 S.C. 757 (paras. 31-36).

33. *Hassanji* v. *State of M.P.,* (1963) Supp. 2. S.C.R. 236 (240-41); A. 1965 S.C. 470.

34. *Joint Chief Controller* v. *Aminchand,* A. 1966 S.C. 478; *State of Assam* v. *Ajit Kumar,* A. 1965 S.C. 1196 (1200) [*Mandamus* refused].

35. *Satyanarayan* v. *Mallikarjun,* A. 1960 S.C. 137 (142); *Rowther* v. *S.T.A. Tribunal,* A 1959 S.C. 896 (899) [*Certiorari*].

36. *Hemlata* v. *State of Maharashtra,* (1981) 4 S.C.C. 647 (657).

37. *Shyam Lal* v. *State of U.P.,* (1955) 1 S.C.R. 26.

38. *Raman & Raman* v. *State of Madras,* A. 1959 S.C. 694 (700).

39. *Mahendra* v. *State of U.P.,* A. 1963 S.C. 1019 (1035).

40. *Rajalakshmiah* v. *State of Mysore,* A. 1967 S.C. 993 (996).

41. *Dwarka* v. *State of Bihar,* A. 1959 S.C. 249 (253).

Government, it would be an illegal imposition (contrary to Art. 265 of the Constitution), which cannot be recovered from any individual.[42]

7. The net result is that when a person is aggrieved because the administrative authority has either refused to apply[43] the administrative instruction or misconstrued it,[44] the aggrieved party can have no legal remedy under Art. 226 of the Constitution or otherwise, even though the foundation of the power to issue administrative instructions may be Art. 73 or Art. 162 of the Constitution which confers 'executive power' on the Union or the State Executive.[43] So long as there is no statutory authority, it makes no difference whether the administrative authority labels his instruction as a rule, order, direction or the like.

8. It may be that a statute itself makes a distinction between rules having statutory force and administrative orders and directions which shall have no legal force.[44] The case of such administrative directions having a statutory force shall be dealt with separately, in order to avoid confusion.

9. Similarly, if may be that while some of the executive instructions are covered by the statutory power, others, though issued under the same statute are not covered by it and have, therefore, no legal force.[45]

Exceptions to the non-enforceability of administrative instructions have, however, been acknowledged on special grounds :

A. (a) Even though a non-statutory rule, bye-law or instruction may be changed by the authority who made it, without any formality and it cannot ordinarily be enforced through a court of law, the party aggrieved by its non-enforcement may, neverthless, get relief under Art. 226 of the Constitution where the non-observance of the non-statutory rule or practice would result in arbitrariness or absence of fair play[46] or discrimination[47],—particularly where the authority making such non-statutory rule or the like comes within the definition of 'State' under Art. 12.[46,48]

(b) It may also be enforceable against the Government or other authority issuing the non-statutory instructions, circular or letter[49] or scheme[50] if it operates to raise the equitable principle of 'promissory estoppel' (which will be more fully explained hereafter).[50]

(c) Analogously, it may be enforced against the Government where it has been acted upon for a long time.[51]

(d) Though an administrative order, not having the force of law, cannot be enforced at the instance of an aggrieved party, an aggrieved party may have his remedies if his constitutional rights are affected by the enforcement of such administrative order against him. Thus, the constitutional remedy

42. *State of Kerala* v. *Joseph*, A. 1958 S.C. 296 (paras. 6-7).
43. *Nagendra* v. *Commr.*, A. 1958 S.C. 398 (412-13).
44. *Abdulla* v. *S.T.A.*, A. 1959 S.C. 896 (paras. 11, 18).
45. *State of Punjab* v. *Joginder*, (1990) 2 S.C.C. 661 (para 10).
46. *Minhas* v. *Indian Statistical Institute*, A. 1984 S.C. 362 (paras. 17(ii)(b), 22-24).
47. *Jagjit* v. *State of Punjab*, A. 1978 S.C. 988 (paras 5-6); *Gurdial* v. *State of Punjab*, A. 1979 S.C. 1622 (para. 12).
48. *Ajay* v. *Khalid*, A. 1981 S.C. 487 (493); *Ramana* v. *I.A.A.I.*, A 1979 S.C. 1628 (1635); *Ahluwalia* v. *State of Punjab*, A. 1975 S.C. 984; *Sukhdev* v. *Bhagatram*, A. 1975 S.C. 1331.
49. *M.P. Sugar Mills* v. *State of U.P.*, A. 1979 S.C. 621 (paras. 32-33).
50. *Union of India* v. *Anglo-Afghan Agencies*, A. 1968 S.C. 718 (paras.10,18-19, 23).
51. *Baleshwar* v. *State of U.P.*, A. 1981 S.C. 41; *Union of India* v. *Joseph*, A. 1973 S.C. 303.

under Art. 32 or 226 may be available if his fundamental right (e.g. Art. 14)[52] has been affected by the administrative order, instruction or guideline.[41]

B. Conversely, a person aggrieved by the application of an administrative instruction, regulation or order against him may obtain relief from the Court—

(a) Where the instruction is addressed to a *quasi-judicial* tribunal who follows it and thereby affects the legal rights of an individual.[53]

(b) Where the instruction is inconsistent with some statutory provision[54] or subordinate legislation, having statutory force.

(c) Where the Petitioner's fundamental rights are affected by the application of such administrative regulation,[53-55] e.g., Arts. 14, 19.[56]

(d) Where the action of the Government is unreasonable,[57] arbitrary[58] or *mala fide*,[56] or lacks, in fair play.[57]

(e) Where the action of the Government is *against public interst*.[56] This proposition the Supreme Court has drawn from the Rule of Law which empowers the Court to invalidate any arbitrary action on the part of the Government.[56]

This proposition is, however, circumscribed by the burden of proof. It has been laid down that there is a *presumption* that governmental action is in the public interest and the burden lies heavily upon the person who avers to the contrary. There are a large number of policy considerations which Government must necessarily weigh in taking any action, and a Court would not strike it down unless it is satisfied on adequate and proper materials that the action of the Government is not in the public interest.[52, 56]

In particular, any action taken to implement any of the Directive Principles in Part IV of the Constitution would ordinarily be taken as informed with public interest.[56]

Can the Court interfere with administrative policy ?

I. The general rule is that a court cannot interfere with the administrative policy[56] of the Government or other executive authorities, relating to administrative matters, e.g., the grant of permission to open a new school;[55] or the grant of Government recognition or aid to an educational institution;[59] or the distribution between private, public and joint sectors under a scheme of nationalisation;[60] or the acceptance of a bid at a public auction;[61] or the equation of posts in case of recruitment from different sources.[62]

Except where legislation is required to affect private rights, Government is also free to make changes in its policy, without any formality.[61, 63]

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52. *Narendra* v. *Union of India*, (1990) Supp. S.C.C. 440 (paras. 106-107).
53. Cf. *Raman* v. *State of Madras*, A. 1959, S.C. 694 (paras 8-9).
54. *Mannalal* v. *State of Assam*, A. 1962 S.C. 386 (para. 12).
55. *State of Maharashtra* v. *Lok Sikshan Sanstha*, A. 1973 S.C. 588 (para. 9); *Bishamber* v. *State of U.P.*, A. 1982 S.C. 33; *State of M.P.* v. *Bharat*, A. 1967 S.C. 1170; *Kharak Singh* v. *State of U.P.*, A. 1963 S.C. 1295 (paras. 19, 21-22, 36).
56. Cf. *Kasturi* v. *State of J. & K.*, A. 1980 S.C. 1992 (paras 11-15); *Raghupati* v. *State of A.P.*, (1988) 4 S.C.C. 364.
57. *Asif* v. *State of J. & K.*, A. 1989 S.C. 1899 (para. 24).
58. *Srinivasa* v. *Veeraiah*, (1992) 3 S.C.C. 63 (para. 6-7).
59. *State of Assam* v. *Ajit*, A. 1965 S.C. 1196.
60. *Sanjeev Coke* v. *Bharat Coking*, A. 1983 S.C. 239 (para. 21).
61. *State of U.P.* v. *Vijay*, A. 1982 S.C. 1234 (para. 3).
62. *Makashi* v. *Menon*, A. 1982 S.C. 101 (para. 34); *Kumar* v. *Union of India*, A. 1982 S.C. 1064 (paras. 24-25).
63. *State of T.N.* v. *Hind Stone*, A. 1981 S.C. 711 (para. 9).

II. To the foregoing general rule, exceptions have been admitted by the Court on the following grounds—

(a) Where the fundamental right of an individual is affected,[55] because Art. 12 hits any governmental action, statutory or non-statutory; or some other constitutional provision is violated.[64]

(b) Where the policy is against 'public interest',[65] (see p. 150 above).

(c) Where some principle of natural justice is violated.[55]

(d) Where the administrative decision is arbitrary, unreasonable, *mala fide*.[61, 63]

(e) Where it involves breach of promissory estoppel[50] or legitimate expectation.[66]

A non-statutory administrative rule or order may be changed.

1. Since there is no formality[67-68] for making a non-statutory administrative order and since it does not create any legal right in favour of any person, it may be changed at any time or withdrawn,[68] without any formality.[69]

2. If, however, an administrative act, whatever be its form, is made in the exercise of a statutory power, it can be changed only in conformity with the requirements of that statutory provision and not at the will of the administrative authority.[70]

3. If, again, the order is *quasi-judicial*, it cannot be reviewed, in the absence of a power of review conferred by statute, even though it has not yet been authenticated under Art. 166 of the Constitution,[71] or even though it is not 'final'.[72]

B. STATUTORY ADMINISTRATIVE ACTION

Source of statutory administrative power.

An administrative order or other act may have a statutory force when it is done in exercise of a power conferred either by a statute or by the Constitution itself.

But though specific provisions of the Constitution may confer specific power to issue orders having the force of law, Art. 73 or Art 162, which defines the extent of the executive power of the Union or a State Government, does not of itself confer on the appropriate Government to make rules having a statutory force. By virtue of these Articles, the Government is entitled to issue instructions to its servants, but that does not give statutory force to such instructions or render them justiciable.[73]

The problem of statutory administrative directions.

I. We have seen that where administrative directions or instructions are issued by a superior authority to his subordinates, such directions have little legal force, so far as the Courts are concerned (p. 148, *ante*).

64. *S.P. Gupta* v. *Union of India*, A. 1982 S.C. 149 (para. 45).
65. *Kasturi* v. *State of J.&K.*, A. 1980 S.C. 1892 (para. 14).
66. *Narendra* v. *Union of India*, (1990) Supp. S.C.C. 440 (para. 106).
67. *Mahendra* v. *State of U.P.*, A. 1963 S.C. 1019 (1035).
68. *State of Mysore* v. *Putte Gowda*, (1967) S.C. [C.A. 1108/63].
69. *Ram Prashad* v. *State of Punjab*, A. 1966 S.C. 1607 (1613).
70. *Jaisinghani* v. *Union of India*, A. 1967 S.C. 1427 (1434).
71. *State of Mysore* v. *Putte Gowda*, (1967) S.C. [C.A. 1108/63].
72. *State of M.P.* v. *Haji Hasan*, A. 1966 S.C. 905 (907).
73. *Fernandez* v. *State of Mysore*, (1967) S.C. [C.A. 218/67].

II. But sometimes the power to issue administrative directions is conferred by the provisions of the relevant statute itself. The legal force of such statutory directions is somewhat anomalous. While they are of a higher order than non-statutory directions, their status is not fully equal to statutory Rules.

A prominent instance of such statutory provision for issuing administrative directions is offered by s. 43A, inserted in the Motor Vehicles Act, 1939, by the Madras Amendment Act, 1948, which reads as follows :

"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 or a Regional Transport Authority and such Transport Authority shall give effect to all such orders and directions."

The general rule is that where rule, regulation, scheme, order or direction is issued in exercise of statutory power, it would have the same force of law as the statute itself.[74]

Raman v. *Raman* : **a critique.**

But in *Raman's case*[68] and the cases that followed it, it has been held that the directions issued under s. 43A, though made in exercise of power conferred by statute, have no force of law. They are binding upon the subordinates of the Department and may be enforced against them for violating the directions.[68] But they do not add to the provisions of the statute[75] nor create any rights in favour of any party to the proceeding before the authorities under the Act.[68,75] Hence, so far as an aggrieved individual is concerned a misapplication of or omission to apply any such direction in a particular case cannot give rise to a cause of action.[75]

The vagaries of the decision in *Raman's case*[68] have been reduced by subsequent decisions, laying down the following propositions :

i. The directions issued under s. 43A are subject to the doctrine of *ultra vires* and would, therefore, be void if they are not in conformity with the scope and the purposes of the Act,[76] or other provisions of the Act.[77]

They would also be void if they seek to affect the fundamental rights of individuals[78] or to control *quasi-judicial* tribunals.[78]

ii. Even though the directions issued under s. 43A may be changed at any time, such change—

(a) cannot affect proceedings for the issue of permit which have been disposed of before such change;[79]

(b) cannot interfere with the discretion of a *quasi-judicial* tribunal[80] or overturn its decisions.[81]

iii. If a *quasi-judicial* tribunal acts according to directions issued under s. 43A, its decision shall be void.[82]

The position regarding the directions issued under s. 43A of the Motor Vehicles Act is thus unsatisfactory. Once the doctrine of *ultra vires* has been introduced to invalidate any such direction, there is no reason why *intra*

74. *Sukhdev* v. *Bhagatram*, A. 1975 S.C. 1331.
75. *Abdulla* v. *S.T.A.*, A. 1959 S.C. 896.
76. *Rameshwar* v. *State of U.P.*, A. 1983 S.C. 383 (paras. 19, 22).
77. *Shanmugam* v. *S.R.V.S.*, A. 1963 S.C. 1626.
78. *Rajagopala* v. *S.T.A.*, A. 1964 S.C. 1573; *Ravi Roadways* v. *Asia*, A. 1970 S.C. 1241.
79. *Attar* v. *R.T.A.*, A. 1978 S.C. 1152 (para. 5).
80. *J.C. Roadways* v. *Pandiyan Corpn.*, A. 1978 S.C. 423.
81. *Sharif* v. *R.T.A.*, A. 1978 S.C. 209 (paras. 11-12).
82. *Gobald* v. *Coimbatore Service*, (1969) 2 S.C.W.R. 619; *Jaya Ram* v. *Rajarathinam*, (1967) 2 S.C.W.R. 857.

vires directions should not be legally enforceable at the instance of an aggrieved individual.

Incidents of statutory administrative orders.

I. Since a statutory order is issued under authority conferred by a statute, it is obvious that it shall be subject to the rule of *ultra vires.*

II. When an order or other statutory instrument is issued not in exercise of the power conferred by a statute itself but by a rule or regulation or other statutory instrument issued under the statute, the order or other statutory instrument of the second degree may be *ultra vires* not only for exceeding the powers conferred by the statute or the purposes thereof but also those of the statutory instrument of the first degree. Thus,—

(i) When a compulsory purchase order or scheme is issued under a statute authorising the acquisition for a specific purpose, say, the building of a market hall and the widening of a road, a notice for acquisition for another purpose, namely, a car park, would be *ultra vires.*[83]

(ii) An order of detention issued and r. 30(1)(b) of the Defence of India Rules, 1962, will be invalid if it is issued for a purpose other than those specified in that Rule, e.g., maintenance of public order, public safety;[84] similarly invalid will be an order for seizure of documents purported to be issued under r. 156.[85]

III. In the case of a statutory order, a further question arises, where the making of the order is left to the *discretion* of the statutory authority, it can also be challenged on the ground of *mala fides,* which, of course, in this context, is an offshoot of *ultra vires.*[86] It means that—

(i) If, in a statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, exercising the discretion, it must have regard to those matters.[86]

(ii) Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, it must disregard those matters.[86]

***Ultra vires* in relation to statutory administrative orders**

The question of *ultra vires* can, obviously, arise only where the administrative order purports to have been made in the exercise of a statutory power. The general principles relating to *ultra vires* having been fully explained before, we shall, in the present context, only notice some applications of those principles to administrative orders, as distinguished from subordinate legislation or statutory instruments having a legislative character, remembering that anything which is *ultra vires* is null and void.[87-88]

As before, it will be convenient to discuss the substantive and procedural requirements of the statute separately, with reference to the two broad categories of 'excess' of power and 'abuse' of power.

I. Substantive *ultra vires.*

(a) An administrative act becomes *ultra vires,* if the subject-matter to

83. *Grice* v. *Dudley Corpn.,* (1957) 2 All E.R. 673 (682).
84. *Ram Manohar* v. *State of Bihar,* A. 1966 S.C. 740 (745-46).
85. *Durga Prasad* v. *Supdt.,* A. 1966 S.C. 1209 (1212).
86. *Associated Prov. Pictures* v. *Wednesbury Corpn.,* (1947) 2 All E.R. 680 (682) C.A.
87. *Minister of Agriculture* v. *Mathews,* (1949) 2 All E.R. 724 (729); *Rhyl U.D.C.* v. *Rhyl Amusements,* (1959) 1 All E.R. 257 (265); *Vine* v. *National Dock Labour Bd.,* (1956) 3 All E.R. 939 (H.L.).
88. *Gokulchand* v. *R.,* A. 1948 P.C. 82.

which the act relates is beyond the powers of the authority under the statute,[89-90] e.g.—

(i) Where the Government cancelled a reference of an industrial dispute made under section 10(1) of the (Indian) Industrial Disputes Act, 1947, without having the power to cancel or revoke a reference under the Act.[91]

(ii) Where, in exercise of a power to 'fix minimum wages', the Government issues a notification providing for a machinery to deal with disputes arising between the parties.[92]

(iii) Where, in the purported exercise of a power "to amend or revise the *constitution* of the Governing Bodies of admitted colleges", the Vice-Chancellor nominates certain persons on the Governing Body of a college.[93]

(iv) Where, in the purported exercise of the power "to regulate the *procedure*" relating to an appeal, the administrative authority makes a rule or notification which cuts down the *substantive* right of appeal conferred by the statute, by providing that the appeal shall not be admitted unless a specified sum is not paid or deposited.[94]

But the test of *ultra vires* is whether the power conferred by the statute has been exceeded and not whether the policy of the statute would be effectively served or implemented by the subordinate legislation in question.[95]

(b) An order or notification may be *ultra vires* for having transgressed an express or implied limitation imposed by the statute which confers the power.

(i) S. 114(2) of the Bombay Industrial Relations Act, 1946, empowers the State Government to give a direction that an agreement entered into by a Representative Union shall be binding on other employers and employees in an industry, under certain conditions. One of these is that—

"before giving a direction under the section the State Government may, in such cases, as it deems fit, make a reference to the Industrial Court for its opinion".

From this it has been held that the State Government could exercise this power only in those cases where the agreement could be enforced by the Industrial Court itself. If the Government makes a direction under this section to enforce an agreement which is contrary to the industrial law, a decision of the Full Bench of the Industrial Court (s. 95A) or a decision of the Supreme Court, such notification must be struck down as *ultra vires*.[96]

(ii) The Kerala Essential Articles Control (Temporary Powers) Act, 1962, empowered the State Government to declare any article *'not* being an essential commodity as defined in the Essential Commodities Act, 1955', as an 'essential article' for the purposes of the Kerala Act.

The State Government declared 'raw casehwnut' as an essential article even though cashewnut was an essential commodity, as a foodstuff, under the Central Act. *Held,* the declaration of the State Government and the Order made thereunder were *ultra vires*.[97]

(c) Where a permit or licence duly issued under a statute imposes a condition upon the licensee which could not be imposed under the statute,[98] or which is void for uncertainty[98] (after proper construction with reference to the context),[79] the condition may be invalidated as *ultra vires*.

(d) It is a condition for the exercise of any statutory power that it

89. *Prescott* v. *Birmingham Corpn.*, (1954) 3 All E.R. 698 (C.A.).
90. *Irani* v. *State of Madras*, A. 1961 S.C. 1731.
91. *State of Bihar* v. *Ganguly*, A. 1958 S.C. 1018 (1026).
92. *Bidi Merchants' Assocn.* v. *State of Bombay*, A. 1962 S.C. 486 (495-96).
93. *Bisheshwar* v. *University of Bihar*, A. 1965 S.C. 601 (606).
94. *Collector of Customs* v. *Bava*, A. 1968 S.C. 13 (15); *Hossein Kasam* v. *State of M.P.*, A. 1954 S.C. 221.
95. *Maharashtra State E. Bd.* v. *Paritosh*, A. 1984 S.C. 1543 (para. 14).
96. *Prakash Cotton Mills* v. *State of Bombay*, (1962) 1 S.C.R. 105 (110-12); *Moon Mills* v. *Meher*, A. 1967 S.C. 1450.
97. *Janardhan* v. *Union of India*, A. 1981 S.C. 1485 (para. 27).
98. *Fawcett Properties* v. *Buckingham C.C.*, (1959) 2 All E.R. 321 (326) C.A.

must be exercised in *good faith*,[99] i.e., for the *purposes*[99-100] for which the Legislature conferred that power, and not for any other.[1] The administrative action would be invalidated if—

"powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorised or actually forbidden".[2]

The reason is that if the statutory power is exercised for a purpose other than that for which the statute conferred it, it ceases to be 'under the statute' and the act as done becomes *ultra vires*. Such illegitimate exercise of a statutory power is also known as a *'fraud* upon the statute.'[2a] An apparent exception to this general rule is that the 'purpose' of a statute includes anything *'ancillary'* to the purpose.[3-4] Whether a power is ancillary to the dominant purpose of a statute is one of construction which, however, is not an easy one as will appear from the dissent of Denning, L.J. (as he then was) in *Fitzwilliam's case*.[3] A power is ancillary if it is necessary for effectuating or 'implementing'[3] the purposes of or the functions under the statute in question.

Even where administrative power is vested in the subjective determination of an authority, the Courts may invalidate the action[4] if it is established that the authority acted otherwise than in good faith,[5] or without applying its mind to the subjective condition precedent.[6]

If any decision is taken by a statutory authority at the behest or on the suggestion of a person who has no statutory role to play the same will be *ultra vires*.[6a]

But, as in *England*, so in India, the challenge on the ground of *mala fides* has hardly succeeded, for the following reasons :

(i) The onus of proving *mala fides* is on the person who challenges the statutory act on this ground;[7-8] and the plea is not entertained in the absence of specific pleading.[9]

(ii) The onus becomes almost impossible to discharge where the statute empowers the authority to act on subjective satisfaction, because the Court cannot undertake an investigation as to the sufficiency of the materials on which such satisfaction was grounded in the case before the Court.[10] As Sastri, C.J,. of *our* Supreme Court observed :

"Allegations of *mala fide* conduct are easy to make but not always as easy to prove."[1]

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99. *State of Bombay* v. *Krishnan*, A. 1960 S.C. 1223; *Union of Journalists* v. *State of Bombay*, A. 1964 S.C. 1617 [refusal to make a reference under s. 10 of the Industrial Disputes Act].

100. *R.* v. *Minister of Health*, (1929) 1 K.B. 619; *Scotland* v. *Overtoun*, (1904) A.C. 515 (695); *Galloway* v. *London Corpn.*, (1866) L.R. 1 H.L. 34 (43).

1. Cf. *Iron & Steel Co.* v. *Workmen*, A. 1958 S.C. 130 (137); *Chartered Bank* v. *Employees' Union*, A. 1960 S.C. 919 (922).

2. *A.G. for Canada* v. *Hallet*, (1952) A.C. 427 (444).

2a. *Janardhan* v. *P.D.S.E.*, (1994) 6 S.C.C. 506 (para. 4)—3 Judges.

3. *Fitzwilliam's Wentworth Estates* v. *Minister of Town & Country Planning*, (1951) 1 All E.R. 982 (C.A.), affirmed by (1952) 1 All E.R. 509 (H.L.).

4. *Travis* v. *Minister of Local Govt.*, (1951) 2 All E.R. 673; *Liversidge* v. *Anderson*, (1942) A.C. 206 (224); *R.* v. *Halliday*, (1917) A.C. 260; *Chidambaram* v. *K.E.*, (1947) A.C. 200 (207); *Point of Ayr Collieries* v. *Lloyd George*, (1943) 2 All E.R. 546; *K.E.* v. *Sibnath*, A. 1945 P.C. 156; *Emp.* v. *Vimlabai*, A. 1946 P.C. 123; *Shibban Lal* v. *State of U.P.*, (1954) S.C.R. 418 (422); *State of Bombay* v. *Atmaram*, (1951) S.C.R. 167.

5. *Union of Journalists* v. *State of Bombay*, A. 1964 S.C. 1617.

6. *K.D. Co.* v. *K.D. Singh*, A. 1956 S.C. 146.

6a. *Bahadursingh Lakhubhai* v. *Jagdishbhai*, (2004)2 SCC 65.

7. *Ex parte Greene*, (1942) A.C. 284.

8. *Ram Singh* v. *State of Delhi*, (1951) S.C.R. 451 (461).

9. *Demetriades* v. *Glasgow Corpn.*, (1951) 1 All E.R. 457 (460-61).

10. *State of Bombay* v. *Atmaram*, (1951) S.C.R 167.

(iii) As has been already stated, the recital in the order raises a presumption as to its correctness.[11] An affidavit of the statutory authority heightens that presumption to the point of irrebutability. Thus, in *Ram Singh* v. *State of Delhi,*[8] it was contended that the order of detention against the Petitioners under s. 3(1) of the Preventive Detention Act, 1950, had not been made for the purpose of 'maintenance of public order' as authorised by the statute, but for "the collateral purpose of stifling effective political opposition and legitimate criticism of the policies pursued by the Congress Party" inasmuch as the Petitioners were prominent members of a political organisation opposed to the Congress Party which was in power. Rejecting this contention, Sastri, C.J., observed—

"The District Magistrate has, in his affidavit filed in these proceedings, stated that, from the materials placed before him by persons experienced in investigating matters of this kind, he was satisfied that it was necessary to detain the petitioners with a view to preventing them from acting in a manner prejudicial to the maintenance of public order and he has emphatically repudiated the purpose and motive imputed to him. We have thus allegations on the one side and denial on the other and the petitioners made no attempt to discharge the burden, which undoubtedly lay upon them, to prove that the District Magistrate acted *mala fide* in issuing the orders of detention."[8]

(e) Where a statute confers a power to be exercised 'subject to' the rules made under the Act, an exercise of the power in contravention of the limitations or conditions imposed by the rules will be *ultra vires.*[12]

(f) As has been already explained, an act of an administrative authority may be *ultra vires* for not complying with statutory rules even where such rules have been made by itself, and *mandamus* will lie to direct it to forbear from giving effect to an order made in violation of its own rules.

(g) As stated earlier, in the absence of specific authorisation by statute, a statutory order cannot be given retrospective effect.[13]

For instance, by giving retrospective effect to the appointment of a statutory authority, Government cannot clothe him with powers conferred by the statute retrospectively; and any act done by a person prior to his actual appointment cannot be validated by any *administrative* act.[14]

Limits of substantive *ultra vires.*

(a) As in the case of other statutory instruments, an administrative statutory order will not be *ultra vires* if it can be construed as reasonably incidental to a function which the Legislature has expressly authorised.[15] Thus—

(i) The power of 'general management of houses' within the area of a local authority has been construed as including the power to arrange for insurance of the house by the tenants through the local authority.[15]

(ii) The power to 'provide for any matter likely to promote the public health' has been construed to include the power to send a delegation to a foreign health conference.[16]

Such incidental power is nothing but "what might be derived by reasonable *implication* from the language of the Act".[17]

Thus, the power to delegate a statutory power to some other 'person' includes the power to delegate in favour of the holder of an office instead of by name.[18]

11. *K.E.* v. *Sibnath,* A. 1945 P.C. 156.
12. *Joginder* v. *Dy. Custodian-General,* A. 1967 S.C. 145 (148).
13. *Dayalbagh Co-operative Society* v. *Sultan Singh,* (1966) S.C. [C.A. 654/65].
14. *Ajit Singh* v. *State of Punjab,* A 1967 S.C. 856 (859).
15. *A.G.* v. *Crayford U.D.C.,* (1962) 2 All E.R. 147 (C.A.).
16. *Nagpur Corporation* v. *Phillip,* (1963) Supp. 2 S.C.R. 600.
17. *Amalgamated Society* v. *Osborne,* (1910) A.C. 87 (97).
18. Cf. *Habeeb Md.* v. *State of Hyderabad,* (1953) S.C.R. 661 (674).

(b) The validity of a statutory administrative act depends upon the question whether it is *intra vires* the statute or statutory instrument under which it purports to have been made. Recital of a wrong section does not, accordingly, vitiate the act, if it is authorised by any other provision.[19]

(c) The principle applicable to general and special powers, relating to rule-making power, is also applicable in other species of statutory power. This means that where a statute confers a specific power 'without prejudice to the generality of the general powers' already conferred, the specific power is only illustrative and does not in any way restrict the general power.[20] In other words, an act done ostensibly in the exercise of the specific power will not be *ultra vires,* if it can be brought under the general power.[20]

(d) Though the Government, in the exercise of its executive power cannot supersede a *statutory* rule or regulation, it can certainly *effectuate* the purpose of such rule or regulation by supplementing it,[21] in a matter on which the statutory provision is silent.[21]

Regulation 5(2), framed by the Central Government in pursuance of r. 8(1) of the Indian Administrative Service (Recruitment Rules, 1954, provided that in a selection of State Civil Service for promotion to the Indian Administrative Service, by the Committee for Selection, shall be based on 'merit and suitability in all respects', with due regard to seniority. It did not, however, furnish any guidelines for assessing merit or suitability of a candidate. Since every executive authority must be interested in maintainng the integrity of every public servant as a requisite for his efficiency, it was competent for the Government to issue administrative instructions that in order to be eligible for selection, a candidate from the State Government must produce an integrity certificate, in the prescribed form, from the State Government. The contention that the said administrative instruction (issued as Resolution 1.1 in the Manual) was *ultra vires* was repelled by the Court, observing that—

"These resolutions of the Government of India do *not* transgress the requirement of the Regulations but are in *furtherance* thereof."[21]

(e) On the other hand, there is no *ultra vires* where the subordinate authority does not comply with the directions of the superior authority which are themselves beyond the statutory powers of the superior authority,[21a] or where the Government issues administrative *Instructions* in the absence of statutory Rules on that matter.[21b]

II. Procedural *ultra vires.*

An administrative act may be procedurally *ultra vires* for various reasons, even though the act itself is within the substantive ambit of the power conferred by the statute upon the authority in question. Thus,—

(i) Where the statute requires a power to be exercised in a certain form, the neglect of that form renders the exercise of the power *ultra vires.*[22]

Thus, where a Minister is empowered to do a thing by making an 'order', it must be done by issuing an order duly made and published in the manner required by the statute and not by issuing 'instructions' to his *subordinates.*[23] Where the statute prescribes a written licence, an oral licence will be invalid.[22] Similar view has been taken as regards a deportation order.[24]

19. Cf. *Radheshyam* v. *State of M.P.,* A. 1959 S.C. 107 (114).
20. *Om Prakash* v. *Union of India,* A. 1971 S.C. 771 (para. 5).
21. *Gurdial* v. *State of Punjab,* A. 1979 S.C. 1622 (para. 12).
21a. *G.H.B.E.A.* v. *State of Gujarat,* (1994) 2 S.C.C. 24 (para. 11)—3 Judges.
21b. *U.O.I.* v. *Amrik,* (1994) 1 S.C.C. 269 (para. 8).
22. *Jackson & Sons* v. *Butterworth,* (1948) 2 All E.R. 558.
23. *Simms Motor Units* v. *Minister of Labour,* (1946) 2 All E.R. 201 [Reg. 58A(4a) of the Defence (General) Regulations, 1939].
24. *Musson* v. *Rodrigues,* (1953) A.C. 530.

A crucial instance is offered by the Supreme Court decision in *Fatma Haji* v. *State of Bombay* :[25]

R. 92 made under the Bombay Land Revenue Code provides—"Where land assessed for purposes of agriculture only is *subsequently used* for any purposes unconnected with agriculture the assessment upon the land so used shall, *unless otherwise directed by Government,* be altered under sub-section (2) of section 48 by the Collector ....."

In view of certain lands being used for non-agricultural purposes, the plaintiff, a proprietor, made an application to the Collector to make non-agricultural assessment on those lands, in accordance with r. 92, read with s. 48(2) of the Code. The Collector rejected this application. Under s. 92, it was imperative for the Collector to make such assessment, unless there was a contrary direction by the Government, and no such direction was in existence at the time of the order of rejection by the Collector. But the Collector's order was *confirmed* by the Government in appeal. The Supreme Court rejected the contention that such confirmation by the Government could not validate the order of the Collector which was void *ab initio,* being in contravention of the mandatory duty under r. 92, since the Government had not issued any direction in terms of r. 92, to exonerate the Collector from the imperative duty imposed by r. 92. The confirmation of the Collector's order on appeal could not be taken as a direction of the Government under s. 92, for the following reason—

"When Government has been given the power to give directions to the Collector not to act in accordance with the *imperative* provisions of a *rule* which enjoin upon him to make the altered assessment, that power has to be exercised in clear and unambiguous terms as it affects civil rights of the persons concerned and the decision that the power has been exercised should be *notified in the usual manner in which such decisions are made known to the public*.....Dismissal by the Government of the plaintiff's appeal and affirmation by it of an erroneous order of the Collector could not be held to amount to action under the provisions of rule 92."[25]

(ii) Where a statute prescribes a *procedure* or condition precedent for the doing of a thing or the exercise of a power, the question arises whether the non-compliance with that procedure renders the resulting act void.

The answer to this question depends upon whether the obligation to follow the procedure is mandatory (or absolute) or directory.

A. (i) If the procedure is *mandatory,* non-compliance with that procedure renders the exercise of the power *ultra vires* and the act done becomes *void.*[26-27]

Where an auctioning authority cancelled the bid of the highest bidder and then gave the contract to another person without resorting to a re-auction or tender as required by the statutory rules, *held,* that a *mandamus* would have issued to set aside the act of the auctioning authority in so far as it was in contravention of the statutory rules, but for the fact that owing to the lapse of the time, the writ had become ineffective.[28]

(ii) Similarly, where an administrative act has been done without complying with a mandatory condition precedent, it will be invalid,[29-30] e.g., it has been done without issuing a notice as required by the statute;[30-31] or without recording reasons.[32]

25. *Fatma Haji* v. *State of Bombay,* (1951) S.C.R. 266 (269, 274-75).
26. *R.* v. *Minister of Health,* (1930) 2 All E.R. 98.
27. Cf. *Commr. of I.T.* v. *Pratapsingh,* A. 1961 S.C. 1027 (1028); *Narayana* v. *I.T.O.,* A. 1959 S.C. 213 (215); *Khub Chand* v. *State of Rajasthan,* (1967) 1 S.C.R. 120 (125).
28. *Guruswami* v. *State of Mysore,* (1954) S.C.A. 993 (999).
29. *East Riding C.C.* v. *Minister of Housing,* (1956) 2 All E.R. 669 (H.L.).
30. *Narayana* v. *I.T.O.,* A. 1959 S.C. 213 (215) [s. 34, Income-tax Act, 1922]; *Khub Chand* v. *State of Rajasthan,* (1967) 1 S.C.R. 120 (125).
31. *Zafar Ali* v. *Asst. Custodian,* A. 1967 S.C. 106 (107); *Ebrahim Aboobaker* v. *Tek Chand,* A. 1953 S.C. 298 (302) [s. 7 of the Administration of Evacuee Property Act, 1950].
32. *Collector of Monghyr* v. *Keshav,* A. 1962 S.C. 1894.

An exception to the rules as to non-performance of a condition precedent is that the law does not compel the doing of an *impossibility*.[33]

B. Breach of a *directory condition*[34] would not invalidate the order[35-36] even where it is a judicial order. At any rate, a *substantial* compliance is held to be sufficient.[37-38]

S. 21(4)-(5) of the (Eng.) Criminal Justice Act, 1948, provides—

"(4) Before sentencing any offender to.....preventive detention, the court shall *consider* any report or representations which may be made....by....the Prison Commissioners."

"(5) A copy of any report or representation made....by the Prison Commissioners for the purposes of the last foregoing sub-section *shall be given* by the Court to the offender ...."

Held, that sub-sec. (4) simply directed the Court to *consider* such report. It was not a condition precedent of making the sentence and that, accordingly, the direction to give a copy was merely a procedural direction, notwithstanding the use of the word 'shall'. A failure to furnish a copy of the report did not, therefore, invalidate the order.[35]

As has been stated earlier, the question whether a statutory requirement is mandatory or directory is one of construction and no universal rules can be laid down for guidance in this matter. The Court is to be decide the question having regard to "the importance of the provision to the *general object intended to be secured* by the Act",[39] and in the case of a formality prescribed for the performance of a public duty, another consideration that influences the construction is that of 'general inconvenience and injustice' if the provision were held to be mandatory.[36, 40]

I. It is *mandatory* if it affects the *jurisdiction* to make the order or to exercise the statutory power,[41] e.g., where the statute says that the order can be made only with the sanction[42] or prior approval[43] of a specified authority; or only after giving a notice[44] or after hearing the person to be affected[44] or after making due inquiry;[45] or that a permit can be granted only if an application is made not less than six weeks before the date from which the permit is to take effect;[46] or after giving reasons for its order'[47]

II. Where the language used by the Legislature is negative, namely, that the act to be done must be done in the *manner* prescribed and in no other

33. *C.S.P. & L. Corpn.* v. *Kerala State*, A. 1965 S.C. 1688 (1691).
34. *R.* v. *Lofthouse*, (1866) L.R. 1 Q.B. 433 (439).
35. *R.* v. *Governor of Parkhurst Prison*, (1960) 1 W.L.R. 115.
36. *State of M.P.* v. *Manbodhan*, A. 1957 S.C. 912; *Biswanath* v. *K.E.*, A. 1945 F.C. 67.
37. *Woodward* v. *Sarsons*, (1875) 10 C.P. 723 (746).
38. *Raza Buland Sugar Co.* v. *Rampur Municipality*, A. 1965 S.C. 895 (901).
39. *Howard* v. *Bodington*, (1877) 2 P.D. 203 (211).
40. *Montreal Street Ry.* v. *Normandin*, (1917) A.C. 170; A. 1917 P.C. 142.
41. *R.* v. *Dickson*, (1949) 2 All E.R. 810; *Brown* v. *Ministry of Housing*, (1953) 2 All E.R. 1385 [s. 3(1)(b) of Sch. I to the (Eng.) Acquisition of Land (Authorisation) Procedure Act 1946]; *East Riding C.C.* v. *Park Estate*, (1956) 2 All E.R. 669 (H.L.); *Commrs. of Customs* v. *Cure & Deely*, (1961) 3 All E.R. 641.
42. *Harson* v. *Corporation of Grand Mere*, (1904) A.C. 789; *Secy. of State* v. *Ananta*, A. 1934 P.C. 9; *Amalgamated Coalfield* v. *Janpad Sabha*, A. 1964 S.C. 1013 (1021).
43. *Commr. of I.T.* v. *Pratapsingh*, A. 1961 S.C. 1026 (1028); *Metcalfe* v. *Cox*, (1895) A.C. 328 (H.L.).
44. *Ealing B.C.* v. *Minister of Housing*, (1952) 2 All E.R. 639.
45. *Leeson* v. *General Medical Council*, (1890) 43 Ch. D. 366 (383).
46. *Shrinivasa* v. *State of Mysore*, A. 1960 S.C. 350 (352) [s. 57(2), Motor Vehicles Act, 1939].
47. *State of Bombay* v. *Krishnan*, A. 1960 S.C. 1223 [s. 12(5) of the Industrial Disputes Act, 1947]; *Collector of Monghyr* v. *Keshav*, A. 1962 S.C. 1894.

manner, the requirement would, in general, be construed as imperative.[48] If the same intention is expressed by affirmative words, they will be construed as imperative.[49]

The requirement to 'consult'.

Where a statutory authority is required to do an act only 'after consultation with' another specified authority, the question arises whether the requirement of consultation shall be construed as mandatory or directory. If it is mandatory, the omission to consult must necessarily render the action *ultra vires*.[50]

(A) *England*.—In England, there are not many decisions to throw light on this question. It arose in two cases[51-52] under s. 11(1) of the New Towns Act, 1946, which provides—

"If the Minister ..... is *satisfied, after consultation* with any local authorities who *appear to him to be concerned*, that it is expedient in the national interest ..... he may make an order designing that area as the site of the proposed new town."

In both cases, the Minister's order was challenged as *ultra vires* for non-compliance with the requirement of consultation. In *Fletcher's case*,[51] Morris, J., avoided a direct pronouncement as to whether lack of consultation would render the order of the Minister *ultra vires*, because on the evidence he found that the statutory obligation of consultation was 'amply fulfilled'. A similar decision in *Rollo's case*[52] was affirmed by the Court of Appeal.

The Privy Council also took the provision for consultation in s. 3(1) of the Pastoral Reorganisation Measure, 1949, as mandatory,[53] but found, on the facts, that the obligation had been discharged by giving to the persons to be consulted 'a sufficient opportunity to submit their opinions'.

(B) *India*.—As stated earlier, a different view has been taken in India, in some cases.

(a) S. 256 of the Government of India Act, 1935, provided—

"No recommendation shall be made for the grant of magisterial powers ... to .... any person save after consultation with the district magistrate ....."

The Federal Court held that the requirement of consultation was only directory and that the order of a Magistrate would not be held to be invalid on the ground that he had been appointed without the consultation required by the section.[54] In coming to this conclusion, the Federal Court relied upon the observations of the Privy Council in *Montreal* v. *Normandin*[40] where it had been held that the omission to revise the jury lists as directed by the statute would not nullify the verdict of the jury.

The above decisions have been applied by the Supreme Court in construing Art. 320(3)(c) of the Constitution in the same way.[55] The provision is—

48. *R.* v. *Leicester J.J.*, (1827) 7 B. & C. (12); *Catteroll* v. *Sweetman*, (1845) 9 Jur. 951 (954); *Pentiah* v. *Veeramalappa*, A. 1961 S.C. 1107 (1113).

49. *Edward* v. *African Woods*, (1960) 1 All E.R. 627 (P.C.); *Pir Bux* v. *Taher*, A. 1934 P.C. 235 (237); *Makhan Singh* v. *State of Punjab*, A. 1952 S.C. 23 (27).

50. Cf. Allen, *Law and Orders*, (1956), p. 237.

51. *Fletcher* v. *Minister of Town & Country Planning*, (1947) 2 All E.R. 496 (Morris, J.).

52. *Rollo* v. *Minister of Town & Country Planning*, (1947) 2 All E.R. 488 (Morris, J.) affirmed by *Rollo* v. *Minister of Town & Country Planning*, (1948) 1 All E.R. 13 (C.A.).

53. *Re, Union of the Benefices*, (1954) 2 All E.R. 22 (P.C.); see also *Port Louis* v. *A.G.*, (1965) A.C. 1111.

54. *Biswanath* v. *Emp.*, A. 1945 F.C. 67 (68).

55. *State of U.P.* v. *Srivastava*, A. 1957 S.C. 912 (918).

"The Union Public Service Commission or the State Public Service Commission, as the case may be, *shall be consulted* ....."

It was held that the above requirement of consultation was directory and that, consequently, a civil servant who was dismissed by the Government without consulting the appropriate Commission could not challenge the order of dismissal as invalid owing to non-compliance with the constitutional provision requiring consultation.[55]

It is to be noted that the decision of the Privy Council rested on the ground of 'serious general inconvenience' if the impugned decision were quashed on the ground of non-compliance with the statutory formality and that in both the cases before the Privy Council[54] and the Federal Court,[40] what was challenged was a judicial decision, where the need for not disturbing decisions for irregularities 'not going to the root of the jurisdiction' is indisputable. Does the same logic apply in the case of an administrative action? What is the *additional* public inconvenience where the order of dismissal of a public servant is annulled by the Court for non-compliance with Art. 320(3)(c) instead of Art. 311? The Court did not even demand a substantial compliance with the provision held to be directory as it had done while holding the provision in Art. 166(1) as directory.[56] There was no discussion of the general rule that constitutional provisions should be regarded as mandatory where such construction is possible or of the fact that there was little to distinguish between the provisions of Arts. 311 and 320(3) except that they were separately placed.

On the other hand, it is significant that in none of the decisions under the (Eng.) New Towns Act, the decision of the Privy Council in *Normandin's case,*[57] or the proposition in Maxwell upon which it rested was referred to at all It is also to be noted that while in *Normandin's case,*[57] the relevant provision was a *procedural formality,* in the case before the Supreme Court, as in the cases under the English statute just cited, the relevant provision was a condition precedent. Unfortunately, the English decisions do not appear to have been cited before the Supreme Court.

(b) A different conclusion has, however, been arrived at in construing s. 59(3) of the Mines Act, 1952, which requires that before publishing the draft of any regulations, the Central Government should refer it to every Mining Board constituted under s. 12. In this case,[58] the Supreme Court held that *Normandin's*[57] test was not applicable, because the Legislature had, in s. 60, provided that in certain specified cases of emergency, regulations might be made without previous consultation with the Board, so that the proper construction was that outside the cases provided for in s. 60, previous consultation with the Board was mandatory and that a regulation made without such consultation, where a Board had been constituted under s. 12,[58] was invalid.

(c) Similarly, consultation with the Chief Justice of India has been construed as mandatory on the part of the President before deciding the question of age of a Judge, under Art. 217(3) of the Constitution.[59]

The same view has been maintained as regards the requirement of consultation for the appointment[60] [Arts. 124(2); 217(1)] or transfer of a Judge[60-61] [Art. 222].

56. *Dattatraya* v. *State of Bombay,* (1952) S.C.R. 612 (624, 631).
57. *Montreal Street Ry.* v. *Normandin,* (1917) A.C. 170.
58. *Banwarilal* v. *State of Bihar,* A. 1961 S.C. 849 (853); *Kalipada* v. *Union of India,* A. 1963 S.C. 134 (137).
59. *Jyoti Prakash* v. *Chief Justice,* A. 1965 S.C. 961 (966).
60. *Gupta* v. *Union of India,* A. 1982 S.C. 149 (paras. 86, 563, 760).
61. *Union of India* v. *Sankalchand,* A. 1977 S.C. 2328 (paras. 15, 21, 44-45).

The requirement to act upon the recommendation of another Authority.

In some statutes, a language stronger than 'consultation' is used. Thus, where it is provided that a statutory authority can act *only* upon the 'recommendation' or 'report' of another authority to exercise the statutory power, the condition is interpreted as mandatory,[62] so that where the Agricultural Land Tribunal recommended a dispossession order relating to 151 acres, a dispossession order covering 155 acres was struck down as invalid.[62]

The requirement as to sanction or 'previous approval'[63] of another authority is similarly construed.

The requirement to issue 'notice'.

U.K.

(a) Where a statute authorises an administrative authority to issue a notice charging a person with a statutory offence,[64] or directing him to do some act, affecting his private rights or imposing a tax,[65] the Court must insist on a strict adherence to formalities. Otherwise, the notice becomes *ultra vires* and invalid.[66]

The reason is that in such a case, the object of the Legislature that the person to be affected shall have a reasonable opportunity of being heard before the order is made would be defeated unless the notice is duly served or published.[65]

Such notice will, accordingly, be liable to be quashed—

(i) if it fails to specify the nature of the alleged contravention of the statute;[64]

(ii) if it charges the person with an offence other than which he has, according to the recitals, actually committed;[66]

(iii) if the notice proceeds on a wholly false basis of fact and so fails to set out the real grounds of the complaint or claim against him;[66-67]

(iv) if the act complained of in the notice does not come within the purview of the statute, e.g., where it does not constitute a 'development' within the meaning of the Town and Country Planning Act, 1947, under which the notice had been issued.[68]

(b) It is also obvious that the resultant act will be invalid if such notice is not issued at all[69] or it is *ultra vires*.[70]

In India, a case of this nature came up before the Supreme Court in *Nageswararao* v. *State of A.P.*[71]

India.

R. 11 of the Rules made under the Motor Vehicles Act, 1939, says—

"..... the Regional Transport Authority ... shall, before eliminating the existing services or cancelling any existing permit ..... give *due notice* to the persons likely to be affected ....."

62. *R.* v. *Agricultural Land Tribunal*, (1955) 2 Q.B. 140.
63. *Commr. of I.T.* v. *Pratapsingh*, A. 1961 S.C. 1026 (1028).
64. *East Riding C.C.* v. *Park Estate*, (1956) 2 All E.R. 669 (672) H.L.
65. *Raza Buland Sugar Co.* v. *Rampur Municipality*, A. 1965 S.C. 985 (900).
66. *Francis* v. *Yiewsley, U.D.C.*, (1958) 3 All E.R. 529 (C.A.).
67. *Cater* v. *Essex C.C.*, (1959) 3 All E.R. 213.
68. *Eastbourne Corpn.* v. *Fortes*, (1959) 2 All E.R. 102.
69. *Narayana* v. *I.T.O.*, A. 1959 S.C. 213 (215).
70. *Brown* v. *Ministry of Housing*, (1953) 2 All E.R. 1385 (1392).
71. *Nageswararao* v. *State of A.P.*, A. 1959 S.C. 1376 (1383).

The Transport Authority cancelled the permit of the Appellants and directed them to stop plying their buses on the specified routes with effect from 25-12-1958, by an order issued on 24-12-1958 and served on the Appellants on the *same* day. The Supreme Court had no difficulty in holding that there had been no compliance with the requirement of R. 11, for two reasons—(a) "While the rule enjoins on the Authority to issue notice to the persons affected *before* making the relevant order, the Authority made the order and communicated the same to the persons affected; (b) while the rule requires *due* notice, i.e., *reasonable* notice, to be given to the persons affected to *enable them to make representation* against the order proposed to be passed, the Regional Transport Authority gave them only a day for complying with that order, which in the circumstances could *not* be considered to be due notice within the meaning of the rule."

It is clear that the cancellation which had been made without complying with the statutory requirement of notice was *ultra vires*. Nevertheless, the Supreme Court decided not to interfere in view of 'supervening circumstances', namely, that the Appellants had withdrawn their buses from the routes and that the vehicles of the Road Transport Corporation had taken their place, and that to direct that another notice should be served upon the Appellants so that they might make their representations to the Regional Transport Authority would have been 'an empty formality' inasmuch as in another application[72] presented by the Appellants, both the High Court and the Supreme Court had heard the contentions of the Appellants and rejected them.

The Supreme Court stressed upon the point that relief under Art. 226 being discretionary, the High Court had rightly exercised its discretion in refusing to quash the order of cancellation of the Appellant's permit inasmuch as it would have been of little avail to the Appellants since they had withdrawn their buses and exhausted their pleas before the highest Tribunal of the land. It is submitted, however, that to observe that the contention as to non-service of the notice in terms of the statute was a 'technical'[73] one was somewhat wide. Service of 'due notice' was a mandatory condition precedent for affecting the individual in his proprietary and business rights. If there was a non-compliance with this condition precedent, the order of cancellation was a *nullity*. If so far be conceded, the questions that arise are—(i) Can a Court, in its *certiorari* jurisdiction, refuse to quash an order, at the instance of the aggrieved party, even where it is a *nullity*? (ii) Even though the Court was unwilling to grant relief, from practical considerations, were not the Appellants entitled to a clear finding that the order was ultra vires? (iii) The object of 'due notice' before cancellation not only envisages an opportunity for representation but also contemplates a reasonable time being given to the persons to be affected to make the necessary arrangements before they were obliged to stop their business. Where they are asked to stop immediately, by an *ultra vires* order, they were entitled to recover damages. Could the Appellants, in this case, sue for damages even after the refusal of the Supreme Court in the instant case?

(c) Where the statutory provision requires an individual or special

72. *Gullapalli* v. *A.P.S.R.T.C.*, A. 1959 S.C. 308.

73. The judgment of Subba Rao, J., in this case should be compared with his Lordship's dissenting judgment in *Fedco* v. *Bilgrami*, A. 1960 S.C. 415 (424).

notice to 'persons interested', a general notice or publication in the Gazette would not suffice.[74]

(d) Subject to the above, the *manner* of publication of an order or notification is generally treated as directory, so that substantial compliance is accepted as valid.[75]

The requirement to 'hear'.

Where a statute requires that an administrative action can be taken only after hearing the parties affected or concerned, action without such hearing renders it *ultra vires* and void.[76]

(A) *England.*—S. 19(5) of the (Eng). Town and Country Planning Act, 1947, provides—

"Before confirming a purchase notice ..... the Minister shall give notice of his proposed action—(a) to the person by whom the notice was served; (b) to the council on whom the notice was served; (c) to the planning authority .....; to any other local authority whom the Minister proposes....to substitute the said Council ..... and ..... shall, before confirming the purchase notice ..... afford to those persons and authorities an opportunity of appearing before and *being heard by a person appointed by the Minister for this purpose.*"

The Minister gave notices to all the persons and authorities specified above, but took his decision to confirm the purchase notice after a meeting was held between his officer and the Borough Council and the planning authority, without issuing a notice of the meeting to the landowner who had served the purchase notice. The order of confirmation was set aside, inasmuch as the landowner had not been heard as required by s. 19(5).[76]

The requirement to her is not satisfied unless the person concerned—

(i) is given a notice of the time and place at which the hearing is to take place;

(ii) is given an opportunity to state his case.[77]

(B) *India.*—The same principles have been applied in India,[78-79] and it has been further held that where a statute thus requires a hearing of, or to afford "a reasonable opportunity to show cause"[80] to the person to be affected, it implies a *quasi-judicial duty*,[80] with all the incidents thereof.

(i) S. 25(1) of the Bihar Mica Act, 1948, enables the Government to cancel a licence on certain specified grounds and the Proviso to that sub-section says—

"Provided further that a licence ..... shall not be cancelled unless the licensee ..... has been furnished with the grounds for such cancellation and has been afforded *reasonable opportunity to show cause* why his licence shall not be cancelled."

An order of cancellation under this provision was quashed on the ground of non-compliance with the above provision on the grounds—(a) that the proceedings for cancellation had been initiated and the order of cancellation

74. *Sub-Divisional Officer* v. *Srinivasa*, A. 1966 S.C. 1164 (1167-68).

75. *Raza Buland Sugar Co.* v. *Rampur Municipality*, A. 1965 S.C. 895 (901).

76. *Ealing B.C.* v. *Minister of Housing*, (1952) 2 All E.R. 639.

77. *Stafford* v. *Minister of Health*, (1946) K.B. 621.

78. *Mineral Development Ltd.* v. *State of Bihar*, A. 1960 S.C. 468 (475); *Fedco* v. *Bilgrami*, A. 1960 S.C. 415 (422).

79. Even though a declaration under s. 6 of the Land Acquisition Act is 'final', where it is made without giving the 'opportunity of being heard' as required by s. 5A(2), the declaration would be a nullity [*Nandeshwar* v. *U.P. Govt.*, A. 1964 S.C. 1217].

80. *Union of India* v. *Goel*, A. 1964 S.C. 364 (369); *Kanda* v. *Govt. of Malaya*, (1962) 2 W.L.R. 1153 (P.C.).

made by the Revenue Minister who, admittedly, had personal bias against the licensee, on political grounds; (b) that the inquiry was conducted in a manner which did not give any *real opportunity* to the Petitioner to explain his conduct and to disprove the allegations made against him.[78]

(ii) But, in a judgment delivered only a week earlier,[78] the Court had failed to be unanimous as to the specific requirements of a 'reasonable' or 'real' opportunity. Cl. 10 of the Imports Control Order, 1955, similarly, required giving a 'reasonable opportunity to be heard' and even a personal hearing, before a licence could be cancelled :

"Applicant or licensee *to be heard.* No action shall be taken ..... unless the licensee had been given a reasonable opportunity of being heard."

It was found that the notice to show cause against the proposed order of cancellation did not give the particulars of the fraud alleged, on the basis of which the cancellation was proposed and also that the Petitioners' requests for an opportunity to inspect the Controller's papers, repeatedly made, were turned down. Nevertheless, the Court, by a majority of 4 : 1, held that the opportunity given to the Petitioners was 'reasonable' inasmuch as they were not prejudiced since they were always anxious to show that they were not a party to the fraud alleged rather than that no fraud had at all been committed. Subba Rao, J., dissenting, held that he was unable to hold that the Petitioners had admitted that a fraud had been committed as alleged. On the other hand, they could not give an effective denial to the allegation unless they were furnished with the particulars of the allegation, which they repeatedly asked for.

We have seen the House of Lords decision that where a statutory notice threatens to affect an individual with any penalty, it must specify the nature of the allegations.[81] The majority[78] seems to have rested their decision upon the principle that a person could not complain of want of notice if he were aware of the facts. Whether the Petitioners were, in the instant case, aware of the facts which constituted the allegaion of fraud is a question of fact and the administrative authority cannot expect that his action should be upheld in future cases on a similar finding. It would be judicious for him to adhere to the rule that where the statutory provisions require the service of a notice to show cause or a reasonable opportunity to be heard, the authority should, invariably, give the particulars of the allegation in the notice. The rule of pleading that a general allegation of fraud, without the particulars, is of no avail,[82] is not a mere technical one but is based on sound principle. How far they should be disclosed in the notice, in a particular case, may be debatable, but a notice cannot be one under the statute unless it gives reasonable particulars so as to apprise the person affected of the case he has to meet.

Where statutory action is purely administrative and would not require natural justice.

I. As has been stated earlier, although the Courts in England and India have been narrowing the fold of purely administrative action, by imposing *quasi-judicial* obligation by implication from the nature of the function or the consequences thereof, there still remains a strip of purely administrative action which would not attract the requirements of natural justice, e.g, to

81. *East Riding C.C.* v. *Park Estate,* (1956) 2 All E.R. 669 (672) H.L.

82. *Willingford* v. *Mutual Society,* 5 App. Cas. 697; *Gunga* v. *Tiluckram,* 15 Cal. 533 P.C.

give a "notice of the charge or a fair opportunity of meeting it"[83] or to give him a 'hearing' or even to make the inquiry in his presence.[84]

II. Instances of such purely administrative statutory action are as follows :

(a) Where the public officer has simply to decide whether there is a *prime facie* case for initiating legal proceedings,[84] e.g., simply to decide whether to issue a notice under s. 28(3), Finance Act, 1960.[84-85]

(b) For making a *preliminary inquiry* to decide whether judicial proceedings should be instituted, without having any specific charge against anybody at that stage,[86] e.g., under s. 165(b) of the (Eng.) Companies Act, 1967;[84] or under ss. 239-240 of the (Indian) Companies Act, 1956.[86]

(c) Where the interests of security of the State predominate.[87-88]

In this area, too, the Court might insert a wedge of the right to make a representation at some subsequent stage.[89]

(d) Where immediate orders are necessary to meet an emergency, say, for the maintenance of public order or human life or public safety, e.g., in pulling down a collapsing house;[90] or there are other circumstances owing to which it is not practicable to give a prior hearing.[91]

But even in such cases, though prior notice or hearing cannot be given, the Courts may insist on a subsequent or *ex post facto* hearing to cancel or revise the order made, where such subsequent hearing would meet the ends of justice.

(e) Where the action does not entail any adverse civil consequences, though it may raise some expectation, e.g., the revaluation of answer papers at an examination.[92]

III. It may be that different *stages* of the same proceeding may be purely administrative or *quasi-judicial*,[93]—the test to differentiate between them being whether there is any charge or allegation against an individual or individuals at that stage which he must meet in order to avoid legal consequences. Thus,

Though the company need not be heard at the stage of ordering an inquiry under s. 165(b) of the Companies Act (Eng.), the *quasi-judicial* obligation would arise as soon as the inspectors appointed for the purpose, start the inquiry,[94] where the company and its officers would be required to answer the allegation or complaints made against them.[93]

It would be profitable, in this context, to refer to the observation of Geoffrey, L.J., in the Court of Appeal :[95]

"In most types of investigations there is in the early stages a point at which action of some sort must be taken firmly in order to set the wheels of investigation

83. *Norwest* v. *Dept. of Trade*, (1978) 3 W.L.R. 73 (89, 91-92, 94) C.A.
84. *Wiseman* v. *Borneman*, (1969) 3 All E.R. 275 (277-78) H.L.; *Hearts of Oak Co.* v. *A.G.*, (1932) A.C. 392.
85. Cf. *G.F.Industries* v. *Union of India*, A. 1977 S.C. 456 (para. 24).
86. *Narayanlal* v. *Maneck*, A. 1961 S.C. 29 (para. 24).
87. Cf. *Hutton* v. *Att. Gen.*, (1927) 1 Ch. 427.
88. *Sadhu Singh* v. *Delhi Admn.*, A. 1966 S.C. 91.
89. *Lakhanpal* v. *Union of India*, A. 1967 S.C. 1505 (para. 8).
90. *Ajoy* v. *Calcutta Corpn.*, A. 1956 Cal. 411; *Bapurao* v. *State*, A. 1956 Bom. 300 (302).
91. Cf. *Pearlberg* v. *Varty*, (1972) 2 All E.R. 6 (16, 17-18, 21) H.L.
92. *Maharashtra State E. Bd.* v. *Paritish*, A. 1984 S.C. 1543 (para. 12).
93. *Johnson* v. *Min. of Health*, (1947) 2 All E.R. 395 (399, 401) C.A.
94. Cf. *Ostreicher* v. *Environment Secy.*, (1978) W.L.R. 810 (815) C.A.
95. *Lewis* v. *Heffer*, (1978) 1 W.L.R. 1061 (1078) C.A.; also Lord Denning at p. 1073.

in motion. Natural justice will seldom if ever at *that* stage demand that the investigator should act judicially in the sense of having to hear both sides. No one's livelihood or reputation at that stage is in danger.

But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss of someone the more necessary it becomes to act *judicially*, and the greater the importance of observing the maxim *audit alteram partem*."[95]

Thus—

Where suspension is to be awarded as a *punishment* for some misconduct,[96] it can be imposed only after the person to be punished is given an opportunity of meeting the charge or allegation against him for which the penalty is sought to be imposed. But no such hearing or opportunity to represent need be given when suspension is proposed to be made *pending* inquiry into the allegations, because such a step must be taken at once in the interests of 'good administration', and at that stage no penalty is sought to be imposed against the delinquent and he is usually paid full pay or a fair subsistence allowance during the period of suspension pending inquiry. The interests of the administration would be prejudiced if the authority has to give notice of a charge upon the suspected delinquent or to hear him.[97]

IV. But though natural justice would not be attracted to purely administrative acts, the other limitations of statutory power, e.g., *ultra vires*, *mala fides* and fair play[98] would be applicable.[99]

The sphere of discretion.

1. A power is said to be committed to the discretion of an administrative authority where the Legislature empowers the authority to choose between two alternative courses of action,[100, 1] without reference to any objective standard, e.g., whether to act or not, or when and how he is to act. In such a case, the authority is free to make his own decision and the Courts cannot interfere on the ground of *propriety* of the decision of the authority or the manner of its exercise.[100] The doctrine of natural justice cannot also be invoked[2] unless, as in India, some constitutional provision has been violated[3] or a citizen's civil rights would be affected by such decision.[4]

2. The conferment of discretionary power, without more, cannot be struck down on the ground of likelihood of misuse.[5]

3. The discretion is larger where the industry is subject to the regulatory policy of the State, e.g., trade in intoxicants.[6]

4. The Court would, however, interfere if the discretion has been

96. E.g., where a member of the Bar is suspended for a specified period for professional misconduct; or where a Government servant is awarded the substantive penalty for suspension after some charge of misconduct is proved against him.

97. *Furnell* v. *Whangarei School Bd.*, (1973) 1 All E.R. 400 P.C.

98. *Srilekha* v. *State of U.P.*, (1991) 1 S.C.C. 212 (paras. 29, 30, 32); *Mahabir* v. *I.O.C.*, A. 1990 S.C. 1031 (paras. 12, 13).

99. *Norwest* v. *Dept. of Trade*, (1978) 3 W.L.R. 73 (94-95) C.A.

100. *Secy. of State* v. *M.B. Tameside*, (1976) 3 All E.R. 665 (695) H.L.; *Maheswar* v. *Suresh*, (1977) 1 S.C.C. 627; *Excise Commr.* v. *Manminder*, A. 1983 S.C. 1051 (para. 3).

1. *Jain Exports* v. *Union of India*, (1993) 4 S.C.C. 51 (para. 9)—3 Judges.

2. *State of Assam* v. *Bharat Kala Kendra*, A. 1967 S.C. 1766 (1771).

3. *State of W.B.* v. *Anwar*, A. 1952 S.C. 75; *State of Madras* v. *Row* A. 1952 S.C. 196; *State of M.P.* v. *Bhagat*, A. 1967 S.C. 1170; *Banthia* v. *Union of India*, (1969) 2 S.C.C. 166.

4. *Rampur Distillery* v. *Company Law Bd.*, (1969) 2 S.C.C. 774 (779).

5. *Sukumar* v. *State of W.B.*, (1993) 3 S.C.C. 723 (para. 38).

6. *State of M.P.* v *Nand Lal*, A. 1987 S.C. 251.

exercised arbitrarily,[98, 1, 7] or where he acts without applying his mind to the aims and objects of the statute which confrred the discretion,[8] or acts at the dictation of some other authority;[9] or it is violated by *mala fides*.[10]

5. As instances of such discretionary power may be mentioned—

(i) The power under s. 125 of the Customs Act, 1962, to fix the quantum of redemption.[1]

(ii) Thus, an administrative authority has the discretion not to accept the highest bid at a tender or public auction.[11] But unless the reasons for non-acceptance of the highest bid are apparent from the record, the action may be challenged as arbitrary.[12]

From all this, Courts in the *U.K.*[13] as well as in *India*[14] have come to the conclusion that to-day, there is nothing like an absolute unfettered discretion, immune from judicial review where it is vested in a public authority.

6. Unguided discretion in a Rule cannot be cured by supplying guideline in supplementary executive instructions.[15]

But this would not preclude the discretionary authority to lay down *intra vires* guidelines or principles for the exercise of the discretionary power, because such principles would exclude arbitrariness and ensure fairness.[16]

The sphere of subjective satisfaction.

1. An extreme case of discretionary power is offered where the Legislature enables the administrative authority to make the choice between alternative courses of action, not upon weighing objective considerations or guidelines presented by the statute, but upon the *subjective* satisfaction or assessment of the situation. It is obvious that in such a case the propriety of the subjective satisfaction or of the occasion for exercise of the discretionary power cannot be questioned by the Courts with reference to any objective text.[17] Nevertheless, even in cases of this extreme category, Courts have inserted the wedge of judicial control on various grounds.

2. Where a statute authorises the Executive to take an administrative action after being satisfied or after forming an opinion as to the existence of a state of circumstances, Courts would not enter upon a review of the *reasonableness* or *propriety* of the satisfaction or the opinion of the Executive in a particular case. That question, however, relates to the merits of the subjective

7. *Rashid* v. *State of Kerala*, (1974) 2 S.C.C. 687; *Ramana* v. *I.A.A.*, (1979) 2 S.C.C. 489; *Ashok* v. *Maruti*, (1986) 2 S.C.C. 293; *Chaitanya* v. *State of Karnataka*, A. 1986 S.C. 825.

8. *Sri Rama Sugar Industries* v. *State of A.P.*, (1974) 1 S.C.C. 534; *Barium Chemicals* v. *Company Law Bd.*, A. 1967 S.C. 295; *Venkataraman* v. *Union of India*, (1979) 2 S.C.C. 491.

9. *Purtabpore Co.* v. *Cane Commr.*, (1969) 1 S.C.C. 308.

10. *Sadanandan* v. *State of Kerala*, A. 1966 S.C. 1925.

11. *State of U.P.* v. *Vijay*, A. 1982 S.C. 1234.

12. *Maharashtra State E. Bd.* v. *Gandhi*, (1991) 2 S.C.C. 716 (para. 21).

13. *Padfield* v. *Min. of Agriculture*, (1968) 1 All E.R. 694; *R.* v. *Metropolitan Police Commr.*, (1968) 1 All E.R. 763; *Anisminic* v. *Foreign Compensation Bd.*, (1969) 2 A.C. 149.

14. *Govt. Press* v. *Belliappa*, A. 1979 S.C. 429 (para. 24); *Khudi Ram* v. *State of W.B.*, A. 1975 S.C. 550 (558).

15. *Senior Supdt.* v. *Bhar*, A. 1989 S.C. 2262.

16. *Union of India* v. *Sangameshwar*, A. 1994 S.C. 612 (para. 21).

17. *Bhimsen* v. *State of Punjab*, A. 1951 S.C. 481; *Shibban Lal* v. *State of U.P.*, A. 1954 S.C. 179.

condition. But the forming of the opinion or getting satisfied has been held to be a mandatory condition precedent for exercising the statutory power, so that where it is shown that the statutory authority did not apply its mind to the subjective condition, the order must be struck down as invalid.[18-19]

3. Upon the question whether, in such a case, it is necessary to recite in the order itself that the condition precedent has been fulfilled, namely, that the competent authority has been satisfied or has formed its opinion before exercising the power, there appears to have been some divergence of opinion :

(A) In *England,* it has been held in one case that the existence of the condition precedent as to the formation of the opinion must be recited in the order itself.[20]

(B) In *India,* the Supreme Court has held[21-22] that a recital in the order itself was not essential and that the fact that the specified authority had formed the opinion or the like could be proved by affidavit or other evidence.

4. But once the order recites the fact of satisfaction as to its necessity, or that is established, Courts would not probe into it to satisfy itself as to the necessity or expediency[23-24] or as to the fact of satisfaction of the authority.[25] At any rate, the recital would raise a presumption[26] which it would be well-nigh impossible for the Petitioner to rebut, the condition being subjective.[27]

5. But even where that condition is satisfied, the validity of a subjective order can be challenged on the ground that—

Judicial review, scope for.

(i) The use of the power was *mala fide*[28] or for a purpose other than that for which it was conferred by the statute.[24]

(ii) The opinion or subjective satisfaction of the authority was not *relevant* or *germane* to the circumstances which fell to be considered under the statutory provision; or that no reasonable man could come to that conclusion in the context of the facts and circumstances established.[19]

(iii) Objectively there were no grounds upon which the statutory authority could be so satisfied and the inference would be 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.[28-29]

(iv) There was any infirmity in the 'decision-making process', e.g., by

18. *Ross Clunis* v. *Papadopoullos,* (1958) 1 W.L.R. 546 (P.C).

19. *Raja Anand* v. *State of U.P.,* (1967) 1 S.C.R. 373 (382); *Barium Chemicals* v. *Company Law Bd.,* A. 1967 S.C. 295; *State of Gujarat* v. *Jamnadas,* A. 1974 S.C. 2233.

20. *R.* v *Comptroller-General of Patents,* (1941) 2 K.B. 306 (316).

21. *Nageswararao* v. *A.P.S.R.T.C.,* A. 1959 S.C. 308 (320); *Swadeshi Cotton Mills* v. *S. I. Tribunal,* A. 1961 S.C. 1381; *Iumaon Motor Union* v. *State of U.P.,* A. 1966 S.C. 785.

22. But where though the power is subjective, the condition precedent to the exercise of the power has to be established *objectively* [*Barium Chemicals* v. *Company Law Board,* (1966) 1 S.C.A. 747], a recital of the satisfaction of the authority about the existence of the condition precedent may be necessary.

23. *A.G. for Canada* v *Hallet,* (1952) A.C. 427 (444).

24. *State of Assam* v. *Bharat Kala Bhandar,* A. 1967 S.C. 1766 (1771).

25. *Thornloe* v. *Board of Trade,* (1950) 2 All E.R. 245.

26. *Liversidge* v. *Anderson,* (1941) 3 All E.R. 338 (H.L.).

27. *K.E.* v. *Sibnath,* A. 1945 P.C. 156.

28. *Raja Anand* v. *State of U.P.,* (1967) 1 S.C.R. 373 (381); *Somawanti* v. *State of Punjab,* A. 1963 S.C. 151 (162). [But see *Rampur Distillery* v. *Company Law Bd.,* A. 1970 S.C. 1789 (para. 12)].

29. *Ross Clunis* v *Papadopoullos,* (1958) 1 W.L.R. 546 (P.C.).

non-compliance with the procedure prescribed by the statute[30]; or denial of fair treatment.[30]

6. As to the requirement of natural justice, the observations in the *Rampur Distillery case*[31] show that the modern trend is to require a compliance with the requirements of natural justice even where the exercise of power is committed to the subjective satisfaction of the administrative authority, in cases where the *civil rights* of an individual are going to be affected by the exercise of such power, e.g., the rights of shareholders.

In a case relating to the power to compulsorily retire a Government servant, however, a Division Bench of the Supreme Court came to the conclusion that the word 'require' in the relevant Rule impliedly excluded natural justice.[32] Perhaps the Court was influenced by the fact that compulsory retirement constitutes no penalty[32] and, therefore, does not affect the civil rights of the public servant. But the slender foundation upon which the Court found that natural justice was excluded by statute cannot be held to be sound in view of the observations of a larger Bench in the *Swadeshi Cotton Mills case*[31] where the Court refused to be swayed by the use of the words "that immediate action is necessary" in the relevant statute, and held that statutory exclusion of natural justice cannot be predicated in the absence of 'unmistakable and unequivocal terms'.

It is also to be noted that though in *Reddy's case*,[32] the Court justified Government acting upon an undisclosed adverse entry in the Confidential Roll, there are other cases where the Court has held that no action should be taken, at least where Art. 311(2) of the Constitution is attracted, upon an adverse entry in the Confidential Roll which has not been communicated to the public servant concerned, giving him an opportunity to explain.[33] Of course, these cases[33] involved loss of promotional opportunities, which differed from compulsory retirement; nevertheless, in the later case of *Shrivastava*,[34] it has been held that though the power to compulsorily retire a Government servant was absolute, it was subject to the overall condition of 'public interest'; hence, the Court may interfere where the power is exercised 'arbitrarily'. An instance of such arbitrary action was where Government acted upon a very *remote* adverse entry where subsequent entries were favourable and even relied upon for promotion. If so, there is no reason why compulsory retirement on the basis of uncommunicated adverse entry should not be branded as 'arbitrary'.

Requirement as to time.

As stated earlier, a requirement as to an act being performed within a given time is liberally construed. Thus, it has been held that—

(i) Where a statute provides that a meeting shall be held *"not earlier than thirty days"* from the date of the notice, it means that the meeting should not be held before the 30th day from the date of the notice, but it would not be unlawful if it is held on the 30th day.[35]

(ii) Where a statute says that something is to be done *"not later than*

30. *Harpal* v. *State of U.P.*, (1993) 3 S.C.C. 552 (paras. 17, 19).

31. *Rampur Distillery* v. *Company Law Bd.*, A. 1970 S.C. 1789 (para 13); also *Swadeshi Cotton Mills* v. *Union of India*, A. 1981 S.C. 818 (paras. 65, 91).

32. *Union of India* v. *Reddy*, A. 1980 S.C. 563 (para. 27).

33. *Amar* v. *State of Bihar*, A. 1984 S.C. 531 (paras. 5, 8); *Gurdial* v. *State of Punjab*, A. 1979 S.C. 1622 (1626).

34. *Shrivastava* v. *State of M.P.*, A. 1984 S.C. 630 (paras. 4, 8).

35. *Jai Charan* v. *State of U.P.*, A. 1968 S.C. 5 (8).

14 days", it means that it may be done any time 'within a period of 14 days', but not later than the 14th day.[36]

On the other hand,—

1. Where the statute provides that a notice is to be served *"not less than* seven days" before the date fixed for the meeting, it means that seven *clear days* must intervene between the service of the notice and the date of the meeting so that both the terminal days, namely, the date of service and the date of the meeting have to be excluded from the computation of seven days.[37]

2. In the case of statutes where the public interest requires that the act must be speedily determined, performance within the specified time will be construed as mandatory.[38]

The duty to inquire.

Where an administrative authority is empowered or required by a statute to make an inquiry, the question arises whether such duty should be performed in a *quasi-judicial* manner. [This will be dealt with separately.]

Whether Administrative Authority needs give reasons for his order.

U.K.

In *England,* the common law has been modified by statute—the Tribunals and Inquiries Acts, 1958, 1971. Under this statute it is obligatory to give reasons for any statutory 'tribunal' or authority holding a 'statutory inquiry', and this obligation may be enforced by *mandamus.*[39]

If, however, any administrative authority does not fall within the purview of the Tribunals and Inquiries Act, an obligation to state reasons may still be imposed by a relevant statute applicable to that authority. Such provision is construed as mandatory.[40]

The question arises as to whether a statutory administrative authority has any obligation to state reasons, in the absence of any such statutory requirement. The common law did not impose any such obligation.[41]

India.

1. It follows, therefore, that where a statute confers a discretionary power without imposing an obligation to state reasons, the statutory authority need not give any reasons for his decision.[42-43]

2. If however, the statutory act is likely to affect the public or the rights of individuals[44], the Court, exercising its power of judicial control over the statutory authority, would be at liberty to come to the conclusion "that he had no good reason for reaching that conclusion", and interfere if there has been an abuse of his statutory power, i.e., if the effect of the statutory order would be "to frustrate the policy and objects of the relevant statute,"[42]

36. *Harindar* v. *Karnail Singh,* A. 1957 S.C. 271.
37. *Jai Charan* v. *State of U.P.,* A. 1968 S.C. 5 (8).
38. *Nair* v. *Teik,* (1967) 2 All E.R. 34 (40) P.C.
39. *Brayhead* v. *Berkshire C.C.,* (1964) 1 All E.R. 149 (154); Halsbury, 4th Ed., Vol. 1, para. 16.
40. Cf. *Maneka* v. *Union of India,* A. 1978 S.C. 587 (paras. 62 65); *Union of India* v. *Chothia,* A. 1978 S.C. 1214; *Ajantha* v. *Central Bd.,* A. 1976 S.C. 437; *Uma Charan* v. *State of M.P.,* A. 1981 S.C. 1915; *Gurdial* v. *State of Punjab,* A. 1979 S.C. 1622 (para. 18).
41. Wade, *Administrative Law* (1977), p. 269.
42. *Padfield* v. *Min. of Agriculture,* (1968) 1 All E.R. 694 (701, 712, 714, 719) H.L.
43. *Kashiram* v. *Union of India,* A. 1965 S.C. 1028; *Narayanappa* v. *C.I.T.,* A. 1967 S.C. 523; *U.O.I.* v. *Nambudiri,* (1991) 3 S.C.C. 48; *Chandra* v. *Secy.,* (1995) 1 S.C.C. 23 (para. 29).
44. *Modi Industries* v. *State of U.P.,* A. 1994 S.C. 536 (*541-42*).

or where the administrative authority rejects the contention of a party as frivolous or untenable.[44]

3. On the other hand, the order without reasons would be *ultra vires,* where an obligation to state reasons is *imposed* by the relevant statute.[45] In such case, the duty extends to communication of the reasons to the party affected.[45a]

4. If the function is *quasi-judicial,* or fundamental rights are affected,[45a] it is well-settled that reasons must be given, in order to make the order valid.[46, 46a]

High Court ought to have given reasons for refusing to grant leave to file appeal against acquittal. By such refusal a close scrutiny of the order of acquittal by the appellate forum has been lost. Reasons introduce clarity in an order. Reason is indicative of an application of mind. The requirement of indicating reasons has been judicially recognized as imperative. Reason is the heartbeat of every conclusion, and without the same it becomes lifeless. Even in respect of administrative orders the giving of reasons is one of the fundamental of good administration. Failure to give reasons amounts to denial of justice. Reasons are live links between the minds of decision-taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. Affected party can know why the decision has gone against him. One of the statutory requirements of natural justice is spelling out reasons for the order made.[46b]

5. There are certain spheres where the Court will not insist on stating reasons because that would not be possible or conducive to the public interest, having regard to the function[47], e.g.—

(i) Where the function of the State is political or sovereign in character;

(ii) Where the matter is academic or involves the intricacies of trade and commerce;

(iii) Where the State enters into the field of private law, e.g., contracts[48] without any element of public law being involved in it.[47]

(iv) Where, in a disciplinary proceeding, the appellate authority *affirms* the findings of the Enquiry Officers.

Effects of *ultra vires.*

I. A statutory act, if *ultra vires,* becomes a nullity,[49-50, 50a] subject, of course, to the doctrine of severability.[50]

45. *Gautam* v. *U.O.I.,* (1993) 1 S.C.C. 78 (paras 13, 32, 40) C.B.

45a. *Jafar* v. *U.O.I.,* (1994) Supp. (2) S.C.C. 1 (para. 12).

46. *Mukherji* v. *Union of India,* A. 1990 S.C. 1984 (para. 39) (C.B.); *Organo Chemical* v. *Union of India,* A. 1979 S.C. 1803 (paras. 8, 38); *Rama* v. *State of Kerala,* A. 1979 S.C. 1918 (para. 14); *Maneka* v. *Union of India,* A. 1978 S.C. 597 (para. 64).

46a. E.g., where employer has stated his grounds for delayed payment of dues under the Employees' State Insurance Act, 1945 [*Prestolite* v. *R.D.,* (1994) Supp. (3) S.C.C. 690 (para. 5); or while giving a certificate under the Payment of Wages Act, *Modi* v. *State of U.P.,* (1994) 1 S.C.C. 159 (para. 15).

46b. *State of Orissa* v. *Dhaniram,* (2004)5 SCC 568.

47. *L.I.C.* v. *Escorts,* (1986) 1 S.C.C. 264 (para. 102) (C.B.).

48. *B.D.A.* v. *Ajay,* A. 1989 S.C. 1076 (paras, 20, 21).

49. *Campbells' Trustees* v. *Police Commr.,* (1870) 2 H.L. (S.C.) 1 (3); *Minister of Health* v. *R.,* (1931) A.C. 494.

50. *Kondabai* v. *Chintamanrao,* A. 1974 S.C. 1868 (paras. 6-7); *Narayana* v. *State of Kerala,* A. 1974 S.C. 175 (paras. 18, 20); *Naraindas* v. *State of M.P.,* A. 1974 S.C. 1232 (paras. 13, 16); *State of M.P.* v. *Ram,* A. 1979 S.C. 868 (paras. 22, 30); *C.A.T.A.* v. *A.P. Govt.,* A. 1977 S.C. 2313 (paras. 12, 23); *Union of India* v. *Chothia,* A. 1978 S.C. 1214; *Umacharan* v. *State of M.P.,* A. 1981 S.C. 1915; *Rajamalliah* v. *Anil,* A. 1980 S.C. 1502; *Kapur* v. *C.I.T.,* A. 1981 S.C. 2057.

50a. *I.N.P.* v. *U.O.I.,* (1994) 4 S.C.C. 269 (para. 11)—3 Judges.

II. When an act of a lower authority is *ultra vires*, the order of a superior or appellate authority who confirms it becomes equally *ultra vires*.[51]

Relaxation of statutory Rules.

It may be that even though a function is *discretionary* (e.g., the admission of a student to an educational institution),[20] there may exist some statutory rule or regulation laying down a *procedure* for exercise of such discretionary power. In such a case, a question arises as to what would happen if the authority exercises the power inderogation of or in relaxation of the relevant Rules in a particular case or cases, on the ground that the function is discretionary.

The answer to this question depends upon the construction of the Rules:

A. If the Rules are *mandatory*, anything done otherwise than in strict compliance with the procedure shall be *ultra vires* and a nullity.[50]

B. If, however, the Rules are merely *directory* or recommendatory or the Rules themselves confer further discretionary power upon the authority to relax the rules in proper cases, the authority may make such relaxation in particular case, subject to the following conditions :

(a) The power of relaxation must be exercised on *objective* considerations relating to the particular case and not capriciously.[52]

(b) If the power of relaxation is resorted to in favour of a particular person, it must be used in the case of all other persons similarly situated, in order to save the impugned act from the vice of discrimination and violation of Art. 14.[52]

Interpretation of statutory order.

Public orders, made in the exercise of a statutory authority, must be construed objectively, with reference to the language used in the order itself, and not in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do.[53]

Amendment of statutory order.

I. While a non-statutory order can be changed at any time, without any formality, a statutory order can be amended or rescinded only if it is done in the same manner and subject to the same conditions as the original order was made.[54] In *India*, this is embodied in s. 21 of the General Clauses Act, which extends to statutory rules and bye-laws as well.[55]

II. The Rule in s. 21 of the General Clauses Act is, however, a rule of construction and its applicability in a particular case must depend upon the context and subject-matter of the statute under which the order is made.[55] Thus, where any of the conditions to be complied with for making the original order has ceased to exist, it would be absurd to insist that that condition must nevertheless be complied with at the time of making an amendment.[56]

51. Cf. *Barnard* v. *National Dock Labour Bd.*, (1958) 1 All E.R. 1113 (1120) C.A.; *London & Westcliff Properties* v. *Minister of Housing*, (1961) 1 All E.R. 610 (617).

52. *Principal* v. *Vishan Kumar*, (1984) U.J.S.C. 7 (paras. 12-15).

53. *Commr. of Police* v. *Gordhandas*, (1952) S.C.A. 53 (57); *Mohinder* v. *Election Commr.*, A. 1978 S.C. 851.

54. *Toronto Ry.* v. *Toronto Corpn.*, (1904) A.C. 809 (815).

55. *Srinivasan* v. *Union of India*, A. 1958 S.C. 419 (431).

56. *K.P. Khetan* v. *Union of India*, A. 1957 S.C. 678 (683-84); *Mahendralal* v. *State of U.P.*, A. 1963 S.C. 1019 (1034-35).

III. The power to amend can, however, be exercised only during the continuance of the original order or notification and not after it has ceased to exist.[57] Nor can it be used to achieve something which could not be done by the original order.[58]

IV. The power to amend a statutory order, however, need not be specifically conferred by the statute. In the absence of anything to the contrary in the statute, it will follow by implication from the power to make such order, by virtue of s. 21.

On the contrary, the power under s. 21 cannot be invoked where the statute which confers the power to make an order expresses an intention negativing its cancellation or revocation.[59]

Administrative Delegation

The Legislature may confer upon an administrative authority not only the power to make rules and regulations to carry out the purposes of a statute but also the power to apply the law to particular cases, by making orders in exercise of the statutory power, e.g., to grant or revoke a licence or to refer an industrial dispute for conciliation or adjudication[60] or to make an appointment.[61] This latter power is referred to in the U.S.A., as administrative delegation.[62]

So far as the validity of such orders themselves are concerned, it has already been pointed out that they are subject to the doctrine of *ultra vires* and must, therefore, be within the limits set out by the statute.

What delegation permissible.

A. The question before us in the present context is how far it would be permissible for the Legislature itself to delegate such administrative power. As will be seen presently, such delegation will be permissible only if in so doing the Legislature does not abdicate its own essential function.

As to what may be delegated to the Executive for the purpose of administering a law, the broad lines have thus been indicated by the Supreme Court of the U.S.A.—

"Undoubtedly the Legislature must declare the *policy* of the law and fix the legal principles which are to control in given cases, but an administrative body may be invested with the power to ascertain the *facts* and *conditions* to which the policy and principles apply. If this could not be done, there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution."[63]

"The true distinction, therefore, is between the delegation of power to make the law which necessarily involves a discretion as to *what it shall be*, and conferring an authority or discretion for its *execution*, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."[64]

I. In short, the delegation is not unconstitutional if the statute lays down the policy underlying the legislation and a standard to guide the Executive in the administration of the law.[65-66]

57. *Strawboard Mfg. Co.* v. *Mill Workers' Union*, A. 1953 S.C. 95 (97-98).
58. *Gopichand* v. *Delhi Administration*, A. 1958 S.C. 609 (617).
59. *State of Bihar* v. *Ganguly*, A. 1958 S.C. 1018.
60. Cf. *Swadeshi Cotton Mills* v. *S.I. Tribunal*, A. 1961 S.C. 1381.
61. Cf. *Vine* v. *National Dock Labour Board*, (1957) A.C. 488.
62. Cf. *N.Y.* v. *U.S.*, (1947) 331 U.S. 284.
63. *Mutual Film Corporation* v. *Industrial Commission*, (1915) 236 U.S. 230 (245).
64. *Hampton & Co.* v. *U.S.*, (1928) 276 U.S. 394 (407).
65. *Carlson* v. *Landon*, (1951) 342 U.S. 524 (544).
66. *Harishankar* v. *State of M.P.*, (1955) 1 S.C.R. 380 (388); *Swadeshi Cotton Mills* v. *S.I. Tribunal*, A. 1961 S.C. 1381 (1384); *Union of India* v. *P.K. Roy*, A. 1968 S.C. 850.

1. Applying these principles, the *American* Supreme Court has upheld those provisions of the Internal Security Act, 1950, which, after laying down the legislative policy and standard for deportation, vests in the Attorney-General a discretionary power to admit or refuse bail to alien communists in deportation proceedings.[65]

2. The same view has been taken in *India.*

Where the Legislature, in enacting a law of acquisition of private property (Bihar Land Reforms Act, 1950), had applied its mind to the form in which compensation had to be paid, by providing that compensation was payable in cash or in bonds or partly in cash and partly in bonds, had fixed the number of equal instalments in which it should be paid, with interest on the compensation amount, but had left (a) the proportion in which the compensation could be paid in cash and in bonds, and (b) the intervals between the instalments, to be determined by the Government, *held,* there was no unconstitutional delegation of legislative power, for, the above two questions must depend upon the financial resources of the Government and the availability of funds upon which the Executive alone can have special means of knowledge. The vesting of such limited discretion by a Legislature in the administrative body cannot be held to be incompetent.[67]

3. S. 3 of the Imports and Exports (Control) Act, 1947, provides—

(1) The Central Government may, by order...., make provision for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order—

(a) the import, export, carriage ..... of goods of any specified description".

Held, that the Preamble of this Act as well as that of its predecessor, namely, the Defence of India Act, the provisions of which it sought to continue, made it clear that the main principle underlying the legislation was to maintain supplies essential to the life of the community. The Legislature had thus supplied the principles for the guidance of those entrusted with its administration and there was no unconstitutional delegation.[68]

4. To confer discretion upon an officer to enforce a law on his being satisfied as to its necessity, is not delegation of the legislative power.[69-70] In some cases, e.g., in the case of preventive detention, where action has to be taken on suspicion, it is not possible for the Legislature to lay down the conditions for the application of the law in each individual case.[71] In such cases, even the Courts are not competent to investigate the question whether such circumstances of suspicion exist as to warrant the restraint on a person.[72]

5. The conferment of a wider discretion upon an administrative authority is tolerated in the matter of licensing, because the function of licensing involves the consideration of complicated factors which cannot possibly be detailed by the Legislature.[72]

II. But if the statute does not prescribe the *standards* or the *rules of conduct* to be applied to particular states of facts determined by appropriate administrative procedure, the delegation of function of applying the law to individual cases[70] becomes, in substance, delegation of legislative power itself, and, accordingly, unconstitutional.

III. As explained earlier, the legislative policy has to be ascertained by the Court from the provisions of the Act, including its Preamble,[66] and, where the impugned Act replaces another Act, the Court may even look into the provisions of that Act in order to determine whether the Legislature has conferred unguided power to the Executive.[68, 73]

In some cases[74] it seems to have been suggested that the delegation

67. *State of Bihar* v. *Kameswar,* A. 1952 S.C. 252 (266).
68. *Bhatnagars* v. *Union of India,* (1957) S.C.R. 701 (718).
69. *Victoria Stevedoring Co.* v. *Dignan,* (1931) 46 C.L.R. 73 (93).
70. *Mohmedali* v. *Union of India,* A. 1964 S.C. 980.
71. *Gopalan* v. *State of Madras,* (1950) S.C.J. 174 (191-92).
72. *National Broadcasting Co.* v. *U.S.,* (1943) 319 U.S. 190.
73. *Pannalal* v. *Union of India,* (1957) S.C.R. 233.
74. Cf. *Garewal* v. *Union of India,* (1959) Supp. (1) S.C.R. 792.

cannot be held to be unfettered where the statute requires the order or notification to be 'laid before the Legislature' and the Legislature is given the power to amend or modify it by a resolution. It is submitted that the proposition as such is open to question. If the statute lays down the policy,[74] the requirement of laying the order or notification before the Legislature may be regarded as an additional safeguard in the hands of the Legislature to check whether the policy laid down by it has been transgressed or not. But where the statute itself does not lay down any policy or standard, the latter requirement alone cannot make the delegation constitutional; since the Legislature cannot make a law by resolutions it cannot validate the process of legislation by a resolution rectifying the act of an administrative authority at a stage prior to such resolution.

The constitutionality of the delegation should rest upon whether the Legislature has laid down the policy of the law[66, 75] and not whether it has retained the power to approve or disapprove of the administrative action by its resolution.

IV. In some cases,[70] it has been observed that a delegation of discretionary power is not uncanalised if the discretion is vested in the Government or some superior official.

With respect, the Author is unable to subscribe to this view. It is based on a presumption that a discretion vested in a high authority will not be abused. That may well be a consideration in adjudging the reasonableness of a restriction under Art. 19 of the Constitution, but the question to be determined where the constitutionality of a delegation is challenged is different, namely, whether the Legislature has itself provided a standard for the guidance of the Government or other executive authority and not whether the power has been vested in a reliable authority (see p. 178, *post*).

Extent of permissible delegation.

B. The *extent* of the permissible delegation will, of course, have to be determined with reference to the terms of the statute because if the delegation exceeds the limits set out by the statute, it will be *ultra vires,* leading to the invalidity of the act done by the delegate.

The doctrine of *ultra vires* has, however, to be applied reasonably and it has been held both in *England*[76] and in *India*[77] that where a *power* is authorised by the Legislature to be delegated, it would also authorise, by implication, the delegation of a duty or other condition precedent to the exercise of the power, if the two are so interwoven that the one cannot be split up from the other.

1. 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."

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.

75. *Swadeshi Cotton Mills* v. *S.I. Tribunal,* A. 1961 S.C. 1381 (1384).
76. *Mungoni* v. *A.G. of N. Rhodesia,* (1960) 2 W.L.R. 389 (P.C.).
77. *State* v. *Shivbalak,* (1965) 1 S.C.R. 211 (216); *Syed Shah* v. *Commr. of Wakfs,* A. 1961 S.C. 1095 (1096).

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 not split them in delegating the power to another 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 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.[76]

2. S. 65(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, provides—

"If it *appears to the State Government* that for any two consecutive years, any land has remained uncultivated ..... through the default of the holder.....the State Government may, after making such enquiry as it thinks fit, declare that the management of such land shall be assumed."

S. 83 then says—

"The State Government may, subject to such restrictions and conditions as it may impose, ... delegate to any of its officers ....., all or any of the powers conferred on it by this Act."

It was contended that though s. 83 empowered the State Government to delegate to its officer the power to make a declaration that the management of a land should be assumed by the Government, before such delegation could be made by the Government, there was an obligation imposed upon the Government to make the inquiry referred to in the earlier part of s. 65(1). Negativing this contention, the Supreme Court held that s. 83 authorised the Government to delegate to its officer not only to make the declaration but also to hold the inquiry necessary for the making of the declaration. In other words, the delegation of the statutory power carried with it the power to determine the condition precedent for the exercise of the power.[77]

Constitutional limits of administrative delegation.

In *India,* the principle that, while delegating administrative power to the Government or its officials or other statutory authority, the Legislature must itself lay down the standards for applying the delegated power to particular cases, is buttressed by constitutional limitations which lead to the same conclusion upon different considerations. Thus,

I. Where the Legislature confers unrestricted or unguided power upon an administrative authority to act at its discretion in particular cases, it would enable the authority to discriminate between persons or things similarly situated, without any reasonable differentia or standard, leading to arbitrary or discriminatory action which is condemned by the principle of equality before the law, which is guaranteed by Art. 14 of the Constitution of India.[78-79] The principle extends to cases where the delegated authority is *quasi-judicial.*[80]

In such a case, the Court would not only strike down the particular discriminatory act of the statutory authority,[78] but would cut at the very root, by annulling the statute itself, on the ground that by delegating naked, unguided power to discriminate, it itself violates Art. 14.[80]

Of course, in discovering whether the Legislature, while delegating administrative power or discretion, has laid down any standard, policy or purpose, in accordance with which the power is to be exercised, the Court

78. *Naraindas* v. *State of M.P.*, A. 1974 S.C. 1232 (para. 21).

79. *Maneka* v. *Union of India,* A. 1978 S.C. 597 (para. 65).

80. *Jyoti Pershad* v. *Union Territory,* A. 1961 S.C. 1602; *State of Punjab* v. *Khan,* A. 1974 S.C. 543 (para. 5).

would take the same liberal attitude[81] as it does while reviewing a statute delegating *legislative* power.

II. A second limitation to delegation of administrative power is offered by Art. 19 of *our* Constitution. If the law confers an absolute discretion upon an administrative authority, without laying down any standard or guideline for the exercise of that discretion, it would constitute an unreasonable restriction[82] upon the fundamental right of the citizen, in the absence of any other control upon the exercise of that discretion.[83]

In some cases, the Supreme Court has warded off attacks under Art. 14[78] as well as Art. 19[79] on the ground that where the discretionary power is vested in the Government or some high official, it may be presumed that they would exercise the discretion reasonably and not capriciously. This, however, is not a sound principle or at least a very weak presumption because even high personages may be tyrannical,[84] guided by personal or political motives, as will be evidenced by cases where the Court has struck down such arbitrary action on the part of high authorities.[84]

What does not constitute delegation of administrative power.

In *India,* there is an independent source of administrative power, namely, Arts. 73 and 162 of the *Constitution,* which vest 'executive power' in the Union and the State Governments, for which no legislative authority is required and which may be exercised so long as the Legislature has not provided otherwise. This executive or administrative power extends to all subjects to which the legislative power of the corresponding Legislature extends.[85]

Hence, when a statute deals with a subject but is silent on certain matters, it is open to the Government to make administrative schemes, regulations, etc., relating to those matters on which the Legislature has not provided otherwise, and in such cases, the administrative action cannot be challenged as *ultra vires,* because the source of the power is a constitutional provision, independent of the Legislature, so that it does not involve any delegation of power by or under the statute in question,[85] e.g., in the matter of framing a scheme for setting up of fair price shops and setting up such shops in pursuance of that scheme.[85]

Administrative sub-delegation.

When an administrative power is vested in the head of an office or department, it is not always physically possible for the departmental head to perform all the administrative acts personally. How far it would be competent for him to delegate such powers to his subordinates has to be considered under two heads :

I. *Where the statute itself authorises sub-delegation.*

1. If the statute itself authorises the administrative authority to

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81. *Verma* v. *Union of India,* A. 1980 S.C. 1461; *Organo Industries* v. *Union of India,* A. 1979 S.C. 1803; *Re Special Courts Act,* A. 1981 S.C. 1829.

82. *State of M.P.* v. *Baldeo,* A. 1961 S.C. 293 (296); *Raghubir* v. *Court of Wards,* A. 1953 S.C. 373; *Harichand* v. *Mizo Dt. Council,* A. 1967 S.C. 829 (838).

83. *Tika Ramji* v. *State of U.P.,* A. 1956 S.C. 676; *Patel* v. *Union of India* (1960) S.C.J. 224 (230).

84. *Mohinder* v. *Chief Election Commr.,* A. 1978 S.C. 851; *Pratap* v. *State of Punjab,* A. 1964 S.C. 72; *Rowjee* v. *State of A.P.,* A. 1964 S.C. 962.

85. *Sarkari Vikreta Sangh* v. *State of M.P.,* A. 1981 S.C. 2030 (para. 9); *Union of India* v. *Patankar,* A. 1984 S.C. 1587 (para. 4).

sub-delegate his powers, little problem arises if the sub-delegation is made in terms of the statute.[86-87]

S. 2(1) of the Cinematograph Act, 1909, provided that " A County Council may grant licences to such persons as they think fit ..... on such terms and conditions .... as ..... the Council may by the respective licences determine." S. 5 of the Act provided—"Without prejudice to any other powers of delegation whether to committees of the Council or to District Councils, a County Council may ..... delegate to Justices ..... any of the powers conferred on the Council by this Act". The licensing committee of the Council imposed a condition in its licence that a film must be certified by the British Board of Film Censors (a trade organisation) before it can be exhibited.

Held, that the statute empowered the County Council to delegate its powers only to its own committees, to District Councils or to Justices. It could not, therefore, delegate its powers to a third party from whom no right of appeal lay to the Council, and a condition which sought to set up such a body was *ultra vires* the committee which imposed the condition.[88]

Even where a statute authorises the statutory authority to *delegate* his powers to another body, the latter cannot again delegate his function to another, by reason of the maxim *delegatus non potest delegare,* and any act done by the sub-delegate would be invalid,[89] unless the sub-delegation is authorised by the statute itself.

2. Of course, the sub-delegation would be invalid if it is *ultra vires.*

But when a statute authorises the sub-delegation of a *power,* all incidental powers as well as the duty or function which must be exercised as a condition for the exercise of the power and which are inseparable from the power, may also be sub-delegated.[90] In other words—

Where delegation or sub-delegation is expressly authorised by the law, the delegation or sub-delegation (as the case may be) will be valid not only if it delegates the statutory power but also the determination of the conditions for the exercise of that power, including the *duty* of having a subjective satisfaction as to the occasion for the exercise of that power,—if the duty is coupled with the power and cannot be separated from it.[90]

II. *Where the statute is silent as to sub-delegation.*

Even where the statute does not specifically authorise a sub-delegation, it is upheld where the nature of the functions is such that it is physically impossible for the departmental head to perform them personally.[88, 91] Thus,—

(A) *England.*

I. When an authority (such as a Minister) is given executive powers by a statute (e.g., the power to requisition property), there is nothing wrong in the Minister's delegating such powers (to be exercised in *particular* cases) to his departmental subordinate, for a Minister cannot possibly perform all his executive acts personally.[92] But if he makes a *general* delegation of such powers to another authority and then makes regulations or instructions governing the exercise of the sub-delegated power, the regulations or instructions assume a legislative form and are invalid unless authorised by the statute.[92-93]

86. *State* v. *Shivbalak,* (1965) 1 S.C.R. 211 (215-216).
87. *Jackson, Stanfield* v. *Butterworth,* (1948) 2 All E.R. 558 (564); *Robertson* v. *U.S.,* (1922) 285 F. 911.
88. *Ellis* v. *Dubowski,* (1921) 3 K.B. 621.
89. *Allingham* v. *Minister of Agriculture,* (1948) 1 All E.R. 780.
90. *Mungoni* v. *A.G. of Northern Rhodesia,* (1960) 1 All E.R. 446 (451) P.C.
91. *Hannibal Bridge Co.* v. *U.S.,* (1911) 221 U.S. 194 (206).
92. *Lewisham Borough Council* v. *Roberts,* (1949) 1 All E.R. 815 (829).
93. *Blackpool Corpn.* v. *Locker,* (1948) 1 All E.R. 85; *Jackson Stansfield* v. *Butterworth,* (1948) 2 All E.R. 558.

II. In general, when a *discretionary* power is vested in a *named* officer, he cannot delegate to another, unless the statute expressly authorises him in that behalf[94] or there is a compelling necessity[92] to obtain the help of a deputy or assistant, e.g., to engage a valuer for the purpose of rating, which is a highly technical matter.[95]

1. The Housing Act, 1936, empowers the 'local authority to take proceedings to recover possession of property and s. 164(2) of the Act requires that a notice to be issued under the Act "shall be signed by their *clerk* or his *lawful deputy*". *Held,* that a notice to quit issued by a person other than the clerk or his lawful deputy was invalid.[94]

2. The (Eng.) Control of Building Operations (Proceedings by Local Authorities) (No. 1) Order, 1947, provides for the appointment of an officer for the purpose of taking proceedings under the order. Under s. 277 of the Local Government Act, 1933, such appointment would require a formal resolution by the local authority. In the absence of such a resolution, a prosecution by the clerk of the authority was invalid and prosecution was quashed.[96]

III. In this respect, a distinction is made between delegation to an independent entity and delegation by a Minister to his subordinates over whom he has control.[92] In the latter case, it is conceded that under a modern system of government, it is physically impossible for a Minister to personally attend to all the business committed to his charge by Parliament and that public business would be paralysed if this were insisted upon.[97] While it is not open to the Minister to delegate a function which is *legislative*[87] in nature of or appertaining to policy-making which is of a general application, it is competent to him to delegate functions which are purely *administrative*[92] or involves the application of the policy to particular cases, e.g., the order of requisitioning particular premises.[97] In the latter case even a *specific* delegation by the Minister is *not* necessary[92] since the act done by a departmental official is equally the act of the Minister as if he had done it personally.[92] But the Court can interfere if the delegated authority is exercised by the departmental subordinate in an erroneous manner.[98]

Conversely, by sub-delegating his statutory power, the Minister or other statutory authority does not denude himself of his statutory power and it is *possible for him to exercise that power, without formally revoking the sub-delegation*.[99] Thus,

When the Minister of Health delegated his power under Reg. 51(5) of the Defence (General) Regulations, 1939, to requisition and take possession of buildings, to the Town Clerk and subsequently exercised the power himself. It was contended that having delegated the power, it was not permissible for the Minister to exercise it himself. Repelling this contention, the Court observed—

"..... a delegation by a competent authority of its powers under Reg. 51 *does not divest* that authority of any of its powers under that Regulation".[99]

To the above general proposition, there are certain exceptions where, in the absence of an express statutory provision, a statutory power cannot be delegated, even though administrative, because of the *personal* nature of the function involved, e.g.,—

(i) Orders affecting personal liberty, such as for deportation[100] or

94. *Becker* v. *Crosby Corpn.*, (1952) 1 All E.R. 1350.
95. *Grainger* v. *Liverpool Corpn.*, (1954) 1 All E.R. 333 (336).
96. *Bob Keats* v. *Farrant*, (1951) 1 All E.R. 899.
97. *Carltona* v. *Works Commrs.*, (1943) 2 All E.R. 560 (563) C.A.
98. *Woollett* v. *Minister of Agriculture*, (1954) 3 All E.R. 529 (551) C.A.
99. *Gordon* v. *Morris*, (1945) 2 All E.R. 616 (621).
100. *R.* v. *Criswick Police Station*, (1918) 1 K.B. 578 (585).

detention under security regulations[1] must be made by the authority specified by the statute.

(ii) Where the holder of an office is empowered to *appoint* a person to another office, the power cannot be delegated to someone else, to make the appointment without referring it to the officer empowered by the statute.[2]

(iii) If the power is *quasi-judicial* in nature, it must be performed by the authority in whom the power is vested, e.g., the decision of objections to a scheme.[3] In short, the power to decide a question cannot be delegated,[89] unless it is authorised by statute, expressly or by implication.[2, 4]

(This topic will be treated separately.)

(B) *U.S.A.*—Generally speaking, sub-delegation of administrative power has been held as valid on the ground of 'necessity'. Thus,

(a) So far as the *statutory* powers of the President are concerned, if the statute does not prescribe in detail the procedure for its exercise or prohibit sub-delegation, the powers of the President can be exercised by the Departmental heads even without an express delegation by the President. The acts of the Secretaries of the State, in such cases, are legally deemed to be those of the President.[5]

(b) But so far as the *quasi-judicial* power of *approval*[6] of a sentence of court-martial or of pardoting an offender is concerned, there is a decision that this power must be exercised by the President personally.[6] These powers also follow from the *Constitution.* In the cited case, it was observed—

"As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of Court-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate....."[6]

If, however, the record shows that it was put up before the President for his approval, his approval is presumed, and a statement of the Secretary of State to the effect that the record was 'submitted to the President' is regarded as sufficient for this purpose.[7]

(c) The same principles have been applied in the case of authorities other than the President. Thus, it has been held that it is competent for a Postmaster General to delegate the duty of hearing cases involving misuse of the mails,[8] or for a Secretary to delegate the function of signing a warrant for the deportation of an alien,[9] or for an immigration officer to delegate to inspectors his function of inspecting ships arriving at his port,[10] or for the Secretary of the Treasury to delegate the hearing of cases for remission of customs duties,[11] for, in all such cases the volume of the business necessitated a delegation of the function.

On the other hand, no sub-delegation is permissible where the statute makes it clear that the matter must be decided by the specified authority

1. *Liversidge* v. *Anderson,* (1942) A.C. 206 (223).
2. *Vine* v. *National Dock Labour Board,* (1956) 3 All E.R. 939 (951) H.L.
3. *Franklin* v. *Minister of Town & Country Planning,* (1948) A.C. 87 (103).
4. *Barnard* v. *National Dock Labour Board,* (1953) 2 Q.B. 18.
5. *Jones* v. *U.S.,* (1890) 137 U.S. 202; *Wilsox* v. *Jackson,* (1839) 13 Pet. 498.
6. *Runkle* v. *U.S.,* (1888) 122 U.S. 543.
7. *U.S.* v. *Page,* (1891) 137 U.S. 673.
8. *Pilpao Laboratories* v. *Farley,* (1937) 302 U.S. 732.
9. *U.S.* v. *Jordan,* (1946) 328 U.S. 868.
10. *Papagianais* v. *The Samos,* (1951) 341 U.S. 921.
11. *U.S.* v. *Cottman Co.,* (1952) 342 U.S. 903.

personally,[12] because of personal trust or confidence reposed in that authority by the Legislature.[13]

But where the nature or volume of the business[13] renders a personal discharge impossible, the inference that it is non-delegable will not be made from the mere fact that a particular authority is named in the statute.[14]

(C) *India.*— As in England, it has been acknowledged in India that a statutory power of an administrative nature may be delegated. Thus, an authority empowered by the Legislature to dismiss an employee is competent to delegate the power to make an inquiry and report, providd the ultimate decision is made by the statutory authority.[15] The limits of such delegation are presumably defined by application of the maxim *"delegatus non potest delegare"*, namely, that an office of confidence cannot be delegated but the doing of *ministerial* acts may be delegated.[16]

Delegatus non potest delegare.

1. This is a maxim which has primarily to be remembered in connection with sub-delegation.

2. It means that a delegate, who has received his authority from the principal, is incompetent to sub-delegate his power to some other person or body. From this it follows that unless sub-delegation is authorised by the statute itself[16a], sub-delegation would be bad and any act done by the sub-delegate would be void.[17] In other words, where a statute has conferred a power on *A*, that power cannot be delegated to be exercised by *B*,[18] nor can such act done by *B* be ractified by *A*.[18]

3. Where a statute confers a power on a collective body, the latter cannot delegate that power to be exercised even by one of its own members, in the absence of statutory provision authorising such sub-delegation.[19]

4. The maxim, however, embodies only a rule of construction of a statute or statutory instrument. *Prima facie*, a discretion conferred by a statute is to be exercised by that authority and by no other. Thus, where a statute entrusts a discretionary function to a Board consisting of two or more members, it must be performed by that body jointly and the Board cannot delegate that function to one of its members.[19] But the intention may be negatived by any contrary indication in the language, scope or object of the statute.[18]

5. No delegation is involved where the statutory authority delegates to another a *ministerial* function, e.g., the function of inquiring into charges brought against an employee,[20] retaining the decision and the responsibility for it in its own hands.[21]

The principle upon which the sub-delegation of a *ministerial* function is permissible is that it does not constitute a delegation of *power* at all.

12. *Cudahy Packing Co.* v. *Holland*, (1942) 315 U.S. 357.
13. *Flemming* v. *Mohawk Co.*, (1947) 331 U.S. 111 (122).
14. *French* v. *Weeks*, (1922) 259 U.S. 326.
15. *Pradyat* v. *Chief Justice*, (1955) 2 S.C.R. 1331 (1345).
16. *Throbe* v. *Cole*, L.J. Ex. 24; *Fowler* v. *Duncan*, (1941) Ch. 450.
16a. *S.S.M.* v. *E.S.E.C.*, (1994) 5 S.C.C. (para 13)—3 Judges.
17. *Allingham* v. *Minister of Agriculture*, (1948) 1 All E.R. 780.
18. *Marathwada University* v. *Chavan*, (1989) 3 S.C.C. 132.
19. *Barium Chemicals* v. *Company Law Bd.*, A. 1967 S.C. 295 (306, 312, 329).
20. *Osgood* v. *Nelson*, (1872) L.R. 5 H.L. 636 (645) H.L.
21. *Board of Education* v. *Rice*, (1911) A.C. 179 (182); *Local Govt. Bd.* v. *Arlidge*, (1915) A.C. 120 (133).

Thus, where the statute empowered the State Government to make an order for the assumption of management of an uncultivated land, "after making such inquiry as it thinks fit", and further empowered the State Government to delegate this power to a Collector, it was held that it was competent for the Collector to have the inquiry made by some subordinate officer, inasmuch as the form of the inquiry was left by the statute to the discretion of the State Government or its delegate, the Collector, and the statute did not require that the Collector should make the inquiry on the spot himself. It was no delegation of his delegated authority if he made the order upon the report of the subordinate officer and on the basis of the materials collected by him.[22]

Relationship between delegator and delegate.

When a statutory power has been *validly* delegated, the question arises as to the precise relationship that is created as between the delegator and the delegate.

It is broadly established that even *where a statute itself authorises the delegation* of a power conferred by it upon a specified authority, the status of the delegate is that of an agent.[23] From this follows the following conclusions:

I. When an administrative authority delegates its power, it does not completely divest itself of its power but is, in the absence of any statutory bar, capable of resuming it[23] and, unless that is precluded by the terms of the delegation, even exercise concurrent powers.[24,25]

"The word 'delegation' implies that powers are committed to another person or body which are as a rule always subject to resumption by the power delegating ..... Unless, therefore, it is controlled by statute, the delegating person can at any time resume his authority."[23]

"Delegation ..... does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself."[23]

Thus, after delegating its power under s. 30 of the Defence of India Rules to the District Magistrate, the State Government is still competent to make an order of detention itself.[25]

II. Even where the statute itself authorises delegation, the responsibility of discharging the statutory duties remains with the body on which the Legislature conferred the power, and if the body finds that the delegate is not performing the duties properly, it is its duty to revoke such delegation and perform the functions itself,[26] even though the term for which the delegate was appointed has not yet expired. The reason is that, by delegation, the statutory authority cannot divest itself of its statutory duties.[26] Notwithstanding such delegation, the delegator is not deprived of

"a residual responsibility for the activities of the delegate and an obligation, in appropriate circumstances, to exercise some degree of control".[26]

III. Since an agent has no independent power but exercises the powers

22. *State* v. *Shivbalak,* (1965) 1 S.C.R. 211 (218); *Union of India* v. *P.K. Roy,* A. 1968 S.C. 850 (867).

23. *Huth* v. *Clarke,* (1890) 25 Q.B.D. 391 (394-95). [The Contagious Diseases (Animals) Act, 1878].

24. *Gordon* v. *Morris,* (1945) 2 All E.R. 616 (621).

25. *Godavari* v. *State of Maharashtra,* (1966) 3 S.C.R. 314 (317).

26. *Manton* v. *Brighton Corpn.,* (1951) 2 All E.R. 101 (107); approved in *R.* v. *City of Birmingham,* (1983) 2 W.L.R. 189 (199) H.L.

of his principal, an act done by a delegate is nothing but the act of the principal.[27]

It follws that if an appeal or revisional power is vested in the delegator, to control its subordinates, the delegator cannot entertain an appeal or revision against the decision of its delegate, because the act of the delegate is that of the delegator and an authority cannot hear an appeal or revision against an order made by itself.[27]

S. 41(1) of the East Punjab Holdings (Consolidation & Prevention of Fragmentation) Act, 1948, provides—

"The State Government may, for the administration of this Act, appoint such person as it thinks fit, and may by notification delegate any of its powers and functions under this Act to any of its officers ....."

"The State Government may at any time for the purpose of satisfying itself as to the legality or propriety of any order passed ..... by any officer under this Act call for and examine the records of any case pending before or disposed of by such officer and may pass such order in reference thereto as it thinks fit."

Held, by the majority of the Supreme Court (3 : 2), that an order made by the State Government, under s. 42, interfering with an order made by an officer to whom it had delegated its power under s. 41(1) was without jurisdiction and a nullity.[27]

S. 42 then says—

"The State Government may at any time for the purpose of satisfying itself as to the legality or propriety of any order passed, scheme prepared ..... call for and examine the records of any case pending before or disposed of by such officer and may pass such order in reference thereto as it thinks fit."

The Supreme Court *held* that where the State Government delegated its power to hear appeals under s. 21(4) to an officer, an order passed by such an officer is an order passed by the State Government itself, because the power to hear appeals is vested by the statute in the State Government and no one else. The result would be that since nobody can interfere with his own order in revision, an order passed by the State Government in revision under s. 42 over the order of its delegate would be a nullity.[27]

IV. Since the delegatee derives its power from the delegator, the delegatee cannot exercise any power which the delegator could not.[28]

Effect of invalid sub-delegation.

When sub-delegation is not authorised by the parent statute which delegated the power, the order or resolution which authorised sub-delegation becomes *ultra vires*, and, therefore, void.[29]

As a result, the order passed by the sub-delegate also becomes void.[29] If a fresh order is issued on the basis of the previous invalid order, that also will be invalid.[30]

27. *Roop Chand* v. *State of Punjab*, A. 1963 S.C. 1503 (1505-06); *Mahla Singh* v. *State of Punjab*, A. 1967 Punj. 446.
28. *I.O.C.* v. *Mun. Corpn.*, (1993) 1 S.C.C. 333 (para. 9).
29. *S.S.M.* v. *E.S.E.C.*, (1994) 5 S.C.C. 346 (paras. 14-15)—3 Judges.
30. *Ramesh* v. *U.O.I.*, (1993) 2 SCC 416 (para. 6).

CHAPTER 6

STATUTORY AUTHORITIES IN GENERAL

General conditions for the exercise of all statutory powers.

Administrative powers may be conferred by the Legislature not only upon the Government[1] or any of its Departments or officials[2] but also upon individuals or bodies of individuals for various public purposes. Thus, a University and its officers may be endowed with necessary powers for the management of the educational functions entrusted to it by a statute;[3] a Court of Wards under the Court of Wards Act, 1879, has the power (s. 18) to sanction leases etc. of the property under its charge.[4] Statutory powers may also be vested in municipalities or other local authorities[5] for the purposes of governmental administration in a local area, or in statutory corporations for the discharge of some other public or commercial functions in which a Welfare State is interested. While the special incidents of these different kinds of statutory authorities will be dealt with in detail in subsequent Chapters, in the present Chapter I shall deal with the common characteristics that belong to all statutory authorities, whether they appertain to the group of 'public corporations' or whether they are local bodies or not, and also irrespective of the question whether the statutory authority is a corporation sole or a corporation aggregate.

Thus, it is a condition of any statutory power that it must be exercised so as not to be *ultra vires*[6-7] and must be exercised *bona fide*,[4,8] reasonably, and without negligence.[8]

I. The exercise of a statutory power is subject to the rule of *ultra vires*.[9]

(a) This means that, though an authority endowed with statutory power is *not bound* to exercise such power except where the power is coupled with a duty, if it does proceed to exercise such power, it must keep strictly within

1. Cf. *State of Madras* v. *Sarathy*, (1953) S.C.R. 334.
2. Cf. *Maqbool* v. *State of Bombay*, (1953) S.C.R. 730.
3. E.g., Allahabad University Act, 1887; Bihar State Universities Act, 1960 [*Bishweshwar* v. *University of Bihar*, A. 1965 S.C. 601]; University of Saugar Act, 1946; Magadh University Act, 1961; Calcutta University Act, 1966.
4. Cf. *Karnapura Development Co.* v. *Kamakshya Narain*, (1956) S.C.R. 325 (334).
5. Cf. *Shenoy* v. *Udipi Municipality*, A. 1974 S.C. 2177 (paras. 27-28).
6. *Tewari* v. *Dt. Board*, A. 1964 S.C. 1680 (1683).
7. *Municipal Council of Sydney* v. *Campbell*, (1925) A.C. 338 (P.C.); *Bromley L.B.C.* v. *G.L.C.*, (1982) 1 All E.R. 129 (154) H.L.
8. *Westminster Corpn.* v. *L. & N. Ry.*, (1905) A.C. 426 (428).
9. For the general principles relating to the doctrine of *ultra vires*, see pp. 92 *et seq* and 149-50 *et seq, ante*.

the power conferred by the statute,[10] and must not use such power for a purpose other than for what it had been conferred by the statute.[11]

(b) Stated otherwise, it means that a statutory authority can exercise only those powers which are *expressly or impliedly* authorised by the statute and what the statute does not expressly or impliedly authorise must be taken to be prohibited.[12]

(i) A statutory power to run tramways does not include the power to run omnibuses;[13] or a power to run tramways for the purpose of "conveying passengers, animals, goods and parcels" does not empower the carrying on of a general parcels delivery service, on areas not covered by the tramways or in respect of goods not carried on the tramways of the statutory corporation.[14]

(ii) When a statute empowered a Municipal Council to compulsorily acquire land for 'carrying out improvements in or remodelling any portion of the city', but they proposed to acquire a land only for the purpose of making a financial gain, without making any plan for improvement of the city, the acquisition was struck down as *ultra vires.*[7]

(c) The rule of *ultra vires* is, however, subject to the doctrine of incidental and consequential powers,[15-16] which means that—

"....where the legislature gives power to a public body to do anything of a public character, the legislature means also to give to the public body all rights without which the power would be *wholly unavailable,* although such a meaning cannot be implied in relation to circumstances arising accidentally only."[17]

Thus,—

(i) The power to make bye-laws involves the power of enforcing them, i.e., the power to prescribe penalty for their breach.

(ii) The power to prescribe the 'conditions of service' of employees includes the power to prescribe the conditions for termination of service.[18]

In determining whether a power claimed by a statutory authority can be held to be incidental to powers expressly conferred by the statute, the Court must see not only whether such power may be 'derived by reasonable implication'[19] from the provisions of the Act but also whether such powers are necessary for carrying out the purposes of the Act.[14,19]

Subject to this doctrine of incidental powers, however, it is incumbent on every statutory authority, when its powers are challenged "to show that it has *affirmatively* an authority to do particular act".[20]

In other words, the burden of showing that the Legislature has authorised an interference with private rights is upon the statutory authority and the Court will construe such statutes strictly against the authority and in favour of the subject affected.[21]

(d) Where the statute confers a power to be exercised subject to specified

10. *Campbell's Trustees* v. *Police Commrs.*, (1870) L.R. 2 H.L. (Sc.) 1 (3).
11. *Stockton Ry.* v. *Brown,* (1860) 9 H.L.C. 246 (256); *Richmond* v. *N.L. Ry.*, (1868) 3 Ch. App. 679 (681).
12. Halsbury, 4th Ed., Vol. I, para. 21; Vol. 44, para. 934.
13. *L.C.C.* v. *A.G.,* (1902) A.C. 165.
14. *A.G.* v. *Manchester Corpn.,* (1906) 1 Ch. 643.
15. *A.G.* v. *Great Eastern Ry.*, (1880) 9 H.L.C. 246 (256).
16. *A.G.* v. *Mersey Ry.*, (1907) A.C. 415.
17. *Dudley Corpn., re.,* (1882) 8 Q.B.D. 86 (93-94).
18. *A.C.C. Ltd.* v. *Sharma,* (1965) 2 S.C.R. 366 (388).
19. *Baroness Wenlock* v. *River Dee,* (1885) 10 A.C. 354 (362) H.L.
20. *A.G.* v. *Fulham Corporation,* (1921) 1 Ch. D. 440.
21. *A.G. for Canada* v. *Hallet & Carey,* (1952) A.C. 427 (450) P.C.

conditions,[22] it must be deemed to have been prohibited to exercise the power or to do an act which could be done in exercise of that power, except in accordance with the provisions of the Act and the conditions and limitations imposed by it.[19]

II. Statutory power must be exercised reasonably.

Even when a statutory power is discretionary, it must be exercised reasonably.[8]

This does not mean that the Court will substitute its own judgment for that of the authority in which it has been vested by statute or that the Court will interfere with *how* the discretion is to be used by that authority,[8] but that—

(i) The exercise of the discretion must not be arbitrary[23] or capricious[24-25] but must follow the course that reason directs.[26]

In *Sharp* v. *Wakefield*,[24] Lord Halsbury observed—

".....when it is said that something is to be done according to the rules of reason and justice, not according to private opinion....; according to law, not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself."[24]

This rule therefore means that where a statutory authority arrives at a decision and makes an order which no *reasonable* authority would have passed on the material before it,[27] its order would be liable to be struck down by the Court as arbitrary or perverse. The result would be the same where the authority had no material or ground for making the order.[27]

(ii) The rule against arbitrariness equally applies whether the power is conferred by the Constitution or by a statute.[28]

(iii) The authority must take into consideration matters which he is bound under the statute to consider.[29]

The result is the same if he refuses to decide the relevant question[30] or refuses to exercise his discretion on irrelevant considerations.[31]

(iv) The authority must exclude from his consideration matters which are irrelevant to what he has to consider.[32-33]

Where the authority, in the exercise of his discretion, acts on considerations some of which are relevant and some are irrelevant, the Court

22. *See Pacific Coasts Coal Mines* v. *Arbuthnot*, (1917) A.C. 607 (616), where the distinction between a formality and a condition has been explained.

23. *Taylor* v. *Munrow*, (1960) 1 All E.R. 455 (461).

24. *Sharp* v. *Wakefield*, (1891) A.C. 173 (179).

25. *R.* v. *Bishop of London*, (1889) 24 Q.B.D. 213 (243); *Short* v. *Poole Corpn.*, (1947) 2 All E.R. 680 (682, 685) C.A.

26. *Robert* v. *Hopwood*, (1925) A.C. 578 (613).

27. *Rhotas Industries* v. *Agarwal*, A. 1969 S.C. 707 (para. 16); *Barium Chemicals* v. *Company Law Bd.*, A. 1967 S.C. 295 (para. 60).

28. *Kasturi* v. *State of J. & K.*, A. 1980 S.C. 1992 (1999); *Maneka* v. *Union of India*, A. 1978 S.C. 597.

29. *Associated Pictures* v. *Wednesbury Corpn.*, (1947) 2 All E.R. 680 (683-84) C.A.

30. *Shanmugam* v. *S.K.V.S. Ltd.*, A. 1963 S.C. 1626.

31. *State of Bombay* v. *Krishnan*, A. 1960 S.C. 1223.

32. *Fawcett Properties* v. *Buckingham C.C.*, (1960) 3 All E.R. 503 (H.L.).

33. *Union of Journalists* v. *State of Bombay*, A. 1964 S.C. 1617; *State of Bombay* v. *Krishnan*, A. 1960 S.C. 1223 [refusing to make a reference under s. 10 of the Industrial Disputes Act]. See also, *Arora* v. *State of U.P.*, A. 1962 S.C. 764; *Anant* v. *State of A.P.*, A. 1963 S.C. 853; *Makhan Singh* v. *State of Punjab*, A. 1964 S.C. 1120.

would strike down the order of the authority,[34] provided the Court is satisfied that the irrelevant grounds are such that if they are excluded, the decision of the authority would reasonably have been affected.[35]

(v) The authority must not, even where his discretion is unlimited, do something which cannot reasonably be held as included within his authority.[36] This, in fact, is an instance of *ultra vires* exercise of power.[35]

But the validity of a statutory rule or regulation cannot be questioned on the ground of unreasonableness of its contents as in the case of a bye-law.[37]

III. Statutory power must be exercised bona fide.[37]

This means that—

(i) A statutory power must not be used for a purpose other than that for which it was given by the Legislature.[38]

Absence of *bona fides* arises not only where the statutory purpose is used *fraudulently,*[39] or from a corrupt motive[40] to effect an ulterior object, but also where the object may be quite laudable and in the interests of the public, provided it is an object other than the object intended by the Legislature.[41]

(ii) Where, however, a statutory authority seeks to carry out one of its statutory objects *bona fide,* "the exact *method* adopted is immaterial, unless that method is forbidden by (its) statutory constitution".[42]

(iii) Similarly, where there are two powers available to an authority, the mere fact that after pursuing the procedure for the exercise of one of those powers for some time, the authority changes its mind and applies the other one, which is more liberal than the other, it cannot be held as a matter of course, that the second power has been used *mala fide,* in order to avoid the obligations of the first power.[43]

(iv) Where a power is used for than one purpose, one of which is authorised and the other unauthorised, the validity of the act will be determined by the 'dominant' purpose, which the Court has to ascertain.[41]

IV. A statutory authority must apply his mind.

When an authority seeks to exercise statutory power—whether purely administrative[44] or discretionary[45] or *quasi-judicial,*[46] without applying his

34. *Keshav Talpade* v. *Emp.*, A. 1943 F.C. 72; *Shibbanlal* v. *State of U.P.*, A. 1954 S.C. 179.

35. *Dwarka Das* v. *State of J. & K.*, A. 1957 S.C. 164.

36. *Prescott* v. *Birmingham Corpn.*, (1954) 3 All E.R. 698 (707-08) C.A.; *Hall & Co.* v. *Shoreham-by-Sea U.D.C.*, (1964) 1 All E.R. 1 (9, 14) C.A.

37. *Maharashtra State Bd.* v. *Paritish*, A. 1984 S.C. 1543 (paras. 16, 18); *Port of Madras* v. *Aminchand*, A. 1975 S.C. 1935.

38. *Municipal Council* v. *Campbell*, (1925) A.C. 338; *Westminster Corpn.* v. *L. & N. W. Ry.*, (1905) A.C. 428; *Galloway* v. *Lord Mayor of London*, (1866) 1 H.L. 34 (43); *General Assembly* v. *Overtun*, (1904) A.C. 515.

39. *Lazarus* v. *Beasely*, (1956) 1 Q.B. 702 (712); *Smith* v. *East Elloe R.D.C.*, (1956) A.C. 736 (770).

40. *Pratap Singh* v. *State of Punjab*, A. 1964 S.C. 72.

41. *Fitzwilliam's Estates* v. *Minister of Town Planning*, (1952) A.C. 362.

42. *Deuchar* v. *Gas Light & Coke Co.*, (1924) 1 Ch. 422 (435).

43. *Kumaon Motor Owners' Union* v. *State of U.P.*, A. 1966 S.C. 785 (791).

44. *D'Souza* v. *State of Bombay*, (1956) S.C.R. 382 (387); *Karanpura Development Co.* v. *Kamakshya Narain*, (1956) S.C.R. 325 (337).

45. *Jagannath* v. *State of Orissa*, A. 1966 S.C. 1141 (1142); *Puranlal* v. *Union of India*, A. 1958 S.C. 163 (169).

46. *R.* v. *Walsall*, (1854) 18 J.P. Jo. 754; *Ross Clunis* v. *Papadopoullos*, (1958) 2 All E.R. 23 (P.C.).

mind,[44,47] to the question before him[44] or the conditions[47-49] and considerations relevant to the exercise of the power and the facts and circumstances before him, it ceases to be a *bona fide* exercise of that power.

Thus,—

There is an obvious failure to apply his mind where the statutory authority refers to all the conditions specified by the statute indiscriminately in his order.[45]

But the mere fact that he mentions more that one condition or purpose would not necessarily show that he did not apply his mind if both the statutory conditions or purposes were present in the particular case.[50]

Reasons behind a statutory order.

I. In the absence of any statutory requirement to give reasons, a statutory authority (other than *quasi-judicial*) has no obligation to give reasons for his order.[51]

II. Nevertheless, whether he has applied his mind to the relevant consideration, in exercising his statutory power, must be evident from the language of the order itself,[52] and the reviewing Court, in determining this question, has to construe the order itself objectively and not in the light of any explanation subsequently given.[52]

III. It follows that when a statutory authority does give the reasons (whether so required by the statute or not) for his order, the validity of the order must be judged by the reasons so mentioned[53] and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.[53]

IV. Where, however, the order of a statutory authority would affect the rights of individuals, the authority should record its reasons,[54] so that the remedy by way of judicial relief against arbitrary action[55] is not frustrated.

The trend of decisions in the Supreme Court is thus to demand reasons even in cases where the administrative function may not be strictly *quasi-judicial*.[56]

Doctrine of fraud on a statute.

This doctrine has various facets.

A. Though a person can lawfully evade a statute, he cannot *infringe* it.[57]

(a) Evasion means so arranging one's affairs that he does not come within the prohibition of a statute.[58] In such a case, he may be or may not

47. *Barium Chemicals* v. *Company Law Bd.*, A. 1967 S.C. 295 (297, 322-23); *Balwant* v. *State of Bihar*, (1977) 4 S.C.C. 448.

48. *Stuart* v. *Anderson*, (1941) 2 All E.R. 665 (671).

49. *Sukhbans* v. *State of Punjab*, A. 1962 S.C. 1711 (1716).

50. *State of Assam* v. *Bharat Kala Kendra*, A. 1967 S.C. 1766 (1770).

51. *Maharashtra S.R.T.C.* v. *Balwant*, A. 1969 S.C. 329.

52. *Commr. of Police* v. *Gordhandas*, A. 1952 S.C. 16 (18); *Tarachand* v. *Municipal Corpn.*, (1977) 1 S.C.C. 472; *Narain* v. *I.T.*, (1973) 2 S.C.C. 265.

53. *Mohinder* v. *Chief Election Commr.*, A. 1978 S.C. 851 (para. 8); *Ram Vilas* v. *Chandrasekhara*, A. 1965 S.C. 107.

54. *Siemens* v. *Union of India*, A. 1976 S.C. 1785; *Mahabir* v. *Shibban Lal*, (1975) 2 S.C.C. 818.

55. *Royappa* v. *State of T.N.*, A. 1974 S.C. 555.

56. *Maneka* v. *Union of India*, A. 1978 S.C. 587; *Govt. Press* v. *Belliappa*, A. 1979 S.C. 429.

57. *Ramsden* v. *Lupton*, (1873) 9 Q.B. 17 (28, 30).

58. *I.R.C.* v. *Westminster*, (1936) A.C. 1 (19).

be morally innocent,[59] but he cannot be legally made liable.[60] In other words, even where the *spirit* of an enactment has been contravened, the law cannot take cognisance of it, so long as there is no infringement of any of its provisions.[61]

(b) But the Court cannot allow a person to evade the prohibition imposed by a statute by resorting to a contrivance.[62] In other words, evasion would not be legitimate where, instead of taking an advantage of an omission of the Legislature, a person seeks to escape from the obligation of a statute by putting 'a private interpretation on its language'.[63] In order to determine whether an act amounts to a fraud on a statute,—

(i) The Court examines the *real nature* of the transaction in question;[64]

(ii) On the other hand, the court puts a proper interpretation on the language of a statute to find out whether an act must be *deemed* to have been prohibited by a statute, even though not expressly prohibited.[65]

B. Sometimes a statutory bar or limitation is sought to be avoided by resorting to some device.[66] If the tansgression is patent, it would clearly be *ultra vires*. If it is done indirectly or covertly, it becomes an instance of 'fraud on the statute'.[67]

In such a case, the Court acts upon the maxim—

"Whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance."[68]

In such cases, the Courts "brush away the cobweb varnish and show the transactions in their true light",[69] because "fraud is fraud all the same; and it is the fraud, not the *manner* of it, which calls for the interposition of the Courts".[70]

S. 68E of the Motor Vehicles Act, 1939, says—

"Any scheme, published under sub-section (3) of section 68D, may at any time be cancelled or modified by the State Transport undertaking and the procedure laid down in section 68C and section 68D shall, so far as it can be made applicable, be followed in every case where the scheme is proposed to be modified as if the modification proposed were a separate scheme."

The effect of the above provision is that any *change* in the scheme must, in order to be valid, comply with the procedure laid down by the statute as if it were a new scheme. Where, therefore, a rule made under the Act provides that "the frequency of services on any of the notified routes shall, if necessary, be varied having regard to the traffic needs during any period", the rule was struck down as *ultra vires*,[71] because a change in the frequency of services amounts to a 'modification' of the scheme,[71] and that it could not be done without complying with s. 68E.[71]

59. *Latilla* v. *I.R.C.*, A.C. 377 (381).
60. *Bullivant* v. *A.G. for Victoria*, (1901) A.C. 196 (202, 207).
61. *Smale* v. *Burr*, (1872) 8 C.P. 64 (69); *A.G.* v. *Richmond*, (1909) A.C. 466 (473).
62. *Fox* v. *Bishop of Chester*, (1824) 2 B. & C. 635 (655).
63. *Netherseal* v. *Bourne*, (1889) 14 App. Cas. 228 (247).
64. *Re Watson*, (1890) 25 Q.B.D. 27.
65. *Philpott* v. *St. George's Hospital*, (1857) 6 H.L.C. 338 (348).
66. *Gajapati* v. *State of Orissa*, A. 1953 S.C. 375: (1954) S.C.R. 1; *Nageswara Rao* v. *A.P.S.R.T.C.*, A. 1959 S.C. 308 (316): (1959) Supp. (1) S.C.R. 319 (329).
67. Cf. *Aswathanarayana* v. *State of Mysore*, A. 1966 S.C. 1848 (1854).
68. *Booth* v. *Bank of England*, 7 Cl. & E. 509 (540).
69. *Collins* v. *Blantern*, 2 Wils. K.B. 341 (349).
70. *Reddaway* v. *Banham*, (1896) A.C. 199 (221).
71. *Kondala* v. *A.P.S.R.T.C.*, A. 1961 S.C. 82 (92).

Subsequent to this, it has been held that where the rule itself provides for a maximum and minimum number of vehicles and trips, any change or variation within the minimum and maximum so fixed would not amount to modification of the scheme and need not, therefore, comply with the requirements of s. 68E.[67] At the same time, it has been laid down that if the gap between the minimum and maximum is fixed not with reference to relevant considerations such as the variation of demand for transport in different seasons but is arbitrarily kept so wide, that it may be said to be a device to avoid the requirements of s. 68E, the rule would be struck down as a fraud on s. 68E.[72]

But there is no fraud on a statutory power or a colourable use thereof where alternative powers are available to a statutory authority and the latter takes resort to the less onerous power in order to avoid the limitations to which the other power is subject.[73]

No prosecution for an offence under s. 26 of the Bihar Sales Tax Act for obstruction of an officer lies without the sanction of the Commissioner. But no sanction is required for prosecution for the offence under s. 353 of the I.P.C. (criminal force). Where the act of snatching away the books of accounts from the custody of an officer by the accused constituted an offence under both the provisions, prosecution under s. 353, I.P.C., alone could not be held to be a colourbale use of that power merely on the ground that it was resorted to in order to obviate the necessity of obtaining the Commissioner's sanction.[73]

C. Stated otherwise, 'fraud on power' implies that a power not conferred is exercised under the cloak of a power conferred.[74]

It is otherwise known as a 'colourable exercise' of a power, e.g., where a power to acquire a land for a public purpose is used for a 'private' purpose.[75]

But if an act can legitimately be referred to as a power conferred, the intention of the person exercising the power or the effect of his exercise of the power is irrelevant.[74]

D. Where a statutory power is used for a purpose other than that for which it had been conferred by the statute,[76] it is nullified by the court as a fraudulent use of a statutory powers,[77] for, a condition for the exercise of all statutory powers, as stated elsewhere, is that it must be *bona fide*.

But, in order to be fraudulent, the power which is sought to be exercised must be beyond the competence of the authority concerned. For, if an act can legitimately be referred to as a power conferred, the intention of the person exercising the power or the effect of his exercise of the power is irrelevant.[74]

In short, in administrative law, 'fraud upon a Statute' or 'fraud on a power' does not require *deception* (as in private law). Shortly speaking, it means a colourable use of a statutory power, or the exercise of a jurisdiction it does not possess, by resorting to a subterfuge. Hence, it does not oblige a statutory authority to disclose facts which the statute does not require it to disclose.[78]

E. In a number of cases, *our* Supreme Court has dealt with the doctrine of fraud on powers in relation to constitutional provisions and these

72. *Rowjee* v. *State of A.P.*, A. 1964 S.C. 962 (976).
73. *Chandrika* v. *State of Bihar*, A. 1967 S.C. 170 (173).
74. *Makhan Singh* v. *State of Punjab*, A. 1964 S.C. 381 (415).
75. Cf. *Somawanti* v. *State of Punjab*, A. 1963 S.C. 151 (164).
76. It is an extension into the statutory sphere of the equitable doctrine of 'fraud on a power of appointment' [*Vatcher* v. *Paul*, (1915) A.C. 372 (378)].
77. *Macbeth* v. *Ashley*, (1874) 2 H.L. Sc. 352.
78. *Shrisht* v. *Shaw Bros.*, (1992) 1 S.C.C. 534 (para. 20).

cases may serve as illustrations of the doctrine of fraud on statutory powers as well.[79]

In *India*, it should be remembered, fraud on a constitutional power is an independent ground for annulling an administrative order.[79]

V. Statutory power must be exercised by the authority in whom it is vested.

A. The general rule is that where a statute directs that certain acts shall be done by a specified person, their performance by any other person is impliedly prohibited.[80, 81] Various corollaries which follow from this general principle will be explained *below*.

B. The above principle applies whether the act is discretionary[82-83] or *quasi-judicial*.[84-85]

1. Where a statute vested the power of granting and cancelling a licence in the Commissioner of Police, an order of cancellation issued by the Commissioner was held not to be an exercise of his statutory power in that behalf because it was made in pursuance of 'instructions' received from the Government—

".....the Commissioner did not in fact exercise his discretion in this case and did not cancel the licence he granted. He merely forwarded to the respondent an order of cancellation *which another authority* had purported to pass. It is evident....that the Commissioner had before him objections which called for the exercise of the discretion *regarding cancellation specifically* vested in him by Rule 250. He was, therefore, bound to exercise it and bring to bear on the matter his *own independent and unfettered judgement and decide* for himself whether to cancel the licence or reject the objection."[83]

2. Where the power to dismiss an employee is vested in the 'Company' by a Standing Order certified under the Industrial Employment (Standing Orders) Act, 1946, it cannot be exercised by the Works Manager or any other officer of the Company, in the absence of a proper delegation.[86]

C. Because of the above principle, the legal character of the statutory act does not change even if the statutory authority in whom the power is vested is required to act according to the 'sanction' of a superior authority, because the superior authority cannot be supposed to sanction his own act.[87] It is only the specified authority who is competent to do the act, e.g., the act of settling a fishery,[87] even though he may act only subject to the sanction of the superior authority.[87]

D. The principle is so strictly adhered to that—

(a) Where the statutory power is vested in the Board of Directors of

79. *State of Bihar* v. *Kameswar*, (1952) S.C.R. 889: A. 1952 S.C. 252; *Gajapati* v. *State of Orissa*, (1954) S.C.R. 1 (17); *Vajravelu* v. *Sp. Deputy Collector*, A. 1965 S.C. 1017 (1024); *Union of India* v. *Metal Corpn.*, A. 1967 S.C. 637 (642); *Jayavantsinghji* v. *State of Gujarat*, (1962) Supp. 2 S.C.R. 411 (449): A. 1962 S.C. 821; *Kunnathat* v. *State of Kerala*, A. 1962 S.C. 552 (559).

80. Crawford, *Statutory Construction*, 1940 Ed., p. 335.

81. *Bar Council* v. *Surjeet*, A. 1980 S.C. 1612.

82. *Simms* v. *Minister of Labour*, (1946) 2 All E.R. 201 (205); *Allcroft* v. *Bishop of London*, (1891) A.C. 666 (674).

83. *Commr. of Police* v. *Gordhandas*, (1952) S.C.R. 135 (147); *Mahadayal* v. *Commercial Tax Officer*, A. 1958 S.C. 667 (671).

84. *Spackman* v. *Plumstead Board of Works*, (1885) 10 App. Cas 229 (240) H.L.; *Middlesex County Valuation Committee* v. *West Middlesex Assessment Committee*, (1937) 1 All E.R. 403 (410); *Cooper* v. *Wilson*, (1937) 2 All E.R. 726 (732) C.A.; *General Medical Council* v. *Spackman*, (1943) A.C. 627 (637) H.L.

85. *Calcutta Dock Labour Board* v. *Jafar Imam*, A. 1966 S.C. 282 (287).

86. *Hindustan Brown Bovery* v. *Workmen*, (1967) S.C. [C.A. 331/66].

87. *State of Assam* v. *Keshav*, (1953) S.C.R. 865 (876-77).

a Corporation, it cannot be exercised even by the entire body of members of the Corporation or Society.[88]

(b) Where the statute provides that a statutory power shall be exercised in consultation with another specified authority, consultation with some *other* authority, whether in substitution of or in addition to the specified authority, makes the resultant act *ultra vires*, and conseqeuntly any Rule which permits such consultation of an extraneous body must be condemned as *ultra vires*. This pronouncement was made by the Supreme Court in connection with the power conferred by Art. 133(1) of the Constitution, as applied to r. 13(c) of the U.P. Higher Judicial Service Rules, which empowered the Governor to appoint a person as District Judge in accordance with the selection "made by a Committee consisting of two Judges of the High Court *and the Judicial Secretary to the Government*".

Art. 233(1) of the Constitution says—

"Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by *the Governor* of the State *in consultation with the High Court*".....

The Supreme Court held, *inter alia*, that the Rule, in so far as it included the Judicial Secretary, a person not specified in Art. 233(1) as a person to be consulted, was unconstitutional for contravention of the mandate of Art. 233(1). The following observations of Subba Rao, C.J., speaking for the Court, are relevant for our purposes—

"The constitutional mandate is clear. The exercise of the power of the appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of a District Judge in consultation with the High Court. ..... This mandate can be destroyed by the Governor in two ways, namely, (i) by not consulting the High Court at all, and (ii) by consulting the High Court *and also other persons*. In one case he directly infringes the mandate of the Constitution, and in the other he *indirectly* does so, for *his mind may be influenced* by other persons not entitled to advise him. .....[89]

To state it differently, if *A* is empowered to appoint *B* in consultation with *C*, he will not be exercising the power in the manner prescribed if he appoints *B* in consultation with *C* and *D*."[90]

(c) Where the power to do a specified act is vested in an inferior authority by statute or rules or bye-laws having statutory force, a superior authority cannot do that act directly.[91] Even though revisional power may be vested in the superior authority, the latter cannot exercise that power in the absence of a revisional proceeding in terms of the statute.[91]

(d) Because of the rule that statutory power must be exercised by the very person or body of persons to whom it is entrusted, there is a strong presumption that the Legislature did not intend that that person or body should have the power to delegate that power to someone else[92] which can be rebutted only by showing that the Legislature evinced such intention by express words or by necessary implication[92] (see *below*). Of course, in the exercise of his power, the statutory authority may take the help of ministerial officers to make an inquiry and to report, but the consideration of that report and the making of the ultimate decision must be the concern of the statutory authority itself.[92]

88. *Lapointe* v. *L'Association*, (1906) A.C. 535 (538) P.C.
89. *Chandramohan* v. *State of U.P.*, A. 1966 S.C. 1987.
90. *Prem Nath* v. *State of Rajasthan*, A. 1967 S.C. 1599.
91. *Chandrika* v. *State of Bihar*, (1984) U.J.S.C. 1 (paras. 13-14).
92. Halsbury, 4th Ed., Vol. I, para. 32; *Vine* v. *National Dock Labour Bd.*, (1956) 3 All E.R. 939 (951) H.L.

(e) For the same reason, a statutory authority cannot enter into any contract or undertaking that he shall not exercise the power or duty vested in him by statute; any such contract shall be void.[93]

VI. Rule against abdication of discretionary power.

A. When a discretion is vested in a statutory authority, he must exercise that discretion himself, independently of the instructions issued by a superior or other authority.[94-96] Put otherwise, the administrative superior of a statutory authority cannot limit or control the exercise of statutory powers by the latter.[94]

B. Where the power is discretionary, the statutory authority may adopt general rules of policy to guide himself in the manner of exercising his discretion, but he must come to his decision by applying those principles to the facts and circumstances of *each* case. Such general rules, again, must be relevant to the purpose of the statutory power and must not be too rigid to fetter the authority in the exercise of his discretion.[95]

C. Nor can a statutory public authority disable itself from exercising its discretionary power by contract.[97]

D. The rule is so strictly adhered to that a public authority is not only incompetent to bargain away his statutory powers by any promise made in advance,[91] but where the exercise of the power involves a *quasi-judicial* obligation, the authority cannot make rules for the exercise of that power in every case, without applying itself to the facts of each case.[98]

Conversely, where a statutory authority has no power or duty under the relevant statute, it could not assume power or be saddled with a responsibility simply because it has done anything in excess of its statutory powers in the past.[99]

VII. Rule against usurpation.

From the rule that a statutory function or power must be exercised by the authority in which it is vested by the Legislature, it follows that even an appellate authority cannot altogether usurp the functions of the original authority,[100] e.g., by directing that all applications for licence must be filed before the appellate authority instead of the licensing authority,[1] even though in exercising its appellate power, it may exercise the powers of the original authority, unless, of course, such powers of the appellate authority are curtailed by the governing statute.

VIII. Rule against delegation.

The instant rule follows from the general maxim—*Delegatus non potest*

93. *Ayr Harbour Trustees* v. *Oswals,* (1883) 8 App. Cas. 623 (H.L.).
94. *Simms* v. *Minister of Labour,* (1946) 2 All E.R. 201.
95. Halsbury, 4th Ed., Vol I, para. 33; *British Oxygen* v. *Min. of Technology,* (1970) 3 All E.R. 165 (170, 175) H.L.; *Cumings* v. *Birkenhead Corpn.,* (1971) 2 All E.R. 881 (885) C.A.; *Sagnata* v. *Norwich Corpn.,* (1971) 2 All E.R. 1441 (1447) C.A.
96. *Commr. of Police* v. *Gordhandas,* (1952) S.C.R. 135 (147).
97. *Ayr Harbour Trustees* v. *Oswald,* (1883) 8 App. Cas. 623; *Southport Corpn.* v. *Birkdale Electric Co.,* (1926) A.C. 325.
98. *R.* v. *Torquay Licensing J.J.,* (1951) 2 All E.R. 656.
99. *Alsager U.D.C.* v. *Barratt,* (1965) 1 All E.R. 889 (891) C.A.
100. *Kennedy* v. *Birmingham L.C.,* (1972) 2 All E.R. 305 (308) C.A.
1. *State of Punjab* v. *Hari Kishan,* A. 1966 S.C. 1081 (1085).

delegare, which means that a delegatee cannot delegate his power, unless he is expressly authorised so to do.[2]

A. From the above maxim follows the general rule that, in the absence of a specific statutory provision[3] authorising a statutory authority to delegate its statutory power to another person or body, when a statute confers a power on a specified authority, the intention of the Legislature is that such power must be exercised by that named authority and not anybody else.[3-5]

As was pointed out by Lord Somervell in *Vine* v. *National Dock Labour Bd.*,[5] the rule against delegation is not confined to *quasi-judicial* functions, but extends to all statutory functions, subject to statutory exceptions. Thus,—

(a) If the power to appoint to an office is vested by statute in a specified authority, the latter cannot, in the absence of a specific provision in the statute authorising delegation, delegate such power to another person. He can take advice or delegate the power to inquire and report but cannot authorise someone else to make the appointment without further reference to him.[5]

(b) Similarly, the statutory power to suspend[4] or dismiss[5] cannot be delegated, whether *quasi-judicial*[4] or not.[5]

B. The rule has a special application where the conferment of power is clothed with a *discretion*. In such a case, it is clear that the discretion must be exercised by that very authority who is entrusted by the Legislature. This principle has been discussed earlier (pp. 196, *ante*).

C. More extreme is the case where the function conferred by the statute is *quasi-judicial*.[5]

"No judicial[5a] tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication."[5]

This rule will be discussed more fully hereafter.

The preceding rules against delegation are subject to the following exceptions :

(i) A political head such as a Minister cannot be expected to do all his official acts personally. Hence, the statutory functions vested in a Minister may be delegated to his subordinates, including the power to be "satisfied" as to the conditions for the application of a statutory power, because the Minister is personally responsible to Parliament for the acts of his subordinates.[6]

(ii) Where a discretionary power is coupled with a duty but the two are so interwoven that the one cannot be separated from the other, a valid delegation of the power enables the delegatee to exercise the duty, e.g., the duty to be 'satisfied' as to the existence of a condition before the power is exercised.[7] This principle has been followed in India in a number of decisions.

(iii) Though an absolute delegation or divesting of discretionary power is bad, a partial delegation, that is to say, the employment of another to do a particular act within the scope of the delegatee's own power may be upheld provided the power of ultimate decision or the power to review the decision of the delegatee is retained by the delegator.[8]

2. Broom's *Legal Maxims*, 1924, p. 543.
3. *Allingham* v. *Minister of Agriculture*, (1948) 1 All E.R. 780.
4. *Barnard* v. *National Dock Labour Bd.*, (1953) 2 Q.B. 18.
5. *Vine* v. *National Dock Labour Bd.*, (1956) 3 All E.R. 939 (951) H.L.
5a. *S.S. Mills* v. *E.S.I.C.*, (1994) 5 S.C.C. 346.
6. *Woollett* v. *Minister of Agriculture*, (1954) 3 All E.R. 529 (539, 550) C.A.
7. *Mungoni* v. *A.G. for Northern Rhodesia*, (1960) 2 W.L.R. 389 P.C.
8. *Associated Picture Houses* v. *Wednesbury Corpn.*, (1947) 2 All E.R. 680 (C.A.).

IX. Rule against curtailment of statutory power.

Where a statute confers a discretionary power upon an authority to do one of two or more things in the alternative, it cannot be compelled to do any one of the alternative things, *without showing* that it had become impossible for the authority to exercise its option to do any of the other alternatives.[9] This follows from the general principle that a court cannot compel an authority to exercise its discretion in a particular manner.

X. Statutory powers not lost by disuse.

A statutory right or power is not lost by disuse or lapse of time.[10]

XI. No estoppel against statutory duty.

1. No statutory authority, who carries on a public function (including a public utility corporation[11-12] created by statute) can exonerate itself from his statutory *duties* by any act or representation so as to raise the plea of estoppel[13] against itself.

2. The doctrine has been extended to *statutory discretion* as well.[14] This means that no contract or representation can fetter the duty of the statutory authority to exercise a free and unhindered discretion.[14]

3. Conversely, statutory power cannot be extended by estoppel,[15] or, in other words, a statutory authority cannot be estopped from pleading the invalidity of an act which was *ultra vires*.[16-17] For the same reason, no conduct of a private person can estop him from challenging an act done by a statutory authority as *ultra vires*,[17] for, to uphold a plea of estoppel on behalf of the statutory authority would also result in extending the power which had been limited by the Legislature.[17]

Promissory estoppel

4. In this context, it would be pointed that the doctrine of 'Promissory estoppel' about which there has been much judicial controversy in the *U.K.* and *India*, has no application where the Government or the administrative authority who made the representation to induce an individual to alter his position on the basis of such representation, was under a *statutory duty* or *prohibition* to do or to omit to do an act, for, a Court cannot compel an authority to act contrary to a statute or to avoid an obligation or liability he has under the statute.[12,18]

But the doctrine of promissory estoppel can be invoked against the Government where the representation relates to a non-statutory executive sphere[19] or the exercise of a statutory *power* as distinguished from a prohibition,[18] where the Government cannot avoid the operation of the equitable

9. *R.* v *S.E. Ry.*, (1853) 4 H.L.C. 471.
10. *Augustus of Hanover* v. *A.G.*, (1955) 3 All E.R. 647 (657) C.A., affirmed by *A.G.* v. *Augustus of Hanover*, (1957) 1 All E.R. 49 (54) H.L.
11. *Society of Medical Officers* v. *Hope*, (1960) 1 All E.R. 316 (324) H.L.; *Howall* v. *Falmouth Co.*, (1951) A.C. 837.
12. *Inland Rev. Commrs.* v. *Brooks*, (1915) A.C. 478 (491).
13. *Maritime Electric Co.* v. *General Diaries*, (1937) 1 All E.R. 748.
14. *Southend Corpn.* v. *Hodgson*, (1961) 2 All E.R. 46 (49).
15. *Min. of Agriculture* v. *Hunkin*, unreported, quoted in (1949) 2 All E.R. 724.
16. *Min. of Agriculture* v. *Mathews*, (1949) 2 All E.R. 724 (729).
17. *Rhyl U.D.C.* v *Rhyl Amusements*, (1959) 1 All E.R. 257 (265).
18. *M.P. Sugar Mills* v. *State of U.P.*, A. 1979 S.C. 621 (paras. 27-28, 33); *Asst. Custodian* v. *Brij Kishore*, A. 1974 S.C. 2325.
19. *Union of India* v. *Indo-Afghan Agencies*, A. 1968 S.C. 718 (723).

doctrine of promissory estoppel and cannot be allowed to raise the plea of 'executive necessity' to the detriment of the individual.[18] Of course, even in the area where the doctrine of promissory estoppel can be properly invoked,—being an equitable doctrine, it would be subject to equitable consideration,[18,20] and cannot be used to uphold the *ultra vires* acts of a Government officer.[20]

XII. Validity of conditions imposed by statutory authority.

When some activity is controlled by legislation, the statute usually authorises an authority to grant permission to carry on that activity 'subject to such conditions' as it may impose.[21] The question then arises what would be the tests of validity of such conditions—can the statutory authority go to any length, so as to take away what the Legislature has empowered it to grant? If the Court finds a condition to be *ultra vires* or unreasonable, it will strike down the condition, so that the permit will operate free of the invalid limitation.

The following propositions are to be noted in this context :

(i) A condition which is *uncertain* shall be void.[22]

This rule is based on the principle that "a man is not to be put in peril upon an ambiguity".[22,23] But the rule should not be applied unless it is impossible to resolve the ambiguity which the condition contains,[22]—not because it would lead to absurd results.[22]

Thus, if the language of the condition is borrowed from the statute where it has an ascertainable meaning, it cannot be held to be uncertain.[22] Again, if it is capable of two meanings, it should be so construed as to make it valid.[22]

(ii) The condition must be reasonable.[24]

This means that the condition, to be valid, must "fairly and reasonably relate" to the permitted activity, or the fulfilment of the purposes of or the policy behind the legislation,[24] and not used for an ulterior object.[24]

".....the task of the court is not to decide what it thinks is reasonable, but to decide whether the condition imposed by the local authority is one which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose."[25]

But before annulling a condition imposed by a representative public authority as unreasonable, the Court must remember, as in the case of bye-laws, that "they are made by a public representative body in the public interest .... they ought to be supported if possible. And credit ought to be given to those who have to administer them, that they will be reasonably administered.[22, 26]

(iii) The condition must not be such as to effect a fundamental alteration in the general law relating to the rights of persons on whom they are imposed unless the power to effect such an alteration is expressed in the clearest

20. *Jitram* v. *State of Haryana*, A. 1980 S.C. 1285 (para. 50); *Vasant* v. *Bd. of Trustees*, A. 1991 S.C. 14.
21. E.g., s. 14(1) of the Town & Country Planning Act, 1947.
22. *Fawcett Properties* v. *Buckingham C.C.*, (1960) 3 All E.R. 503 (517-18) H.L.
23. *London & N.E. Ry. Co.* v. *Rerriman*, (1946) 1 All E.R. 255 (270) H.L.
24. *Pyx Granite Co.* v. *Ministry of Housing*, (1958) 1 All E.R. 625 (633) H.L.
25. *Associated Prov. Pictures* v. *Wednesbury Corpn.*, (1947) 2 All E.R. 680 (684).
26. *Hall & Co.* v. *Shoreham-by-Sea U.D.C.*, (1964) 1 All E.R. 1 (5) C.A.

possible terms,[27] e.g., where the condition seeks to take away existing property rights of the plaintiff, without payment of compensation.[26, 28]

(iv) The power to impose a condition must be exercised *bona fide*, i.e., not for an 'ulterior object, however desirable, that object may seem to them to be in the public interest."[22,24]

XIII. Statutory Power and Duty.

A. Where a permissive statute merely confers a discretionary power (as distinguished from a *duty*), the statutory authority cannot be compelled to exercise that power,[29] or to pay damages for mere non-exercise of the power.[29]

B. Where the statute does not impose any duty or obligation to exercise a power, the authority cannot place itself "in the same position as if that task had been imposed as duty upon them" by part performance of the work. In other words, merely because they undertake a work which they could not be compelled to do, they cannot be compelled to complete the work merely because they had done a part of it.[29]

C. There are, however, statutes which do not merely enable a person or authority to exercise some power, but provide for the performance by person or an authority of certain duties created by the statute. But every statute that creates a duty is not necessarily enforceable in a court of law. A distinction is still made between directory and mandatory statutes.

(a) The Courts cannot compel the performance of a duty if the statute is merely *directory*.[30]

(b) It is the violation of a *mandatory* statute that entails legal consequences, and, in case of its violation, the question arises as to what remedy would be available for its enforcement.

The same Act may contain both mandatory and directory provisions.[31]

XIV. Contracts by Statutory Authority.

Apart from the general conditions as to illegality of contracts in the case of ordinary individuals, some special bars arise in the case of contracts by a statutory authority, as follows :

A. A statutory authority cannot enter into any contract or take any action incompatible with the due exercise of its statutory powers or the discharge of its statutory duties[32] or a contract not to exercise its statutory powers or to abdicate its statutory duties.[33]

B. From the general rule of *ultra vires* (p. 181, *ante*), it follows that a contract which is *ultra vires* the powers conferred by the statute, by which it was created, is not valid and is not on the authority.[34]

Such *ultra vires* contract is void *ab initio* and cannot be validated by

27. *Mixnam's Properties* v. *Chertsey U.D.C.*, (1964) 2 All E.R. 627 (H.L.)
28. *Hartnell* v. *Ministry of Housing*, (1965) 1 All E.R. 490 (494) (H.L.).
29. *East Suffolk Rivers Catchment Bd.* v. *Kent*, (1941) A.C. 74 (107). [This case will be fully dealt with hereafter.]
30. Cf. *Collector of Monghyr* v. *Keshav*, A. 1962 S.C. 1894.
31. Cf. *Woodwards* v. *Sarsons*, (1875) L.R. 10 C.P. 733; *Equitable Life Assce. Society* v. *Reed*, (1914) A.C. 587.
32. *Birkdale Electric Supply Co.* v. *Southport Corpn.*, (1926) A.C. 355 (364) H.L.
33. *Staines U.D.C.'s Agreement* v. *Staines U.D.C.*, (1968) 2 All E.R. 1 (5).
34. *Ashbury Carriage Co.* v. *Riche*, (1875) L.R. 7 H.L. 653 (683).

any act of ratification on the part of the statutory authority or its shareholders where it is a statutory corporation.[34]

C. A contract may be void not only where the transaction is expressly prohibited by a statute but also where it is prohibited impliedly.[35] Thus, where a statute prohibits the carrying on of some operation, such as building, without obtaining a licence, a contract for the doing of such act except under a licence, must be held to be forbidden by implication.[36]

In such cases, the Court nullifies the bargain as being contrary to public policy.[37] It has, therefore, to find out the object of a statute—

(a) If it is for the purpose merely of raising revenue, in the absence of an express prohibition of a contract, the court would not invalidate the contract, but would impose the monetary penalty prescribed by the statute.[38]

(b) Where, however, the object of the statute is the protection, security or benefit of the public or some other object of general policy, the Court would imply a prohibition of the contract even though the Legislature may have prescribed only a penalty for its violation.[39]

XV. Liability for ultra vires and illegal acts.

Even though an authority may have been set up and endowed with powers by a statute, it may be liable at law not only where its acts are *ultra vires*, or have exceeded the powers conferred, but also where it has failed to perform its statutory *duty* or has committed negligence or other illegality in its performance. These will be treated separately.

A. Liability for ultra vires acts.

When a statutory authority exceeds the limits of its powers, it forfeits the protection of the statute and renders itself liable to the remedies available under the general law against an unlawful act. Thus,—

(i) Apart from a declaration that an act is *ultra vires*, the party likely to be affected by it is entitled to an injunction[40] to restrain the commission of such act before it is actually done, or against its continuance.

(ii) The aggrieved person may recover damages for injury caused by such act.[41]

B. Liability in Torts for breaches of statutory duty.

The failure of a statutory authority to perform its statutory duties may take place by an act of commission[42] or of omission[43] (e.g. failure to keep a school building in repairs according to a prescribed standard).[44]

Where a statutory authority has duties imposed upon it by statute, the question arises whether a private individual who is injured by a failure

35. *St. John Shipping Corpn.* v. *Joseph Rank*, (1956) 3 All E.R. 683 (690).
36. *Dennis & Co.* v. *Munn*, (1949) 1 All E.R. 616; *Strongman* v. *Sincock*, (1955) 3 All E.R. 90.
37. *Vita Food Products* v. *Unus Shipping Co.*, (1939) 1 All E.R. 513 (523) H.L.
38. *Smith* v. *Mawhood*, (1845) 14 M. & W. 452 (463).
39. *Cope* v. *Rowlands*, (1836) 2 M. & W. 149.
40. *Herron* v. *Rathmines Improvement Commrs.*, (1892) A.C. 498 (H.L.).
41. *Saunby* v. *London Water Commrs.*, (1906) A.C. 110 (P.C.)
42. *Cutler* v. *Wandsworth Stadium*, (1949) 1 All E.R. 544 H.L.
43. *Padfield* v. *Min. of Agriculture*, (1968) 1 All E.R. 694.
44. *Reffell* v. *Surrey C.C.*, (1964) 1 All E.R. 743.

of the authority to carry out its duties is entitled to bring an action for damages in tort against the authority. The following principles are to be noted in this connection :

I. Nature of the wrong.

An action for damages for breach of statutory duty to take care is sometimes considered as a species of negligence.[45] But the better view, expressed by Lord Wright in *London Passengers Transport Board* v. *Upson*,[46] is that it is a specific wrong :

"A claim for damages for breach of a statutory duty indended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense."[46]

II. When breach of statutory duty gives rise to an action for damages.

1. The *general rule* is that when a statute creates an obligation (which did not exist at common law)[47] and also prescribes a specific remedy for its non-performance, e.g., a fine or other penalty, the performance cannot be enforced *in any other manner*, so that no action for damages would lie for its breach.[48]

2. When, on the other hand, a statute creates a liability which already existed at common law, the question arises whether the common law remedy for damages for injury caused by a wrongful act still exists or not.

(a) In such a case, even though the statute provides a special remedy, the common law remedy is not excluded, unless the statute contains express words of exclusion.[47]

3. Nor would the common law remedy be excluded where the statute creates a *new* liability, not existing at common law but does not provide any special remedy.

In other words, if a statute simply prescribes a duty but no penalty for its breach,[49] a right to damages accrues (under common law) to a person who is injured by its breach,[42] for, otherwise the duty imposed by the statute, being without any sanction, would be nugatory.

4. But even where the statute prescribes a specific remedy, a person injured by its breach may have, in addition, a personal right of action, in

45. Cf. Winfield, *Law of Torts*, 6th Ed., pp. 506-07.

46. *London Passengers Transport Board* v. *Upson*, (1949) 1 All E.R. 60 (67) H.L.

47. *Wolverhampton Waterworks* v. *Hawkesford*, (1859) 6 C.B. (N.S.) 336 (356); *Atkinson* v. *Newcastle Waterworks*, (1877) 2 Ex. D. 441.

48. *Pasmore* v. *O.U.D.C.*, (1898) A.C. 394 (H.L.).

49. *Dawson & Co.* v *Bingley U.C.*, (1911) 2 K.B. 149.

50. The Betting and Lotteries Act, 1934, provides that so long as a totalisator is being lawfully operated on a licensed dog-racing track, the occupier "shall not .... exclude any person from the track by reason only that he proposes to carry on book-making on the track" and prescribes a penalty by way of conviction for the breach of the provision. A book-maker, who had been refused a space on the track for his book-making business, brought an action for damages. *Held*, that the obligation imposed by the statute was intended for the benefit of the public who resorted to the track

certain cases. It depends upon the intention of Parliament as to whether a civil remedy is excluded or not. The intention of Parliament is to be ascertained from the scope and purpose of the statute and, in particular, the persons for whose benefit it is intended.[50]

(i) If the statutory obligation is imposed only[51] for the benefit of the public (as distinguished from particular persons) who resort to a place open to the public, the only remedy for the breach is the statutory remedy.[50]

Such statutes, for instance, are—the Highways Act,[52] Road Transport Lighting Act.[51]

A Water Company had the statutory obligation to keep its supply pipes charged with water for fighting fire. Because of the lack of the requisite pressure, the plaintiff's premises were destroyed by fire. *Held,* the plaintiff had no right of action; the only remedy was the statutory penalty, because" .... it is no part of the scheme of this Act to create any duty which was to become the subject of an action at the suit of individuals".[53]

(ii) But when a statutory duty is imposed for the benefit of particular persons or a particular class of persons, whether in addition to public benefit or not, there arises at common law a correlative right in those persons who may be injured by its contravention.[54-55]

Thus, the regulations imposed by the Factory Act or the Coal Mines[56] Regulation Act[57] have been construed as having for their object the protection of the workmen who work in the factories, so that each workman who is injured owing to failure of the employer to comply with the regulations has a right to sue for damages.

Similarly, where statutory authority had the *duty* to use reasonable care to keep a dyke in repair or to supply wholesome drinking water, the authority was held liable in damages to occupiers of farms near the dyke whose lands were damaged by the dyke overflowing[58] or to a rate-payer whose daughter contacted typhoid by drinking infected water supplied by the corporation,[59] absence of reasonable care having been established.

(iii) The general rule of exclusion of other than the statutory remedy applies only in cases of *non-feasance,* i.e., the failure to perform a duty. It does not extend to an act of *misfeasance* or malfeasance, e.g., the violation of an express prohibition in the Act.[60]

(iv) Nor would non-statutory remedies, such as *mandamus* or injunction, be barred where the act of the statutory authority is *ultra vires* or in excess of his jurisdiction or discretion or the policy or objects of the Act.[61]

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and not for the benefit of the book-makers in the sense in which the Factory Act may be said to have been enacted for the benefit of the workmen in the factories. Hence, the action must fail [*Cutler* v. *Wandsworth Stadium,* (1949) 1 All E.R. 544 (H.L.)].

51. *Clark* v. *Brims,* (1947) 1 All E.R. 242.
52. *Phillips* v. *Britannia Hygienic Co.,* (1923) 2 K.B. 832 (C.A.).
53. *Atkinson* v. *Newcastle Waterworks Co.,* (1877) 2 Ex. D. 441.
54. *Black* v. *Fife Coal Co.,* (1912) A.C. 165.
55. *Britannic Merthyr Coal Co.* v. *David,* (1910) A.C. 74.
56. *Longhelly Iron & Coal Co. Ltd.* v. *M'Mullan,* (1934) A.C. 1.
57. *Grant* v. *National Coal Board,* (1956) 1 All E.R. 682 (684).
58. *Rippengale Farms* v. *Black Sluice Drainage Bd.,* (1963) 3 All E.R. 726.
59. *Read* v. *Croydon Corpn.,* (1938) 4 All E.R. 631.
60. *Bradbury* v. *London Borough,* (1967) 3 All E.R. 434 (442) C.A.
61. *Padfield* v. *Min. of Agriculture,* (1968) 1 All E.R. 694 (701-02; 717) H.L.

5. On the other hand—

Even where it is established that the Legislature intended to protect not only the public in general but also a particular class of persons, an individual cannot recover damages for breach of the statutory duty unless he can show—

(a) that he belongs to that class for whose protection the duty was imposed;[57]

(b) that the injury complained of is an injury against which the statute was designed to protect him.[57] If the injury is of a different kind, no action will lie;[62]

(c) that the breach of duty caused the damage complained of.[63-64]

Thus, where the breach of duty alleged by an employee is the failure of the employer to take safety measures, it is for the employee to prove that (i) the safety measures would have been effective to avoid the injury, and (ii) the plaintiff would have made use of them had they been available.[63]

III. Defences to an action for breach of statutory duty.

1. The liability created by a statute may be (a) absolute or (b) to take due and reasonable care—

(a) Where the liability is absolute (e.g., under the Factories Act) the question of due care or negligence becomes immaterial.[65] Even the act of a third party will be no defence where the duty is absolute.[66]

Such inference of absolute liability or duty is usually made in the case of statutes enacted to secure the health and safety of the workmen concerned.[67] The duty is to to ensure their safety and not merely to take reasonable care.[68]

Thus—

(i) The words 'properly maintained ' in s. 81(1) of the (Eng.) Mines and Quarries Act, 1954, have been construed as meaning that the employer, upon whom such duty is imposed by the statute, "warrants that the machine or other equipment which he is obliged to maintain will *never be out of order*".[68]

(ii) Such absolute duty has been implied from the word 'maintain', *simpliciter*, in Reg. 13 of the (Eng.) Shipbuilding Regulations, 1931,[67] so that the employer cannot escape from liability in damages even by showing that they have discharged their duty by competent inspection of the machinery at frequent intervals.[67] It has been held that, in the absence of a statutory definition to the contrary,[69] the very word 'maintian' would imply the absolute duty, even without the attribute 'properly'.[68]

But the absolute liability may be intended only in respect of a particular injury taking place in a particular manner. In such a case, the injured person shall have no right to damages if the injury was other than what was in the contemplation of the Legislature.[70] But this defence would not be available

62. *Kilgollan* v. *Cooke & Co.*, (1956) 2 All E.R. 294 (298) C.A.
63. *Wigley* v. *British Vinegars*, (1962) 3 All E.R. 161 (165) H.L.
64. *McWilliams* v. *William*, (1962) 1 All E.R. 623 (626) H.L.; *Ross* v. *Portland Cement Ltd.*, (1964) 2 All E.R. 452 (455) H.L.
65. *Carroll* v. *Andrew Barclay & Sons*, (1948) 2 All E.R. 380 (H.L.).
66. *Cooper* v. *Railway Executive*, (1953) 1 All E.R. 477 (478).
67. *Smith* v. *Cammell Laird*, (1939) 4 All E.R. 381 (394) H.L.
68. *Hamilton* v. *National Coal Board*, (1960) 1 All E.R. 76 (81) H.L.
69. *Latimer* v. *A.E.C. Ltd.* (1953) 2 All E.R. 449 (455) H.L. [This case has been distinguished and explained in *Hamilton* v. *National Coal Board*, (1960) 1 All E.R. 76 (H.L)].
70. *Nichols* v. *Austin*, (1946) 2 All E.R. 92 (H.L.).

where the liability under the statute is not limited to a class of injuries caused in some particular way.[71]

(b) Some statutes, however, prescribe a lower standard of care by using words such as "reasonably practicable", "sufficient for protecting such lands from.....cattle.....straying thereout".[66]

In such cases, it will depend upon the construction of the terms of each particular statute as to what degree of care was required by the statute from the person on whom the duty was imposed.[66,71]

An absolute duty, that is to say, a liability for a thing, which no reasonable care and skill can obviate, cannot be imposed upon a public duty unless the Legislature has done it "in the clearest possible terms".[72] Hence, nothing more than a duty to take 'reasonable care'[73] has been inferred in the following cases—

(i) Where a municipal statute enjoined that the municipality 'shall provide and keep....a supply of pure and wholesome water".[73]

(ii) Where the (Eng.) Mines and Quarries Act, 1954, required the Manager of a mine "to take such steps .... as may be necessary for keeping the road or working place secure".[74]

Where an absolute duty cannot be predicated, any cause lying outside ordinary skill and care will furnish a defence, e.g.—

(a) An earthquake, an atom bomb detonation,[75] or an explosion caused by the plaintiff.[76]

(b) Deliberate operations to bring the structure down.[77]

(c) Latent defect, which could not be reasonably foreseen.[78]

But the defendant must take all steps to prevent 'foreseeable insecurity'.[79]

C. Common law liability for breach of statutory duty.

Where an action for damages for breach of statutory liability fails either because the plaintiff does not belong to the class of persons whom the Legislature wanted to protect or because the injury is not one against which the Legislature wanted to protect, the plaintiff may still recover damages on the footing of negligence at common law,[62] if he succeeds in proving that—

(a) there was a reasonable apprehension of damage,[62] having regard to the natue of the hazard involved;[80]

(b) the defendant had a duty to take reasonable care to guard against such danger and he has failed to take such care;[62]

(c) the injury suffered by the plaintiff has been caused by the breach of duty on the part of the defendant.[80]

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71. *John* v *Frost*, (1955) 1 All E.R. 870 (885) H.L.
72. *Hammond* v. *St. Pancras Vestry*, L.R. 9 C.P. 316.
73. *Read* v *Croydon Corpn.*, (1938) 4 All E.R. 631.
74. *Brown* v. *National Coal Board*, (1962) 1 All E.R. 81 (85) H.L.
75. *Marshall* v. *Gotham Co.*, (1954) 1 All E.R. 937 (943) H.L.
76. *Jackson* v. *National Coal Bd.*, (1955) 1 All E.R. 145.
77. *Gough* v *National Coal Bd.*, (1959) 2 All E.R. 164 (170) H.L.
78. *Tomlinson* v. *Beckermet Mining Co.*, (1964) 3 All E.R. 1 (7) C.A.
79. *John* v. *O'Hanlon*, (1965) 1 All E.R. 547 (550) H.L.
80. *Haynes* v. *Qualcast*, (1958) 1 All E.R. 441 (C.A.)

Liability for Negligence.

As stated earlier, it is a condition for the exercise of any statutory power that it must be exercised with 'due or 'reasonable' care.

The fact that a body of persons has been endowed by the Legislature with special power to do an act does not *ipso facto* mean that the Legislature has exempted it from liability which an individual or a body of individuals would have, under the ordinary law, for causing damage to another person by doing a lawful act in a negligent manner, i.e, without taking such amount of care as would be 'reasonable' in the circumstances. As will be seen presently, even where the Legislature confers absolute authority to do an act, which, by its very nature, is likely to cause injury to another, the statutory authority will not be immune from an action for damages if the act authorised by the Legislature is done *negligently.*[81]

Several questions have to be considered with respect to an action for negligence against a statutory authority.

(i) The principle laid down in the well-known case of *Donoghue* v. *Stevenson*[82] is to be applied to determine the liability of a statutory authority, as in the case of private individuals, in an action for negligence. Hence, the questions to be determined are—

(a) Had the defendant a duty to take care of persons who are closely and directly affected by their acts?

(b) Is the plaintiff one of such persons?

(c) Has the defendant failed in his duty to take 'reasonable care', in the exercise of its statutory functions?

(ii) Though the standard of care required is 'reasonable care', the degree of care varies with the *likelihood of harm.*[83]

Thus, a greater degree of care is required where there is a notice of abnormality of the persons likely to be affected.

Poisonous berries were grown in a public park frequented by children and no precautions were taken to warn the children of the danger of eating them, and a child ate some of the berries and died. It was held by the House of Lords that the owners of the park were liable for negligence, for they owned a 'special duty' to take every precaution to make the park reasonably safe for *children,* as distinguished from adults.[83]

(iii) This principle has been extended to hold that in taking precautions, a reasonable and prudent man should be influenced not only by the greater or lesser probability of an accident occurring but also the *gravity* of the *consequences if an accident does occur.*[84] Thus, if to the knowledge of the employer, a workman is suffering from a disability which, though it does not increase the risk of an accident occurring while he is at work, does increase the risk of serious injury if an accident should befall him, that special risk of injury is a relevant consideration in determining whether the employer has taken reasonable care for the safety of the individual workman.[84]

(iv) On the other hand, under compulsion of *necessity,* a greater risk may legitimately be taken.[85]

To answer an urgent call, firemen took out a lorry which was not adapted to carry a heavy jack, as a result of which the jack fell when the brakes were suddenly

81. *Geddis* v. *Proprietors of Benn Reservoir,* (1878) 3 App. Cas. 430 (435).
82. *Donoghue* v. *Stevenson,* (1932) A.C. 609.
83. *Glasgow Corpn.* v. *Taylor,* (1922) 1 A.C. 44.
84. *Paris* v. *Stepney Borough Council,* (1951) 1 All E.R. 42 (H.L.)
85. *Watt* v. *Hertfordshire C.C.,* (1954) 2 All E.R. 368 (C.A.).

applied and injured a fireman. When the emergency call had been received, all the vehicles specially fitted for the purpose were out and the officer in charge had no other way of answering the emergent call than by ordering the lorry to be used. *Held,* that though the defendant Council carrying on the fire service should ordinarily keep proper vehicles, the risk to be avoided by answering the emergent call justified the use of the lorry and so the defendants were not liable for the damage caused to the fireman.[85]

(v) A duty to warn may sometimes arise from the nature of the undertaking and the dangers arising from it.[86]

A statutory Water Board supplied pure water from its mains, but on its way to the plaintiff's premises, the water became contaminated because it passed through old leaden pipes belonging to the plaintiff's premises. *Held,* that the defendant's duty to take care did not end with the supply of pure water from its mains; it had the further duty to warn the consumer of the danger likely to ensue from the condition of the leaden pipes joined with the Board's mains.[86]

The test of reasonableness applies not only to the foreseeability of the injury but also to the *extent* of the liability. As was observed in *Glasgow Corporation* v. *Muir* :[87]

"Legal liability is limited to *those consequences* of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation."[87]

The manageress of a tea room belonging to the Corporation permitted members of a picnic party to carry an urn of boiling tea through a small shop, which formed part of the tea room. One of the people carrying the urn accidently lost his grip, as a result of which the boiling tea scalded some children who were buying sweets at the shop. *Held,* that though the relationship of the manageress (servant of the Corporation) and the children was such as to give rise to a duty of care on her part towards the children, yet the event which had actually occurred could not have been reasonably foreseen by her. Hence, neither the manageress nor the Corporation could be held liable for the injury to the children.[87]

A special defence open to a local authority or any other authority created by statute in an action for torts, such as trespass or nuisance, is that of 'statutory authority'.

A distinction is made between absolute and conditional authority.

(a) *Absolute authority.* When a statute authorises the doing of an act (which would otherwise be a wrong), no action can be maintained for that act even if it causes injury to anyone, in spite of due care being taken; and the person injured is without a remedy except so far as the Legislature has provided for compensation.[88-89] But the powers conferred by the Legislature must be exercised with judgement and caution, and an action will lie if the acts be done *negligently.*[90-91]

"The burden lies on those who seek to establish that the Legislature intended to take away the private rights of individuals to show that by express words or by necessary implication that intention appears".[92]

The foregoing propositions must, however, be read with a number of corollaries which make the situation rather complicated. Distinction has been made—

86. *Barnes* v. *Irwell Valley Water Bd.,* (1938) 2 All E.R. 650.
87. *Glasgow Corpn.* v. *Muir,* (1943) 2 All E.R. 44 (H.L.).
88. *Vaughan* v *Taff Vale Ry. Co.,* (1860) 5 H. & N. 679.
89. *Marriage* v *East Norfolk Catchment Bd.,* (1949) 2 All E.R. 1021 (C.A.).
90. *Hammersmith Ry. Co.* v. *Brand,* (1869) L.R. 4 H.L. 171.
91. *Fisher* v. *Ruislip-Northwood U.D.C.,* (1945) 2 All E.R. 458.
92. *Metropolitan Asylum Dt. Board* v. *Hill,* (1881) 6 A.C. 193.

(a) Between cases of authorisation to do a *particular* work and cases of general authorisation to do a number of works at the *discretion* of the statutory authority;[93]

(b) Between cases where the statute provides for compensation and where no compensation is provided for.[93]

Where the statute authorises the doing of a particular work, such as the construction and operation of a reservoir,[81] a hospital[92] or a generating station,[94] the powers are, in the absence of clear provision to the contrary in the statute, limited to the doing of the particular thing authorised, without infringing the rights of others, except in so far as any such infringement may be a *demonstrably necessary consequence* of doing what is authorised to be done.

Thus, the power to construct and operate a reservoir and pass water from it down a prescribed channel, does not authorise the passing of water down the channel *without keeping* it in a fit condition to receive the water so as to avoid the flooding of adjoining lands.

(b) *Conditional authority.* When a statute merely *permits* a thing to be done, the authority is said to be conditional. If the Legislature merely gives a discretionary power to do a thing with choice of time and place, the discretion must be exercised *in strict conformity with private rights,* and an action lies if it is done in such a manner as to cause injury.[92] "When the authority given is, in the strict sense of the law, *permissive merely, and not imperative,* the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others."[95]

In other words, in order to maintian the plea of statutory authority, the defendant must show that the statute did not merely confer upon it the *power* to carry out a certain function but *required* the authority to carry out the function in the very manner complained of.[92]

The Metropolitan Asylum District Board were authorised to purchase lands and erect buildings to be used as hospitals. But the Act did not imperatively order these things to be done. The Board erected a smallpox hospital which became a nuisance to the owners of neighbouring lands. *Held,* the Board could not set up the statute as a defence. The Act was construed as meaning that a smallpox hospital might be built and maintained if it could be done *without creating a nuisance.*[92]

In other words, in order to avail of the defence, the local authority must show,—

(a) That the words used by the statute are imperative, as distinguished from enabling. Thus, if the authority has no statutory obligation to establish a hospital, it can do so only if and so far as it can be done without affecting private rights, e.g., without constituting nuisance to anybody.[92]

(b) That the mandate of the Legislature *cannot possibly* be carried out without affecting private rights. Thus, if the statute has directed the construction of certain works at a particular site and according to specified plans and specifications, the authority cannot be held liable for any nuisance caused by the works. In such a case, the authority will not be liable for any injury caused to an individual except for negligence.[92] If, however, the statute has not specified any site or plan or the like, and it is possible to construct the works without causing nuisance, the authority will be liable if the works cause nuisance because of its choice of site or the like.[92]

93. *Marriage* v. *E. Norfolk Catchment Bd.*, (1949) 2 All E.R. 1021 (1034) C.A.
94. *Manchester Corpn.* v. *Farnworth*, (1930) A.C. 171.
95. *Canadian Pacific Ry. Co.* v. *Parke*, (1899) A.C. 535.

Duty coupled with power or discretion.

A case of breach of statutory duty may raise further issues where the statute imposes a duty coupled with a *discretion* as to how the duty is to be performed.

Thus, if the statute leaves it open to the authority to perform its duty in one of several ways,—

(a) the authority would not be liable for breach of duty if he honestly makes his choice as to the manner or means which cannot be said to be entirely unreasonable,[96] even though damage is caused thereby;[96]

(b) If, however, the authority does something which the statute expressly prohibits or fails to do something which the State expressly enjoins, or otherwise so conducts himself as to frustrate or hinder the policy and objects of the Act,[97] his act would be *ultra vires,* being outside the ambit of the discretion delegated to him, and he would accordingly be liable for damages.[96-98]

Damage resulting from non-exercise of power.

A negligent exercise of a statutory power must be distinguished from a mere *non-exercise* of such power, because it has been held in *England*[99] that where a statutory authority is merely endowed with an enabling power, *without any obligation or duty* to exercise that power, it will not be liable in damages even if damage is caused to an individual by reason of non-exercise of such power.

The leading case on this point is the House of Lords decision in *East Suffolk Catchment Bd.* v. *Kent.*[99]

A River Board had the power to maintain the walls which protected low-lying land being flooded by the river in question. There was a breach in the wall caused by a gale as a result of which the plaintiff's land was flooded. The Board did undertake to repair the breach, but owing to the slowness of its machinery, the work actually took a much longer time than was normal or reasonable in the circumstances. An action brought by the plaintiff against the Board for damages was dismissed by the majority of the House of Lords on the ground that the Board had no *duty* to repair the wall and that they could not be made liable for mere non-exercise of the power in such a case and, for the same reason, could not be held liable for slow execution of the work or repair which could not be placed higher than non-repair. Lord Atkin, dissenting, held that the case was no other than a simple case of negligent use of a statutory power.[99]

This decision[99] has since been commented upon by many jurists. In so far as the decision of the House of Lords extends the common-law immunity of local authorities for non-feasance in respect of highways[100] (see *post*), the decision has lost its moral support, inasmuch as the immunity of non-feasance in respect of highways has itself been abolished by the Legislature by enacting the Highways (Miscellaneous Provisions) Act, 1961, as a result of protests against the irrationality of the immunity in modern conditions.

In *India,* we should be careful before applying this decision [see further under Ch. 15, Liability of the State, *post*[3]].

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96. *Home Office* v. *Dorset Yacht Co.,* (1970) 2 All E.R. 294 (332) H.L.
97. *Padfield* v. *Min. of Agriculture,* (1968) 1 All E.R. 694 (701) H.L.
98. *Anns* v. *London Borough,* (1977) 2 All E.R. 492 (503-04) H.L.
99. *East Suffolk Catchment Bd.* v. *Kent,* (1941) A.C. 74.
100. Which rested on a different principle, namely, that a local authority had no duty to a particular individual to repair a highway.

D. Statutory penalty.

We have seen that where a statute creates a duty it often prescribes a sanction for breach thereof instead of leaving it to the general law of damages for negligence or the like.

Under the present head, we shall discuss the characteristics of such penal proceedings.

Where the statute provides for the imposition of a fine or forfeiture or other monetary penalty[1] for breach of its commands, a proceeding for the recovery or enforcement of the penalty is called a 'penal proceeding'.[2]

The peculiarity of a penal proceeding is that though it is not a 'criminal proceeding' (which term is confined to a proceeding started by an indictment or prosecution before a criminal court), yet the law imputes to it some of the characteristics attributable to a criminal proceeding. Thus,—

I. The penal provision must be strictly construed,[3] which means that—

"If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions, we must give the more lenient one."[3]

This doctrine, however, does not warrant the straining of a plain language because the provision is penal.[4]

II. It follows that unless a penalty is imposed in clear terms, it will not be enforceable.[5]

III. The *procedure* indicated by a penal statute must be closely followed.[6]

IV. Where a statute provides for forfeiture for a joint offence committed by several persons, the offenders are liable to one forfeiture only.[7]

But in the case of a monetary penalty, different considerations arise :

(i) If the statute *expressly* provides that 'every person committing the offence shall be liable for the penalty, the penalty may be recovered from every one of the offenders, even though the offence committed is one.[8]

(ii) If, however, the statute does not expressly state whether the penalty is to be a joint or several liability, the question depends upon whether the offence is severable or not.

(a) Where the offence is in its nature single and cannot be severed, there the penalty shall be only single because, though several persons may join in committing it, it still constitutes but one offence.[9]

(b) But where the offence is in its nature severable, and where each person concerned *may be separately guilty of it,* there each offender is separately liable to the penalty, because the crime of each is distinct from the offence of the others, and each is punishable for his own crime.[9]

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1. E.g., double or treble the tax otherwise payable under a taxing statute [*I.R.C.* v. *Hinchy,* (1960) 1 All E.R. 505 (H.L.)].
2. *Derby Corpn.* v. *Derbyshire C.C.,* (1897) A.C. 550 (552).
3. *Tuck & Sons* v. *Priester,* (1887) 19 Q.B.D. 638.
4. *The Gauntlet,* (1872) L.R. 4 P.C. 184 (191).
5. *A.G.* v. *Till,* (1910) A.C. 50 (51).
6. *Smith* v. *Wood,* (1889) 24 Q.B.D. 23 (28).
7. *Del Campo* v. *R.,* (1837) 2 Moo. P.C. 15 (18).
8. *R.* v. *Dean,* (1842) 12 M. & W. 39.
9. *R.* v. *Clark,* (1777) 2 Cowp. 610 (612).

CHAPTER 7

QUASI-JUDICIAL FUNCTIONS

What is 'quasi-judicial'.

The first man who uttered the word *'quasi-judicial'* may not be discovered readily, as it has been born in course of the natural evolution of the law. Originally, any authority other than the Court was described as 'administrative', and when it was required to make a determination affecting the rights of parties, it was stated, in the earlier cases, that it must proceed or act 'judicially' e.g., Byles, J., in *Cooper* v. *Wandsworth Board*;[1] in the same case, Erle, C.J., said that the matter in question must be decided "according to judicial forms". In 1878, the Privy Council described the function of a Governor to declare a lease forfeited on the ground of abandonment as "a function of a judicial nature" which must be exercised in conformity with the elementary principles of natural justice.[2] In 1915, it was held by the House of Lords, that the 'duty of deciding an appeal' must be performed 'judicially',[3] even though the authority vested with the appellate power was an administrative body.

But it was soon realised that an administrative authority, even when it has to decided a question according to judicial forms, could not be described as performing a 'judicial' function, because that was an attribute reserved exclusively for the courts of law,—the regular judicial tribunals of the realm. Jurists were thus led to invent the word *'quasi-judicial'*, the word *'quasi'* meaning literally, "not exactly". It is commonplace to state that an authority is described as *quasi-judicial* because it has some of the attributes or trappings of a 'Court' but not all.[4-5]

The first public use of the word *'quasi-judiciql'* appears in the report of the Donoughmore Committee on Ministers' Powers, (1932) Cmd. 4060, at p. 73 at which the Committee analysed the characteristics of a 'free judicial decision' and summed up the characteristics the presence or absence of which stamped a decision as *'quasi-judicial'*. The term *'quasi-judicial'* was soon used by Greer, L.J., in the Court of Appeal in *Errington* v. *Minister of Health*.[6]

> "..... in deciding whether a closing order should be made in spite of the objections which have been raised by the owners the Minister should be regarded as exercising *quasi-judicial functions.*'

The analysis of 'judicial' and *'quasi-judicial'* functions as made by the Donoughmore Committee came to be recorded judicially in the case *of Cooper* v. *Wilson*,[7] in the judgment of Scott, L.J., who had taken a leading part in the Donoughmore Committee. He described the Watch Committee in the case

1. *Cooper* v. *Wandsworth Board*, (1863) 14 C.B. (N.S.) 180.
2. *Smith* v. *The Queen*, (1878) 3 App. Cas. 624.
3. *Local Govt. Board* v. *Arlidge*, (1915) A.C. 120.
4. *Bharat Bank* v. *Employees*, A. 1950 S.C. 188 (195).
5. *Jaswant Sugar Mills* v. *Lakshmichand*, A. 1963 S.C. 677 (685).
6. *Errington* v. *Minister of Health*, (1935) 1 K.B. 249 (258) C.A.
7. *Cooper* v. *Wilson*, (1937) 2 All E.R. 726 (740) C.A.

before him (p. 740, *ibid*)[7]. as obliged to make a *'quasi-judicial* approach' which meant that they were "exercising *nearly* judicial functions", though "not tied to ordinary judicial procedure". In 1940, *Cooper's case*[7] was followed by the Judicial Committee in deciding whether, after considering the objections of persons affected, a declaration that a building is unfit for human habitation should be revoked or submitted to the Governor-General-in-Council for his approval, the Improvement Trust "must be regarded as exercising *quasi-judicial functions.*".[8]

Notwithstanding such copious instances, for some time, Judges like Lord Greene or Cohen, L.J., in *Johnson* v. *Minister of Health,*[9] made fun of this intruder in the realm of jurisprudence,—the word *'quasi'*, and demonstrated the ludicrous extent to which its use might be carried if applied to other legal terms. But the days of sarcasm are over and the word *'quasi-judicial'* has entrenched itself in text-books as well as judicial decisions.[10]

Supreme Court on quasi-judicial authority.

Quasi-judicial function and administrative act: Distinction.— Quasi-judicial function stands between judicial and administrative function. Adjudication of claim by two contending parties is quasi-judicial. A statutory authority is empowered to do an act. The contest is between the authority and the subject. Decision of authority is quasi-judicial. In some cases fair play demands affording an opportunity to a claimant whose right is going to be affected by the act of the administrative authority still it is no quasi-judicial authority. If law requires that an authority before arriving at a decision must make an enquiry, such a requirement of law makes the authority a quasi-judicial authority. Authority which acts quasi-judicially is required to act according to rules whereas the authority which acts administratively is dictated by policy and expediency.[10a]

Administrative and judicial function.

Judicial function has to be discharged by the Judges. It cannot be delegated. Administrative function need not be discharged by the Judges of the High Court themselves. It can be delegated.[10b]

Quasi-judicial authority.

Power to summon witness, enforce their attendance, examine them on oath, discovery and production of documents indicate quasi-judicial function. A mere fact that a competent authority has been appointed to carry out the provisions of the Act will not constitute it an administrative authority.[10c]

Municipal assessment authority while determining rateable value of landed property he acts as a quasi-judicial authority.[10d]

8. *Estate & Trust Agencies* v. *Singapore Improvement Trust,* (1837) 3 All E.R. 324 (P.C.).

9. *Johnson* v. *Minister of Health,* (1947) 2 All E.R. 395 (400-02, 405).

10. E.g., *Franklin* v. *Minister of Town & Country Planning,* (1947) 2 All E.R. 289 (295) H.L.; *University of Ceylon* v. *Fernando,* (1960) 1 All E.R. 631 (637) P.C.; *Ridge* v. *Baldwin,* (1963) 2 All E.R. 66 (75; 86; 109).

10a. *Indian National Congress* v. *Institute of Social Welfare,* (2002)5 SCC 685: AIR 2002 SC 2158.

10b. *Jamaluddin* v. *Abu Saleh,* (2003)4 SCC 257: AIR 2003 SC 1917.

10c. *State* v. *Marwanjee,* (2002)2 SCC 318: AIR 2002 SC 456.

10d. *Lt. Col. P.R. Chaudhary* v. *Municipal Corporation,* (2000)4 SCC 577.

Quasi-judicial Tribunal.

Quasi-judicial function is conferred on administrative authority. They should be allowed to perform their function without fear or favour. They should not be subjected to constant threat of disciplinary proceeding.[10e] Quasi-judicial function stands in the midway between judicial and administrative function. Primary test is whether the quasi-judicial authority has any express statutory duty to act judicially in arriving at a decision. The quasi-judicial authority has some of the attributes or trapping of judicial function, but not all.[10f]

Review of the decision of quasi-judicial body by executive.

Review or revision of the decision of a quasi-judicial body by executive will amount to interference with the exercise of judicial function.[10g]

Quasi-judicial function distinguished from administrative and judicial functions.

A *quasi-judicial* function is one which stands midway between a judicial and an administrative function.

I. On the one hand, it differs from a purely administrative act in the following respects :

(a) A purely administrative act does not *decide* any rights of private parties though it may affect them. But a *quasi-judicial* act *determines* private rights with a binding force.[11]

(b) An administrative act may be non-statutory and does not necessarily require statutory authority. But a body is called *quasi-judicial* only when it has statutory authority to discharge the function in question.

(c) A purely administrative body has *no* procedural obligation, unless it is specifically imposed by the State.[10] But as soon as function is held be *'quasi-judicial'*, the law requires that the rules of natural justice must be observed in discharging that function.[12,13]

(d) While an administrative or ministerial function[14] may be delegated, a judicial or *quasi-judicial* function cannot, in the absence of express statutory provision, be delegated (see *post*).[15]

(e) What distinguishes a judicial from an administrative decision is that the decision of a court is *objective*, i.e., arrived at by the application of *fixed* standards; even the discretion, which a court of justice is allowed to exercise in some particular cases, has to be exercised in accordance with certain fixed principles.[16] On the other hand, the decisions of administrative authorities are usually *subjective*, in the sense that they are reached without applying any standard at all, except that of expediency[15-17] or policy (as

10e. *Zunjarrao Bhikaji* v. *Union of India*, AIR 1999 SC 2881: (1999)7 SCC 409.
10f. *State* v. *Raja Mahendra Pal*, (1999)4 SCC 43: AIR 1999 SC 1786.
10g. *Union of India* v. *K.M. Shankarappa*, (2001)1 SCC 582.
11. *R.* v *Dublin Corpn.*, (1878) 2 Ir. 371 (376); *R.* v *Local Govt. Bd.*, (1852), 2 Q.B. 309 (321).
12. *Union of India* v. *Verma*, A. 1957 S.C. 882.
13. *Neelima* v. *Harinder*, A 1990 S.C. 1402 (paras. 19, 22)
14. *Hunt* v. *Allied Bakeries*, (1959) 1 All E.R. 37 (41) C.A.
15. *Vine* v. *National Dock Labour Bd.*, (1956) 3 All E.R. 393 (950) H.L.
16. *Sharp* v. *Wakefield*, (1891) A.C. 173 (179).
17. *Labour Relations Board* v. *J.E.I. Works*, (1949) A.C. 134 (149).

distinguished from the application of legal principles to ascertained facts).[17] In the words of the Committee on Ministers' powers[18]—

"In the case of an *administrative* decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments; or to collate any evidence or to solve any issue. The *grounds* upon which he acts, and the *means* which he takes to inform himself before acting, are left entirely to his discretion."[18]

"Just as the absence of discretion is the mark of the *ministerial* duty, so it is the essential presence of *discretion* which distinguishes the *administrative* function, from the ministerial on the one hand, and from the judicial on the other."[18]

When an administrative authority is required to decide *objectively,* his decision is said to be *quasi-judicial.*[8-20] 'Objectively' means upon a consideration of the proposal and the evidene adduced by the parties in support of either.[21] It would not, however, be correct to say that there cannot be a *quasi-judicial* decision if the authority has at any time or to any extent to consider *policy* as well :

(i) Where the authority has to act *exclusively* upon the evidence, it is a judicial decision, obviously, but because the authority is not a 'court', the decision is to be called *quasi-judicial.*

(ii) But more numerous are the cases where the authority has to act partly or at different stages on considerations of policy and is yet required to arrive at its decision *after* hearing the parties; in that case, as we shall see, the *quasi-judicial* character will be attributed to the stage or function with respect to which he has to decide objectively.[22]

The same view has been taken in *India* in the matter of approving of a scheme for nationalisation of public motor transport, where, undoubtedly, the question of policy relating to public interest was involved.[23] In the matter of granting a licence, similarly, the licensing authority may have to refuse an application on the ground that it would not be in the public interest to grant it to the applicant,[24] and yet may be under an obligation to hear the applicant on the merits of his case before coming to that conclusion.[25]

(f) A function which is otherwise administrative is not rendered *quasi-judicial merely because* it has to be performed after forming an *opinion* as to the existence of any *fact* or objective state of affairs.[26]

But when an administrative authority exercises discretion *after first applying some fixed standards,* or only upon the existence of some *objective* fact or condition,[27] e.g., when a licensing authority refuses or grants a licence after deciding whether an applicant is legally qualified to hold a licence,[28] the administrative authority may be said to combine administrative and judicial functions, or shortly, to exercise *quasi-judicial* functions.

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18. Report of the Committee on Ministers' Powers, (1932) [Cmd. 4060, pp. 73-74].
19. *R.* v. *Manchester Legal Aid Committee,* (1952) 1 All E.R. 480 (489).
20. *Gopalkrishna* v. *State of M.P.,* A. 1968 S.C. 240 (243).
21. Cf. *R.* v. *L.C.C.,* (1931) 2 K.B. 215 (233) C.A. [Duty to "decide on evidence between a proposal and an opposition'].
22. *Johnson* v. *Minister of Health,* (1947) 2 All E.R. 395 (399) (C.A.) [Minister confirming a compulsory purchase order].
23. *Nageswara* v. *A.P.S.R.T.L.,* A. 1958 S.C. 308 (322-23).
24. *Boulter* v. *Kent JJ.,* (1897) A.C. 556 (569).
25. *Frome United Breweries* v. *Bath JJ.,* (1926) A.C. 586.
26. *Prov. of Bombay* v. *Khusaldas,* (1950) S.C.R. 621 (633. 728).
27. *Newspapers Ltd.* v. *Industrial Tribunal,* A. 1957 S.C. 531 (539).
28. *R.* v. *Woodhouse,* (1906) 2 K.B. 501.

(g) Where a question is left to the subjective determination of an authority, the *mere* existence of a right of appeal against the order is not enough to indicate that the authority whose order is subject to appeal is, under an obligation to act judicially[29] though the appellate function itself has been held to be a *quasi-judicial* function.[29]

Conversely, where the *quasi-judicial* obligation is present, the mere fact that the decision of the authority is subject to *confirmation* and approval of another authority does not take away the *quasi-judicial* character of the decision.[30] On the other hand, where the decision of an authority is *quasi-judicial,* the act of an authority *confirming* that decision must necessarily be judicial.[31]

(h) Where a function is entrusted to the subjective satisfaction of an authority, to be determined entirely on considerations of *policy* (e.g., the supersession of a Municipality) and the statute gives no indication that he has to follow a *quasi-judicial* procedure. the mere fact that the statute requires him to give reasons would not change his administrative determination into a *quasi-judicial* decision.[32]

II. On the other hand, it differs from a purely 'judicial' function in the following respects :

(i) A *quasi-judicial* act of a body which has *some* of the 'trappings' of a 'court' but not all of them. If a body of persons possesses all the attributes catalogued at p. 8, *ante,* it is a 'court'; if it possesses only *some* of them, including the most essential one, namely, the *obligation* to proceed judicially, it is a *quasi-judicial* body.

This was emphasised by the Report on the Committee on Ministers' Powers,[33] and the observations therein have later been adopted by Scot, L.J., in *Cooper* v. *Wilson* :[34]

"A true judicial decision presupposes an existing dispute between two or more parties and involves four requisites:—(1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of *fact,* the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the evidence; (3) if the dispute between them is a question of *law,* the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law to the facts so found, including, where required, a ruling upon any disputed question of law.

"A *quasi-judicial* decision, on other hand, involves requisites (1) and (2), does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action."[34]

The above observation, however, does not give a complete picture of a *quasi-judicial* function or decision. It merely points out that a *quasi-judicial* decision has only two points in common with the decision of a court, namely, (a) presentation of their respective cases by both parties; (b) the decision of the questions of fact so raised by means of evidence adduced by the parties. The first characteristic mentioned is not present in the case of those *quasi-judicial* tribunals, like an authority making a compulsory purchase or acquisition of

29. *Nagendra* v. *Commr.*, A. 1958 S.C. 398 (406).
30. *Bharat Bank* v. *Employees of Bharat Bank,* (1950) S.C.R. 459; *Estate & Trust Agencies* v. *Singapore I.T.,* A. 1937 P.C. 265.
31. *Dipa Pal* v. *University of Calcutta,* (1952) 56 C.W.N. 278 (288)
32. *Radheshyam* v. *State of M.P.,* A. 1959 S.C. 107 (119, 129).
33. Report of the Committee on Ministers' Powers, (1932) Cmd. 4060, pp. 73-74.
34. *Cooper* v. *Wilson,* (1937) 2 K.B. 309 (340).

land, where the tribunal itself is one of the parties. Of course, it gives notice to the individual affected by what it wants to do, but it does not take the shape of a presentation of a case before the tribunal itself as in a Court. *Secondly,* to say that a *quasi-judicial* tribunal comes to its decision by means of the evidence of the parties does not explain its obligation clearly enough. There may be cases where there is no evidence to be taken, and yet the tribunal is *quasi-judicial* because it has to determine the matter after *hearing* the party affected. On the other hand, though a *quasi-judicial* authority has to ascertain the *facts* from the evidence adduced by the parties, as a court would do, in coming to its decision, the authority is not bound to apply the *law* to the facts so ascertained; the decision is arrived at according to considerations of *public policy* or *administrative discretion*, which considerations are foreign to a court of law.[34]

The *essential test* of a *quasi-judicial* tribunal, therefore, is that it has a duty to follow the 'judicial approach' in determining the questions of fact involved in the case or matter before such tribunal.[35]

(ii) A *lis inter partes* is an essential feature of a judicial function but it is not so in the case of a *quasi-judicial* function.[13]

There are, indeed, some *quasi-judicial* bodies which determine a *lis* between two contending private parties, such as a Rent Tribunal[36] determining 'fair rent' between a landlord and his tenant, or an Election Tribunal deciding an election dispute between rival candidates,[37] even though such tribunal may not necessarily be a 'Court'.

But there are other *quasi-judicial* bodies which determine a matter affecting a party by an administrative act or decision; the other party to the dispute, if any, is the tribunal itself, e.g., where a local authority makes an order granting legal aid,[38] or a licensing authority issuing a licence for an ordinary profession or business,[39] or a Medical Council determining allegations of misconduct against a member of the profession,[40] or a Labour Relations Board.[41] Before such authorities, an issue may be raised even without the assent of the individual who is to get the relief.[41]

(iii) A *quasi-judicial* tribunal is not bound by the rules of evidence and may even act upon inadmissible evidence,[42-43] and their own knowledge[42] provided the rules of natural justice are observed (see *post*).

(iv) While a court is bound by precedents a *quasi-judicial* tribunal is not bound to follow its previous decisions, though in practice it may refer to[44] them, and is not (unless required by statute) even bound to give reasons for its decision—a problem which has attracted the attention of the Legislature and the Courts[45] in many countries.

35. *R.* v. *L.C.C.*, (1931) 2 K.B. 215 (233); *R.* v. *Statutory Visitors*, (1953) 2 All E.R. 766 (768).
36. *R.* v. *Fulham Rent Tribunal*, (1951) 2 All E.R. 465.
37. *Sangram* v. *Election Tribunal*, (1955) 2 S.C.R. 1.
38. *R.* v. *Manchester Legal Aid Committee*, (1952) 1 All E.R. 480.
39. *R.* v. *Bath Licensing JJ.*, (1952) 2 All E.R. 700.
40. *Leeson* v. *General Council of Medical Education*, (1889) 43 Ch. D. 366.
41. *Labour Relations Bd.* v. *J.E.I. Works*, (1949) A.C. 134.
42. *R.* v. *City of Westminster Assessing Committee*, (1941) 1 K.B. 53 (62) C.A.
43. *Union of India* v. *Verma*, A. 1957 S.C. 882; *V.P.T. Co.* v. *N.S.T. Co.*, (1957) S.C.R. 98.
44. Robson, *Justice & Administrative Law*, 3rd Ed., pp. 573 *et seq.*
45. Cf. *Express Newspapers* v. *Union of India*, A. 1958 S.C. 578 (636); *Tara Chand* v. *Municipal Corpn.*, (1977) 1 S.C.C. 472.

(v) In modern times, the category of *quasi-judicial* bodies has been widened by including in it some administrative bodies to whom all the principles of natural justice which apply to a court may not apply. But all of them have two common features, namely, that (a) they must act *'fairly'* or follow a "fair procedure";[13, 46] (b) they must *affect* an individual's personal rights or result in civil *consequences* to him.[46]

(vi) Barring cases of contempt of court (against courts of record), a court cannot be a judge in its own cause,[47] but an administrative authority, vested with *quasi-judicial* powers, may itself be a party to the controversy before it.[48-49]

When does a function become quasi-judicial.

I. An administrative function is called *quasi-judicial* when there is *an obligation to adopt the judicial approach* and to comply with the basic requirements of justice; when there is no such obligation, the decision is called 'purely administrative' (see p. 212, *ante*); there *is no third category*. This is what was meant by Lord Reid in *Ridge* v. *Baldwin* :[50]

"In cases of the kind with which I have been dealing the Board of Works .... was dealing with a single isolated case. It was not deciding, like a judge in a law suit, what were the rights of the persons before it. But it was deciding *how he should be treated*—something analogous to a judge's duty in imposing a penalty ... So it was easy to say that such a body is performing a *quasi-judicial task* in considering and deciding such a matter and to require it to observe *the essentials* of all proceedings of a judicial character—*the principles of natural justice. Sometimes the functions of a minister or* department may also be of that character and *then the rules of natural justice can apply in much* the same way ....."[50]

"The concept of a *quasi-judicial* act implies *that the act is not wholly judicial,* it describes only a duty cast on the executive body or authority to conform to *norms of judicial procedure* in performing some acts *in exercise of its executive power* .....

The aforesaid decisions accept the fundamental principle of natural justice that in the case of *quasi-judicial* proceedings, the authority empowered to decide the disputes between opposing parties must be one without bias towards one side or other in the dispute."[51]

II. It follows from the above that the *quasi-judicial* obligation to follow the principles of natural justice attaches to a *function* or the exercise of a *power;* and much of confusion would arise if it is supposed to attach to an *office.*[50] It is possible for judicial officer to pass a particular order which is ministerial and for an administrative officer to make an order or arrive at a decision which is *quasi-judicial.*[52]

Put otherwise, an administrative authority may be under a duty to proceed *quasi-judicially* at a particular stage of the proceedings before him, e.g., in making an inquiry or hearing objections to a proposal,[53] though the

46. *S.C. Mills* v. *Union of India,* A. 1981 S.C. 818; *Mohinder* v. *C.E.C.,* A. 1978 S.C. 851 (871-72).
47. *Rice* v. *Commr. of Stamp Duties,* (1954) A.C. 216 (234).
48. *R.* v. *Statutory Visitors,* (1953) 2 All E.R. 766 (768); see also *Ridge* v. *Baldwin,* (1963) 2 All E.R. 66 (113) H.L.
49. *Prov. of Bombay* v. *Khusaldas,* (1950) S.C.R. 621 (724).
50. *Ridge* v. *Baldwin,* (1963) 2 All E.R. 66 (73-74, 113) H.L.
51. *Nageswara Rao* v. *A.P.S.R.T.C.,* A. 1959 S.C. 308 (326-27).
52. *Errington* v. *Minister of Health,* (1935) 1 K.B. 249 C.A.
53. *Robinson* v. *Minister of Town & Country Planning,* (1947) 1 All E.R. 851.

ultimate decision may be administrative, being governed by subjective or policy considerations.[54]

III. Even a Judge may have administrative functions. Nor is an order necessarily administrative simply because it is made in the course of administration of the assets of a company.[55] Broadly speaking, an order is administrative if it is directed to the *regulation* or *supervision* of matter as distinguished from an order which *decides* the rights of parties or confers or refuses to confer *rights to property* which are the subject of adjudication before the Court.[55] Another test is whether the determination, even though discretionary, is to be made on a subjective or an *objective* basis.[55] A subjective determination is contrary to the judicial approach.[56]

Quasi-judicial authority: Exercise of Power.

Normally no instruction of a superior authority can fetter the exercise of quasi-judicial power. A statutory authority invested with such power has to act independently in arriving at a decision under the Act. But when there is a statutory mandate to observe and fallow the orders and instructions of CBEC in regard to specified matters that mandate has to be complied with. The adjucating authority cannot deviate from those orders and instructions which the statute enjoins that it should follow.[56a]

Quasi-judicial function : No judgment.

When an administrative authority acts judicially as adjudicator and awards penalty under an Act for violation of civil obligation, he does not act as a judge of criminal court nor imposes sentence for an offence but discharges quasi-judicial function.[56b]

Administrative Authority or quasi-judicial authority — Jurisdiction.

An administrative authority or a quasi-judicial authority while adjudicating upon a lis is obliged to pose and answer a right question so as to enable it to arrive at a conclusion as to whether he has jurisdiction in the matter or not.[56c]

Sources of quasi-judicial obligation.

The difficulty of distinguishing administrative and *quasi-judicial* functions is due to the fact that there are various circumstances, not one, which impute a *quasi-judicial* obligation upon an administrative authority.

As Parker, J., observed in the *Legal Aid case*[54] :

".....the duty to act judicially may arise in widely different circumstances which it would be *impossible, and, indeed, inadvisable,* to attempt to define exhaustively."[54]

It may only be stated briefly that the duty may arise expressly as well as impliedly.[57]

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54. *R.* v. *Manchester Legal Aid Committee,* (1952) 1 All E.R. 480 (489); *R.* v. *Registrar of Building Societies,* (1960) 2 All E.R. 549 (560) C.A.; *Johnson* v. *Minister of Health,* (1947) 2 All E.R. 395.

55. *Shankarlal* v. *Shankarlal,* A. 1965 S.C. 506 (511).

56. *Sadhu Singh* v. *Delhi Administration,* A. 1965 S.C. 91 (97).

56a. *Commissioner of Customs* v. *Indian Oil Corporation,* (2004)3 SCC 488.

56b. *Director of Enforcement* v *M.C.T.M. Corporation (P) Ltd.*, (1996)2 S.C.C. 471: A. 1996 S.C. 1100.

56c. *Ashok Leyland Ltd.* v. *State,* (2004)3 SCC 1.

57. *Radheshyam* v. *State of M.P.*, A. 1959 S.C. 107.

I. *Express statutory provision.*

The primary test is whether the administrative authority has any express statutory *duty*[58, 59] to act judicially in arriving at the decision in question.

But this is not the only source of *quasi-judicial* obligation[58] as was supposed in some cases.[59-60]

On the other hand, where there is a statutory duty to act judicially (i.e., to come to a decision after considering a proposal and an objection)[57] it is not necessary, further, that the authority must have the trappings of a court or must follow a procedure analogous to that before a court of law.[61]

"An administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of and are not in accordance with the practice in a court of law."[61]

There is no set formula from which a Court would infer a *quasi-judicial* obligation. The clearest case, is, of course, where the statute directs that the party to be affected should be *heard*[62] before making the order. But such obligation has also been inferred from other expressions, not so clear, read in the context of the legislation, e.g.—

To arrive at a decision 'justly and properly',[63] or 'after due inquiry',[64-65] or after giving him an opportunity of 'making a representation',[66] or after giving 'a reasonable opportunity of showing cause'.[67]

The C.P. & Berar Municipalities Act, 1922, has two provisions—s. 53A and s. 57. The former empowers the Government to supersede a Municipality for a temporary period not exceeding 18 months and the latter for an indefinite period. The former power may be used for securing "a general improvement in the administration of the municipality" while the latter power is in the nature of a punishment for incompetence or *ultra vires* action on the part of the municipality. S. 57 expressly provided for a reasonable opportunity to be given to the municipal committee before making the order, while s. 53A had no corresponding power. The majority of the Supreme Court held that the power under s. 53A was an administrative one while the *quasi-judicial* obligation attached to the exercise of s. 57. The majority held that the Legislature had made this difference because of the nature of the two functions, that under s. 57 being a drastic power affecting the members of the committee.[57]

On the other hand, a *quasi-judicial* obligation would not be inferred from expressions indicating that the decision would be arrived at upon the subjective opinion of the authority concerned or the mode of inquiry is left to his discretion, e.g.—

(i) The words "If the Secretary of State has *reasonable cause to believe*", in an

58. *Ridge* v. *Baldwin*, (1963) 2 All E.R. 66 (78-79; 107; 109; 114) H.L.

59. *Franklin* v. *Minister of Town & Country Planning*, (1947) 2 All E.R. 289 (296) H.L.; *Nakuda Ali* v. *Jayaratne*, (1951) A.C. 66 (78).

60. *Prov. of Bombay* v. *Khusaldas*, (1950) S.C.R. 621 (632-33); *Board* v. *Arlidge*, (1915) A.C. 120 (132).

61. *Board of Education* v. *Rice*, (1911) A.C. 179 (182);

62. *Union of India* v. *Goel*, A. 1964 S.C. 364 (369).

63. *General Medical Council* v. *Spackman*, (1943) 2 All E.R. 337 (339).

64. *Labouchere* v. *Earl of Wharncliffe*, (1879) 13 Ch. D.; *Leeson* v. *General Medical Council*, (1890) 53 Ch. D. 460 (472); *General Medical Council* v. *Spackman*, (1943) A.C. 627 (640).

65. *Shivji Nathubhai* v. *Union of India*, A. 1960 S.C. 606 (609).

66. *Union of India* v. *P.K. Roy*, A. 1968 S.C. 850 (858).

67. Cf. *Ridge* v. *Baldwin*, (1963) 2 All E.R. 66 (78-79; 114) H.L.; *Kanda* v. *Govt. of Malaya*, (1962) 2 W.L.R. 1153 (P.C.).

emergency Regulation, authorising the Secretary of State to intern persons "for securing public safety and the defence of the realm".[68-69]

(ii) The words "shall be of *opinion* that proceedings shall not be taken".[70]

(iii) The words *"reasonable grounds to believe"* in an Emergency Regulation, empowering the Textile Controller to cancel a textile licence.[69]

(iv) The words *"as it may judge* best for the benefit of the property and the advantage of the minor" in a Court of Wards Act, authorising the Court of Wards to enter into certain transactions with respect to the property of the ward.[71]

(v) The words "considers ..... is likely to be secured".[72]

(vi) The words "after such *summary inquiry, if any, as he thinks necessary*".[73]

II. *Inference from lis inter partes.*

The leading English decision on this point is *Errington* v. *Minister of Health,*[74] where it was held that though ordinarily the Minister's function of confirming a clearance order made by a local authority was administrative, it became *quasi-judicial* if objections were made by any person, in which case the minister must, before making his order, hear the local authority as well as the objector and must not hear either of the paties in the absence of the other.[74] The principle has been explained in a recent case :[75]

"Where two parties are in dispute, and the obligation of some person or body is to decide equitably between the competing claims, *each claim must receive consideration* and each claimant must ..... *be invited*—not merely left so that if he chooses to take the initiative he can do it—*to put forward the material* in the form of documents or accounts which he desires to be considered and an *opportunity* must be afforded to him of making comment on material of the same character which has been put forward by rival claimants ....."[75]

But the *lis,* if it is essential for the purpose, need not be between two private litigants as in an action at law, but one of the parties in a *quasi-judicial* proceeding may be the statutory authority itself who is vested with the power to adjudicate the dispute.[76]

A. Of course, where there is a *lis inter partes,* a *quasi-judicial* obligation will be inferred, if the Legislature has not excluded it expressly.[77] This view

68. *Liversidge* v. *Anderson,* (1942) A.C. 206.

69. But outside the sphere of emergency legislation, the expression 'has reasonable cause' indicates a condition precedent, the existence of which must be objectively established, when challenged in a court of law [*vide* dissenting opinion of Lord Atkin in *Liversidge's case,* (1942) A.C. 206; *Nakkuda* v. *Jayaratne,* (1951) A.C. 66]. But in *Nakkuda Ali's case* (*ibid*) even though the Judicial Committee held that the existence of reasonable grounds upon which the belief of the authority could be based must be established, it did not follow that these words indicated that the authority must proceed *quasi-judicially* to determine whether such reasonable grounds did exist. A different conclusion may be warranted in India by reason of Art. 19(1)(g) [cf. *Chaturbhai* v. *Union of India,* A. 1960 S.C. 424 (430); *Shivji* v. *Union of India,* A. 1960 S.C. 606 (609)].

70. *Allcroft* v. *Bishop of London,* (1891) A.C. 666.

71. *K.D. Co.* v. *K.N. Singh,* A. 1956 S.C. 446 (452).

72. *Radheshyam* v. *State of M.P.,* A. 1959 SC 107 (129).

73. *Virindar* v. *State of Punjab,* A. 1956 S.C. 153 (157) [s. 36(2), Representation of the People Act, 1951].

74. *Errington* v. *Minister of Health,* (1935) 1 K.B. 249 (265).

75. *Hoggard* v. *Worsborough U.D.C.,* (1962) 1 All E.R. 468 (471).

76. *Johnson* v. *Minister of Health,* (1947) 2 All E.R. 395 (401-05) (C.A.); *R.* v. *Manchester Legal Aid Committee,* (1952) 1 All E.R. 480 (489-90).

77. *R.* v. *Brighton Rent Tribunal,* (1950) 1 All E.R. 946 [*certiorari* issued even though the Tribunal was empowered by statute to act on its own knowledge and without a hearing except on notice from a party].

was followed by Bhagwati, J., in the *Express Newspapers case*[78-79] with respect to the Wage Board under the Working Journalists (Conditions of Service) Act, 1955, in these words—

"If the functions performed by the Wage Board would thus consist of the determination of the issues as between a proposition and an opposition on data and materials gathered by the Board in answer to the questionnaire issued to all parties interested and the evidence led before it, there is no doubt that there would be imported in the proceedings of the Wage Board a duty to act judicially and the functions performed by the Wage Board would be *quasi-judicial* in character."[78]

B. But there are many other cases where a *quasi-judicial* duty has been implied, in case of *quasi-lis,* from the nature of the function itself, though the statute was completely silent about the duty to hear or to consider objections.

It is not two parties which is essential; what are essential are—

(a) that there is a 'proposition' or 'opposition' on a question affecting the civil rights of the party;

(b) that the relevant statutory provision does not empower the authority to determine the question solely on his subjective satisfaction or on considerations of policy; mere silence of the statute as to the procedure to be followed is not enough[72] in a matter which involves civil consequences.[80]

Once the above tests are satisfied the question to be decided *quasi-judicially* may arise even without the consent of the individual who is interested.[81]

III. *Implication from the nature of the function.*

(A) *England.*—We have already pointed out that though certain observations in *R.* v. *Electricity Commrs.*,[82] led to the view in some cases that an administrative authority could be said to be under a duty to proceed *quasi-judicially* only where such duty was laid down by statute, there was another line of respectable decisions where it had been held that a statute is not the only source of imposing a *quasi-judicial* obligation and that there are certain functions or powers[83] which, from their very nature, must be performed *quasi-judicially,* even though the governing statute is *silent* as to the procedure to be followed.

The following are instances of such functions—

(a) Deciding an appeal;[84]

(b) Licensing.[85]

(c) Passing accounts, under statutory power. Where a power to pass accounts is vested in a court or other authority, *certiorari* will lie to quash illegal allowances, even though the statute has not imposed a *quasi-judicial* obligation:

"*Passing accounts is a judicial act;* those who do so ought to allow or disallow according to law; and, this being a judicial act and the *certiorari* not being taken away, we are *bound,* if it appears that an illegal item has been passed, to grant a *certiorari* and to quash the illegal allowance."[86]

78. *Express Newspapers* v. *Union of India,* A. 1958 S.C. 578 (613).
79. Also, *Radheshyam* v. *State of M.P.,* A. 1959 S.C. 107 (115-16); *Gullapalli* v. *A.P.S.T. Board,* A. 1959 S.C. (308); *Shivji Nathubhai* v. *Union of India,* A. 1960 S.C. 606 (608).
80. *State of Orissa* v. *Binapani,* A. 1967 S.C. 1269.
81. *R.* v. *Westminster Assessment Committee,* (1941) 1 K.B. 53 (62) C.A.
82. *R.* v. *Electricity Commrs.,* (1924) 1 K.B. 171 (C.A.)
83. *Ridge* v. *Baldwin,* (1963) 2 All E.R. 66 (78-79) H.L.
84. *Local Govt.* v. *Arlidge,* (1915) A.C. 120 (133, 138).
85. *R.* v. *London C.C.,* (1892) 1 Q.B. 190.
86. *R.* v. *Saunders,* (1854) 3 E. & B. 763.

(d) Depriving a person of his property, in exercise of a statutory power,[87] e.g., the demolition of a house alleged to have been built in contravention of the municipal law,[87] at least at the stage of hearing objections against such proposed order.[88]

(e) Granting a medical certificate required by a statute for claiming compensation[89] or other benefit,[90] not intended by the Legislature to be determined solely on considerations of policy.[90]

(f) The function of determining an offence and to award *punishment* for it are obviously the functions of a court. Hence, where such powers are vested in some statutory authority other than a court, the function of the authority must be held to be *quasi-judicial*.[87]

(g) The principle has been extended to any disciplinary proceedings penalising an individual in his civil rights,[91] and even to the withdrawal of statutory rights from an institution, e.g., to assume the management of an unaided school on the ground that it was being administered in contravention of the statute.[92]

(B) *India.*—*Our* Supreme Court has, similarly, deduced a *quasi-judicial* obligation from the nature of the function[93] itself, though the statute was silent about the procedure, in the following cases—

(a) An *appellate* function, even where the appeal is from an administrative order and the appellate power is vested in another administrative authority.[94]

(b) The same principle has been extended to the power of *revision* vested in a superior administrative authority,[94] whether the party aggrieved has a *right* to apply for such review or revision,[94] or the power is to be exercised *suo motu*.[95]

(c) *Disciplinary proceedings against students* which may seriously affect their career or render them liable to criminal presecution.[95-96]

(d) Proceedings before an administrative authority which may lead to the imposition of heavy *pecuniary liability* after a determination involving questions of *pure law*,[97] e.g., determining the liability of an instrument to stamp duty under s. 56(2) of the Stamp Act;[97] confiscation of goods under s. 167(8) of the Sea Customs Act, 1878.[98]

(e) Statutory authority exercising its power to terminate the sevices of

87. *Cooper* v. *Wandsworth Board*, (1863) 14 C.B. (N.S.) 180; *Hopkins* v. *Smethwick Local Board*, (1890) 24 Q.B.D. 712; *Smith* v. *Queen*, (1878) 3 A.C. 614.

88. *Estate & Trust Agencies* v. *Singapore Improvement Trust*, (1937) 3 All E.R. 324 P.C.; *Errington* v. *Minister of Health*, (1935) 1 K.B. 249 (258) C.A.

89. *R.* v. *Postmaster-General*, (1928) 1 K.B. 291.

90. *R.* v. *Boycott*, (1939) 2 All E.R. 626; *R.* v. *Manchester Legal Aid Committee*, (1952) 1 All E.R. 480.

91. *General Medical Council* v. *Spackman*, (1943) 2 All E.R. 337 (340); *Cooper* v. *Wilson*, (1937) 2 All E.R. 726 (735; 740; 750).

92. *Mardana Mosque* v. *Badi-ud-din*, (1966) 1 All E.R. 545 (550).

93. *Anglo-American Direct Tea Trading Co.* v. *Workmen*, A. 1963 S.C. 874.

94. *Shivji* v. *Union of India*, A. 1960 S.C. 606 (609); *Harinagar Sugar Mills* v. *Shyam Sundar*, (1962) 2 S.C.R. 339; *D.N. Roy* v. *State Bank of Bihar*, A 1971 S.C. 1045.

95. *Board of High School* v. *Ghanshyam*, A. 1962 S.C. 1110 (1114-15).

96. *Shri Bhagwan* v. *Ram Chand*, A. 1965 S.C. 1767 (1770).

97. *Board of Revenue* v. *Vidyawati*, A. 1962 S.C. 1217 (1220).

98. *East India Commercial Co.* v. *Collector of Customs*, A. 1962 S.C. 1893 (1903); *Ambalal* v. *Union of India*, A. 1961 S.C. 264.

its employees,[99] or determining the age of an employee for the purpose of superannuation.[100]

IV. *Nature of the rights affected.*

1. This test is practically complementary to the test discussed. Instead of looking at the problem from the nature of the function or power to be exercised, it can be also looked at from the standpoint of the nature of the rights to be affected by the order.[1]

The leading English authority upon which this aspect of *certiorari* jurisdiction is based is the observation of Willes, J., in *Cooper* v. *Wandsworth Board* :[97]

".....a tribunal which is by law invested with power *to affect the property* of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that rule is *of universal application*, and founded on the plainest principles of justice."[87]

Of course, *Cooper's case*[87] was an action for damages,[2] but once it is held that the *quasi-judicial* obligation to hear is attached to the exercise of any statutory power, *certiorari* or prohibition will issue, if the grounds therefor exist, where the exercise of such statutory power—

(i) destroy's one's property, e.g., by the demolition of his house;[3] or forfeiture of his lease;[4] or

(ii) deprives him of his property or affects it by a development scheme or the like involving compulsory acquisition of property;[4]

(iii) Depriving a person of his profession, business or calling.[5]

2. On the other hand, even though the foregoing conditions may be satisfied, no *quasi-judicial* obligation will arise where the relevant statute expressly empowers the specified authority to decide a matter and makes his decision 'final'.[6]

[See, further, under 'Exceptions to Natural Justice', *post*].

Whether certiorari lies against administrative proceedings.

The two consequences which follow from a proceeding to be held *'quasi-judicial'* is that it must comply with the rules of natural justice;[5] otherwise *certiorari* will issue to quash the decision arrived at in the proceeding.[7] Neither is applicable to a purely administrative proceeding.

But this distinction between administrative and *quasi-judicial* proceedings or decisions has been blurred by recent decisions both in *England* and *India*, by expanding the concept of *quasi-judicial*, by applying more and more liberal tests, as has just been seen. In fact, even without finding a proceeding

99. *Calcutta Dock Labour Board* v. *Imam*, (1965) II S.C.A. 226 (230).
100. *State of Orissa* v. *Binapani*, A. 1967 S.C. 1269.
1. *Radheshyam* v. *State of M.P.*, A. 1959 S.C. 107.
2. *Hopkins* v. *Smethwick Local Bd.*, (1890) 24 Q.B.D. 713.
3. *Urban Housing Co.* v. *Oxford City Council*, (1940) Ch. 70.
4. *Smith* v. *Queen*, (1878) 3 App. Cas. 624; *R.* v. *Hendon R.D.C.*, (1933) 2 K.B. 696; *R.* v. *Minister of Health*, (1936) 2 K.B. 29.
5. *Calcutta Dock Labour Bd.* v. *Imam*, (1965) II S.C.A. 226 (230); *City Coroner* v. *Collector*, A. 1976 S.C. 143; *Eurasian Equipment* v. *State of W.B.*, A. 1975 S.C. 266; *Villangandan* v. *Executive Engineer*, A. 1978 S.C. 930.
6. *Neelima* v. *Harinder*, A. 1990 S.C. 1402 (paras. 24-26).
7. *Union of India* v. *Verma*, (1958) S.C.R. 499; *State of M.P.* v. *Chintaman*, A. 1961 S.C. 1623.

to be *quasi-judicial*, the rules of natural justice (or some of its ingredients) have been applied and the writ of *certiorari* invoked to ensure their compliance whenever a decision is attended with 'civil consequences' to an individual. [See, further, Chapters VIII, IX, XIV].

This result may be examined more closely, with reference to the development of case-law in England and India.

(A) *England.*—There has been a marked change in the judicial climate on this topic, since the House of Lords decision, in 1963, in *Ridge* v. *Baldwin*.[8]

Prior to 1963, the consensus of opinion was that *certiorari* did not lie against purely administrative functions where the relevant statute did not impose any *duty* to proceed *judicially*.[9]

In 1963, however, the House of Lords, by a majority,[8] held that even though the statute did not prescribe any judicial procedure for the exercise of an administrative function, the law would imply an obligation to act in conformity with *natural justice*, wherever the exercise of the statutory function would affect the *rights* of an individual or would decide "what the rights of an individual should be". Though not without occasional wavering, the majority view in *Ridge's case*[8] has been affirmed by the House of Lords as late as 1982.[10]

In the result, as Prof. de Smith says,[11] the age-old distinction between judicial and *quasi-judicial* functions has been 'blurred'.

But even though it is now acknowledged that a duty to comply with natural justice may be implied where the administrative function affects the civil rights of an individual or inflicts consequences upon him, where the duty to act *judicially* is not laid down by statute, the obligation of the administrative authority should properly be described as a duty to act *'fairly'*.[11] In the latter case, what the Court has to see is whether the authority acted 'fairly'.[15-16] The standard of fairness would depend upon the circumstances of each case. While in all cases, the person going to be affected should be told the allegations against him and given an opportunity of meeting them, a trial type of hearing with the examination and cross-examination of witnesses would not be required in the absence of a statutory requirement to that effect. In many cases, the demand of 'fairness' would be met by giving the individual an opportunity of making a representation against the action proposed.

(B) *India.*—The decisions of the Indian Supreme Court have undergone the same somersault, following the English decision since *Ridge's case*.[8]

The orthodox view expressed in *Khusaldas's case*[12] was departed from step by step and, in 1970, the Supreme Court observed in *Kraipak's case*:[13]

"The dividing line between an administrative power and *quasi-judicial* power .... is being gradually obliterated."[13]

In 1978, the distinction was called "obsolescent after *Kraipak*[13] in India".[14]

8. *Ridge* v. *Baldwin*, (1964) A.C. 40 (75-76); *Pearlberg* v. *Varty*, (1972) 1 W.L.R. 534 (H.L.).

9. *R.* v. *Electricity Commrs.*, (1924) 1 K.B. 215; *Frome United Breweries* v. *Bath JJ.*, (1926) A.C. 586.

10. *O'Reilly* v. *Mackman*, (1982) 3 All E.R. 1124 (1129-30), Lord Diplock; *Chief Constable* v. *Evans*, (1982) 3 All E.R. 141 (144, 154) H.L.

11. S.A. de Smith, *Judicial Review of Administrative Action* (3rd Ed., 1973), pp. 58, 68; *Pearlberg* v. *Varty*, (1972) 1 W.L.R. 534 (547) H.L.

12. *Prov. of Bombay* v. *Khusaldas*, (1950) S.C.R. 621 (631, 698).

13. *Kraipak* v. *Union of India*, A. 1970 S.C. 150 (para. 13).

14. *Mohinder* v. *Chief Election Commr.*, A. 1978 S.C. 851 (paras. 44, 75).

Thus, it is now settled by a number of decisions[13-15] of the Supreme Court that natural justice must be complied with whenever an administrative authority proposes to affect an individual's civil rights or to visit him with civil consequences, even if the function be discretionary.[15]

At the same time, it has been observed in several cases (and, in the opinion of the Author, that is the better view) that in such categories of administrative functions, attended with civil consequences, the duty is not to act 'judicially', but to act 'fairly',[14] or, according to the rules of 'fair play'.[15] Hence, in such cases, all the canons of natural justice or any particular procedure need not be followed. All that is required is that the party to be affected must be apprised of the case against him, he must be given an opportunity of making a representation against it and that representation must be fairly appraised.[14] That is the substance of 'fair play' in administrative proceedings involving civil consequences.[14,17]

Whether quasi-judicial function may be delegated.

(A) *U.S.A.*—In the *United States*, there are observations in *Runkle* v. *U.S.*[18] and *U.S.* v. *Page* [19] to the effect that a judicial or *quasi-judicial* power must be exercised by the delegate personally and that he cannot redelegate it to another. In these cases,[18-19] it was held that the President's power of approval of a court-martial sentence was of a judicial nature and could not, accordingly, be delegated.

Whatever be the soundness of the actual decision in these cases, they establish the principle that where a power is entrusted to the *personal judgment* of a *quasi-judicial* authority, such trust cannot be delegated.[20]

But notwithstanding the acknowledgment of the above principle, a *partial* delegation of *quasi-judicial* power has been conceded by the Courts, in view of the fact that where *quasi-judicial* functions are vested in an administrative body as an 'institution' (like the President) or 'tribunal', it is practically impossible for such body to personally hear evidence on the great volume of administrative disputes that may be presented before it. It has, accordingly, been conceded that it is permissible for such body to delegate the function of *hearing parties* and *taking evidence*, provided the tribunal itself gives the *decision* after a final hearing.[20]

Thus,—

(a) Courts have upheld the power of the administrative boards to appoint assistants to make inquiries and hearers to take the evidence and report to the boards.[21] So, an administrative tribunal may delegate the power of taking evidence (or sifting the evidence thus taken[20]) to a subordinate body, provided it gives an opportunity to the parties of a hearing before itself

15. *State of Orissa* v. *Binapani*, A. 1967 S.C. 1269; *Eurasian Equipment* v. *State of W.B.*, A. 1975 S.C. 266; *State of Punjab* v. *Ajudhia*, A. 1981 S.C. 1374; *Tripathi* v. *State Bank of India*, A. 1984 S.C. 279 (para. 13); *Rampur Distillery* v. *Company Law Bd.*, (1969) 2 S.C.C. 774 (779); *Raja Anand* v. *State of U.P.*, A. 1967 S.C. 1766 (1771); *U.P.F.C.* v. *Gem Cap.* (1993) 2 S.C.C. 299 (306-07).

16. This view of the Author, expressed at p. 223 of the 3rd Edition, has been affirmed by *Yadav* v. *J.M.A.I.*, (1993) 3 S.C.C. 259 (*267-68*).

17. *Maneka* v. *Union of India*, A. 1978 S.C. 597 (paras. 59-61).

18. *Runkle* v. *U.S.*, (1887) 122 U.S. 543.

19. *U.S.* v. *Page*, (1891) 137 U.S. 673.

20. *Morgan* v. *U.S.*, (1936) 298 U.S. 468 (481) [known as Morgan I].

21. *N.L.R.B.* v. *Baldwin*, (1942) 128 F. 2d. 39 (54).

after the report of the hearer is received and before the decision of the tribunal is finally made.[22] In the absence of such hearing by the tribunal "upon its proposals before it issues its final command", the decision will violate due process.[22] Such hearing before the tribunal includes the right to *submit oral argument* by means of which a party may meet the claims of his opposing party.[22] An order of a Secretary was thus annulled on the ground that the case was heard by an examiner and there was oral argument before another officer, and the order was made by the Secretary without any further hearing before himself.[20]

"*The one who decides must hear.*"[20]

"The hearing is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not *considered* evidence or argument, it is manifest that the hearing has not been been given."[20]

The utility of the above proposition has, however, been minimised by the Supreme Court in a later stage of the same case by holding that it is not permissible for a party to interrogate a member of an administrative tribunal (just as a judge cannot be so interrogated) as to the mental process by which he arrived at the conclusion of his order.[23] It is, thus, not possible to establish that the tribunal *did not consider* the evidence taken by another person, by examining the only person who is competent to testify on the point. It is also well-nigh impossible to rebut the presumption of validity attaching to public proceedings by the affidavit of, or other evidence adduced by, the complainant in this behalf.[24]

(b) S. 7 of the Administrative Procedure Act, 1946, now provides for the examination of witnesses and the collection of evidence by 'hearing officers'. The hearing officers make an initial decision which becomes the decision of the administrative tribunal vested with the adjudicatory power, either *ipso facto* where it is not taken to the latter on appeal or review, or on affirmation by the latter [S.8(a)].

(B) *England.*—A judicial or *quasi-judicial* function vested in a particular body by statute cannot be delegated to another person or body unless such delegation is authorised by the statute expressly[25] or by necessary implication.[26]

The question whether a power to delegate can be inferred by necessary implication will depend on the nature of the duty and the character of the person or the constitution of the body in whom the Legislature has confided the function.[27]

Where a *quasi-judicial* authority is not entitled to delegate its function, it can neither ratify the decision of its delegate,[25] and the decision of the latter must held to be a nullity.[27]

(a) This does not, however, mean that an administrative tribunal or *quasi-judicial* authority must *hear* every case personally. In the absence of any statutory requirement, the authority is free to determine its own procedure and, provided the decision is his, he can act upon evidence heard or materials collected by his subordinates and the strict judicial principle that a decision can be given only by the Judge who heard the case, does not apply to administrative tribunals.[26]

22. *Morgan* v. *U.S.*, (1937) 304 U.S. 1 (18-19, 20, 25) [Morgan IV].
23. *U.S.* v. *Morgan*, (1941) 313 U.S. 409 [known as Morgan IV].
24. *Willapoint Oysters* v. *Ewing*, (1949) 338 U.S. 860 (*denying cert.*).
25. *Barnard* v. *National Dock Labour Board*, (1953) 1 All E.R. 1113 (1118) C.A.
26. *Local Govt. Board* v. *Arlidge*, (1915) A.C. 120.
27. *Vine* v. *National Dock Labour Board*, (1956) 3 All E.R. 939 (950) H.L.

(b) The principle against delegation of judicial or *quasi-judicial* powers is not applicable to a particular function which is 'ministerial'.[28] Thus,—

The power of investigation may be delegated by a *quasi-judicial* body to its own officers or to a committee, provided it retains the power to make the decision to itself.[27]

(c) Whether the *quasi-judicial* authority agrees with or differs from the report of the inquiry officer, he is bound to form his *independent* view and give his decision accordingly.[29-30]

(C) *India.*

I. In India, too, it has been held that the function of making a *quasi-judicial decision* cannot be delegated to another person or body, in the absence of statutory provisions authorising such delegation.[31]

II. On the other hand, in the absence of anything in the governing statute to require that the party who decides must also hear, natural justice is not denied in delegating the power to 'inquire and report'[32] to a subordinate authority, provided the *quasi-judicial* authority retains to itself the power to *decide*,[32-33] after applying his mind to the findings of the Inquiry Officer as well as the representation of the person to be affected.[34] This view has been taken in India under Art. 311(2),[32-33] and the principle would apply to similar statutory functions.

But the duty to hear cannot be delegated where the statutory provisions confer upon the person to be affected a right to be heard in person by the *quasi-judicial* authority specified by the statute.[35]

S. 68D(2) of the Motor Vehicles Act, 1939, as amended in 1956, provides—

"The State Government may, after considering the objections and after giving an opportunity to the objector ..... to be *heard* in the matter ..... approve or modify the scheme."

Under r. 10 framed under the Act, this right of the objector to be heard was either 'in person or through authorised representatives'.

In exercise of the powers conferred by the Rules of Business made under Art. 166 of the Constitution, the Minister in Charge of the Transport Department delegated this function of hearing objectors to his Secretary and to put up his notes to the Minister for his decision.

In quashing an order of approval of a scheme made after a hearing by the Secretary, the majority of the Court (3 : 2) observed—

".....while the Act and the Rules framed thereunder impose a duty on the State Government to give a *personal hearing*, the procedure prescribed by the Rules (of Business) impose a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is destructive of the concept of judicial hearing.

Such a procedure defeats the object of *personal hearing*. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, personal hearing becomes an empty formality."[35]

28. *Hunt* v. *Allied Bakeries*, (1959) 1 All E.R. 37 (41) C.A.
29. Cf. *Nelsovil* v. *Minister of Housing*, (1962) 1 All E.R. 423 (426).
30. Cf. *D'Silva* v. *Union of India*, A. 1962 S.C. 1130 (1132-34).
31. *Bombay Municipal Corpn.* v. *Dhondu*, A. 1965 S.C. 1486 (1488): (1965) 2 S.C.R. 929 (932).
32. *Pradyot* v. *Chief Justice*, (1955) 2 S.C.R. 1331 (1345-46)
33. Cf. *Garewal* v. *State of Punjab*, A. 1959 S.C. 512 (519).
34. *State of Orissa* v. *Govind Das*, (1958) S.C. [C.A. 288/58].
35. *Nageswara* v. *A.P.S.R.T. Corpn.*, A. 1959 S.C. 308 (327). [It thus echoes the American decision in the *Morgan case*, cited at p. 224, *ante*.].

III. Where the statute authorises the delegation of a *quasi-judicial* function, the delegator cannot reserve to himself any power to interfere with the exercise of the *quasi-judicial* function by the delegate or to impose his own decision upon the delegate.[36]

But the reservation of *administrative control,* e.g., the *time* within which the power might be exercised, would not vitiate the delegation.[36]

Where, in authorising such delegation, the relevant statute used wide language, it was interpreted by the Supreme Court to mean only an administrative control over the delegate. S. 68(1) of the Bombay Municipal Corporation Act, 1888, provides—

"Any of the powers ..... vested in the Commissioner ..... may be exercised ....., under the *Commissioner's control* and subject to his revision and to such conditions and limitations, if any, as he shall think fit to prescribe, by any municipal officer whom the Commissioner ..... empowers in writing in this behalf ....."

The delegation of the power to evict a person after inquiry, under ss. 105B-E, was challenged on the ground that there could not be any delegation of a *quasi-judicial* power subject to the control of the delegator. It was held that the words 'control' and 'revision', in the context of delegation of a *quasi-judicial power*, referred only to control over the administrative aspect of the exercise of the power.[36-37]

Quasi-judicial function must be exercised by the authority in whom it is vested by statute.

I. The principle that *any statutory power,* if specifically vested in a certain person, must be exercised by that very person and no other, applies to *quasi-judicial* power.[38-42] This is expressed by saying that "judicial duties" cannot be *abnegated.*[42]

II. It follows from the foregoing principle that—

(a) The *quasi-judicial* authority cannot decide according to instructions received from some other person or body,[37] or "under the dictation of some other person or persons to whom the authority is *not given by law*".

(b) If by rules made under such statute, the *quasi-judicial* power is sought to be vested in some other person either in substitution of or in addition to the authority in which it was vested by statute, such rule or other subordinate legislation will be *ultra vires,*[40] and the resultant decision will be a nullity.[40]

By s. 191 of the Municipal Corporation, Act, 1882, "*the power to dismiss* any constable whom they think negligent in the discharge of duties" was vested in the *Watch Committee* of the Borough. In exercise of his power to make regulations under

36. *Bombay Municipal Corpn.* v. *Dhondu,* A. 1965 S.C. 1486 (1488).

37. It is submitted that the question of invalidity of the provision in s. 68(1) was not discussed by the Supreme Court. It was made clear that if the Commissioner, in fact, influenced the decision of his delegate, the decision of the latter would have been a nullity. The question is whether the statute, having authorised a delegation of a *quasi-judicial* function with a reservation which was unfettered and might include an interference with the decision of the delegate, should be struck down as making an improper delegation. This question has not been answered in this case.

38. *Spackman* v. *Plumstead Board of Works,* (1885) 10 App. Cas. 229 (240) H.L.

39. *Middlesex Country Valuation Committee* v. *West Middlesex Assessment Committee,* (1937) 1 All E.R. 403 (410).

40. *Cooper* v. *Wilson,* (1937) 1 All E.R. 726 (732) C.A.

41. *General Medical Council* v. *Spackmen,* (1943) A.C. 627 (637) H.L.

42. *Calcutta Dock Labour Board* v. *Jafar Imam,* A. 1966 S.C. 282 (287).

s. 4 of the Police Act, 1919, the Secretary of State provided that the power of dismissal could be exercised by the *Chief Constable,* "subject to confirmation by the Watch Committee". The Court of Appeal held that if the Regulations meant that the power of dismissal was given to the Chief Constable, then the Regulations would be *ultra vires the statute,* and that, notwithstanding the Regulations (which must be so interpreted as to remain *intra vires*)—

"There can be no doubt that the power of dismissal in boroughs remains *solely in the Watch Committee.*"

The Court, therefore, set aside the order of the the Watch Committee on the ground, *inter alia,* that they had allowed the Chief Constable to sit with the Committee while the latter were hearing the proceeding for confirmation of the Chief Constable's provisional decision.[40]

(c) A statutory tribunal is *not* absolved of its duty to decide the question which has been entrusted to it even where the question has already been decided by a court of competent jurisdiction. The reason was thus given by Lord Atkin—

"Now, it is plain that the statute throws on the council and *on the council alone* the duty of holding the inquiry and of judging guilt (as to the infamous conduct of the medical practitioner). They cannot, therefore, rely on inquiry by another tribunal or a judgment of guilt by another tribunal .....

If this is *inconvenient,* it cannot be helped. It is much more *inconvenient* that a medical practitioner should be judged guilty of an infamous offence *by any body other than the statutory body.*"[41]

An employer, in the exercise of his statutory power of dismissing an employee, must hear the employee, independently, on the charge and then "come to a decision of his own".[42] Even where an Advisory Board under the Preventive Detention Act had found an employee to be guilty of violent anti-social activities, his services could not be terminated on the sole basis of that finding of the Advisory Board, however impartial it might be.[42]

(d) There is a denial of natural justice if an extraneous person is present while the *quasi-judicial* decision is being formulated, even though such extraneous person may have *no interest* in the cause,[39] because of the reasonable likelihood of the *quasi-judicial* authority being biased.[44-45]

Where the function of assessment was vested in the Assessment Committee, the question arose whether the presence of the Valuation Officer or other representative of the County Valuation Authority would vitiate the decision of the Committee. The Court of Appeal answered the question in the affirmative. Lord Wright observes—

"The decision which the assessment committee is arriving at is the *decision of the committee itself.* The county valuation committee has nothing to do *with the formulation of the decision,* which is purely the function of the assessment committee itself as a judicial body, and it would be improper, *on general principles of law,* that extraneous persons, who *may or may not have independent interests of their own,* should be present at the formulation of that judicial decision."[39]

The case becomes more serious where the extraneous person has *an interest* or case against the latter. In such a case, even though the extraneous person does not offer any advice at all or advises only on matters of procedure, the decision would be vitiated.[46]

Where the extraneous person does participate in the making of the decision, the case is worse.[45] The case is the worst where the extraneous person is a party to the dispute or litigation.[40]

43. *Lapointe* v. *L'Association,* (1906) A.C. 535 (538) P.C.
44. *R.* v. *Sussex JJ.,* (1924) 1 K.B. 256 (259).
45. *R.* v. *East Kerrier JJ.,* (1952) 2 All E.R. 144 (146).
46. *R.* v. *Salford Assessment Committee,* (1937) 2 All E.R. 98 (109).

Even where a person is not a formal party to a *lis*, he may have an interest in the cause.[47] Such interest need not be a personal or pecuniary interest.[48] It may be a 'legal interest', by reason of his having taken a decision or view in favour of or against a party to the cause, at an earlier stage.[48]

The Licensing Justices referred an application for the renewal of licence to the Compensation Authority for its decision and authorised a solicitor to appear before that authority and *to oppose the application*. Subsequently, those very Licensing Justices sat and voted as members of the Compensation Authority by virtue of their office. The House of Lords, reviewing a number of earlier decisions, set aside the decision of the Authority on the ground that the Licensing Justices were disqualified from sitting as members of the Authority, having taken a decision *to oppose* the renewal of the licence and thus prejudged the cause. As Lord Carson put it in that case (p. 618), even "excellent motives and feelings" on the part of such interested persons could not save them from the disqualification because it "affected the character of administration of justice". Much stronger were the words of Lord Atkinson (p. 609),—

"The licensing justices obviously took up the position (by directing the solicitor to oppose the renewal) towards the applicants for those licences of *hostile litigants and sustained that character to the end.* They thus became at once to a certain extent prosecutors and judges in the same causes."[48]

Whether a quasi-judicial tribunal can review its own orders.

1. The general rule is that a *quasi-judicial* tribunal becomes *functus officio* as soon it makes a decision relating to a particular matter. It cannot, therefore, review its decision, unless so empowered by statute.[49]

2. This does not mean that, in the absence of statutory provisions, it is powerless to exercise those powers which are inherent in every judicial tribunal, e.g.—

(a) To reopen an *ex parte* proceeding,—not on the ground that a party failed to appear,—but on the ground that a decision was reached behind the back of a necessary party, without issuing notice upon him.[51]

(b) To rectify its own mistake, which was committed overlooking a change in the law which had taken place before its decision.[49]

3. On the other hand,—

Where the power of review is conferred by a statute for specific purposes, it cannot be enlarged by any liberal interpretation. Thus, a power of review "to correct arithmetical or clerical error or errors apparent on the face of the record arising or occurring from accidental slip or omission in an order passed by him" cannot include the power to review an order on grounds which were not raised or arguments which were not advanced at the first instance.[52]

4. Where the statute does not confer a power of review, the order of the administrative tribunal must stand unless and until it is set aside on appeal or revision, so that the tribunal itself cannot give any relief to a party ignoring its previous decision. Such review order becomes a nullity.[51]

47. *R.* v. *L.C.C.*, (1892) 1 Q.B. 190
48. *Frome United Breweries* v. *Bath JJ.*, (1926) A.C. 586.
49. *State of M.P.* v. *Hasan*, (1966) 2 S.C.R. 854 (858).
50. *Sub-Divisional Officer* v. *Srinivas Prasad*, (1966) S.C. [C.A. 751/63].
51. *Kuntesh* v. *H.K.M.*, (1987) 4 S.C.C. 525 (paras. 11-12).
52. *Construction Co.* v. *State of Orissa*, (1966) 3 S.C.R. 99 (104).

Does Privilege from Defamation extend to quasi-judicial tribunals.

(A) *England.*—In England it has been held that the absolute privilege from defamation which is available to courts of justice extends also to a 'tribunal recognised by law'.[53] The word 'tribunal', however, has been interpreted to include those tribunals which simulate a court in acting in a manner similar to that in which courts act,[54] e.g., a tribunal which has power to summon witnesses and to examine them on oath.[55] It is not, however, essential that such tribunal must be required to hear in public.[55]

The privilege would not, however, extend to any tribunal which does not function as a court so that the principle which lies behind absolute privilege cannot be claimed in its favour.[56]

The distinction between the two classes is not yet scientifically defined and it can be demonstrated only by enumerating tribunals to which privilege has been held to extend and those to which it has been extended.

(a) The privilege has been extended to—

A military tribunal;[52] the Benches of an Inn of Court, exercising disciplinary matters;[56] the Disciplinary Committee established under the Solicitors Act, 1957;[55] Incorporated Law Society.[57]

(b) On the other hand, the privilege has been held to be not available to—

The Bar Council;[56] a County Council, granting licences.[53]

(B) *India.*—Since the civil law of defamation is still uncodified in India, English common law applies. Hence, the principle that a statutory tribunal which has functions and powers similar to those of courts should be entitled to 'privilege' should be applicable to India.

Whether the doctrine of *Res Judicata* applies to quasi-judicial decisions.

(A) England.—The House of Lords[58] has reiterated the conditions for the application of the principle of *res judicata* as follows :

(a) That the previous judgment which is relied upon to operate as *res judicata* in a later proceeding must be the judgment of a court of concurrent or exclusive jurisdiction;[59-60]

(b) That the judgment must have *directly* decided the point which arises for determination in the later proceeding;

(c) That the point or question raised in the subsequent proceeding must be *identical*;[59]

(d) That the parties to both the proceedings must be the same;

(e) That there was a *lis inter partes* in the previous proceeding upon which there could have been a 'judgment';

53. *Dawkins* v. *Rokeby*, (1873) 8 Q.B. 255.

54. *Royal Aquarium* v. *Parkinson*, (1892) 1 Q.B. 431; *O'Connor* v. *Waldron*, (1935) A.C. 76 (81).

55. *Addis* v. *Crocker*, (1960) 2 All E.R. 629.

56. *Lincoln* v. *Daniels*, (1961) 3 All E.R. 740.

57. *Lilley* v. *Roney*, (1892) 61 L.J. Q.B. 727.

58. *Society of Medical Officers* v. *Hope*, (1960) 1 All E.R. 317 (H.L.).

59. *Leith Harbour Commrs.* v. *Inspector of the Poor*, (1866) L.R. 1 S.C. & Div. 17 (22) (H.L.).

60. *Duchess of Kingstone's case*, (1776) 2 Smith L.C. 761.

(f) That the matter (or course of action)[59] in the subsequent proceeding to which the rule of *res judicata* is sought to be applid must be identical with the matter with respect to which the point was decided in the previous proceeding;

(g) That the previous court must have been a court of competent jurisdiction, i.e., must have the jurisdiction to come to a final decision *inter partes*[61] upon the question on which it is relied upon as *res judicata*.

The general principle is that the rule of *res judicata* is confined to courts[62] and that, accordingly, it is not applicable to the decisions of administrative bodies, though vested with *quasi-judicial powers,* for, they are not courts.

Excepting the case of *Hoystead* v. *Taxation Commr.*,[63] we do not get any authoritative decision extending the principle to *quasi-judicial* tribunals. But this decision has been explained away by four subsequent decisions[59,64] of the House of Lords. In *Hoystead's case,* the House of Lords applied the principle of estoppel by judgment to hold that the liability to assessment to a tax decided in respect of a previous period was conclusive as regards a subsequent period. But, as pointed out in the later cases,[64-65] the point that the liability in respect of a different period related to a separate cause of action as to which the principle of *res judicata* cannot apply was not urged before their Lordships in *Hoystead's case* and the House of Lords is no longer prepared to apply that decision as an authority on res *judicata*.[66]

Even though it may be said that the assessment of tax or rate for different periods may have a peculiarity of its own,[64-65] apart from observations relating to this peculiarity in the case of assessment to tax, there are general observations in the *Hope case*[66] as follows—

(a) The jurisdiction of an administrative tribunal is a limited one, being confined to the particular matter assigned to its determination by the statute.[66] It has no jurisdiction to finally determine *general questions of law*.[66]

This pinciple is also applicable to a court of law of summary jurisdiction; its decision is final on the question as to the right or liability which is the subject-matter of the particular proceeding and not on the question of law.[62] Similarly, the decision of a *quasi-judicial* tribunal will never be *res judicata* on a question of general law, even though it be necessary for the tribunal to decide such a question in order to determine the matter before it. The observation of Lord Radcliffe on this point is illuminating :

"For the purpose of arriving at it decision, the tribunal may well have to take account of, and form its own opinion on, questions of general law .... but ..... the view

61. *Inland Rev. Commrs.* v. *Sneath,* (1932) All E.R. 739 (745).

62. Halsbury, 3rd Ed., Vol. 15, p. 187; *R.* v. *Hutchings,* (1881) 6 Q.B.D. 300 (C.A.).

63. *Hoystead* v. *Taxation Commr.*, (1925) All E.R. 56 (H.L.).

64. *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council,* (1925) All E.R. 672 (H.L.); *New Burnswick Ry.* v. *British & French Trust Corpn.*, (1938) 4 All E.R. 747 (770) H.L.; *Caffoor* v. *I.T. Commr.*, (1961) A.C. 584 (597).

65. *Bennett & White* v. *Municipal District,* (1951) A.C. 786 (P.C.).

66. *Society of Medical Officers* v. *Hope,* (1960) 1 All E.R. 317 (H.L.). The contrary decision of the Privy Council in *Hoystead* v. *Taxation Commr.*, (1925) All E.R. 56 (P.C.) was explained by the House of Lords in (1960) 1 All E.R. 317 (323; 325) on the ground that the point that the subject-matter before the Taxation Authority was *different* from that to which his previous determination related, was not raised before the High Court or the Judicial Committee.

adopted with regard to them is *incidental* to its only direct function, that of fixing the assessment (referring to a 'valuation court'). For that limited purpose it is a court with a jurisdiction competent to produce a final decision between the parties before it; but it is not a court of competent jurisdiction to decide general questions of law with the finality which is needed to set up the estoppel *per res judicata* that arises in certain contexts from *legal judgments.*"[66]

Of course, if there is a provision for appeal from such decision to a regular court, the decision of the tribunal will merge into that of the court and the decision of the court may operate as *res judicata.* That, however, is a different matter.

Again, where the statute confers 'finality' upon the decision of an administrative tribunal, which is in the nature of a judgment *in rem*, it would operate as *res judicata*,[67] unless, of course, the decision was *ultra vires*, for, there cannot be any *res judicata* or estoppel to uphold an *ultra vires* decision.[68]

(b) Though the question may be different in the case of a statutory tribunal which determines a *lis* between two private parties, where the administrative authority, vested with *quasi-judicial* powers, is himself a party to the matter to be determined by him, the position is different. It may assume the form of a *lis* for drawing the obligation to proceed judicially, but it does not go to the length of satisfying the requirement of a *lis* for the purpose of applying the principle of *res judicata.*[66]

(c) Where the *quasi-judicial* authority is a public official, he cannot be estopped against his statutory duties not only because there cannot be an estoppel against a statute[66,69] but also because the Executive cannot be estopped by the acts or representations of public officials,[70] which are *ultra vires.*[71]

Of course, the decision of a *quasi-judicial* tribunal may be binding as regards the very subject-matter to which decision relates[72] in the sense that being a statutory body, it cannot change or review its decision at will, unless a power of review is expressly given by the statute. But the doctrine of *res judicata* is a different matter, namely, whether such decision shall be binding upon the tribunal in a different proceeding.

(B) *U.S.A.*—In the U.S.A., though there are decisions where it has been asserted as a general proposition that the doctrine of *res judicata* or estoppel by judgment applies only to judicial decision[73] and not to administrative decisions, such as an order for the deportation of an alien,[74] the preponderant view is that the principle of *res judicata* may also apply to administrative

67. *Wakefield Corpn.* v. *Cooke,* (1904) A.C. 31; *Armstrong* v. *Whitfield,* (1973) 71 L.G.R. 282.

68. Wade, *Administrative Law* (1977), pp. 232-33.

69. *Maritime Electric Co.* v. *General Diaries,* (1937) 1 All E.R. 748 (P.C.); *Inland Rev. Commrs.* v. *Brooks,* (1915) A.C. 478.

70. *Howell* v. *Falmouth Boat Construction,* (1951) 2 All E.R. 278 (285) H.L. (dissenting from Denning, J.,'s observation in *Robertson* v. *Minister of Pensions.* (1948) 2 All E.R. 767 (770).

71. *A.G. for Ceylon* v. *Silva,* (1953) A.C. 461 (480) P.C.

72. *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council,* (1925) All E.R. 672 (675) H.L.

73. *Arizona Grocery Co.* v. *Atchinson,* (1932) 284 U.S. 370; *N.L.R.B.* v. *Baltimore Transit Co.,* (1944) 321 U.S. 795.

74. *Pearson* v. *Williams,* (1906) 202 U.S. 281.

decisions[75] e.g., on a question of jurisdiction,[75] where the matter raised in a subsequent proceeding[76] "is identical in all respects with that decided in the first proceeding and ..... the controlling facts and applicable rules remain unchanged".[77] If these conditions are satisfied, even the decision in a tax proceeding may be *res judicata* on the same question for a later tax year.[78] But not so, if there has been a subsequent modification of the significant facts or a change or development in the controlling legal principles.[77]

(C) *India.*—I. There is a passing observation by S.K. Das, J., in *Ujjam Bai* v. *State of U.P.*[79] that the doctrine of *res judicata* has been applied to *intra vires* decisions of *quasi-judicial* tribunals. Apparently, the observation is based on the statement in Prof. de Smith's *Judicial Review of Administrative Action,* (1959) at p. 63[80] and the cases cited therein. But the statement in that work appears to have been generally made with respect to the binding nature of the decision of a statutory tribunal in regard to the *very subject-matter* which it decides. Of the cases cited by the learned Professor, we have already noted that the decision of the House of Lords in *Hope's case*[81] is rather an authority against the extension of the principle of *res judicata* to *quasi-judicial* decisions so that they may be binding in *subsequent* proceedings. The other case, *Re Denton Road,*[82] again, is an authority for the proposition that when a final (as distinguished from a provisional or preliminary) decision has been made by a statutory body, it cannot, in the absence of statutory authority, withdraw or change that decision at its will. Any suggestion of estoppel made therein, base on *Robertson* v. *Minister of Pensions,*[83] upon which it relies, has been undermined by the observation of the House of Lords in the *Hope case.*[81]

Re Birkenhead Corporation[84] is the only decision, cited by Prof. de Smith, which supports the extension of *res judicata* to the decision of a *quasi-judicial* tribunal, namely, the National Arbitration Tribunal. The court held that the National Tribunal had jurisdiction to deal with a trade dispute arising out of a *private* agreement and that, accordingly, its decision was binding on the parties as to any claim arising out of such agreement and coming within the scope of that trade dispute so that a cause of action in a court of law, founded on such claim, was barred by *res judicata*. This latter finding as to *res judicata,* however, was based on the *concession* of counsel for the plaintiff. If the question of *res judicata* involved in this case[84] were to be decided to-day in the light of the observations in the *Hope case,*[81] the Author would venture to suggest an answer in the negative, because the main contention upon which the action in court was founded was one of *law,* namely, that of the true construction of the resolution of the Corporation out of which the claim arose. The construction of a legal instrument is a question of law upon which the courts of law could only be the *final* authority.

75. *Sunshine Anthracite Coal Co.* v. *Adkins,* (1940) 310 U.S. 381; *Seatrin Lines* v. *Pennsylvania R. Co.,* (1953) 207 F. 2d. 255.
76. *Seatrin Lines* v. *Pennsylvania R. Co.,* (1953) 207 F. 2d. 255.
77. *Commr.* v. *Sunnen,* (1948) 333 U.S. 591 (599-600).
78. *Tait* v. *W.M. Ry.,* (1933) 289 U.S. 620.
79. *Ujjam Bai* v. *State of U.P.,* A. 1962 S.C. 1621.
80. P. 91 of the 1968 Ed.
81. *Society of Medical Officers* v. *Hope,* (1960) 1 All E.R. 317 (H.L.).
82. *Denton Road, re,* (1952) 2 All E.R. 799.
83. *Robertson* v. *Minister of Pensions,* (1948) 2 All E.R. 767.
84. *Birkenhead Corporation, re,* (1952) 1 All E.R. 262 (273).

II. Of course, in a previous decision,[85] the principle of *res judicata* had been applied by the Supreme Court with respect to the decision of one Industrial Tribunal being binding upon another Industrial Tribunal, relating to the *same* subject-matter. A close analysis of this decision shows that if is practically an interpretation of s. 19(6) of the Industrial Disputes Act, 1947, rather than a decision as to the application of the principle of *res judicata,* in general, to the decisions of Industrial Tribunals. The dispute relating to a Schedule was determined by one Tribunal. A party to the award of that Tribunal repudiated that under s. 19(6) of the Act by serving a notice upon the other party and there was a fresh reference of the *same matter* to another Tribunal. The Court, on a proper interpretation, came to the conclusion that s. 19(6) did not enable a party to reagitate the *same matter* by serving a notice of repudiation any time it liked but enabled it to have the award reopened only when there was a *change in the circumstances* which warranted an alternation in the award. The *effect* of the decision is thus directed against *reopening the same proceedings except* on good casue authorised by the statute.

This decision has been followed in *I.G.N. Ry. Co.* v. *Workmen,*[86] with the caution that the very fact that an award can be terminated under s. 19(6) of the Act shows that "the principle of *res judicata* would be applied with caution in industrial disputes".

III. The decision in *Bombay Gas Co.* v. *Shridhar*[87] stands on a different footing; but even though it does not rely on *res judicata* in so many words, it should be referred to in the present context.

In this case,[87] certain workers demanded increased wages on the ground that they were workmen within the meaning of the Factoris Act, 1948. Before the Industrial Tribunal, the workers *conceded* that the Factories Act did not apply to them but contended that, nevertheless, they should be treated similarly as workmen under the Factories Act, which contention was rejected by the Tribunal. They next applied to the Authority under the Payment of Wages Act. 1936, urging that the Factories Act applied to them. The Supreme Court held that so long as the award of the Industrial Tribunal, which was within jurisdiction, stood, the Authority under the Payment of Wages Act had no jurisdiction to entertain the question whether the workers who were parties to that award were governed by the Factories Act. The Court observed—

"If this were permissible, it would mean that the Authority under the Payment of Wages Act would be practically sitting in appeal on awards of industrial tribunals and upsetting them."

In effect, the decision rested on the principle of *res judicata* so as to hold the decision of the Industrial Tribunal binding upon the Authority under the Payment of Wages Act.[87]

The conclusion, however, it is submitted, raises some nice questions:

(a) The question as to the applicability of the Factories Act is a question of law. Had the Industrial Tribunal final jurisdiction to determine that? If not, how could an independent authority, having jurisdiction to determine the question from a different footing, be precluded from exercising jurisdiction on the ground that the Industrial Tribunal had decided it?

(b) Whatever might be said about the Payment of Wages Act, why would not the Supreme Court decide this question, which was a *jurisdictional* question,[88] when the matter had come up before the Supreme Court on appeal

85. *Burn & Co.* v. *Employees,* (1956) S.C.R. 781 (788).
86. *I.G.N. Ry. Co.* v. *Workmen,* A. 1960 S.C. 1286 (1287).
87. *Bombay Gas Co.* v. *Shridhar,* A. 1961 S.C. 1196 (1198).
88. Contrast *Regional Prov. Fund Commr.* v. *Shree Krishna Mfg. Co.* [A. 1962 S.C. 1536], where the High Court reviewed the finding of the Provident Fund Commr. on this point under Art. 226 and the Supreme Court affirmed.

on special leave. The Court held that the Industrial Tribunal had the jurisdiction to determine the question whether the workers were entitled to higher wages and, therefore, such decision was conclusive. But that conclusion begged the question whether the workers were workmen within the meaning of the governing statute, and this question the Supreme Court declined to decide on the ground that it was "*not* necessary".

(c) If the matter were said to rest on the principle of estoppel, that is to say, that the parties should not be allowed to go back upon their 'concession' before the Tribunal, one might very well raise the question whether the principle of estoppel not being available against a statute should not apply to the present case inasmuch as the Factories Act had laid an obligation upon the employers, in the public interest, to pay higher wages if the workers satisfied a certain test. Can an employer get rid of this statutory liability by any agreement with the employee? If not, the consent[89] or 'concession' of the employee as to the *applicability of the statute* would be immaterial.

IV. A decision to the opposite direction is *Visheswara* v. *I.T. Commr.*,[90] where the Court has made the short statement that "there is no such thing as *res judicata* in income-tax matters".

The facts of the case, however, related to the applicability of the principle of *res judicata* as to the liability for *two different periods*. In the previous period, the profits from the sale of certain shares were exempted from assessment while in the latter period, they were assessed. It was held that the decision of exemption with respect to the previous period did not constitute *res judicata* so as to preclude the income-tax authorities from assessing income of the same nature in respect of subsequent period. The decision is thus in line with the English decisions discussed at p. 233, *ante*.

From the foregoing decision it would appear that in India—

(a) The principle of *res judicata* does not apply to purely administrative proceedings and in the absence of any statutory provision or the doctrine of promissory estoppel or any constitutional bar, it is compeent for the Government to review its previous order.[91]

(b) The same general rule applies to *Quasi-judicial* proceedings,[90] but in particular cases, the rule of *res judicata* may be applied if substantial justice so requires.[92]

V. A purely administrative decision, whether right or wrong cannot be used as *res judicata* or as a *precedent*,[93] in a later case which must be decided on its its facts and circumstances.

89. Cf. Wade, *Administrative Law*, (1977) p. 221.
90. *Visheswara* v. *I.T. Commr.*, A. 1961 S.C. 1062 (1065); *Instalment Supply* v. *Union of India*, A. 1962 S.C. 53 (59).
91. *Verma* v. *Union of India*, A. 1980 SC 1461; *W.I.W. Co.* v. *Workers*, A. 1970 S.C. 1205.
92. *Workmen* v. *S.B.M. Co.*, A. 1974 S.C. 1132.
93. *Chandigarh* v. *Jagjit*, (1995) 1 S.C.C. 745 (para. 6).

CHAPTER 8

NATURAL JUSTICE

Basis of the application of the principles of natural justice.

It has been stated in the preceding Chapter that a statutory authority having a *quasi-judicial* obligation must comply with the rules of natural justice. We must, therefore, inquire into the principles involved in the expression 'natural justice'.

But before entering into the implications of the doctrine of natural justice, it is necessary to explain the basis of importing this doctrine to test the validity of the decisions of administrative tribunals.

It should at once be pointed out that the initial application of the doctrine of natural justice was to 'courts', that is to say, in respect of judicial functions and it is from that sphere that the doctrine has been extended to statutory authorities or tribunals exercising *'quasi-judicial'* functions, and, later, to any administrative authority who has the function of determining civil rights or obligations[1] [p. 216, *ante*].

(A) *England.*—Natural justice' is an expression of English common law, and involves a procedural requirement of fairness.

Without going into the ramifications of the doctrine of natural justice at this stage, it may be said that the doctrine, as understood in England, rests on two broad principles resting on Latin maxims, which were drawn by common law from *'jus naturale'*.[2]

(a) *"Nemo debet esse judex in propria causa"*, which means that no one should be a judge in his own cause or that the tribunal must be impartial and without bias.

(b) *"Audit alteram partem", which means*—"hear the other side, or that both sides in a case should be heard" (before it can be decided) or that no man should be condemned unheard.

England

In the original application of these principles in England, there was no concern with administrative tribunals. In the 19th century, the phrase came to be applied by the superior courts in controlling the decisions of courts of summary jurisdiction and it was asserted that any court of justice or judicial tribunal, whatever might be the procedure prescribed for it, must observe these minimum safeguards for justice, failing which its decisions would lose their judicial character. That these are the essential requirements of a judicial decision would appear from the notable words of Viscount Haldane in *Local Government Board* v. *Arlidge* :[2]

".....those whose duty it is to decide must act judicially. They must deal with the question referred to them *without bias and they must give to each of the parties the opportunity of adequately presenting the case made.* The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out *justice.*"

1. *Rattan* v. *Managing Committee,* (1993) 4 S.C.C. 10 (para. 9); *Yadev* v. *J.M.A.I.,* (1993) 3 S.C.C. 259 (para. 11).

2. *Local Govt.* v. *Arlidge,* (1915) A.C. *120 (138) H.L.*

Greer, L.J., put it more tersely in *Errington's case*[3]—

A judge must "hear both sides and must not hear one side in the absence of the other".[3]

It is logical, therefore, that with the growth of administrative tribunals and other statutory bodies the duty to decide the rights of parties *judicially* came to be vested by law in bodies other than Courts,[4] the application of the principles of natural justice came to be extended to these *'quasi-judicial'* authorities as well. In *Lapointe* v. *L'Association*,[5] the Judicial Committee thus observed :

"The rule (*Audi alteram partem*) is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."[5]

In an appeal from Malaya, the Judicial Committee (per Lord Denning),[6] has summarised the principle thus :

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them .... It follows, of course, that the judge or whoever had to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough."[6]

U.S.A.

(B) *U.S.A.*—In the United States, the expression 'natural justice', as such, is not so frequently heard of;[7] for, it is not necessary to rely on common law when 'due process' is guaranteed by the Constitution whenever an individual's 'life, liberty or property' is to be affected by State action [Fifth & Fourteenth Amendments]. 'Due process' is, of course, a vague and undefined expression, the implications of which are not finally settled even to-day. But, thanks to the genius of the American judiciary, it has secured the observance of the minimum requirements of justice embodied in the principles of natural justice, by taking advantage of the very vagueness of the phrase 'due process'.[8]

In the hands of the Supreme Court, the phrase early came to evolve a twofold meaning,—substantive and procedural, and the principles of natural justice were considered to be implied in the *procedural* aspect of due process.

Thus, in *Snyder* v. *Massachussets*,[9] the Supreme Court observed that there was a violation of due process whenever there was a breach of a "principle of justice so rooted in the *traditions* and conscience of our people as to be ranked as fundamental". And in the early case of *Hagar* v. *Reclamation District*,[10] the Court had formulated the view that 'hearing' before decision was one of such fundamental principles and that, accordingly, 'due process' required *inter alia*, that—

3. *Errington* v. *Minister of Health*. (1935) 1 K.B. 249 (268).
4. *R.* v. *London County Council*. (1931) 2 K.B. 215 (233).
5. *Lapointe* v. *L'Association*, (1906) A.C. 535 (539).
6. *Kanda* v. *Fed. of Malaya*, (1962) 2 W.L.R. 1153 (P.C.)
7. It appears to have been used in the early case of *Calder* v. *Bull*. (1798) 3 Dall. 396 (398 f.); Ex parte *Robinson*, (1898) 86 U.S. 505.
8. *Caritativo v. California*, (1957) 357 U.S. 549 (558).
9. *Snyder* v. *Massachussets*, (1934) 291 U.S. 97 (105).
10. *Hagar* v. *Reclamation District*, (1884) 111 U.S. 701; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, (1951) 341 U.S. 123 (178).

"Whenever it is necessary for the protection of the parties, it must give the an *opportunity to be heard* respecting the justness of the judgment sought."[10]

It is thus to be seen that the three ingredients of procedural due process, as summarised by Prof. Willis,[11] basically correspond to the English common law principles of natural justice.

India.

(C) *India.—Our* Constitution has conferred upon the superior Courts the same supervisory jurisdiction over inferior courts and tribunals as gave rise to the doctrine of natural justice in England, and once it is conceded that there are certain fundamental requirements the absence of which vitiates any judicial or *quasi-judicial* decision affecting the rights of individuals[12] (a proposition for which no specific constitutional authority is required[1]), *our* superior Courts cannot help applying these requirements while exercising their jurisdiction under Arts. 32 and 226 to issue *certiorari;*[13] or the supervisory jurisdiction of the High Court under Art. 227;[14] or the *extraordinary* power of appeal vested by Art. 136 in the Supreme Court.[15]

On the other hand, a constitutional requirement of compliance with the principles of natural justice is derived from the expression 'reasonable restriction' in Cls. (2)-(6) of Art. 19.[16]

The difference in the application of the doctrine of natural justice in England, on the one hand, and the U.S.A. and India, on the other hand, is that where 'due process' or reasonableness is a constitutional safeguard, it cannot be taken away or abridged, as in England, by ordinary legislation.

The Principles of Natural Justice.

1. Any judicial or *quasi-judicial* tribunal, determining the rights of individuals, must conform to the principles of 'natural justice' in order to maintain 'the rule of law'.[17] The reason is that these principles constitute the 'essence of justice'[18] and must, therefore, be observed by *any* 'person or body charged with the duty of deciding[19] the rights of parties[12] which involves the duty to act judicially.[18]

2. In *India,* the requirement to comply with the principles of natural justice has been deduced from Arts. 14 and 21 of the Constitution and thus extended to domestic inquiry, including even inquiries held under Standing Orders[20] governed by Industrial Disputes Act, 1947.

Though both in *England,*[21] and *India,*[13,22] it has been held that there

11. Willis, *Constitutional Law,* pp. 642-43.
12. *Manak Lal* v. *Prem Chand,* (1957) S.C.R. 575 (580-81).
13. Cf. *N.P.T. Co.* v. *N.S.T. Co.,* (1957) S.C.R. 98 (100).
14. *Waryam* v. *Amarnath,* (1954) S.C.R. 565.
15. Cf. *D.C. Mills* v. *Commr. of I.T.,* (1955) 1 S.C.R. 941 (950).
16. Cf. *Hari* v. *D.C. of Police,* A. 1956 S.C. 559; *Gurbachan* v. *State of Bombay,* (1952) S.C.R. 993; *Sri Kishan* v. *State of Rajasthan,* (1955) 2 S.C.R. 531 (540); *Fedco* v. *Bilgrami,* (1960) S.C.J. 235 (249).
17. Cf. Rep. of the Committee on Ministers' Powers, (1932) Cmd. 4060, p. 75.
18. *Spackman* v. *Plumstead Board of Works,* (1885) 10 App. Cas. 229 (240); *General Medical Council* v. *Spackman,* (1943) A.C. 627 (641).
19. *Marriott* v. *Minister of Health,* (1937) 1 K.B. 128.
20. *Yadev* v. *J.M.A.I.,* (1993) 3 S.C.C. 259.
21. *General Medical Council* v. *Spackman,* (1943) A.C. 627 (638); *Russell* v. *Duke of Norfolk,* (1949) 1 All E.R. 109 (118); *R.* v. *Registrar,* (1960) 2 All E.R. 549 (554).
22. *Rattan* v. *Managing Committee,* (1993) 4 S.C.C. 10 (para. 10); *State of Gujarat* v. *Anand,* A. 1993 S.C. 1196; *Mohinder* v. *Chief Election Commr.,* A. 1978 S.C. 851; *Bd of Mining Exam.* v. *Ramjee,* A. 1977 S.C. 965; *State of Kerala* v. *Shaduli,* (1977) U.J.S.C. 318 (para. 5).

is no universal or uniform standard of natural justice appliable to all cases coming within the purview of the doctrine and that the contents or requirements of natural justice vary with the varying constitution of different *quasi-judicial* bodies and their functions, the subject-matter of inquiry, the relevant statutory provisions,[23] and the other circumstances of the case,[24] nevertheless, it is agreed on all hands that there are certain broad principles deducible from the two Latin maxims which form the foundation of the doctrine (p. 229, *ante*) and extend to all cases where the doctrine is attracted.

I. "Nemo debet esse judex in propria causa."

(A) *England and India.*

It means that no one should be a judge in his cause.

The rule is of a wide application and means that a judicial or *quasi-judicial* authority should not only himself not be a party[25] but must also not be interested *as* a party[26] in the subject-matter of the dispute which he has to decide. In short,

Absence of bias. "Judges, like Caesar's wife, should be above suspicion."[27]

In the celebrated observation of Lord Hewart—

"(It) is of fundamental importance that justice should not only be done, but should *manifestly and undoubtedly be seen to be done.*"[28]

Broadly speaking, bias means a predisposition to decide for or against one party without proper regard to the true merits of the dispute.[22, 29]

It means pre-disposition or prejudice concept of bias has had a steady retirement with changing structure of society. There may be mere apprehension of bias or a real danger of bias. The court will look to surrounding circumstances to conclude whether there is a real bias.[29a]

'Bias' means partiality or preference. A person or authority required to act in a judicial or quasi-judicial matter must act impartially. Every kind of bias does not vitiate an act. It must be a prejudice which is not founded on reason and actual by self-interest, pecuniary or personal. A litigant can successfully impugn an action by establishing a reasonable possibility of bias or proving circumstances from which the operation of influence can be inferred.[29b]

The word stands included within the attributes and broader purview of the word "malice", which in common acceptation means and implies "spite" or "ill will". Mere general statements will not be sufficient for the purpose of indication of the ill-will. Cogent evidence must be brought on record to conclude bias which resulted in miscarriage of justice. Sorrounding circumstances must and ought to be collated and necessary conclusion has to be drawn therefrom as to the existence of bias or a mere apprehension.[29c]

It is also linked with the question of jurisdiction.

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23. Cf. *Local Govt. Board* v. *Arlidge,* (1915) A.C. 120; *Board of Education* v. *Rice,* (1911) A.C. 179 (182).
24. *Ceylon University* v. *Fernando,* (1960) 1 W.L.R. 223 (P.C.).
25. *Frome United Breweries* v. *Bath Justices,* (1926) A.C. 586 (591, 593) H.L.
26. *Ranger* v. *G.W. Ry.,* (1854) 5 H.L.C. 72 (89).
27. *Leeson* v. *General Council,* (1889) 43 Ch. D. 366 (385).
28. Lord Hewart in *R.* v. *Sussex Justices,* (1924) 1 K.B. 256 (259), approved in *Franklin* v. *Minister of Town Planning,* (1947) 2 All E.R. 289 (H.L.)
29. *Secy.* v. *Muraswamy,* (1988) Supp. S.C.C. 561.
29a. *Kumaon Mondal Vikas Nigam Ltd.* v. *Girja Shankar,* (2000)7 Supreme 112: 2000 (Supp 2) JT 206.
29b. *G.N. Nayak* v. *Goa University,* (2002)2 SCC 712: AIR 2002 SC 790.
29c. *K.M.V.N. Ltd.* v. *Girja Shankar,* AIR 2001 SC 24: (2001)1 SCC 182.

If persons who have a direct interest in the subject-matter of an inquiry before an inferior court or tribunal takes part in adjudicating upon it, the court is improperly constituted, and is without jurisdiction.[30]

A decision of the court or tribunal is vitiated by the mere fact that an interested person sat at the hearing, even though such person did not take part in the discussion or did not vote.[31] The mere presence of the interested person may vitiate the decision if he sat in such a position that gave an appearance that he was a member of the tribunal.[32-33]

"It makes no difference whether he then discussed the case with them (the court) or not; the risk that a respondent may influence the court is so abhorrent to English notions of justice that the possibility is sufficient to deprive the decision of all judicial force and to render it a nullity."[33]

On this principle—

1. The conviction for a motoring offence was quashed on the ground that the clerk to the Justice, who was a member of a firm of solicitors who were to represent the accused in civil proceedings arising out of the same collision, retired with the Justices, although he did not give them any advice on the conviction.[32]

2. The proceedings of a Borough Watch Committee to confirm the provisional dismissal of a police constable by the Chief Constable was quashed on the ground that the Chief Constable was present at the meeting when this matter was being deliberated by the Committee.[33]

Hence, not only will *certiorari* issue where the adjudication has been vitiated by the personal interest of the member or members of the tribunal, but even where the Clerk of the tribunal is a person who has given some advice or his firm, without his knowledge, has given some advice to one of the parties before the tribunal.[34]

But where the Clerk, though a person having a bias in the cause, took no part in the deliberations of the tribunal, nor had any chance of influencing the decision of the tribunal, there was no denial of natural justice.[35]

The rule is commonly expressed as saying that a judge must be free from bias.[36] 'Bias', in this context,—

"denotes a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a *quasi-judicial* office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute".[37]

Bias may be said to be of three different kinds :[37]

Legal interest.

(a) A Judge may have a bias in the subject-matter which means that he is himself a party[38] or has direct connection with the litigation,[39] so as to constitute a legal interest.

30. Halsbury, Hailsham Ed., Vol. IX. para. 1487; Vol XXVI. para. 606.

31. *R.* v. *Justice of Hertfordshire*, (1845) 6 Q.B. 853; *R.* v. *Meyer*, (1876) 1 Q.B.D. 173; *R.* v. *London County Council*, (1892) 1 Q.B. 190.

32. *R.* v. *Sussex Justices*, (1924) 1 K.B. 256; *R.* v. *Barry*, (1953) 2 All E.R. 1005.

33. *Cooper* v. *Wilson*, (1937) 2 All E.R. 726.

34. *R.* v. *Justices of Essex*, (1927) 2 K. B. 475.

35. *R.* v. *Architects' Registration Tribunal*, (1945) 2 All E.R. 131; *Re Lawson*, (1941) 57 T.L.R. 315.

36. Cf. *Local Govt. Board* v. *Arlidge*, (1915) A.C. 120 (132).

37. *Franklin* v. *Minister of Town and Country Planning*, (1947) 2 All E.R. 289 (296) H.L.

38. *R.* v. *Great Yarmouth Justices*, (1882) 8 Q.B.D. 525 [in a connected case].

A 'legal interest' means that the Judge is 'in such a position that a bias *must be assumed*".[39]

The best illustration of legal interest is the House of Lords case of *Dimes* v. *Grand Junction Canal*,[40] in which the facts were exceptional :

A public company brought a bill in equity against a landowner in a matter involving the interests of the company which was heard by the Vice-Chancellor who granted relief to the company. On appeal, the order was confirmed by the Lord Chancellor, Lord Cottenham, who was a shareholder in the company. The decree was impugned before the House of Lords after Lord Cottenham had retired and the House, presided over by another Lord Chancellor (Lord St. Leonards) set aside the decree, with the observation :

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but it is of the last importance that the maxim that no man is to be a judge in his cause should be held sacred .... This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest but to avoid the appearance of labouring under such an influence."[40]

Where a Judge is disqualified, the disqualification extends to his deputy, unless the deputy is judicially independent of control of the Judge whose deputy he is.[40]

The smallest legal interest will disqualify the judge. Thus,

(i) Members of a local or other body[41] who had taken part in promulgating an order or regulation[42] cannot afterwards sit for adjudication of a matter arising out of such order,—because of their disqualification on the ground of bias.

(ii) Subject to statutory exceptions,[43] "persons who had once decided a question should not take part in reviewing their own decision",[43] on appeal.[44]

Thus,—

(a) The persons who constitute the Disciplinary Committee of the Institute of Chartered Accountants must not sit on the Governing Council which approves the report of the Disciplinary Committee.[45]

(b) A Judge should not try a case in which he has examined himself as a *witness*.[46] The principle being that a person having a bias in favour of or against a party should not take part in the decision of the dispute,[47] the prohibition extends to all cases where such a bias is likely to arise, e.g., where the Judge has personal knowledge of the material facts of a case.[48]

The question whether there is a 'legal interest' is a question of fact to be determined with reference to the facts of each case, the question to be answered being—

"Has the Judge whose impartiality is impugned taken any part whatever in the prosecution either by himself or his agent?"[49]

But the interest, in order to disqualify, must be a *specific* interest in the cause before the tribunal.

A mere *general* interest in the 'general object' to be pursued would

40. *Dimes* v. *Grand Junction Canal*, (1852) 3 H.L.C. 759.
41. *R.* v. *Deal Justices*, (1881) 45 L.T. 439 (441).
42. *R.* v. *Rand*, (1913) 22 C.C. 147.
43. *R.* v. *Licensing JJ. of Cheshire*, (1906) 1 K.B. 362 (366; 368; 370)
44. *R.* v. *Hertfordshire JJ.*, (1845) 6 Q.B. 753.
45. *I.C.A.* v. *L.K. Ratna*, A. 1987 S.C. 71.
46. *Frome United Breweries* v. *Justices of Bath*, (1926) A.C. 586 (590).
47. *State of U.P.* v. *Nooh*, (1958) S.C.R. 595 (601)
48. *Hurpurshad* v. *Sheo Dyal*, 3 I.A. 259 (286).
49. *Leeson* v. *General Council*, (1889) 43 Ch. D. 366 (384).

not disqualify the Judge. Thus, a Magistrate who subscribed to the Society for the Prevention of Cruelty to Animals was not thereby disqualified from trying a charge brought by that body of cruelty to a horse.[41] If, however, the Judge has reached and announced certain fixed conclusions from which it may be inferred that the parties cannot get a fair hearing, he cannot be allowed to decide the matter.[42]

Mere membership of an association or institution which is a party to the proceedings does not disqualify a judge.[50] Disqualification arises where the Judge has been a party to the prosecution, by taking part in the resolution to prosecute the aggrieved party,[51] or by acting as a lawyer for a party to the proceeding while the Judge was at the Bar.[51a]

Pecuniary interest.

(b) Pecuniary interest in the cause,[52] however slight, will disqualify the Judge, even though it is not proved that the decision has in fact been affected by reason of such interest.[49] For the same reason, where a person having such interest sits as one of the Judges,[53] the decision is vitiated even though he does not take part in the actual decision.[54-55] On this principle,—

(i) The Court struck down the resolution of a local authority sanctioning a development scheme, on the ground that one of the councillors who had applied for permission to make the development, as an estate agent, took part in the meeting where the resolution was passed.[56]

(ii) Shareholders in a railway were held to be disqualified from hearing charges against ticketless passengers,[57] even though "the interest to each shareholder may be less than 1/4d.".[58]

On the other hand,—

(i) Mere trusteeship of a friendly society would not constitute a pecuniary interest to disqualify a trustee.[42]

(ii) It is difficult to hold, without further facts, that a person who is in the permanent service of the State can be deemed to have acquired a financial interest by merely being put in charge of a Department.[59]

In the *United States,* this exception has been further extended in relation to administrative proceedings to hold that an administrative body is not disqualified from adjudicating a particular case on the ground that during its *ex parte* investigations, it had come to form an opinion as to what action would, in general, constitute a violation of the law. It would be disqualified only if it is established that the minds of its members were so *"irrevocably closed* on the subject" as not to be changed by any evidence produced by the parties at the hearing.[60]

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50. *R.* v. *Pwllehli* JJ., (1948) 2 All E.R. 815.
51. *R.* v. *Lee,,* (1882) 9 Q.B.D. 394; *R.* v. *Henley,* (1892) 1 Q.B. 504; *R.* v. *Giasford,* (1892) 1 Q.B. 381; *Taylor* v. *National Union,* (1967) 1 All E.R. 767.
51a. *Vandana* v. *Chandra,* (1994) Supp. (3) S.C.C. 133.
52. Cf. *Tumey* v. *Ohio,* (1927) 273 U.S. 510.
53. Cf. *Jeejeebhoy* v. *Asst. Collector,* A. 1965 S.C. 1096.
54. *R.* v. *Meyer,* (1875) 1 Q.B.D. 173 (177).
55. Visiting the Court for other purposes and not as a member of the Bench, is a different thing [*R.* v. *Pwllehli JJ.,* (1948) 2 All E.R. 815 (816)].
56. *R.* v. *Hendon R.D.C.,* (1933) 2 K.B. 696 (703-04).
57. *Re Hopkins,* (1858) E.B. & E. 100.
58. *R.* v. *Hammond,* (1863) 9 L.T. (N.S.) 423.
59. *Moti Lal* v. *Uttar Pradesh,* A. 1951 All. 257 (265) F.B.
60. *Fed. Trade Commn.* v. *Cement Institute,* (1947) 333 U.S. 683.

Personal bias.

(c) A Judge may have a *personal* bias towards a party owing to relationship[61] and the like or he may be personally hostile to a party as a result of events happening either before or during the trial. Whenever there is any allegation of personal bias, the question which should be satisfied is—

"Is there in the mind of the litigant a *reasonable* apprehension that he would not get a *fair* trial?"[62]

The test is whether there is a 'real likelihood of prejudice',[63] but it does not require *certainty*.[64] 'Real likelihood' is the apprehension of a *reasonable* man apprised of the facts[65] and not the suspicion of fools or 'capricious persons'.[66]

Before the Recorder came to his decision, the Clerk of the Peace, acting in the interest of the accused, handed over a police report and drew the attention of the Recorder to a particular passage. The Recorder kept the report beside him until he dismissed the appeal of the accused. Underneath the passage marked by the Clerk of the Peace was a statement that the accused had been previously convicted of certain offences. *Certiorari* was granted to quash the decision of the Recorder on the ground that it was impossible to assume that the Recorder had not been influenced by the statement of previous conviction.[67]

Though it is open to the party aggrieved to adduce evidence to show that the tribunal has actually shown bias in favour of the other party, the reviewing Court will interfere as soon as it is established that there was a 'real likelihood' of bias.[67]

In other words, the test is not whether a bias has actually *affected* the judgment, but whether the litigant could *reasonably apprehend* that a bias attributable to a member of the Tribunal *might* have operated against him in the final decision of the Tribunal.[68]

The causes which may lead to personal bias cannot be exhausted. The principle would come into operation whenever there is a 'real likelihood of bias'.[69] The reports disclose grounds such as—

(a) Relationship,[42] (b) Personal friendship,[62] (c) Professional or employment relationship, (d) Personal hostility,[70] (e) Having acted as a witness against the party aggrieved, in the same inquiry.[69]

(i) In a proceeding under s. 7 of the Police Act, 1861, against a constable, the Presiding Officer (a Superintendent of Police) got himself examined as a prosecution witness, the Supreme Court (though refusing to interfere with the order of dismissal made by the Presiding Officer on other ground) observed that the act of the Presiding Officer "in having his own testimony recorded in the case indubitably produces a state of mind which clearly discloses *considerable bias* against the respondent . . . the rules of natural justice were completely dicarded and all canons of *fair play* were grievously violated by Shri Bhalla (the Presiding Officer) continuing to preside over the trial".[69]

61. *Ashok* v. *State of Haryana*, A. 1987 S.C. 454 (468).
62. *Cottle* v. *Cottle*, (1939) 2 All E.R. 535.
63. *R.* v. *Camborne Justices*, (1954) 2 All E.R. 850.
64. *R.* v. *Grimsby Quarter Sessions*, (1955) 3 All E.R. 300 (303).
65. *R.* v. *Sunderland JJ.*, (1901) 2 K.B. 357 (373).
66. *R.* v. *Taylor*, (1898) 14 T.L.R. 185.
67. *R.* v. *Caernarvon Licensing JJ.*, (1948) 113 J.P. 23 ((42).
68. *Rattan* v. *Managing Committee*, (1993) 4 S.C. 10 (para. 11).
69. *State of U.P* v. *Nooh*, A. 1958 S.C. 86 (91).
70. *Meenglass Tea Estate* v. *Workmen*, A. 1963 S.C. 1719; *Mineral Development* v. *State of Bihar*, A. 1960 S.C. 468; *A.P.S.R.T.C.* v. *Satyanarayan Transports*, A. 1965 S.C. 1303.

(ii) The appellant, an Advocate was the Pleader for the applicant in a s. 145, (Cr. P.C.) proceeding, while *C* was engaged on behalf of the opposite party. A Bar Council Tribunal was appointed to inquire into an alleged misconduct of the appellant arising out of the s. 145 proceeding, and *C* was appointed Chairman of that Tribunal. *Held,* that the appellant was entitled to contend that the Tribunal was not properly constituted, without actual proof of any prejudice on the part of *C*.[71]

(iii) Where a member of a Selection Board is himself a candidate for a post, he cannot be present at the meeting of the Board even though he does not take part in the deliberations of the Board when the particular selection takes place.[72]

(iv) Where an officer in the Armed Forces is proceeded against for disobeying the orders of his superior officer, that superior officer cannot record evidence and order dismissal.[73]

(v) Authors of educational books should not sit on a Committee constituted to approve textbooks for schools.[74]

(vi) A member of a Selection Committee who is related to a candidate should avoid sitting in the entire selection process. Merely not participating in the sitting wherein the related candidate is interviewed is not enough.[61]

B. *U.S.A.*

In the *United States,* it has been similarly held that—

"A fair trial by an *unbiased* and non-partisan trier of facts is of the essence of the adjudicatory process as well when the judging is done by an administrative functionary as when it is done in a court by a judge."[75]

Exceptions to the Rule against bias.

There are certain exceptional cases where a person is allowed to decide a case even though, but for the exceptional circumstances, he would have been disqualified :

(a) *Statutory authority.*

(A) *England.*—In *England,* there are a number of statutes which enable persons to determine matters under the Local and Public Health and Licensing statutes even though they are themselves rate-payers or members of the local bodies who are interested,[76] or even otherwise interested in the parties[77] or the subject-matter.[77]

Statutory exception.

But even in such cases, the principle that prosecutor should not be the judge has been applied and held that where a person has, as a member of an urban authority, sanctioned a prosecution, he cannot, as a judge, hear the case instituted upon that sanction.[78] Similarly, in *Frome* v. *Bath Compensation Authority,*[79] the House of Lords held that, in the absence of a *clear provision* in the statute removing the disqualification, licensing justices who, as members of the licensing committee,

71. *Manaklal* v. *Premchand,* A. 1957 S.C. 425 (429).

72. *Kraipak* v. *Union of India,* A. 1970 S.C. 150; cf. *Sharma* v. *Lucknow University,* A. 1976 S.C. 2428.

73. *Ranjit Thakur* v. *Union of India,* A. 1987 S.C. 2386.

74. *J. Mohapatra & Co.* v. *State of Orissa,* A. 1984 S.C. 1572.

75. *National Labour Bd.* v. *Phelps,* (1943) 136 F. 2d. 562 (563); see also *Wong Yang Sung* v. *McGrath,* (1950) 339 U.S. 33. But it has been excluded by legislation, as regards deportation proceedings, by the Immigration and Nationality Act, 1952 [*Marcello* v. *Bonds,* (1955) 349 U.S. 302].

76. Cf. Public Health Act, 1936, s. 48(5) of the Licensing Act, 1953.

77. *R.* v. *Barnsley Licensing JJ.,* (1960) 2 All E.R. 703 (C.A.) [s. 48(5) of the Licensing Act, 1953].

78. *R.* v. *Milledge,* (1879) 4 Q.B.D. 332.

79. *Frome United Breweries* v. *Bath Justices,* (1926) A.C. 586.

refer the case of a renewal to the Compensation Authority, where they are to appear as opponents of the renewal, cannot sit as a member of the Compensation Authority as a judge in the dispute. Under the Licensing (Consolidation) Act, 1910, such a clear exception was indeed incorporated, providing that licensing justice was not disqualified for sitting as a member of the Compensation Authority merely on the ground that he originated an objection to the renewal, and this provision was interpreted as removing the disqualification.[80]

S. 48 of the Licensing Act, 1953, disqualifies a person to act as a licensing justice if he is a brewer etc. of any intoxicating liquor himself or in partnership with another, or holds share in a company which carries on such business or he is interested in the profits of any premises which is the subject-matter of a case before the justices, but sub-sec. (5) of that section says—

"No act done by any justice disqualified by this section shall be invalid reason only of that disqualification."

It has heen held[77] that though the different sub-secs. of s. 48 impose certain personal disqualifications upon the justices, *certiorari* will not lie to quash their act, such as the granting of a licence, on the ground of the existence of any of the disqualifications specified in sub-secs. (1)-(4) of the section. The statute gives a complete protection to the act done by the justices notwithstanding the existence of these grounds of bias. But *certiorari* will lie if there was evidence of 'real bias' on some ground outside those mentioned in the section, e.g., if it is shown that the licensing justices or any one of them was anxious to have the licence granted in order to enhance the prospects of his or their election.[77]

The general rule, thus, is that even in the case of statutory immunity, *certiorari* would lie if a real likelihood of bias is proved.[77]

There are other statutes which directly make a party to the cause the arbter of it, e.g., the local authority deciding the rights of its employees under the Local Government Superannuation Act, 1937;[81] or the Minister determining the rights and liabilities of the employees under the National Health Service Act, 1946.[82]

But, if there is any ambiguity in the statute, the Court would lean against a construction which would make an administrative authority the judge in his own cause.[83]

(B) *India.*—Defence to statutory provisions has already been shown by *our* Supreme Court in some cases. Thus,—

S. 57 of the Bombay Police Act, 1951, authorised the Commissioner of Police, *inter alia,* to make an order of externment against a person, having previous convictions, "if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar to that for which he was convicted". The proceeding against such person was to be initiated by a Police Officer above the rank of an Inspector of Police, who was to inform the person proceeded against of the general nature of the material allegations against him, to give him a reasonable opportunity of meeting those allegations, and to allow him to appear in person or through lawyer and also to adduce evidence. It was contended that the proceedings were vitiated for violating the principles of natural justice inasmuch as the

80. *R.* v. *Leicester JJ.,* (1927) 1 K.B. 557.
81. *Wilkinson* v. *Barking Corpn.,* (1948) 1 All E.R. 564 (C.A.).
82. *Healey* v. *Minister of Health,* (1954) 3 All E.R. 449 (C.A.).
83. *Rice* v. *Commr. of Stamp Duties,* (1954) A.C. 216 (234).

proceedings were initiated by the Police and it was the Police which was the judge in the proceeding to make the order of externment. The Supreme Court rejected this contention on the following grounds :

(a) The rule against bias applicable to criminal trials could not be strictly applied to the proceedings under this Act which were 'preventive' in nature.

"The proceedings contemplated by the impugned section ..... are not *prosecutions for offences* or judicial proceedings, though the officer or authority charged with the duty aforesaid has to examine the information laid before him by the police. The police force is charged with the duty not only of detection of offences and of bringing offenders to justice, but also of preventing the commission of offences by persons with previous records of conviction or with criminal propensities."[84]

(b) Secondly, the initiation of the proceedings and the making of the order were not placed in the same hands. The collection of the information after making the inquiry was entrusted to the Inspector of Police but the order, after considering the materials so collected, could be made only by the Commissioner of Police. Hence,

"*the satisfaction is not that of the person prosecuting* ..... The Legislature has advisedly entrusted officers of comparatively higher rank in the police or in the magistracy with the responsible duty of examining the material and of being satisfied that such person is likely again to engage himself in the commission of an offence similar to that for which he had previously been convicted".[84]

But as regards the statutory exclusion of the rule against bias, a word of caution has to be said, with respect to India, as the Supreme Court (speaking through Subba Rao, J.) has done, in *Nageswararao* v. *State of A.P.* :[85]

"..... These decisions show that in England a statutory invasion of the common law objection on the ground of bias is tolerated by the decisions, but the invasion is confined strictly to the limits of the statutory exception. It is not out of place here to notice that in England the Parliament is supreme and therefore a statutory law, however repugnant to the principles of natural justice, is valid, whereas in India the law made by Parliament or a State Legislature *should stand the test of fundamental rights declared in Part III of the Constitution.*"[85]

In *Hari* v. *Dy. Commr.*,[84] as has been already noted, the majority of the Court (4 : 1) supported the reasonableness of the restriction imposed by the statute on the ground that the subject-matter of the legislation being *preventive* in nature, the making of the order against an individual could be vested in the subjective satisfaction of an officer of a higher rank and that, accordingly, the proceedings not bieng judicial in nature, the rule of bias was not applicable. Jagannathadas, J., dissented and held that the circumstances at the back of the impugned legislation did not justify the vesting of power in the subjective determination of the administrative authority and that, accordingly, the impugned provision violated Art. 19(1)(g) and was void. If the latter view has prevailed, the exclusion of the rule of bias would have invalidated the statute itself.

In the earlier *Nageswara case*,[86] the majority of the Court (3 : 2) held that the Secretary of the Transport Department, being the head of the statutory undertaking, was disqualified from hearing the objections to the scheme. Though Sinha, J., (as he then was) dissented along with Wanchoo, J., it is to be noted that when in the later *Nageswara case*[77] the appellant

84. *Hari* v. *Dy. Commr.*, (1956) S.C.R. 506 (522).
85. *Nageswararao* v. *State of A.P.*, A. 1959 S.C. 1376 (1379).
86. *Nageswara* v. *A.P.S.R.T. Corpn.*, A. 1959 S.C. 308.

sought to extend the earlier decision against the Minister of the Department, and the unanimous Court refused to admit such extension on independent grounds, no question as to the decision in the earlier case was raised by Sinha, J., who was a party to this later decision.

The decision,[86] accordingly, stands that the Secretary of the Department was disqualified from hearing the objections. Supposing now that the statute had expressly authorised that the Secretary would be competent to hear the objections, the statute would have been held as unconstitutional, having imposed an unreasonable restriction upon the fundamental right of the citizens to carry on the business of transport, guaranteed by Art. 19(1)(g).

(b) *Statutory modification.* There are some statutes which, instead of totally excepting a function out of the rule of bias, limit it by statutory qualifications. Thus, under s. 76 of the (Eng.) Local Government Act, 1933, a member of an authority shall be disqualified from taking part in a meeting if he has a pecuniary interest in the subject-matter of a contract and that he shall be treated as having an indirect pecuniary interest "if he or any nominee of his is a member of a company ... with which the contract is made ... or which has a *direct*[87] pecuniary interest in the matter under consideration".

(c) *Official or departmental bias.* This is a topic on which there has been judicial controversy both in *England* and in *India*, and some of the decisions have met with criticism from jurists. Nevertheless, the following general propositions may be formulated.

(I) Where a Minister or other Departmental authority has to formulate a governmental *policy* or scheme, he is not debarred from hearing objections against that policy or scheme, because the formulation of a policy is a general matter, while hearing of an objection relates to a specific matter, and it cannot be said that an official head had acquired an interest in the furtherance of the Government policy so as to prejudge any specific objection. In other words, a mere 'policy decision' would not constitute a predetermination of the issue between the Government and a private party.[88] It has also been said that 'official bias' which is inherent in a statutory duty imposed upon an authority should be distinguished from a personal bias of the said authority in favour of or against one of the parties.[85]

(II) In *India*, a distinction has been made between the political head of a Department (i.e., the Minister), and the official head of a Department (i.e., the Secretary), on the ground that while the Secretary is identified with the Department, the Minister's role is only advisory.[86] In the result, it has been held—

(a) That the Secretary of the State Transport Department, as the head of the Department, is disqualified from hearing objections of private operators, under the Motor Vehicles Act, to the schemes framed by the Transport Department as the statutory 'undertaking' created by the Act,[85] but—

(b) That the Minister in charge of the Transport Department is *not* disqualified from hearing the same objections, on the ground that while the Secretary forms a part of the Department, the Minister does not. A Minister is only a member of the Council of Ministers which, as a body, advises the Governor, and a Minister is only responsible for the disposal of the business in a particular department.[86]

87. Cf. *Rands* v. *Oldroyd*, (1958) 3 All E.R. 344.

88. *Kondala Rao* v. *A.P.S.R.T.C.*, A 1961 S.C. 82 (para. 14). [A different view has been taken in the case of a local body (*R.* v. *Rand*, (1913) 22 C.C. 147)].

"The law does not measure the amount of interest which a Judge possesses. If he has any *legal* interest in the decision of the question one way, he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."[89]

In a later case, however,[90] the immunity from disqualification given to a Minister appears to have been extended to the Secretary of the Department, in respect of a 'policy decision'.

In the Author's view, the real distinction is that a Minister, who formulates a policy,[88] has only a *general* interest in the subject-matter, as distinguished from the *Secretary* who is responsible for carrying out that policy and has thus a 'specific interest' in the cause which would disqualify him from hearing objections against such implementation, where his previous participation related to the implementation, as distinguished from its formulation.[90]

Of course, if there are circumstances which would show that the Minister had, *in fact,* done something to show that he had predetermined and foreclosed his mind, that would be a case of personal bias.[91] But the House of Lords has held that even where the Minister had expressed himself emphatically in a public meeting that the policy would be carried out, it was a mere *political* speech advocating the Bill and its implementation, but it did not necessarily show that "he had *forejudged* any genuine consideration of the objections ..... at the later stage when they were submitted to him".[91-92]

(d) *Contempt of Court.*—The inherent power of a court of record to punish for its own contempt is an exception to the doctrine of bias.

But even in this sphere, it has been opined that in the case of contempt for a personal scandalisation of a Judge, it would be desirable that the proceedings should be heared by some other Judge, where possible.[93] This, however, is not a rule or exclusion of jurisdiction :

"We do not lay down any general rule because there may be cases where that is impossible, as for instance, where there is only one Judge or two and both are attacked. Other cases may also arise where it is more convenient and proper for the Judge to deal with the matter himself."[93]

(e) *Waiver.*— Though the parties cannot, by their consent, give jurisdiction to a tribunal where he has none, an exception is made in the case of certain grounds, such as bias, presumably on the assumption that such a

89. *Sergent* v. *Dale,* (1877) 2 Q.B. 558 (567).

90. *Govindaraja* v. *State of T.N.,* A. 1973 S.C. 974 (para. 14).

91. *Franklin* v. *Min. of Town Planning,* (1947) 2 All E.R. 289 (297) H.L.; *Maraouna Mosque* v. *Bhadluddin,* (1966) 1 All E.R. 545 (550) P.C. [Cf. *F.T.C.* v. *Cement Institute,* (1947) 333 U.S. 683].

92. It is to be noted that in the *Franklin case,* Lord Thankerton sought to cut at the root by holding that the function of 'hearing objections' under the relevant statute was not a *quasi-judicial* but a purely administrative function, so that the rules of natural justice could not be invoked. But later decisions in England and in India have established that such a function, determining the rights of the parties or imposing civil consequences, must be regarded as *quasi-judicial.* Hence, Subba Rao, J.'s view on this point in *Nageswara Rao's case* [A. 1959 S.C. 308 (para. 24)] has been justified by subsequent decisions.

93. *Sukhdeo* v. *Teja Singh,* A. 1954 S.C. 186 (190).

defect does not go to the root of the jurisdiction,[94] and that it only makes the proceedings *voidable*,[95] not void.

A party who is aware[96] of the fact causing the bias or like disqualification should raise that objection before the tribunal itself before it takes up the case on the merits.[97] If he does not raise such objection or otherwise acquiesces in the tribunal's proceeding with the case, the party is deemed to have waived his objection on the ground of bias[98] and he cannot have the decision quashed on the ground of bias by *certiorari* unless he can show on the affidavits that neither he nor his advocate knew of the facts constituting the bias at the time of the hearing before the tribunal.[99] Knowledge of one fact, however, does not constitute a waiver on the ground of another fact, involving interest, which was not known.[100]

On the above principles, it has been held, in *India*, that a party, who with full knowledge of the facts constituting bias, does not raise the objection before the inferior tribunal, will not be heard on this point in a proceeding for *certiorari*.[1]

Being voidable, the decision cannot be quashed in collateral proceedings, on the ground of bias.[2]

(f) *Purely administrative duty.* In *Franklin* v. *Minister of Town & Country Planning*,[3] the House of Lords highlighted the proposition that where the duty is purely administrative (as distinguished from *quasi-judicial*), the doctrine of 'bias' does not apply. Lord Thankerton observed :

"I could wish that the word 'bias' should be confined to its proper sphere. Its proper significance in my opinion is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a *quasi-judicial office* such as an arbitrator. The reason for this clearly is that, having to adjudicate as between *two or more parties* he must come to his adjudication with an independent mind without any inclination or bias towards one side or other in the dispute ..... But in the present case the respondent *having no judicial duty* ....."[3]

The facts in this case[3] were as follows :

S. 1 of the (Eng.) New Towns Acts, 1946, provided that—"If the Minister is *satisfied*, after consultation with local authorities ..... that it is *expedient* in the national interest that any area of land should be developed as a new town ..... he may make an order ..... ", and that the provisions of the First Schedule should be followed in making the order. The procedure prescribed by the First Schedule was that where the Minister proposed to make an order, he should prepare a *draft* order, publish a notice inviting objections to the draft order; that if any objection was made the Minister should cause a public local inquiry to be held and consider the report arising from such inquiry and then confirm the draft order or make such modifications as he might think fit.

At a public meeting held before hearing the objections on the draft Stevenage New Town (Designation) Order, made under the Act, the Minister stated that he would make the order. When the final order was made, confirming the draft order, *certiorari*

94. Cf. *United Commercial Bank* v. *Workmen*, A. 1951 S.C. 230.
95. *Dinies* v. *Grand Junction Canal*, (1852) 3 H.L.C. 759.
96. *R.* v. *Essex JJ.*, (1927) 2 K.B. 475 (489).
97. *R.* v. *Byles*, (1912) 108 L.T. 270 (271).
98. *Ex parte Ilchester Parish*, (1861) 25 J.P. 56.
99. *R.* v. *Williams*, (1914) 1 K.B. 608.
100. *R.* v. *Cumberland JJ.*, (1888) 58 L.T. 491.
1. *Sarjoo Prasad* v. *S.B.R.T.A.*, A. 1957 Pat. 732.
2. *Wildes* v. *Russell*, (1866) L.R. 1 C.P. 722.
3. *Franklin* v. *Minister of Town & Country Planning*, (1947) 2 All E.R. 289 (H.L.).

was sought to quash the order on the ground, *inter alia,* that the Minister was biased in confirming his own order in the face of objections made by local citizens. Rejecting this contention, the House of Lords held that the statute did not impose any *quasi-judicial* duty upon the Minister and that his function under the Act was purely administrative and that if he had complied with the statutory direction to hold a public inquiry and *consider* the report thereof, no question of any *bias* in coming to his administrative determination to make the order could arise. In short, the determination was solely a matter of policy even though a statutory procedure was prescribed in coming to the determination; the only question that the Court could entertain was whether the statutory directions had been complied with but not whether the Minister was *biased* in coming to his decision.[3]

The question whether the Minister, in hearing objections under the New Towns Act, 1946, was exercising a function which should be treated as *quasi-judicial,* must remain a debatable one and there is hardly a publicist in England who has not commented upon the ratio of the decision on this point.[4] As will be shown hereafter, the escape from the anomalous position lies in adopting the 'functional' test of a *quasi-judicial* duty and excluding from its ambit the functions under social policy-making legislation which entrusts such functions to a high Executive, acting in his *subjective discretion.*[5] But a Legislature which legislates to this effect should note the observations of the Donoughmore Committee :[6]

"We think it is clear that bias from strong and sincere conviction as to public policy may operate as a *more serious disqualification than pecuniary interest,* and that in any case in which the Minister's Department would naturally approach the issue with a desire that the decision should go one way rather than another, the Minister should be regarded as having an interest in the cause."[6-7]

And in a country like *India,* the courts shall have to deal with the intriguing question whether the very legislative provision like the above will be unconstitutional where 'fundamental rights' are involved[8] or a statutory act vitiated by bias shall be nullified notwithstanding the subjective terms of the statute, where fundamental rights are affected.[8a]

Natural justice : Principles generally

Natural justice is commonsense justice. Rules of natural justice are not codified canons. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

4. Cf. Allen, *Law & Orders,* 1956, pp. 281-82; Robson, *Justice & Administrative Law,* 533; Wade, *Administrative Law* (1977), pp. 417-18, 439.

5. Cf. *Nageswara* v. *A.P.S.R.T. Corpn.,* A. 1959 S.C. 308 (323).

6. (1932) Cmd. 4060; Rep., p. 78.

7. It is unfortunate that such argument was not placed before *our* Supreme Court in the second *Nageswararao case* [A. 1959 S.C. 1376] where the Court distinguished the Minister in charge of a Department from its Secretary on the ground that while the latter was a part of the Department, the former was not and was thus immune from the rule against bias. [See in this context, *A.P.S.R.T.C.* v. *Suryanarayana Transports,* A. 1965 S.C. 1303 (1306)].

8. Cf. *State of Madras* v. *Row,* (1952) S.C.R. 597; *Raghubir* v. *Court of Wards,* A. 1953 S.C. 373.

8a. *Nageswararao* v. *State of A.P.,* A. 1959 S.C. 1376 (1397).

The expressions "natural justice" and "legal justice" do not present a water-tight classification. It is the substance of justice which is to be secured by both and whenever legal justice fails to achieve this solemn purpose natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. No form or procedure should ever be permitted to exclude the presentation of a litigants defence.

Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. Distinction between judicial act and an administrative act has withered away. Principle of natural justice has to be adhered to when a quasi-judicial body determines a dispute between parties or an administrative action involving civil consequence is in issue. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice.

The expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and of non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

Two rules have been evolved as representing the principles of natural justice. The first rule is "nemo judex in causa sua" or "nemo debet esse judex in propria causa sua" that is "no man shall be a judge of his own cause". The second rule is "audi alteram partem", that is, "near the other side". As a necessary corollary it comes that "he who shall decide anything without the other side being heard will not have been what is right, i.e. justice should not only be done but should manifestly be seen to be done.

An order in violation of natural justice is invalid and it has to be struck down. The proceeding is not terminated. Fresh proceeding is open.

Even if a statute is silent as to application of the principle of natural justice there is need to hear the parties whose rights and interests are likely to be affected by the orders of the authority. A fair procedure has to be followed before taking a decision unless the statute provides otherwise. The principle of natural justice must be read into unoccupied interstices of the statute unless there is a clear mandate to the contrary. No form or procedure should ever be permitted to exclude the presentation of a litigant's defence or stand. Even in the absence of provision in procedural laws, power inheres in every tribunal court of a judicial, quasi-judicial character, to adopt modalities necessary to achieve requirements of natural justice.[8b]

Requirement of natural justice has to be read into statutory provision. By explicitly or impliedly only it can be excluded.[8c] Doctrine of natural justice cannot be defined. It normally means fairness. It is applied not only to secure justice but to prevent injustice. What a common man deems to be fair is fairness. Doctrine is solely dependent upon facts and circumstances of each case.[8d]

Rule of natural justice does not apply to legislative act of legislature. But in case of subordinate legislation the legislature may provide for observance of the principles of natural justice or a prior hearing. Failure to give an opportunity of hearing before taking a decision would render the decision

8b. *Mangilal* v. *State* (2004)2 SCC 447.
8c. *State Govt. H.H.E. Association* v. *State*, (2001)1 SCC 610: AIR 2001 SC 437.
8d. *K.M.V.N. Ltd.* v. *Giria Shankar*, AIR 2001 SC 24: (2001)1 SCC 182.

invalid. People cannot insist on a hearing if the legislature chooses not to make a provision for hearing.[8e]

Administrative orders affecting the right to property of a citizen or attributes of property must conform to the rules of natural justice.[8f]

Exchange of views, consultations, consideration of objection before imposition of taxes. Rule of natural justice is sufficiently complied with.[8g]

Situation may arise when violation of natural justice is not set aside. If prejudice is not caused to a person interference by court is impermissible. The theory that breach of principle of natural justice is itself treated as prejudice as held in *Ridge* v. *Baldwin* is now obsolete. Now the petitioner has to show prejudice in addition to principles of natural justice.[8h]

Uncommunicated adverse remarks can be relied upon even if no opportunity was given to represent against them before an order of compulsory retirement was passed.[9]

Rules of natural justice are fundamental. Principles are applicable to almost whole range of administrative actions.[9a] Administrative orders must be made in consonance with the principles of natural justice.[9b] In purely administrative function, however, the principle is inapplicable, e.g. the accused need not be heard before grant of sanctioning prosecution.[9c] But order having civil consequences has to be passed following principles of natural justice.[9d] Exclusion of natural justice can be by express statutory provision or by necessary statutory implication.[9e] Rules of natural justice are not rigid rules. They are flexible. Their application depends on the setting and background of statutory provision, nature of right which may be affected. Rules are often excluded by express provision or implication.[9f] Normal rule is that whenever it is necessary to ensure against the failure of justice, principles of natural justice must be read in the provision.[9g]

Standing order providing dismissal without domestic enquiry for conviction in a criminal case or where competent authority is satisfied for recorded reasons that continuance in service is neither expedient nor in the interest of security.[9h] Natural justice is not denied if rule provides for dismissal from service for theft without holding enquiry subject to the result of criminal trial.[9h] The distinction between substantive and procedural provision may not be overlooked. Court will not interfere for violation of procedural provision if the same is not of substantial or mandatory character and if no prejudice is caused to the person proceeded against. It will suffice if substantial

8e. *State* v. *Tehal Singh*, (2002)2 SCC 7: AIR 2002 SC 533.
8f. *Style (Dressland)* v. *Union Territory*, (1999)7 SCC 89.
8g. *Saij Gram Panchayat* v. *State*, (1999)2 SCC 366: AIR 1999 SC 826.
8h. *Aligarh Muslim University* v. *Monsoor Ali*, AIR 2000 SC 2783: (2000)7 SCC 529.
9. *Badrinath* v. *Govt. of T.N.*, (2000)8 SCC 395.
9a. *Rattan Lal Sharma* v. *Managing Committee, Dr. H.R. (Co-Ed.) H.S. School*, A. 1993 S.C. 2155.
9b. *Shree Krishna Gyanoday Sugar Ltd.* v. *State*, A. 1978 Pat 157.
9c. *Superintendent of Police (C.B.I.)* v. *Deepak Chowdhury*, (1995)6 S.C.C. 225 : 1995 S.C.C. (Cr) 1095 : A. 1996 S.C. 186.
9d. *Raghunath* v. *State*, A. 1989 S.C. 620 (para 4) : (1989)1 S.C.C. 229, 230.
9e. *Umrao Singh* v. *State*, (1994)4 S.C.C. 328 : (1994)27 A.T.C. 580; *Rashlal Yadav* v. *State*, (1994)5 S.C.C. 267, 268.
9f. *R.S. Dass* v. *U.O.I.*, A. 1987 S.C. 593.
9g. *State of U.P.* v. *Vijay*, A. 1995 S.C. 1130 : 1995 Supp. (1) S.C.C. 552.
9h. *Hari Pada* v. *Union of India*, (1996)1 S.C.C. 536 : A. 1996 S.C. 1065.

compliance is made. No interference is warranted either for violation of mandatory procedural provision even if it is in the interest of the person proceeded against and not in public interest or the person waived the requirement thereof. If rules, regulation or statutory provision do not incorporate the principles of natural justice but they are implicit in them total violation will invalidate the order. Violation of only a facet of the principle is of no consequence if no prejudice is caused.[9i] Requirements of natural justice can be moulded in such a way as to take care of two basic facts of this principle, viz., (1) to make known the nature of accusation, (2) to give opportunity to state the case.[9j]

Principles of natural justice are but the means to achieve the ends of justice. *Justice* means justice between both the parties. Interests of justice equally demand that the guilty should be punished and that the technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice.[9i]

Fundamental requisite of the principles of natural justice is an opportunity to be heard before any person is prejudicially affected by any administrative action.[9k] No inference of exclusion should be made if opportunity of hearing is not provided in the relevant provision.[9l] Silence in statute has no exclusionary effect.[9m] Principles of natural justice have to be read in a statutory provision if such provision does not provide for a right of hearing.[9n] A party has a right of hearing if an action of authority would visit him with civil or pecuniary consequences.[9n] No proceeding affecting life, liberty or property of a person can be held behind the back of a person without giving him an opportunity of participating therein.[9-o] *Audi alteram partem* rule is a must if civil consequences follow. Civil consequences not only cover infraction of property, personal right but also civil liberties, material deprivations and non-pecuniary damages, i.e. everything that affects a citizen in his civil life.[9p] Even if there is no provision in statute for a show-cause notice or a hearing the principle of *audi alteram partem* has to be followed.[9q] On account of absence of such provision in the statute there cannot be an inference that provision excludes compliance with such basic right, i.e. observance of the principles of natural justice.[9p] But unless a person is deprived of liberty or property rule of *audi alteram partem* is not applicable. Rule also will not apply in cases where nothing unfair can be inferred from not affording opportunity.[9r] Where State or public interest requires curtailing of the rule of *audi alteram partem* court balance that interest with requirements of natural justice.

9i. *State Bank of Patiala* v. *S.K. Sharma*, (1996) 3 S.C.C. 364 : A. 1996 S.C. 1669.

9j. *Shiv Sagar* v. *Union of India*, (1997) 1 S.C.C. 444.

9k. *Indian Metals & Ferro Alloys Ltd.* v. *State*, 98 Cal W.N. 1090 : 1994 Lab. I.C. 1203; *Subhas Chandra Basu* v. *U.O.I.*, 98 Cal W.N. 672 : (1994)4 Serv L.R. 664.

9l. *S. L. Kapoor* v. *Jagmohan*, A. 1981 S.C. 136 (para 10); *Girija Mishra* v. *Berhampur Municipality*, A. 1993 Ori 152.

9m. *Mohinder* v. *Chief Election Commissioner*, A. 1978 S.C. 851; *Girija Mishra* v. *Berhampur Municipality*, A. 1993 Ori 152.

9n. *Jagroop* v. *State*, A. 1995 Punj 303.

9-o. *Sangram Singh* v. *Election Tribunal, Kotah*, A. 1955 S.C. 425.

9p. *M.N. Gupta* v. *University of Delhi*, A. 1992 Del. 212; *Mahinder* v. *Chief Election Commissioner*, A. 1978 S.C. 851, 876.

9q. *Swadeshi Cotton Mills, In re.*, A. 1981 S.C. 818 : (1981) 1 S.C.C. 664; *M.N.Gupta* v. *University of Delhi*, A. 1992 Del 212 (para 22).

9r. *U.O.I.* v. *W.N. Chanda*, A. 1993 S.C. 1082.

Requirement of passing a speaking order does not mean that an opportunity of hearing has to be given to the person concerned.[9s] Personal hearing is not necessary in every case. Opportunity to make comments or to furnish details of certain facts will suffice.[9t] In urgent matters post-decisional hearing is a sufficient compliance.[9u]

Post-decisional opportunity is valid to cure illegality. In case of massive action or a situation of great magnitude service of notice individually is impracticable.[9v] Prior hearing is not necessary in case of transfer for exigencies of situation.[9w] But deletion of name of approved contractors from list on basis of vigilance report without hearing is unjustified.[9x] Change in the area of local bodies results in civil consequences. So before it is done reasonable opportunity to raise objections and hearing them is necessary.[9u] If order is passed without giving an opportunity of being heard a writ will lie and it cannot be refused on the ground of an alternative remedy.[9y]

Normal rule is that wherever it is necessary to ensure against the failure of justice principle of natural justice must be read in the provision unless rule excludes either expressly or by necessary intendment the application of the principle. But such a rule may fall for consideration by court.[9z]

The principle of *audi alteram partem* is a basic concept of the principle of natural justice. The omnipotency inherent in the doctrine is that no one should be condemned without heing heard or given an opportunity to the person affected to present his case before taking a decision or an action. This principle has been applied to ensure fair play and justice to the affected person. But its application depends upon the factual matrix to improve administrative efficiency and expediency and to mate out justice.[9za]

Doctrine of *audi alteram partem* is not applicable to purely administrative function. Opportunity of hearing of an accused before grant of sanction is not necessary.[9zb]

A vested right created in favour of a person cannot be deprived of or denied without affording him an opportunity of hearing. But a favour made erroneously may be withdrawn without hearing the favoured.[9zc]

Natural justice (*Audi alteram*)

Statutory instruction makes provision for appeal by way of review. So authorities must consider all objections raised by a party and pass a reasoned order. Thus the authorities should hear the parties, consider their objections and then pass a reasoned order although not a judgment.[9zd]

9s. *Haryana Ware Housing Corporation* v. *Ramavatar*, (1996)2 S.C.C. 98.

9t. *Pyare Lal* v. *State*, A. 1993 All 118.

9u. *State of U.P.* v. *Pradhan Sangh Kshettra Samiti*, A. 1995 S.C. 1512.

9v. *Ashwani Kumar* v. *State*, (1996)7 S.C.C. 577.

9w. *State Bank of Patiala* v. *Mahendra*, 1994 Supp. (2) S.C.C. 463.

9x. *Southern Painters* v. *Fertilizer & Chemicals Travancore Ltd.*, 1994 Supp. (2) S.C.C. 699, 703 : A. 1994 S.C. 1277.

9y. *Amar Singh* v. *State*, A. 1995 Raj 151.

9z. *State* v. *Vijay Kumar*, 1995 Supp (1) S.C.C. 552 : 1995 S.C.C. (L&S) 569 : A. 1995 S.C. 1130.

9za. *Sarat Kumar* v. *Biswajit*, 1995 Supp (1) S.C.C. 434 : 1995 S.C.C. (L&S) 508 : (1995) 29 A.T.C. 351.

9zb. *Supdt. of Police (C.B.I.)* v. *Deepak*, (1995) 6 S.C.C. 225 : 1995 S.C.C. (Cri) 1095.

9zc. *State* v. *Mahesh Kumar*, (1997) 6 S.C.C. 95.

9zd. *Punjab S.E.B.* v. *Ashwini Kumar*, (1997) 5 S.C.C. 120.

II. 'Audi alteram partem' (Hear the other side).

It means that no man shall be condemned *unheard.*

"The rule (*Audi alteram partem*) is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."[10]

Hence, any tribunal, judicial or administrative,[11] which is invested with power to affect the property of a citizen is bound to give him an opportunity of being heard before it proceeds.[11-12] It leads to the result that no man is to be deprived of his property without having an opportunity of being heard.[13]

But, as stated at the outset, though this principle is of a general application to any authority or tribunal empowered 'to decide' questions of legal right, the contents of the principle are not uniform in the case of every such tribunal or authority. *Firstly*, the procedure to be followed by an administrative body vested with such *quasi-judicial* power cannot, in the very nature of things, be the same as in a court of law.[12] *Secondly*, even amongst *quasi-judicial* bodies, the duty of following the judicial approach and of hearing the matter in the judicial manner cannot be the same in all cases, but must vary with the duties conferred upon such bodies by the respective statutes.[13]

But there are certain essential requirements which must be complied with by any body or authority who is vested with *quasi-judicial* powers. Thus, in *Board of Education* v. *Rice,*[12] Lord Loreburn observed—

"In such cases ..... they must act in *good faith and fairly listen to both sides,* for it is a duty lying upon everyone who *decides* anything. But I do not think they are bound to treat such a question as though it were a trial ..... .They can obtain information in any way they think best, always giving a *fair opportunity* to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."[12]

The peculiarities that obtain in the case of different kinds of tribunals may be evident only if we analyse, more fully, the main ingredients of the *Audi alteram partem* rule. Such analysis will also point out the striking similarity between essential contents of the Anglo-American doctrine of 'Natural Justice' and the American doctrine of 'Due Process'.

A. *Notice.*

Notice.

(A) *England and India.*—The requirement of notice means that the party whose civil rights are affected, must have reasonable notice of the case he has to meet and an opportunity of stating his case.[14-15] The form and adequacy of the notice may vary according to the nature of the proceedings,[16] but it is a question for the court to determine.[17-18] All that is required is

10. *Lapointe & L'Association,* (1906) A.C. 535 (539).
11. *Cooper* v. *Board of Works,* (1863) 14 C.B. (N.S.) 180; *Smith* v. *The Queen,* (1878) 3 A.C. 614.
12. *Board of Education* v. *Rice,* (1911) A.C. 179 (182) H.L.
13. *N.P.T. Co.* v. *N.S.T. Co.,* (1957) S.C.R. 98.
14. *R.* v. *Huntingdon Confirming Authority,* (1929) 1 K.B. 698.
15. *Joseph* v. *Ex. Engineer,* A. 1978 S.C. 930; *N.S.T.* v. *State of Punjab,* A. 1976 S.C. 57.
16. *Russell* v. *Duke of Norfolk,* (1949) 1 All E.R. 109 (118).
17. *Ceylon University* v. *Fernando,* (1960) 1 W.L.R. 223 (P.C.).
18. *State of Bombay* v. *Atmaram,* (1951) S.C.R. 167; *Tarapada* v. *State of W.B.,* (1951) S.C.R. 212.

that no adverse civil consequences are allowed to ensue before one is put on notice that the consequence would follow if he would not take of the lapse.[18a] Natural justice is violated where the charges are vague and no materials are disclosed to explain them.[19]

The standard may, however, be relaxed where the party was already conversant with the charges[16] and is, therefore, not prejudiced.[20] The onus to establish lack of notice and prejudice is upon the party aggrieved.[21]

But the better view is that the question of prejudice is immaterial where there has been a violation of the requirements of natural justice.[22]

Where notice of one charge has been given, the person charged cannot be punished on a separate and distinct charge of which he has had no notice, even though he may not have appeared to defend himself against the original charge.[23]

Notice is vague and is not founded on any material. Notice is bad.[23a]

A precise and unambiguous notice has to be served. Thus a party has to be appraised what case he has to meet. Adequate time should be given to enable him to make representative.[23b]

(B) *U.S.A.*—'Due process' requires that except in cases of an emergency nature where the law permits summary action (see *post*), no person can be deprived of his private property without notice and a hearing,[24] at some stage prior to the order being effective.[25]

The notice must give "a plain statement of the thing claimed to be wrong so that the respondent may be put upon his defence".[26] The sufficiency of the particulars of the issue to be heard is determined by the test whether "the party had the opportunity to defend himself *adequately*".[27] The party to be affected must have a "reasonable opportunity to know the claims of the opposing party and to meet them".[28]

If rules provide issue of notice a termination of service without notice is invalid.[28a] Appointment order provides for one month's notice or one month's salary in lien thereof. Service is terminated in contravention of the provision. Employee is reinvestated.[28b] Termination forthwith "by payment of a sum equivalent to the amount of pay plus allowance for the period of notice." The expression means payment of wages within a reasonable period of termination. Payment simultaneously with termination is not necessary.[28c] When only one

18a. *Maharashtra S.F.C.* v. *S.B.M.*, (1994) 5 S.C.C. 566 (para. 3).

19. *N.R. Co-operative Society* v. *Industrial Tribunal*, A. 1967 S.C. 1182 (1188); *Nasir* v *Asst. Custodian*, A. 1980 S.C. 1157; *North Bihar Agency* v. *State of Bihar*, A. 1981 S.C. 1758.

20. *Keshav Mills* v. *Union of India*, A. 1973 S.C. 389 (paras. 15-16); *Bd. of Mining* v. *Ramjee*, A. 1977 S.C. 965 (para. 13).

21. *Davis* v. *Carey-Pole*, (1956) 2 All E.R. 524.

22. *C.A.T.A. Society* v. *A.P. Govt.*, A. 1977 S.C. 2313 (para. 21); *Kerala* v. *Fed. of Malaya*, (1962) 2 W.L.R. 1153 (P.C.); *Kapoor* v. *Jagmohan*, A. 1981 S.C. 136 (paras. 16, 24).

23. *Annamunthodo* v. *Oilfields Workers*, (1961) 3 All E.R. 621 (624) P.C.

23a. *Food Corporation* v. *State*, AIR 2001 SC 250: (2001)1 SCC 291.

23b. *Canara Bank* v. *Debasis Das*, (2003)4 SCC 557: AIR 2003 SC 2041.

24. *Chicago, M. & St. P. Ry.* v. *Minnesota*, (1890) 132 U.S. 418 (457).

25. *U.S.* v. *Illinois C.R. Co.*, (1934) 291 U.S. 457.

26. *F.T.C.* v. *Gratz*, (1920) 253 U.S. 421.

27. *C.A.B.* v. *State Airlines*, (1950) 338 U.S. 572.

28. *Morgan* v. *U.S.*, (1937) 304 U.S. 1 (18).

28a. *Chandra Prakash* v. *State*, (2000)5 SCC 152: AIR 2000 SC 1706.

28b. *Prabhudayal* v. *M.P.R.N.A. Nigam Ltd.*, (2000)7 SCC 502.

28c. *Municipal Corporation* v. *Prem Chand*, (2000)10 SCC 115.

conclusion can be drawn absence of notice to show cause will not vitiate a penal action.[28d]

On undisputed facts the delinquent could not put forth any defence when opportunity was given. Service may be terminated without opportunity to show cause.[28e]

Certain benefit was given to a certain person. That benefit cannot be withdrawn without giving him an opportunity to show cause.[28f]

Unless the High Court is satisfied that the show cause notice was totally *non est* in the eye of law for absolute want of jurisdiction of authority to even investigate into facts writ petition will not lie. Whether the show-cause notice was founded on any legal premises is a jurisdictional issue which can be urged before the authority issuing the notice and he will adjudicate it. When the court passes an interim order it should be careful to see that the statutory functionaries specially constituted for the purpose are not demanded of powers and authority to initially decide the matter.[28g]

B. *Hearing.*

Hearing.

(A) *England and India.*—The second corollary from the *Audi alteram partem* maxim is that the party whose civil rights are to be affected by a *quasi-judicial* authority must have a reasonable opportunity of being heard in his defence.[29]

It is otherwise expressed as the principle that no man should be condemned unheard.[30] In an early case,[31] the principle was formulated thus:

U.K.

"Is it not a common principle in every case which has in itself *the character of a judicial proceeding,* that the party against whom the judgment is to operate shall have an opportunity of being heard?"[31]

The object of granting an opportunity of hearing is to ensure that an illegal action or decision does not take place.[31a]

Statute provides a right of hearing. The right is neither indiscriminate or unregulated. So an indiscriminate hearing cannot be claimed. Court cannot deprive such hearing.[31b]

More explicit is the pronouncement in a later case :[32]

"No proposition can be more clearly established than that a man cannot incur the loss of *liberty or property* for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him *unless indeed the Legislature has expressly or impliedly* given an authority to act *without* that necessary preliminary".[32]

The principle was applied to *quasi-judicial* authority by *Cooper* v. *Wandsworth Board,*[33] (a statutory municipal authority demolishing a structure

28d. *Aligarh Muslim University* v. *Mansoor Ali,* (2000)7 SCC 529: AIR 2000 SC 2783.
28e. *D.R.A.R.M. Educational Institution* v. *Educational Appellate Tribunal,* (1999)7 SCC 332.
28f. *Gajanan* v. *State,* (1999)8 SCC 378.
28g. *Special Director* v. *Md. Ghulam,* (2004)3 SCC 440.
29. *Spackman* v. *Plumstead Board of Works,* (1885) 10 A.C. 229 (240).
30. *R.* v. *Archbishop of Canterbury,* (1859) 1 E. & E. 545.
31. *Capel* v. *Child,* (1832) 2 C. & J. 558 (579).
31a. *B.A.L.C.O. Employees' Union* v. *Union of India,* (2002)2 SCC 333: AIR 2002 SC 350.
31b. *W.B. Electricity Regulatory Commission* v. *C.E.S.C. Ltd.,* (2002)8 SCC 715.
32. *Bonaker* v. *Evans,* (1850) 16 Q.B. 162 (171).
33. *Cooper* v. *Wandsworth Bd.,* (1863) 14 C.B. (N.S.) 180 (194).

made in breach of the statutory conditions); and *Spackman* v. *Plumstead Board of Works*[29] (a superintendent architect fixing the 'general line of buildings' in a road, for infringement of which prosecution would lie under the statute).

In India, it is now settled that wherever a statute empowers an authority to make any decision to the *prejudice* of a person, such authority has an obligation to afford a pre-decisional opportunity of hearing to the affected person.[33a]

In all cases post-decisional hearing cannot be a substitute for pre-decisional hearing. But in a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing. Personal hearing was granted by the appellate authority though not statutorily prescribed. No prejudice has been shown by the employee.[33b]

The rule of hearing, again, has several ingredients :

I. The party to be affected is entitled to a notice of the time of hearing,[29] without which he cannot be said to have a reasonable opportunity of being heard.

The obligation attaches whenever the decision affecting the party is made or changed.[34]

An owner, served with a notice that it was proposed to value his property at £ 2,500, consented to that proposal and was told that it would not be necessary for him to be present at the Assessment Committee. At the meeting of that Committee, however, the Valuation Officer objected to the valuation proposed by the rating Authority and, upon that objection, the Assessment Committee, without issuing further notice upon the owner, *raised* the valuation to £ 4,500. The valuation was quashed by *certiorari* on the ground that for the decision to enhance the valuation agreed to by the owner, it was necessary to give him an opportunity of being heard.[34]

A notice of the date or time of hearing is not, of course, necessary where the statute does not require a 'trial' form of hearing. In such cases, an opportunity of showing cause against the proposed order suffices. Thus, in *Cooper* v. *Wandsworth Board*,[33] the rule of natural justice was expressed in the alternative form of requiring the administrative authorities either (a) to give the person to be affected "notice that they intend to take this matter into consideration with a view to coming to their decision", or, (b) "if they have come to their decision, that they propose to act upon it", to "give him an opportunity of showing cause why such steps should not be taken",[33] or in other words, "to give notice of their order before they proceeded to execute it".[33]

II. A judicial or *quasi-judicial* authority must act on the evidence properly brought before him in the presence of both parties[35] and not on any information which he may receive otherwise.[36]

Ordinarily, no evidence (personal or real) should be received at the back of the other party, and if any evidence is recorded, it must be made available to the other party.[37-38]

33a. *S.C.W.S.W.A.* v. *State of Karnataka*, (1991) 2 S.C.C. 604 (paras. 15-16).

33b. *Canara Bank* v. *Debasis Das*, (2003)4 SCC 557: AIR 2003 SC 2041.

34. *R.* v. *Newmarket Assessment Committee*, (1945) All E.R. 371.

35. *R.* v. *Bodmin JJ.*, (1947) 1 All E.R. 109.

36. *Collector of Central Excise* v. *Sanwarmal*, (1968) S.C. [C.A. 1362/67, dt. 16-2-1968].

37. *Stafford* v. *Minister of Health*, (1946) K.B. 621; *R.* v. *Newmarket Assessment Committee*, (1945) 2 All E.R. 371 (374); *Ceylon University* v. *Fernando*, (1960) 1 W.L.R. 223 (P.C.).

38. *Hira Nath* v. *Principal*, (1973) 1 S.C.C. 805.

The principle is not confined to formal evidence but extends to any material (e.g., information as to previous conviction)[39] upon which the tribunal may act, without giving opportunity to the party affected to rebut it. Thus, a conviction has been quashed on the ground that the Justices received a note from[40] their Clerk in their Chambers, containing points for conviction before convicting the accused.[40]

Even where a tribunal is empowered to make such inquiry *as it thinks fit*, and wants to decide on the basis of facts discovered by itself or on a personal inspection of the premises,[36] it should inform the parties to be affected and give them a chance of dealing with it.[41] Similarly, if the tribunal receives a document from a third party and desires to act upon it, it should give an opportunity to the parties of commenting upon it.[42]

The rule is not confined to evidentiary facts but is of a wider import: "No communication shall be made by one party to a judicial tribunal without the knowledge of the other party."[43] If the decision or order or report[44] of a *quasi-judicial* tribunal is altered as a result of a communication received from one party without notice to the other, it is liable to be set aside.[43-44]

A licence granted by the Licensing Justices (rejecting the opposition) was confirmed by the Confirming Authority, after hearing the parties, subject to two conditions. Notice of this decision having been given to the Licensing Justices, they told the Confirming Authority that they could not agree to the condition, whereupon the Confirming Authority, without giving notice to the parties and without hearing them as to the variation of the conditions, confirmed the grant subject to *one* condition only. The order of confirmation was set aside as a nullity and the matter was remitted to the Confirming Authority to hear and determine after hearing the parties interested.[45]

The principle of *waiver* has been acknowledged by *our* Supreme Court as an exception to the present rule. Thus, where a party, coming to know that the Tribunal was using a document, raised no objection that he had no opportunity of rebutting it, nor asked for an adjournment, to meet the statements made in the document, a superior court would not entertain such objection at a later stage.[46]

III. If follows from the above that the tribunal cannot even make an inspection of the disputed premises without informing both parties,[41] or discuss the subject-matter of inquiry with interested persons at the back of one of the parties, after the formal inquiry in the presence of both parties is over.[47] It is against the principle of natural justice for a *quasi-judicial* authority, after holding a public inquiry, to hold a private inquiry to which one party only was admitted,[47] but if the authority is not influenced by an *administrative* conference where the aggrieved party is not represented, there is no denial of natural justice.[48]

The principle has, of course, no application where the authority is doing a purely *administrative* act, without any *quasi-judicial* element involved.[49]

39. *R.* v. *East Kerrier JJ.*, (1952) 2 All E.R. 144.
40. *Ross*, ex parte, (1962) 1 All E.R. 540.
41. *R.* v. *Paddington Rent Tribunal*, (1949) 1 All E.R. 720 (727).
42. *Johnson* v. *Minister of Health*, (1947) 2 All E.R. 395 (405) C.A.
43. *Inland Rev. Commrs.* v. *Hunter*, (1914) 3 K.B. 423 (428).
44. *The Corchester*, (1956) 3 All E.R. 878.
45. *R.* v. *Huntington Confirming Authority*, (1929) 1 K. B. 698.
46. *N.P.T. Co.* v. *N.S.T. Co.*, A. 1957 S.C. 232 (242).
47. *Errington* v. *Minister of Health*, (1935) 1 K.B. 249.
48. *Horn* v. *Minister of Health*, (1937) 1 K.B. 164; *Offer* v. *Minister of Health*, (1936) 1 K.B. 40.
49. *Robinson* v. *Minister of Town Planning*, (1947) 1 All E.R. 851 (857-59) C.A.

But the situation becomes complicated when an administrative authority, for the purpose of making an *administrative decision*, has to perform a *quasi-judicial* function (e.g., to hear objections) at some stage :

(i) If the authority has to perform first an administrative act and then a *quasi-judicial* duty, the fact that he made inquiries at the administrative stage in the discharge of his statutory duties, in the absence of the parties affected, will not vitiate his subsequent *quasi-judicial* order which he makes after hearing the parties.[50]

(ii) On the other hand,—

So far as the decision of the *quasi-judicial* question is concerned, the rule of natural justice requires that the authority should not take any evidence at the back of one of the parties.[47, 51] Hence, once the *lis* has started, he must not hear one party in the absence of the other[52] nor receive any evidence without communicating it to the other party.[49] He cannot even take expert or technical advice without informing the parties or giving them an opportunity of commenting on such advice.[53]

This does *not* mean, however,—

(a) That the authority must not enter upon the *quasi-judicial* stage with any information or knowledge acquired by him in his executive or administrative capacity, or that he must disclose to the parties in the *lis* any material or information acquired by him before the *lis* had come into existence.[52]

(b) That in coming to the ultimate decision, which is executive, he cannot use information obtained by him in his executive capacity.[42]

(c) That he cannot secure information from either of the parties or from other sources, on matters which do not relate to the decision which is *quasi-judicial*.[48]

The reason is that in taking action on a question of *policy*, the executive authority is free to base his opinion on any consideration or material;[42] and his primary concern would be the public interest.[54]

Civil rights and consequences.

IV. Even where a statute does not impose any *quasi-judicial* delegation, a duty to hear has been implied from the principle of fair treatment or fair play by a public authority when its action affects the *civil rights* of an individual or inflicts upon him *civil consequences*.[54a-54b]

Simple illustration of this principle is to be found in cases of public employment, e.g.,—

(a) Where a person's services are terminated.[54b]

(b) Where a person is reverted, after a lapse of time, from a higher post to which he had been regularised,[54c] e.g.,

IV. There has been a divergence of judicial opinion on the question whether the report of a preliminary inquiry should be furnished to the person

50. *Frost* v. *Minister of Health*, (1935) 1 K.B. 286; cf. *Johnson* v. *Min. of Health*, (1947) 2 All E.R. 395.

51. *Stafford* v. *Minister of Health*, (1946) K.B. 261.

52. *Vengamma* v. *Kesanna*, A. 1953 S.C. 21 [*re.* arbitration]; *Collector of Central Excise* v. *Sanwarmal*, (1968) S.C. [C.A. 1362/67, dt. 16-2-1968].

53. *R.* v. *Deputy Industrial Injuries Commr.*, (1962) 2 All E.R. 430 (435).

54. *Ridge* v. *Baldwin*, (1963) 2 All E.R. 66 (76) H.L.

54a. *Ramana* v. *D.A.A.I.*, A. 1979 S.C. 1628 (paras. 10, 21).

54b. *D.T.C.* v. *Mazdoor Union*, A. 1991 S.C. 101 (paras. 199, 144) C.B.

54c. *Usmani* v. *U.O.I.*, (1995) 2 S.C.C. 377 (para. 8).

charged at the stage of the disciplinary proceeding in order that the delinquent may have an opportunity of meeting the findings of the Inquiry Officer. The following propositions may be formulated :

(a) Non-supply of the inquiry report cannot vitiate the decision in the disciplinary proceeding where the impugned finding of the disciplinary authority against the delinquent does not rest upon the report of the Inquiry Officer;[55] or there are *other* charges and findings thereupon by which the decision may be justified.[56]

(b) If, however, the disciplinary authority founds his decision upon the preliminary report, his decision would be vitiated unless a copy of such report was furnished to the delinquent.[57]

(c) In appropriate cases, the requirement of natural justice would be satisfied if, instead of supplying a copy of the document relied upon, the authority supplies a summary of such document (e.g., the document on the basis of which the Collector issued notice for cancelling a licence for holding games of skill)—provided the summary is not misleading.[58]

In some cases, the question of prejudice has been introduced by way of exception to the foregoing rule. Thus, it has been held that non-supply of the inquiry report would not vitiate the impugned decision where it was possible for the delinquent to make his representation effectively, even without the report,[59] or where the delinquent does not specifically ask for it, for the purpose of making his representation.[60]

These cases, however, lost weight in the face of the principle that violation of the principles of natural justice would vitiate the decision irrespective of the prejudice caused to the aggrieved party or of the merits of the decision.[61]

V. Where judicial or *quasi-judicial* power is vested in a person, the decision must be his.

(a) Even though he may obtain the assistance of other persons, e.g., of the clerk of the court (on a point of law),[62-63] he cannot be influenced by the clerk in coming to the decision.[62]

"On a point of fact it is essential that the public should be able to see, and to understand, that the decision is of the Justices and of nobody else."[64]

So, a conviction has been quashed by *certiorari* not only where the clerk of the court handed over to the Justices a note for conviction in the chamber,[65] but also where the clerk was in the chamber, at the time when the Justices were considering the questions of fact, there being no point of law involved in the case.[64]

(b) This principle is also violated where the *quasi-judicial* authority, without exercising his own judgment and without giving the parties an

55. *N.P.T. Co.* v. *N.S.T. Co.*, A. 1957 S.C. 232; cf. *Sunil* v. *State of W.B.*, A. 1980 S.C. 1170 (para. 4).
56. *State of Orissa* v. *Bidyabhusan*, A. 1963 S.C. 779.
57. *High Commrs.* v. *Lal*, A. 1948 P.C. 121.
58. *City Coroner* v. *Personal Asst.*, A. 1976 S.C. 143 (para. 5).
59. *Keshav Mills* v. *Union of India*, (1973) 1 S.C.C. 380.
60. *Suresh* v. *University of Kerala*, A. 1969 S.C. 198.
61. *Kanda* v. *Fed. of Malaya*, (1962) 2 W.L.R. 1153 P.C.; *Gen. Medical Council* v. *Spackman*, (1943) A.C. 627 (644) H.L.; *Ridge* v. *Baldwin*, (1963) 2 All E.R. 66 (102) H.L.
62. *R.* v. *East Kerrier JJ.*, (1952) 2 All E.R. 144 (146).
63. *R.* v. *Welshpool JJ.*, (1952) 2 All E.R. 807.
64. *R.* v. *Barry JJ.*, (1953) 2 All E.R. 1005 (1007).
65. *Ross*, ex parte, (1962) 1 W.L.R. 456.

opportunity of meeting the point of view adopted by a superior officer, gives his decision in accordance with instructions received from the superior officer.[66]

In the words of the Earl of Selborne in the *Spackman case,*[67]

"the person who is to decide ..... must act honestly and impartially and not under the dictation of *some other person or persons* to whom the authority is not given by law".[67]

VI. 'Hearing' means hearing by an *impartial* tribunal. This rule already follows from the rule that the tribunal must be without a bias. But this does not mean that the tribunal must be a judicial tribunal or that the procedure to be followed by the tribunal shall be *judicial,*[68-69] in every case. Natural justice is satisfied if there is a hearing by a tribunal—judicial, administrative or advisory, provided only the tribunal is impartial,[69] and gives the person affected an 'opportunity of being heard'.[70]

VII. In general, the person who hears must decide the case. But this principle does not apply where a matter is to be decided by the Government or by other impersonal body.[71]

(B) *U.S.A.*—Where the 'life, liberty or property' of an individual is liable to be affected by the decision of an administrative authority, the 'Due Process' clause of the 14th Amendment is attracted.

The requirement of 'due process' under the present head is summed up by the expression 'fair hearing'.[72] Where an administrative agency or tribunal denies 'fair hearing' in contravention of the guarantee of 'due process', the courts are bound to interfere,[72] irrespective of any other consideration :

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that *minimal requirement* has been neglected."[73]

Whether 'due process' has been violated in a particular case is, however, a matter of substance, not of form, and the court would not entertain trivial objections as to procedure which have no substantial bearing on the ultimate rights of the parties.[73]

(C) *India.*—In *India,* there is a special category of cases, where a reasonable opportunity of being heard must be given to the party affected, *viz.*, where his *fundamental right* is going to be affected,[73a] *e.g.,* for imposing a ban on association [Art. 19(1)(6)]; where absence of hearing would render the decision arbitrary or violative of Art. 14.[73b]

Outside the realm of fundamental rights, a hearing before making an order would be required—

Civil Consequences.

(a) Where the order would entail civil consequences[73c-73d] upon a person, *e.g.,* blacklisting a Government contractor;[73e] or rejecting a tender which had been accepted earlier.[73f]

66. *Mahadayal* v. *C.T.O.,* A. 1958 S.C. 667 (671).
67. *Spackman* v. *Plumstead Board of Works,* (1885) 10 A.C. 229 (240).
68. *U.S.* v. *Ju Toy,* (1905) 198 U.S. 253 (263).
69. *Local Govt. Board* v. *Arlidge,* (1915) A.C. 120 (H.L.).
70. *Gopalan* v. *The State,* (1950) S.C.R. 88 (123, 163).
71. *Ossein and Gelatine etc. Association* v. *Modi Alkalis and Chemicals,* (1989) 4 S.C.C. 264; *State* v. *Sushila,* (1988) 4 S.C.C. 490.
72. *Ohio Bell Tel. Co.* v. *Public Utilities Commn.,* (1937) 301 U.S. 292.
73. *Market St. R.C.* v. *Railroad Commn.,* (1945) 324 U.S. 548.
73a. *Jafar* v. *U.O.I.,* (1994) Supp. (2) S.C.C. 1.
73b. *F.C.I.* v. *K.C.F.I.,* (1993) 1 S.C.C. 71 (para. 71).
73c. *Mohinder* v. *C.E.C.,* A. 1978 S.C. 851 (para. 75) C.B.
73d. *Raghunath* v. *State of Bihar,* (1989) S.C. 229 (para. 4).
73e. *Southern Painters* v. *F.C.T.,* (1994) Supp. (2) S.C.C. 699 (para. 11); *Erusian* v. *State of W.B.,* (1975) 1 S.C.C. 70 (75).
73f. *Tata* v. *U.O.I.,* (1994) 6 S.C.C. 651 (paras. 148, 151).

(b) Any action against an employee, which is *penal* in nature,[73g] *e.g.*, reduction in rank or *pay*.[73h]

(c) In general, when the decision of a statutory authority would be *prejudicial* to a person.[73-i]

Maximum and minimum of hearing.

U.K.

It has been pointed out earlier, that it is agreed in England,[69] in India,[74] and in the U.S.A.,[75] that there are no universal rules as to the kind of hearing required by natural justice. There is a minimum which would be enforced even where the statute is silent, provided the function is held to be *quasi-judicial*. But about that, the nature of hearing required is to be determined upon a construction of the governing statute,[69] the nature of the functions,[74] to be discharged by the authority in question, and the 'facts and circumstances of the case in point'.[76]

In *Local Government Board* v. *Arlidge*,[69] Lord Parmoor observed—

"Where, however, the question of propriety of procedure is raised in a hearing before some tribunal other than a court of law, there is no obligation to adopt the regular forms of judicial procedure. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice. In determining whether the principles of substantial justice have been complied with in matters of procedure, regard must necessarily be had to the *nature of the issue* to be determined and the *constitution of the tribunal*."[69]

More explicit stress on the functional guide to the nature of the hearing was made by Lord Atkin in *General Medical Council* v. *Spackman*:

"Some analogy exists no doubt between the various procedures of this and other not strictly judicial bodies, but I cannot think that the procedure which may be very just in deciding whether to close *a school or an insanitary house* is necessarily just in deciding a *charge of infamous conduct against a professional man*."[77]

The 'nature of inquiry' and the 'subject-matter that is being dealt with' were also referred to as the criteria in *Russell* v. *Duke of Norfolk*.[78]

India.

It is in consonance with the above observations that *our* Supreme Court[74] has said through Sinha, J. :

".....the question whether the rules of natural justice have been observed in a particular case must itself be judged in the light of the *constitution* of the statutory body which has to function in accordance with the rules laid down by the Legislature and in that sense the rules themselves must vary."[74]

Of course, in the above observation reference was made only to the statutory provisions and not to the nature of the issues to be determined, but his Lordship referred to the decision in *General Medical Council* v. *Spackman*[77] as

"authority for the proposition that the rules of natural justice have to be inferred

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73g. *State of U.P.* v. *Abhai*, (1995) 1 S.C.C. 336 (para. 9).

73h. *Bhagwan* v. *U.O.I.*, (1994) 6 S.C.C. 154 (para. 3).

73-i. *S.C.W.S.A.* v. *State of Karnataka*, (1991) 2 S.C.C. 604 (paras. 15-16).

74. *N.P.T. Co.* v. *N.S.T. Co.*, (1957) S.C.R. 98 (106); *City Corner* v. *P.A.*, A. 1976 S.C. 143 (para. 5).

75. *F.C.C.* v. *W.J.R.*, (1949) 337 U.S. 265.

76. *Ceylon University* v. *Fernando*, (1960) 1 W.L.R. 223 (231) P.C.

77. *General Medical Council* v. *Spackman*, (1943) A.C. 627 (638). [See also *Durayappati* v. *Fernando*, (1967) 2 All E.R. 152 (P.C.)].

78. *Russel* v. *Duke of Norfolk*, (1949) All E.R. 109 (118).

from the nature of the tribunal, the *scope of its inquiry* and the statutory rules of procedure laid down by the law for carrying out the objectives of the statute".

In fact, in the very interpretation of the statutory provisions, courts are influenced by the nature of the functions to be discharged and the issues to be determined and the courts in India would not differ from those in England in this matter. As will be shown hereafter, *our* Supreme Court has inferred the duty to hear from the words 'just and proper', though the other words in the relevant statute implied a subjective determination, with respect to an administrative review from an order of refusal of a mining 'licence'.[79]

It is because of this flexibility of the contents of natural justice and hearing that the modern principle is that other basic or essential requirement is 'fair play in action'.[79a]

This position may be best illustrated with reference to typical instances from England, India and the U.S.A.

(A) *England and India.*

I. *Maximum of hearing.*

In both these countries, the maximum of hearing has been prescribed by the Legislature and exacted by the courts in the case of the statutory tribunals determining property rights. Some of these may be referred to by way of illustrations.

England.

(a) *Appellate Tribunals.*—The Lands Tribunal set up by the (Eng.) Lands Tribunal Act, 1949, is manned by legally qualified persons, discharging the functions previously vested in an appellate court. Like a court, thus, its decision must be limited to the issues raised by the appellant, and, accordingly, in the absence of a cross-appeal by the respondent in an appeal by a rate-payer, the valuation cannot be enhanced at the instance of the valuation officer.[80] There is a right of legal representation before the Tribunal and it must give reasons for its decision.[81] Similar view has been taken regarding the Income-tax Appellate Tribunal[81] in India.

(b) *Disciplinary proceedings under certain statutory rules.*—The inquiry into a charge of misconduct against a Government servant under r. 55(1) of the Civil Services (Classification, Control and Appeal) Rules has to be conducted almost as a regular trial; witnesses have to be examined in support of the allegations, opportunity has to be given to the delinquent to cross-examine them and then to lead evidence in his defence.[82-83]

(II) *Minimum of hearing.*

A. At the lowest level of the *quasi-judicial* procedure stands the cases where the statute confers upon the party to be affected only a right to make a *written representation* against the action proposed[84-85] or an explanation to the charges[84] brought against him.

79. *Shivaji Nathubhai* v. *Union of India*, A. 1960 S.C. 606 (see *post*).

79a. *Maneka* v. *U.O.I.* (1978) 1 S.C.C. 248 (*286*) C.B.; *Ravi* v. *U.O.I.*, (1994) Supp. 25 S.C.C. 641 (para. 20).

80. *Ellerby* v. *March*, (1954) 2 All E.R. 375 (C.A.).

81. *I.T. Commr.* v. *Alps Theatre*, A. 1967 S.C. 1435 (1437).

82. *State of Bombay* v. *Nurul Latif*, A. 1966 S.C. 269 (274).

83. Cases under Art. 311(2) of the Constitution fall under this category [*Khem Chand* v. *Union of India*, A. 1958 S.C. 300].

84. *M.P. Industries* v. *Union of India*, A. 1966 S.C. 671 (675) [Proviso to r. 55 of the Mineral Concession Rules, 1960].

85. *Union of India* v. *Jyoti Prakash*, A. 1971 S.C. 1093 (paras. 24-25)

In such cases, it has been held that natural justice does not require that a personal hearing must be offered to the person affected,[84] at least not where he does not ask for a personal hearing where he would offer his explanation and the materials in support thereof.[86] But in *J.P. Mitter's case*,[85] the court held that even refusal to accede to his *request* for oral hearing did not vitiate the President's decision, since he was given an opportunity to make his representation in writing.[85]

B. Both in Englasnd and in India, it is settled that even though the statute creating a *quasi-judicial* authority is silent about the procedure to be followed by such authority, it most conform to the principles of *audi alteram partem*.[87]

But in *England* and *India*, there being no general statute (like the American Administrative Procedure Code, laying down a minimum of natural justice to be followed by all administrative agencies), the Legislature must prescribe the procedure in the relevant statute where it is intended that the administrative authority or tribunal, dealing with a particular subject-matter must follow a particular type of hearing to arrive at its decision. In the *absence* of such specific legislation, an administrative authority is free to devise its own procedure, consonant with natural justice.

Hence, arises the question, *how much* of natural justice must be complied with where the governing statute is silent.

It is settled that even where the statute is silent about the procedure to be followed by an administrative authority or tribunal, which determines the rights of individuals or inflicts civil consequences upon them, natural justice would require a minimum of fair procedure[88] and what that minimum would be, it is for the court to determine, having regard to the provisions of the statute in question, the subject-matter of inquiry, the nature of the right to be affected and the like.[89] In the result, we have different kinds of hearing prescribed by different statutes, as well as different standards of minimum hearing insisted upon by the courts, from a trial type of hearing, taking evidence of witnesses, on the one hand, to a mere right of representation of the party to be affected, attended with a consideration of that representation, on the other hand. The position was thus expressed by Iyer, J., in *Mohinder's case* :[89]

A minimum standard of fair hearing.

"It can be fair without the rules of evidence or forms of trial. It *cannot be fair* if apprising the affected and appraising the representations is absent."[89]

Whether a fair hearing has been given in a particular case is a justiciable question and the superior Court has to determine two questions:[90]

(a) Whether an opportunity of hearing was given by the inferior tribunal;

(b) Whether that opportunity was reasonable.

The reasonableness of the opportunity given will, however, depend upon

86. *State of Assam* v. *Gauhati Municipality*, A. 1967 S.C. 1398 (1399) [s. 298 of the Assam Municipal Act, 1957].

87. *Chaturbedi* v. *Union of India*, A. 1960 S.C. 424 (430); *Sewpujanbai* v. *Collector of Customs*, A. 1958 S.C. 845; *Cooper* v. *Wandsworth Bd.*, (1863) 14 C.B. (N.S.) 180.

88. *Maneka* v. *Union of India*, A. 1978 S.C. 597 (paras. 57-58).

89. *Mohinder* v. *Chief Election Commr.*, A. 1978 S.C. 851 (para. 75); *Tripathi* v. *State Bank of India*, A. 1984 S.C. 273 (paras. 29, 32, 41).

90. *Indru* v. *Union of India*, (1988) 4 S.C.C. 1 (para. 20).

the statutory provision and the attendant circumstances of each case, as will appear from below.[90]

Where a statute conferring a *quasi-judicial* power is silent as to the procedure to be followed by the authority or leaves it to his discretion, the court would be satisfied if the minimum of natural justice is observed, namely,—

(a) That the person to be affected by the order is given—

"an opportunity to correct or contradict any relevant statement to his prejudice";[91] or "a real and effective opportunity of meeting any relevant allegations made against him".[92]

England.

Hence, in such cases, the authority may obtain information at the back of the aggrieved party or examine witnesses without allowing him an opportunity of cross-examining such witnesses, provided he is informed of the case he had to meet and has been given an opportunity of meeting the case alleged against him.[91]

At the minimum level, thus, natural justice does not postulate either a right to be heard orally,[91] or to adduce evidence or to confront or cross-examine witnesses,[91] but simply to make a representation against the action proposed.[93] In *Nakkuda Ali's case,*[94] also, the Privy Council observed that this was the 'essential' required by natural justice and held that the essential was complied with in the facts of the case, assuming that the Controller was bound to act *quasi-judicially* :

"The appellant was *informed* in precise terms what it was that he was suspected of; and he was given a proper opportunity of dissipating the suspicion and having such *representations* as might aid him .... In fact, the *explanation* that he did offer was hardly calculated to allay the respondent's suspicions; probably they confirmed them ..... But, failing explanations from him on points such as these, a heavy cloud of suspicion remained; and if the respondent felt bound to act on this suspicion, it was not because he had come to entertain it through any denial of natural justice or without reasonable cause, but because the appellant himself either could not, or would not, produce the explanation that would have dissolved it."[94]

The Privy Council has reiterated the theory in a latter case from Ceylon :[91]

B complained to the Vice-Chancellor that *F*, an examinee, had previous knowledge of a question paper. The Vice-Chancellor set up a Commission of Inquiry which heard *B* in the absence of *F* and accepted her evidence, rejecting that of *F*, and on the recommendation of the Commission, *F* was suspended from all University examinations for an indefinite period.

The Judicial Committee found that *F* had been given full *notice of the charge against him* and was given *a fair opportunity to contradict the allegations.* The relevant clause of the University Act which authorised the Vice-Chancellor to report such cases was *silent* about the procedure to be followed by him. In the circumstances, the Judicial Committee held, the rules of natural justice were not violated by reason of not giving *F* an opportunity to confront or cross-examine *B*, particularly when *F* had not asked for such an opportunity.[91]

Where the court simply requires that notice of the action proposed should be given to the party to be affected, it is assumed that the party, on

91. *Ceylon University* v. *Fernando,* (1960) 1 W.L.R. 223 (232) P.C.; *Local Govt. Board* v. *Arlidge,* (1915) A.C. 120.

92. *R.* v. *Archbishop of Canterbury,* (1944) 1 All E.R. 179 (181).

93. *Cf. The second alternative laid down in Cooper v. Wandsworth Board, (1863) 14 C.B. (N.S.) 180.*

94. *Nakkuda Ali* v. *Jayaratne,* (1951) A.C. 66.

receiving the notice of the action and the allegations upon which the action is proposed, will have a right to meet those allegations by a representation. It is in this sense that the minimum of natural justice was laid down in the leading (Eng.) case of *Cooper* v. *Wandsworth Board* :[93]

S. 76 of the Metropolis Local Management Act, 1855, authorised the district board to demolish a building if it had been constructed by the owner without giving to the board notice of his intention to build. The statute laid down no procedure for exercise of the power of demolition and the board demolished a house in exercise of the above power without issuing any notice to the owner of the house. The board was held liable in damages for not having given "notice of their order before they proceeded to execute it".[95]

It was held that the board was exercising a *quasi-judicial* power "because they had to determine the offence, and they had to apportion the punishment as well as the remedy". In such a case, Byles, J., observed—

"Although there are no positive words in a statute that the party should be heard, yet the justice of the common law will supply the omission of the Legislature."

What the party affected could do if notice were given to him is pointed out in the judgment of Earle, C.J. :

"The *default* in sending notice to the board of the intention to build is a default, *which may be explained.* There may be a great many excuses for the apparent default. He may have actually conformed to all the regulations ..... though by accident his notice *may have miscarried;* and, under those circumstances, if he explained how it stood, the proceedings *have miscarried*, and, under those circumstances, if he explained how it stood, the proceeding to demolish, merely because they had ill-will against the party, is a power that the Legislature never intended to confer."[93]

India.

In *India,* it has been held that where the relevant statute or statutory rule is silent about the procedure to be followed, but the question has to be determined *objectively,*[95] such as the age or date of birth of an employee,[96] the fixation of pay during suspension of a Government employee,[97] or in-disciplinary proceedings against students,[98] or statutory employees,[99] the minimum of natural justice must be afforded, which means that—

(i) An *opportunity* must be given to the party to be heard or to put forward his case or to make a representation.[85,99] Where such an opportunity has been given, but the party states that he does not want a personal hearing[100] or does not avail of the opportunity of making a representation,[1] or chooses to be absent from the proceeding in spite of repeated intimation,[2] the requirement of natural justice is fulfilled.

Unless the delinquent in his reply to show cause notice states that he desired a personal hearing order of termination cannot be challenged on the ground of denial of natural justice for want of a personal hearing.[2a]

95. Cf. *State of Punjab* v. *Iqbal,* A. 1976 S.C. 667; *Coal Commr.* v. *Lalla,* A. 1976 S.C. 676.

96. *State of Orissa* v. *Binapani,* A. 1967 S.C. 1269; *Sarjoo* v. *General Manager,* A. 1981 S.C. 148.

97. *Gopalkrishna* v. *State of M.P.,* A. 1968 S.C. 240.

98. *Suresh* v. *University of Kerala,* A. 1969 S.C. 198.

99. *Tripathi* v. *State Bank of India,* A. 1984 S.C. 273 (para. 29); *Chingleput Bottlers* v. *Majestic Bottling,* A. 1984 S.C. 1030 (paras. 29, 41).

100. *F.N. Roy* v. *Collector of Customs,* A. 1957 S.C. 648; *Sewpujanrai* v. *Collector of Customs,* A. 1958 S.C. 845.

1. *John* v. *State of T.C.,* A. 1955 S.C. 160.

2. *Roshan Lal* v. *Iswar Dass,* A. 1962 S.C. 646 (656).

2a. *S.B.I.* v. *Luther Kondhpan,* (1999)9 SCC 268.

The right to represent against the proposed action cannot be denied even where the information upon which the action is based was furnished by the very person proceeded against, if it was furnished in a casual way or for some other purposes.[3]

(ii) But, under this group of cases, there is no obligation, as in cases under Art. 311(2) of the Constitution, to supply to the delinquent a copy of the report on the basis of which the notice to show cause was issued.[98] Nor does it matter if the previous statement of a witness is used, provided a copy of such statement is supplied to the person affected and he is given an opportunity to cross-examine such witness.[98]

Again, outside Art. 311(2) of the Constitution, or any statutory requirement in that behalf, the right to examine or cross-examine witnesses is not an essential ingredient of natural justice or fair play, where the decision has been arrived at in a just and objective manner with regard to the relevant materials and reasons, and no real prejudice has been caused to the party aggrieved.[4]

(b) That the authority acts *honestly* and *by honest means.*[5] In other words, the decision must be made in *good faith,*[6] i.e., it must not be made in order to achieve some object other than that for which judical or *quasi-judicial* power is given.[7] It must be arrived at without any bias and not in an arbitrary or capricious manner.[8] This is what is meant by 'fair play' or acting 'fairly'.[8]

This is a condition for the exercise of all statutory powers, as has already been explained (p. 183, *ante*).

On the foregoing principle it has been held that a notice or hearing must be given—

Before cancelling a lease before expiry of the stipulated period.[9]

III. *Intermediate types.*

In between the maximal and minimal types are cases where the statute does not require a 'trial' type of hearing, but does not, on the other hand, reduce it to a *mere right to make a a representation.* Thus,

(a) *Income-tax Officer, making assessment and Income-tax Appellate Tribunal.*—Under s. 23 of the (Indian) Income-tax Act, 1922 (*vide* s. 143 of the I.T. Act, 1961), where the Income-tax Officer was not satisfied with the correctness of a return, he may make an assessment himself. Sub-sec. (2) required him to issue a notice of the date of hearing, directing the assessee "to produce any evidence on which such person may rely in support of the return". The nature of the hearing is stated in sub-sec. (3) :

"On the day specified in the notice issued under sub-section (2), or as soon as may be, the Income-tax Officer, after hearing such evidence as such person produces and *such other evidence as the Income-tax Officer may require,* on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment."

3. *Kapoor* v. *Jagmohan,* A. 1981 S.C. 136 (para. 16).
4. *Tripathi* v. *State Bank of India,* A. 1984 S.C. 273 (paras. 32-33, 41); *Kanungo* v. *Collector of Customs,* (1973) 2 S.C.C. 438.
5. *Local Government Board* v *Arlidge,* (1915) A.C. 120 (138) H.L.
6. *Board of Education* v. *Rice,* (1911) A.C. 179 (182); *Leeds Corpn.* v. *Ryder,* (1907) A.C. 420 (433) H.L.
7. *Marshall* v. *Corporation of Blackpool,* (1935) A.C. 16.
8. *Chingleput Bottlers* v. *Majestic Bottling,* A. 1984 S.C. 1030 (para. 41).
9. *State of Haryana* v. *Ram,* A. 1988 S.C. 1301.

It is evident that the Income-tax Officer is not required to follow the rules of procedure laid down in the Code of Civil Procedure or the rules of evidence laid down in the Evidence Act, so that he may even admit evidence which would be inadmissible in a court of law. Nevertheless, in giving the hearing and in coming to his conclusions, the Income-tax Officer must comply with the 'fundamental rules' of natural justice.[9]

There is provision for appeal to an Appellate Tribunal, but s. 5A(8) of the Act gave the Appellate Tribunal the power

"to regulate its own procedure".

Notwithstanding the above discretionary powers, the Supreme Court set aside the assessment made by an Income-tax Officer and confirmed by the Appellate Tribunal, on the following grounds, constituting a denial of a 'fair hearing' and violation of the 'fundamental rules' of natural justice :

(i) The Appellate Tribunal did not disclose to the assessee the information that had been supplied by the Income-tax Department to the Tribunal against the assessee;

(ii) The Tribunal did not give any opportunity to the assessee to rebut the material furnished to the Tribunal by the Income-tax Department;

(iii) The Tribunal declined to take all the material that the assessee would produce in support of his case;

(iv) The Income-tax Officer as well as the Tribunal made the assessment on pure *guess* and *suspicion* as to the gross profits of the assessee company.[7]

The principle has been extended to all 'best judgment assessment' under other tax laws, such as the Sales Tax Act.[10]

(b) *Commission of Inquiry Act.* This Act provides that if any person is likely to be prejudicially affected by an inquiry made under this Act, such person must be given *"a reasonable opportunity of being heard"*, but gives such person a right to cross-examine "any person appearing before the Commission .... as a witness". It has been held by the Supreme Court[11] that the statute or the rules of natural justice appertaining to the fact-finding inquiry made by the Commission under this Act did not give the person a right to cross-examine the deponents of affidavits before the Commission.[11]

(c) *Statute requiring the giving of a 'reasonable opportunity to show cause'.*

1. The expression 'reasonable opportunity to show cause' in Art. 311(2) of *our* Constitution has been intepreted to mean that for the purposes of a termination of service or reduction in rank under that constitutional provision, an inquiry of the 'trial' type will be required in India, including a right of the delinquent officer to adduce evidence and to confront the evidence adduced against him,[12] on the assumption that the proceeding is *quasi-penal.*

Right to confront witnesses.

2. Even in ordinary statutes, which relate to termination of employment, the right to examine and cross-examine witnesses has been deduced from the expression 'reasonable opportunity of being heard', although Art. 311(2) of the Constitution is not applicable.[4,13]

3. In ordinary statutes (not relating to employment) where such expression occurs, a trial type of hearing will not necessarily be inferred, but

10. *State of Kerala* v. *Shaduli,* A. 1977 S.C. 1627 (paras. 4-5).

11. *State of J.&K.* v. *Gulam Md.,* A. 1967 S.C. 122 (131).

12. *Union of India* v. *Verma,* A. 1957 S.C. 882; *Khem Chand* v. *Union of India,* A. 1958 S.C. 300; *State of M.P.* v. *Om Prakash,* (1969) 3 S.C.C. 775 (782).

13. *Meenglass Tea Estate* v. *Workmen,* A. 1963 S.C. 1719; *Central Bank of India* v. *Karunamoy,* A. 1968 S.C. 226.

the Court may demand something more than a notice or a right to make representation.

Thus,—

S. 25(1) of the Bihar Mica Act, 1948, required that no licence shall be cancelled.

"unless the licence ... has been furnished with the grounds for such cancellation and has been afforded reasonable opportunity to show cause why his licence shall not be cancelled".

The Court annulled an order of cancellation on the following grounds, *inter alia*, (a) that neither in the notice initiating the proceedings nor in the notification cancelling the licence it was stated that the Petitioner was guilty of 'repeated failure' to comply with the provisions of the statute and the rules make thereunder, though 'repeated failure' was a *necessary* condition for cancellation under s. 25(1) of the Act; (b) that no opportunity was given to the Petitioner to inspect its *accounts and to explain the alleged defaults* with reference to the accounts.[14]

A more relaxed standard was applied by the Court (against the dissent of Subba Rao, J., in interpreting the *same expression* in the matter of cancellation of a licence under the Imports (Control) Order, 1955,[15] in view of the existence of certain circumstances such as the conduct of the person aggrieved and the nature of the plea taken by him, which, according to the majority, justified such relaxation. In this case, a notice to show cause was given to the Petitioner against the proposed order, stating therein that the ground on which the cancellation was proposed was that the licences had been obtained fraudulently; and a personal hearing was also given thereafter. But—

(a) Particulars of the fraud alleged were not given, even though asked for;

(b) No opportunity was given to inspect the relevant documents though asked for.

The majority[15] held that notwithstanding these admitted omissions, there was no denial of a reasonable opportunity because "the Company's representatives appeared to have been more concerned to show that the Company was not a party to the fraud *than to show no fraud was practised at all*". But there is much force in the comment made by Subha Rao, J., on this point, namely, that in the circumstnaces of the case, it could not be said that plea or the conduct of the party amounted to an admission that a fraud had been committed. So said his Lordship :

"It is not as if the Petitioners admitted that they committed the fraud. When they were confronted with the notice, unless *the particulars* were given to them and the documents shown to them, it was *not possible for them to know whether a fraud was committed at all* and, if committed, how was it committed. It is for the purpose of explaining that no fraud was committed by them, they asked for the particulars, for inspection of the relevant documents and for a personal hearing: all these were denied to them."

4. The right to confront witnesses was definitely denied where the person affected was entitled under the statute not only to have a "reasonable opportunity of explaining" the allegations made against him, but also to appear through a lawyer and examine witnesses for clearing his character. This was s. 27(4) of the City of Bombay Police Act, 1902, which provided for the externment of persons who are engaged or about to engaged in the commission of an offence. An earlier sub-section in the same section [27(1)] authorised the Commissioner of Police to make the order on his subjective

14. *Mineral Development* v. *State of Bihar*, A. 1960 S.C. 468 (472).

15. *Fedco* v. *Bilgrami*, A. 1960 S.C. 415 (Das Gupta, J., for himself, Sinha, C.J., Gajendragadkar & Shah, JJ.).

satisfaction that (a) the person was of the aforesaid character; and (b) "witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property". It was, therefore, open to the Commissioner to act on the information or evidence of witnesses without affording to externee the opportunity to cross-examine them. Notwithstanding the statutory requirement of 'reasonable opportunity of explaining the material allegations against him, the Supreme Court[16] upheld the provision which denied the externee the right to confront witnesses on the extraordinary nature of the legislation:

"The law is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of injury to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitutes a menace to the safety of the public residing therein. This object would be wholly defeated if a right to confront or cross-examine these witnesses was given to the suspect."[16]

In general, it may be stated that unless the relevant statute insists upon a trial-type of hearing, natural justice would not require—

(a) that the witnesses examined by the inquiring authority should be examined in presence of the person to be affected;[17] or

(b) that he should be allowed to cross-examine such witnesses from whom the authority had collected the materials.[17]

In such cases, the minimum of natural justice would be satisfied if the person is served with a show-cause notice, setting forth all the allegations and materials against him, and he is given an opportunity to explain them.[17]

U.S.A.

(B) *U.S.A.*—In the United States, a distinction is made between a 'hearing' and a 'trial form of hearing', and whether the one or the other is required to be complied with depends upon the basis of the obligation to hear, namely, whether it is constitutional (i.e., coming under the 'Due Process" clause) or non-constitutional, being required by a statute, outside the field of 'Due Process'.

I. *In the non-constitutional field.*

The common law on this point is substituted by s. 5 of the Administrative Procedure Act, 1946, which lays down the procedure to be followed whenever a statute requires an 'adjudication' to be determined 'after opportunity for an agency hearing'. This minimum of hearing in the non-constitutional field as required by this Act is as follows :

(a) Notice to the persons entitled to the hearing of—(i) the time, place and nature of the hearing; (ii) the legal authority and jurisdiction under which the hearing is to be held; and (iii) the matters of fact and law asserted.

(b) An opportunity to all interested parties for the submission and consideration of facts, arguments ..... where time, the nature of the proceeding, and the public interest permit.

(c) An impartial hearing by presiding officers who are not disqualified, and having authority to take evidence on oath 'whenever the ends of justice would be served thereby'.

(d) The decision shall be on record consisting of all papers and evidence, which shall be available to the parties on payment of costs. Further, "when any agency decision rests on official notice of a material fact not appearing

16. *Gurbachan* v. *State of Bombay,* (1952) S.C.R. 737.

17. *Kanungo* v. *Collector,* A. 1972 S.C. 2136 (para. 12) [a proceeding under s. 167(8) of the Customs Act, 1878].

in the evidence on the record, any party shall on timely request be afforded an opportunity to show the contrary".

(e) There is a right to present oral arguments and the decision must show the ruling on each finding or conclusion, whether of law or of fact.

II. *In the constitutional field.*

Where the 'Due Process' clause of the Constitution is attracted, what is required is a 'fair hearing'[18] or a 'fair trial' or a 'judicial type' hearing. It does not mean trial by a court or even that the administrative agencies will follow the judicial procedure of a trial.[19]

Even in the sphere of 'Due Process', the standard of hearing may be raised by statutory requirements; but no statute can reduce the minimal requirement[17] of fair hearing which is guaranteed by the 'Due Process' clause. "There can be no compromise on the footing of convenience or expediency or because of a natural desire to be rid of harassing delay when that minimal requirement has been neglected or ignored."[18] The requirements of 'Due Process' vary according to time, place and circumstances.[20] But there is a minimum below which it ceases to be 'fair'. Briefly speaking, it includes an opportunity "to present one's case, and be heard in its support.[21]

These minimal requirements of 'Due Process" are—

(a) The party to be affected must be given notice of the time, place and nature of hearing,[20] within a reasonable time before the date of hearing,[22] except where the party had actual knowledge of the impending proceeding.[23]

(b) The notice must give sufficient particulars of the claims which he has to meet.

(c) The decision of the Tribunal must be based on matters on the record[18] and not on speculation or conjecture, or without substantial evidence[24] to support the decision.[19]

The Tribunal is not, however, precluded from making any inference from the materials already on the record.[25]

(d) The evidence on which the Tribunal relies or the facts of which it takes judicial notice[23] must be recorded.

(e) The evidence must be taken in the presence of both the parties and not in secret,[23] or without notice to the parties.[26]

(f) The parties must be allowed to adduce relevant evidence and reasonable time to produce such evidence.[25]

(g) Each party must be given a reasonable opportunity to meet all such evidentiary facts on which the Tribunal relies;[25-26] and to cross-examine the witnesses deposing against him,[26] on relevant questions,[27] even where the statute authorises the administrative agency to act upon evidence satisfactory to him.[27]

18. *Ohio Bell Tel. Co.* v. *Pub. Utilities Commn.*, (1937) 301 U.S. 292 (204-05).
19. *Lloyd* v. *Elting*, (1932) 287 U.S. 329 (335).
20. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, (1951) 341 U.S. 123 (162); *F.C.C.* v. *W.J.R.*, (1949) 337 U.S. 265.
21. *Brinkerhoff-Faris Trust* v. *Hill*, (1930) 281 U.S. 673.
22. *U.S.* v. *Fisher*, (1911) 222 U.S. 204.
23. *Fleisher* v. *U.S.*, (1940) 311 U.S. 15.
24. *Universal Camera Corpn.* v. *N.L.R.B.*, (1951) 340 U.S. 474 (see *post*).
25. *Market Street Ry. Co.* v. *Railroad Commn.*, (1945) 324 U.S. 548.
26. *U.S.* v. *Baltimore & Ohio Southwestern R. Co.*, (1912) 226 U.S. 14.
27. *Reilly* v. *Pinkus*, (1949) 338 U.S. 269.

(h) The party who has the right to be heard shall be entitled to make arguments to support his case.[28] [As to whether this means written or oral arguments, see *below*].

(A) The traditional view is that the *audi alteram partem* ingredient of natural justice requires a hearing afforded to the person to be affected in his liberty or property *before* the order affecting him is made.[29-30]

(B) But there are *exceptional* cases where a hearing or even a right of representation given to the affected person, *after* the prejudicial order is made, so that it may be set aside or other relief granted to the affected person after hearing his case [para. 63],[29] would suffice.

(a) It is not possible to exhaustively enumerate such cases where a *post*-decisional hearing would satisfy natural justice, but the common ground underlying such cases is that in the circumstances urgent action on the part of the administrative authority is necessary so that it would not be feasible to prevent social injury if delay is caused by a pre-decisional proceeding [para. 63].[29,31]

(b) But there may be other cases where a pre-decisional hearing cannot be afforded in view of the special circumstances of case, such as the following:

(a) Where the matter rests in the subjective consideration of the authority concerned, e.g., where a representation for correcting the age of an employee shortly before his superannuation, is rejected, after considering the materials on the record.[32]

How far natural justice requires oral hearing.

(A) *England.*—In England, it is settled,[33] as a general rule, that *in the absence of a provision in the statute* or statutory rules,[34] an administrative authority is not bound to hear a party *orally* or to allow him to appear in person and that the requirements of natural justice are satisfied if he is given the opportunity of *stating* his case in writing.

At the same time, it has also been established[35] that the contents of the *quasi-judicial* obligation vary according to circumstances and the nature of the question decided and that in the case of some *quasi-judicial* authorities the function is 'almost entirely judicial'.[35] Thus, a right to make oral arguments before the Tribunal has been considered essential—

(i) Where a statute empowered a County Court to remove a Clerk for 'a reasonable cause';[36]

(ii) Where a statute empowered a local authority to 'decide' how 'general line of buildings' had to be fixed;[37]

28. *Londoner* v. *Denver*, (1908) 210 U.S. 373 (386); *F.C.C.* v. *W.J.R.*, (1949) 337 U.S. 265.
29. *Maneka* v. *U.O.I.*, A. 1978 S.C. 597 (paras. 31, 36)—7 Judges.
30. *Swadeshi C.M.* v. *U.O.I.*, A. 1981 S.C. 818; *Olga Tellis* v. *B.M.C.*, A. 1986 S.C. 180; *Institute of C.A.* v. *Ratna*, A. 1987 S.C. 71 (paras. 13, 19).
31. See cases noted at pp. 277 ff., *post.*
32. *Executive Engineer* v. *Rangadhar*, (1993) Supp. (1) S.C.C. 763 (paras. 3,4).
33. *Local Government Board* v. *Arlidge*, (1915) A.C. 190; *Jeffs* v. *N.Z. Dairy Bd.*, (1966) 3 All E.R. 863 (P.C.).
34. E.g., National Insurance (Industrial Disputes) Acts, 1946-50 [*R.* v. *Dy. Industrial Injuries Commr.*, (1962) 2 All E.R. 430 (432, 435).
35. *Vine* v. *National Dock Labour Board*, (1956) 3 All E.R. 939 (943).
36. *Osgood* v. *Nelson*, (1862) L.R. 5 H.L. 636.
37. *Spackman* v. *Plumstead Board of Works*, (1885) 10 App. Cas. 229 (240).

(iii) Where a statute authorised an authority to decide applications for renewal of a licence after giving to the persons interested an 'opportunity of being heard';[38]

(iv) The function of deciding an administrative appeal;[39]

(v) The function of hearing objections against an order of compulsory purchase.[40]

(B) *U.S.A*—(i) Where the statute itself requires an oral hearing,[41] no question arises.

(ii) Where the statute does not require it, the question whether 'due process' requires an oral hearing would depend on the circumstances of each case and the particular interests affected.[42] It is not a matter for "broadside generalisation and indiscriminate application".[42]

The general rule is, of course, that—

"an opportunity to present contentions orally, with whatever advantages the method of presentation has, is one of the rudiments of the fair play required when property is being taken or destroyed".[43]

A distinction, however, appears to have been made as between the right to present oral *testimony* and the right to make *argument*. There is unanimity on the point that the right to present evidence is an essential requirement of a fair hearing required by due process.[44]

So far as the right to present oral argument is concerned, it has been held that 'due process' is not a term of 'invariable content' and that it cannot be said that every decision to be fairly arrived at would require oral argument. The court would interfere only where the administrative authority has abused its discretion by disposing of the controversy on written submission only.[42] On this point, the court would also respect the power of Congress to devise different administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind.[42]

I. In some cases it has been held that a consideration of written objections only is not enough to satisfy 'due process'.

Thus,

(a) As regards proceedings for assessment of tax, it has been held that the assessee should, at any stage before the proceedings become final, be given an opportunity not only to prove his allegations but also to support the allegations by argument, however brief.[45]

(b) In a proceeding for fixing the maximum rates to be charged by marketing agencies, where the administrative authority vested with that power (to be exercised after a 'full hearing') delegated the power of taking evidence to an examiner, and accepted the findings of the examiner without giving an opportunity to the party to submit oral argument, the order of the authority was annulled on the ground of having been made without a full hearing. The Court observed—

"The right to a hearing embraces not only the right to present evidence but also

38. *Frome Breweries* v. *Bath Justices*, (1926) A.C. 586.
39. *R.* v. *Archbishop of Canterbury*, (1859) 1 A. & E. 545 (559); *R.* v. *Housing Appeal Tribunal*, (1920) 3 K.B. 334.
40. *Stafford* v. *Minister of Health*, (1946) K.B. 621.
41. Administrative Procedure Act, s. 7(c).
42. *F.C.C.* v. *W.J.R.*, (1949) 337 U.S. 265 (276).
43. *Standard Airlines* v. *Civil Aeronautics Bd.*, (1949) F. 2d 18 (21).
44. *Morgan* v. *U.S.*, (1937) 304 U.S. 1.
45. *Londoner* v. *Denver*, (1908) 210 U.S. 373.

reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into *contest with the Government in a quasi-judicial* proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.'[44]

II. In other cases, an opportunity to submit *written arguments* and their consideration have been held sufficient.

Thus,

(a) Where a statute required the authority to fix the maximum rates to be charged by marketing agencies for the sale of livestock "whenever after *full* hearing ..... the Secretary is of the opinion that any rate ..... is or will be unjust, unreasonable or discriminatory", the Court held that the full hearing indicated a *quasi-judicial* obligation to hear both evidence and argument by the very authority who came to the finding required by the statute but that the "argument may be *oral or written*. The requirements are not technical".[46]

(b) Where a broadcasting company filed an objection to the granting of licence to another company on the ground of interference with its operations and asked the permission of the Federal Communications Commission to make oral argument, the Commission rejected that request on the ground that the written objection filed by the company did not disclose facts sufficient to raise any legal issue on which arguments could be necessary. The Supreme Court refused to interfere, on the ground that in the circumstances of the case, the Commission had not abused its discretion in hearing the company on its submission, because the point involved was 'one of law', namely, "whether under the rules the protection of the licence was limited to the normally protected contour".[47]

(C) *India.*— (1) A right to make oral argumentation or representation is conferred by certain statutory provisions, e.g.—

(i) The Public Servants (Inquiries) Act, 1850;[48]

Oral argumentation

(ii) R. 55 of the Civil Services (Classification, Control & Appeal) Rules;[49]

(iii) S. 68D(2) of the Motor Vehicles Act, read with r. 10 framed thereunder.[49]

2. In the absence of such statutory requirement, the general rule laid down by *our* Supreme Court is that natural justice does not necessarily involve a right to oral hearing.[50]

"I am not prepared to accept the contention that a right to be heard orally is an essential right of procedure even according to the rules of natural justice. The right to defence may be admitted, but there is nothing to support the contention that an oral interview is compulsory."[50]

3. Whether oral hearing should be given or a written representation will meet the ends of justice will depend on the facts of each case .[51]

46. *Morgan* v. *U.S.*, (1936) 298 U.S. 468.

47. *F.C.C.* v. *W.J.R.*, (1949) 337 U.S. 274 (277).

48. *Kapur Singh* v. *Union of India*, A. 1960 S.C. 493 (495).

49. *State of Maharashtra* v. *Nurul Latif*, (1965) 3 S.C.R. 135 (143); *Nageswara* v. *A.P.S.R.T.C.*, A. 1959 S.C. 308 (320).

50. *Gopalan* v. *The State*, (1950) S.C.R. 88 (124); *T.N. Roy* v. *Collector of Customs*, (1957) S.C.A. 764; *Kapur Singh* v. *Union of India*, A. 1960 S.C. 493; *M.P. Industries* v. *Union of India*, A. 1966 S.C. 671 (675).

51. *Indru* v. *Union of India*, (1988) 4 S.C.C. 1.

In *J.P. Mitter's case,*[52] the Supreme Court held that since the Petitioner Judge had been given an opportunity to submit his case in writing, denial of an opportunity to submit oral arguments, even after request, did not violate the principles of natural justice. This decision is questionable from points more than one.[53] The Petitioner, a High Court Judge, lost his job (by way of premature retirement) because, by a determination under Art. 217(3) of the Constitution, the President held that the declaration about his age at the time of his appointment was false. The Court overlooked the fact that (a) the Petitioner was a Judge of the High Court who merited at least that consideration which would have been shown to a clerical employee in like circumstances;[54] (b) the determination of the age of a person was an objective fact relating to his status which could be determined by a suit, but for the constitutional amendment [inserting Cl. (3) in Art. 217], during the pendency of the proceeding against him; and (c) that he lost his office because of the adverse determination by the President.[55]

The most striking feature of the *J.P. Mitter decision*[52] is that there are conflicting observations. Even at the end of the judgment (para. 31) it is observed—

> "..... normally an opportunity for an oral hearing should be given to the Judge whose *age* is in question, and the question should be decided by the President on consideration of such materials *as may be placed* by the Judge concerned....."[52]

If so, it would be for the Court to point out the exceptional circumstances which did not require such oral hearing in *J.P. Mitter's case.*[52] The answer of the Court was that the evidence on the record (paras. 24-25) was simple and meagre and that "there were no complicated questions to be decided by the President". It is difficult to agree that the question of determination of the disputed age of a person, which is otherwise left to a civil suit under s. 9 of the Civil Procedure Code is not a complicated question so as to require an oral hearing of the person concerned.

It is difficult also to reconcile this decision[52] with some other Supreme Court decisions where oral hearing has been held to be essential for natural justice, where the determination of disputed questions of fact was involved:

(i) Where the problem is technical and complex and difficult questions are raised, such as the chemical composition of articles, for the purpose of applying the Central Excises and Salt Act.[56]

(ii) Where a statute requires an 'inquiry' before removal of an employee, such inquiry must be made in the presence of that employee, giving him an opportunity to rebut the allegations made against him.[57]

Right to be represented by counsel.

(A) *England.*—Where there is no right to an oral hearing,[58] no question

52. *Union of India* v. *J.P. Mitter,* A. 1971 S.C. 1093.

53. See full discussion in the judgment of Basu, J., in (1967) 71 C.W.N. 926 (1023).

54. Cf. *State of Orissa* v. *Binapani,* A. 1967 S.C. 1269 (paras. 6, 10, 11-12); *Union of India* v. *Verma,* A. 1957 S.C. 882 (885); *Registrar* v. *Dharam Chand,* A. 1961 S.C. 1743.

55. See comments in Author's *Commentary on the Constitution of India,* 6th Ed., Vol. H, pp. 241-53.

56. *Trav. Rayons* v. *Union of India,* A. 1971 S.C. 862 (para. 7).

57. *Dewan Singh* v. *State of Haryana,* A. 1976 S.C. 1921 (para. 8).

58. *Local Govt. Board* v. *Arlidge,* (1915) A.C. 120.

of the right to appear through a lawyer arises. But where there is a right to appear in person, the right to appear through a counsel is inferred,[59] in the absence of a statutory provision to the contrary.

Absence of legal representation, where technical questions of fact or law are involved, goes against an adequate opportunity to represent one's case, and the Franks Committee has, therefore, recommended[60] that the right of legal representation should not be curtailed save in exceptional circumstances. But it has not so far been implemented by any legislation.

On the other hand, Courts have conceded the validity of exclusion of legal representation in various cases :

i. Where the relevant rules exclude it.[61] In the absence of such rules a domestic tribunal has the discretion to allow such representation, which must be exercised in proper cases.[61]

ii. In general, it may be disallowed, at the trial stage, in disciplinary proceedings;[62] or before an investigating body.[63]

(B) *U.S.A.*—Outside the requirement of a statute [e.g. s. 6(a) of the Administrative Procedure Act, 1946], the right to appear through counsel must be deduced from the requirement of 'fair hearing' implied in the constitutional guarantee of due process.[64]

But, while in criminal proceedings it has been asserted as an absolute proposition[65] that the right to a hearing includes the right to be represented by a counsel when desired and provided by the party charged, it is not required as an invariable requirement of a fair hearing in an administrative proceeding where the administrative authority has a right to determine for himself how the investigation was to be conducted.[66] The right, in such proceedings, would depend upon the nature of the proceeding,[67] and there may be cases where the refusal of assistance of a counsel may tend to prove arbitrary conduct on the part of the administrative tribunal.

S. 6(a) of the Administrative Procedure Act, 1946, has set at rest the controversy as to cases where that Act applies, by giving the right to appear through a counsel to a person who has to appear before any administrative agency. It has been interpreted to mean the right to be represented by a counsel of one's own choice.[68]

(C) *India.*—1. In India, in general, the right to be represented by a counsel is not considered an ingredient of natural justice, unless required by a constitutional or statutory provision.[69]

2. But in a case of preventive detention, it has been held that if the

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59. *R.* v. *St. Mary Assessment Committee,* (1891) 1 Q.B. 378.
60. (1957) Cmnd. 218.
61. *Enderby Club* v. *FA,* (1971) 1 All E.R. 215 (219) C.A.
62. *Maynard* v. *Osmond (1),* (1977) 1 All E.R. 64 (C.A.)
63. *R.* v. *Race Relations Bd.,* (1975) 1 W.L.R. 1686 (C.A.).
64. *Golberg* v. *Kelly,* (1970) 397 U.S. 254; *Goss* v. *Lopez,* (1975) 419 U.S. 565 (574).
65. *Powell* v. *Alabama,* (1932) 287 U.S. 45; *Johnson* v. *Zerbst,* (1938) 304 U.S. 458.
66. *Bowels* v. *Baer,* (1944) 142 F. 2d. 787.
67. Gellhorn & Byse, *Administrative Law,* 1954, pp. 912-13; Forkosch, *Administrative Law,* 1956, pp. 329-30; cf. *U.S.* v. *Pitt,* (1944) U.S. F. 2d. 169.
68. *Backer* v. *Commr. of Internal Revenue,* (1960) 275 F. 2d. 141.
69. *Suk Das* v. *Union Territory of Arunachal Pradesh,* A. 1986 S.C. 991; *Hoskot* v. *State of Maharashtra,* A. 1978 S.C. 548.

department is represented by a lawyer, the detenu must be allowed to be represented by a lawyer.[70]

3. This principle has been extended to a disciplinary proceeding before a statutory authority.[71]

4. In a domestic inquiry the delinquent's right to be represented by a counsel may be conceded in cases where the charge is of a *serious or complex* nature.[72] But apart from such special circumstances, there is no right to be represented by a counsel unless the law specifically confesses such right.[72]

Exceptions to the requirements of notice and hearing.

While the normal rule is that a person whose civil rights are sought to be affected by administrative action is entitled to a notice and a hearing, the requirement may be excluded under certain exceptional circumstances e.g.—

(a) In cases where immediate action is called for;

(b) Where the statute lays down that the power should be exercised subjectively and not *quasi-judicially.*

We shall take up with these cases separately.

Speaking order

If rule directs to record reasons it is a *sine qua non* for a valid order. Writing of judgment is not necessary. Order with brief reasons is sufficient. Communication of the order to the affected person is necessary.[72a] Disciplinary authority examined the entire proceedings and applied his mind. Order of removal without recording reasons is not invalid.[72b]

Application of mind to the allegations made and explanation offered is necessary even though such application is not stipulated in the section.[72ba]

Application of mind is essential. Power is not unlimited even if not circumscribed by statute.[72bb] Order is passed in a typed pro-forma. It by itself does not indicate non-application of mind.[72bc]

State has statutory power to compulsorily retire a person in public interest. Order does not indicate consideration of public interest or ingredients of relevant rule. It is a case of non-application of mind and therefrom the order is had in law.[72bd]

Reasoned order

Decision of urgency in exercise of power under section 17(4) and dispensing with an enquiry under section 5A, Land Acquisition Act, 1894 by the Appropriate Government being an administrative decision a reasoned order is not necessary.[72c]

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70. *A.K. Roy* v. *Union of India,* A. 1982 S.C. 710.
71. *Bd. of Trustees* v. *Dilip,* A. 1983 S.C. 109.
72. *Crescent D.C.* v. *Ram,* (1993) 2 S.C.C. 115 (paras. 12, 17)—3 Judges.
72a. *M. J. Sivani* v *State,* (1995)6 S.C.C. 289 : A. 1995 S.C. 1770.
72b. *State Bank of Bikaner* v *Probhu Dayal,* (1995) 6 S.C.C. 279 : 1995 S.C.C. (L&S) 1376 : (1995) 31 A.T.C. 492.
72ba. *Tarlochan Dev* v. *State,* (2001)6 SCC 260: AIR 2001 SC 2524.
72bb. *A.P. S.R.T.C.* v. *State,* AIR 1998 SC 2621: (1998)7 SCC 353.
72bc. *State* v. *Ram Singh,* AIR 2000 SC 870: (2000)5 SCC 88.
72bd. *Rajat Baran* v. *State,* (1999)4 SCC 235: AIR 1999 SC 1661.
72c. *Union of India* v *Praveen Gupta,* (1997) 9 S.C.C. 78.

I. Natural justice in emergency action.

(A) *England.*—It has been held that in certain circumstances, condemnation of property cannot be done under the ordinary judicial procedure and that 'rapid and *summary* proceedings' must be taken, e.g., the condemnation of food unfit for human consumption and its destruction, under the (Eng.) Food and Drugs Act, 1938;[73] demolition of imminently dangerous buildings.[74]

Though in such cases, too, the exact procedure to be followed depends upon the provisions of the governing statute, the cases relating to the demolition of buildings illustrate the difference in the attitude of courts as between emergent and non-emergent circumstances.

(a) Where the order of demolition is simply to enforce the provisions of a statute against unauthorised constructions and there is no apprehension of imminent danger which might require a summary procedure, the courts would imply the requirement of a notice before demolition even though the statute be silent about it.[75-76]

(b) On the other hand, where a statute provided (s. 38 of the Manchester Improvement Act, 1867) that a municipal corporation might pull down or repair a building 'without notice or other formality', if the City Surveyor certified in writing that "there is imminent danger from" the building, the court held that the certificate of the Surveyor was *final* and not open to judicial review. Nor did the statute imply that the corporation could take action only after certificate of the Surveyor was first considered by the Corporation or a committee :[75]

> "It was necessary that some person should have power to form a judgement upon which *prompt action* could be taken."[74]

There are, of course, statutes which require the giving of a notice and opportunity to the person to be affected to be heard even in cases of this group, e.g., the (Eng.) Food and Drugs Act, 1938, and in such cases, the authority "has to bring qualities of impartiality and fairness" to bear on the problem, though it is acknowledged that such cases involve no *lis* and even when the function of condemnation is vested in a court, it exercises the function *'administratively'*.[73]

(B) *U.S.A.*—It has been acknowledged that though 'due process' requires a hearing before a person is deprived of his life, liberty or property, it is neither practicable nor necessary[77] to give such hearing in certain cases where emergent action is necessary to prevent immediate social injury.[78]

(a) The primary application of this principle has been in cases where summary destruction of property which has become imminently[79] dangerous to the safety, health[77] or morals of the public who might use them or might otherwise be affected by it, e.g., food in cold storage which has become unfit for human consumption;[80] impure milk;[78] property causing or likely to cause a public nuisance for which abatement[81] is permissible under the general law; injurious drugs.[82]

73. *R.* v. *Cornwall Quarter Sessions,* (1956) All E.R. 872 (875).
74. *Cheetham* v. *Mayor of Manchester,* (1875) 10 C.P. 249 (269).
75. *Cooper* v. *Wandsworth Board of Works,* (1863) 14 C.B. (N.S.) 180 (194).
76. *Hopkins* v. *Smethwick Local Board,* (1890) 24 Q.B.D. 712 (714).
77. *North American Cold Storage Co.* v. *Chicago,* (1908) 211 U.S. 306; *Hodel* v. *Virginia Mining,* (1981) 452 U.S. 264.
78. *Adams* v. *Milwaukee,* (1913) 228 U.S. 572.
79. *Southern Ry. Co.* v. *Virginia,* (1953) 290 U.S. 190.
80. *North American Cold Storage Co.* v. *Chicago,* (1908) 211 U.S. 306.
81. *Lawton* v. *Steele,* (1894) 152 U.S. 133; the Court has expressed its unwillingness to extend it to things of a higher value [*Ashon* v. *Board of Commrs.,* (1913) 229 U.S. 606 (denying *cert.*)].
82. *Ewing* v. *Mytinger & Casselberry,* (1950) 339 U.S. 594.

In such cases, the court excludes the statutory or administrative action from the requirement of a hearing as a *condition precedent* to the deprivation of property on two grounds :

(i) That it was not practicable to give the owner a notice and hearing without causing serious danger to the public in the meantime.[78] Thus, if contaminated milk is allowed to remain in the depots, it would be "reeking and rotting, a breeding place for pathogenic bacteria and insects during the period necessary for notice to the owner, and resort to judicial proceedings".[80] In such conditions summary destruction is the 'only availabe' remedy to save the public from grave injury.

(ii) That due process is not really denied if it is offered at any stage, and that in cases where summary action is necessary, due process is complied with by offering a hearing in court *after* condemnation,[77] in an action for tort at the instance of the party aggrieved.[80]

"If a party cannot get his hearing in advance of the seizure and destruction, he has the right to have it afterwards, which right may be claimed upon the trial in an action brought for the destruction of his property, and in that action those who destroyed it can only successfully defend if the jury shall find the fact of unwholesomeness as claimed by them."[80]

Or, more explicitly,

"..... it is not a requirement of the due process that there be judicial inquiry *before discretion can be exercised.* It is sufficient, where *only property rights are concerned,* that there is *at some stage* an opportunity for a hearing and a judicial determination."[80]

This is, however, a quibble and, if pursued to its logical extreme, might obviate the need for a hearing before condemnation in any case whatever. It runs counter to the basic principle that the demands of due process require the requisite hearing to be held "before the final order becomes *effective*".[83] The principle can be acknowledged only as an exception, founded on the emergency of the situation, to the general rule propounded in the *Morgan case* :[84]

"Those who are brought into contest with the Government in a *quasi-judicial* proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposed and to be heard upon its proposals *before it issues* its final command."[84]

It follows from the above that the power of summary destruction cannot be availed of where the danger is not 'imminent' and it is possible, without public danger, to give the person affected a hearing, e.g., in the case of removal of a railway grade crossing in order to construct an overhead passage for the safety and convenience of the public.[85] Of course, the court does not interfere if the emergency is "one which would *fairly* appeal to the *reasonable* discretion of the Legislature";[82] but it seems that the court would distinguish between property which is inherently dangerous or which can be used only for an illegal purpose, and property which is innocent in its ordinary use but becomes obnoxious when used for an illegal purpose.

(b) A converse case is the interest of protecting other person's property by destroying one's property which is infected with contagious disease, pests and the like;[86] or by pulling down a house which has caught fire.[87]

83. *Opp. Cotton Mills* v. *Administrator,* (1941) 312 U.S. 126 (152).
84. *Morgan* v. *U.S.,* (1938) 304 U.S. 1.
85. *Southern Ry. Co.* v. *Virginia,* (1933) 290 U.S. 190.
86. Cf. *Miller* v. *Schoene,* (1928) 276 U.S. 272.
87. *Miller* v. *Horton,* (1891) 152 Mass. 540.

(c) In some cases, the urgency of the situation and the magnitude of the public danger involved justifies a *seizure* and taking possession of property or business without prior hearing. In such cases, 'due process' is held to be complied with by giving a hearing after the seizure has taken place, e.g., where a loan association[88] or bank[89] is pursuing a course of action which is injurious to the public and it is necessary to take over the management by the State immediately,[88] in view of the "*impossibility* of preserving credit during an investigation".[88]

(C) *India.*—In India, it has been generally acknowledged that in cases of extreme urgency, where public interest would be jeopardised by the delay or publicity involved in a hearing, a hearing before condemnation would not be required by natural justice, e.g., where a dangerous building has to be immediately demolished in order to save human life,[90] or a reckless company has to be wound up to save depositors;[91] or there is an imminent danger to the security of the State or the public peace.[92] Temporary suspension of a dealer's licence in case of acute shortage of foodstuff.[93]

But even in such cases, the court would insist upon a *post-decisional* hearing, wherever possible,[94-95] e.g., in the matter of impounding a passport;[94] or cancelling a poll, and ordering a re-poll *in toto*, owing to violent activities or the like.[95] In such cases, if a notice is given after the decision is taken, the party affected may make a representation setting forth his case and plead for setting aside the action proposed,[94] and thus natural justice would be satisfied.

A *post-decisional* hearing would suffice—

(a) In cases of urgency,[96] or where the giving of a prior notice would defeat the very object of the action;

(b) Where the function is purely administrative[97] and the principle of prior hearing as required by natural justice does not apply and yet the requirement of 'fairness' must be complied with.[97-98]

But a prior hearing must be given where an administrative action will result in *civil consequences* to the party to a dispute,[97] even though the statute is silent as to the procedure to be adopted.[98]

Of course, an express statutory provision may exclude the requirement of prior hearing. But, though not excluding the rule of hearing, the statute may itself provide for a full review of the administrative action, in which case the court may imply that the statute contemplates a *post-decisional* hearing.[97,99] In that case, the constitutional requirements of Arts. 14, 19 and 21 would be satisfied by a *post-decisional* hearing.[99]

88. *Fahey* v. *Mallonee,* (1947) 332 U.S. 245.
89. *Savings & Commercial Bank* v. *Anderson,* (1915) 238 U.S. 611.
90. *Nathubhai* v. *Bombay Corp.,* A. 1959 Bom. 332 (338); *Ajit* v. *Corp. of Calcutta,* A. 1956 Cal. 411.
91. *Joseph* v. *Reserve Bank of India,* A. 1962 S.C. 1371.
92. *Babulal* v. *State of Maharashtra,* A. 1961 S.C. 884; *Sadhu Singh* v. *Delhi Admn.,* A. 1966 S.C. 91.
93. *Sukhwinder* v. *State of Punjab,* A. 1982 S.C. 65.
94. *Maneka* v. *Union of India,* A. 1978 S.C. 597 (para. 63).
95. *Mohinder* v. *Chief Election Commr.,* A. 1978 S.C. 851 (para. 55).
96. *Liberty Oil Mills* v. *Union of India,* A. 1984 S.C. 1271 (paras. 15, 42, 76) 3 Judges.
97. *Neelima* v. *Harinder,* (1990) 2 S.C.C. 746 (paras. 19, 22-23).
98. *Nally* v. *State of Bihar,* (1990) 2 S.C.C. 48 (paras. 13, 19, 20).
99. *Charan* v. *Union of India,* A. 1990 S.C. 1480 (para. 109) C.B.

II. Statutory exclusion of hearing.

The question under the present head is whether, though a *quasi-judicial* obligation to hear the parties may arise under common law in view of the nature of the function, such obligation can be excluded by legislation.

(A) *England.*—In England, because of the legislative sovereignty of Parliament being absolute, it is competent for Parliament to exclude the principles of natural justice and it is beyond the competence of the Courts to invalidate a law itself on the ground that its provisions are contrary to the principles of natural justice.

"An Act of Parliament may be so worked as *expressly* to authorise a procedure inconsistent with the principles of justice recognised by the common law of England. Parliament is omnipotent."[100]

But though, in England, it is not competent for the court to declare a law as invalid on the ground of violation of the rules of natural justice, the court can so interfere with subordinate legislation, on the plea of *vires*, by holding that the statute has created an authority with a *quasi-judicial* obligation so that a subordinate legislation made under the statute cannot dispense with *any* hearing (though it may exclude oral hearing, which is not a necessary ingredient of natural justice).[1]

(B) *U.S.A. and India.*—In the U.S.A. and in India, the powers of the Legislature being limited by the Constitution a statutory exclusion of natural justice may, in certain cases, render such law unconstitutional, on the ground that the denial of notice or hearing renders the restriction upon a fundamental right 'unreasonable'[2-3] e.g., under Art. 14 or 21 of the Indian Constitution, which requirement cannot be dispensed with by ordinary legislation.[4]

In the absence of any such constitutional requirement, natural justice may be excluded by statute.[5]

Though the cases of statutory exclusion are of various kinds, an attempt may be made to classify them under some broad heads :

(i) *Emergency legislation.*

1. The (Eng.) Emergency Powers (Defence) Act, 1939, authorised the Government to make Regulations under the Act "for the detention of persons whose detention *appears* to the Secretary of State to be *expedient* in the interest of public safety or the defence of the realm.

Emergency legislation.

Repelling the contention that the legislation which encroached upon the liberty of the subject should be construed in favour of the subject, the House of Lords held that the legislation was a war measure relating to the safety of the nation itself which required a "drastic" invasion of the liberty of the subject", and Lord Maugham observed that under the statute and the Regulation made thereunder the Secretary of State was under no duty to give prior notice or opportunity to be heard.[6]

2. The Peace Preservation Ordinance of the Gold Coast empowered the Governor-in-Council to order that the inhabitants of a proclaimed area

100. *R.* v. *Local Government,* (1914) 1 K.B. 160 (175).
1. *R.* v. *Housing Appeal Tribunal,* (1820) 3 K.B. 334.
2. Cf. *Goldberg* v. *Kelly,* (1970) 397 U.S. 254.
3. Cf. *Virendra* v. *State of Punjab,* A. 1958 S.C. 896 (906).
4. *Baldev* v. *State of H.P.,* A 1987 S.C. 1239; *Mohinder* v. *C.E.C.,* A. 1978 S.C. 851; *A.R.P.S.* v. *State of Assam,* (1989) 4 S.C.C. 496.
5. *Union of India* v. *Sinha,* A. 1971 S.C. 40.
6. *Liversidge* v. *Anderson,* (1942) A.C. 206 (221).

should be charged with the cost of additional police and that a District Commissioner shall, *"after inquiry, if necessary,* assess the proportion in which such cost is to be paid by the inhabitants *according to his judgement* of their respective means". The Privy Council unheld the validity of an order of a Deputy Commissioner under this provision, assessing the liability without giving to the inhabitants within this area any opportunity of being heard, with the observation :

"Their Lordships realise that if this appeal fails the appellant will be deprived of a part of his property without having had an opportunity of being heard ..... but this unusual situation arises from *legislation couched in unusual terms and designed to meet ..... an unusual situation".*[7]

3. In *India,* legislation similar to the English Act of 1939 was enacted as the Defence of India Act, 1962. Rr. 29-30 of the D.I. Rules empowered the Executive to make orders for externment for the maintenance of public order. No hearing was necessary for the purpose of making such order to direct the removal, detention, externment, internment and the like of any person, if it is 'satisfied' that such order was necessary for the defence or efficient conduct of military operations and maintenance of public order.

(ii) *Where summary action is necessary.*

(A) *England.*—Apart from the emergencies affecting the security of the State or public order, notice or hearing may be excluded by the Legislature where immediate action is necessary to save human life or property, e.g., by pulling down a dangerous building (s. 38 of the Manchester Improvement Act, 1967), destruction of infected crops.

(B) *U.S.A.*—The cases where immediate action, such as the destruction of property, is necessary to save the public from imminent danger, e.g., adulteration of food, spreading of contamination, have already been noticed. In these cases, the law is not held to be unconstitutional, on the assumption that 'due process' is, in the circumstances of the cases, satisfied by affording an opportunity for hearing *after* condemnation[8] or seizure,[9] say, in a legal action against the administrative authority if the condemnation has been unlawful.

Where summary action is necessary.

Instead of making a final order without hearing, a temporary action (in the nature of an interlocutory order in a judicial proceeding), such as a suspension of a licence, may be necessary, without a full hearing, in order to avert immediate injury to the public. In such cases, 'due process' is satisfied by offering a full hearing before the *final* order is made.[10] Of course, such legislation may be struck down as offending 'due process' if *no* safeguard is provided against arbitrary action.[11]

(C) *India.*—Similarly, in *India,* the Courts have, on the ground of the need for immediate action, upheld the validity of laws conferring power on administrative authorities to act, on their subjective satisfaction without a hearing—

(a) to demolish a dangerous building;[12]

7. *Patterson* v. *District Commr.,* (1948) A.C. 341 (348).
8. *Northern American Cold Storage* v. *Chicago,* (1908) 211 U.S. 190.
9. *Fahey* v. *Mallonee,* (1947) 322 U.S. 245.
10. *F.P.C.* v. *Natural Gas Pipeline Co.,* (1942) 315 U.S. 757; *Ewing* v. *Mytinger,* (1950) 339 U.S. 594.
11. *Standard Airlines* v. *Civil Aeronautics Board,* (1949) 177 F. 2d. 18.
12. *Nathubhai* v. *Municipal Corpn.,* A. 1958 Bom. 332 [s. 354, Bombay Municipal Corporation Act, 1888]; *Ajit* v. *Corpn. of Calcutta,* A. 1956 Cal. 411.

(b) to wind up a banking company in order to save depositors;[13]

(c) to prohibit a procession or meeting for the preservation of an imminent breach of the peace;[14]

(d) to regulate or prohibit trades or occupations which are *inherently dangerous* to the community.[15]

On the other hand,—where there is no necessary connection with the prevention of an *immediate* breach of the peace, e.g., in the matter of prohibiting the entry of publication of any literature in a particular area, the Supreme Court has held that a law conferring such power on the subjective satisfaction of the Government or any other administrative authority, without providing for the opportunity to the party affected to make a representation would be struck down as an unreasonable restriction upon the fundamental right guaranteed by Art. 19(1)(a).[16]

But even in cases where urgent action is needed, the Court may insist on a *post-decisional* hearing, wherever possible, e.g., for impounding a passport.[17]

(iii) *Planning and development legislation.*

Development legislation.

In *England*, the Town and Country Planning Act, 1947, empowered the Minister to make an order, if "satisfied that it is expedient in the public interest that the board should acquire any land", "for the purpose of disposing of it for development for which permission has been granted under Part III of this Act". An order made under this provision was challenged as invalid on the ground that the persons who had applied for the permission were not owners of the land and the planning authority, in granting the permission, had not notified the true owner of the land. There was no provision in the Act for the giving of notice or for a hearing, but it was contended that the proceedings before the planning authority were of a *quasi-judicial* nature and that an opportunity of being heard should have been given by the authority to the persons going to be affected by the order. Replying to this contention, it was observed that even if the proceedings before the planning authority might be in the nature of judicial proceedings, "one must look at the legislation which is in question and see whether under that legislation it is required that persons or any particular person should be notified and be heard".[18]

In *India*, statutes conferring power upon the Executive to acquire or requisition any land, on its subjective opinion as to its necessity,[19] come under this head.

The foregoing decisions may be expected to be reconsidered ere long,

13. *Joseph* v. *Reserve Bank of India*, A. 1962 S.C. 1371.
14. *Babulal* v. *State of Maharashtra*, A. 1961 S.C. 884.
15. *Cooverjee* v. *Excise Commr.*, (1954) S.C.R. 873.
16. *Virendra* v. *State of Punjab*, A. 1957 S.C. 896 (903).
17. *Maneka* v. *Union of India*, (1978) 1 S.C.C. 248; *Mohinder* v. *Election Commr.*, (1978) 1 S.C.C. 405 (432); *State of Punjab* v. *Gurdial*, A. 1980 S.C. 319.
18. *Hanily* v. *Minister of Local Govt. & Planning*, (1952) 1 All E.R. 1293. [It is interesting to note that *Cooper* v. *Wandsworth Board of Works*, (1863) 14 C.B. (N.S.) 180 (194), was not cited at all, though the present case was also one of omission of the Legislature to provide for a notice or hearing where rights of property were going to be affected].
19. Cf. *Prov. of Bombay* v. *Khusaldas*, (1950) S.C.R. 621.

because both in *England*[20] and in *India*,[21] it is now settled that the natural justice requirement of hearing may not necessarily be excluded merely because a function has been made discretionary and that even where there is no legal right to a hearing, the person to be affected in his civil rights may have a reasonable expectation of hearing before being condemned where a good administration would require such a fair deal.[20] Of course, in cases of urgency, a *post-decisional* hearing would satisfy natural justice.[17]

Exclusion of natural justice by necessary implication.

1. The requirement of natural justice may be excluded by the relevant statute either expressly or by necessary implication.[22]

2. Such implication may be made, e.g.—(a) Where the statute classifies different situations and while, in some cases, it makes it obligatory to give a hearing to the party to be affected by the proposed order, in some other specified circumstances, such as an emergency or the avoidance of public injury, no such hearing is required because of the nature of the exceptional situation.[23] But this is not impelling where civil consequences are inflicted.[24]

(b) Where the giving of notice for hearing would frustrate the very object of the statute (which does not expressly require such notice), e.g., where in the interest of public health and safety, it is necessary to destroy obnoxious food or to remove persons suffering from contagious diseases,[23] cases under s. 133 of the Cr. P. Code or s. 17, Land Acquisition Act.[25]

(c) Where the nature of the function implies a *policy* decision.[26]

(d) Academic adjudication by way of assessment of the performance of a student by means of examination negatives any right to an opportunity to be heard. In the absence of bias or *mala fides*, the court cannot interfere.[27]

(e) In cases of need for urgent action, a pre-decisional hearing may be excluded by implication where the statute offers a *post-decisional* hearing by way of cancellation of that order.[25-28]

(f) An overall limit to the application of natural justice is that the doctrine should not be 'unnaturally expanded' so as to result in what is antithetical to justice.[29] Thus, in a writ proceeding challenging an order to termination of service on the ground that the report of the Inquiry Officer was not furnished to the employee, the Court has to find whether, in fact, prejudice has been caused to the employee, in the circumstances of the case,

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20. *A.G. of Hong Kong* v. *Ng Yuen*, (1983) 2 All E.R. 346 (350) P.C.; *O'Reilly* v. *Mackman*, (1982) 3 All E.R. 1124 (1126-27) H.L.

21. *Rampur Distillery* v. *Company Law Bd.*, (1969) 2 S.C.C. 774 (779); *Raja Anand* v. *State of U.P.*, A. 1967 S.C. 1082 (1085); *Swadeshi Cotton Mills* v. *Union of India*, A. 1981 S.C. 818 (paras. 57, 63-65).

22. *Union of India* v. *Sinha*, A. 1971 S.C. 40.

23. *Dy. Secy.* v. *Moying*, A. 1983 Gau, 54 (para.7); *Bhuban* v. *State of Assam*, A. 1972 Gau. 41 (para. 9).

24. *Kapoor* v. *Jagmohan*, A. 1981 S.C. 136 (paras. 10-11, 16-17).

25. *Swadeshi Cotton Mills* v. *Union of India*, A. 1981 S.C. 818 (paras. 31, 35, 42, 55, 105).

26. *Saxena* v. *State of Haryana*, A. 1987 S.C. 1463 (para. 6)—3 Judges.

27. *J.N.U.* v. *Narwal*, A. 1980 S.C. 1666.

28. *Mohinder* v. *Chief Election Commr.*, A. 1978 S.C. 851 (para. 91); *Maneka* v. *Union of India*, A. 1978 S.C. 597 (para. 63).

29. *Managing Director* v. *Karunakar*, (1993) 4 S.C.C. 727 [para. 30(v)] C.B.; *U.O.I.* v. *Chadha*, (1993) Supp. 4 S.C.C. 260 (280).

by non-supply of the report. If the Court finds that even after furnishing the copy, no different consequence would have followed, it would be a *perversion* of justice to permit the employee to resume duty and to get all consequential benefits.

On the same principle, there is no violation of natural justice on the ground of absence of hearing, where the delinquent, charged with malpractices at an examination, knew the charges fully and had committed his guilt.[30]

(g) No hearing would be required where the impugned order is, in fact, beneficial to the petitioner or it has been made to rectify a mistake, *e.g.*, to revoke an order which has been passed in violation of a Court order;[30a] or for making an order of transfer of an employee which is not punitive but is made for the exigencies of the administration.[30b]

3. But an implication to exclude natural justice should not be made unless the case for such implication is irresistible, because the courts act on the presumption that the Legislature intends to act in accordance with the principles of natural justice; the statutory provision must, therefore, be read consistently with the requirements of natural justice, if possible.[22]

4. Even in cases of urgency, the requirement to act *fairly* remains, so that the court has to make an adjustment between the need of expedition and the need to give full opportunity to the party affected,[31] e.g., by insisting upon *minimal* natural justice, such as a mere notice or a *post-decisional* hearing, wherever possible,[28] i.e., except where the giving of any such opportunity would paralyse the administrative process.[32]

5. On the other hand, obligation of natural justice, to offer to the person proceeded against an opportunity to represent against the proposed action, is not to be excluded by implication—

(a) Merely because the facts or allegations are admitted,[24] except where on such admitted or indisputable facts *only one* conclusion is possible, and under the law only one penalty is permissible, so that it would be futile for the court to issue a futile writ[24] to give an opportunity to the person affected to explain such facts, by way of an empty formality.

(b) Merely because it would have made any difference if the person affected were given an opportunity, where the facts are controversial or the penalty is discretionary.[24] It is not necessary for the person who complains of a violation of natural justice to further show that he has actually been prejudiced by such violation.[33]

III. Matters relating to the conduct of military, naval or foreign affairs.

(A) *U.S.A.*—S. 5 of the Administrative Precedure Act, 1946, excludes from its procedural requirements any case which 'involves the conduct of military, naval or foreign affairs functions'. The result is that even where a statute relating to such affairs requires a hearing, such hearing need not conform to the general procedural requirements of the Administrative Procedure

30. *Controller* v. *Sunder*, (1993) Supp. (3) S.C.C. 82.
30a. *Ram* v. *U.P.P.S.T.*, (1994) 5 S.C.C. 180 (para 9).
30b. *Director* v. *Karuppa*, (1994) Supp. (2) S.C.C. 666 (para. 2).
31. *Wiseman* v. *Borneman*, (1971) A.C. 297; *Howard* v. *Borneman*, (1974) 3 All E.R. 862; *Duryappah* v. *Fernando*, (1967) 2 All E.R. 152 (H.L.).
32. *State of Punjab* v. *Gurdial*, A. 1980 S.C. 319.
33. *Annamunthodo* v. *Oilfields Union*, (1961) 3 All E.R. 621 (625) P.C.; *R.* v. *Thames Magistrate*, (1974) 2 All E.R. 1219 (Q.B.D.).

Act, 1946. On the other hand, the Supreme Court has liberalised the restriction imposed by the above exception by holding that in cases where the *Constitution* requires a hearing, the procedure under s. 5 must be[34] followed even though the governing statute may not require a hearing.

As to the constitutional requirement of 'Due Process', the position is not quite clear, but the trend seems to be towards including within the fold of 'Due Process' cases where 'issues basic to human liberty and happiness' are involved even in these security spheres. Thus, it has been held that *deportation* requires a hearing according to 'Due Process' and in conformity with the provisions of the Administrative Procedure Act, relating to 'administrative adjudication'.[34]

(B) *England.*—Where the public interest is likely to be prejudiced by the disclosure of information, the rule of *audi alteram partem* is excluded, e.g., in the matter of acquisition of land for defence purposes.[35]

IV. Expulsion of a foreigner.

(A) *U.S.A.*—In the *U.S.A.* a distinction has been made by the courts as between exclusion and deportation of aliens. While the Sovereign's right to refuse admission to an alien is not considered to be subject to judicial review,[36] additional rights and privileges have been conceded to an alien sought to be deported after he has entered the United States with the leave of the Government. A deportation order has, accordingly, been held subject to 'due process', so that the alien is entitled to a hearing[34] and a 'solidity of proof' is required when the person sought to be deported has lived in the U.S.A. for a long time.[37] Hence, a deportation order is subject to judicial review on the ground of violation of 'due process' even though the statute has not provided for a hearing[36] and even though the statute itself is not subject to the constitutional inhibition against *ex post facto* legislation, deportation being considered to be a 'civil proceeding'.[38]

(B) *England.*—In England, the subject of deportation of aliens is now governed by the Aliens Restriction (Amendment) Act, 1919, and the Aliens Order, 1953, made under it. This Order gives subjective power to the Home Secretary to order the deportation of "an undesirable alien *if he considers* it conducive to the public good".

In earlier cases it was held that the merits of a deportation order are not subject to judicial review as the power is committed to the discretion of the Home Secretary.[39] Being an administrative act, it is not subject to *certiorari,*[40] and the Home Secretary need not give the alien any opportunity of leaving the country voluntarily, or to give reasons before making the order of deportation.[41]

But the Privy Council has recently held[42] that the removal order cannot be *executed* without giving the alien an opportunity of being heard. The rule

34. *Wong Yang* v. *McGrath,* (1950) 339 U.S. 33.
35. *Hutton* v. *Att.-Gen.,* (1927) 1 Ch. 427 (439).
36. *Shaughnessy* v. *U.S.,* (1953) 345 U.S. 206 (212).
37. *Rowoldt* v. *Perfetto,* (1957) 335 U.S. 115 (120).
38. *Lehman* v. *Carson,* (1956) 353 U.S. 685 (690).
39. Ex parte *Venicoff,* (1920) 3 K.B. 72.
40. *R.* v. *Governor of Brixton Prison,* (1963) 2 Q.B. 243.
41. Ex parte *Sliwa,* (1952) 1 All E.R. 187 (C.A.).
42. *A.G. of Hong Kong* v. *Ng Yuen,* (1983) 2 All E.R. 346 (352) P.C.

of fair hearing, it has been observed, is a criterion of good administration and it would make no difference whether the person affected is a citizen or an alien.[42]

(C) *India.*—In India, the statute law and the Courts have made a distinction between extradition and expulsion.

The Extradition Act makes provision for magisterial inquiry and the order is subject to judicial review for enforcing compliance of the statutory provisions relating to the proceeding which is regarded as of a penal or *quasi-criminal* nature.[43]

S. 3 of the Foreigners Act, 1946, however, provides—

"The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigners, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein."

As has been pointed out by the Supreme Court,[43] the above provision gives "absolute and unfettered discretion" to the Central Government and the power is not subject either to any conditions or to any procedure laid down in the statute. The Constitution also affords no protection, because the provisions of Art. 19 are not applicable to a foreigner. In the result, "as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains",[43] and, it is obvious, there is no scope for judicial review, except on the ground of *mala fides,* which hardly means anything in reality.

V. Termination of public employment.

As will be just shown, the law on this subject in *India* is much in advance of that in England or in the United States in view of the requirements of Art. 311(2) of *our* Constitution.

(A) *U.S.A.*—S. 5 of the Administrative Procedure Act, 1946, specifically exempts cases relating to the 'tenure of an officer or employee of the United States ....', from the requirements of notice and hearing laid down in the statute. The constitutional guarantee of 'due process' (whether substantive or procedural) has also been held to be inapplicable to the tenure of civil servants, on the ground that "the criterion for retention or removal of subordinate employees is the confidence of superior executive officials".[44-45]

In the result, in the absence of any specific statutory provision, there is no requirement of a hearing before terminating the services of a federal civil servant,[46] and he may lose his job on the unconfronted evidence of an 'unknown witness'.[44]

Some exceptions have, however, been engrafted by statute :

(i) The Civil Service Act, 1946, requires that in order to terminate the service of an employee 'in the classified civil service of the United States', the employee must be given notice, a copy of the charges and an opportunity to answer the charges in writing.[47] But there is no provision for any *hearing* and the competent authority can dismiss an employee even on suspicion, provided the procedural requirement of an opportunity of giving an answer to the charges is offered.[44]

43. *Hans Miiller* v. *Superintendent,* (1955) 1 S.C.R. 1284 (1299).
44. *Bailey* v. *Richardson,* (1951) 341 U.S. 918.
45. *Washington* v. *McGrath,* (1951) 341 U.S. 923.
46. *Croghan* v. *U.S.,* (1950) 89 F. Supp. 1002.
47. *Carter* v. *Forrestal,* (1949) 338 U.S. 832.

(ii) The war veterans to whom the Veteran Preference Act of 1944 applies are in a better position inasmuch as this statute lays down that a war veteran can be removed only for 'a cause'.[48] The court can, therefore, interfere if the charges are not sufficiently specific to provide a fair opportunity of refutation or the charges are not based on substantial evidence or an opportunity for cross-examining the State witnesses is not given to the employee,[49] provided a timely request is made by the employee for such purpose.[50]

(B) *England.*—Similarly, in England,—since service is held at the pleasure of the Crown,—there is no procedural requirement in the absence of statutory provisions[51] and the courts cannot interfere on the ground that the rules of natural justice have been violated.[52]

(C) *India.*—The position of civil servants in *India* is better in view of the specific constitutional requirement in Art. 311(2) that the civil servant must be given "a reasonable opportunity of showing cause against the action proposed"[53] before he can be "dismissed or removed or reduced in rank". It is interesting to note that this requirement of reasonable opportunity has been equated by the Supreme Court to the requirements of natural justice, requiring a trial type of hearing.[54-55] The Supreme Court has thus explained what 'natural justice' requires in a case falling under Art. 311(2) of the Constitution :

"Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witness examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them."[55]

The Court has laid down that this 'reasonable opportunity' means that an opportunity must be given to the delinquent employee at two stages,[56] (i) once at the inquiry stage, where the delinquent must be given a reasonable opportunity to defend himself against the charges and to establish his innocence; and (ii) again, after the inquiry, to show cause against the punishment that is proposed by the disciplinary authority upon his findings on the charges.

By the Constitution (Fifteenth Amendment) Act, 1963, the foregoing principles of natural justice deduced by the Supreme Court from the expression 'reasonable opportunity of showing cause' were codified, by substituting Cl. (2) of Art. 311 as follows :

"No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges *and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry.*"

48. *Friedman* v. *Schwellenbach,* 331 U.S. 865.
49. *Viteralli* v. *Seaton,* (1958) 359 U.S. 535.
50. *Williams* v. *Zuckert,* (1962) 371 U.S. 531.
51. *Gould* v. *Sturiat,* (1896) A.C. 575.
52. *Rodwell* v. *Thomas,* (1944) All E.R. 700 (703).
53. This expression was used in the original clause (2) of Art. 311, which has been replaced by the amendment of 1963, by a more elaborate phraseology.
54. *John* v. *State of T.C.*, A. 1955 S.C. 160.
55. *Union of India* v. *Verma,* A. 1957 S.C. 882.
56. *Khem Chand* v. *Union of India,* A. 1958 S.C. 300; *Hukam Chand* v. *Union of India,* A. 1959 S.C. 536.

The italicized words in Cl. (2) have been subsequently omitted by the Constitution (42nd Amendment) Act, 1976, doing away with the 2nd show-cause stage.[57]

VI. Termination of employment under statutory authorities.

A. *England.*

(i) Where a statute lays down a procedure for the termination of an employment under a statutory authority, the rule of *ultra vires* is obviously attracted, so that if there is any contravention of the procedure so laid down, the termination would be unlawful, with all the incidents following from breach of a statutory duty.[58]

(ii) Even where no procedure is laid down, if the statute confers a power to dismiss for 'a cause', e.g., negligence or unfitness,[59] such power can be exercised only after informing the delinquent of the charges and affording him opportunity to defend himself against the charges, in consonance with the requirements of natural justice,[59-60] otherwise the dismissal would be void.[60]

(iii) But apart from the intervention of a statute, in any of the foregoing respects, the position of the employee of a statutory authority is no better than that of a servant under common law, and he is not entitled to anything save a reasonable notice before termination of his services.[61] Further, the absence of any such notice (which is required by common law to enable the employee to find out an alternative employment) does not render the termination of service a nullity, and the only remedy of the employee is an action for damages for wrongful dismissal.[62]

B. *India.*

(i) Where the relevant statute lays down a procedure for termination e.g., that sanction of a specified authority is to be obtained or notice for a specified period is to be given, a termination of service without complying with such requirement renders the termination *ultra vires*,[63] as in England.

(ii) Where the statute provides that the employee must be given an opportunity of defending himself against the charges when he is sought to be dismissed on the ground of misconduct, the principles of natural justice are imported by the court in interpreting such statutory requirement.[64]

(iii) It is now established that where the power to *dismiss* an employee is derived from a statute, either expressly or by implication from the power to appoint (under s. 14 of the General Clauses Act),[65] even though the statute is silent as to the procedure to be adopted for such dismissal, such power can be exercised only after due inquiry held in a manner consistent with

57. See, further, Author's *Shorter Constitution of India*, 10th Ed., pp. 851 *et seq.*

58. *McClelland* v. *N. Ireland General Health Services Bd.*, (1957) 2 All E.R. 129; *Barber* v. *Manchester Hospital Bd.*, (1958) 1 All E.R. 322 (332); *Cooper* v. *Wilson*, (1937) 2 All E.R. 726 (C.A.).

59. *Osgood* v. *Nelson*, (1872) L.R. 5 H.L. 636 (646, 649).

60. *Ridge* v. *Baldwin*, (1964) A.C. 40 (H.L.).

61. *Crediton Gas Co.* v. *Crediton U.D.C.*, (1928) Ch. 174.

62. *Vine* v. *National Dock Labour Bd.*, (1956) 3 All E.R. 939 (948) H.L.; *Vidyodoya University* v. *Silva*, (1964) 3 All E.R. 865 (867) P.C.

63. *Tewari* v. *Dt. Board.* A. 1964 S.C. 1680.

64. *Mafatlal* v. *Divisional Commr*, (1966) 3 S.C.R. 40 (44).

65. *Bool Chand* v. *Kurukshetra University*, A. 1968 S.C. 292 (296-97).

the rules of natural justice[65] because of the *nature of the function*, which deprives the employee of his means of livelihood.[66]

It is to be noted that this principle has been applied by *our* Supreme Court[65] even in a case where the statute did not lay down that the termination could be made only for a specified 'cause'. In this respect, *our* Supreme Court appears to have gone in advance of the English decision in *Ridge* v. *Baldwin*.[67]

S. 1(4) of the Kurukshetra University Act, 1956, empowers the Chancellor to appoint a Vice-Chancellor "for a period of three years which term may be renewed". There was no provision for termination of the services of the Vice-Chancellor. Nevertheless, it was held that a power to dismiss was implied in the statutory power to appoint and that, though the statute did not provide any procedure for such dismissal, the Chancellor could exercise the power to dismiss only for a good cause and in consonance with the principles of natural justice. The Court observed—

"The power to appoint a Vice-Chancellor has its source in the University Act; investment of that power carries with it the power to determine the employment; but the power is coupled with duty. The power may not be exercised arbitrarily; it can be only exercised for a *good cause*, i.e., in the interests of the University and only when it is *found after due inquiry* held in a manner consistent with the rules of natural justice, that the holder of the office is unfit to continue as Vice-Chancellor."[65]

On the other hand,—

Outside the cases of public employment governed by Art. 311(2), where a statute says that the holder of an office is to hold his office (e.g., that of the Chairman of a Board) 'at the pleasure of' the Government', no notice is required before terminating the tenure of his service.[68]

Natural justice in purely administrative proceedings?

There was a consensus on the proposition that the doctrine of natural justice is applicable only to judicial and *quasi-judicial* proceedings and not to purely administrative proceedings.[69-70]

The modern view, since the House of Lords decision in *Ridge* v. *Baldwin*,[60] however, is that to say that a statutory function is not *quasi-judicial* but administrative is not to say that such authority "has not to observe the rules of a fair play".[71-72] If such observations as to 'fair play' mean that the administrative authority has to comply with all the requirements of natural justice, the result would be to obliterate the distinction between administrative and *quasi-judicial* functions and all the struggle of the courts to distinguish the two functions must be said to have been unmeaning. In the Author's opinion, such observations cannot mean anything other than that all *statutory powers*, including those which are administrative, must be exercised reasonably and *bona fide* and not arbitrarily.[73] In *India*, it is thus settled[73] that any

Fair play and fairness

66. *Calcutta Dock Labour Bd.* v. *Imam*, (1965) II S.C.A. 226 (231-32).

67. *Ridge* v. *Baldwin*, (1964) A.C. 40.

68. *Saxena* v. *State of Haryana*, A. 1987 S.C. 1463.

69. *Patterson* v. *Dt. Commr.*, (1948) A.C. 341 (350); *R.* v. *Archbishop of Canterbury*, (1944) 1 All E.R. 179; *Franklin* v. *Minister of Town & Country Planning*, (1948) A.C. 87 [excluding rule against bias]; *Wednesbury Corpn.* v. *Min. of Housing*, (1965) 3 All E.R. 571.

70. *Radheshyam* v. *State of M.P.*, A. 1959 S.C. 107 (115-16); *N.P.T. Co.* v. *N.S.T. Co.*, A. 1957 S.C. 232.

71. *O'Reilly* v. *Mackman*, (1982) 3 All E.R. 1124 (1127) H.L.

72. *A.G. of Hong Kong* v. *Ng Yuen*, (1983) 2 All E.R. 346 (350) P.C.

73. This view of the Author, expressed at p. 275 of the previous edition has been accepted in *Neelima* v. *Harinder*, (1990) 2 S.C.C. 746 (para. 23); *Yadav* v. *J.M.A.I.*, (1993) 3 S.C.C. 259 (paras. 8, 10, 11).

public authority must act *fairly*, justly, reasonably and impartially, even in the absence of any statutory requirement to that effect.

So understood, it would simply mean that even an administrative authority should not be arbitrary or capricious.[74] It is in this sense that Lord Diplock spoke for the House of Lords[71] when he said that an administrative authority must "act fairly towards him in carrying out their decision-making process". Of course, in the same judgment, Lord Diplock used 'fairness' as identical with 'natural justice' by the expression 'natural justice and fairness' (p. 1127).[71] It cannot, however, be overlooked that in that case, the case of the Appellants was that the Prison Authorities, in imposing a disciplinary penalty upon the Appellants had violated the Prison Rules which expressly required the Board of Visitors to make an inquiry into the charge after giving a 'full *opportunity* of hearing what is alleged against him and of presenting his own case'. Here then was a *statutory* tribunal which was required by the statutory Rules to give a trial type of hearing, which would attract the principles of natural justice *in toto*.

In the case before the Privy Council,[72] however, there was no such statutory requirement. On the other hand, s. 19 of the Immigration Ordinance empowered the Governor to make a removal order *'if it appears to him* that the person is an undesirable immigrant'. The Privy Council, speaking through Lord Fraser (who was a party to the House of Lords decision),[71] held that there was no statutory right of the immigrant to be heard before the removal order was made, but that the principle of 'fairness' which was identified with 'good administration'[72] required that before the order of removal was executed the authority should give the immigrant an opportunity of making a *representation* to place his case (on humanitarian grounds, if not anything else) which the authority might consider in the exercise of his *discretion*.

The conclusion that may be drawn from these two latest decisions[71-72] is that in the absence of any statutory requirement the principle of 'fair play' would be satisfied if the administrative authority gives to the person aggrieved a *post-decisional* opportunity to make a *representation* (as distinguished from an opportunity to be heard or a duty to make an inquiry, which is essential to a *quasi-judicial* procedure). This is *minimal* natural justice which would be required in purely administrative proceeding, such as the cancellation of an election poll[75] or impounding a person's passport[76] or the supersession of a municipal body[77] or the taking over of a company[78] or even the deportation of an alien.[72]

The minimum of natural justice which is demanded by 'fair play-in-action' is thus,

> "norms of natural justice *in so far as* conformance to such canons can *reasonably* and realistically be required of it ... in a most important area of the constitutional order, viz., elections .... although *not in full panoply* but in flexible practicability".[75]

In view of various shades of judicial opinion on the matter, it would be profitable to formulate certain propositions, in order to avoid confusion:

74. *Chingleput Bottlers* v. *Majestic Bottling*, A. 1984 S.C. 1030 (para. 41).
75. *Mohinder* v. *Election Commr.*, A. 1978 S.C. 851 (para. 91).
76. *Maneka* v. *Union of India*, A. 1978 S.C. 597 (para. 63). [It should be noted that, in this case, the Court held that the function was *quasi-judicial* (para. 59) and invoked the doctrine of 'fair play' only in the alternative (para. 62).
77. *Kapoor* v. *Jagmohan*, A. 1981 S.C. 136 (para. 16).
78. *Kesava Mills* v. *Union of India*, A 1973 S.C. 389 (paras. 7-8).

i. Where a statute lays down a particular procedure, that procedure must be strictly observed, so that a debate as to whether the function is administrative or *quasi-judicial* would be unnecessary.

ii. The question becomes relevant where the statute is silent as to the procedure. But even here, according to recent decisions, the question may be material only to determine *how much* of natural justice would be demanded by the law. It is now settled that the requirements of natural justice are not fixed for all situations but would depend upon various factors, including the nature of the function or of the rights affected and the like. This test would be applicable whether we call the function *quasi-judicial* or administrative.[76]

Right to fair play or fair treatment

iii. When it is said that natural justice is applicable also to purely administrative proceedings (which involve 'civil consequences'), what is meant is not that the authority must act *'quasi-judicially'* but that, in every case, it must act 'fairly', that is, its action must be free from even any appearance of unfairness, unreasonableness and arbitrariness.[79]

iv. Where the function is purely administrative, nothing more than a right to make a representation before final action may be called for. But a *pre-decisional* hearing may be called for where the administrative action is attended with *civil consequences,* and there are no exceptional circumstances.[80]

Civil consequences[46a] ensue, for instance, when vested rights are taken away, e.g.,

taking away chances of appointment or termination of any existing employment.

Fairness in action : What is

Fairness, good faith and want of bias are necessary in administrative action. There shall be no arbitrariness or capriciousness. High Court can scrutinize whether administrative action is reasonable.[79a] Procedural fairness is an implied mandatory requirement to protect arbitrary action.[79b] If procedure offends the fundamental fairness or established ethos or traditions or shocks the conscience it becomes unconstitutional.[79c]

Even if discretion can be exercised in administrative action it must be fair and reasonable. So discretion must be exercised reasonably, rationally, in public interest and in conformity with the conditions or guidelines announced to safeguard interests of the public and the nation.[79d]

Legitimate Expectation.

In the words of the Privy Council,[80a]—

"A person may have a legitimate expectation of being treated *in a certain way* by an administrative authority even though he has *no legal right* in private law to receive such treatment."

The foundation of this doctrine is fair procedure and just treatment.[80b]

79. This view of the Author, expressed at pp. 255 ff. of the 3rd Ed., has been affirmed by *Yadav* v. *J.M.A.I.,* (1993) 3 S.C.C. 259 (paras. 8, 10, 12).

79a. *Pyrites, Phosphates and Chemicals Ltd.* v. *Bihar Electricity Board,* A. 1996 Pat 1.

79b. *Rashlal Yadav* v. *State,* (1994)5 S.C.C. 267, 277 : (1994)4 Serv LR 449.

79c. *Tata Cellular* v. *U.O.I.,* (1994)6 SCC 651, 700.

79d. *Delhi Science Forum* v *Union of India,* (1996)2 S.C.C. 405 : AIR 1996 SC 1356.

80. *Swadeshi Cotton Mills* v. *Union of India,* A. 1981 S.C. 818 (para. 76).

80a. *A.G.* v. *Ng. Yuen,* (1983) 2 All E.R. 346 P.C.

80b. *U.P.A.E.V.P.* v. *Gyan Debi,* (1995) 2 S.C.C. 326 (para. 41) C.B.

It is in the interest of good administration that a public authority should act fairly.[80a]

I. This doctrine, evolved in *England*,[80c] has been followed in most English-speaking countries, including *India*,[80d] to insist a duty to hear upon an administrative authority in some cases where otherwise the affected individual had no right to be heard.

Thus, where this new doctrine is applicable, the aggrieved individual may get a chance of being heard after setting aside the impugned administrative decision, through the writ of *mandamus*[80d] (or *certiorari*[80e])

II. While the common law rule or natural justice applied only to (a) the exercise of *statutory* power and (b) to the prejudice of *existing legal* rights of interests, the doctrine of legitimate expectation extends this protection of natural justice to (a) the exercise of non-statutory[80f] administrative power as well, (b) and where the interest affected is only a *privilege* or benefit[80g] and it is not existing but *prospective*.[80f, 80h]

Hence, unless excluded by statute, a person shall now have a right to be heard even where an exercise of administrative power would affect some right, interest, privilege or benefit which he might legitimately expect to obtain or enjoy in the future.[80h]

VII. Of course, a mere *hope* that he would obtain or enjoy a benefit would not suffice.[80e] In order to constitute such expectation legitimate, it must have a reasonbale[80e] basis, e.g., (a) a *statement* or *udertaking*[80e, 80g] or any act on the part of the public authority which would make it unfair or inconsistent with good administration to deny such opportunity; or (b) the existence of a regular practice which the claimant can reasonably exepct to continue.[80d, 80g]

The *Indian* Supreme Court has held[80-i] that an earlier order of a statutory authority may give rise to a legitimate expectation that the procedure created by that order will continue and that this application will be considered while making the final order.[80-i]

The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy and intention policy statements cannot be disregarded unfairly or applied selectively. The doctrine is essentially procedural in character. but in a given situation it may be enforced as a substantive right. The claimant must be aggrieved either (*a*) by altering rights or obligations which are enforceable by or against him in private law; or (*b*) by either (*i*) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue (*ii*) he has received assurance from the decision maker that it will not be withdrawn.[80-ia]

The principle of legitimate expectation requires regularity, predictability and certainly in the Government's dealings with the public. The procedural part of it requires that a hearing or appropriate procedure be afforded before

80c. Halsbury, 4th Ed., Vol. I, para. 81.
80d. *N.C.H.S.* v. *U.O.I.*, A. 1993 S.C. 155 (paras. 6, 15-16) [under Art. 226).
80e. *A.G.* v. *Ng Yuen* (1983) 2 All E.R. 346 (351-352) P.C.
80f. *R.* v. *Secy of State*, (1989) L.R.C. (Const.) 966 (970, 972) C.A.
80g. *C.C.S.U.* v. *Min.*, (1984) 3 All E.R. 935 (943-44) H.L.
80h. *Haoucher* v. *Min.*, (1991) L.R.C. (Const.) 918 (843-45)—Australia.
80-i. *State of Kerala* v. *Madhavan*, A. 1989 S.C. 49 [paras. 27, 30(1)].
80-ia. *National Building Construction Corporation* v. *S. Raghunathan*, (1998)7 SCC 66: AIR 1998 SC 2779.

a decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued or not be substantially varied, then the same could be enforced. The doctrine of legitimate expectation in the substantive sense has been accepted as part of our law. The decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way.[80-ib]

In short, the doctrine of legitimate expectation would be attracted even where the statement, act or conduct of the authority which is relied upon relates to a matter of *policy*.[65,80j] e.g., the deportation of aliens[63]; immigration of a foreign child for adoption[80k]; grant of consent to capital issue by a company or a change of such policy.[80-l]

B. As instances of the second category, i.e., a resonable expectation arising out of previous *practice,* may be mentioned the following :

(i) If a non-statutory licence for a specified term is revoked before the *expiry* of its term.

(ii) Forfeiture of the remission of sentence of a prisoner by a disciplinary authority.[80m]

VIII. The doctrine extends to the exercise of even *non-statutory* or common law powers,[81] e.g., a circular guideline.[80-l]

IX. It applies even where *policy* matter are involved,[83] e.g., deportation.[63]

Even in *England,* where the granting of a *passport* is in the *non-statutory* discretion of the Secretary of State; appertaining to the realm of *policy,* it has been held that—

The ready issue of a passport is normal expectation of every citizen, unless there is good reason for making him an exception.[82]

It follows, therefore, that before refusing to grant a passport or its renewal, a *fair* exercise of the discretion demands that the Secretary of State should notify to the applicant the reasons for the refusal and that he would consider if the applicant could show any special reasons for granting it.[82]

X. The doctrine also extends to a *change*[83-84] of governmental policy[83] but cannot preclude the Government's duty to protect *public health*;[85] *prison discipline*[86], *national security*,[75] and similar overriding public interests.[83] Hence, in the absence of any such overriding interest, notice must be given to the occupant of a Government premises before imposing on him damage rent and penal rent on the ground that he was an unauthorised occupant after retirement.[83]

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

80j. *Narendra* v. *Union of India*, (1990) Supp. S.C.C. 440 (paras. 106-107).

80k. *R.* v. *Secy. of State*, (1985) 1 All E.R. 40 (48, 52, 59) C.A.

80-l. *M.C.H.S.* v. *U.O.I.*, A. 1993 S.C. 155 (para. 15).

80m. Cf. *O'Reilly* v. *Macman*, (1982) 1 All E.R. 1124 (1126-27) H.L.; *R.* v. *Hull Prison Bd.*, (1979) 3 All E.R. 545 (C.A.).

81. *R.* v. *Secy. of State*, (1985) 1 All E.R. 40 (46, 51-52) C.A.

82. *R.* v. *Secy. of State*, (1989) L.R.C. (Const.) 966 (970, 972) C.A.

83. *N.C.G.H.S.* v. *Union of India*, A. 1993 S.C. 155 (paras. 4, 7-8).

84. *R.* v. *Home Secy.*, (1987) 2 All E.R. 518 (531).

85. *R.* v. *Secy. of Health*, (1992) 1 Q.B. 353 (369, 372).

86. *R.* v. *Secy. of Health*, (1992) 1 Q.B. 353 (369, 372).

XV. On the other hand—

(*a*) There cannot be a legitimate expectation to a thing which would involve the violation of a statute, e.g., to run a cinema house without licence;[87] or interference with a public duty of the authority.[88]

Exceptions.

Where a person other than a licensee was operating a cinema show, no hearing of such outsider would be required before making an order suspending such show.[87]

(*b*) For the same reason, legitimate expectation cannot preclude *legislation*.[89, 90]

(*c*) No legitimate expectation can be founded on an application which has been rejected for failure to comply with the conditions imposed for its consideration.[91]

(*d*) Since, in the matter of appointment to Government service, a candidate does not acquire an indefeasible right to be appointed merely because his name appears in the Select List made by a Selction Board. In the absence of any specific Rule entitling him to such appointment, the Court or Tribunal cannot fetter the discretion of the appointing authority by the doctrine of legitimate expectation, in the absence of arbitrariness or *mala fides*.. Even the doctrine of natural justice cannot be invoked if he is not heard before cancelling such Select List for *bona fide* reasons.[91]

Burden of proof.

The burden of proving that natural justice has been violated is, of course, upon the person aggrieved. But, in discharging this onus, he is not confined to the face of the record; he may establish it from other reliable evidence.[92] Thus, where the Petitioner's allegation is that the real charge against him upon which the Minister had acted was not disclosed to him, the Petitioner can rely upon a later speech of the Minister that he had acted partly on grounds which had not been notified to the Petitioner, and the Minister's order would be quashed.[92]

Effects of contravention of natural justice: whether void or voidable?

(A) *England*.—There has been a difference of judicial opinion at the highest level, and even now the horizon is not very clear.

I. The decisions of the House of Lords lead to the following propositions:

(a) A distinction appears to have been made between a case of bias and a case of denial of hearing. In the former case, the decision is not void, but merely voidable.[93-94] But in the case of violation of the *'audit alteram partem'* rule, the decision is null and void.[95-96]

87. *Ved Gupta* v. *Apsara*, A. 1983 S.C. 978 (para. 19).
88. *R.* v. *Secy. of State*, (1986) A.C. 240 (249) H.L.
89. *R.* v. *Min. of Agriculture*, (1991)1 All E.R. 41 (68)
90. *Govt. of A.P.* v. *The Nizam*, A. 1993 A.P. 76 (paras. 36, 42).
91. *Union Territory* v. *Dibagh*, (1993) 23 A.T.C. 431 (para. 12) S.C.
92. *Maradana Mosque* v. *Badluddin*, (1966) 1 All E.R. 545 (550) P.C
93. *Dimes* v. *Grand Junction Canal Proprietors*, (1852) 2 H.L.C. 759.
94. In *O'Reilly* v. *Mackman*, (1982) 3 All E.R. 1124 (1127), the House of Lords, speaking through Lord Diplock, seems to suggest that in both cases the decision would be a *nullity*.
95. *Ridge* v. *Baldwin*. (1964) A.C. 40 (80, 117, 125, 135-36) H.L.
96. *Anisminic* v. *Foreign Compensation*, (1969) 1 All E.R. 208 (217, Lord Reid; 233, Lord Pearce; 246, Lord Wilberforce) H.L.

(b) A decision made without giving the opportunity to be heard is void *ab initio*[95] and has thus been assimilated to a decision without or in excess of jurisdiction.[96]

1. When a decision is said to be a nullity, it should follow that the aggrieved person may disobey with impunity such a void decision and need not wait for obtaining a declaration from a competent court that it is null and void. At any rate, he may impeach its validity in a collateral proceeding, as in the case of a decision without jurisdiction.[96]

ii. It should also follow that the defect cannot be cured by the waiver of the party aggrieved.[97]

iii. Another consequence would be that the nullity cannot be removed and the dead decision cannot be revived by anything done at the appellate stage.[95, 98]

II. The Privy Council has, however, held[99] that even though a decision in breach of the requirement to hear is a nullity, it survives for *certain* purposes until it is declared void by a competent court.

Thus, appeal lies from such void decision, and if the *appellate body* gives a *fair hearing* and arrives at a fair result, a court of law would refuse the discretionary relief of a declaration that the original decision was void.[99] In this case, the Privy Council distinguished its earlier decision in *Anumunthodo's case*[98] on the ground that in that case, even the appellate body was without jurisdiction to take the action (under the relevant statutory Rules) impugned, so that affirming the action after giving a hearing would vitiate the appellate decision itself.

The ratio of *Calvin's case*[99] is that until a decision violative of natural justice is declared to be void by a court of law, it is capable of having some consequences at law which could be the basis of an appeal to a higher tribunal.[99]

It is a paradox that *Calvin's case*[99] has not been mentioned in *O'Reilly's case*[94] though the *Anisminic case*,[96] to which Lord Wilberforce was a party, has been cited. Perhaps another decision of the House of Lords is necessary to come to a clear picture, after reviewing all the aforesaid cases together. Till then the picture remains hazy.

III. The voidability of a decision which violates natural justice does not depend upon the soundness or otherwise of the decision on its merits :

"If the principles of natural justice are violated in respect of any decision, it is, indeed, *immaterial whether the same decision would have been arrived at* in the absence of the departure from the essential principles of justice. The decision must be *declared to be no decision.*"[100]

It follows that the person affected by a denial of natural justice is entitled to have such decision set aside without establishing prejudice or actual injury,[98] because it is a nullity,[98, 1] as soon as the Court finds that natural justice has been denied.

IV. But in India, in a proceeding for *certiorari*, the Court may, instead

97. *Mayes* v. *Mayes*, (1971) 2 All E.R. (401-02) P.D.A.

98. *Anumunthodo* v. *Oilfield Workers*, (1961) 3 All E.R. 621 (625) P.C.

99. *Calvin* v. *Carr*, (1979) 2 All E.R. 440 (449) P.C. (Lord Wilberforce, speaking for himself and Viscount Dilhorne, Lord Hailsham, Lord Keith and Lord Scarman).

100. *General Medical Council* v. *Spackman*, (1943) A.C. 627 (644) H.L.

1. *State of Orissa* v. *Binapani*, A. 1967 S.C. 1269.

of striking down the invalid order as a nullity, give the Administration an opportunity of making a fresh order after complying with natural justice.[2]

(B) *India.*—The Supreme Court has made a distinction between a decision vitiated by bias and a decision made without hearing.

(a) As regards bias, the consensus seems to be that it renders the decision merely voidable,[3,4] so that the defect may be waived.[5] A party may be deemed to have waived his objection on this ground if he does not take this objection at the earliest opportunity,[3] after having acquired clear and full knowledge as to the facts constituting such disqualification.[3]

(b) As regards denial of hearing, the mystic problem of 'void' or 'voidable' was raised in *Nawabkhan's case,*[4] but it was left open by the Court upon the view that in that case, the impugned decision had violated a *fundamental right,* which rendered it void, apart form denial of natural justice.

In a number of cases it has been held that irrespective of any violation of a fundamental right, a decision without hearing as required by the *audi alteram partem* rule would be void.[1,6-7] The reason is that a decision without a fair deal suffers from a *jurisdictional* error, which involves procedural *ultra vires,* and consequently renders the decision *void.*[8]

Nevertheless, where an order without hearing is challenged in a writ proceeding, the Supreme Court, with its wide powers, can, in proper cases, direct that a fresh decision be taken after a proper hearing, instead of quashing it on the ground of nullity.[2]

In the interest of certainty, Indian Courts should stick to the proposition that an order made without hearing is a nullity and should be quashed.[7] The reason is that in India, the requirement of natural justice has been assimilated to be a fundamental right under Art. 14[9] (non-arbitrariness) or Art. 19 (reasonableness), so that the violation constitutes a nullity[10] under Art. 13(2), of the Constitution.

Consequently, an employee whose services have been terminated without hearing is entitled to be reinstated with arrears of salary or wages.[11]

Legitimate expectation : Scope, nature and character

Principle of legitimate expectation forms part of procedural law.[11a] The expectation is no anticipation. It is neither an assertable expectation.[11a]

Legitimate expectation will arise in case of express promise by a public

2. Cf. *Swadeshi Cotton Mills* v. *Union of India,* A. 1981 S.C. 818; *Kapoor* v. *Jagmohan,* A. 1981 S.C. 136; *Subba Rao* v. *State of A.P.,* A. 1975 S.C. 94.
3. *Manaklal* v. *Premchand,* A. 1957 S.C. 425 (429).
4. *Nawabkhan* v. *State of Gujarat,* A. 1974 S.C. 1471 (para. 13).
5. It should be noted that in *State of U.P.* v. *Nooh,* A. 1958 S.C. 86 (para. 28), the plea of waiver had not been taken.
6. *City Corner* v. *Personal Asst.,* A. 1976 S.C. 143 (para. 5).
7. *Nasir* v. *Asst. Custodian,* A. 1980 S.C. 1157 (para. 6); *Bd. of Trustees* v. *Dilip,* A. 1983 S.C. 109 (para. 15); *Govindarajan* v. *K.N.R.T.C.,* (1986) 3 S.C.C. 273 (para. 7).
8. *Ravi* v. *U.O.I.,* (1994) 5 Supp. (2) 641 (para. 20); *Krishan* v. *State of J. & K.,* (1994) 4 S.C.C. 422 (para. 28).
9. *C.I.W.T.C.* v. *Brojo,* (1986) 3 S.C.C. 156 (paras. 104-105); *Union of India* v. *Tulsiram,* (1985) 3 S.C.C. 398 (para. 95).
10. *Shridhar* v. *Nagar Palika,* A. 1990 S.C. 307 (para. 8).
11. *Singh* v. *Union of India,* A. 1990 S.C. 1 (paras. 24-25).
11a. *M. S. N. Medicals* v. *K.S.R.T.C.,* A. 1995 Ker 119, 120 : (1993)2 Ker LJ 423.

authority, in case of a regular practice which claimant can reasonably expect to continue. But the expectation must be reasonable.[11b]

Legitimate expectation cannot be pressed as legal right and yielded no vested right to quell right of others.[11c] It permits no enforcement of substantive right.[11a] Legitimate expectation is no independent legally enforceable right.[11d] Every legitimate expectation does not by itself factify into a right. It gives the applicant sufficient *locus standi* for judicial review. Doctrine does not give scope to claim relief straightway from authorities. A case of legitimate expectation will arise when a body by representation or past practice aroused expectation which it has power to fulfil.[11e] Person basing claim on doctrine to satisfy that there is a foundation and thus has *locus standi* to make such a claim.[11f] Mere reasonable or legitimate expectation of a citizen may not by itself be a distinct enforceable right but failure to consider and give due weight to it may render the decision arbitrary.[11g] Legitimate expectation may be expectation which go beyond enforceable legal rights provided it has some reasonable basis. A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. Observation of Privy Council in *Attorney-General of Hong Kong* v. *Ng Yuen Shiu*,[11h] was quoted with approval by the Supreme Court in *U.P. Awas Evam Vikas Parishad* v. *Gyan Devi*.[11i] The doctrine of legitimate expectation operates in the domain on public law and in an appropriate case, constitutes a substantive and enforceable right while Government entered into agreement with a party the latter can legitimately expect that the renewal clause would be given effect to in the usual manner and according to past practice unless there is any special reason not to adhere to it.[11j]

Legitimate expectation is different from wish, desire, hope. It is not a claim or demand on the ground of right. It must be founded on sanction of law or custom or an established procedure followed in natural and regular sequence.[11k]

Principle of legitimate expectation can be invoked only in a case where the aggrieved was deprived of some benefit on advantage which in the past had been permitted to be enjoyed.[11-l]

Doctrine has no application in contractual field.[11m]

11b. *Madras City Wine Merchants' Association* v. *State*, (1994)5 S.C.C. 509, 535; *A.C.Roy Co.* v. *U.O.I.*, A. 1995 Cal 246.

11c. *Tata Cellular* v. *U.O.I.*, (1994)6 SCC 651; *Shankar Lal* v. *Indore Development Authority*, A. 1995 M.P. 182, 185.

11d. *Ravi S. Naik* v. *U.O.I.*, 1994 Supp (2) S.C.C. 641, 653 : A. 1994 S.C. 1558; *Ghaziabad D.A.* v. *Delhi Auto & General Finance*, A. 1994 S.C. 2263.

11e. *U.O.I.* v. *Hindustan Development Corporation*, A. 1994 S.C. 988.

11f. *Bhagat Singh Negi* v. *H.P. Housing Board*, A. 1994 H.P. 60.

11g. *D. S. Dalal* v. *S.B.I.*, A. 1993 S.C. 1608.

11h. (1983) 2 All E.R. 346.

11i. (1995)2 S.C.C. 326 : A. 1995 S.C. 724.

11j. *M.P. Oil Extraction* v. *State*, (1997)7 S.C.C. 592.

11k. *U.O.I.* v. *Hindustan Development Corporation*, A. 1994 S.C. 988 : (1993)3 S.C.C. 499.

11-l. *K. M. Pareeth Labba* v. *Kerala Livestock Development Board Ltd.*, A. 1994 Ker 286.

11m. *A. C. Roy Co.* v. *U.O.I.* A. 1995 Cal 246; *D. Wren International Ltd.* v. *Engineers India Ltd.*, A. 1996 Cal. 424.

The doctrine of Legitimate Expectation.

I. This doctrine, evolved in England[12] has been followed in most English-speaking countries, including India[13], to insist a duty to hear upon an administrative authority in some cases where otherwise the affected individual had no right to be heard.

Thus, where this new doctrine is applicable, the aggrieved individual may get a chance of being heard after setting aside the impugned administrative decision, through the writ of *mandamus*[13] (or *certiorari*[14])

II. While the common law rule of natural justice applied only to (a) the exercise of *statutory* power and (b) to the prejudice of *existing legal* rights or interests, the doctrine of legitimate expectation extends this protection of natural justice[15] or fairness to (a) the exercise of non-statutory[15] administrative powers well, (b) and where the interest affect is only a *privilege* or benefit[16] and it is not existing by *prospective*.[15, 17]

U.K. Hence, unless excluded by statute, a person shall now have a right to be heard even where an exercise of administrative power would affect some right, interest, privilege or benefit which he might legitimately expect to obtain or enjoy in the future.[17]

III. The new doctrine is only an offshoot of the general doctrine that every public authority must act fairly.[14, 18] Every legitimate expectation is a relevant factor for due consideration to make the decision-making process *'fair'*.[19]

IV. In *England* it has been held that the plea of legitimate expectation provides a sufficient interest to a person to enable him to move for judicial review in a case where he cannot point to the existence of a substantive right to obtain leave of the Court.[20]

V. It is now established that even where a person has no *legal right* to a hearing and the administrative authority has no *duty* to offer it, the person to be affected may, yet, possess a 'legitimate expectation' that he would be given an opportunity of being heard or to make his representation before any decision is made affecting his interests.[2]

VI. Even where a person claiming some *benefit* or privilege has no legal right to it (in private law), he may give a legitimate expectation of receiving the benefit or privilege as a matter of *public* law,[21] in which case the Courts will insist on a fair procedure.

VII. Of course, a mere hope that he would obtain or enjoy a benefit would not suffice.[22-23] In order to constitute such expectation legitimate, it must have a resonable[2] basis e.g., (a) a statement or undertaking[2,9] or any

12. Halsbury, 4th Ed., Vol. I, para. 81.
13. *N.C.H.S.* v. *U.O.I.* A. 1993 S.C. 155 (para 6, 15-16) [case under Art. 226].
14. *A.G.* v. *Ng Yuen,* (1983) 2 All E.R. 346 (351-352) P.C.
15. *R.* v. *Secy of State,* (1989) L.R.C. (Const.) 966 (970, 972) C.A.
16. *C.C.S.U.* v. *Min.,* (1984) 3 All E.R. 9356 (943-44) HL.
17. *Haucher* v. *Min.,* (1991) LRC (Const.) 819 (843-45)—Australia.
18. *R.* v. *C.S.A.B.,* (1991) 4 All E.R. 310 (320, 325-26) C.A.
19. *F.C.I.* v. *K.C.F.I.,* (1993) 1 S.C.C. 71 (para. 8)—3 Judges; *N.C.G.H.S.* v. *Union of India,* (1992) 4 S.C.C. 477 (para. 16).
20. *Findlat* v. *Secy of State,* (1984) 3 All E.R. 801 (830) H.L.
21. *C.C.S.U.* v. *Min.,* (1984) 3 All E.R. 935 (943-44) H.L.
22. *Govt. of A.P.* v. *The Nizam,* A. 1993 A.P. 67 (para. 36).
23. *Mokotso* v. *R.,* (1988) L.R.C. (Const.) 24, 960—Lesotho.

act on the part of the public authority which would make it unfair or inconsistent with good administration to deny such opportunity; or (b) te existence of a regular practice wich the claimant can reasonably expect to continue.[21, 23, 24]

Licence revocation of or refusal to renew.

A. As an instance of the former class may be mentioned—I. The quashing of the order of deportation of an illegal immigrant (who has no legal right to stay or to any hearing before deportation), on the ground that he had a legitimate expectation of being accorded a hearing inasmuch as the Director of immigrants had given an assurance that illegal immigrants would not be deported without first being interviewed "on the merits" of each case. Since no such interview was given to the appellant, he was denied the opportunity of explaining the humanitarian or other special grounds by reason of which he should not be removed.[14]

The justification for this rule in public law, as explained by the Privy Council,[2] is that it is in the interest of good administration that a *public authority* should *act fairly*. If, therefore, such authority has promised to follow a certain *procedure,* it should implement its promise, so long as such implementation does not interfere with its *statutory duty*.[14]

Even though a statutory corporation cannot contract itself out of its statutory powers, this does not mean that it can give an undertaking and then break it as it pleases. So long as the performance of the undertaking is compatible with its public duty, it must honour it.[14, 25]

The *Indian* Supreme Court has held[26] that an earlier order of a statutory authority may give rise to a legitimate expecatation that the procedure created by that order will continue and that this application will be considered while making the final order.[26]

In short, the doctrine of legitimate expectation would be attracted even where the statement, act or conduct of the authority which is relied upon relates to a matter of policy,.[22, 27] e.g., the deportation of aliens[14]; immigration of a foreign child for adoption;[28] grant of consent to capital issue by a company[15] or a *change* of such policy.[29]

B. An instance of the second category, i.e., a reasonable expectation arising out of previous *practice,* may be mentioned the following :

(i) If a non-statutory licence for a specified term is revoked *before the expiry* of its term.[14]

The principle has been extended to the premature revocation of the immigration permit of an alien,[14, 30]—except on ground of national security.[31]

(ii) After the expiry of the term of a (lease or) licence, the (lessee or) licensee loses all interest and is not, therefore, entitled to invoke natural justice or claim a right to be heard,[32] in the absence of any statutory provision.

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24. *N.C.H.S.* v. *Union of India,* A. 1993 S.C. 155 (paras. 15-16).
25. *Re. Liverpool T.O.A.* (1972) 2 All E.R. 589 (594) C.A.
26. *State of Kerala* v. *Madhavan,* A. 1989 S.C. 49 [paras. 27, 30(1)].
27. *Narendra* v. *Union of India,* (1990) Supp. S.C.C. (paras. 106-107).
28. *R.* v. *Secy. of State,* (1985) 1 All E.R. 40 (48, 52, 59) C.A.
29. *N.C.H.S.* v. *U.O.I.,* A. 1993 S.C. 155 (para. 15).
30. *Berthelsen* v. *D.G.I.* (1988) L.R.C. (Const.) 621—Malaysia.
31. *O'Relly* v. *Mackman,* (1982) 3 All E.R. 1124 (1126) H.L.
32. Cf. *Vohra* v. *India Export,* (1985) 1 S.C.C. 712 (paras. 8, 13).

But the doctrine of legitimate expectation comes in where the holder of an existing licence applies for a *renewal* to which he has *no legal* right.[33-35]

Even though the licensee had no legal right to a renewal, t;he licensing authority could not refuse a renewal without considerin each case on its merits, e.g., that there has been a material change in the circumstances since the original grant of the licence which warranted the refusal of renewal.[35]

(iii) Forfeiture of the remission of sentence of a prisoner by a disciplinary authority.[14, 36]

Under the Prison Rules (Eng.) a prisoner has no legal right to obtain any remission of his sentence, but as matter of general practice a specified remission is granted in cases where no disciplinary award of forfeiture of remission is *made* against him within the given time. An order of forfeiture of remission by the Prison Board was quashed on the ground that the Appeallant had been given no opportunity of making a representation, showing special reasons, as to why such an order should not be made against him, because the general practice raised a reasonable expectation that he would be granted remission in due course.

VIII. The doctrine extends to the exercise of even *non-statutory* or common law powers,[37] e.g., a circular[37] guideline.[29]

IX. It applies even where *policy* matters are involved,[14] e.g., deportation.[14]

Even in *England* where the granting of a *passport* is in the *non-statutory* discretion of the Secretary of State, appertaining to the realm of *policy*, it has been held that—

The ready issue of a passport is a normal expectation of every citizen, unless there is good reason for making him an exception.[38]

It follows, therefore, that before refusing to grant a passport or its renewal, a *fair* exercise of the discretion demands that the secretary of State should notify to the applicant the reasons for the refusal and that he would consider if the applicant could show any special reasons for granting it.[38]

The doctrine also extends to change[39-40] of governmental policy[39] by cannot preclude the Government's duty to protect *public health*;[41] *prison discipline*,[42] *national security*,[31] and similar overriding public interests.27 Hence, in the absence of the such overriding interest, notice must be given to the occupant of a Government premises before imposing on him damage rent and penal rent on the ground that he was an unauthorised occupant after retirement.[39]

At the same time, as the *Australian* High Court has held,[43] the doctrine of legitimate expectation requires *procedural* fairness but does not ensure substantive protection against Government policy which the Executive is competent to adopt, so long as it is not *ultra vires*.[43]

33. *Mclnnes* v. *Onslow*, (1978) 3 All E.R. 211 (218).
34. *Bahadur* v. *A.G.*, (1989) L.R.C. (Cont.) 632 (641)—Trinindad & Tobago.
35. *R.* v. *Wndosor L.JJ.*, (1983) 2 All E.R. 550 (557, 563) C.A.,; *R.* v. *County L.C.*, (1957) 1 All E.R. 112 (122) C.A.
36. Cf. *O'Reilly* v. *Macman*, (1982) 1 All E.R. 1124 (1126-27) H.L.; *R.* v. *Hull prison Bd.*, (1979) 3 All E.R. 545 (C.A.).
37. *R.* v. *Secy. of State* (1985) 1 All E.R. 40 (46, 51-52) C.A.
38. *R.* v. *Secy. of State*, (1989) L.R.C. (Const.) 966 (970, 972) C.A.
39. *N.C.G.H.S.* v. *Union of India*, A. 1993 S.C. 155 (paras. 4, 7-8).
40. *R.* v. *Home Secy.*, (1987) 2 All E.R. 518 (531).
41. *R.* v. *Secy. of Health*, (1992) 1 Q.B. 353 (369, 372).
42. *Findlay* v. *Secy of State*, (1984) 3 All E.R. 801 (830).
43. *A.G.* v. *Quin*, (1992) L.R.C. (Const.) 751 (760, 780-81, 795); *A.G.* v. *Ng. Yuen*, (1983) 2 A.C. 629 (638) P.C.

The doctrine has been applied even in the matter of appointment of Judges of the highest Courts.[44]

X. Although an undertaking or promise may be one of the sources of legitimate expectation, this concept is not identical with that of *estoppel.* What is relevant in legitimate expectation is not the knowledge or state of mind of the individual concerned as in estoppel but the interest affected by the exercise of power by the public authority.[45] Unlike the case of promissory estoppel, it is not necessary for the Petitioner who relies on legitimate expectation to show that he has altered his position on the basis of the alleged practice or assurance on behalf of the Government.[45]

XI. It extends to any person, including *aliens*,[46] because it is founded on the principle that if a public authority has, by its statement or conduct, promised to follow a certain *procedure*, then it should implement its promise, so long as implementation does not interfere with its statutory duty.[46-47]

XII. The *occassions* which may give rise to legitimate expectation have thus been stated,[48] without being exhaustive[49] :

The decision must affect some other person either—

"(a) by altering rights or obligations of that persons which are enforceable by or against him in private law; or (b) by depriving him or some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given and opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

In short, it would arise from an express promise or the existence of a regular practice.[48]

XIII. The obligations which may be imposed on the authority, where this doctrine is attracted may be[48]—

(a) To *hear* the party to be affected,34 or to allow him to make a *representation*.[29, 46, 48]

(b) To *consult*[50] the persons to be[48] affected.

(c) To *publish*[51] a change of policy.

(d) To give *reasons*.[52]

XVI. On the other hand—

(a) There cannot be a legitimate expectation to a thing which would involve the violation of a statute, e.g., to run a cinema house without licence;[53] or interference with a public duty of the authority.[54]

Exceptions.

Where a person other than a licensee was operating a cinema show, no hearng of such outsider would be required before making an order suspending such show.[53]

44. *S.C. Advocates* v. *Union of India*, (1993) 4 S.C.C. 441 [para. 478(4)]—9 Judges Bench.
45. *Haoucher* v. *Min.*, (1985) L.R.C. (Const.) 819 (*836*)–Austraila.
46. *A.G.* v. *Nq Yuen*, (1985) L.R.C. (Contest) 931 (*937*) P.C.
47. *Re Pham*, (1991) L.R.C. (Const.) 987 (997)—Hongkong.
48. *C.C.S.U.* v. *Min.*, (1985) A.C. 374 (401, 408) H.L.
49. *R.* v. *Secy. of State*, (1986) A.C. 240 (249) H.L.
50. Re Westminster C.C., (1986) A.C. 668 (*692*).
51. *R.* v. *Home Secy.*, (1987) 2 All E.R. 518 (531).
52. *R.* v. *C.S.A.B.* (1991) 4 All E.R. 310 (317, 320, 322, 325-326) C.A.
53. *Ved Gupta* v. *Apsara*, A. 1983 S.C. 978 (para. 19).
54. *R.* v. *Secy. of State*, (1986) A.C. 240 (249) H.L.

(b) For the same reason, legitimate expectation cannot preclude *legislation*.[55-56]

(c) No legitimate expectation can be founded on an application which has been rejected for failure to comply with the conditions imposed for its consideration.[57]

(d) Since, in the matter of appointment to Government service, a candidate does not acquire an indefeasible right to be appointed merely because his name appears in the Select List mady by a Selection Board. In the absence of any specific Rule etitling him to such appointment, the Court or Tribunal cannot fetter the discretion of the appointing authority by the doctrine of legitimate expectation, in the absence of arbitrariness or *mala fides*. Even the doctrine of natural justice cannot be invoked if his is not heard before cancelling such Select List for bona fide reasons.[58]

(e) The legitimate expectation of an individual is subject to the larger consideration of *public interest*. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other important considerations may outweigh,[50-60] e.g., in the matter of non-acceptance of the highest bid at a public auction or tender relating to a Government contract or licence.

(f) Legitimate expectation does not give rise to any substantive right straight away.[60] It gives a *locus standi* to a person to challenge an administrative decision and to have it quashed only if the decision is arbitrary, unreasonable or not taken in public interest, and the failure to give a hearing to such affected person has resulted in a failure of justice.[60]

In *India*, such vices in an administrative decision would attract the constitutional mandate of Art. 14 (para. 35).[60]

55. *R.* v. *Min. of Agriculture*, (1991) 1 All E.R. 41 (68).
56. *State of H.P.* v. *Kailash*, (1992) Supp. (II) S.C.C. 351 (para. 87).
57. *Govt. of A.P.* v. *The Nizam*, A. 1993 S.C. 76 (paras. 36, 42).
58. *Union Territory* v. *Dilbagh*, (1993) 23 A.T.C. 431 (para. 12) S.C.
59. *F.C.I.* v. *K.C.F.I.*, (1993) 1 S.C.C. 71 (paras. 8, 10)—3 Judges.
60. *Union of India* v. *H.D.C.* (1993) 3 S.C.C. 499 (paras. 33, 35).

CHAPTER 9

ADMINISTRATIVE ACTION

State or other authority acting under a statute are creatures of statute. They must act within the few corners of statute. When a statutory authority is required to do a thing in a particular manner the same must be done in that manner or not at all.[1] Nobody or authority, statutory or not, vested with powers can abstain from exercising the power if occasion warrants it. A public authority is duty bound to exercise its power if occasion arises. Courts will compel the authority to exercise the power if it refuses to do so.[2] Power is vested by statute in a public authority such power should be viewed in trust coupled with duty which has to be exercised in larger public and social interest.[3] The elements of public interest are (1) public money would be spent for the purpose of contract, (2) the goods or services which are being commissioned would be for a public purpose e.g. construction of road, public buildings etc. (3) the public would be directly interested in the timely fulfilment of the contract so that public may receive service expeditiously, (4) the public would also be interested in the quality of the work.[4] Even an individual cannot affect the public right. An individual has to exercise his right or even fundamental right within reasonable limits. If exercise of such right makes inroads into public right leading to public inconvenience it has to be curtailed to that extent.[5] So if statutory power is vested in an authority requirements of law have to be complied with in exercising the power.[6]

Official decision should not be infected with motive, e.g. fraud, dishonesty, malice, personal interest. Duty to act in good faith is inherent in the process. If fraud does not fructify it does not furnish a cause of action.[7]

State may confer wide discretionary power upon an authority. Nevertheless the powr has to be exercised reasonably within the sphere of the statute and the said exercise of power must stand the test of judicial scrutiny.[8] Exercise of discretionary power cannot be unrestricted. In exercising wide power the Government will consider all relevant aspects governing the question.[9] The power must be exercised in a reasonable way in accordance with the spirit of the Constitution.[9] The reason recorded must truly disclose the justifiability of the exercise of such power. The power must be exercised for furtherance of the policy.[10]

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1. *Bhavnagar University* v. *Palitana Sugar Mills*, (2003)2 SCC 111: AIR 2003 SC 511.
2. *Uppal* v. *Union of India*, AIR 2003 SC 739: (2003)2 SCC 45.
3. *Delhi Administration* v. *Monoharlal*, (2002)7 SCC 222.
4. *Raunaq International Law* v. *I.V.R. Construction Ltd.* AIR 1999 SC 393: (1999)1 SCC 492.
5. *Consumer Action Group* v. *State*, (2000)7 SCC 425.
6. *S. Ramanathan* v. *Union of India*, (2001)2 SCC 118.
7. *Punjab Communications Ltd.* v. *Union of India*, (1999)4 SCC 727: AIR 1999 SC 1801.
8. *Consumer Action Group* v. *State*, (2000)7 SCC 425; *Dai-Ichi-Karkaria Ltd.* v. *Union of India*, (2000)4 SCC 57: AIR 2000 SC 1741.
9. *Dai-Ichi-Karkaria Ltd.* v. *Union of India*, (2000)4 SCC 57: AIR 2000 SC 1741.
10. *Consumer Action Group* v. *State*, (2000)7 SCC 425.

It has been pointed out above that the action must be reasonable. High Court directed the collector to remove encroachment from the land within 72 hours in complete disregard of humanitarian consideration and the possibility of law and order problem. There were a large number of hutment-dwellers on the land who were liable to be evicted. So the court ought to have granted reasonable time. This is an instance of unreasonable action.[11]

It must be remembered that a designated authority created under a statute cannot act beyond the provisions ofthe scheme.[12]

There must be fairness in administrative action. Fairness is synonymous with reasonableness. It has been pointed out above that an administrative action must be reasonable. Reasonableness is what is in contemplation of an ordinary man of prudence similarly placed. Appreciation of this common man's perception in its proper perspective would prompt one to determine the situation whether the same is reasonable.[13] So the Government working should always be in tune with concept of fairness and not *de hors* the same.[14]

So power should be exercised honestly and fairly. Malice, ill-will, self-interest, ill motive must not influence the exercise of power. In a case order of compulsory retirement was passed for a collateral purpose of the employee's immediate removal rather than public interest. It is a colourable exercise of power.[15] Court will not uphold such action. Colourable exercise of power has been seriously condemned by court on a number of occasions.

An administrator exercising quasi-judicial power must record reasons for his decision. It introduces clarity or excludes or rather minimises the chance of arbitrariness. Further, higher forum can test the correctness of the decision.[16]

Official decision should not be influenced by motive, fraud, dishonesty, malice or personal interest.[17] Malice is "ill will" or "spite" towards a party and any indirect or improper motive in taking an action. It is sometimes said to be "malice in fact". Legal malice or malice in law means "something done without lawful excuse". It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling or spite. It is a deliberate act in disregarded of the rights of others. The malice of State is no personal ill will or spite. Malice of State may be described as an act which is taken with an oblique or indirect object. In a legal malice the action of the State is not taken *bona fide*.[18]

The decision of an administrator may be wrong *bona fide*. A wrong decision of an administrator cannot be treated as a precedent.[19]

A citizen may challenge the decision of an administrator on the ground of *mala fides*. He has to establish the change of bad faith, an abuse or misuse of power by the authority if he seeks to invalidate or nullify any act.

11. *State* v. *Alka B. Hingde*, (1998)4 SCC 315.
12. *Hemalatha Gargya* v. *C.I.T.*, (2003)9 SCC 510.
13. *State* v. *K. Khanna*, AIR 2001 SC 343: (2001)2 SCC 330.
14. *V.C. Mohan* v. *Union of India*, AIR 2002 SC 1205: (2002)3 SCC 451.
15. *State* v. *Suryakant*, (1999)1 SCC 529.
16. *Charan Singh* v. *Healing Touch Hospital*, (2000)7 SCC 668.
17. *Punjab Communications Ltd.* v. *Union of India*, (1999)4 SCC 727: AIR 1999 SC 1801.
18. *State* v. *Goverdhanlal*, (2003)4 SCC 739: AIR 2003 SC 1941.
19. *State* v. *Rajeev*, (1999)9 SCC 240.

Clear proof is necessary. It is, however, difficult to establish the state of one's mind. *Mala fide* in the sense of improper motive need not be established by direct evidence. It may be discerned from the impugned order and from sorrounding factors. A person apparently acting on the legitimate exercise of power may in fact be acting *mala fide*. But even then bad faith has to be deduced as a reasonable and inescapable inference from proved facts. Court should be slow to draw dubious inference from incomplete facts and particularly when the imputations are grave and they are made against a high holder of an office.[20]

20. *Indian Railway Construction Co. Ltd.* v. *Ajay Kumar*, (2003)4 SCC 579: AIR 2003 SC 1843.

CHAPTER 10

ADMINISTRATIVE TRIBUNALS

'Administrative Tribunals', meaning of.

The extension of governmental activities is responsible for entrusting to the executive authority the right of deciding *quasi-judicial issues*[1] in place of the ordinary courts. The main arguments in favour of this system[2] are that (a) the ordinary courts are already overburdened with work; (b) their procedure is technical and costs are prohibitive; (c) questions arising out of a social or industrial legislation are better decided by persons who have an intimate and specialised knowledge of the working of that Act.

Though a body exercising executive or administrative functions, purely from the point of view of policy or expediency, may be loosely called a tribunal because its determinations also affect the rights of parties—in the present context, we are considering only those tribunals which have to follow the *quasi-judicial* procedure or approach at least at some stage of their functions or in respect of some of the matters to be determined by them.[3]

Administrative Tribunal, distinguished from 'Court'.

Though the dictionary meaning of the word 'tribunal' is the 'seat of a Judge' and is thus wide enough to include courts of law,—in Administrative Law, the word 'tribunal' is used to refer to bodies other than the regular courts of the land, who simulate the courts in that they too determine controversies but are yet not 'courts'. In the words of *our* Supreme Court, the two words are used in Art. 136 of the Constitution in juxtaposition with

1. *E.g.*, question of fair rent, compensation for compulsory acquisition of land, licences for running omnibuses, adjudicating industrial disputes, election disputes and the like.

2. Rep. of the Committee on Ministers' Powers, (1932) Cmnd. 4060, p. 97.

3. Though it may involve begging the question, it may be stated briefly that by 'administrative tribunals' we mean statutory tribunals, over which the Supreme Court of India has jurisdiction under Art. 136 and a High Court under Art. 226 of the Constitution of India, that is, excluding tribunals which exercise purely administrative or executive functions [*Bharat Bank* v. *Employees of Bharat Bank*, A. 1950 S.C. 188 (189, 190,196); *Durgashankar* v. *Raghuraj*, A. 1954 S.C. 520], or those exercising a domestic jurisdiction [*ibid*], or those which only determine questions of policy without any *lis* before them [*R.* v. *Manchester Legal Aid Committee* (1952) All E.R. 481; *Franklin* v. *Minister of Town Planning*, (1947) 2 All E.R. 289 (295) H.L.]; or military tribunals. Under Art. 136, the Supreme Court has widened the category of tribunals by holding that *any* authority which is empowered by statutory provisions "to exercise any adjudicating power of the State" would be held to be a 'tribunal' [*A.P.H.L. Conf.* v. *Sangma*, A. 1977 S.C. 2155 (2163)], e.g., the Election Commission, deciding disputes as to party symbols (*ibid*); the Settlement Commission under s. 245L of the Income-tax Act [*C.I.T.* v. *Bhattacharya*, A. 1979 S.C. 1724]; Arbitrator appointed under s. 10A of the Industrial Disputes Act [*Gujarat Steel Tubes* v. *Mazdoor Union*, A. 1980 S.C. 1896]; the Central Government exercising powers under s. 111(3) of the Companies Act [*Harinagar Sugar Mills* v. *Shyam Sundar*, A. 1961 S.C. 1669 (1679)].

each other, to mean two similar things, but not the same thing.[4] The word 'tribunal' is wider than 'court'; all courts are tribunals, but all tribunals are not courts.[5] A body which determines controversies or the rights of parties is called a 'tribunal' when it possesses *some* but not *all* the trappings of a court.[5]

The following are the broad features which characterise a 'court' :

(a) A court is the part of a hierarchy of tribunals set up by a State under this Constitution to exercise the judicial power of the State, i.e., the power to decide controversies between its subjects, or between itself and its subjects,—to uphold rights and to punish wrongs.[4]

(b) It must be recognised by the law as a 'court'; mere exercise of functions in a judicial manner is not enough.

(c) It must exercise the power to decide by reason of the sanction of law, and not by the voluntary submission of the parties to its jurisdiction.

(d) A court determines the controversy *objectively* and impartially.

(e) A court is bound by precedents.

(f) The doctrine of *res judicata* or estoppel by judgment applies to decisions of courts, subject to certain conditions.

An administrative tribunal is similar to a court in that it is also constituted by the State and when it is set up by a statute it is called a *statutory* tribunal.[6] In this respect, an administrative tribunal is to be distinguished from a domestic tribunal, which is a private body set up by the agreement of parties and does not derive any authorty from the State.[7]

As the Franks Committee has observed,[8] an administrative tribunal, in order to behave properly, must, like courts, be characterised by 'openness, fairness and impartiality' and should not function as 'appendages of Government Departments'.

An administrative tribunal also resembles a court in that (a) it must sit in public;[9] (b) it must be capable of giving *determinative* judgment or award affecting the rights of the parties; (c) it must be moved by an application in the nature of a plaint;[10] (d) it must be satisfied as to the facts and circumstances which would give it jurisdiction;[11] (e) must comply with the rules of natural justice;[12] and (f) give reasons for its decisions.[12]

But, at same time, it is not possible for an administrative tribunal to combine in itself all the virtues of a Court. Thus,

(a) Even though a tribunal may have to apply statutory provisions, it has no jurisdiction to decide general questions of law, and its decision is

4. *Harinagar Sugar Mills* v. *Shyam Sunder*, A. 1961 SC. 1669 (1680).
5. *A.C. Companies* v. *Sharma*, A. 1965 S.C. 1595.
6. In *India*, tribunals are mostly created and governed by statute. e.g., the Central Board of Revenue exercising appellate powers under ss. 190-191 of the Sea Customs Act; an Industrial Tribunal under the Industrial Disputes Act; an Election Tribunal under the Representation of the People Act.
7. *Durgashankar* v. *Raghuraj*, A. 1954 S.C. 520.
8. Rep. of the Franks Committee on Administrative Tribunals and Inquiries, (1957) Cmnd. 218 (pp. 8-10. 55, 57).
9. *Jaswant Sugar Mills* v. *Lakshmi Chand*, A. 1963 S.C. 677.
10. *Bharat Bank* v. *Employees*, A. 1950 S.C. 188.
11. *Md. Hasnuddin* v. *State of Maharashtra*, A. 1979 S.C. 404 (para. 27).
12. *Rama* v. *State of Kerala*, A. 1979 S.C. 1918 (para. 14).

confined to the actual question before it relating to a particular period of circumstances.[13]

(b) It follows from the above that the determination by a tribunal cannot operate as estoppel or *res judicata* in relation to another period,[14] i.e., relating to a different question.[15]

(c) A court can decide a question only objectively, on the materials before it and applying the law to them; an administrative tribunal, even though it may have such materials before it, may be guided by considerations of policy as well, in which the tribunal itself may be interested.[16-17]

(d) A judge is an impartial arbiter and cannot decide a cause in which it is interested; an administrative tribunal may itself be a party to the case to be decided by it.[18]

Growth of Administrative Tribunals.

It has already been stated that the setting up of administrative tribunals and the conferment of adjudicatory functions on them in place of the courts of law is a modern growth owing to the complexity of the problem, caused by the Industrial Revolution and the increase of the points which bring the State into contact with the individual since the undertaking of welfare functions of the State. Once introduced as an apologetic exception to the Rule of Law, as envisaged by Dicey,[19] the number of administrative tribunals in the Anglo-American world has multiplied so much that today the individual is more affected by administrative decisions than by judgments of courts of law.[20]

England. (A) *England.*—Thus, in England, many recent Acts provided that questions arising out of the administration of the Act shall be decided by the Department of the Local Government authorities who administer it.

It is evident that this system of administrative tribunals violates the principle of equality before the law in the *Dicean* sense, viz., the subjection of all persons to the ordinary courts of law, for an administrative tribunal is not bound to follow the procedure of a court of law. It is free to follow that procedure which enables an administrative authority to act efficiently. Hence, *in the absence of a statutory requirement,* an administrative tribunal is not bound to disclose to a party the report of an official[21] or to hear a party orally; it is not fettered by any rules of evidence for obtaining information,[22] nor is it bound to produce evidence for preferring one course to the other,[23] nor to furnish to the parties the reasons for its decision[24] (these will be more fully explained hereafter).

13. *R.* v. *Hutchings,* (1881) 6 Q.B.D. 300 (305).
14. *Society of Medical Officers* v. *Hope,* (1960) 1 All E.R. 317 (321) H.L.
15. *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council,* (1925) All E.R. 672 (P.C.).
16. *Labour Relations Bd.* v. *John East Iron Works,* (1949) A.C. 134 (149).
17. *Rice* v. *Commr. of Stamp Duties,* (1954) A.C. 216 (234).
18. *Wilkinson* v. *Barking Corpn.,* (1948) 1 K.B. 721 (727).
19. Dicey, *Law of the Constitution,* 9th Ed., pp. 202-03.
20. Jackson, *The Supreme Court in the American System of Government* (1955), p. 51.
21. *Denby* v. *Minister of Health,* (1936) 1 K.B. 337.
22. *Board of Education* v. *Rice,* (1911) 1 A.C. 179.
23. *Re Greenwich Housing Order,* (1937) 3 All E.R. 305.
24. *Parsons* v. *Lakenheath School Board,* (1889) 58 L.J. Q.B. 371; *R.* v. *Brighton Rent Tribunal,* (1950) 1 All E.R. 946.

Until 1958, there was no provision for control of these administrative tribunals in England by any superior Administrative Tribunal as in the Continent. The question was, therefore, referred to the Committee on Ministers' Powers,[25] 1932, as to whether England should adopt a full-fledged system of Administrative Courts on the French model. But the Committee gave its opinion against such a proposal on the ground that it was opposed to the flexibility of the English Constitution and the system of normal judicial control over administrative proceedings. Instead, the Committee recommended that these authorities should continue to exercise such judicial powers but that (i) the power of the High Court to keep them within limits by the prerogative writs such as *mandamus, prohibition* and *certiorari* should be retained; (ii) these tribunals should observe the rules of natural justice; (iii) there should be an appeal to the High Court on points of law.

The Report of the Committee on Ministers' Powers evoked public attention to the subject and, in 1955, the Lord Chancellor constituted a Committee, known as the Franks Committee, to consider and make recommendations on two questions, widely framed : (a) The constitution and working of tribunals other than ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purposes of a Minister's functions. (b) The working of such administrative procedures as include the holding of an inquiry or hearing by or on behalf of a Minister on an appeal or as the result of objections or representations and, in particular, the procedure for the compulsory purchase of land. The Committee's Report was published in 1957.[25]

Of the many recommendations made by this Committee, we should note the following : (i) When Parliament left the decision of certain questions to administrative tribunals, rather than to the ordinary courts, the tribunals should function as a machinery for adjudication rather than as a part of the machinery of administration and that, accordingly, their proceedings should be characterised by 'openness, fairness and impartiality'. (ii) There should be an appeal from these tribunals to the courts on points of law but not of fact. (iii) An Advisory Council should be established, appointed by the Lord Chancellor, to report on the working of the tribunals.

The above three recommendations have been substantially adopted by the enactment of the Tribunals and Inquiries Act, 1958, since replaced by the Act of 1971 :

(a) A Council on Tribunals, appointed by the Lord Chancellor, has been constituted to keep under review the constitution and working of the tribunals specified in the Schedule of the Act and also to report on other specified matters relating to the Tribunals (s. 1.).

Tribunals and Inquiries Act.

(b) Appeal on points of law shall lie to the High Court from certain Tribunals, with further appeal to the Court of Appeal (s. 9).

(c) The High Court's supervisory powers of issuing *certiorari* or *mandamus* cannot be taken away by law (s. 11).

(d) Reasons for the decision of a Minister or other tribunal must be given if requested (s. 12).

England has thus provided for a control of the administrative tribunals by the ordinary courts and maintained the traditional Rule of Law, without

25. Report of the Committee on Ministers' Powers, (1931-32) Cmd. 4060, Vol. XII.

either abolishing the administrative tribunals with their special procedure or introducing the system of administrative courts on *droit administratif*.

According to the modern theory, Rule of Law is reconcilable with the existence of administrative tribunals provided they are properly kept under the control of the ordinary courts, to ensure that they observe the rules of 'natural justice'.[26]

(B) *U.S.A.*—In the United States, the problem is known as one of *'administrative adjudication'*. Prima facie, it would seem that there was no scope for administrative adjudication in the U.S.A. in view of the prevalence of the doctrine of Separation of Powers which pervades the entire constitutional system[27] and the specific provision in Art. III, s. 1 that—

U.S.A.

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior *courts* as the Congress may from time to time ordain and establish."

The judicial power cannot, according to the Constitution, be vested in administrative bodies which are not courts. The sheer exigencies of government have, however, led to the creation and justification of administrative tribunals, by a resort to the doctrine of *'quasi'*. The theory, in short, is that the power that is vested in or exercised by administrative tribunals is not 'judicial' but *'quasi-judicial'*. This escape from logical conclusion resulting from the doctrine of Separation of Powers has been possible because of the view that the essential attribute of the judicial power is 'finality' of the decision,[28] free of any interference from the other two organs of the State,—Executive and Legislative. What is delegated to an administrative agency or tribunal is not 'judicial power' but 'judicial process', and so long as an administrative tribunal lacks this judicial finality and *is open to judicial review*, there is no infringement of Art. III, s. 1. When it is found that some of the administrative tribunals enjoy a fair degree of finality and independence, it is urged that anything short of the full judicial power can be delegated without infringement of the constitutional provision.

Another test by means of which the power of an administrative tribunal is distinguished from 'judicial power' is that while a court has the power to *execute* its own decisions, an administrative tribunal has no such power. Further, none but a court has the power to award imprisonment as a penalty,[30] though administrative tribunals are competent to impose a fine.[31]

Whatever be the plea on which the courts have come to tolerate these administrative tribunals, they have, in fact, been obliged to tolerate them by the sheer logic of circumstances which have multiplied problems, which are beyond the capacity of either the Legislature or the Courts to grapple with because they require expert knowledge and experience. As a recent statement of the American Bar Association has put it—

> "The proliferation of administrative agencies in the past thirty years has resulted from the inability of legislatures and courts to deal effectively and promptly with the

26. Wade & Phillips, *Constitutional Law*, p. 54; Wade's *Introduction to Dicey's Law of the Constitution*. 10th Ed., p. cxxx.

27. *Springer* v. *Govt. of the Philipine Islands*, (1928) 277 U.S. 189 (201).

28. Crowin. *Constitution of the U.S.A.*, 1953, p. 513; Forkosch, *Administrative Law*, 1956, pp. 49, 52.

29. E.g., the Board of Tax Appeals [*Dobson* v. *Commr.*, (1943) 320 U.S. 489 (498).]

30. *Wong Wing* v. *U.S.*, (1896) 163 U.S. 228.

31. *Lloyd Subauda Societs* v. *Elting*, (1932) 287 U.S. 329 (355).

infinitely varied complexities of an industrial society.The drafting of rules and regulations is too great a demand upon legislatures., for rules must be subject to prompt modification dictated by intensive practical experience. Determination of rates of service charges, application of business and labor standards, or evaluation of property interests as the basis for assessment of taxes cannot be made by a legislature or a court but only by bodies of specialists exercising flexible *quasi-judicial* powers. Courts dealing with all aspects of society are less well equipped to acquire special competence essential to solution of problems arising out of specific limited activity such as the constituent elements of railroad revenue, employer-employee relations and the like.[32]

The part played by administrative tribunals in the *U.S.A.* to-day can hardly be better explained than in the words of a prominent Judge[33] of the American Supreme Court :

"The values affected by administrative decisions probably exceed every year many times the dollar value of all money judgments rendered by the Federal courts. They also affect the vital rights of citizens."[33]

Administrative tribunals are , therefore, flourishing in the United States with the support of the same Judiciary which is unwilling to part wih the doctrine of Separation of Powers in other spheres. As regards the combination of the functions of the investigator, prosecutor and judge in the same administrative body, the Supreme Court perhaps feels helpless and observes that the evil of such concentration of functions it is the Congress to remedy, not the courts.[34]

In the United States, the administrative tribunals are kept under the control of the courts of law by the doctrine of judicial review, aided by the constitutional requirement of the Fifth and Fourteenth Amendments that

"No person shall be ... deprived of his life, liberty or property, without due process of law."

Though the contents of 'due process' [see *post*] as applied to administrative tribunals are not rigidly uniform but vary with the nature and function of tribunals, the minimum that is required corresponds to the demands of the English doctrine of 'natural justice' from which it has emerged, and thus postulates the requirement of 'notice and opportunity to be heard'.[35] In practice, statutes which vest adjudicatory functions in administrative tribunals provide for hearing, but even where a statute omits to do so, the constitutional requirement would enable the court to interfere and nullify the decision made without an opportunity for hearing.[36] Thus,

"Although the statutes empowering ..... the Commissioner to grant, suspend or revoke a hack driver's licence do not expressly require that those licences may be withdrawn only upon notice and an opportunity to be heard, it is not necessary that they do so. Where the exercise of statutory power adversely affects property rights ..... the courts have implied the requirements of notice and hearing, where the statute is silent."[37]

But while the Court adheres to its orthodox view that 'Due Process' cannot be abrogated either by the Legislature or any of its creatures, the court has diluted the contents of 'Due Process' by holding that it does not

32. *The Rule of Law in the United States,* (1958), pp. 34-35.
33. Jackson, *The Supreme Court in the American System of Government*, (1955), p. 51.
34. *Marcello* v. *Bonds,* (1955) 349 U.S. 302.
35. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* (1951) 341 U.S. 123 (178).
36. *Wong Yang* v. *McGrath,* (1950) 339 U.S. 33 (49).
37. *Hecht* v. *Monaghan,* (1954) 307 N.Y. 461 (468).

require a hearing in a court of law in every case and its requirements are satisfied if there is a review of the decision of an administrative authority at any time before it is made final.

India—In India, too, in many recent statutes, *quasi-judicial* powers have been vested in administrative authorities, e.g., the Transport Authorities and the Claims Tribunal under the Motor Vehicles Act, 1939; the Rent Controller under the State Rent Control Acts; the Appellate Tribunal under the Income-tax Act; the Copyright Board under the Copyright Act, 1958.

India.

Apart from these, there are tribunals which are called special tribunals in that they are not regular courts but have judicial authority and have the 'trappings of a court', e.g., an Industrial Tribunal.[38]

The number of such tribunals is on the increase owing to the welfare role taken up by the State under *our* Constitution, so much so that "the number of Indian statutes which constitute administrative authorities, purely administrative and *quasi-judicial*, is legion".[39]

As in *England*, the problem of efficiently keeping all these tribunals under the control of the ordinary courts has attracted the attention of jurists in India, and the Law Commission which submitted its Fourteenth Report[39] in 1958, presented the problems thus :

"Some of these affect valuable rights of the citizen and impose onerous obligations upon parties. These may be broadly classified as our revenue and taxation laws, labour laws and land laws. Some of them provide no right of appeal or revision even to higher administrative authorities. Others confer right of appeal and revision but these lie to the higher administrative authority and not to any judicial authority. It is only in a few cases that we find an ultimate appeal or revision given to a court of law. Finally, in a number of statutes care is taken to exclude in express terms the appearances of lawyers before the administrative bodies and to bar the courts from entering any appeal or revision.

"It is surprising that duties of customs should be levied on sea and land frontiers under laws which leave not only the determination of the duty but the levy of penalties of confiscation and fine to administrative officers and provide an appeal and revision to superior officers, prescribing no procedure whatever for the hearing of these appeals and revisions. Not infrequently under these Acts, the citizen is subjected to heavy penalties without any opportunity of a review by a judicial authority in matters of a clearly *quasi-judicial* nature."

The Commission's recommendations, *inter alia*, are—

(1) The existing jurisdiction of the Supreme Court and the High Court which enables them to examine to a limited extent the action of administrative bodies should be maintained unimpaired.

(2) Decisions should be demarcated into—

(a) judicial and *quasi-judicial*, and

(b) administrative.

(3) In judicial and *quasi-judicial* decisions, an appeal on facts should lie to an independent tribunal presided over by a person qualified to be a Judge of a High Court. He may be assisted by a person or persons with administrative or technical knowledge. The tribunal must function with openness, fairness and impartiality as laid down by the Franks Committee.

(4) In the case of judicial or *quasi-judicial* decisions, an appeal or a revision on questions of law should lie to the High Court. Special machinery can, if necessary,

38. *Bharat Bank* v. *Employees of Bharat Bank*, (1950) S.C.R. 459.

39. The Fourteenth Rep. of the Law Commission (Reform of Judicial Administration), Vol. II. para. 38.

be provided to assist the High Court Judge. The suggestions made by the Franks Committee (p. 292, *ante*) may be (adopted) in this connection.

(5) In the case of administrative decisions, provision should be made that they should be accompanied by reasons. The reasons will make it possible to test the validity of these decisions by the machinery of appropriate writs.

(6) The tribunals delivering administrative judgments should conform to they principles of natural justice and should act with openness, fairness and impartiality.

(7) Legislation providing a simple procedure embodying the principles of natural justice for the functioning of tribunals may be passed. Such procedure will be applicable to the functioning of all tribunals in the absence of special provision or provisions in the statutes constituting them."

We shall now take up the subject of judicial control of administrative acts and decisions, whether they are *quasi-judicial* or purely administrative. The discussion will be under two heads—

(i) The jurisdiction of the ordinary courts, how far excluded by statutory tribunals.

(ii) Judicial review of administrative actions, including *quasi-judicial* decisions. The second one of the topic will be taken up in a separate Chapter.

Tribunals under Arts. 323A-323B, Constitution of India.

The development of the law relating to Administrative Tribunals in India has been furthered by the 42nd Constitution Amendment Act, 1976, which inserted Arts. 323A and 323B in the Constitution.

A. The features which are common to these two Articles are :

(i) They empower the Legislature to set up Administrative Tribunals for the adjudication of disputes between the State and the individual, relating to certain specified matters, and to lay down the jurisdiction and powers of such Tribunals.

(ii) Such powers may include the power to punish for their contempt.

(iii) Such law may lay down the procedure to be followed by such tribunals, including rules as to limitation and evidence.

(iv) Such law may provide for the transfer to such Tribunals cases which are pending before a court or other authority at the time of establishment of each Tribunal.

(v) Incidental provisions for their effective functioning may be included in such laws.

(vi) Such law may exclude the jurisdiction of all courts, other than the jurisdiction of the Supreme Court under Art. 136, in respect of such matters.

(vii) The provisions of both Articles shall override the provisions in the Constitution or any other law, to the contrary.

B. The points on which the two Articles differ are :

Art. 323A :	Art 323B :
1. Art. 323A is confined to matters relating to the public services.	1. Art. 323B relates to Tribunals relating to any of the matters specified in clause (2), e.g., taxation, foreign exchange, labour dispute, land reforms, elections, essential goods; offences and incidental matters relating to such matters.
2. Only one such Tribunal may be created for the Union and one for each State or two or more States together (no hierarchy).	2. The appropriate Legislature is empowered to establish a hierarchy of Tribunals relating to each subject specified in clause (2).

3. The power to make such law belongs exclusively to Parliament.	3. The legislative power is divided between the Union and State Legislatures according to their respective legislative competence over each of the subjects.

The Constitution (42nd Amendment) Act did not impose any conditions as to how the administrative tribunals will arrive at their decision,—not even that they must follow the *quasi-judicial* procedure, consistent with the principles of natural justice, but left everythng to be provided for in the respective laws relating to these different matters.

But unless the Legislature intends to violate juristic principles, it may be expected that it will impose a *quasi-judicial* obligation, consistently with the fact that an appeal to the Supreme Court lies under Art. 136 from the decisions of these Tribunals and that the decisions of the Supreme Court lay down that functions like the following are, by their nature, *quasi-judicial* :

(i) Determination of an election dispute.[40]
(ii) Assessment of a tax.[41]
(iii) Adjudication of industrial disputes.[42]
(iv) Termination of services.[43]
(v) A Revenue Officer, like a Customs Authority, imposing penalty.[44]
(vi) Order affecting an individual's property.[45]

It is to be noted that neither Art. 323A nor 323B are self-executing provisions. They merely authorise the specified Legislature to make laws to set up such Tribunals and to include therein ancillary provisions. In other words, they only offer the constitutional authority for such legislation. It follows that so long as no law is made under Art. 323A(2)(d) or Art. 323B, the existing jurisdiction of the ordinary courts and the High Courts under Arts. 226-227 of the Constitution shall continue over Administrative Tribunals.

Tribunals under the Administrative Tribunals Act, 1985.

Parliament has since passed the Administrative Tribunals Act, 1985 This Act implements Art. 323A as regards the speedy settlement of disputes and complaints regarding recruitment and service conditions of the employees of the Central and State Governments as well as local authorities [*vide* App. II, *post*, for the text of this Act, with a full annotation].

Administrative tribunals, how far bound by rules of evidence.

It has already been seen that in England and India as well as in the U.S.A., it is acknowledged that, in the absence of statutory requirements, administrative tribunals are free to follow *any* procedure, so long as the rules of natural justice[46-47] or the 'fundamentals of fair play'[48] are observed.

40. *Indira* v. *Raj Narain*, A. 1976 S.C. 2299 (para. 329).
41. *Suraj Mal* v. *Viswanatha*, A. 1954 S.C. 545; *D.C.M.* v. *Commr. of I.T.*, (1955) 1 S.C.R. 941.
42. *Express Newspapers* v. *Workers*, A. 1963 S.C. 569.
43. *Calcutta Dock Labour Bd.* v. *Imam*, (1965) II S.C.A. 226 (230); *State of Orissa* v. *Binapani*, A. 1967 S.C. 1269.
44. *Pioneer Traders* v. *Chief Controller*, A. 1963 S.C. 734 (740); *Leo Roy* v. *Supdt.*, A. 1958 S.C. 119 (121).
45. *D.F.O.* v. *Ram Sanehi*, A. 1973 S.C. 205; *Sri Bhagwan* v. *Ramchand*, A. 1965 S.C. 1767 (1771).
46. *Local Govt. Board* v. *Arlidge*, (1915) A.C. 120; *General Medical Council* v. *Spackman*, (1943) A.C. 827.
47. *Union of India* v. *Verma*, A. 1957 S.C. 882.
48. *F.C.C.* v. *Pottsville Broadcasting Co.*, (1940) 309 U.S. 134.

The question is how far they would be bound by the law of evidence which is applicable to the courts.

(A) *England.*—Not only are administrative tribunals not bound by the rules relating to admissibility of evidence, they are not bound to act upon the evidence duly admitted (even though the parties be agreed upon such evidence), if it goes against their own 'expert knowledge".[49] For,

England.

"The experience of an expert tribunal. . . is part of its equipment for determining the case. Litigants must take that experience as they find it; and because the tribunal is assumed to be impartial they have no grievance if they cannot test it by cross-examination."[49]

This is subject to the limit that they cannot act on 'no *evidence*', i.e., unless there is some evidence which is *reasonably* capable of supporting their finding,[50] in which case the finding becomes perverse or *ultra vires.*

In England, the power of an administrative tribunal to take official notice of facts and of acting on its expert knowledge has not so far been subjected to such procedural limitations as have been evolved in the United States out of the 'due process' doctrine (see *below*).

(B) U.S.A.—Since administrative tribunals are free to determine their own procedure (in the absence of statutory requirements), the rules of evidence are not binding upon them.[51] They are free to act on evidence which would be inadmissible[52] in a judicial proceeding but which "tends *reasonably* to show the purpose and character of the particular transactions under scrutiny".[53] The standard of judicial proof is also relaxed in the case of an administrative proceeding. The reason was thus explained in *Inter-State Commerce Commission* v. *Baird*[54]—

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"The inquiry of a Board of the character of Inter-State Commerce Commission should not be too narrowly construed by the technical rules of admissibility of proof. Its function is one of investigation and it should not be hampered in making inquiry by those narrow rules which prevail in terms of the common law where strict correspondence is required between allegation and proof."[54]

Even s. 7(c) of the Administrative Procedure Act, 1946, enables an adjudicatory body to receive "any oral or documentary evidence", so that a proceeding is not vitiated by reason of admission of inadmissible evidence, overruling objection.[55]

But a court would, in review, quash an administrative decision if it is not based on *'substantial* evidence', which means that the decision will fall if it is based solely on inadmissible evidence, such as hearsay.[56]

An administrative tribunal is also entitled to act upon its own expert knowledge to the exclusion of the evidence adduced before it, even though of expert witnesses. But this power of acting upon its own knowledge is limited to making inference[56] from *facts already on the record.* The universal requirement of due process demands that the administrative tribunal must act upon facts which are already on the record, or which are placed before

49. *R.* v. *City of Westminster Assessing Committee,* (1941) 1 K.B. 53 (62) C.A.
50. *Coleen Properties* v. *Min. of Housing,* (1971) 1 W.L.R. 433; *R.* v. *Secy. of State,* (1977) Q.B. 122 (123).
51. *Consolidated Edison Co.* v. *N.L.R. Board,* (1938) 305 U.S. 197.
52. *U.S.* v. *Abilene & S. Ry.,* (1924) 265 U.S. 274 (288).
53. *Fed. Trade Commn.* v. *Cement Institute,* (1948) 333 U.S. 683 (705).
54. *Inter-State Commerce Commn.* v. *Baird,* (1904) 194 U.S. 25 (44).
55. *Willapoint Oysters* v. *Ewing,* (1949) 174 F. 2d. 676 (690).
56. *N.L.R.B.* v. *Amalgamated Meat Cutters,* (1953) 202 F. 2d. 673.

the parties[57] even though in an informal manner,[58] so that the parties may have an opportunity of rebutting such materials.[57] If the tribunal decides upon undisclosed data, it amounts to condemnation without trial.[57]

S. 7(d) of the Administrative Procedure Act, 1946, makes express provision to safeguard an abuse of the power of 'official notice' :

"Where an agency decision rests on official notice of a material fact not appearing in the evidence on the record, any party shall on timely request be afforded an opportunity to show the contrary."

(C) *India.*—As in England, it has been held that an administrative tribunal is not fettered by the rules of evidence,[59] and is free to act on inadmissible evidence; nor is it bound to follow the procedure for examination of witnesses given in the Evidence Act.[60]

India.

Its only duty is to observe the rules of natural justice.[61] It cannot, therefore, come to a finding on mere guess, based on no material whatsoever,[62] or on secret or unrebutted evidence;[59] or deny the right to cross-examine a witness,[61] or deny to a party the opportunity of adducing all relevant evidence on which he relies.[59]

There must be *some* evidence to support the finding of the tribunal[63] and, in a disciplinary proceeding against an employee, the delinquent cannot be interrogated without adducing any evidence on behalf of the prosecution in support of the charges;[64] nor can he be punished on his admission which is clear or unambiguous.[65]

The court cannot interfere on the ground that the evidence was *inadequate,*[66] it can only interfere where there was 'no evidence', judged by a fair commonsense standard as distinguished from evidence acceptable to a court of law.[67] But evidence not disclosed to the party and which he had no opportunity of rebutting would be 'no evidence'.[68]

Is an administrative tribunal bound to give reasons for its decision?

(A) *England.*

I. Prior to the enactment of the Tribunals and Inquiries Act, 1958, the law was as follows :

England.

Unless so required by statute, an administrative tribunal (as distinguished from a court of law) was not bound to give reasons for its decisions[69] and where a tribunal did not

57. *Ohio Bell Tel Co.* v. *Public Utilities Commn.,* (1937) 301 U.S. 292 (301-02).
58. *Market Street Ry. Co.* v. *Railroad Commn.,* (1945) 324 U.S. 548; *Richardson* v. *Perales,* (1971) 402 U.S. 389.
59. *D.C. Mills* v. *Commr. of I.T.,* A. 1955 S.C. 65 (69) [Income-tax Officer].
60. *N.P.T. Co.* v. *N.S.T. Co.,* (1957) S.C.R. 98.
61. *Union of India* v. *Verma,* A. 1957 S.C. 882.
62. *Raghubar* v. *State of Bihar,* A, 1957 S.C. 810 (812).
63. *State of A.P.* v. *Rama Rao,* A. 1963 S.C. 1723 (1726).
64. *State of Punjab* v. *Amar Singh,* A. 1966 S.C. 1313 (1317).
65. *Jagdish* v. *State of M.P.,* A. 1961 S.C. 1070.
66. *Nand Kishore* v. *State of Bihar,* (1978) 3 S.C.C. 366.
67. *State of Haryana* v. *Ratan,* (1977) 2 S.C.C. 491; *Jain* v. *State Bank,* A. 1981 S.C. 673.
68. *Kishin* v. *I.T. Commr.,* A. 1981 S.C. 673; *Bareilly E.S.C.* v. *Workmen,* (1971) 2 S.C.C. 617 (629).
69. *R.* v. *Northumberland Compensation Tribunal,* (1952) 1 K.B. 338 (352); *Parsons* v. *Lakenheath School Board,* (1889) 58 L.J. Q.B. 371.

choose to give the reasons, the High Court could not interfere by a writ of *certiorari*, however erroneous the decision may be.[69]

A duty to give reasons had been judicially inferred in the case of licensing justices, exercising a *quasi-judicial* function.[70]

II. The above position has been modified by the Tribunals and Inquiries Act, 1958 (now Act of 1971), passed in pursuance of the recommendations of the Franks Committee.[71] S. 12 of this Act enables a person concerned to obtain, by request, a statement of the reasons for the decision of any of the Tribunals specified in the Act or of any Minister making a statutory inquiry, and such statement shall form part of the decision and the record. The reasons, so supplied, must be intelligible and must deal with the substantial points that have been raised,[72] but need not be elaborate.[73]

(B) *U.S.A.*—(i) S. 8(b) of the Administrative Procedure Act, 1946, makes it obligatory for every adjudicatory body to include in its decision a statement of 'findings and conclusions as well as the reasons or basis thereof, upon all the material issues of fact, law or discretion presented on the record". The administrative tribunals to whom this Act applies are thus obliged to deliver opinions very much similar to judgments given by courts of law.

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(ii) Even outside the scope of the statute, it has been held that one who decides must give reasons for this decision.[74] The Supreme Court has said that the reasons are essential for enabling the court to effectively exercise its power of judicial review.[75]

(C) *India.*—With respect, it must be said that judicial opinion in India, on this point, had been oscillating between all possible views, until recently.

I. The general rule is that a purely administrative authority has no obligation to state reasons for its action,[76] in the absence of statutory requirements to that effect.[77]

India.

Edceptions to this rule are—that reasons must be given where the impugned order is attended with *civil consequences*[78] whether it is labelled as *quasi-judicial* or not;[78] or when the facts are disputed.

II. Reasons must be given where the function in question is *quasi-judicial*,[78] except where the requirement is dispensed with by statute;[79] or the circumstances are such that no reasons are required to be stated.[78]

But the Supreme Court had to evolve this rule through different stages:

III. At the one extreme stands the view that in the absence of a statutory requirement, it is at the discretion of the tribunal to give reasons or not,[80] and, therefore, a decision does not become invalid merely because reasons have not been given.[81]

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70. *Sharp* v. *Wakefield*, (1891) A.C. 173.
71. Cmnd. 218.
72. *Re. Poyser & Mills' Arbitration*, (1963) 1 All E.R. 612.
73. *Elliott* v. *Southwark L.B.C.*, (1976) 1 W.L.R. 499.
74. *U.S.* v. *Forness*, (1942) 125 F. 2d. 928 (942); *Fed. Communications Commn.* v. *Pattsville Broadcasting Co.*, (1940) 309 U.S. 134.
75. *U.S.* v. *Chicago*, (1935) 294 U.S. 499 (511).
76. *Maharashtra S.E.B.* v. *Gandhi*, (1991) 2 S.C.C. 716 (paras. 20, 22).
77. Cf. *Gautam* v. *Union of India*, (1993) 1 S.C.C. 78 (paras. 31-32).
78. *Modi Industries* v. *State of U.P.*, (1994) 1 S.C.C. 159 (para. 11).
79. *S.N. Mukherjee* v. *Union of India*, (1990) 4 S.C.C. 594 (paras. 46, 48) C.B.
80. *Express Newspapers* v. *Union of India*, A. 1958 S.C. 578 (636).
81. *M.P. Industries* v. *Union of India*, A. 1966 S.C. 671 (675-76).

Thus, it has been held that under s. 165 of the Army Act, the confirming authority or the Central Government has no obligation to give reasons for its decision.[82]

IV. The obligation to give reasons has been particularly implied in the case of exercise of powers of appeal,[83-84] review and revision[81] by administrative tribunals, even though courts have the power to dismiss such matters *in limine.*

V. As to the generality of *quasi-judicial* decisions (outside the sphere of appeal or revision), the Supreme Court was at first contented with merely pointing out the *desirability* of giving reasons.

Of late, a unanimous court has, on review of previous decisions, firmly laid down,[85] that the supervisory powers of the High Court under Art. 226[86] or 227[85] or the appellate power of the Supreme Court under Art. 136 over the decision of every *quasi-judicial* tribunal would be rendered nugatory unless the inferior *quasi-judicial* body gives the reasons for its decision, which can be scrutinised by the superior tribunals of the land which are vested by the Constitution with the power of judicial review. If an order does not give any reasons, it "does not fulfil the elementary requirements of a *quasi-judicial* process".[86]

In *M.P. Industries* v. *Union of India,*[81] it was contended that the obligation to give reasons might involve delay. Rejecting this contention, the Court observed—

> "The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons—minimise arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an *appellate or supervisory court to keep the tribunals within bounds.*"[81]

It is on this very ground, namely, that the powers under Art. 136 of the Constitution would be rendered infructuous that the Court held that even when the subject-matter was confidential, the Government, while exercising *quasi-judicial* powers, must gives its reasons.[83]

In *Bhagat Raja's case*[85] it has further been held that the absence of any requirement in the relevant statutory provision to give reasons was immaterial and that even when the *quasi-judicial* tribunal was confirming the order of an inferior authority, it was bound to give its reasons in short, though it might not be required to write out a judgment as a court of law would. Again, in the absence of a statutory requirement, there is nothing wrong in the tribunal passing an oral order in the presence of the parties, followed by an order in writing, giving reasons.[87]

Eventually, a general obligation to give reasons has been laid down as regards all *quasi-judicial* decisions, by a three-Judge Bench.[87] In this case, the requirement to state reasons has been raised to the pedestal of 'a basic principle of natural justice' 'like the principle of *audi alteram partem*'.[87] It has been held that such reasons must be sufficiently clear and explicit. This requirement would apply not only to *quasi-judicial* functions like assessment[87] or deciding an appeal[88] but would extend to *all* administrative decisions which would affect the civil rights of individuals, such as the impounding of

82. *Som Datta* v. *Union of India,* (1968) S.C. [W.P. 118/68, 20-9-1968].
83. *Hari Narayan Sugar Mills* v. *Shyam Sundar,* A. 1961 S.C. 1669 (1678).
84. *I.T. Commr.* v. *Alps Theatre,* A. 1967 S.C. 1435 (1437).
85. *Bhagat Raja* v. *Union of India,* (1967) 2 S.C.R. 302.
86. *Govindarao* v. *State of M.P.,* A. 1965 S.C. 1222.
87. *Siemens Co.* v. *Union of India,* A. 1976 S.C. 1785 (para. 6); *Rama* v. *State of Kerala,* A. 1979 S.C. 1918.
88. *Travancore Rayons* v. *Union of India,* A. 1971 S.C. 862.

a passport,[89]—now that the distinction between *quasi-judicial* and administrative decisions has broken down.[90]

In some cases, the obligation has been amplified to include the requirement to communicate the reasons to the party affected.[91]

IV. But notwithstanding the formulation of the foregoing general principles, exceptions have been engrafted from time to time :

(a) It has been held[92-94] that in a *disciplinary proceeding*, where the Government[92] or other punishing authority[94] inflicts punishment on the delinquent employee, differing from the findings arrived at by the inquiring authority, it must give reasons; but where the findings or the inquiry officer or tribunal are accepted by the punishing authority, it *need not* give its reasons for such acceptance. This exception has been admitted by the court having regard to "the manner in which these proceedings are conducted", namely, that before the punishing authority is called upon to act, it has before it the materials not only of the *quasi-judicial* proceedings at the inquiry stage held by the inquiry officer or tribunal but also the report of the Public Service Commission, where it is consulted.[95]

(b) A three-Judge Bench[94] has held that in exceptional circumstances, the reasons of the tribunal may be *implied*, so that the requirement to give explicit reasons[88] is not universal. Such exceptional circumstances were held to exist where the delinquent did not deny the charges which were simple enough and the disciplinary authority ostensibly founded its decision upon the admission of the delinquent.[94]

V. If a statute expressly *prohibits* a tribunal from giving its reasons where fundamental rights are involved, the statute would be void for an indirect contravention of Art. 32, for, as a result of the prohibition, the party aggrieved would be deprived of his remedy by way of *certiorari*, which is guaranteed by Art. 32.[96]

VI. On the other hand, if the statute requires the authority to state reasons, such requirement must be held to be *mandatory* and non-compliance will invalidate the decision, on the ground of *ultra vires*.[97-98] In such cases,

89. *Maneka* v. *Union of India*, A. 1978 S.C. 597.

90. *Mahabir Mills* v. *Shibban Lal*, A. 1975 S.C. 1057 would be longer be good law after *Maneka's case* [A. 1978 S.C. 597].

91. *Ajantha Industries* v. *Central Bd.*, A. 1979 S.C. 437.

92. *State of Madras* v. *Srinivasan*, A. 1966 S.C. 1827.

93. *Nandaram* v. *Union of India*, (1966) S.C.D. 147 (152); *Madhya Pradesh Industries* v. *Union of India*, (1966) S.C.D. 342 (per Bachawat, J.).

94. *Tripathi* v. *State Bank of India*, A. 1984 S.C. 273 (para. 42); *Tara Chand* v. *Delhi Municipality*, A. 1977 S.C. 567.

95. The reasoning is unquestionable where the findings are favourable to the delinquent and the punishing authority acquits him; but it is not so clear where the findings are against the delinquent and the punishing authority punishes him on the basis of the findings of the inquiry officer. It has been held [*Union of India* v. *Goel*, A. 1964 S.C. 364; *D'Silva* v. *Union of India*, A. 1962 S.C. 1130 (1132)], that the entire responsibility for the punishment is that of the punishing authority,—neither of the Inquiry Officer nor of the Public Service Commission,—and that the punishing authority cannot act as a mere rubber-stamp, adhering to the recommendations before him. If so, there is no apparent reason why in such a case, the reasons should not be recorded by the punishing authority,—to show that he has applied his mind independently, to the materials before him.

96. *Express Newspapers* v. *Union of India*, A. 1958 S.C. 578 (636).

97. *Union of India* v. *Chothia*, A. 1978 S.C. 1214; *Ajantha Industries* v. *Central Bd.*, A. 1976 S.C. 437; *Uma Charan* v. *State of M.P.*, A. 1981 S.C. 1915; *Rajamallaiah* v. *Anil*, A. 1980 S.C. 1502.

98. *U.O.I.* v. *Nambudri*, (1991) 3 S.C.C. (paras. 8-10).

the court would not save the order by discovering the reasons by implication[99] or by accepting *ex post facto* recording of reasons by the authority concerned.[100]

VII. Where the statute does not require the *recording* of reasons, an administrative order is not rendered illegal for absence of reasons.[98] But, if a challenge is made to the order on the ground of its being arbitrary or *mala fide*, the authority may justify the fairness of the order only by showing that there are materials on the record which explain the reasons for the record.[98]

Is an Administrative Tribunal bound to disclose departmental report?

(A) *England.*—Though it is settled that an administrative tribunal cannot act upon evidence which is not taken before[1] or presented to[2] both parties, it is also laid down by high authority[3] that the tribunal is not bound to disclose any report of inquiry made by a departmental officer, even though the tribunal has based its decision upon it,[4] on the ground that if there was such a disclosure, departmental staff would not be in a position to act freely. The requirements of natural justice would be satisfied if the person affected had an opportunity of stating his case before the officer who made the inquiry.[3]

The above view has, however, been widely criticised by jurists[5] as well as by expert bodies,[6] and some departments have made concessions in this respect but the courts have not so far changed their views.

England. In an appeal from *Malaya*, however, the Privy Council,[7] speaking through Lord Denning, has held that in a disciplinary proceeding against an employee, it would be a breach of the principles of natural justice if the report of a fact-finding inquiry is placed before the disciplinary authority, without disclosing it to the delinquent employee.

In *Scotland* also, it has been held[8] that the report of an inquiry, in pursuance of which the administrative tribunal comes to its decision, must be disclosed to the party before the tribunal decides.

U.S.A. (B) *U.S.A.*—In the United States, under the Administrative Procedure Act, 1946 [s. 8(b)], the report of a hearing or inquiry officer shall form part of the record and be available to the parties, as a part of the record.

(C) *India.*—From the observations of *our* Supreme Court in *N.P.T. Co.* v. *N.S.T. Co.*,[9] it is evident that the Court is not prepared to lay down any uniform rule on this point. Thus,

India. (a) Under s. 47 of the Motor Vehicles Act, 1939, the Transport Authority has the power to grant or refuse a permit having regard to the specified statutory conditions and after considering

99. *State of U.P.* v. *Lalai*, A. 1977 S.C. 202.
100. *Parashram* v. *Ram*, A. 1982 S.C. 872.
1. *Errington* v. *Minister of Health*, (1935) 1 K.B. 179.
2. *Stafford* v. *Minister of Health*, (1946) K.B. 621.
3. *Local Govt. Board* v. *Arlidge*, (1915) A.C. 120.
4. *Denby & Sons* v. *Minister of Health*, (1936) 1 K.B. 377 (343).
5. Allen, *Law & Orders*, 1965, pp. 253-54; Robson, *Justice & Administrative Law*, 3rd Ed.; Wade, *Administrative Law* (1977), pp. 433-34.
6. Committee on Ministers' Powers, Rep. 80, 105; Franks Committee, Rep. 73 (1957, Cmd. 218).
7. *Kanda* v. *The Federation of Malaya*, (1962) A.C. 322 (337).
8. *Paterson* v. *Secy. of State*, (1971) S.C. 1.
9. *N.P.T. Co.* v. *N.S.T. Co.*, A. 1957 S.C. 232 (236-37).

the representations made by (i) persons already providing road transport facilities along or near the proposed route or routes; (ii) any police or local authority in whose jurisdiction the route or routes lie; (iii) any association interested in the provision of road transport facilities. S. 64 provides for an appeal to a prescribed authority from an order under s. 47 and under s. 64, read with the rules framed under the Act, the Appellate Authority was bound to give to the appellant as well as the Transport Authority and other parties interested, such as the local or police authority "an opportunity of being heard".

An Appellate Authority read out a subsequent report of the police authority during the hearing of the appeal, and decided the appeal without giving a copy of the police report to the appellant or giving him an opportunity of meeting the contents of the report.[9] The court held that the Appellate Authority was exercising *quasi-judicial* functions and that the appellant as well as the local or police authorities and interested persons were parties before it at the hearing. Apparently, there was a *lis* and normally one would expect that the tribunal would not accept any information from any of the parties without giving the other party adequate opportunity of meeting that case. The court, however, proceeded on the footing that the *lis* was as between the two rival candidates and that the police was entitled to inform the Transport Authority as to the credit or discredit of the candidates as suppliers of transport facilities, frrom the standpoint of maintenance of law and order. But it is submitted, the observation of the court that the report of the police was "in the nature of information supplied by the police in order to *assist* the authority in making up its mind" is not strong enough[10] in view of the provisions of ss. 47 and 64 of the Act and the rules made thereunder and the finding of the court that both the original and the appellate authorities exercise *quasi-judicial* and not purely administrative functions. Nevertheless, the court came to the conclusion that since neither the Act nor the Rules prescribed in detail the procedure to be followed, the 'minimum' of hearing was all that was required, and, following *Local Government Board* v. *Arlidge*,[3] held that in the circumstances of the case, the rules of natural justice were not violated by not giving to the appellant a copy of the police report.

There is, however, a special circumstance which justifies the decision in this case, apart from any proposition of law deduced from the silence of the statute as to the procedure to be followed by the *quasi-judicial* authority, namely, that the appellant was represented by counsel at the hearing and that he neither asked for a copy of the police report nor asked for an adjournment of the hearing of the appeal to meet the information disclosed in the police report which was *read out* by the appellate authority to all the parties to the hearing. It is, thus, not a case of simple non-disclosure. There was, indeed, an informal disclosure and the party did not press for more.

10. *Prima facie*, in the U.S.A., the above procedure would have been hit by s. 5(c) of the APA. Obviously, the police report related to the issue before the authority, viz., whether permit should be granted to the applicants. On such a matter, s. 5(c) of the APA prohibits the adjudicating officer from consulting not only any party but also *"any person"* without giving an opportunity to all the parties to participate. If the officer is influenced in the decision of the issue by something said by any person in the absence of a party, the decision is liable to be invalidated at the instance of such party.

The English precedents may not be helpful to the aggrieved party on this point, but on principle, though a *quasi-judicial* decision may legitimately take into consideration the interests of the administration or even matters of policy, there is no reason why the person affected by a proceeding should not be entitled to meet the facts laid by the administrative authority before the *quasi-judicial* authority except where the security of the State and similar well-established exceptional reasons justify the refusal of the right.

From this, it could be concluded that 'adequate' opportunity of meeting the information disclosed had been given.[9, 11-12]

(b) It has been held that where the decision of the administrative authority relates to the grant of a privilege,[13] such as a liquor licence and there is no *lis,* the authority need not disclose to the parties the report of the Collector or other sources of information upon which the decision of the authority has been founded.

(c) On the other hand, the court has annulled the order of an Income-tax Tribunal on the ground, *inter alia,* that the Tribunal had acted upon information supplied to it by the Income-tax Department, without disclosing that to the assessee. The Court, instead of holding that the information supplied by the Department was merely to assist the Tribunal in making its mind, expressed surprise "that the Tribunal took from the representative of the department a statement of gross profit rates of *other cotton mills* without showing that statement to the assessee and without giving him an opportunity to show that the statement had *no relevancy* to the case of the mill in question", even though the court conceded that it was competent for the Tribunal "to act on material which may not be accepted as evidence in a court of law".[14]

(d) It should also be noted that in cases under Art. 311(2) of the Constitution, it is settled that natural justice requires that a copy of the inquiring officer's report or an adequate summarry thereof should be supplied to the civil servant concerned where it is proposed to punish him on the basis of the report.[15]

(e) Of course, natural justice would not demand disclosure of a document which is held to be secret or confidential.[16]

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11. This is an exception to the principle of natural justice that a *quasi-judicial* authority must afford to the party an opportunity of rebutting the information or materials upon which he decides,—the exception being based on acquiescence, namely, that the party, *knowing* that the Tribunal was using such document or material, raised no objection before the Tribunal nor asked for an opportunity to meet the statements made therein.

It should be pointed out, however, that this exception may be quite justified where the party is aided by a lawyer, but not in cases where the law relating to the Tribunal prohibits the appearance of lawyers or where, owing to want of means, persons of low means or intellect are unable to obtain legal aid. This is the very reason why the (American) Administrative Procedure Act, 1946, provides the right of engaging lawyers in every proceeding and the Franks Committee recommends for free legal aid and also the right to engage lawyers except in most exceptional cases.

It is a matter for serious consideration whether we, in India, should enforce principles like waiver and the like at least in administrative proceedings, so long as we are unable to provide for free legal aid in every such proceeding, to deserving persons.

12. Similar view has been taken as regards non-disclosure of the investigation report under s. 15 on the basis of which the taking over of a company under s. 18A of the Industries (Development and Regulation) Act, 1951, has been made when, otherwise, the administrative authority had acted 'fairly' [*Kesava Mills* v. *Union of India,* A. 1973 S.C. 389 (para. 21)].

13. *Chingleput Bottlers* v. *Majestic Bottling,* A. 1984 S.C. 1030 (para. 41); *Vishnu* v. *Parag,* A. 1984 S.C. 898 (para. 16). [The Court said that there 'was no *lis* between the Commissioner and the person who is refused such previlege' (para. 40); but there are competing applicants and how is the applicant, whose claim is rejected and thereby his means of livelihood is taken away, to know what allegations have been made against him and in favour of his rivals, if the report upon which the Commissioner decides is not disclosed to him?].

14. *D.C. Mills* v. *Commr. of I.T.,* (1955) 1 S.C.R. 941.

15. *State of Assam* v. *Bimal,* A. 1963 S.C. 1612; *State of Punjab* v. *Amar Singh,* A. 1966 S.C. 1313 (1317).

16. *Bishnu* v. *Parag,* A. 1984 S.C. 898 (paras. 12, 16).

Administrative Tribunal bound to follow the law declared by the Supreme Court and the High Court of the State.

Though Art. 141 of *our* Constitution is confined only to the binding force of the law declared by the Supreme Court upon the other *courts* in India, there is little doubt that such law is also binding upon all administrative tribunals of the country who are under the appellate jurisdiction of the Supreme Court under Art. 136.

Even in the absence of a provision corresponding to Art. 141, the same view must prevail as to the law declared by the High Court of the State in which the tribunal is situate, because it is subject to the supervisory jurisdiction of that High Court under Art. 227 and the writ jurisdiction thereof under Art. 226,[17] in the same way as decisions of the High Court are binding upon the inferior *courts* within the State. In the result, the High Court is bound to interfere under Art. 226 or 227 when an administrative tribunal seeks to transgress the law laid down by the High Court[16-17] and to quash any proceedings before such tribunal, which are contrary to the law declared by the High Court, as being without jurisdiction.[17]

The working of the Industrial Tribunal as a specimen Administrative Tribunal.

Since the number of administrative tribunals now functioning in India are numerous and of different kinds, it is not possible to deal with them separately within the scope of this work.

It is, therefore, proposed to refer in brief to the working of the Industrial Tribunal, as a specimen, to explain and illustrate the legal principles relating to administrative tribunals as stated in the foregoing pages.

An Industrial Tribunal is constituted under s. 7A of the Industrial Disputes Act, 1947, for the adjudication of 'industrial disputes', which means disputes between employer and workmen or between workmen and workmen, "which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person". If the dispute relates to an industry carried on under the authority of the Central Government, a railway, banking, mining, oilfield or insurance company, the authority to set up the Industrial Tribunal is the Government of India. The State Government, similarly, may constitute an industrial tribunal where the dispute relates to other industries.

The Act provides for various methods of settlement of industrial disputes: one of these is conciliation by Conciliation Officers, acting as mediators (s. 4), or a Board of Conciliation (s. 5). A Court of Inquiry may be set up by the appropriate Government (s. 6), simply for the purpose of making an inquiry into any matter connected with an industrial dispute. A Labour Court (s. 7) and an Industrial Tribunal (s. 7A) are agencies of *adjudication*, i.e., for the purpose of *deciding* a dispute by the *quasi-judicial* mode,[18] as distinguished from conciliation or arbitration.[19]

Though the function of the Tribunal is to adjudicate, it has more freedom than a court of law in adjudicating labour disputes. Though it applies

17. *East India Commercial Co.* v. *Collector of Customs*, A. 1962 S.C. 1893.
18. *Bharat Bank* v. *Employees*, (1950) S.C. 649.
19. *Western India Automobile Assocn.* v. *Industrial Tribunal*, (1949) F.C.R. 231.

the law[20] and the principles of justice, equity and good conscience, it has to keep in view that it deals with a special type of disputes and not with the mere enforcement of contractual obligations.[21] Its adjudication is on the basis of fairness and justness having regard to the prevailing conditions in the industry concerned and is by no means analogous to what a court of law does while deciding solely according to the legal rights of the parties to a suit.[22] Since the tribunal is intended to achieve social justice, it is, "to a large extent, free from the restrictions of technical considerations imposed on court".[22]

Thus—

(a) An Industrial Tribunal can modify a contract while a Court has no such power.

"A court of law proceeds on the footing that no power exists in the courts to make contracts for people; and the parties must make their own contracts. The courts reach their limit of power when they enforce contracts which the parties have made. An Industrial Tribunal is not so fettered and may create new obligations or modify contracts in the interests of industrial peace, to protect legitimate trade union activities and to prevent unfair practice or victimisation."[22]

The does not mean, however, that an Industrial Tribunal can altogether ignore an existing agreement for no rhyme or reason whatsoever.[22]

(b) The immediate objective in an industrial dispute as to wage structure is to settle the dispute by constituting such a wage structure as would do justice to the interests of both labour and capital, would establish harmony between them and lead to their genuine and wholehearted co-operation in the task of production.[23]

(i) If an employer cannot maintain his enterprise without ensuring to his workmen a bare subsistene of minimum wage, he has no right to conduct his enterprise on such terms.[23]

(ii) If, however, the wage structure is above this level, it would be open to an employer to ask for its revision, upon a proper case even though it operates to the prejudice of the workmen. But in such a claim, the Tribunal has to consider whether the financial difficulties of the employer are temporary or permanent or whether they can be met by means other than the reduction of wages, e.g., by retrenchment in personnel as may be sanctioned by the Tribunal; discontent amongst the workmen is likely to result from such reduction of wages together with the consideration that the industry itself may have to close down leading to unemployment if the wage burden is not reduced.[23]

If the Tribunal comes to its conclusion upon a consideration of all the above factors, the Supreme Court will not interfere unless the conclusion is vitiated by error in law or other circumstances affecting the jurisdiction of the Tribunal.[23] Where, in revising the wage structure, the Tribunal has applied the proper principle, the Supreme Court will not interfere in matters of detail.[24] Nor will the Court interfere simply because the award has been given retrospective effect from the date of the reference.[24]

20. *J.K. Iron & Steel Co.* v. *Mazdoor Union*, A. 1956 S.C. 231.
21. *N.T.F. Mills* v. *2nd Punjab Tribunal*, A. 1957 S.C. 329.
22. *B.C.P.W.* v. *Workmen*, A. 1959 S.C. 633.
23. *Crown Aluminium Works* v. *Workmen*, A. 1957 S.C. 30.
24. *Hindustan Times* v. *Workmen*, (1964) 2 S.C.J. 1.

On the other hand,—

The function of the Industrial Tribunal and the Labour Appellate Tribunal is to ascertain the real dispute between the parties, to narrow down the area of conflict and then to decide the dispute with reference to the pleadings and the issues that arise therefrom. They cannot act as benevolent despots and base their conclusions on irrelevant considerations ignoring the pleadings of the parties.[20]

(c) The Tribunal may impose any conditions upon the employer to secure social justice and industrial peace, provided such conditions are not *ultra vires* the statute which confers jurisdiction upon the Tribunal.[25]

The Tribunal cannot, however, entertain any dispute for adjudication unless it is 'referred' to the Tribunal for the purpose by the appropriate Government (s. 10).

Upon receipt of such reference, the Tribunal has to proceed *quasi-judicially* to hear the parties to the dispute, in accordance with the provisions of the Rules made under the Act. The Tribunal must hold its proceedings in public, after issuing notice to the parties. The Tribunal is a 'Court" within the meaning of the General Clauses Act[26] and has power to direct the parties to produce their books and the like.

The determination of the Tribunal on the dispute referred to or any question relating thereto is to be embodied in the form of an 'award', submitted to the referring Government (s. 15), which is to be published by the latter and becomes final (ss. 17-17A), after the expiry of the specified period, and becomes enforceable, unless the appropriate Government declares otherwise. The award is binding on the parties to the dispute referred to as well as all persons employed in the establishment to which the dispute relates (s. 18).

The Tribunal and its award are subject to the supervisory jurisdiction of the Supreme Court under Art. 136[18] and of the High Court of the State under Arts. 226[27] and 227.

The grounds for and scope of interference by these superior Courts with the awards and other orders of the Industrial Tribunals will be dealt with more elaborately in the Chapter on Judicial Review.

Administrative Tribunal regarding service matters.—See under Ch. 19, Forms of Judicial Review.

25. *Bidi Merchants' Assen.* v. *State of Bombay*, A. 1962 S.C. 486.
26. *Viswamitra Press* v. *Workmen*, A. 1953 S.C. 41.
27. *Express Newspapers* v. *Workers*, A. 1963 S.C. 569 (573).