Lecture VIII

Judicial Review of Administrative Discretion

We will not make justices, constables, sheriffs or bailiffs who do not know the law of the land and mean to observe it well.

—MAGNA CARTA

Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler.... Where discretion is absolute man has always suffered. —JUSTICE DOUGLAS

Discretion is a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections. —JUSTICE COKE

SYNOPSIS

1. INTRODUCTION

As discussed in the previous lectures, the traditional theory of '*laissez faire*' has been given up by the State and the old 'police State' has now become a 'welfare State'. Because of this philosophy, governmental functions have increased. The administrative authorities have acquired vast discretionary powers and generally, exercise of those powers are left to the subjective satisfaction of the administration without laying down the statutory guidelines or imposing conditions on it. The administration administers law enacted by the legislature and thus performs executive functions; it also enacts legislation when the legislative powers are delegated to it by the legislature and it also interprets law through administrative tribunals. Thus, practically there is concentration of all powers in the hands of the administration — legislative, executive and judicial.

2. ADMINISTRATIVE DISCRETION: MEANING

The best definition of 'administrative discretion' is given by Professor Freund[1] in the following words:

> "When we speak of administrative discretion, we mean that a determination may be reached, in part at least, upon the basis of consideration not entirely susceptible of proof or disproof.... It may be practically convenient to say that discretion includes the case in which the ascertainment of fact is legitimately left to administrative determination."

Thus, in short, here the decision is taken by the authority *not only on the basis of the evidence* but in accordance with policy or expediency and in exercise of discretionary powers conferred on that authority.

3. JUDICIAL REVIEW: MEANING

Judicial review is a great weapon in the hands of judges. It comprises the power of a court to hold unconstitutional and unenforceable any law or order based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land.[2]

Broadly speaking, judicial review in India deals with three aspects; (*i*) judicial review of legislative action; (*ii*) judicial review of judicial decision; and (*iii*) judicial review of administrative action. In this lecture, we are concerned with the last aspect, namely, judicial review of administrative action.[3]

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1. *Administrative Powers over Persons and Property*, 1928, p. 71.
2. Henry Abraham cited in *Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 (292): AIR 1997 SC 1125.
3. *Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 (292): AIR 1997 SC 1125.

4. JUDICIAL REVIEW: OBJECT

The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion which is correct in the eye of law.[4]

As observed by the Supreme Court in *Minerva Mills Ltd.* v. *Union of India*[5], the Constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and the validity of legislation. It is the solemn duty of the judiciary under the Constitution to keep different organs of the State within the limits of the power conferred upon them by the Constitution by exercising power of judicial review as *sentinel on the qui vive*. Thus, judicial review aims to protect citizens from abuse or misuse of power by any branch of the State.

Judicial quest in administrative matters is to strike the just balance between the administrative discretion to decide matters as per government policy, and the need of fairness. Any unfair action must be set right by administrative review.[6]

5. JUDICIAL REVIEW: NATURE AND SCOPE

Judicial review of administrative action is perhaps the most important development in the field of public law in the second half of this century. In India, the doctrine of judicial review is the basic feature of our Constitution. Judicial review is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law. Judicial review is the touchstone of the Constitution. The Supreme Court and High Courts are the ultimate interpreters of the Constitution. It is, therefore, their duty to find out the extent and limits of the power of coordinate branches, viz. executive and legislature and to see that they do not transgress their limits. This is indeed a delicate task assigned to the judiciary by the Constitution. *Judicial review is thus the touchstone and essence of the rule of law.*[7] (emphasis supplied)

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4. *Chief Constable* v. *Evans*, (1982) 3 All ER 141: (1982) 1 WLR 1155; *Sterling Computers Ltd.* v. *M & N Publications*, (1993) 1 SCC 445, 458: AIR 1996 SC 51; *Mahesh Chandra* v. *U.P. Financial Corpn.*, (1993) 2 SCC 279; *G.B. Mahajan* v. *Jalgaon Municipal Council*, (1991) 3 SCC 91: AIR 1991 SC 1153; *LIC of India* v. *C.E.R.C.*, (1995) 5 SCC 482: AIR 1995 SC 1811.
5. (1980) 3 SCC 625 (677-78): AIR 1980 SC 1789 (1925-26). See also *Fertilizer Corpn. Kamgar Union* v. *Union of India*, (1981) 1 SCC 568(574-75): AIR 1981 SC 344 (347).
6. *Tata Cellular* v. *Union of India*, (1994) 6 SCC 651: AIR 1996 SC 11, 13.
7. *R.K. Jain* v. *Union of India*, (1993) 4 SCC 119 (168); *Sitaram* v. *State of U.P.*, (1972) 4 SCC 485: AIR 1972 SC 1168; *Krishna Swami* v. *Union of India*,

The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution.[8]

In judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or order is made. A court of law is not exercising appellate power and it cannot substitute its opinion for the opinion of the authority deciding the matter. The areas where judicial power can operate are limited to keep the executive and legislature within the scheme of division of powers between three organs of the State. The ultimate scope of judicial review depends upon the facts and circumstances of each case. The dimensions of judicial review must remain flexible.[9]

It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority lofty can claim to be the sole judge of its power under the Constitution. The rule of law requires that the exercise power by the legislature or by the judiciary or by the government or by any other authority must be conditioned by the Constitution. Judicial review is thus the touchstone and repository of the supreme law of the land. It is a vital principle of our Constitution which cannot be abrogated without affecting the basic structure of the Constitution.[10]

In recent times, judicial review of administrative action has become extensive and expansive. The traditional limitations have vanished and the sphere of judicial scrutiny is being expanded. Under the old theory, the courts used to exercise power only in cases of absence or excess or abuse of power. As the State activities have become pervasive and giant public corporations have come in existence, the stake of public exchequer justifies larger public audit and judicial control.[11]

(1992) 4 SCC 605 (649).

8. *Id.*; see also *Dwarkadas Marfatia* v. *Board of Trustees*, (1989) 3 SCC 293: AIR 1989 SC 1642; *Mahabir Auto Stores* v. *Indian Oil Corpn.*, (1990) 3 SCC 752: AIR 1990 SC 1031; *Shreelekha Vidyarthi* v. *State of U.P.*, (1991) 1 SCC 212: AIR 1991 SC 537.
9. *Shreeram* v. *Settlement Commr.*, (1989) 1 SCC 628: AIR 1989 SC 1038; *State of H.P.* v. *Umed Ram*, (1986) 2 SCC 68 (80-83): AIR 1986 SC 847; *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1 (para 376).
10. *S.R. Bommai* v. *Union of India*, (*supra*), p. 207 (SCC); *S.S. Bola* v. *B.D. Sardana*, (1997) 8 SCC 522: AIR 1997 SC 3127 (3167).
11. *Star Enterprises* v. *City & Industrial Development Corpn.*, (1990) 3 SCC 280 (284).

6. JUDICIAL REVIEW AND JUSTICIABILITY

Judicial review must be distinguished from justiciability. The two concepts are not synonymous. The power of judicial review goes to the authority of the court and can be exercised by the court in appropriate cases.[12]

Justiciability is not a legal concept with fixed contents, nor is it susceptible of scientific verification. There is not and there cannot be a uniform rule regarding scope and reach of judicial review applicable to all cases. It varies from case to case depending upon subject-matter, nature of right and other relevant factors.[13]

The power of judicial review relates to the jurisdiction of the court whereas justiciability is hedged by self-imposed judicial restraint. A court exercising judicial review may refrain to exercise its power if it finds that the controversy raised before it is not based on judicially discoverable and manageable standards. Moreover, the area of justiciability can be reduced or curtailed.[14] Even when, exercise of power is bad, the court in its discretion decline to grant relief considering the facts and circumstances of the case.[15]

7. JUDICIAL REVIEW: LIMITATIONS

Judicial review has certain inherent limitations. It is suited more for adjudication of disputes than for performing administrative functions. It is for the executive to administer the law and the function of the judiciary is to ensure that the Government carries out its duty in accordance with the provisions of the Constitution.[16]

The duty of the court is to confine itself to the question of legality. It has to consider whether a decision-making authority exceeded its powers, committed an error of law, violated rules of natural justice, reached a decision which no reasonable man would have reached or otherwise abused its powers. Though the court is not expected to act as a court of appeal, nevertheless it can examine whether the "decision-making process" was reasonable, rational, not arbitrary or not violative

12. *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1 (paras 201, 256-58).
13. *Ibid.*, See also *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 (753): AIR 1993 SC 477.
14. *S.R. Bommai* v. *Union of India*, *Id.* at para 211 (SCC); *K. Ashok Reddy* v. *Union of India*, (1994) 2 SCC 303; *A.K. Kaul* v. *Union of India*, (1995) 4 SCC 73: AIR 1995 SC 1403.
15. *State of Rajasthan* v. *Laxmi*, (1996) 6 SCC 445.
16. *S.R. Bommai* v. *Union of India*, (*supra*), at para 376 (SCC); see also *G. B. Mahajan* v. *Jalgaon Municipal Council*, (1991) 3 SCC 91 (109): AIR 1991 SC 1153.

of Article 14 of the Constitution. The parameters of judicial review must be clearly defined and never exceeded. If the authority has faultered in its wisdom, the court cannot act as super auditor.[17]

Unless the order passed by an administrative authority is unlawful or unconstitutional, power of judicial review cannot be exercised. An order of administration may be right or wrong. It is the administrator's right to trial and error and so long as it is bonafide and within the limits of the authority, no interference is called for. In short, power of judicial review is supervisory in nature. Unless this restriction is observed, the court, under the guise of preventing abuse of power by the administrative authority, will itself be guilty of usurping power.[18]

Bernard Schwartz[19] rightly stated:

> "If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts. That would destroy the values of agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields. At the same time, the scope of judicial inquiry must not be so restricted that it prevents full inquiry into the question of legality. If that question cannot be properly explored by the judge, the right to review becomes meaningless. It makes judicial review of administrative orders a hopeless formality for the litigant. .. It reduces the judicial process in such cases to a mere feint."

8. OVERRIDING CONSIDERATIONS

Two overriding considerations are responsible to narrow the scope of judicial review;

(*a*) Due deference to administrative expertise. It is not expected of a judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator; and

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17. *S.R. Bommai* v. *Union of India (supra)*, para 64 (SCC); *Board of High School* v. *Chitra Ghosh*, (1970) 1 SCC 121: AIR 1970 SC 1039; *State of H.P.* v. *Umed Ram (supra)*; *Fertilizer Corpn. Kamgar Union* v. *Union of India*, (1981) 1 SCC 568: AIR 1981 SC 344; *G.B. Mahajan* v. *Jalgaon Municipal Council (supra)*.
18. *Id.*; see also *Tata Cellular* v. *Union of India*, (1994) 6 SCC 651 (677): AIR 1996 SC 11. *R.* v. *Panel on Take-overs*, (1987) 1 All ER 564; *Sterling Computers Ltd.* v. *M & N Publications Ltd.*, (1993) 1 SCC 445: AIR 1996 SC 51.
19. *Administrative Law*, 2nd Edn., p. 584 cited in *Tata Cellular* v. *Union of India*, (1994) 6 SCC 651 (680): AIR 1996 SC 11, 13.

(*b*) Paucity of time. It is the pressure of judicial calendar which leads to perfunctory affirmance of the vast majority of agency decisions.[20]

In *Tata Cellular* v. *Union of India*,[21] the Supreme Court stated, "The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention, the other covers the scope of the court's ability to quash an administrative decision on its own merits. *These restraints bear the hallmarks of judicial control over administrative action.* (emphasis supplied)

9. DISCRETIONARY POWER AND JUDICIAL REVIEW

Discretionary powers conferred on the administration are of different types. They may range from simple ministerial functions like maintenance of births and deaths register to powers which seriously affect the rights of an individual, e.g. acquisition of property, regulation of trade, industry or business, investigation, seizure, confiscation and destruction of property, detention of a person on subjective satisfaction of an executive authority and the like.

As a general rule, it is accepted that courts have no power to interfere with the actions taken by administrative authorities in exercise of discretionary powers. In *Small* v. *Moss*[22], the Supreme Court of the United States observed:

> "Into that field (of administrative discretion) the courts may not enter."

Lord Halsbury[23] also expressed the same view and observed:

> "Where the legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any court to contest that discretion."

In India also, the same principle is accepted and in a number of cases, the Supreme Court has held that courts have no power to interfere with the orders passed by the administrative authorities in exercise of discretionary powers.[24]

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20. Bernard Schwartz: *Administrative Law* 2nd Edn., p. 584 cited in *Tata Cellular* v. *Union of India*, (infra).
21. (1994) 6 SCC 651 (676): AIR 1996 SC 11, 13 (28).
22. (1938) 279 NY 288.
23. *Westminster Corpn.* v. *London & North Western Rly. Co.*, (1905) AC 426 (427): 93 LT 143: 74 LJ Ch 629; *see also* de Smith: *Judicial Review of Administrative Action*, 1995, p. 296.
24. *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27: 1950 SCR 88; *Bhimsen* v.

This does not, however, mean that there is no control over the dis cretion of the administration. As indicated above, the administration pos sesses vast discretionary powers and if complete and absolute freedon is given to it, it will lead to arbitrary exercise of power. The wider th discretion the greater is the possibility of its abuse. As it is rightly said 'every power tends to corrupt and absolute power tends to corrupt ab solutely'. All powers have legal limits. The wider the power, the greate the need for the restraint in its exercise. There must be control ove discretionary powers of the administration so that there will be a 'Gov ernment of laws and not of men'. It is not only the power but the dut of the courts to see that discretionary powers conferred on the adminis tration may not be abused and the administration should exercise then properly, responsibly and with a view to doing what is best in the publi interest. 'It is from this presumption that the courts take their warrant t impose legal bounds on even the most extensive discretion.'[25] 'Wid discretion must be in all administrative activity but it should be discretio defined in terms which can be measured by legal standards lest cases o manifest injustice go unheeded and unpunished.'[26] As early as in 1647,[27] it was laid down by the King's Bench that 'wheresoever a Commissione or other person hath power given to do a thing at his discretion, it is t be understood of sound discretion, and according to law, and that thi Court hath power to redress things otherwise done by them'. In *Shar* v. *Wakefield*[28], Lord Halsbury rightly observed:

> " '[D]iscretion' means when it is said that something is to b done within the discretion of the authorities that something is to b done according to the rules of reason and justice, not according t private opinion ... according to law and not humour. It is to be, no arbitrary, vague, and fanciful, but legal and regular. And it must b exercised within the limit, to which an honest man competent to th discharge of his office ought to confine himself...."

There is nothing like unfettered discretion immune from judicial re viewability. The truth is that in a Government under law, there can b no such thing as unreviewable discretion. The law always frowns or

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State of Punjab, AIR 1951 SC 481: 1952 SCR 18; *Lakhanpal* v. *Union of India* AIR 1967 SC 908: (1967) 1 SCR 434; *Ram Manohar Lohia* v. *State of Bihar* AIR 1966 SC 740: (1966) 1 SCR 709; *Ranjit Thakur* v. *Union of India*, (1987) 4 SCC 611 (621): AIR 1987 SC 2386 (2390).

25. Wade: *Administrative Law*, 1994, pp. 379-459.
26. Wade: *Courts and Administrative Process*, 1949, 63 LQR 173.
27. *Estwick* v. *City of London*, (1647) Style 42.
28. (1891) AC 173 (179): (1886-90) All ER 651: 39 WR 561.

uncanalised and unfettered discretion conferred on any instrumentality of the State and it is the glory of administrative law that such direction has been through judicial decisions structured and regulated.[29] It is true that abuse of power is not to be assumed lightly but, experience belies the expectation that discretionary powers are always exercised fairly and objectively.[30] The basic rule should be that the governing power wherever located must be subject to the fundamental constitutional limitations.[31]

Thus, in almost all the democratic countries it is accepted that discretion conferred on the administration is not unfettered, uncontrolled or non-reviewable by the courts. To keep the administration within its bounds, the courts have evolved certain principles and imposed some conditions and formulated certain tests and taking recourse to these principles, they effectively control the abuse or arbitrary exercise of discretionary power by the administration. In India, where in a written Constitution the power of judicial review has been accepted as the 'heart and core' of it and which is treated as the 'basic and essential feature of the Constitution' and 'the safest possible safeguard' against abuse of power by any administrative authority, the judiciary cannot be deprived of the said power.[32]

10. GROUNDS

While exercising power of judicial review, the Court does not exercise appellate powers. It is not intended to take away from administrative authorities the powers and discretion properly vested in them by law and to substitute courts as the bodies making the decisions. Judicial review is a protection and not a weapon.[33]

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29. *Jaisinghani* v. *Union of India*, AIR 1967 SC 1427: (1967) 2 SCR 714; *Khudiram* v. *State of W.B.*, (1975) 2 SCC 81: AIR 1975 SC 550; *Govt. Press* v. *Balliappa*, (1979) 1 SCC 447: AIR 1979 SC 429; *Sheonandan Paswan* v. *State of Bihar*, (1987) 1 SCC 288 (323): AIR 1987 SC 877 (895).

30. *Delhi Transport Corpn.* v. *D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600: AIR 1991 SC 101 (173); *State of Maharashtra* v. *Kamal Durgule*, (1985) 1 SCC 234 (245-46): AIR 1985 SC 119.

31. *Delhi Transport Corpn.* v. *D.T.C. Mazdoor Congress*, *Id.* at pp. 632, 707 (SCC).

32. *Minerva Mills* v. *Union of India*, (1980) 3 SCC 625 (677-78): AIR 1980 SC 1789 (1825-26); *State of U.P.* v. *Maharaja Dharmander Prasad Singh*, (1989) 2 SCC 505 (524-25): AIR 1989 SC 997 (1010); *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87 (para 332): AIR 1982 SC 149; *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1 (177).

33. *Chief constable* v. *Evans*, (*supra*); *R.* v. *Panel of Take-overs & Mergers*, (1989) 1 All ER 509: (1990) 1 QB 146; *Amin* v. *Entry Clearance Officer*, (1983) 2 All ER 864; *Tata Cellular* v. *Union of India*, (1994) 6 SCC 651: AIR 1996 SC 11, 13; *Lonhro* v. *Secy. of State*, (1989) 2 All ER 609.

In *Chief Constable* v. *Evans*,[34] Lord Brightman said, "Judicial review is concerned not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court *in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.*" (emphasis supplied)

The duty of the court is to confine itself to the question of legality. Its concern should be:

(1) whether a decision-making authority exceeded its powers?

(2) committed an error of law,

(3) committed a breach of the rules of natural justice,

(4) reached a decision which no reasonable tribunal would have reached or,

(5) abused its powers.[35]

In India, the courts will interfere with the discretionary powers exercised by the administration in the following circumstances:

(1) Failure to exercise discretion; or

(2) Excess or abuse of discretion.

Let us consider each ground in *extenso*:

11. FAILURE TO EXERCISE DISCRETION

The main object of conferring discretionary power on an administrative authority is that the authority itself must exercise the said power. If there is failure to exercise discretion on the part of that authority the action will be bad. Such type of flaw may arise in the following circumstances:

(*a*) Sub-delegation;

(*b*) Imposing fetters on discretion by self-imposed rules of policy;

(*c*) Acting under dictation;

(*d*) Non-application of mind; and

(*e*) Power coupled with duty.

(a) Sub-delegation

de Smith[36] says, "a discretionary power must, in general, be exercised only by the authority to which it has been committed. It is a well-known principle of law that when a power has been confided to a person in circumstances indicating that trust is being placed in his individual

34. (1982) 3 All ER 141 (154): (1982) 1 WLR 1155.

35. *Tata Celluar* v. *Union of India*, (1994) 6 SCC 651(677): AIR 1996 SC 13(26).

36. *Judicial Review of Administrative Action*, 1995, p. 357.

judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another". The very object of conferring a power on a particular administrative authority is that the power must be exercised by that authority and cannot be sub-delegated to any other authority or official. "Delegation may be the result of honest misapprehension by the authority concerned of the legal position. It sometimes arises out of a desire to expedite official business. But still it will be invalid if it is not legally permitted."[37]

Thus, in *Allingham* v. *Minister of Agriculture*[38] and *Ganpati Singhji* v. *State of Ajmer*[39], the sub-delegation of power was held to be bad. Likewise, in *Sahni Silk Mills* v. *ESI Corpn.*[40], the parent Act enabled the corporation to delegate its power to recover damages to the Director General, who, however, in turn sub-delegated the said power to Regional-Directors. Since there was no such provision permitting the Director General to sub-delegate his power, the action was held to be bad. But in *Pradyat Kumar* v. *Chief Justice of Calcutta*[41], the inquiry against the Registrar of the High Court was made by a puisne Judge of the Court. After considering the report and giving show-cause notice, he was dismissed by the Chief Justice. The Supreme Court held that it was not a case of delegation of power by the Chief Justice but merely of employing a competent officer to assist the Chief Justice.

(b) Imposing fetters on discretion by self-imposed rules of policy

An authority entrusted with discretionary power must exercise the same after considering individual cases. Instead of doing that if the authority imposes fetters on its discretion by adopting fixed rules of policy to be applied in all cases coming before it, there is failure to exercise *discretion* on the part of that authority. What is expected of the authority is that it must consider the facts of each case, apply its mind and decide the same. If any general rule is pronounced, which will be applied to all cases, there is no question of considering the facts of an individual case at all and exercising discretion by the authority.

Thus, in *Gell* v. *Taja Noora*[42], under the Bombay Police Act, 1863, the Commissioner of Police had discretion to refuse to grant a licence

37. Markose: *Judicial Control of Administrative Action in India*, 1956, p. 395.
38. (1948) 1 All ER 780. For facts, *see* Lecture IV (*supra*).
39. AIR 1955 SC 188: (1955) 1 SCR 1065. For facts, *see* Lecture IV (*supra*).
40. (1994) 5 SCC 346.
41. AIR 1956 SC 285: (1955) 2 SCR 1331. For detailed discussion about sub-delegation, *see* Lecture IV (*supra*).
42. ILR (1907) 27 Bom 307.

for any land conveyance 'which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public'. Instead of applying this discretionary power to individual cases, he issued a general order that any Victoria presented for licence must be of a particular pattern. The High Court of Bombay held the order bad as the Commissioner had imposed fetters on his discretion by self-imposed rules of policy and failed to consider in respect of each individual carriage whether or not it was fit for the conveyance of the public.

Similarly, in *Keshavan Bhaskaran* v. *State of Kerala*[43], the relevant rule provided that no school-leaving certificate would be granted to any person unless he had completed fifteen years of age. The Director was, however, empowered to grant exemption from this rule in deserving cases under certain circumstances. But the Director had made an invariable rule of not granting exemption unless the deficiency in age was less than two years. The court held that the rule of policy was contrary to law.

In *Tinkler* v. *Wandsworth Board of Works*[44], a sanitary authority laid down a general rule that all cesspits and privies in its area should be replaced by water-closets and did not consider each case on merits. The Court of Appeal held the action bad. In *R.* v. *Metropolitan Police Commr.*[45], a chief constable adopted a rigid rule not to institute any prosecution at all for an anti-social class of criminal offence. The action was held to be bad.

In *Rama Sugar Ind.* v. *State of A.P.*[46], tax was imposed on the purchase of sugarcane but the Government was granted power to exempt any new sugar factory from payment of tax for a period of three years. The Government, however, by way of policy decision decided to grant such exemption only in favour of the cooperative sector. The appellant challenged the said policy. The Constitution Bench, by majority of 3: 2, upheld the decision of the Government. It is submitted that the majority decision is not correct. The minority rightly observed: "*In fact, the Government by making the policy decision, had shut its ears to the merits of the individual applications.*"[47] (emphasis supplied)

Likewise, in *Gurbaksh Singh* v. *State of Punjab*[48], the Supreme Court observed that no principles of universal application can be laid down

43. AIR 1961 Ker 23.
44. (1858) 27 LJ Ch 342: 6 WR 390.
45. (1968) 2 QB 118: (1968) 1 All ER 763: (1968) 2 WLR 893.
46. (1974) 1 SCC 534: AIR 1974 SC 1745.
47. *Id.* at p. 546 (SCC): 1753 (AIR) (per Mathew, J.).
48. (1980) 2 SCC 565(580): AIR 1980 SC 1632(1641).

regarding granting of anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973. "Generalisations on matters which rest on discretion and an attempt to discover formula of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion."

Again, in *Nagraj* v. *Syndicate Bank*[49], the Ministry of Finance issued a direction to all banks to accept the punishment proposed by the Vigilance Commission against a delinquent officer. Holding the directive to be "wholly without jurisdiction" and "completely fettered", the Supreme Court held that the authorities have to exercise their judicial discretion having regard to the facts and circumstances of each case.

This does not, however, mean that no principle can be laid down or policy adopted. The only requirement is that even when a general policy is adopted, each case must be considered on its own merits. As Lord Reid[50] rightly states, a Minister having a discretion, may formulate a policy or make a limiting rule as to the future exercise of his discretion, if he thinks that good administration requires it, '*provided the authority is always willing to listen to anyone with something new to say*'. (emphasis supplied). The administrative authority exercising discretion must not 'shut its ears to an application'. It is submitted that the test is correctly laid down in *Stringer* v. *Minister of Housing*[51], wherein Lord Cooke, J. rightly observed: "[A] Minister charged with the duty of making individual administrative decisions in a fair and impartial manner may nevertheless have a general policy in regard to matters which are relevant to those decisions, *provided that the existence of that general policy does not preclude him from fairly judging all the issues which are relevant to each individual case as it comes up for decision.*"[52]

(emphasis supplied)

(c) Acting under dictation

Sometimes, an authority entrusted with a power does not exercise that power but acts under the dictation of a superior authority. Here, the authority invested with the power purports to act on its own but 'in substance' the power is exercised by another. The authority concerned does not apply its mind and take action on its own judgment, even though

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49. (1991) 3 SCC 219: AIR 1991 SC 1507.
50. *British Oxygen Co. Ltd.* v. *Minister of Technology*, (1970) 3 WLR 488(495): (1970) AC 610: (1970) 3 All ER 165.
51. (1970) 1 WLR 1281: (1971) 1 All ER 65.
52. *Id.* at p. 1298 (WLR). For detailed discussion, *see* C.K. Thakker: *Administrative Law*, 1996, pp. 321-28.

it was not so intended by the statute. In law, this amounts to non-exercise of power by the authority and the action is bad. It is well-settled that if the authority permits its decision to be influenced by the dictation of others, it would amount to abdication and surrender of discretion. If the authority "hands over its discretion to another body it acts ultra vires".[53]

Thus, in *Commissioner of Police* v. *Gordhandas*[54], under the City of Bombay Police Act, 1902, the Commissioner of Police granted licence for the construction of a cinema theatre. But later on, he cancelled it at the direction of the State Government. The Supreme Court set aside the order of cancellation of licence as the Commissioner had acted merely as the agent of the Government.

Similarly, in *Orient Paper Mills* v. *Union of India*[55], under the relevant statute, the Deputy Superintendent was empowered to levy excise. Instead of deciding it independently, the Deputy Superintendent ordered levy of excise in accordance with the directions issued by the Collector. The Supreme Court set aside the order passed by the Deputy Superintendent.

Likewise, in *Rambharosa Singh* v. *State of Bihar*[56], the relevant rules empowered the District Magistrate to give public ferries on lease, subject to the direction of the Commissioner. Instead of the Commissioner, the Government gave certain directions. The District Magistrate acted in accordance with those directions. The High Court set aside the order passed by the District Magistrate.

Again, in *Anirudhsinhji Jadeja* v. *State of Gujarat*[57], an offence was committed under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA). The District Superintendent of Police did not give approval on his own but requested the Additional Chief Secretary to accord permission to proceed under the Act, which was granted. Setting aside the order, the Court stated, "(T)he dictation came on the prayer of the DSP will not make any difference to the principle."

A reference may be made to another decision of the Supreme Court in *Mansukhlal* v. *State of Gujarat*.[58] In that case, the government did not

53. *State of U.P.* v. *Maharaja Dharmander*, (1989) 2 SCC 505 (523-24): AIR 1989 SC 997.
54. AIR 1952 SC 16: 1952 SCR 135.
55. (1970) 3 SCC 76: AIR 1970 SC 1498.
56. AIR 1953 Pat 370. See also *Orient Paper Mills* v. *Union of India*, AIR 1969 SC 48: (1969) 1 SCR 245; *Purtabpore Co. Ltd.* v. *Cane Commr. of Bihar*, (1969) 1 SCC 308: AIR 1970 SC 1896.
57. (1995) 5 SCC 302 (308): AIR 1995 SC 2390 (2393).
58. (1997) 7 SCC 622: (1997) 8 Supreme 178.

grant sanction to prosecute appellant (public servant) under the Prevention of Corruption Act. The complainant filed a petition in the High Court and the High Court 'directed' the authorities to grant sanction. The appellant was prosecuted and convicted. Setting aside the conviction, the Supreme Court observed that "by issuing a direction to the Secretary to grant sanction, the High Court closed all other alternatives to the Secretary and compelled him to proceed only in one direction". The sanction was, therefore, illegal and conviction bad in law.

There is, however, a distinction seeking advice or assistance on the one hand and acting under dictation on the other hand. Advice or assistance may be taken and then discretion may be exercised by the authority concerned genuinely without blindly and mechanically acting on the advice. For instance, a licensing authority may take into account the general policy of the Government in granting licences, provided it decides each case on its own merits. In *Gordhandas*, the Supreme Court observed that the Commissioner was "entitled to take into consideration the advice tendered to him by a public body set up for this express purpose, and he was entitled in the *bona fide* exercise of his discretion to accept that advice and act upon it even though, he would have acted differently if this important factor had not been present in his mind when he reached a decision".[59]

In *Baldev* v. *Union of India*[60], the appellant was compulsorily retired in public interest by the Accountant General at the recommendation of the Reviewing Committee. It was contended that the Accountant General acted as per dictation of the Committee. The Supreme Court negatived the contention observing that the decision was of Accountant General and taking advice of the committee was not illegal.

In *Barium Chemicals* v. *Company Law Board*[61], investigation of the affairs was ordered by the Chairman. That action was challenged *inter alia* on the ground that it was taken at the behest of the Finance Minister. Holding the order legal and valid, the Court observed that the circumstances might create suspicion, but suspicion, however grave, cannot take the place of proof.

An interesting question arose in the case of *R.* v. *Waltham Forest London Borough Council*[62]. The respondent council by a resolution increased the rates of house tax. Ratepayers challenged the said resolution

59. AIR 1952 SC 16(18): 1952 SCR 135.
60. (1980) 4 SCC 321: AIR 1981 SC 70.
61. AIR 1967 SC 295(320): 1966 Supp SCR 311 (Shelat, J.).
62. (1987) 3 All ER 671: (1988) QB 419.

inter alia on the ground that certain councillors who had voted in favour of the resolution had voted against it prior to a council meeting. They had voted in favour of the resolution due to the party 'whip' and thus, had fettered their discretion by obeying the whip. Really they had acted under dictation. Rejecting the argument, Donaldson, M.R. observed:

> "*The distinction between giving great weight to the views of colleagues and to party policy, on the one hand, and voting blindly in support of party policy may on occasion be a fine one, but it is nevertheless very real.*"[63] (emphasis supplied)

(d) Non-application of mind

When a discretionary power is conferred on an authority, the said authority must exercise that power after applying its mind to the facts and circumstances of the case in hand. If this condition is not satisfied, there is clear non-application of mind on the part of the authority concerned. The authority might be acting mechanically, without due care and caution or without a sense of responsibility in the exercise of its discretion. Here also, there is failure to exercise discretion and the action is bad.

Thus, in *Emperor* v. *Sibnath Banerji*[64], an order of preventive detention was quashed as it had been issued in a routine manner on the recommendation of police authorities and the Home Secretary himself had not applied his mind and satisfied himself that the impugned order was called for or not.

Likewise, in *Jagannath* v. *State of Orissa*[65], in the order of detention six grounds were verbatim reproduced from the relevant section of the statute. The Home Minister filed the affidavit in support of the order. In that affidavit, he has stated that his personal satisfaction to detain the petitioner was based on two grounds. The Supreme Court held that the detaining authority must be satisfied about each of the grounds mentioned in the order. Since it was not done, as in the affidavit it was mentioned that the order was based only on two grounds and also from the fact that in the impugned order in which various grounds were mentioned, instead of using the conjunctive "*and*" the disjunctive "*or*" had been used, there was clear non-application of mind by the Home Minister and the order was liable to be quashed.

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63. *Id.* at pp. 673-76 (All ER).
64. AIR 1945 PC 156: 1945 FCR 191.
65. AIR 1966 SC 1140: (1965) 3 SCR 134.

In the well-known case of *Barium Chemicals Ltd.* v. *Company Law Board*[66], an order of investigation against the petitioner company was passed by the Central Government. Under the Companies Act, 1956, the Government was empowered to issue such order if, 'there are circumstances suggesting fraud on the part of the management'. It was held by the Supreme Court that it was necessary for the Central Government to state the circumstances which led to the impugned action so that the same could be examined by the Court. Shelat, J. observed:

> "*It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded.* It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose."[67] (emphasis supplied)

Hidayatullah, J. (as he then was) also took the same view and observed: "No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the *sine qua non* for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to inference unless the existence of the circumstances is made out."[68]

However, in *Ananta Mukhi* v. *State of W.B.*[69], even though the order of detention was passed against the petitioner 'to prevent him from acting in any manner prejudicial to the security of the State *or* the maintenance of public order, the Supreme Court by majority, held the order valid observing that "though all activities prejudicial to the security of the State and those which are prejudicial to the maintenance of the public order are not identical, because of close nexus between maintenance of public order and security of State, there is bound to be some overlapping".[70]

Similarly, in *Monghyr Factory* v. *Labour Court, Patna*[71], the Supreme Court held the order of reference passed under the Industrial Disputes Act, 1947 valid even though the reference contained both the

66. AIR 1967 SC 295: 1966 Supp SCR 311.
67. *Id.* at p. 325 (AIR).
68. *Id.* at p. 309 (AIR); see also *Rohtas Industries* (*infra*), *Barium Chemicals Ltd.* v. *Rana*, (1972) 1 SCC 240: AIR 1972 SC 591.
69. (1972) 1 SCC 580: AIR 1972 SC 1256.
70. *Id.* at pp. 593-94 (SCC).
71. (1978) 3 SCC 504: AIR 1978 SC 1428.

clauses, viz. the industrial dispute '*exists or is apprehended*'. The Su preme Court held that there was non-application of mind by the Gov ernment, but the reference was not bad on that ground on 'the facts o the case'. The Court, however, observed that 'care should always be take to avoid a mere copying of the words from the statute'.[72]

(e) Power coupled with duty

A number of statutes confer powers on administrative authorities an officers to be exercised by them in their discretion. The power is i permissive language such as "may", "it shall be lawful", "it may b permissible", etc. The question is whether it is open to the authoritie to exercise or not to exercise the power at their sweet wills.

de Smith[73] states: "Discretionary powers are frequently coupled wit duties." In the words of Lord Blackburn; "enabling words were alway compulsory where the words were to effectuate a legal right". In th leading case of *Julius* v. *Lord Bishop of Oxford*[74], the bishop was em powered to issue a commission of inquiry in case of alleged misconduc by a clergyman, either on an application by someone or *suo motu* an when such an application was made, the question was whether the Bisho had a right to refuse the commission. The House of Lords held that th Bishop had discretion to act pursuant to the complaint and no mandator duty was imposed on him. However, Earl Cairns, L.C. made the follow ing remarkable and oft-quoted observations:

> "Where a power is deposited with a public officer for the pur pose of being used for the benefit of persons who are specificall pointed out, and with regard to whom a definition is supplied by th legislature of the conditions upon which they are entitled to call fo its exercise that power ought to be exercised, and the court will re quire it to be exercised."[75]

Thus, it was held that the licensing authorities were bound to renew licences of cab-drivers if the prescribed procedural requirements had bee complied with.[76] Similarly, local authorities were bound to approve build ing plans if they were in conformity with bye-laws.[77] Again, the cou

72. *Id.* at pp. 512-13 (SCC): p. 1432 (AIR); see also *Abdul Razak Abdul Wahab* Commr. of Police, (1989) 2 SCC 222: AIR 1989 SC 2265; *Abhay Shridhar* Commr. of Police, (1991) 1 SCC 500: AIR 1991 SC 397.

73. *Judicial Review of Administrative Action*, 1995, p. 300.

74. (1880) 5 AC 214: 49 LJQB 577.

75. *Id.* at p. 225 (AC).

76. *R.* v. *Metropolitan Police Commr.*, (1911) 2 QB 1131.

77. *R.* v. *Newcastle-upon-Tyne Corpn.*, (1889) 60 LT 963.

was bound to pass a decree for possession in favour of the landlord, if the relevant facts were proved.[78]

In *Commissioner of Police* v. *Gordhandas Bhanji*[79], the relevant rule granted *absolute discretion* to the Commissioner to cancel or suspend licence. It was argued that the Commissioner cannot be compelled to exercise the discretion. Holding the power as coupled with duty, the Supreme Court observed that the duty "cannot be shirked or shelved nor can it be evaded".

In *Hirday Narain* v. *ITO* [80], Section 35 of the Income Tax Act, 1922 empowered the Income Tax Officer to rectify the mistake in assessment either upon an application of the assessee or *suo motu*. Holding the said power as coupled with duty, Shah, J. (as he then was) observed: "If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. *Even if the words used in the statute are prima facie enabling the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right—public or private—of a citizen.*"[81] (emphasis supplied)

An interesting point having far-reaching effect arose in the leading case of *Ratlam Municipality* v. *Vardichand*[82]. Some residents of Ratlam Municipality moved the Sub-Divisional Magistrate under Section 133 of the Code of Criminal Procedure, 1973 for abatement of nuisance by directing the municipality to construct drain pipes with flow of water to wash away the filth and stop the stench. The Magistrate found the facts proved and issued necessary directions.

Holding the provision as obligatory, Krishna Iyer, J. observed:

> "Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the Sub-Divisional Magistrate, Ratlam, has, before him information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act.... *This is a public duty implicit in the public*

78. *Ganpat Ladha* v. *Shashikant*, (1978) 2 SCC 573: AIR 1978 SC 955.
79. AIR 1952 SC 16: 1952 SCR 135.
80. (1970) 2 SCC 355: AIR 1971 SC 33.
81. *Id.* at p. 359 (SCC): 36 (AIR).
82. (1980) 4 SCC 162: AIR 1980 SC 1622.

power to be exercised on behalf of the public and pursuant to a public proceeding.''[83] (emphasis supplied)

12. EXCESS OR ABUSE OF DISCRETION

When discretionary power is conferred on an administrative authority, it must be exercised according to law. But as Markose[84] says, ''when the mode of exercising a valid power is improper or unreasonable, there is an abuse of the power''. Thus, ''if a new and sharp axe presented by Father Washington (the legislature) to young George (the statutory authority) to cut timber from the father's compound is tried on the father's favourite apple tree'' an abuse of power is clearly committed.

There are several forms of abuse of discretion, e.g. the authority may exercise its power for a purpose different from the one for which the power was conferred or for an improper purpose or acts in bad faith, takes into account irrelevant considerations and so on. These various forms of abuse of discretion may even overlap. Take the classic example of the red-haired teacher, dismissed because she had red hair. In one sense, it is unreasonable. In another sense, it is taking into account irrelevant or extraneous considerations. It is improper exercise of power and might be described as being done in bad faith or colourable exercise of power. In fact, all these things 'overlap to a very great extent' and 'run into one another'.[85]

Excess or abuse of discretion may be inferred from the following circumstances:

(*a*) Absence of power;

(*b*) Exceeding jurisdiction;

(*c*) Irrelevant considerations;

(*d*) Leaving out relevant considerations;

(*e*) Mixed considerations;

(*f*) Mala fide;

(*g*) Improper purpose: Collateral purpose;

(*h*) Colourable exercise of power;

(*i*) Non-observance of natural justice;

(*j*) Unreasonableness.

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83. *Id.* at p. 170 (SCC); 1628 (AIR). For detailed discussion, *see* C.K. Thakker: *Administrative Law*, 1996, pp. 334-38.

84. *Judicial Control of Administrative Action in India*, 1956, p. 417.

85. *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*, (1948) 1 KB 223 (229): (1947) 2 All ER 680: 177 LT 641: 63 TLR 623. (per Lord Greene, M.R.).

Let us consider each ground in detail.

(a) Absence of power

It is well-settled that there can be no exercise of power unless such power exists in law. If the power does not exist, the purported exercise of power would be non-existent and void. Likewise, where the source of power exists, exercise of it is referable only to that source and not to some other source. But if a source of power exists, mention of wrong provision or even omission to mention the provision containing such power will not invalidate such order.[86]

In *R.* v. *Minister of Transport*[87], even though the Minister had no power to revoke the licence, he passed an order of revocation. The action was held *ultra vires* and without jurisdiction. Similarly, if the appropriate government has power to refer an "industrial dispute" to a tribunal for adjudication, it cannot refer a dispute which is not an industrial dispute.[88] Again, if a taxing authority imposes tax on a commodity exempted under the Act, the action is without authority of law.[89] In *State of Gujarat* v. *Patel Raghav Nath*,[90], the revisional authority exercising powers under the Land Revenue Code went into the question of title. The Supreme Court observed that when the title of the occupant was in dispute, the appropriate course would be to direct the parties to approach the civil court and not to decide the question.

(b) Exceeding jurisdiction

An administrative authority must exercise the power within the limits of the statute and if it exceeds those limits, the action will be held *ultra vires*. A question whether the authority acted within the limits of its power or exceeded it can always be decided by a court.

For example, if an officer is empowered to grant a loan of Rs 10,000 in his discretion for a particular purpose and if he grants a loan of Rs 20,000, he exceeds his power (jurisdiction) and the entire order is *ultra vires* and void on that ground.

In *London County Council* v. *Attorney General* [91], the local authority was empowered to operate tramways. The local authority also carried on a bus service. An injunction against the operation of buses by the Council

86. *Union of India* v. *Tulsiram*, (1985) 3 SCC 398 (500-01): AIR 1985 SC 1416.
87. (1934) 1 KB 277: (1933) All ER 604.
88. *Newspapers Ltd.* v. *State Industrial Tribunal*, AIR 1957 SC 532: 1957 SCR 754.
89. *Bengal Immunity Co.* v. *State of Bihar*, AIR 1955 SC 661: (1955) 2 SCR 603.
90. (1969) 2 SCC 187: AIR 1969 SC 1297.
91. (1902) AC 165: 71 LJ Ch 268.

was duly granted. Similarly, in *A.G.* v. *Fulham Corp.*[92], the local authority was empowered by the statute to run municipal baths and washhouses. An action of opening a public laundry by the corporation was held *ultra vires*.

Again, if the authority is empowered to award a claim for the medical aid of the employees, it cannot grant the said benefit to the family members of the employees.[93] Likewise, if the relevant regulation empowers the management to dismiss a teacher, the power cannot be exercised to dismiss the principal.[94]

(c) Irrelevant considerations

A power conferred on an administrative authority by a statute must be exercised on the considerations relevant to the purpose for which it is conferred. Instead, if the authority takes into account wholly irrelevant or extraneous considerations the exercise of power by the authority will be *ultra vires* and the action bad. It is settled law that where a statute requires an authority to exercise power, such authority must be satisfied about existence of the grounds mentioned in the statute. The courts are entitled to examine whether those grounds existed when the action was taken. A person aggrieved by such action can question the legality of satisfaction by showing that it was based on irrelevant grounds. Thus, the existence of the circumstances is open to judicial review.[95]

This may, however, be distinguished from *mala fide* or improper motive inasmuch as here 'the irrelevant considerations dominate not because of any deliberate choice of the authority but as a result of the honest mistake it makes about the object or scope of its powers'.[96]

Thus, when the red-haired teacher was dismissed because she had red-hair, or because the teacher took an afternoon off in poignant circumstances, or that the teacher refused to collect money for pupils' meals, the action is bad in law.

In *Ram Manohar Lohia* v. *State of Bihar*[97], under the relevant rules, the authority was empowered to detain a person to prevent subversion of 'public order'. The petitioner was detained with a view to prevent

92. (1921) 1 Ch D 440: 90 LJ Ch 281.
93. *G.E.S. Corpn.* v. *Workers' Union*, AIR 1959 SC 1191.
94. *Chaudhary* v. *Datta*, AIR 1958 SC 722: 1959 SCR 455; see also *Barium Chemicals Ltd.* v. *Company Law Board*, AIR 1967 SC 295: 1966 Supp SCR 311.
95. *Indian Nut Products* v. *Union of India*, (1994) 4 SCC 269 (275).
96. Markose: *Judicial Control of Administrative Action in India*, 1956, p. 417.
97. AIR 1966 SC 740: (1966) 1 SCR 709.

him from acting in a manner prejudicial to the maintenance of 'law and order'. The Supreme Court set aside the order of detention. According to the Court, the term 'law and order' was wider than the term 'public order'.

Similarly, in *R.L. Arora* v. *State of U.P.*[1], under the provisions of the Land Acquisition Act, 1894 the State Government was authorised to acquire land for a company if the Government was satisfied that 'such acquisition is needed for the construction of a work and that such work is likely to prove useful to the public'. In this case, the land was acquired for a private company for the construction of a factory for manufacturing textile machinery. The Supreme Court, by majority, held that even though it was a matter of subjective satisfaction of the Government, since the sanction was given by the Government on irrelevant and extraneous considerations, it was invalid. Wanchoo, J. (as he then was) observed:

> "*The Government cannot both give meaning to the words and also say that they are satisfied on the meaning given by them.* The meaning has to be given by the court and it is only thereafter that the Government's satisfaction may not be open to challenge if they have carried out the meaning given to the relevant words by the court."[2] (emphasis supplied)

In *Rohtas Industries Ltd.* v. *Agrawal*[3], an order of investigation was issued against the petitioner company *inter alia* on the ground that there were a number of complaints of misconduct against one of the leading directors of the company in relation to other companies under his control. The Supreme Court quashed the order holding the ground irrelevant.

In *Hukam Chand* v. *Union of India*[4], under the relevant rule, the Divisional Engineer was empowered to disconnect any telephone on the occurrence of a 'public emergency'. When the petitioner's telephone was disconnected on the allegation that it was used for illegal forward trading (*satta*) the Supreme Court held that it was an extraneous consideration and arbitrary exercise of power by the authority.

In *State of M.P.* v. *Ramshanker*[5], services of a teacher were terminated on the ground that he had taken part in RSS and Jan Sangh activities. Observing that to deny employment to an individual because of

1. AIR 1962 SC 764: 1962 Supp (2) SCR 149.
2. *Id.* at p. 772 (AIR).
3. (1969) 1 SCC 325: AIR 1969 SC 707.
4. (1976) 2 SCC 128: AIR 1976 SC 789.
5. (1983) 2 SCC 145: AIR 1983 SC 374.

his political affinities would be violative of Articles 14 and 16 of the Constitution, the Supreme Court set aside the order.

(d) Leaving out relevant considerations

As discussed above, the administrative authority cannot take into account irrelevant or extraneous considerations. Similarly, if the authority fails to take into account relevant considerations, then also, the exercise of power would be bad. But it is very difficult to prove that certain relevant factors have not been taken into consideration by the authority, unless detailed reasons are given in the impugned order itself from which it can be inferred. Still, however, sometimes the relevant considerations are prescribed by the statute itself, e.g. "regard shall be had to", "must have regard to", etc. Here, the matter so specified must be taken into account.

In *Rampur Distillery Co.* v. *Company Law Board*[6], the Company Law Board refused to give its approval for renewing the managing agency of the Company. The reason given by the Board for not giving its approval was that the Vivian Bose Commission had severely criticized the dealings of the Managing Director, Mr Dalmia. The court conceded that the past conduct of the directors were a relevant consideration, but before taking a final decision, it should take into account their present activities also.

Again, in *Ashadevi* v. *Shivraj*[7], an order of detention was passed against the detenu under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA). The order was based on the detenu's confessional statements made before the Customs authorities. But the said confessional statements were subsequently retracted by the detenu before the order of detention. The Supreme Court held that the question whether the earlier statements recorded were voluntary or not was a 'vital' fact which ought to have been considered by the detaining authority before passing the order of detention. But if such retraction is an afterthought, it will not vitiate subjective satisfaction.[8]

The words "having regard to", however, do not mean that the authority cannot take into account other factors. The expression "having regard to" cannot be read as "having regard only to". The authority must

6. (1969) 2 SCC 774: AIR 1970 SC 1789.
7. (1979) 1 SCC 222: AIR 1979 SC 447; see also *Sk. Nizamuddin* v. *State of W.B.*, (1975) 3 SCC 395: AIR 1974 SC 2353; *Dharamdas* v. *Police Commr.*, (1989) 2 SCC 370: AIR 1989 SC 1282; *Sitaram Sugar Co.* v. *Union of India*, (1990) 3 SCC 223: AIR 1990 SC 1277.
8. *Noor Salman* v. *Union of India*, (1994) 1 SCC 381.

address itself to the question to which it must have regard. But having done so, it can reasonably consider other relevant factors.[9]

(e) Mixed considerations

(i) General

Sometimes, a peculiar situation arises. Here the order is not *wholly* based on extraneous or irrelevant considerations. It is based *partly* on relevant and existent considerations and *partly* on irrelevant or non-existent considerations. There is no uniformity in judicial pronouncements on this point. In some cases, it was held that the proceedings were vitiated,[10] while in other cases, it was held that the proceedings were not held to be bad.[11] It is submitted that the proper approach is to consider it in two different situations:

(*a*) Conclusions based on subjective satisfaction; and

(*b*) Conclusions based on objective facts.

(ii) Conclusion based on subjective satisfaction

If the matter requires *purely* subjective satisfaction; e.g. detention matters, a strict view is called for, and if the order of detention is based on relevant and irrelevant considerations, it has to be quashed. The reason is very simple and obvious. It is very difficult for the court to say as to what extent the irrelevant (or non-existent) grounds have operated on the mind of the detaining authority and whether it would have passed the same order even without those irrelevant or non-existent grounds. In *Dwarka Das* v. *State of J & K* [12], setting aside the order of the detention which was based on relevant and irrelevant grounds, the Supreme Court observed: "Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. That is so because the matter being one for subjective satisfaction, it must be properly based on all the reasons on which it purports to be based. If some out of them are found to be non-existent

9. *Sitaram Sugar Co.* v. *Union of India*, (1990) 3 SCC 223 (243-45): AIR 1990 SC 1277.

10. *Dhirajlal* v. *CIT*, AIR 1955 SC 271: (1954) 26 ITR 736; *Lal Chand* v. *CIT*, AIR 1959 SC 1295: (1960) 1 SCR 301.

11. *State of Orissa* v. *Bidyabhusan*, AIR 1963 SC 779; *State of Maharashtra* v. *Babulal Takkamore*, AIR 1967 SC 1353; *Pyare Lal Sharma* v. *J & K Ind. Ltd.*, (1989) 3 SCC 448: AIR 1989 SC 1854.

12. AIR 1957 SC 164: 1956 SCR 948.

or irrelevant, the court cannot predicate what the subjective satisfaction of the said authority would have been on the exclusion of those grounds or reasons. *To uphold the validity of such an order in spite of the invalidity of some of the reasons or grounds would be to substitute the objective standards of the court for the subjective satisfaction of the statutory authority.*''[13] (emphasis supplied)

But the Court further stated:

> ''In applying these principles, however, the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, *might reasonably have affected the subjective satisfaction of the appropriate authority.* It is not merely because some ground or reason of a *comparatively unessential nature* is defective that such an order based on subjective satisfaction can be held to be invalid. The court while anxious to safeguard the personal liberty of the individual will not lightly interfere with such orders. It is in the light of these principles that the validity of the impugned order has to be judged.''[14]
>
> (emphasis supplied)

It is respectfully submitted that these observations are unnecessary and very wide and do not lay down the correct law. They leave the courts to speculate. If the order is based on *subjective satisfaction* and if it is not permissible for the court (as the court itself conceded) 'to substitute the objective standards of the court for the subjective satisfaction of the statutory authority' one fails to see how the *objective standard* can be applied? It is therefore, submitted that in detention matters, the orders must necessarily be quashed if they are based on mixed considerations.[15]

Sometimes, the legislature itself provides that inspite of mixed considerations or relevant as well as irrelevant grounds, an order of detention shall be treated as legal and valid. For instance, Section 5-A of the National Security Act, 1980 enacts that when an order of detention is made on two or more grounds, it shall be deemed to have been made separately on each ground and it will not be deemed to be invalid or inoperative

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13. *Id.* at p. 168 (AIR).
14. *Id.* at p. 168 (AIR); see also *Ram Manohar Lohia* v. *State of Bihar*, AIR 1966 SC 740: (1966) 1 SCR 709; *Manu Bhusan* v. *State of W.B.*, (1973) 3 SCC 663: AIR 1973 SC 295; *Pushker* v. *State of W.B.*, (1969) 1 SCC 10: AIR 1970 SC 852; *Fagu* v. *State of W.B.*, (1974) 4 SCC 501: AIR 1975 SC 245; *Kamlakar* v. *State of M.P.*, (1983) 4 SCC 443: AIR 1984 SC 211. For other cases, *see* C.K. Thakker: *Administrative Law*, 1996, p. 346.
15. For detailed discussion, *see* C.K. Thakker: *Administrative Law*, 1996, pp. 345-51.

merely because one or more of the grounds is or are non-existent, vague or irrelevant. Such provisions are held to be constitutional.[16]

(iii) Conclusion based on objective facts

If the conclusion of the authority is based on *objective facts* and the action is based on relevant and irrelevant considerations the court may apply the *objective standard* and decide the validity or otherwise of the impugned action.

Thus, in *State of Orissa* v. *Bidyabhusan*[17], *A* was dismissed from service on certain charges. The High Court found that some of them were not proved and, therefore, directed the Government to consider the case whether on the basis of the remaining charges the punishment of dismissal was called for. On appeal, the Supreme Court reversed the judgment of the High Court and upheld the order of dismissal. According to the Supreme Court, if the order could be supported on any of the grounds, it was not for the court to consider whether on that ground alone the punishment of dismissal can be sustained.

Shah, J. (as he then was) rightly observed: "*[I]f the order may be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed*, it is not for the court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The court has no jurisdiction if the findings of the inquiry officer or the Tribunal *prima facie* make out a case of misdemeanour; to direct the authority to reconsider the order because in respect of some of the findings but not all it appears that there had been violation of the rules of natural justice."[18] (emphasis supplied)

Similarly, in *State of Maharashtra* v. *Babulal Takkamore*[19], the State Government superseded the municipality on two grounds. One of them was held to be extraneous and yet the order was upheld as the court felt 'reasonably certain that the State Government would have passed the order on the basis of the second ground alone' as in the show-cause notice itself it was mentioned that the grounds 'jointly as well as severally' were serious enough to warrant action.

In *Pyare Lal Sharma* v. *J&K Industries Ltd.*[20], the services of the petitioner were terminated on two grounds: (*i*) unauthorised absence from

16. *Attorney-General* v. *Amritlal*, (1994) 5 SCC 54: AIR 1994 SC 2179. For detailed discussion, *see* V.G. Ramachandran: *Law of Writs*, 1993, pp. 440-46.
17. AIR 1963 SC 779: 1963 Supp (1) SCR 648.
18. *Id.* at p. 786 (AIR).
19. AIR 1967 SC 1353: (1967) 2 SCR 583.
20. (1989) 3 SCC 448: AIR 1989 SC 1854; see also *Madhukar* v. *Hingwe*, (1987)

duty; and (*ii*) taking part in active politics. It was proved that no notice was issued to the delinquent regarding taking part in active politics. The Supreme Court, however, upheld the order by observing that 'the order of termination can be supported on the ground of remaining unauthorisedly absent from duty'.

(iv) Correct principle

It is submitted that the aforesaid view is correct. The principle has been succinctly laid down by Shelat, J. in *Zora Singh* v. *J.M. Tandon*[21], wherein His Lordship observed:

> "The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective facts or evidence, but on subjective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior court to find out which of the reasons, relevant or irrelevant, valid, or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. *If it is found that there was legal evidence before the Tribunal, even if some of it was irrelevant, a superior court would not interfere if the finding can be sustained on the rest of the evidence.*"[22] (emphasis supplied)

(f) Mala fide

(i) General

Every power must be exercised by the authority reasonably and lawfully. However, it is rightly said, "every power tends to corrupt and absolute power corrupts absolutely". It is, therefore, not only the power but the duty of the courts to see that all authorities exercise their powers properly, lawfully and in good faith. If the power is not exercised *bona fide*, the exercise of power is bad and the action illegal.

(ii) Definition

Though precise and scientific definition of the expression "*mala fide*" is not possible, it means ill-will, dishonest intention or corrupt motive. A power may be exercised maliciously, out of personal animosity,

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1 SCC 164: AIR 1987 SC 570.

21. (1971) 3 SCC 834: AIR 1971 SC 1537.

22. *Id.* at p. 838 (SCC): pp. 1540-41 (AIR); see also *Union of India* v. *Parma Nanda*, (1989) 2 SCC 177: AIR 1989 SC 1185.

ill-will or vengeance or fraudulently and with intent to achieve an object foreign to the statute.[23]

(iii) Types

From the above definition, it can be said that malice is of two types: (1) express malice or "malice in fact", and (2) implied or legal malice or "malice in law". *Mala fides* violating proceedings may be factual or legal. Former is actuated by extraneous considerations whereas the latter arises where a public authority acts deliberately in defiance of law, may be, without malicious intention or improper motive.[24] In other words, a plea of *mala fide* involves two questions; (*i*) whether there is a personal bias or oblique motive; and (*ii*) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of power.[25]

(A) Malice in fact

When an administrative action is taken out of personal animosity, ill-will, vengeance or dishonest intention, the action necessarily requires to be struck down and quashed.

Thus, in *Pratap Singh* v. *State of Punjab*[26], the petitioner was a civil surgeon and he had taken leave preparatory to retirement. Initially the leave was granted, but subsequently it was revoked. He was placed under suspension, a departmental inquiry was instituted against him and, ultimately, he was removed from service. The petitioner alleged that the disciplinary proceedings had been instituted against him at the instance of the then Chief Minister to wreak personal vengeance on him as he had not yielded to the illegal demands of the former. The Supreme Court accepted the contention, held the exercise of power to be *mala fide* and quashed the order.

Similarly, in *Rowjee* v. *State of A.P.*[27], the State Road Transport Corporation had framed a scheme for nationalisation of certain transport routes. This was done as per the directions of the then Chief Minister. It was alleged by the petitioner that the particular routes were selected to take vengeance against the private transport operators of that area as

23. de Smith: *Judicial Review of Administrative Action*, 1995, pp. 344-46; *Jai Chand* v. *State of W.B.*, AIR 1967 SC 483: 1966 Supp SCR 464; *Venkataraman* v. *Union of India*, (1979) 2 SCC 491: AIR 1979 SC 49.
24. *State of Maharashtra* v. *Budhikota*, (1993) 3 SCC 71 (78): 1993 SCC (Cri) 597.
25. *State of Bihar* v. *P.P. Sharma*, 1992 Supp (1) SCC 222 (260): AIR 1991 SC 1260 (1278-79).
26. AIR 1964 SC 72: (1964) 4 SCR 733.
27. AIR 1964 SC 962: (1964) 6 SCR 330.

they were his political opponents. The Supreme Court upheld the contention and quashed the order.

In *Shivajirao Patil* v. *Mahesh Madhav*[28], in a writ petition, it was alleged that altering and tampering with the mark-sheet had been done in favour of *A*, daughter of the then Chief Minister of Maharashtra at M.D. Examination at the behest of the Chief Minister. Though there was no direct evidence about the fact, from various circumstances, the court held that such alteration had been made by the person conducting the examination at the behest of the then Chief Minister. Mukharji, J. (as he then was) rightly observed: "This court cannot be oblivious that there has been a steady decline of public standards or public morals and public morale. It is necessary to cleanse public life in this country along with or even before cleaning the physical atmosphere. The pollution in our values and standards is an equally grave menace as the pollution of the environment. *Where such situations cry out the courts should not and cannot remain mute and dumb.*"[29] (emphasis supplied)

On the other hand, in *State of Haryana* v. *Bhajan Lal*[30], a complaint regarding corruption was filed against the former Chief Minister. The High Court under Article 226 of the Constitution quashed the proceedings *inter alia* observing that they were initiated due to political vendetta and were tainted with personal *mala fides*. The Supreme Court quashed the order of the High Court.

(B) Malice in law

When an action is taken or power is exercised without just or reasonable cause or for purpose foreign to the statute, the exercise of power would be bad and the action *ultra vires*.

In *Municipal Council of Sydney* v. *Campbell*[31], under the relevant statute the Council was empowered to acquire land for "carrying out improvements in or remodelling any portion of the city". The Council acquired the disputed land for expanding a street. But in fact the object was to get the benefit of probable increase in the value of land as a result of the proposed extension of the highway. No plan for improving or remodelling was proposed or considered by the Council. It was held that the power was exercised with ulterior object and hence it was *ultra vires*.

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28. (1987) 1 SCC 227: AIR 1987 SC 294.
29. *Id.* at p. 253 (SCC): 311 (AIR).
30. 1992 Supp (1) SCC 335: AIR 1992 SC 604.
31. (1925) AC 338: (1924) All ER 930.

Similarly, in the well-known case of *Express Newspapers (P) Ltd.* v. *Union of India*[32], a notice of re-entry upon forfeiture of lease granted by the Central Government and of threatened demolition of the Express Buildings was held to be *mala fide* and politically motivated by the party in power against the Express Group of Newspapers in general and Ram Nath Goenka, Chairman of the Board of Directors, in particular.

In *State of Haryana* v. *Bhajanlal*[33], however, an action of launching prosecution against the Chief Minister under the provisions of the Prevention of Corruption Act, 1947 was not held to be *mala fide* and the proceedings were not quashed. Likewise in *T.N. Sheshan* v. *Union of India*[34], the President of India, by an Ordinance made the Election Commission a multi-member Commission. The said action was challenged by the petitioner as *mala fide*. Holding the Ordinance constitutional, the Supreme Court observed that the action was not vitiated by malice in law.

(iv) Test

Two important factors will throw considerable light in determining whether a decision is *mala fide* or motivated by improper considerations; (*i*) first relates to the manner or method of reaching the decision; and (*ii*) second to the circumstances in which the decision is taken and the considerations which have entered into in reaching that decision.[35] It is difficult to establish *mala fide* in a straight-cut manner. In appropriate cases, the court may draw an inference of *mala fide* action from pleadings and antecedent circumstances. Such inference must be based on foundation of facts, pleaded and proved. An inference of *mala fide* cannot be drawn on insinuation and vague allegations.[36]

(v) Burden of proof

The burden of proving *mala fide* is on the person making the allegations, and the burden is 'very heavy'.[37] Neither express nor implied malice can be inferred or assumed.[38] It is for the person seeking to invalidate an order to establish the charge of bad faith. The reason is simple

32. (1986) 1 SCC 133: AIR 1986 SC 872.
33. 1992 Supp (1) SCC 335: AIR 1992 SC 604.
34. (1994) 4 SCC 611.
35. *State of M.P.* v. *Nandlal*, (1986) 4 SCC 566 (612): AIR 1987 SC 251.
36. *Rajendra Roy* v. *Union of India*, (1993) 1 SCC 148: AIR 1993 SC 1234.
37. *E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3 (41): AIR 1974 SC 555 (586); *Gulam Mustafa* v. *State of Gujarat*, (1976) 1 SCC 800 (801-02): AIR 1977 SC 448 (448-49); *Kedar Nath* v. *State of Punjab*, (1978) 4 SCC 336 (339): AIR 1979 SC 220 (227); *Shivajirao Patel* v. *Mahesh Madhav*; (*supra*).
38. *State of Maharashtra* v. *Budhikota*, (1993) 3 SCC 71 (78): 1993 SCC (Cri) 597.

and obvious. There is presumption in favour of the administration that it always exercises its power *bona fide* and in good faith. It is to be remembered that the allegations of *mala fide* are often more easily made than made out, and the very seriousness of such allegations demands proof of a high order of credibility. *It is the last refuge of a losing litigant.*[39] (emphasis supplied)

(vi) Counter-affidavit

It is settled law that the person against whom personal *mala fides* or 'malice in fact' is imputed should be impleaded *eo nomine* as a party respondent and should be afforded opportunity to meet with those allegations.[40] It is, however, not necessary to make allegations against a named official.[41] But when definite allegations have been made and necessary and sufficient particulars in support of such allegations have been furnished by the petitioner in the petition, it is obligatory on the part of the respondent to deal with them by filing a counter-affidavit. In the absence of a denial affidavit by the person against whom such allegations are made, the court may accept those allegations as correct on the test of probability.[42]

(vii) Summary dismissal

When serious allegations of *mala fides* have been made by the petitioner in the petition, the court may not dismiss the petition *in limine* without issuing notice to the respondent.[43] No doubt the court would be justified in refusing to carry out investigation by making a roving inquiry if sufficient particulars making out a *prima facie* case are not included in the petition.[44] But the court must consider the totality of the circumstances and not each allegation individually and independently for deciding whether the impugned action is *mala fide*.[45]

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39. Per Krishna Iyer, J. in *Gulam Mustafa* v. *State of Gujarat*, (1976) 1 SCC 800 (802): AIR 1977 SC 448 (449).
40. *State of Bihar* v. *P.P. Sharma*, 1992 Supp (1) SCC 222: AIR 1991 SC 1260 (1279-80).
41. *State of Punjab* v. *Ramji Lal*, (1970) 3 SCC 602: AIR 1971 SC 1228.
42. *R.P. Kapoor* v. *Sardar Pratap Singh*, AIR 1961 SC 1117(1125): (1961) 2 SCR 143; *Pratap Singh* v. *State of Punjab*, AIR 1964 SC 72 (83): (1964) 4 SCR 733; *Rowjee* v. *State of A.P.*, AIR 1964 SC 962 (969-70): (1964) 6 SCR 330; *Hem Lall* v. *State of Sikkim*, (1987) 2 SCC 9(12): AIR 1987 SC 762(765).
43. *British India Corpn.* v. *Industrial Tribunal, Punjab*, AIR 1957 SC 354(356); *Gian Chand* v. *State of Haryana*, (1970) 3 SCC 270; *D.D. Suri* v. *A.K. Barren*, (1970) 3 SCC 313: AIR 1971 SC 175; *Hem Lall* v. *State of Sikkim* (*Id.*).
44. *E.P. Royappa*, (*supra*); *Tara Chand* v. *Delhi Municipal Corpn.*, (1977) 1 SCC 472 (484): AIR 1977 SC 567 (577); *Hem Lall*, (*Id.*).
45. *State of Haryana* v. *Rajendra Sareen*, (1972) 1 SCC 267 (282-83): AIR 1972

(viii) Legislative power and mala fides

It is well-established that an executive action can be challenged on the ground of *mala fide* exercise of power. A question may, however, arise: whether a pure legislative or quasi-legislative act can be challenged on such ground? The decisions of the Supreme Court are not uniform on that point. In some cases, it was held that legislative action can be impugned on the ground of malice in law, whereas in other cases, a contrary view has been taken. It is submitted that the former view is correct and is in consonance with the doctrine of judicial review which is the basic structure of the Constitution.[46]

(g) Improper object: Collateral purpose

A statutory power conferred on the authority must be exercised for that purpose alone and if it is exercised for a different purpose, there is abuse of power by the authority and the action may be quashed. Improper purpose must be distinguished from '*mala fide*' exercise of power. In the latter, personal ill-will, malice or oblique motive is present, while in the former it may not be so, and the action of the authority may be *bona fide* and honest and yet, if it is not contemplated by the relevant statute, it may be set aside. In other words, "a power used under the misapprehension that it was needed for effectuating a purpose, which was really outside the law or the proper scope of the power, could be said to be an exercise for an extraneous or collateral purpose".[47]

In the leading American case of *Nader* v. *Bork*[48], by revoking a regulation, Cox, Watergate Special Prosecutor was relieved by the Attorney- General by abolishing that office. However, within few days, once again, the regulation was reinforced. The court held the revocation illegal since "it was simply a ruse to permit the discharge of Cox, a purpose that could never be legally accomplished with the original regulation in effect".

In *Nalini Mohan* v. *District Magistrate*[49], the relevant statute empowered the authority to rehabilitate the persons displaced from Pakistan as a result of communal violence. That power was exercised to accom-

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SC 1004 (1016).

46. For detailed discussion, see V.G. Ramachandran: *Law of Writs*, 1993, pp. 452-58.
47. *State of Mysore* v. *P.R. Kulkarni*, (1973) 3 SCC 597 (600): AIR 1972 SC 2170 (2172); *Pratap Singh* v. *State of Punjab*, AIR 1964 SC 72: (1964) 4 SCR 733.
48. (1973) 366 F Supp 104.
49. AIR 1951 Cal 346.

modate a person who had come from Pakistan on medical leave. The order was set aside.

Likewise, in *State of Bombay* v. *K.P. Krishnan*[50], the Government refused to make a reference on the ground that 'the workmen resorted to go slow during the year'. The Supreme Court held that the reason was not germane to the scope of the Act and set aside the order.[51]

In *Banglore Medical Trust* v. *Muddappa*[52], a piece of land earmarked for a public park was allotted at the instance of the then Chief Minister to a private trust for construction of nursing home. It was contended that the action was taken in public interest and the local authority would get income. The Supreme Court, however, held that the "exercise of power was contrary to the purpose for which it was conferred under the statute".

In *Forward Construction Co.* v. *Prabhat Mandal*[53], a plot was reserved for a bus depot under the Development Plan. A substantial portion of the plot was utilised for the bus depot whereas a part thereof was allowed to be used for commercial purpose. The Supreme Court, in these circumstances, held that it could not be said that the plot had been used for a different purpose from the one for which it had been acquired.

(h) Colourable exercise of power

Where a power is exercised by the authority ostensibly for the purpose for which it was conferred, but in reality for some other purpose, it is called colourable exercise of power. Here, though the statute does not empower the authority to exercise the power in a particular manner, the authority exercises the power under the 'colour' or guise of legality.

Similarly, where the legislature enacts law on assumption that it has legislative power to legislate and ultimately it is found that it has no such power or competence, such enactment is called a 'colourable legislation'.[54]

In the leading case of *Somavanti* v. *State of Punjab*[55], interpreting the provisions of the Land Acquisition Act, 1894, the Supreme Court observed: "If the purpose for which the land is being acquired by the

50. AIR 1960 SC 1223: (1961) 1 SCR 227.
51. For detailed discussion, *see* C.K. Thakker: *Administrative Law*, 1996, pp. 360-62.
52. (1991) 4 SCC 54: AIR 1991 SC 1902.
53. (1986) 1 SCC 100: AIR 1986 SC 391.
54. *S.S. Bola* v. *B.D. Sardana*, (1997) 8 SCC 522: AIR 1997 SC 3127 (3183).
55. AIR 1963 SC 151 (164): (1963) 2 SCR 774.

State is within the legislative competence of the State, the declaration of the Government will be final, subject, however, to one exception. That exception is that *if there is a colourable exercise of power the declaration will be open to challenge at the instance of the aggrieved party.*''

(emphasis supplied)

In *Vora* v. *State of Maharashtra*[56], the State Government requisitioned the flat of the petitioner, but in spite of repeated requests of the petitioner, it was not derequisitioned. Declaring the action bad the court observed that though the act of requisition was of a transitory character, the Government in substance wanted the flat for permanent use, which would be a 'fraud upon the statute'.

In *D.C. Wadhwa* v. *State of Bihar*[57], the Supreme Court quashed the action of the State of Bihar of issuing promulgation of Ordinances on a large scale being a fraud on the Constitution.

In *R.S. Joshi* v. *Ajit Mills*[58], the relevant statute provided that if any person collected tax from any buyer on a tax-free item, the said sum was liable to forfeiture by the State. Describing the provision as incidental and ancillary, the Supreme Court negatived the contention that there was colourable exercise of power by the State Legislature.

But it is very difficult to draw a dividing line between improper or collateral purpose on the one hand and colourable exercise of power on the other. It is obvious that if the statutory power is exercised for an 'improper' or 'collateral' purpose, there is 'colourable' exercise of power. Similarly, if there is 'colourable' exercise of power, it cannot be said that it was exercised for proper purpose. Thus, both the phrases can be used interchangeable.

One thing, however, should not be forgotten. The legislature is one of the three organs of the State; others being the executive and the judiciary. And, therefore, judiciary must think twice before holding a legislative provision as fraud on the Constitution or colourable exercise of power by the legislature (the coordinate organ of the State).[59]

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56. (1984) 2 SCC 337: AIR 1984 SC 866; see also *S.S. Bola* v. *B.D. Sardana*, (1997) 8 SCC 522: AIR 1997 SC 3127(3183).
57. (1987) 1 SCC 378: AIR 1987 SC 579.
58. (1977) 4 SCC 98: AIR 1977 SC 2279; see also *Gajapati* v. *State of Orissa*, AIR 1953 SC 375: 1954 SCR 1: *Vajravelu* v. *Sp. Dy. Collector*, AIR 1965 SC 1017: (1965) 1 SCR 614: *Ashok Kumar* v. *Union of India*, (1991) 3 SCC 498: AIR 1991 SC 1792.
59. *R.S. Joshi* v. *Ajit Mills*, (1977) 4 SCC 98 (108): AIR 1977 SC 2279 (2286); *see also* V.G. Ramachandran: *Law of Writs*, 1993, pp. 471-77.

(i) Non-observance of natural justice

By now, it is well-settled law that even if the exercise of power is purely administrative in nature, if it adversely affects any person, the principles of natural justice must be observed and the person concerned must be heard. Violation of the principles of natural justice makes the exercise of power *ultra vires* and void.[60]

(j) Unreasonableness

(i) General

A discretionary power conferred on an administrative authority must be exercised by that authority reasonably. If the power is exercised unreasonably, there is an abuse of power and the action of the authority will be *ultra vires*.

The term 'unreasonable' is ambiguous and may include many things, e.g. irrelevant or extraneous considerations might have been taken into account by the authority or there was improper or collateral purpose or *mala fide* exercise of power by it or there was colourable exercise of power by the authority and the action may be set aside by courts.

(ii) Meaning

But the difficult question is: what do we mean by the expression 'reasonable'? It would be unreasonable to expect an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The word 'reasonable' has in law the *prima facie* meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know.[61]

Similarly, the term 'unreasonable' may include many things, e.g. irrelevant or extraneous considerations might have been taken into account by the authority or there was improper or collateral purpose or *mala fide* exercise of power by it or there was colourable exercise of power by the authority and the action may be set aside by courts. Thus, the expression ''unreasonableness'' covers a multitude of sins.[62]

(iii) Ambit and scope

The concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.[63] Judicial review of administrative

60. For detailed discussion *see* Lecture VI (*supra*).
61. *A Solicitor, Re*, (1945) KB 368 (371).
62. Wade: *Administrative Law*, 1994, p. 411; see also *Mahajan* v. *Jalgaon Municipal Council*, (1991) 3 SCC 91: AIR 1991 SC 1153.
63. *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802.

action is a basic feature of the Constitution. But at the same time it is also to be remembered that "an application for judicial review is not an appeal". If the scope of such review is too broad, it will destroy the autonomy of independent agencies, on the other hand, if it is too narrow, it will make the doctrine of judicial review a "hopeless formality". A court cannot take the place of the body to whom Parliament has entrusted the power to decide. But if such a decision is arbitrary, unlawful, *ultra vires* or unreasonable, the court can and must interfere.[64]

(iv) Leading cases

In the leading case of *Roberts* v. *Hopwood*[65], the local authority was empowered to pay "such wages as it may think fit". In exercise of this power, the authority fixed the wages at £ 4 per week to the lowest grade worker in 1921-22. The court held that though discretion was conferred, it was not exercised reasonably and the action was bad. According to Lord Wrenbury, 'may think fit' means 'may reasonably think fit'. His Lordship observed: "Is the verb 'think' equivalent to 'reasonably think'? My Lords, to my mind there is no difference in the meaning, whether the word 'reasonably' or 'reasonable' is in or out ... I rest my opinion upon higher grounds. A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so — he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. *He must act reasonably*." (emphasis supplied)

In *Rohtas Industries Ltd.* v. *S.D. Agrawal*[66], an order of investigation was issued by the Central Government against the petitioner company under the Companies Act, 1956. The Supreme Court set aside the order. Hegde, J. rightly stated: "We do not think that any reasonable person much less any expert body like the Government on the material before it, could have jumped to the conclusion that there was any fraud involved in the sale of the shares in question.... *The opinion formed by the Government was a wholly irrational opinion.*" (emphasis supplied)

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64. *G.B. Mahajan* v. *Jalgaon Municipal Council*, (1991) 3 SCC 91: AIR 1991 SC 1153; *Tata Cellular* v. *Union of India*, (1994) 6 SCC 651: AIR 1996 SC 11.
65. (1925) AC 578 (613); (1925) All ER 24: 94 LJ KB 542.
66. (1969) 1 SCC 325: AIR 1969 SC 707 (719-20).

In *Pukhraj* v. *Kohli*[67], under Section 178-A of the Customs Act, 1878, the burden of proof that the goods are not smuggled goods is on the person from whom they are seized in the 'reasonable belief' that they are smuggled goods. The Supreme Court took a narrow view and held that it was not sitting in appeal over the decision of the authority and all that was necessary was the *prima facie* ground about the reasonable belief.

But in *Sheonath* v. *Appellate Asstt. Commr.*[68], the court held that the expression 'reason to believe' suggests that the belief must be that of an honest and reasonable person based upon reasonable grounds and not on mere suspicion.

(v) Test

The difficulty, however, is: what is the test for unreasonableness? By whose standards can "reasonableness" be decided? In different fields and in different situations, the meaning of reasonableness differs. Moreover, the test of reasonableness in Administrative Law is different from the test of reasonableness familiar to the Law of Torts. The concept of reasonableness of restrictions on the Fundamental Rights under Part III of the Constitution is yet another area and different considerations must be applied.[69]

(vi) Burden of proof

The onus of proof that the decision of the authority is unreasonable is on the petitioner who challenges such decision as unreasonable. It is, however, open to a court to inquire as to whether a reasonable man could have come to a decision in question without misdirecting himself or the law or the facts in material respects. If the court comes to a conclusion that the decision is so unreasonable that no reasonable man could ever have come to it, the court can interfere.[70]

(vii) Conclusions

At the same time, however, an action of the authority cannot be held to be unreasonable merely because the court thinks it to be unreasonable.[71] Two reasonable persons can reasonably come to opposite conclu-

67. AIR 1962 SC 1559: 1962 Supp (3) SCR 866.
68. (1972) 3 SCC 234: AIR 1971 SC 2451.
69. *G.B. Mahajan* v. *Jalgaon Municipal Council*, (1991) 3 SCC 91 (109-10): AIR 1991 SC 1153 (1164).
70. *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1 (100); *Tata Cellular* v. *Union of India*, (1994) 6 SCC 651 (679): AIR 1996 SC 11; *Delhi Science Forum* v. *Union of India*, (1996) 2 SCC 405 (418): AIR 1996 SC 1356.
71. *Kruse* v. *Johnson*, (1898) 2 QB 91 (100): 46 WR 630 (per Lord Russell).

sions on the same set of facts without forfeiting their title to be regarded as reasonable.[72] The court cannot sit in appeal over the decision of the administrative authority. It can interfere only if the decision is 'so unreasonable that no reasonable man could have ever come to it', or is 'perverse' or there is 'no evidence' to justify the conclusion. "It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it",[73] or in the words of Lord Scarman, the decision is so absurd that one is satisfied that the decision-maker 'must have taken leave of his senses'.[74]

13. DOCTRINE OF PROPORTIONALITY

(a) General

With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, unreasonable or irrational, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power is the doctrine of proportionality.

(b) Doctrine explained

In *Council of Civil Service Unions* v. *Minister for Civil Service*,[75] Lord Diplock observed:

> "Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". This is not to say that further development on a case by case basis may not in course of time add further grounds. *I have in mind particularly the possible adoption in the future of the principle of 'proportionality'* "[76] (emphasis supplied)

72. Per Lord Hailsham in *An Infant, Re*, (1971) AC 682 (700).
73. *Council of Civil Service Unions* v. *Minister for the Civil Service*, (1985) AC 374 (410): (1984) 3 All ER 935 (Per Lord Diplock).
74. *Nottinghamshire County Council* v. *Secy. of State*, (1986) AC 240 (247): (1986) 1 All ER 199 (207).
75. (1984) 3 All ER 935: (1984) 3 WLR 1174: (1985) AC 374.
76. *Id.* at p. 950 (All ER): 408 (AC). See also *R.* v. *Secy. of State*, 1986 AC 240.

Proportionality is "concerned with the way in which the decision-maker has ordered his priorities, the very essence of decision-making consists in the attribution of relative importance to the factors in the case". In the human rights context, proportionality involves a 'balancing test' and the 'necessity test.' The former scrutinises excessive and onerous penalties or infringement of rights or interest whereas the latter takes into account other less restrictive alternatives.[77]

(c) Nature and scope

The doctrine ordains that administrative measures must not be more drastic than is necessary for attaining the desired result. If an action taken by an authority is grossly disproportionate, the said decision is not immune from judicial scrutiny. Apart from the fact that it is improper and unreasonable exercise of power, it shocks the conscience of the court and amounts to evidence of bias and prejudice.[78]

(d) Illustrative cases

Let us consider some cases on the point.

In *Hind Construction Co.* v. *Workman*,[79] some workers remained absent from duty treating a particular day as holiday. They were dismissed from service. The Industrial Tribunal set aside the action. Confirming the order of the tribunal, the Supreme Court observed that the absence could have been treated as leave without pay. The workman might have been warned and fined. "*It is impossible to think that any reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this manner.*"

(emphasis supplied)

In *Ranjit Thakur* v. *Union of India*,[80] an army officer did not obey the lawful command of his superior officer by not eating food offered to him. Court martial proceedings were initiated and a sentence of rigorous imprisonment of one year was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment. The said order was challenged *inter alia* on the ground that the punishment was grossly disproportionate. Upholding the contention, following *Council of Civil Service Unions*, and emphasising that "all

77. *Union of India* v. *G. Ganayatham*, (1997) 7 SCC 463.
78. Wade: *Administrative Law*, (1994), p. 403; *Council of Civil Service Unions* v. *Minister for Civil Service*, (*supra*).
79. AIR 1965 SC 917(919-20): (1965) 2 SCR 85.
80. (1987) 4 SCC 611: AIR 1987 SC 2386.

powers have legal limits'', Venkatachaliah, J. (as he then was) rightly observed:

> ''The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. *The doctrine of proportionality as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.*''[81] (emphasis supplied).

In *Sardar Singh* v. *Union of India*,[82] a jawan serving in an Indian Army was granted leave and while going to his home town, he purchased eleven bottles of rum from army canteen though he was entitled to carry only four bottles. In court martial proceedings, he was sentenced to undergo R.I for three months and was also dismissed from service. His petition under Article 226 of the Constitution was dismissed by the High Court. The petitioner approached the Supreme Court. Holding the action arbitrary and punishment severe, the Court set aside the order.

In *Union of India* v. *Parma Nanda*,[83] however, the Supreme Court took a very narrow view. In that case, an employee was charge-sheeted alongwith two other employees for preparing false pay bills and bogus identity card. In inquiry all of them were found guilty. A minor punishment was imposed on two employees, but the petitioner was dismissed from service, since he was 'master-mind' behind the plan. His application before the Central Administrative Tribunal was partly allowed and the penalty was reduced in the line of two other employees. Union of India approached the Supreme Court. The appeal was heard by a Division Bench of three Judges. Allowing the appeal, setting aside the judgment of the Tribunal and considering the decision in *State of Orissa* v. *Bidyabhushan Mahapatra*,[84] and other cases[85] and making wider observations, the Court stated:

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81. *Id.* at p. 620 (SCC): 2392 (AIR).
82. (1991) 3 SCC 213: AIR 1992 SC 417.
83. (1989) 2 SCC 177: AIR 1989 SC 1185.
84. AIR 1963 SC 779: 1963 Supp (1) SCR 648.
85. *Dhirajlal* v. *CIT*, AIR 1955 SC 271; *State of Maharashtra* v. *B.K. Takkamore*, AIR 1967 SC 1353: (1967) 2 SCR 583; *Zora Singh* v. *J.M. Tandon*, (1971) 3

"*If the penalty can lawfully be imposed and is imposed on the proved misconduct, the Tribunal has no power to substitute its own discretion for that of the authority*. The adequacy of penalty unless it is mala fide is certainly not a matter for the Tribunal to concern itself with. The Tribunal also cannot interfere with the penalty if the conclusion of the Inquiry Officer or the competent authority is based on evidence even if some of it is found to be irrelevant or extraneous to the matter."[86] (emphasis supplied)

It is submitted that the observations made by the Supreme Court did not lay down the correct law inasmuch as, the doctrine of proportionality in awarding punishment has been recognised by the Indian Courts since long. It is no doubt true that in the facts and circumstances of the case, the punishment awarded to the petitioner could not be said to be excessively high or grossly disproportionate to the charges levelled and proved against him, wider observations were unnecessary. If the punishment imposed on employee is excessively harsh or disproportionate, a High Court or the Supreme Court, in exercise of the powers under Articles 32, 226, 136 and 227 of the Constitution of India, can interfere with it. If the Central Administrative Tribunal could be said to be 'substitute' of a High Court which position was conceded even by the Supreme Court, the Tribunal undoubtedly possessed power to interfere with the order of punishment.

Again, in *Union of India* v. *G. Ganayatham*,[87] on proved misconduct of an employee, 50% pension and 50% gratuity were withheld. The Central Administrative Tribunal reduced the penalty. Holding that the scope of judicial review in such matters is very limited, the Supreme Court quashed the order of the Tribunal and upheld the action taken by the authorities.

Relying upon *Council of Civil Service Unions* and *Wednesbury Corpn.*,[88] the court rightly observed that in such matters the role of the court is secondary. Ordinarily, the court of law would not interfere with the punishment imposed by the administrative authorities unless it is unreasonable, irrational or out of proportion. Even in those cases as a general rule, the matter has to be remitted back to the appropriate auth-

SCC 834: AIR 1971 SC 1537.

86. (1989) 2 SCC 177 (189): AIR 1989 SC 1185 (1192-93).

87. (1997) 7 SCC 463.

88. *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*, (1947) 2 All ER 680: (1948) 1 KB 223.

ority for reconsideration and only in very rare cases to shorten litigation, it can substitute its own view on quantum of punishment.

(e) Proportionality and reasonableness

It is clear that the principles of reasonableness and proportionality cover a great deal of common ground.[89] Even prior to the leading decision in *Council of Civil Service Unions* v. *Minister for the Civil Service*,[90] the reasoning was applied in a number of cases by the Supreme Court. Thus, if a trader's licence is cancelled for a minor irregularity, it can be quashed either on the ground that the penalty is 'disproportionate' or is 'unreasonable'.[91] Such an action can also be held to be arbitrary as observed in *Sardar Singh* v. *Union of India*.[92]

(f) Conclusions

The doctrine of proportionality, as a part of judicial review ensures that a decision otherwise within the province of administrative authority must not be arbitrary, irrational or unreasonable. Though in judicial review the court is not concerned with the correctness of the decision but the way in which the decision is taken, the very decision-making process involves attributing relative importance to various aspects in the case and there the doctrine of proportionality enters.

It is submitted that the following observations of Lord Diplock in *R.* v. *Goldstein*,[93] lay down the correct law on the point, and therefore, are worth quoting;

> "What is therefore needed is a preparedness to hold that a decision which overrides a fundamental right without sufficient objective justification will, as a matter of law, necessarily be disproportionate to the aims and view. . . The deployment of proportionality sets in focus the true nature of the exercise; the elaboration of a rule about permissible priorities."[94]

14. DOCTRINE OF LEGITIMATE EXPECTATIONS

(a) General

The doctrine of "legitimate expectations" has been recently recognised in the English as well as in the Indian legal system. It is the 'latest

89. Wade: *Administrative Law*, (1994), p. 403.
90. (1984) 3 All ER 935: (1984) 3 WLR 1174: (1985) AC 374.
91. *R.* v. *Barnsley*, (1976) 1 WLR 1052.
92. (1991) 3 SCC 213: AIR 1992 SC 417.
93. (1983) 1 All ER 434; (1983) 1 WLR 151.
94. *Id.* at p. 157 (WLR); see also *Union of India* v. *G. Ganayatham*, (1997) 7 SCC 463.

recruit' to a long list of concepts fashioned by the courts for the review of administrative actions. The doctrine has an important place in the development of law of judicial review.[95]

(b) Nature and scope

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.

Where a decision of an administrative authority adversely affects legal rights of an individual, duty to act judicially is implicit. But even in cases where there is no legal right, he may still have legitimate expectation of receiving the benefit or privilege. Such expectation may arise either from express promise or from existence of regular practice which the applicant can reasonably expect to continue. In such cases, the court may protect his expectation by invoking principles analogous to natural justice and fair play in action. The Court may not insist an administrative authority to act *judicially* but may still insist him to act *fairly*.[96]

(c) Object

Principles of natural justice will apply in cases where there is some right which is likely to be affected by an act of administration. Good administration, however, demands observance of doctrine of reasonableness in other situations also where the citizens may legitimately expect to be treated fairly.

A doctrine of legitimate expectation has been developed both in the context of reasonableness and in the context of natural justice.

(d) Doctrine explained

In the leading case of *Attorney General of Hong Kong* v. *Ng Yuen Shiu*,[97] Lord Fraser stated: "When a public authority has promised to follow a certain procedure, it is in the interest of good administration

95. *Westminister City Council, Re*, (1986) AC 668: (1986) 2 All ER 278, *Findlay* v. *Secy. of State*, (1984) 3 All ER 801: 1985 AC 318; *Union of India* v. *Hindustan Dev. Corpn.*, (1993) 3 SCC 499: AIR 1994 SC 980; *Madras City Wine Merchants' Assn.* v. *State of T.N.*, (1994) 5 SCC 509.

96. *Schmidt* v. *Secy. of State*, (1969) 1 All ER 904, 914: (1969) 2 WLR 337: (1969) 2 Ch D 149; *Attorney-General of Hong Kong* v. *Ng Yuen Shiu*, (1983) 2 All ER 346:(1983) 2 WLR 735:(1983) 2 AC 629; *Council of Civil Service Unions* v. *Minister for Civil Service*, (1984) 3 All ER 935: (1984) 3 WLR 1174: (1985) AC 374; *Halsbury's Laws of England*, 4th Edn., Vol. 1(I), p. 151.

97. (1983) 2 All ER 346: (1983) 2 AC 629.

that it should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty."

Wade[1] also states:

> "In many cases legal rights are affected, as where property is taken by compulsory purchase or someone is dismissed from a public officer. But in other cases, the person affected may have no more than an interest, a liberty or an expectation . . . 'legitimate expectation' which means reasonable expectation, can equally well be invoked in any of many situations where fairness and good administration justify the right to be heard."

(e) Development

The concept of legitimate expectation made its first appearance in *Schmidt* v. *Secy. of State*,[2] wherein it was held that an alien who was granted leave to enter the U.K. for a limited period had legitimate expectation of being allowed to stay for the permitted period.

The doctrine was reiterated when alien students were refused extension of their permits as an act of policy by the Home Secretary. The Court of Appeal held that though the students had no right for extension, revocation of permits would be contrary to 'legitimate expectation'.[3]

(f) Illustrations

The promise of a hearing before a decision is taken may give rise to a legitimate expectation that a hearing will be given. A past practice of consulting before a decision is taken may give rise to an expectation of consultation before any future decision is taken. A promise to confer, or past practice of conferring a substantive benefit, may give rise to an expectation that the individual will be given a hearing before a decision is taken not to confer the benefit. The actual enjoyment of a benefit may create a legitimate expectation that the benefit will not be removed without the individual being given a hearing. On occasions, individuals seek to enforce the promise or expectation itself, by claiming that the substantive benefit be conferred. *Decisions affecting such legitimate expectations are subject to judicial review.*[4] (emphasis supplied)

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1. *Administrative Law*, (1994), pp. 522-25, 418-20.
2. (1969) 1 All ER 904:(1969) 2 Ch D 149.
3. *R.* v. *Home Secretary*, (1984) 1 WLR 1337.
4. Clive Lewis: *Judicial Remedies in Public Law*, p. 97, cited in *Madras City Wine Merchants' Assn.* v. *State of T.N.*, (1994) 5 SCC 509, 526(544).

(g) Leading cases

In *Attorney General of Hong Kong* v. *Ng Yuen Shiu*[5] the government announced that illegal immigrants would not be deported till their cases would be considered individually on merits. A deportation order was passed against the applicant without affording opportunity. Quashing the order, the Court observed:

> "When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."

In *Breen* v. *Amalgamated Engg. Union*,[6] Lord Denning stated that if a person seeks a privilege to which he has no claim, he can be turned away without a word. He need not be heard. But if he is deprived of his livelihood, he should be afforded a hearing. Likewise, if he has some right of interest, or legitimate expectation, of which it would not be fair to deprive him without hearing, then he should be afforded hearing.

In *Navjyoti Coop. Group Housing Society* v. *Union of India*,[7] as per the policy of the government, allotment of land to housing society was to be given on the basis of "First come first served". It was held that the societies who had applied earlier could invoke the doctrine of 'legitimate expectation'.

In *Supreme Court Advocates-on-Record Assn.* v. *Union of India*,[8] the Supreme Court held that in recommending appointment to the Supreme Court, due consideration of every legitimate expectation has to be observed by the Chief Justice of India. "Just as a High Court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of a High Court in his turn in the ordinary course, he has the legitimate expectation to be considered for appointment to the Supreme Court in his turn, according to his seniority."

(h) Consequences

The existence of a legitimate expectation may have a number of consequences. It may give *locus standi* to a claimant to seek leave to apply for judicial review; it may mean that the authority ought not to act so as to defeat that expectation without justifiable cause. It may also mean that before defeating a person's legitimate expectation, the auth-

5. (1983) 2 All ER 346: (1983) 2 WLR 735: (1983) 2 AC 629.
6. (1971) 1 All ER 1148: (1971) 2 QB 175.
7. (1992) 4 SCC 477: AIR 1993 SC 155.
8. (1993) 4 SCC 441(703): AIR 1994 SC 268(437) (Verma, J.).

ority should afford him an opportunity of making representation on the matter. The claim based on the principle of legitimate expectation can be sustained and the decision resulting in denial of such expectation can be questioned provided the same is found to be unfair, unreasonable, arbitrary or violative of principles of natural justice.[9]

(i) Legitimate expectation and estoppel

Although there is some similarity between the two doctrines, and arguments under the label of 'estoppel' and 'legitimate expectation' are substantially the same, both the doctrines are distrinct and separate. The element of acting to applicant's detriment which is a *sine qua non* for invoking estoppel is not a necessary ingredient of legitimate expectation.[10]

Duty of applicant

Legitimate expectation affords the applicant standing to apply for judicial review. A person who bases his claim on the doctrine of legitimate expectation in the first instance, must satisfy that there is a foundation for such claim.[11]

(k) Duty of authority

Where the applicant *prima facie* satisfies the court that his claim on the basis of legitimate expectation is well founded, it is for the authority to justify the action taken against the applicant.[12]

(l) Duty of court

When a case of legitimate expectation is made out by the applicant, the Court will consider the prayer of the applicant for grant of relief. The protection of legitimate expectation does not require the fulfilment of the expectation where public interest requires otherwise. The court may uphold the decision taken by the authority on the basis of overriding public interest. Thus, protection of doctrine of legitimate expectation and grant of relief in favour of the claimant are two distinct and separate matters and presence of former does not necessarily result in the latter.[13]

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9. *Halsbury's Laws of England*, 4th Edn., Vol. 1 (I), p. 151, see also *Union of India* v. *Hindustan Dev. Corpn.*, (1993) 3 SCC 499: AIR 1994 SC 980; *Madras City Wine Merchants' Assn.* v. *State of T.N.*, (1994) 5 SCC 509.
10. Wade: *Administrative Law*, (1994), p. 419-20; *Madras City Wine Merchants' Assn.* v. *State of T.N.*, (1994) 5 SCC 509(527).
11. *Union of India* v. *Hindustan Dev. Corpn.*, (1993) 3 SCC 499: AIR 1994 SC 980; *Madras City Wine Merchants' Assn.* v. *State of T.N.*, (1994) 5 SCC 509.
12. *Ibid.*
13. *Ibid.*

(m) Limitations

The doctrine of 'legitimate expectation', has its own limitations.

The concept of legitimate expectation is only procedural and has no substantive impact. In *Attorney General for New South Wales* v. *Quin*,[14] one *Q* was a stipendiary Magistrate in charge of Court of Petty Sessions. By an Act of Legislature that court was replaced by Local Court. Though applied, *Q* was not appointed under the new system. That action was challenged. The Court dismissed the claim observing that if substantive protection is to be accorded to legitimate expectations, it would result in interference with administrative decisions on merits which is not permissible.

Moreover, the doctrine does not apply to legislative activities. Thus, in *R.* v. *Ministry of Agriculture*,[15] conditions were imposed on fishing licences. The said action was challenged contending that the new policy was against 'legitimate expectations'. Rejecting the argument and dismissing the saction, the court held that the doctrine of 'legitimate expectations' cannot preclude legislation.

Likewise, in *Sri Srinivasa Theatre* v. *Govt. of T.N.*, [16] by amending the provisions of the Tamil Nadu Entertainments Tax Act, 1939, the method of taxation was changed. The validity of the amendment was challenged *inter alia* on the ground that it was against legitimate expectation of the law in force prior to amendment. Rejecting the argument and following *Council of Civil Service Unions*, the Supreme Court held that a legislation cannot be invalidated on the basis that it offends the legitimate expectations of the persons affected thereby.

Again, doctrine of 'legitimate expectations' does not apply if it is contrary to public policy or against the security of State.

Thus, in *Council of Civil Service Unions* v. *Minister for Civil Service*,[17] the staff of Government Communications Head Quarters (GCUQ) had the right to unionisation. By an order of the government, the employees of GCHGQ were deprived of this right. The union challenged the said action contending that the employees of GCHQ had legitimate expectations of being consulted before the Minister took action.

Though in theory, the House of Lords agreed with the argument of the Union about legitimate expectations, it held that "the Security con-

14. (1990) 64 Aust LJR 327: (1990) 93 ALR 1.
15. (1991) 1 All ER 41.
16. (1992) 2 SCC 643: AIR 1992 SC 999.
17. (1984) 3 All ER 935: (1984) 3 WLR 1174: (1985) AC 374.

siderations put forward by the Government—override the right of the Union to prior consultation."

Similarly, in *State of M.P.* v. *Kailash Chand*,[18] an Act was amended by providing age of superannuation. It was contended that when an appointment was made by fixing a tenure, there was right to continue and the doctrine of legitimate expectation would apply. The claim was, however, negatived observing that "legitimate expectation cannot preclude legislation."

In *Union of India* v. *Hindustan Development Corpn.*,[19] in government contract, dual pricing policy was fixed by the State Authorities (lower price for big suppliers and higher price for small suppliers). That action was taken in larger public interest and with a view to break "cartel", it was held that adoption of dual pricing policy by government did not amount to denial of legitimate expectation.

(n) Conclusions

From the above discussion, it is clear that the doctrine of legitimate expectations in essence imposes a duty to act *fairly*. Legitimate expectations may come in various forms and owe their existence to different kinds of circumstances. It is not possible to give an exhaustive list in the context of vast and fast expansion of government activities. They shift and change so fast that the start of our list would be absolute before we reached the middle.[20]

One thing, however, is clear. A court cannot assume jurisdiction to review administrative act or decision, which is unfair in the opinion of the court. If that be allowed, the court would be exercising jurisdiction to do the very thing which is to be done by the repository of an administrative power, i.e. choosing among the courses of action upon which reasonable minds might differ.[21]

It is submitted that the following observations of Brennan, J. in *Attorney General for New South Wales* v. *Quin*,[22] lay down the correct law on the point:

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18. 1992 Supp (2) SCC 351: AIR 1992 SC 1277.
19. (1993) 3 SCC 499: AIR 1994 SC 980.
20. *Union of India* v. *Hindustan Development Corpn.*, (1993) 3 SCC 499 (548-49): AIR 1994 SC 980 (1020-21).
21. *Attorney General* v. *Quin*, (1990) 64 Aust LJR 327: (1990) 93 ALR 1.
22. (1990) 64 Aust LJR 327, cited in *Union of India* v. *Hindustan Development Corpn.* (*supra*); *Madras City Wine Merchants' Assn.* v. *State of T.N.*, (1994) 5 SCC 509.

"(T)he Court must stop short of compelling fulfilment of the promise or practice unless the statute so requires or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power. It follows that *the notion of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not unlocks the gate which shuts the court out of review on the merits.*" (emphasis supplied)

15. CONCLUSIONS

It is a fundamental principle of law that every power must be exercised within the four corners of law and within the legal limits. Exercise of administrative power is not an exception to that basic rule. The doctrines by which those limits are ascertained and enforced form the very marrow of administrative law. Unfettered discretion cannot exist where the rule of law reigns. Again, all power is capable of abuse, and that the power to prevent the abuse is the acid test of effective judicial review.[23]

Under the traditional theory, courts of law used to control existence and extent of prerogative power but not the manner of exercise thereof. That position was, however, considerably modified after the decision in Council of *Civil Service Unions* v. *Minister for Civil Service*,[24] wherein it was emphasised that the reviewability of discretionary power must depend upon the subject-matter and not upon its source. The extent and degree of judicial review and justifiable area may vary from case to case.[25]

At the same time, however, the power of judicial review is not unqualified or unlimited. If the courts were to assume jurisdiction to review administrative acts which are 'unfair' in their opinion (on merits), the courts would assume jurisdiction to do the very thing which is to be done by administration. If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk.[26]

It is submitted that the following observations of Frankfurter, J. in *Trop* v. *Dulles*,[27] lay down correct legal position;

"All power is, in Madison's Phrase 'of an encroaching nature'. Judicial Power is not immune against this human weakness. *It also*

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23. Wade: *Administrative Law*, (1994), pp. 39-41.
24. (1984) 3 All ER 935: (1984) WLR 1174: (1985) AC 374.
25. Craig: *Administrative Law*, (1993), p. 291.
26. *Attorney General, New South Wales* v. *Quin*, (1990) 64 Aust LJR 327: (1990) 93 ALR 1.
27. (1958) 35 US 86.

must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self restraint.''[28]
(emphasis supplied)

Id. at p. 119. See also *Union of India* v. *Hindustan Dev. Corpn.*, (1993) 3 SCC 499: AIR 1994 SC 980.

Lecture IX

Judicial and other Remedies

"Ubi jus ibi remedium"

The King is at all times entitled to have an account, why the liberty any of his subjects is restrained. —BLACKSTON

We have a legislative body, called the House of Representatives, of ov 400 men. We have another legislative body, called the Senate, of le than 100 men. We have, in reality, another legislative body, call the Supreme Court, of nine men; and they are more powerful tha all the others put together. —GEORGE W. NORR

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1. INTRODUCTION

Administrative law provides for control over the administration by an outside agency strong enough to prevent injustice to the individual while leaving the administration adequate freedom to enable it to carry on effective Government.[1] Due to increase in governmental functions, administrative authorities exercise vast powers in almost all fields. But as has been rightly observed by Lord Denning,[2] "properly exercised the new powers of the executive lead to Welfare State, but abused they lead to the Totalitarian State". Without proper and effective control an individual would be without remedy, even though injustice is done to him. This would be contrary to the fundamental concept in English and Indian legal systems in which the maxim '*ubi jus ibi remedium*' (wherever there is a right there is a remedy) has been adopted since long. In fact, right and remedy are two sides of the same coin and they cannot be dissociated from each other. The remedies available to an individual aggrieved by any action of an administrative authority may be classified as follows:

(1) Prerogative remedies;
(2) Constitutional remedies;
(3) Statutory remedies;
(4) Equitable remedies;
(5) Common law remedies;
(6) Parliamentary remedies;
(7) Conseil d' Etat;
(8) Ombudsman; and
(9) Self-help.

Let us now consider each of them in detail.

1. Garner: *Administrative Law*, 1963, p. 95.
2. *Freedom under the Law*, 1949, p. 126.

2. PREROGATIVE REMEDIES[3]

(a) Meaning

Though the expression "prerogative writ" is well known, precise and scientific definition of the said term is not possible. However, as the name indicates, it is a writ specially associated with the King. Under the Common law, the sovereign was considered as the fountain of justice. The Crown used to exercise extraordinary and prerogative powers in the interest of justice.

(b) Historical background

In England, the high prerogative writs played a very important role in upholding the rights and liberties of subjects and in providing effective safeguards against arbitrary exercise of power by public authorities. Under the provisions of the Regulating Act, 1773, three Supreme Courts were established at Calcutta, Madras and Bombay by issuing a Royal Charter and they were vested with power to issue the high prerogative writs. The said power was also conferred on High Courts established under the Indian High Courts Act, 1861 and since then, High Courts exercise the power to issue the prerogative writs to protect the rights of individuals.

(c) Constitutional provisions

The Founding Fathers of the Constitution of India were aware of the part played by prerogative writs in England. In these circumstances, they have made specific provisions in the Constitution itself empowering the Supreme Court and High Courts to issue writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari* for enforcement of Fundamental Rights (Articles 32 and 226) and also for other purposes (Article 226). Articles 32 and 226 read as under:

> "32. *Remedies for enforcement of rights conferred by this Part.*—(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions, orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

3. For detailed discussion, *see* C.K. Thakker: *Administrative Law*, 1996, pp. 375-439; V.G. Ramachandran: *Law of Writs*, 1993.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by the Constitution.

226. *Power of High Courts to issue certain writs.*—(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(*a*) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(*b*) giving such party an opportunity of being heard,

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this Article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32."

(d) Object

As stated above, right and remedy are really the two sides of the same coin and they cannot be dissociated from each other. Therefore whenever an individual is aggrieved by any illegal action of an authority certain remedies are available to him. The most important is issuance o prerogative writs.

Article 32 guarantees the right to move the Supreme Court by ap propriate proceedings for enforcement of fundamental rights guaranteed by Part III of the Constitution. Dr Ambedkar, one of the principal archi tects of the Constitution, said about Article 32 as under:

> "If I was asked to name any particular Article in this Constitu tion as the most important Article without which this Constitution would be a nullity, I could not refer to any other Article except thi one. *It is the very soul of the Constitution and the very heart of it.*"
>
> (emphasis supplied

The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a fundamental right. That being so, a right to obtain a writ when the petitioner establishes a case for it, must equally be a fundamental right. It is, therefore, not merely a right of an individual to move the Supreme Court, but also the duty and responsibility of the Supreme Court to protect the Fundamental Rights.[5]

Article 226 empowers every High Court to issue directions, orders or writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari* or any of them. Such directions, orders or writs may be issued (*i*) for enforcement of fundamental rights, or (*ii*) for any other purpose.

So far as the enforcement of fundamental rights is concerned, the jurisdiction of the High Court is substantially the same. If there is violation of a fundamental right and it is the duty of the Supreme Court to enforce it, it is absurd to contend that there is no such duty on High Courts to grant relief in case of violation of fundamental rights. In *Devila* v. *STO* [6], Gajendragadkar, J. (as he then was) rightly stated:

4. *Constituent Assembly Debates*, Vol. III, p. 953.
5. *Daryao* v. *State of U.P.*, AIR 1961 SC 1457 (1461): (1962) 1 SCR 574; *K.K Kochuni* v. *State of Madras*, AIR 1959 SC 725 (730): 1959 Supp (2) SCR 316 *Fertilizer Corpn. Kamgar Union* v. *Union of India*, (1981) 1 SCC 568 (574-75) AIR 1981 SC 344 (347).
6. AIR 1965 SC 1150: (1965) 1 SCR 686.

"There can be no doubt that the Fundamental Rights, guaranteed to the citizens are a significant feature of our Constitution and *the High Courts under Article 226 are bound to protect these Fundamental Rights.*"[7] (emphasis supplied)

But when there is violation not of any fundamental right but of an ordinary legal right, the jurisdiction of the High Court under Article 226 is discretionary. It has been rightly observed in the case of *Manjula* v. *Director of Public Instruction*[8]:

"As at present advised, I am of the opinion that the proper interpretation of Article 226 would be that *in enforcing a Fundamental Right guaranteed under the Constitution the court is under a duty to exercise its power under that Article while in exercising this power for any other purpose it has a discretion.*" (emphasis supplied)

(e) Nature and scope

The jurisdiction of High Courts under Article 226 of the Constitution is equitable and should be exercised to ensure that the law of the land is obeyed and public authorities are kept within the limits of their jurisdiction. In a proceeding under Article 226, the High Court does not determine private rights of parties. It is a remedy against violation of rights by State or statutory authorities. *It is a remedy in public law.*[9] (emphasis supplied)

(f) Discretionary remedy

The jurisdiction of High Courts under Article 226 of the Constitution is discretionary and it should be exercised in the larger interest of justice (*ex debito justitiae*). The High Court may issue writs in the nature of prerogative writs as understood in England for doing substantial justice. While exercising powers, the court must keep in mind the well-established principles of justice and fair play and should exercise the discretion if the ends of justice require it.[10]

7. *Id.* at p. 1152 (AIR); see also *Charanjit Lal* v. *Union of India*, AIR 1951 SC 41: 1950 SCR 869; *Mohd. Yasin* v. *Town Area Committee*, AIR 1952 SC 115: 1952 SCR 572; *State of Bombay* v. *United Motors*, AIR 1953 SC 252 (256): 1953 SCR 1069; *Himmatlal* v. *State of M.P.*, AIR 1954 SC 403 (405-06): 1954 SCR 1122; *K.K. Kochuni* v. *State of Madras*, (*supra*); *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 (192): AIR 1984 SC 802 (817).
8. AIR 1952 Ori 344 (347).
9. *Mohammed Hanif* v. *State of Assam*, (1969) 2 SCC 782 (786): (1970) 2 SCR 197 (202-03); *LIC* v. *C.E.R.C.*, (1995) 5 SCC 482 (498-99): AIR 1995 SC 1811.
10. *Gujarat Steel Tubes Ltd.* v. *Mazdoor Sabha*, (1980) 2 SCC 593: AIR 1980 SC 1896.

As rightly observed by Krishna Iyer., J., "*we have to be cautious both in not overstepping as if Article 226 were as large as an appeal and not failing to intervene where a grave error has crept in*".[11]

(emphasis supplied)

(g) Locus standi: who may apply

Locus standi asks the question whether the petitioner is entitled to invoke the jurisdiction of the court. This question is different from the question whether the petitioner is entitled to the relief as prayed by him.[12] The attitude of the courts in the question of *locus standi* does not appear to be uniform. They vary from country to country, court to court and case to case. In some cases courts have taken a very narrow view holding that unless an applicant has suffered legal injury by reason of violation of his legal right or legally protected interest, he cannot file a petition. The other extreme view is that the courts may in their discretion issue a writ at the instance of any member of public. A close scrutiny, however, reveals that neither of the two extreme views is correct.

As a general rule, in order to have *locus standi* to file a petition, the petitioner should be an 'aggrieved person'. The question, however, is who is an aggrieved person ? The expression denotes an elastic, and to some extent, an illusive concept. According to the traditional theory, only a person whose right has been infringed can apply to the court. But the modern view has liberalised the concept of aggrieved person and the right-duty pattern commonly found in private litigation has been given up. The only limitation is that such a person should not be a total stranger.[13]

(h) Against whom writ would lie

Ordinarily, a writ would lie against the State and statutory bodies and persons charged with public duties.[14] Though private persons are not

11. *Id.* at p. 624 (SCC): 1916 (AIR).
12. *Fertilizer Corpn. Kamgar Union* v. *Union of India*, (1981) 1 SCC 568 (579-80, 588-89): AIR 1981 SC 344 (350, 356); *Bangalore Medical Trust* v. *Muddappa*, (1991) 4 SCC 54: AIR 1991 SC 1902.
13. *Jasbhai Motibhai* v. *Roshan Kumar*, (1976) 1 SCC 671: AIR 1976 SC 578; *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87: AIR 1982 SC 149; *Fertilizer Corpn. Kamgar Union* v. *Union of India*, (1981) 1 SCC 568: AIR 1981 SC 344; *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802.
14. *Sohan Lal* v. *Union of India*, AIR 1957 SC 529: 1957 SCR 738; *Praga Tools Corpn.* v. *Imanual*, (1969) 1 SCC 585: AIR 1969 SC 1306; for detailed discussion, *see* V.G. Ramachandran: *Law of Writs*, 1993, pp. 44-77.

immune from the writ jurisdiction of the Supreme Court as well as of High Courts, issuance of a writ to them would require exceptional circumstances.[15]

As a general rule, a writ can be issued against Parliament and Legislatures of States,[16] Central and State Governments,[17] all local authorities[18] and other authorities. *Rajasthan State Electricity Board* v. *Mohan Lal*[19] is the leading decision wherein the Supreme Court interpreted the expression "other authorities" in Article 12 liberally. The law developed very fast thereafter and a number of authorities were held to be "State" within the meaning of Article 12.

The following authorities are held to be "State" within the meaning of Article 12 of the Constitution:

Airport Authority, Railway Board, Electricity Board, Transport Corporation, Port Trust, Reserve Bank, Nationalised Banks, Oil and Natural Gas Commission, Life Insurance Corporation, State Trading Corporation, Indian Oil Corporation, Food Corporation, Bharat Petroleum, Sainik School, Modern Bakery, a public or private trust receiving grant from the Government, etc.

The following authorities, on the other hand, are held not to be "State" within the meaning of Article 12 of the Constitution:

Hindustan Shipyard, Council of Scientific and Industrial Research, a company registered under the Companies Act, 1956, Army Welfare Housing Organisation (AWHO), National Council of Educational Research and Training (NCERT), Cooperative Banks, Private Institutions or bodies performing private functions, etc.

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15. *Id.* see also *Rohtas Industries Ltd.* v. *Staff Union*, (1976) 2 SCC 82: AIR 1976 SC 425; *Anadi Mukta Sadguru Trust* v. *V.R. Rudani*, (1989) 2 SCC 691: AIR 1989 SC 1607.
16. Under Article 143, *Constitution of India, Re*, AIR 1965 SC 745: (1965) 1 SCR 413.
17. *Khajoor Singh* v. *Union of India*, AIR 1961 SC 532: (1961) 2 SCR 828; *Madhav Rao Scindia* v. *Union of India*, (1971) 1 SCC 85: AIR 1971 SC 530.
18. *Union of India* v. *R.C. Jain*, (1981) 2 SCC 308: AIR 1981 SC 951; *Municipal Corpn. of Delhi* v. *Birla Cotton Mills*, AIR 1968 SC 1232: (1968) 3 SCR 251; *Dwarkadas* v. *Board of Trustees*, (1989) 3 SCC 293: AIR 1989 SC 1642.
19. AIR 1967 SC 1857: (1967) 3 SCR 377; see also *Sukhdev Singh* v. *Bhagatram*, (1975) 1 SCC 421: AIR 1975 SC 1331; *R.D. Shetty* v. *International Airport Authority*, (1979) 3 SCC 489: AIR 1979 SC 1628; *Ajay Hasia* v. *Khalid Mujib*, (1981) 1 SCC 722: AIR 1981 SC 487; *see also* V.G. Ramachandran: *Law of Writs*, 1993, pp. 58-77.

(i) Territorial jurisdiction

The powers of the Supreme Court under Article 32 of the Constitution are not circumscribed by any territorial limitation. The powers of High Courts under Article 226 of the Constitution, on the other hand, have territorial limitations. Such powers extend to any person or authority within their territorial jurisdiction.

(j) Delay and laches

It is well settled that under Article 226, the power of a High Court to issue an appropriate writ is discretionary. One of the grounds for refusing relief under Article 226 is that the petitioner has been guilty of delay and laches. It is imperative, if the petitioner wants to invoke the extraordinary remedy available under Article 226 of the Constitution, that he should come to the court at the earliest reasonably possible opportunity. Inordinate delay in making the motion for a writ will be a good ground for refusing to exercise the discretion. It is essential that persons who are aggrieved by any order of the Government or any executive action should approach the High Court with utmost expedition.[20] In an appropriate case the High Court may not exercise its discretion and may refuse to grant relief if there is such negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the other party.[21]

The underlying object is that the courts do not encourage agitation of State claims and exhuming matters which have already been disposed of or where the rights of third parties have accrued in the meantime, or where there is no reasonable explanation for delay.[22] This principle applies even in case of infringement of fundamental rights.[23]

20. *Narayani Devi* v. *State of Bihar*, C.A. No. 140 of 1964, decided. on 22-9-1964 (SC); *Durga Prasad* v. *Chief Controller*, (1969) 1 SCC 185: AIR 1970 SC 769; *State of M.P.* v. *Bhailal*, AIR 1964 SC 1006: (1964) 6 SCR 261; *Kamini Kumar* v. *State of W.B.*, (1972) 2 SCC 420: AIR 1972 SC 2060; *Chandra Bhushan* v. *Dy. Director*, AIR 1967 SC 1272: (1967) 2 SCR 286.
21. *Id.* see also *Moon Mills* v. *Industrial Court, Bombay*, AIR 1967 SC 1450: (1967) 2 LLJ 34; *R.S. Deodhar* v. *State of Maharashtra*, (1974) 1 SCC 317: AIR 1974 SC 259.
22. *Id.* see also *Tilokchand Motichand* v. *H.B. Munshi*, (1969) 1 SCC 110: AIR 1970 SC 898; *Rup Diamonds* v. *Union of India*, (1989) 2 SCC 356: AIR 1989 SC 674.
23. *Tilokchand Motichand* v. *H.B. Munshi* (*Id.*); *Durga Prasad* v. *Chief Controller*, (1969) 1 SCC 185: AIR 1970 SC 769; *Rabindra* v. *Union of India*, (1970) 1 SCC 84: AIR 1970 SC 470.

Where there is inordinate delay in filing a writ petition, the Supreme Court under Article 32 or a High Court under Article 226 of the Constitution of India may refuse to exercise its discretionary powers. The fact that the third party's rights were not created is hardly a ground for interference. This principle also applies to orders which are void.

Very recently, in *State of Rajasthan* v. *Laxmi*[24], the Supreme Court stated:

> "Though the order may be void, if the party does not approach the court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. *When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void.*" (emphasis supplied)

The real difficulty is about the measure of delay. Since the Limitation Act does not apply to writ petitions and no period of limitation is prescribed by the Constitution to move the Supreme Court under Article 32 or High Courts under Article 226, the matter is 'more or less' left to judicial discretion. In *Narayani Devi (Smt)* v. *State of Bihar*[25], speaking for the Supreme Court, Gajendragadkar, C.J. observed: "No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is a matter which must be left to the discretion of the High Court and *like all matters left to the discretion of the court, in this matter too discretion must be exercised judiciously and reasonably.*" (emphasis supplied)

In *Tilokchand Motichand* v. *H.B. Munshi*[26], Hidayatullah, C.J. observed: "[T]he question is one of discretion for this court to follow from case to case. There is no lower limit and there is no upper limit. A case may be brought within Limitation Act by reason of some article but this court need not necessarily give the total time to the litigant to move this court under Article 32. Similarly, in a suitable case this court may entertain such a petition even after a lapse of time. *It will all depend on what the breach of the Fundamental Right and the remedy claimed are and when and how the delay arose.*" (emphasis supplied)

24. (1996) 6 SCC 445 (453). See also *State of Punjab* v. *Gurdev Singh*, (1991) 4 SCC 1: AIR 1992 SC 111.
25. C.A. 140 of 1964, decided on September 22, 1964 (SC) (unrep.).
26. (1969) 1 SCC 110 (116): AIR 1970 SC 898.

Thus, while on the one hand, writ petitions filed within the 'period of limitation' prescribed for a civil action for the same remedy may be dismissed on the ground of delay and laches, and on the other hand, a court may entertain a petition even after 'the period of limitation'.[27]

It is submitted that the correct view is as laid down by the Supreme Court in *P.S. Sadasivaswamy* v. *State of T.N.*[28], in the following words:

> "It is not that there is any period of limitation for the courts to exercise their powers under Article 226 nor is it that there can never be a case where the courts cannot interfere in a matter after the passage of a certain length of time. But *it would be a sound and wise exercise of discretion for the courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the court to put forward stale claims and try to unsettle settled matters.*"[29]
>
> (emphasis supplied)

(k) Alternative remedy

It is well-established that the remedy provided for in Article 226 of the Constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant such a relief in certain circumstances even though a legal right might have been infringed. Availability of an alternative remedy is one of such considerations which the High Court may take into account to refuse to exercise its discretion.[30]

The underlying object is apparent and obvious. High Courts are the apex judicial institutions in the States and it is but natural that if an alternative, adequate and equally efficacious remedy is available to the party, they may refuse to exercise this extraordinary jurisdiction and direct the aggrieved party to first avail of the said alternative remedy.[31]

Ordinarily, in case of infringement of non-fundamental rights, a High Court may refuse to grant relief under Article 226 if the aggrieved party

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27. *Id.* see also V.G. Ramachandran: *Law of Writs*, 1993, pp. 129-50.
28. (1975) 1 SCC 152: AIR 1974 SC 2271.
29. *Id.* at p. 154 (SCC): 2272 (AIR).
30. *Rashid* v. *Income Tax Investigation Commission*, AIR 1954 SC 207 (210): 1954 SCR 738; *Union of India* v. *T.R. Verma*, AIR 1957 SC 882 (884): 1957 SCR 499; *Thansingh* v. *Supdt. of Taxes*, AIR 1964 SC 1419 (1423): (1964) 6 SCR 654.
31. *Id.* see also *Venkateshwaran* v. *Wadhwani*, AIR 1961 SC 1506 (1508-10): (1962) 1 SCR 753; *Baburam* v. *Zila Parishad*, AIR 1969 SC 556 (558): (1969) 1 SCR 518.

can file appeal or application against the impugned order.[32] A High Court may also refuse relief if a person may obtain appropriate relief by filing a suit, by making an application or representation or by raising a dispute in accordance with law.[33]

It should, however, be remembered that the existence of an alternative remedy is not an absolute bar to the granting of writ under Article 226 of the Constitution. It is a rule of policy and practice and not a rule of law. It is a question of discretion and not of jurisdiction. Therefore, in exceptional cases a writ can be issued notwithstanding the fact that an alternative remedy is available to the party and has not been availed of.[34]

Thus, if there is violation of a fundamental right, an aggrieved party has the right to move the Supreme Court under Article 32 or a High Court under Article 226.[35] Similarly, if the remedy provided by the statute cannot be said to be 'alternative', adequate or equally efficacious or the Act by which such a remedy is provided is itself ultra vires or unconstitutional or the impugned order is without jurisdiction or violative of the principles of natural justice, the court can grant relief to the petitioner.[36]

It is submitted that the following observations of Das, C.J. in the leading case of *State of U.P.* v. *Mohd. Nooh*[37] lay down the correct proposition of law:

> "The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. *But this rule requiring*

32. *State of U.P.* v. *Mohd. Nooh*, AIR 1958 SC 86: 1958 SCR 595; *STO* v. *Shiv Ratan*, AIR 1966 SC 142: (1965) 3 SCR 71; *Titaghur Paper Mills* v. *State of Orissa*, (1983) 2 SCC 433: AIR 1983 SC 603.
33. *Sohan Lal* v. *Union of India*, AIR 1957 SC 529 (531): 1957 SCR 738; *Bhopal Sugar Industry* v. *STO*, AIR 1967 SC 549 (551-52): (1964) 1 SCR 488; *Basant Kumar* v. *Eagle Rolling Mills*, AIR 1964 SC 1260 (1263): (1964) 6 SCR 913.
34. *Rashid Ahmed* v. *Municipal Board*, AIR 1950 SC 163 (165): 1950 SCR 566; *Union of India* v. *T.R. Verma* (*supra*); *Baburam* v. *Zila Parishad* (*supra*).
35. *K.K. Kochuni* v. *State of Madras*, AIR 1959 SC 725 (730): 1959 Supp (2) SCR 316.
36. *State of U.P.* v. *Mohd. Nooh*, AIR 1958 SC 86: 1958 SCR 595; *Ram & Shyam* v. *State of Haryana*, (1985) 3 SCC 267: AIR 1985 SC 1147; *Central Inland Water Transport Corpn.* v. *Brojo Nath Ganguly*, (1986) 3 SCC 156: AIR 1986 SC 1571.
37. AIR 1958 SC 86: 1958 SCR 595.

the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law...."[38] (emphasis supplied)

(l) Disputed questions of fact

Normally, in exercise of powers under Article 32 or under Article 226 of the Constitution of India, the Supreme Court or a High Court may not investigate into disputed questions of fact. Ordinarily, such questions are to be left to the fact-finding authority. The question, however, is of discretion and not of jurisdiction.[39]

In *Om Prakash* v. *State of Haryana*[40], the Supreme Court rightly stated: "There is no rule that the High Court will not try issues of fact in a writ petition. In each case the court has to consider whether the party seeking the relief has an alternative remedy which is equally efficacious by a suit, whether refusal to grant relief in a writ petition may amount to denying relief, whether the claim is based substantially upon consideration of evidence, oral and documentary of a complicated nature and whether the case is otherwise fit for trial in exercise of the jurisdiction to issue high prerogative writs."

(m) Suppression of material facts

Under the English Law, a person invoking prerogative remedy of the King's Courts must come with clean hands. He should make full, complete and candid disclosure of all material facts. He must refrain from suppressing, concealing or deliberately keeping back material facts and circumstances from the court even if they are against him. If the applicant does not make fullest possible disclosure of every material fact, the court may reject his petition only on that ground without going into the merits.[41]

The same principle applies to Indian Law. It is well-settled that a party seeking relief under Article 32 or under Article 226 of the Constitution must be truthful, frank and open. He should disclose all relevant facts without any reservation. He cannot pick and choose the facts he likes to disclose and keep back or conceal other facts. The very basis of

38. *Id.* at p. 93 (AIR). For detailed discussion, *see* V.G. Ramachandran: *Law of Writs*, 1993, pp. 151-84.

39. *DLF Housing Construction* v. *Delhi Municipal Corpn.*, (1976) 3 SCC 160: AIR 1976 SC 386; *Sohanlal* v. *Union of India*, AIR 1957 SC 529: 1957 SCR 738; *Kamini Kumar* v. *State of W.B.*, (1972) 2 SCC 420: AIR 1972 SC 2060.

40. (1971) 3 SCC 792 (793); see also *Babubhai Patel* v. *Nandlal Barot*, (1974) 2 SCC 706: AIR 1974 SC 2105.

41. *R* v. *Kensigton Income Tax Commrs.*, (1917) 1 KB 486.

the writ jurisdiction rests on disclosure of correct facts. If material facts are suppressed, twisted or distorted, the very functioning of writ courts would become impossible.[42]

(n) Public Interest Litigation (PIL)

(*i*) *General*

A novel and recent feature of Indian Legal System is the rapid growth and development of public interest litigation. In a number of cases, the Supreme Court as well as many High Courts have entertained petitions and "letters" not only by the person or persons who can be said to be "aggrieved" or adversely affected in strict sense of the term by any action or omission by the respondents but acting *pro bono publico*.[43]

(*ii*) *Nature*

Public interest litigation is a totally different *field* of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and the other opposing such claim or resisting such relief. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of a large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed.

(*iii*) *Object*

Public interest litigation is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution.

In public interest litigation, the role held by the court is more assertive than in traditional actions; it is creative rather than passive, and it assumes a more positive attitude in determining facts.

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42. *Vijay Kumar* v. *State of Haryana*, (1983) 3 SCC 333 (334-35): AIR 1983 SC 622; *State of Haryana* v. *Karnal Distillery*, (1977) 2 SCC 431: AIR 1977 SC 781; *Narayanaswamy* v. *State of Karnataka*, (1991) 3 SCC 261 (263): AIR 1991 SC 1726 (1728); *All India State Bank Officers' Federation* v. *Union of India*, 1990 Supp SCC 336 (340-41).

43. For detailed discussion of 'Public Interest Litigation', *see* C.K. Thakker: *Administrative Law*, 1996, pp. 539-86; V.G. Ramachandran: *Law of Writs*, 1993, pp. 549-77.

(iv) Illustrative cases

In the leading case of *S.P. Gupta* v. *Union of India*[44], (popularly known as the *Judges' Transfer case*), the Supreme Court entertained petitions by lawyers challenging the constitutionality of Law Minister's circular regarding transfer and non-confirmation of Judges of High Courts. Similarly, in *People's Union for Democratic Rights* v. *Union of India*[45], (*Asiad case*), a petition by public-spirited organisation on behalf of persons belonging to socially and economically weaker section employed in the construction work of various projects connected with the Asian Games, 1982 complaining of violation of various provisions of labour laws was held maintainable. In *D.S. Nakara* v. *Union of India*[46], it was held that a registered cooperative society consisting of public-spirited citizens seeking to espouse the cause of old and retired infirm pensioners unable to seek redress through expensive judicial procedure can approach the court by filing a petition. Likewise, a public-spirited organisation was held entitiled to move the court for release of bonded labourers working in stone quarries[47], or against unjustifiable police atrocities, and for compensation.[48] A guardian of a student of a medical college can complain to the court about ragging of junior students by senior students of the college[49]. A professor of politics "deeply interested in ensuring proper implementation of the constitutional provisions" can approach the court against practice of issuing promulgation of Ordinances on large scale being fraud on the Constitution of India[50].

In *Municipal Council, Ratlam* v. *Vardichand*[51], the Supreme Court issued certain directions to the Municipal Council to construct public latrines, drains, etc. In *State of H.P.* v. *Umed Ram Sharma*[52], on the basis of a letter addressed by some poor harijans, directions were issued by the court to construct road in a hilly area of the State of Himachal

44. 1981 Supp SCC 87: AIR 1982 SC 149.
45. (1982) 3 SCC 235: AIR 1982 SC 1473.
46. (1983) 1 SCC 305: AIR 1983 SC 130.
47. *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802.
48. *People's Union for Democratic Rights* v. *State of Bihar*, (1987) 1 SCC 265: AIR 1987 SC 355; *Khatri* v. *State of Bihar* (*Bhagalpur Blinding case*), (1981) 1 SCC 623: AIR 1981 SC 928; *Saheli* v. *Commr. of Police*, (1990) 1 SCC 422: AIR 1990 SC 513; *Supreme Court Legal Aid Committee* v. *State of Bihar*, (1991) 3 SCC 482.
49. *State of H.P.* v. *Parent of a Student of Medical College*, (1985) 3 SCC 169: AIR 1985 SC 910.
50. *D.C. Wadhwa* v. *State of Bihar*, (1987) 1 SCC 378: AIR 1987 SC 579.
51. (1980) 4 SCC 162: AIR 1980 SC 1622.
52. (1986) 2 SCC 68: AIR 1986 SC 847.

Pradesh. Again, the court can direct the Government to pay compensation to the victims if they have suffered irreversible damage to their eyes at the eye-camp.[53] In *Charan Lal Sahu* v. *Union of India*[54], the court upheld the validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 with a view to extending relief and immediate help to the victims. In *Parmanand Katara* v. *Union of India*[55], the court directed the Government that every injured citizen brought for medical treatment should instantaneously be given aid to preserve life and only thereafter the procedural criminal law should be allowed to operate in order to avoid negligent death of an injured.

(v) Conclusions

The court must be careful to see that the petitioner who approaches it is acting *bona fide* and not for personal gain, private profit or for political or other oblique considerations. In other words, it is not only the *right* but the *duty* of the court to see that the judicial process should not be abused or misused in the name of public interest litigation or with a view to achieving private goals or political objectives[56]. The court must also take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved for the executive or the legislature by the Constitution.[57]

It is submitted that the following observations must always be borne in mind in dealing with public interest litigation:

> "If carefully and prudently used, the public interest litigation has great potential in correcting administrative wrong, but if liberally and indiscriminately used in all kinds of cases, it may turn into an engine of destruction."[58]

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53. *A.S. Mittal* v. *State of U.P.*, (1989) 3 SCC 233: AIR 1989 SC 1570.
54. (1990) 1 SCC 613: AIR 1990 SC 1480.
55. (1989) 4 SCC 286: AIR 1989 SC 2039.
56. *Chhetriya Pradushan Mukti Sangharsh Samiti* v. *State of U.P.*, (1990) 4 SCC 449: AIR 1990 SC 2060; *Shubhash Kumar* v. *State of Bihar*, (1991) 1 SCC 598: AIR 1991 SC 420; *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802; *Sachidanand Pandey* v. *State of W.B.*, (1987) 2 SCC 295: AIR 1987 SC 1109; *Sheela Barse* v. *Union of India*, (1988) 4 SCC 226: AIR 1988 SC 2211; *Janata Dal* v. *H.S. Chowdhary*, (1991) 3 SCC 756 (*Bofors Gun Deal case*).
57. *State of H.P.* v. *Parent of a Student of Medical College*, (1985) 3 SCC 169 (174): AIR 1985 SC 910; *State of H.P.* v. *Umed Ram Sharma*, (1986) 2 SCC 68 (80-81): AIR 1986 SC 847.
58. Dr S.N. Jain: *Standing and Public Interest Litigation.*

(o) Writs in particular

I. HABEAS CORPUS

(a) General

The writ of *habeas corpus* is one of the most ancient writs known to the common law of England. The latin phrase '*habeas corpus*' means 'have the body'. This is a writ in the nature of an order calling upon the person who has detained another to produce the latter before the court, in order to let the court know on what ground he has been confined and to set him free if there is no legal justification for the imprisonment.[59] In other words, by this writ, the court directs the person or authority who has detained another person to bring the body of the prisoner before the court so that the court may decide the validity, jurisdiction or jusification for such detention.

(b) Object

The writ of *habeas corpus* provides a prompt and effective remedy against illegal restraints. The principal aim is to provide for a swift judicial review of alleged unlawful detention. As Lord Wright[60] states, "the incalculable value of *habeas corpus* is that it enables the immediate determination of the right of the appellant's freedom". 'If the court comes to the conclusion that there is no legal justification for the imprisonment of the person concerned, the court will pass an order to set him at liberty forthwith.'[61] Thus, the object of the writ of *habeas corpus* is to release a person from illegal detention and not to punish the detaining authority. "The question for a *habeas corpus* court is whether the subject is lawfully detained. If he is, the writ cannot issue, if he is not, it must issue."[62] Blackstone states:

> "It is a writ antecedent to statute, and throwing its root deep into the genus of our common law.... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I."[63]

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59. *State of Bihar* v. *Kameshwar*, AIR 1965 SC 575 (577): (1963) 2 SCR 183.
60. *Greene* v. *Home Secy.*, (1942) AC 284 (302): (1941) 3 All ER 388.
61. *Ghulam Sarwar* v. *Union of India*, AIR 1967 SC 1335: (1967) 2 SCR 271.
62. *R.* v. *Home Secy., ex p Greene*, (1941) 3 All ER 104 (105).
63. *Comm.*, Vol. 3, p. 131.

(*c*) *History*

In England, *habeas corpus* is of common law origin. In India, the jurisdiction to issue prerogative writs came with the establishment of Supreme Courts at Calcutta, Bombay and Madras under the Regulating Act, 1773. On abolition of Supreme Courts and establishment of High Courts, the said power had been conferred on High Courts. Under the Constitution of India, the Supreme Court (Article 32) and all High Courts (Article 226) have power to issue a writ of *habeas corpus*.

(*d*) *Who may apply*

An application for the writ of *habeas corpus* may be made by the person illegally detained.[64] But if the prisoner himself is unable to make such application, it can be made by any other person having interest in the prisoner. Thus, a wife,[65] a father[66] or even a friend[67] may in such circumstances make an application for the writ of *habeas corpus*. He should not, however, be a total stranger.[68]

(*e*) *Against whom habeas corpus would lie*

A writ of *habeas corpus* may be issued against any person or authority who has illegally detained or arrested the prisoner.

(*f*) *Procedure*

Every application for the writ of *habeas corpus* must be accompanied by an affidavit stating the facts and circumstances leading to the making of such an application. If the court is satisfied that there is a prima facie case for granting the prayer, it will issue a rule nisi calling upon the detaining authority on a specified day to show cause as to why the rule nisi should not be made absolute. On the specified day, the court will consider the merits of the case and will pass an appropriate order. If the court is of the opinion that the detention was not justified, it will issue the writ and direct the detaining authority to release the prisoner forthwith. On the other hand, if according to the court, the detention was justified, the *rule nisi* will be discharged. Where there is no return to the *rule nisi*, the prisoner is entitled to be released forthwith.[69] The court has jurisdiction to grant interim bail pending disposal of a

64. *Charanjit Lal* v. *Union of India*, AIR 1951 SC 41 (paras 43, 81): 1950 SCR 869.
65. *Cobbet* v. *Hudson*, (1850) 15 QB 988; *Sundarajan* v. *Union of India*, AIR 1970 Del 29 (FB).
66. *Thompson, Re*, (1860) 40 LJMC 19; *Sundarajan* (*Id.*).
67. *Rajadhar, Re*, AIR 1948 Bom 334.
68. *Charanjit Lal* v. *Union of India*, AIR 1951 SC 41 (para 43): 1950 SCR 869.
69. *State of Bihar* v. *Kameshwar*, AIR 1965 SC 575: (1963) 2 SCR 183.

petition.[70] In exceptional circumstances, a petition is maintainable even if the person is not actually detained.[71]

(*g*) *Delay in applying*

Delay by itself in applying for a writ of *habeas corpus* does not disentitle the petitioner for the relief. The right of personal liberty is one of the fundamental rights guaranteed in Part III of the Constitution and it cannot be waived. Moreover, a wrongful detention or arrest of a person is a continuous wrong and the injury subsists till it is remedied. A petition for a writ of *habeas corpus*, therefore, cannot be dismissed on the ground of delay.

(*h*) *When may be refused*

Since the object of the writ of *habeas corpus* is remedial and not punitive, the legality or otherwise of the detention must be decided by the court with reference to the date of *return* of the *rule nisi* and not with reference to the date of *making* such application. Thus, the writ would not be issued if at the time of the *rule nisi*, the prisoner was not illegally detained, even though at the time of detention the order was illegal.[72] Similarly, if during the pendency of the petition for the writ of *habeas corpus* the prisoner is released, it will become infructuous.[73]

(*i*) *Duty of State*

Whenever an action of detaining or arresting any individual is challenged, it is the duty of the State to place before the court all relevant and material facts leading to the impugned action truly, faithfully and with utmost fairness.[74]

(*j*) *Duty of Courts*

The liberty of an individual is the most cherished of human freedoms and in cases of gravest emergencies, Judges have played a historic role in guarding that freedom with zeal and jealously. Where allegations are made that a person is in illegal custody, it is the duty of the Court to safeguard his freedom against any encroachment on life or liberty. The duty of the court is to strike a balance between the need to protect com-

70. *State of Bihar* v. *Ram Balak Singh*, AIR 1966 SC 1441: (1966) 3 SCR 314.
71. *Kiran Pasha* v. *Govt. of A.P.*, (1990) 1 SCC 328.
72. *Naranjan Singh* v. *State of Punjab*, AIR 1952 SC 106: 1952 SCR 395; *B.R. Rao* v. *State of Orissa*, (1972) 3 SCC 256: AIR 1971 SC 2197.
73. *Talib Hussain* v. *State of J&K*, (1971) 3 SCC 118: AIR 1971 SC 62.
74. *Halsbury's Laws of England*, 4th Edn., Vol. II, paras 1492-95, pp. 791-93; *Khudiram* v. *State of W.B.*, (1975) 2 SCC 81 (96): AIR 1975 SC 550 (560-61).

munity on the one hand and the necessity to preserve the liberty of a citizen on the other.[75]

(*k*) *Successive applications*

For many years it was accepted in England that an unsuccessful applicant could go from judge to judge and court to court successively and get his application renewed on the same evidence and on the same grounds for the writ of *habeas corpus*.[76] Thus, the applicant "could go from one judge to another until he could find one more merciful than his brethren".[77] But *Hastings (No. 2), Re*,[78] the earlier view was overruled. Today, a person has no right to present successive applications for the writ of *habeas corpus*.[79] But if there are new or fresh grounds, subsequent petition will not be barred.[80]

(*l*) *Compensation*

Ordinarily, while exercising powers under Article 32 or under Article 226 of the Constitution, the Court will not award compensation. In appropriate cases, however, the Court may award monetary compensation to the person who has been illegally arrested or detained. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of the Court were limited to passing orders of release from illegal detention. *One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation.*[81] (emphasis supplied)

(*m*) *Execution*

A writ of *habeas corpus* issued by the Supreme Court or by a High Court must be obeyed by the person to whom it is issued. A wilful interference by the person to whom it is issued would amount to contempt of court and would be punishable with attachment of property and even imprisonment of the contemner.[82]

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75. *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 (612): AIR 1976 SC 1207; *A.K.Roy* v. *Union of India*, (1982) 1 SCC 271: AIR 1982 SC 710; *State of U.P.* v. *Hari Singh*, 1987 Supp SCC 190: AIR 1987 SC 2080.
76. *Eshugbayi Eleko* v. *Govt. of Nigeria*, AIR 1928 PC 300: (1928) AC 459.
77. Per Harman, J., in *Hastings (No. 3), Re*, (1959) Ch 368 (379): (1958) 3 WLR 768: (1959) 1 All ER 698.
78. (1959) 1 QB 358: (1958) 3 All ER 625 (per Lord Parker).
79. *Ghulam Sarwar* v. *Union of India*, AIR 1967 SC 1335: (1967) 2 SCR 271.
80. *Lallubhai Jogibhai* v. *Union of India*, (1981) 2 SCC 427: AIR 1981 SC 728.
81. *Rudal Shah* v. *State of Bihar*, (1983) 4 SCC 141: AIR 1983 SC 1086; *Bhim Singh* v. *State of J&K*, (1985) 4 SCC 677: AIR 1986 SC 494.
82. *Halsbury's Laws of England*, 4th Edn., Vol. II, paras 1497, pp. 793-94; *Mohd. Ikram* v. *State of U.P.*, AIR 1964 SC 1625 (1629): (1964) 5 SCR 86.

(n) Habeas corpus and proclamation of Emergency

Article 359 of the Constitution of India empowers the President to suspend the right to move any court for the enforcement of such of the fundamental rights conferred by Part III as may be mentioned in the Presidential Order. In *Makhan Singh* v. *State of Punjab*[83], the Supreme Court held that the court cannot issue a writ of *habeas corpus* to set at liberty a person who has been detained under the Defence of India Act, 1962 even if his detention was inconsistent with his constitutional rights guaranteed under Part III of the Constitution. But the Presidential Order does not debar the jurisdiction of the court to decide as to whether the order of detention was under the Defence of India Act, 1962 or rules made thereunder. It is open to the petitioner to contend that the order was *mala fide* or invalid and in either of the cases, he is entitled to move the court for the protection of his rights under Articles 21 and 22 of the Constitution of India.

Unfortunately, however, in *A.D.M., Jabalpur* v. *Shivakant Shukla*[84], the Supreme Court by a majority of 4: 1 held that during the Emergency and suspension of Fundamental Rights, no person has *locus standi* to move any court for a writ of *habeas corpus*. As stated elsewhere[85], the majority judgment does not lay down correct law.

(o) General principles

From the leading decisions, the following principles regarding a writ of *habeas corpus* emerge;[86]

(1) A writ of *habeas corpus* is a remedial writ, which can be used in all cases of wrongful deprivation of individual freedom and personal liberty.

(2) It, however, cannot be employed to impeach or otherwise challenge the correctness or propriety of a decision rendered by a court of competent jurisdiction unless the decision is void or without jurisdiction.

(3) An order of release by *habeas corpus* does not *per se* amount to discharge or acquittal of the prisoner or detenu.

(4) Since a writ of *habeas corpus* is not punitive in nature, it cannot be utilised as an instrument of punishment of one who has

83. AIR 1964 SC 381: (1964) 4 SCR 797.
84. (1976) 2 SCC 521: AIR 1976 SC 1207.
85. *See* pp. 27-29 (*supra*). For detailed discussion, *see* V.G. Ramachandran: *Law of Writs*, 1993, pp. 581-638.
86. For detailed discussion and case law, see V.G. Ramachandran: *Law of Writs*, (1993), pp. 581-638.

wrongfully arrested or detained another person or parted with his custody.

(5) A prisoner or detenu himself or his relative or his friend or any other person interested in the prisoner or detenu can move the court for a writ of *habeas corpus*. He should not, however, be a total stranger.

(6) A writ of *habeas corpus* is available not only for release from detention by the State but also for release from private detention.

(7) Mere delay in applying for a writ of *habeas corpus* will not bar the prisoner or detenu from challenging arrest or detention.

(8) A writ of *habeas corpus* is required to be heard and disposed of as expeditiously as possible.

(9) When the detenu contends that he is wrongfully detained, the burden is on the authority to justify the detention. However, if the detenu takes a particular plea (such as *mala fide*), the burden is on him to establish it.

(10) The approach of the Court in *habeas corpus* proceedings has to be one of eternal vigilance. The Court must strike a balance between the need to protect the society on the one hand and the necessity to safeguard the liberty of a citizen on the other hand.

(11) In *habeas corpus* proceedings, it is the duty of the State to place before the Court all the material facts and relevant record truly, faithfully and with utmost fairness.

(12) As a general rule, a writ of *habeas corpus* cannot be granted *ex parte*. In exceptional circumstances, however, the Court has power to issue a writ even *ex parte*.

(13) Usually, no bail can be granted in case of preventive detention. Of course, in exceptional cases, the Court can grant bail or parole pending the proceedings.

(14) In exceptional cases, even before actual detention a writ of *mandamus* against an order of detention is maintainable.

(15) Wilful or intentional disobedience of a writ of *habeas corpus* will amount to contempt of court.

(16) While issuing a writ of *habeas corpus*, the Court can award compensation or damages as a consequential or ancillary relief.

(17) Once an order of detention has expired, revoked or is quashed and set aside, no fresh order can be passed on the same facts and for the same grounds.

(18) If, however, after expiry, revocation or setting aside of an order of detention, new facts or fresh grounds come into existence, a fresh order can be passed.

(19) General principles of *res judicata* apply even to *habeas corpus* proceedings, but on fresh grounds a subsequent petition for the same relief is maintainable even after dismissal of the earlier one.

(20) Even during Emergency, a writ of *habeas corpus* for the enforcement of the fundamental rights guaranteed under Articles 20 and 21 is maintainable.

II. MANDAMUS

(*a*) *Nature and scope*

Mandamus means a command. It is an order issued by a court to a public authority asking it to perform a public duty imposed upon it by the Constitution or by any other law.[87] *Mandamus* is a judicial remedy which is in the form of an order from a superior court (the Supreme Court or a High Court) to any Government, court, corporation or public authority to do or to forbear from doing some specific act which that body is obliged under law to do or refrain from doing, as the case may be, and which is in the nature of a public duty and in certain cases of a statutory duty.

(*b*) *Mandamus distinguished from other writs*

Mandamus differs from prohibition and *certiorari* in that while the former can be issued against administrative authority, the latter are available against judicial and quasi-judicial authorities. *Mandamus* acts where the authority declines jurisdiction; prohibition and *certiorari* act where the courts and tribunals usurp jurisdiction vested in them or exceed their jurisdiction. Whereas *mandamus* demands activity, prohibition commands inactivity. While *mandamus* compels, *certiorari* corrects.

Mandamus is a command to a person to do something which is his legal duty, *quo warranto* is directed to a person by what authority he is claiming a public office.

(*c*) *Conditions*

A writ of *mandamus* can be issued if the following conditions are satisfied by the petitioner:

87. *State of Mysore* v. *Chandrasekhara*, AIR 1965 SC 532; *S.I. Syndicate* v. *Union of India*, (1974) 2 SCC 630: AIR 1975 SC 460.

(*i*) *Legal right*

The petitioner must have a legal right. Thus, when the petitioner contended that his juniors had been promoted by the Government and he had been left out, and it was found that the petitioner was not qualified for the post, his petition was dismissed.[1]

(*ii*) *Legal duty*

A legal duty must have been imposed on the authority and the performance of that duty should be imperative, not discretionary or optional. There must be in the applicant a right to compel the performance of some duty cast on the opponent.[2] Thus, if at its own discretion, Government makes a rule to grant dearness allowance to its employees, there is no legal duty and the writ of *mandamus* cannot be issued against the Government for performance of that duty.[3] Such a duty must be *statutory*, i.e. one imposed either by the Constitution,[4] or by any other statute,[5] or by some rule of common law,[6] but should not be contractual.[7] In certain circumstances, however, even if discretionary power is conferred on the authority and the statutory provisions are made for such exercise of the said power, the writ of *mandamus* can be issued for the enforcement of that duty.[8] Such a duty must be of a *public nature*[9]. If the public authority invested with discretionary power abuses the power,[10] or exceeds it,[11] or acts *malafide*,[12] or there is non-application of mind by it,[13] or irrelevant considerations have been taken into account,[14] the writ of *mandamus* can be issued.

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1. *Umakant* v. *State of Bihar*, (1973) 1 SCC 485: AIR 1973 SC 964.
2. *State of M.P.* v. *Mandavar*, AIR 1954 SC 493: 1955 SCR 158.
3. *Id.*; *State of Mysore* v. *Syed Mahmood*, AIR 1968 SC 1113: (1968) 3 SCR 363.
4. *Rashid Ahmed* v. *Municipal Board*, AIR 1950 SC 163: 1950 SCR 566; *Wazir Chand* v. *State of H.P.*, AIR 1954 SC 415: 1955 SCR 408.
5. *State of Bombay* v. *Hospital Mazdoor Sabha*, AIR 1960 SC 610: (1960) 2 SCR 866; *Guruswamy* v. *State of Mysore*, AIR 1954 SC 592: 1955 SCR 305.
6. *Commr. of Police* v. *Gordhandas*, AIR 1952 SC 16: 1952 SCR 135.
7. *Lekhraj* v. *Dy. Custodian*, AIR 1966 SC 334: (1966) 1 SCR 120.
8. *Commr. of Police* v. *Gordhandas*, (*supra*).
9. *Sohan Lal* v. *Union of India*, AIR 1957 SC 529: 1957 SCR 738.
10. *State of Punjab* v. *Ramji Lal*, (1970) 3 SCC 602: AIR 1971 SC 1228; *State of Haryana* v. *Rajendra*, (1972) 1 SCC 267: AIR 1972 SC 1004.
11. *Calcutta Discount Co.* v. *ITO*, AIR 1961 SC 372: (1961) 2 SCR 241.
12. *Pratap Singh* v. *State of Punjab*, AIR 1964 SC 72: (1964) 4 SCR 733; *Rowjee* v. *State of A.P.*, AIR 1964 SC 962: (1964) 6 SCR 330.
13. *State of Punjab* v. *Hari Kishan*, AIR 1966 SC 1081: (1966) 2 SCR 982; *Kishori Mohan* v. *State of W.B.*, (1972) 3 SCC 845: AIR 1972 SC 1749.
14. *Rohtas Industries* v. *S.D. Agrawal*, (1969) 1 SCC 325: AIR 1969 SC 707; *Manu Bhusan* v. *State of W.B.*, (1973) 3 SCC 663: AIR 1973 SC 295.

(iii) Demand and refusal

The petition for a writ of *mandamus* must be preceded by a demand of justice and its refusal. In *Halsbury's Laws of England*[15], it is stated:

> "As a general rule the order will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the *mandamus* desires to enforce, and that that demand was met by a refusal."

The above principles are accepted in India also.[16]

(iv) Good faith

An application for *mandamus* must have been made in good faith and not for any ulterior motive or oblique purpose. A petition for *mandamus albeit* made in good faith, will not be granted if designed to harass the respondent or with a view to wreak personal grievances.[17]

(d) Who may apply

A person whose right has been infringed may apply for the writ of *mandamus*. Such right must be subsisting on the date of filing the petition.[18] Thus, in case of an incorporated company, the petition must be filed by the company itself.[19] In case any individual makes an application for the enforcement of any right of an institution, he must disclose facts to relate what entitled him to make an application on behalf of the said institution.[20]

(e) Against whom mandamus would lie

A writ of *mandamus* is available against Parliament and legislatures, against courts and tribunals, against the Government and its officers, against local authorities like municipalities, panchayats, against State-owned or State-controlled corporations, against Universities and other educational institutions, against election authorities and against other

15. *Halsbury's Laws of England*, 3rd Edn., Vol. 13, p. 106.
16. *Kamini Kumar* v. *State of W.B.*, (1972) 2 SCC 420: AIR 1972 SC 2060; *Amrit Lal* v. *Collector of Central Excise*, (1975) 4 SCC 714: AIR 1975 SC 538; *S.I. Syndicate* v. *Union of India*, (1974) 2 SCC 630: AIR 1975 SC 460.
17. *Halsbury's Laws of England*, 4th Edn., Vol. 1, para 123, pp. 133-34; *Chhetriya Pradushana Mukti Sangathan Samiti* v. *State of U.P.*, (1990) 4 SCC 449: AIR 1990 SC 2060.
18. *Kalyan Singh* v. *State of U.P.*, AIR 1962 SC 1183: 1962 Supp (2) SCR 838.
19. *Charanjit Lal* v. *Union of India*, AIR 1951 SC 41: 1950 SCR 869.
20. *Raj Rani* v. *U.P. Govt.*, AIR 1954 All 492.

authorities falling within the definition "State" under Article 12 of the Constitution.

(f) Against whom mandamus would not lie

A writ of *mandamus* will not lie against the President or the Governor of a State for the exercise and performance of powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.[21] It will not lie against the State legislature to prevent them from considering enacting a law alleged to be violative of constitutional provisions.[22] It will not lie against an inferior or ministerial officer who is bound to obey the orders of his superior. "The writ of *mandamus* will not be granted against one who is an inferior or ministerial officer, bound to obey the orders of a competent authority, to compel him to do something which is part of his duty in that capacity." It also does not lie against a private individual or any incorporate body.[23]

(g) Alternative remedy

A writ of *mandamus* will not be refused on the ground of alternative remedy being available if the petitioner approaches the court with an allegation that his fundamental right has been infringed.[24] As discussed above, it is the duty of the High Court to safeguard the fundamental rights of the petitioner and the writ of *mandamus* will be issued. But if the complaint is not about the infringement of any fundamental right, the availability of an alternative remedy may be a relevant consideration. And if an equally efficacious, effective and convenient remedy by way of appeal or revision is available against the impugned order, the court may refuse to issue a writ of *mandamus*. This prerogative remedy is not intended to supersede other modes of obtaining relief provided in statutes. As the Supreme Court of the United States observed: "The office of a *mandamus* is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such performance, and *who has no other alternative remedy.*"[25] (emphasis supplied) But application of this rule is discretionary and does not bar jurisdiction of the court and if the alternative remedy is ineffective,

21. Article 361, Constitution of India.
22. *Narinder Chand* v. *Lt.Governor, H.P.*, (1971) 2 SCC 747: AIR 1971 SC 2399.
23. *Praga Tools* v. *Imanual*, (1969) 1 SCC 585: AIR 1969 SC 1306.
24. *Himmatlal* v. *State*, AIR 1954 SC 403: 1954 SCR 1122; *State of Bombay* v. *United Motors*, AIR 1953 SC 252: 1953 SCR 1069.
25. *Robert L. Cutting, Re*, 94 US 14.

inadequate or onerous, the court may not throw away the application for *mandamus* on that ground.[26]

(*h*) *Certiorarified mandamus*

A writ of *mandamus* can be issued directing a public authority to perform its duty. A writ of *certiorari*, on the other hand, quashes a decision taken by a court or tribunal if it is without jurisdiction or in excess thereof. In a given case, however, *mandamus* and *certiorari* may be combined. By issuing *certiorari*, a decision can be quashed and simultaneously by issuing *mandamus*, certain directions can also be given. This is known as "*certiorarified mandamus*".[27]

Thus, where the Government refuses to make reference under Section 10 of the Industrial Disputes Act, 1947, a High Court can issue a writ of *certiorari* quashing that order and at the same time can issue *mandamus* directing the Government to decide the matter afresh or in an appropriate case to make reference.[28] Similarly, in spite of statutory provision for renewal of permit for three years if the renewal is granted only for one year, the court not only can quash that order (*certiorari*) but also direct the authority to renew permit for three years (*mandamus*).[29]

(*i*) *Conclusions*

The position of *mandamus* in India is indeed very encouraging. It is the most popular writ, extensively and successfully used by aggrieved persons. Since the object of Public Law is to make functioning of administrative bodies in an efficient manner yielding the best results to the State, society and the individuals without undue delay or costs, it is the duty of courts to hold this process through the instrumentality of writs, more particularly by a writ of *mandamus*. It is submitted that the following observations of Baron Martin, J.[30] lay down correct proposition of law and, therefore, worth quoting:

> "Instead of being astute to discover reasons for not applying this great constitutional remedy for error and mis-government, we think

26. *Himatlal case* (*supra*); *Commr. of Police* v. *Gordhandas*, AIR 1952 SC 16: 1952 SCR 135; *Ram and Shyam* v. *State of Haryana*, (1985) 3 SCC 267: AIR 1985 SC 1147.
27. Wade: *Administrative Law*, (1994), p. 653; *State of Kerala* v. *Rashama*, (1979) 1 SCC 572: AIR 1979 SC 765.
28. *State of Bihar* v. *Ganguly*, AIR 1958 SC 1018: 1959 SCR 1191; *Ram Avtar* v. *State of Haryana*, (1985) 3 SCC 189: AIR 1985 SC 915.
29. *Maheboob Sheriff* v. *Mysore State Transport Authority*, AIR 1960 SC 321: (1960) 2 SCR 46.
30. *Rochester Corpn.* v. *R.*, (1958) 120 EB & E 1024 (1033): 27 LJ QB 434.

it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable."

III. PROHIBITION

(*a*) *Nature and scope*

A writ of prohibition is a judicial writ. It can be issued against a judicial or quasi-judicial authority. When such authority exceeds its jurisdiction or tries to exercise jurisdiction not vested in it. When a subordinate court or an inferior tribunal hears a matter over which it has no jurisdiction, the High Court or the Supreme Court can prevent it from usurping jurisdiction and keep it within its jurisdictional boundaries.[31]

In *East India Commercial Co.* v. *Collector of Customs*[32], the Supreme Court observed:

> "A writ of prohibition is an order directed to an inferior Tribunal forbidding it from continuing with a proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise."

The principle underlying the writ of prohibition is that 'prevention is better than cure'.

(*b*) *Prohibition distinguished from other writs*

Certiorari and prohibition are judicial writs and are available against courts and Tribunals. In respect of time, however, they differ. The former applies to a decision which is *fait accompli*; the latter seeks to prevent the *fait* from becoming *accompli*.

Prohibition is converse to *mandamus* in that, while *mandamus* compels the authority to do something, prohibition prevents a court or tribunal from doing something which it has no jurisdiction to do so. In other words, *mandamus* demands activity, prohibition commands inactivity.

(*c*) *Grounds*

Essentially, both the writs of *certiorari* and prohibition can be issued when an inferior court or tribunal acts without or in excess of its jurisdiction, or acts in violation of principles of natural justice, or acts under a law which is *ultra vires* or acts in contravention of fundamental rights.

31. *East India Commercial Co. Ltd.* v. *Collector of Customs*, AIR 1962 SC 1893 (1903): (1963) 3 SCR 338; *Govinda Menon* v. *Union of India*, AIR 1967 SC 1274 (1277): (1967) 2 SCR 566.
32. AIR 1962 SC 1893 (1903): (1963) 2 SCR 338.

(*i*) *Absence or excess of jurisdiction*

In case of absence or total lack of jurisdiction, writ of prohibition would be available against a judicial or quasi-judicial authority prohibiting it from exercising jurisdiction not vested in it. Thus, in case of levy of licence fee without authority of law, prohibition was issued.[33] Again, if a taxing authority proposes to impose tax on a commodity exempted under the Act, a writ of prohibition can be issued.[34] It should, however, be remembered that, such absence or lack of jurisdiction should be patent and apparent on the face of the record and should not be latent and should not ordinarily require for its establishment a lengthy enquiry into questions of fact. Similarly, a distinction must be drawn between lack of jurisdiction and the manner or method of exercising jurisdiction vested in a court or tribunal. Prohibition cannot lie to correct the course, practice or procedure of an inferior court or a tribunal or against a wrong decision on the merits. Therefore, when a tribunal has the jurisdiction to make an order, but in the exercise of that jurisdiction, it commits a mistake whether of fact or of law, the said mistake can only be corrected by an appeal or revision and not by a writ of prohibition[35].

(*ii*) *Violation of natural justice*

A writ of prohibition can also be issued when there is violation of the principles of natural justice. In fact, if the principles of natural justice have not been observed, e.g. if there is bias or prejudice on the part of the Judge or if no notice was issued or hearing given to the person against whom the action is sought to be taken, there is no jurisdiction vested in the court or the tribunal to proceed with such matter.[36]

(*iii*) *Unconstitutionality of statute*

A writ of prohibition will also be issued if a court or a tribunal proceeds to act under a law which is *ultra vires* or unconstitutional. Thus, if the proceedings are pending in a court or a tribunal under a statute which itself is *ultra vires* Article 14, or Articles 25 and 26, of the Con-

33. *Abdul Kadir* v. *State of Kerala*, AIR 1962 SC 922: 1962 Supp (2) SCR 741.

34. *Mathra Parshad* v. *State of Punjab*, AIR 1962 SC 745: 1962 Supp (1) SCR 913; *Himmatlal* v. *State of M.P.*, AIR 1954 SC 403: 1954 SCR 1122; *Bengal Immunity Co. Ltd.* v. *State of Bihar*, AIR 1955 SC 661: (1955) 2 SCR 603.

35. *Govinda Menon case* (*supra*); *Narayana Chetty* v. *ITO*, AIR 1959 SC 213: 1959 Supp (1) SCR 189; see also *Shyam Behari* v. *State of M.P.*, AIR 1965 SC 427: (1964) 6 SCR 636; *Abdul Kadir* v. *State of Kerala*, (*supra*); *Peare Lal* v. *State of Punjab*, AIR 1958 SC 664 (667): 1959 SCR 438.

36. *Hari Vishnu Kamath* v. *Ahmad Ishaque*, AIR 1955 SC 233: (1955) 1 SCR 1104; *Govinda Menon case* (*supra*). For detailed discussion about 'Natural Justice', *see* Lecture VI (*supra*).

stitution or is beyond the competence of the legislature, a writ of prohibition can be issued against further proceedings.[37]

(iv) Infringement of Fundamental Rights

Prohibition can also be issued where the impugned action infringes the fundamental rights of the petitioner. Thus, prohibition was issued against the income tax assessment proceedings where the order by which the proceedings were transferred to another officer was arbitrary and violative of Article 14.[38]

(d) Who may apply

Where the defect of jurisdiction is apparent on the face of the proceedings, an application for prohibition can be brought not only by the aggrieved party but also by a stranger. The principle underlying this rule is that usurpation of jurisdiction is contempt of the Crown and an encroachment upon royal prerogative. Consequently it is immaterial by whom the Court is informed about the usurpation.[39]

(e) Against whom prohibition would lie

A writ of prohibition is a judicial writ. It may be issued against courts, tribunals and other quasi-judicial authorities such as Tax authorities, not Custom Authorities, Settlement Officers, Statutory Arbitrators, etc.

(f) Against whom prohibition does not lie

Prohibition, however, does not lie against administrative authorities from discharging administrative, executive or ministerial functions. Likewise, it would not lie against legislature restraining it from enacting or enforcing a law.

(g) Alternative remedy

Prohibition is not a writ of course but it is a writ of right and not discretionary.[40] The existence of another alternative, adequate and equally

37. *STO* v. *Budh Prakash*, AIR 1954 SC 459: 1955 SCR 1133; *Commissioner* v. *Lakshmindra*, AIR 1954 SC 282: 1954 SCR 1005; *State of W.B.* v. *Anwar Ali*, AIR 1952 SC 75: 1952 SCR 284; *Carl Steel* v. *State of Bihar*, AIR 1961 SC 1615: (1962) 2 SCR SC; *State of Rajasthan* v. *Rao Manohar*, AIR 1954 SC 297: 1954 SCR 996; *Suraj Mall* v. *Vishvanatha*, AIR 1954 SC 545: 1955 SCR 448; *Bengal Immunity Co. Ltd.* v. *State of Bihar*, AIR 1955 SC 661: (1955) 2 SCR 603.

38. *Bidi Supply Co.* v. *Union of India*, AIR 1956 SC 479: 1956 SCR 267.

39. *Worthington* v. *Jeffries*, (1875) LR 10 CP 379 (382): 23 WR 750; *London Corpn.* v. *Cox*, (1867) LR 2 HL 239 (277-78): 16 WR 44.

40. *Bengal Immunity Co. Ltd.* v. *State*, AIR 1955 SC 661 (726): (1955) 2 SCR 603.

efficacious remedy is a matter which may be taken into consideration by the High Court in granting a writ of prohibition. But the existence of an alternative remedy is not an absolute bar to the issuance of a writ of prohibition. Therefore, where there is patent lack of jurisdiction in an inferior tribunal, or where the law which confers jurisdiction on such tribunal is itself unconstitutional or *ultra vires*, or there is infringement of any Fundamental Right of the petitioner, the existence of an alternative remedy is altogether irrelevant and the writ of prohibition will be issued as of right.[41]

(*h*) *Limits of prohibition*

(*i*) The object of the writ of prohibition is to prevent unlawful assumption of jurisdiction. Therefore, it can be issued only when it is proved that a judicial or quasi-judicial authority has no jurisdiction or it acts in excess of jurisdiction vested in it. Prohibition cannot lie in cases where such authority having jurisdiction exercises it irregularly, improperly or erroneously.[42]

(*ii*) A writ of prohibition can lie only in cases where the proceedings are pending before a judicial or quasi-judicial authority. Thus, when such authority hears a matter over which it has no jurisdiction, the aggrieved person may move a High Court for the writ of prohibition forbidding such authority from proceeding with the mattter. But if the proceedings have been terminated and such authority has become *functus officio*, a writ of prohibition would not lie.[43] There the remedy may be a writ of *certiorari*.

(*iii*) If the proceedings before a judicial or quasi-judicial authority are partly within and partly without jurisdiction, the writ of prohibition may be issued in respect of latter. Thus, if the Collector of Customs imposes invalid conditions for release of certain goods on payment of fine in lieu of confiscation, the writ of prohibition may be issued against the Collector from enforcing illegal conditions.[44] Similarly, if some proceedings are disposed

41. *Id.* see also *State of U.P.* v. *Mohd. Nooh*, AIR 1958 SC 86: 1958 SCR 595; *Venkateshwaran* v. *Wadhwani*, AIR 1961 SC 1506: (1962) 1 SCR 753; *Abraham* v. *ITO*, AIR 1961 SC 609: (1961) 2 SCR 765; *Calcutta Discount Co.* v. *ITO*, AIR 1961 SC 372: (1961) 2 SCR 241.

42. *Narayana Chetty* v. *ITO*, AIR 1959 SC 213: 1959 Supp (1) SCR 189.

43. *Hari Vishnu Kamath* v. *Ahmad Ishaque*, AIR 1955 SC 233: (1955) 1 SCR 1104.

44. *Sewpujanrai* v. *Collector of Customs*, AIR 1958 SC 845: 1959 SCR 821.

of and some are still pending, in respect of the pending proceedings, the writ of prohibition may be issued.[45]

(*i*) *Conclusions*

A writ of prohibition lies where there is absence of jurisdiction or excess of jurisdiction. Hence, if defect of jurisdiction is apparent, it is not only the *power* but the *duty* of superior court to issue this writ to prevent a subordinate court or inferior tribunal from usurping jurisdiction not vested in it or from exceeding it. *A superior court should not be chary of exercising power of prohibition if judicial or quasi judicial authorities attempt to exercise jurisdiction beyond the powers given to them by Parliament.*[46] (emphasis supplied)

IV. *CERTIORARI*

(*a*) *Nature and scope*

'*Certiorari*' means 'to certify'. It is so named as in its original latin form it required "the judges of any inferior court of record to certify the record of any matter in that court with all things touching the same and to send it to the King's Court to be examined". It is an order issued by the High Court to an inferior court or any authority exercising judicial or quasi-judicial functions to investigate and decide the legality and validity of the orders passed by it.[47]

(*b*) *Object*

The object of the writ of *certiorari* is to keep inferior courts and quasi-judicial authorities within the limits of their jurisdiction; and if they act in excess of their jurisdiction their decisions can be quashed by superior courts by issuing this writ.[48]

(*c*) *Certiorari distinguished from other writs*

A writ of *habeas corpus* reaches the body but not the record. A writ of *certiorari* always reaches the record but never the body.

Certiorari differs from *mandamus* in that while *mandamus* acts where the Tribunal declines jurisdiction, *certiorari* acts in cases of usurption or excess of jurisdiction. *Certiorari* corrects while *mandamus* compels to act. Whereas *certorari* can be issued against judicial or

45. *Hari Vishnu Kamath case*, (*supra*).
46. *Taj Mahal Transporters* v. *Regional Transport Authority*, AIR 1966 Mad 8: (1965) 2 MLJ 453.
47. *Prabodh Verma* v. *State of U.P.*, (1984) 4 SCC 251 (275, 289): AIR 1985 SC 167 (185, 190); *Basappa* v. *Nagappa*, AIR 1954 SC 440: 1955 SCR 250.
48. *Basappa* v. *Nagappa*, AIR 1954 SC 440 (443); *Prabodh Verma* v. *State of U.P.* (*supra*).

quasi-judicial authorities, *mandamus* is available against administrative authorities also.

Both prohibition and *certiorari* are judicial writs and are available against subordinate courts and inferior tribunals. There is, therefore, no difference in principle between *certiorari* and prohibition except in respect of timing of the remedy; one before while the other after the decision. Prohibition and *certiorari* are two complementary writs and frequently go hand in hand. A writ of *certiorari* is corrective or remedial whereas a writ of prohibition is preventive. *Certiorari* applies to a decision which is *fait accompli*, prohibition seeks to prevent the fait from becoming *accompli*.[49]

Sometimes both the writs might be neccesitated. Thus, in a proceeding before an inferior court, a decision might have been arrived at which did not completely dispose of the matter, in which case it might be necessary to apply both *certiorari* and prohibition. *Certiorari* for quashing what has been decided; and prohibition for restraining further continuance of the proceeding.[50]

(*d*) *Conditions*

In *R.* v. *Electricity Commissioners*[51], Lord Atkin observed:

> "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."[52]

From these observations, it becomes clear that a writ of *certiorari* (and prohibition) can be issued if the following conditions are fulfilled:

(*i*) The judicial or quasi-judicial body must have legal authority;

(*ii*) Such authority must be an authority to determine questions affecting rights of subjects;

(*iii*) It must have duty to act judicially; and

(*iv*) It must have acted in excess of its authority.

(*e*) *Grounds*

A writ of *certiorari* may be issued on the following grounds:

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49. C.K. Allen: *Law and Order*, 3rd Edn., p. 267; *Hari Vishnu Kamath* v. *Ahmed Ishaque*, AIR 1955 SC 233 (241): (1955) 1 SCR 1104; *Prabodh Verma* v. *State of U.P.*, (1984) 4 SCC 251: AIR 1985 SC 167.

50. *Hari Vishnu Kamath* v. *Ahmed Ishaque (supra)*; *Hong Kong and Shanghai Banking Corporation* v. *Bhaidas*, AIR 1951 Bom 158.

51. (1924) 1 KB 171: 93 LJKB 390.

52. *Id.* at p. 205 (KB). For detailed discussion, *see* Lecture III (*supra*).

(i) Error of jurisdiction

When an inferior court or tribunal acts without jurisdiction, in excess of its jurisdiction or fails to exercise jurisdiction vested in it by law, a writ of *certiorari* may be issued against it.

In *R.* v. *Minister of Transport*[53], even though the Minister was not empowered to revoke a licence, he passed an order of revocation of licence. The order was quashed on the ground that it was without jurisdiction and, therefore, *ultra vires*. Under the provisions of the Industrial Disputes Act, 1947, the appropriate Government is empowered to refer an 'industrial dispute' to a tribunal constituted under the Act. But if the Government refers a dispute to the Industrial Tribunal for adjudication which is not an 'industrial dispute' within the meaning of the Industrial Disputes Act, 1947, the tribunal has no jurisdiction to entertain and decide such dispute[54]. Similarly, in absence of any provision in the relevant statute, after a man is dead, his property cannot be declared as an evacuee property. The decision of the authority would be without jurisdiction[55].

(ii) Jurisdictional fact

Lack of jurisdiction may also arise from absence of some preliminary facts, which must exist before a tribunal exercises its jurisdiction. They are known as 'jurisdictional' or 'collateral' facts. The existence of these facts is a *sine qua non* or a condition precedent to the assumption of jurisdiction by an inferior court or tribunal. To put it simply, the fact or facts upon which an administrative agency's power to act depends can be called a 'jurisdictional fact'. If the jurisdictional fact does not exist, the court or the tribunal cannot act. If an inferior court or a tribunal wrongly assumes the existence of such a fact, a writ of *certiorari* can be issued. The underlying principle is that by erroneously presuming such existence, an inferior court or a tribunal cannot confer upon itself jurisdiction which is otherwise not vested in it under the law.[56]

Thus, in *State of M.P.* v. *D.K. Jadav*[57], under the relevant statute all jagirs, including lands, forests, trees, tanks, wells, etc. were abolished and vested in the State. However, all tanks, trees, private wells and buildings on '*occupied land*' were excluded from the provisions of the statute.

53. (1934) 1 KB 277: (1933) All ER 604.
54. *Newspapers Ltd.* v. *State Industrial Tribunal*, AIR 1957 SC 532: 1957 SCR 754.
55. *Ebrahim Aboobaker* v. *Tek Chand*, AIR 1953 SC 298: 1953 SCR 691.
56. *Raja Anand* v. *State of U.P.*, AIR 1967 SC 1081: (1967) 1 SCR 373; *Naresh Shridhar Mirajkar* v. *State of Maharashtra*, AIR 1967 SC 1: (1966) 3 SCR 744.
57. AIR 1968 SC 1186: (1968) 2 SCR 823.

If they were on '*unoccupied land*' they stood vested in the State. The Supreme Court held that the question whether the tanks, wells, etc. were on 'occupied' land or on 'unoccupied' land was a jurisdictional fact.

Similarly, in *Shauqin Singh* v. *Desa Singh*[58], the relevant statute empowered the Chief Settlement Commissioner to cancel an allotment of land if he was "*satisfied*" that the order of allotment was obtained by means of 'fraud, false representation or concealment of any material fact'. The Supreme Court held that the satisfaction of the statutory authority was a jurisdictional fact and the power can be exercised only on the existence thereof.

But if an inferior court or a tribunal acts within the jurisdiction vested in it, the writ of *certiorari* cannot be issued against it. In *Ebrahim Aboobakar* v. *Custodian General*[59], the Supreme Court observed:

> "It is plain that such a writ cannot be granted to quash the decision of an inferior court within its jurisdiction on the ground that the decision is wrong. Indeed, it must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it...."

But if the authority itself is given power to decide the preliminary fact and that authority decides it wrongly, a writ of *certiorari* does not lie. The order can be corrected only in appeal or revision, if it is provided under the relevant statute.

(*iii*) *Error apparent on face of record*

If there is an error of law, which is apparent on the face of the record, a decision of an inferior court or a tribunal may be quashed by a writ of *certiorari*.[60] But such error must be manifest or patent on the face of the proceedings and should not require to be established by evidence. But what is an error of law apparent on the face of the record? What is the distinction between a mere error of law and an error of law apparent on the face of the record ? When does an error cease to be a mere error and become an error apparent on the face of the record ?

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58. (1970) 3 SCC 881: AIR 1970 SC 672.
59. AIR 1952 SC 319(322): 1951 SCR 696.
60. *Veerappa Pillai* v. *Raman and Raman*, AIR 1952 SC 192: 1952 SCR 583; *Basappa* v. *Nagappa*, AIR 1954 SC 440: 1955 SCR 250; *Hari Vishnu Kamath* v. *Ahmad Ishaque*, AIR 1955 SC 233: (1955) 1 SCR 1104; *Satyanarayan* v. *Mallikarjun*, AIR 1960 SC 137: (1960) 1 SCR 890; *Ujjam Bai* v. *State of U.P.*, AIR 1962 SC 1621: (1963) 1 SCR 778; *Syed Yakoob* v. *Radhakrishnan*, AIR 1964 SC 477: (1964) 5 SCR 64; *Prabodh Verma* v. *State of U.P.*, (1984) 4 SCC 251: AIR 1985 SC 167.

Even though precise, perfect and exhaustive definition is not possible, it may be stated that if an inferior court or a tribunal takes into account irrelevant considerations or does not take into account relevant considerations or erroneously admits inadmissible evidence or refuses to admit admissible evidence or if the finding of fact is based on no evidence, it can be said that there is such an error. In short, "the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record".[61]

But an error of fact, 'however grave it may appear to be' cannot be corrected by a writ of *certiorari*. Where two views are possible, if an inferior court or tribunal has taken one view, it cannot be corrected by a writ of *certiorari*. Thus, in *Ujjam Bai* v. *State of U.P.*[62], the question was one of interpretation of a notification. By wrongly interpreting the said notification, tax was imposed, which was challenged by the petitioner. The Supreme Court refused to interfere under Article 32 and observed:

> "Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, *whether it is wrong in law or in fact.*"[63]
>
> (emphasis supplied)

But Subba Rao, J. (as he then was) rightly stated: "In a sense he (Sales Tax Officer) acts *without jurisdiction* in taxing goods which are not taxable under the Act."[64] (emphasis supplied)

(iv) Violation of natural justice

A writ of *certiorari* can be issued when there is violation of the principles of natural justice.[65]

(f) Who may apply

Normally the party whose rights are affected may apply for a writ of *certiorari*. But if the question affects the public at large, any person may apply. The distinction, however, is that where the application is made by the aggrieved party, the court should grant relief *ex debito jus-*

61. *Syed Yakoob* v. *Radhakrishnan*, AIR 1964 SC 477 (480): (1964) 5 SCR 64; see also *A.C.C.* v. *P.D. Vyas*, AIR 1960 SC 665: (1960) 2 SCR 974; *Sk. Mohd.* v. *Kadalaskar*, (1969) 1 SCC 741: AIR 1970 SC 61.
62. AIR 1962 SC 1621: (1963) 1 SCR 778.
63. *Id.* at p. 1629 (AIR) (per Das, J.).
64. *Id.* at p. 1653 (AIR).
65. For detailed discussion, *see* Lecture VI (*supra*).

titiae, but if it is made by a party not directly affected in the litigation, grant of writ is entirely in the discretion of the court.[66]

(*g*) *Against whom certiorari would lie*

A writ of *certiorari* is a judicial writ. It lies against subordinate courts, inferior tribunals, quasi-judicial bodies and adjudicating authorities. Even if the court or tribunal ceases to exist or becomes *functus officio*, *certiorari* can still be issued against it.[67]

(*h*) *Alternative remedy*

A writ of *certiorari* is a discretionary remedy and the fact that the aggrieved party has another adequate remedy may be taken into consideration and it may not be issued on that ground. But as discussed above, it is a rule of policy, convenience and discretion and not of jurisdiction and in spite of alternative remedy being available it may be issued where the order is on the face of it erroneous or the inferior court or tribunal has acted without jurisdiction or in excess of its jurisdiction or contrary to the principles of natural justice or there is infringement of a fundamental right of the petitioner.

(*i*) *Limits of certiorari*

An important question of law was raised in *Prabodh Verma* v. *State of U.P.*[68] In that case a petition was filed in the High Court of Allahabad under Article 226 of the Constitution for a writ of *certiorari* for declaration that Ordinance 22 (a legislative act) was *ultra vires* and unconstitutional. The High Court granted the relief. The State filed an appeal in the Supreme Court. The Supreme Court held that "a writ of *certiorari* can never be issued to call for the record of papers and proceedings of an Act or Ordinance and for quashing such Act or Ordinance". (Legislative act).

(*j*) *Conclusions*

A writ of *certiorari* controls all courts, tribunals and other authorities when they purport to act without jurisdiction, or in excess of it. It is also available in cases of violation of the principles of natural justice, or where there is an error of law apparent on the face of the record. Over and

66. *Charanjit Lal* v. *Union of India*, AIR 1951 SC 41: 1950 SCR 869; *Calcutta Gas Co.* v. *State of W.B.*, AIR 1962 SC 1044: 1962 Supp (3) SCR 1, *Jashbhai Motibhai* v. *Roshan Kumar*, (1976) 1 SCC 671: AIR 1976 SC 578.

67. *Hari Vishnu Kamath* v. *Ahmed Ishaque (supra)*; *Shree Muktajeevandas Trust* v. *Rudani*, (1989) 2 SCC 691: AIR 1989 SC 1607.

68. (1984) 4 SCC 251: AIR 1985 SC 167 overruling *U.P. Madhyamik Shikshak Sangh* v. *State of U.P.*, 1979 All LJ 178.

above judicial and quasi judicial bodies, now this writ is also available against administrative orders.[69]

V. *QUO WARRANTO*

(*a*) *Nature and scope*

'*Quo warranto*' literally means 'what is your authority'. It is a judicial remedy against an occupier or usurper of an independent substantive public office, franchise or liberty. By issuing this writ the person concerned is called upon to show to the court by what authority he holds the office, franchise or liberty. If the holder has no authority to hold the office he can be ousted from its enjoyment. On the other hand, this writ also protects the holder of a public office from being deprived of that to which he may have a right.[70]

(*b*) *Object*

In *University of Mysore* v. *Govinda Rao*[71], the Supreme Court observed: "the procedure of *quo warranto* confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen being deprived of public office to which he may have a right."

(*c*) *Quo warranto distinguished from other writs*

A writ of *habeas corpus* reaches the body, a writ of *quo warranto* reaches an office, franchise or liberty. While *mandamus* is a command to a person or a body under a duty to do something which is his or its legal duty, *quo warranto* is a proceeding by which a person is asked to state by what authority he supports his claim to a particular office. *Certiorari* lies against subordinate courts and inferior tribunals, *quo warranto* is directed against an occupier or usurper of a public office. A writ of prohibition seeks to prevent a court or a tribunal from exercising or exceeding its jurisdiction which is not vested in it. A writ of *quo warranto* seeks to prevent an occupier or usurper of an office which is of a public nature.

(*d*) *Conditions*

Before the writ of *quo warranto* can be issued the following conditions must be satisfied:[72]

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69. de Smith: *Judicial Review of Administrative Action*, 1995, p. 1002.
70. *University of Mysore* v. *Govinda Rao*, AIR 1965 SC 491: (1964) 4 SCR 576.
71. AIR 1965 SC 491 (494): (1964) 4 SCR 576.
72. For detailed discussion and case-law, *see* C.K. Thakker: *Administrative Law*, 1996, pp. 435-37.

(*i*) The office must be of a public nature. By public office is meant an office in which the public has an interest. Before the writ can be issued the court must be satisfied that the office in question is a public office and the holder thereof has no legal authority to hold the said office. This writ will not lie in respect of office of a private nature, e.g. a managing committee of a private school.

(*ii*) The office must be of a substantive character. The words 'substantive character' means the office in question must be an independent office. The holder of such office must be an independent official and not merely a deputy or servant of others. But the mere fact that the office is held at pleasure will not make the office one which is not substantive. Thus, the membership of the Privy Council, or the office of an Advocate General of a State, or the Governor, though held during the pleasure of the Crown can be said to be of a substantive character.

(*iii*) The office must be statutory or constitutional. Thus, a writ of *quo warranto* may be issued in respect of offices of the Prime Minister, Advocate General, Judge of a High Court, Public Prosecutor, Speaker of a House of the State legislature, members of a Municipal body, University officials, etc.

(*iv*) The holder must have asserted his claim to the office. Mere making of a claim is not enough. But defective swearing can warrant *quo warranto.*

(*e*) *Who may apply*

The object of the writ of *quo warranto* is to prevent a person who has wrongfully usurped a public office from continuing in that office. Therefore, an application for a writ of *quo warranto* challenging the legality and validity of an appointment to a public office is maintainable at the instance of any private person even though he is not personally aggrieved or interested in the matter. In *G.D. Karkare* v. *T.L. Shevde*[73], the High Court of Nagpur observed:

> "In proceedings for a writ of '*quo warranto*' the applicant does not seek to enforce any right of his as such, nor does he complain of any non-performance of duty towards him. What is in question is the right of the non-applicant to hold the office and an order that is passed is an order ousting him from that office."

73. AIR 1952 Nag 330 (334).

(*f*) *When may be refused*

Quo warranto is a discretionary remedy and the petitioner cannot claim this writ as of right.[74] The court may refuse to grant this writ taking into account the facts and circumstances of the case. This may include instances where the issue of a writ would be vexacious, or where there was acquiescence on the part of the petitioner, or where it would be futile as the holder of an office has ceased to hold the office in question. It may also be refused if there is mere irregularity in election.

A writ of *quo warranto* may also be refused on the ground that alternative statutory remedy is available to the petitioner. Thus, when a writ of *quo warranto* was sought to be enforced against a member of the State legislature, it was refused on the ground that there was an alternative remedy by way of making an election petition. But if the objection taken by the petitioner falls outside the statutory remedy, the existence of an alternative will be no bar to the writ of *quo warranto.*

But a writ of *quo warranto* cannot be refused only on the ground of delay. There is an obvious reason behind it. In *Sonu Sampat* v. *Jalgaon Municipality*[75], the High Court of Bombay observed:

> "If the appointment of an officer is illegal, every day that he acts in that office, a fresh cause of action arises; there can, therefore, be no question of delay in presenting a petition for *quo warranto* in which his very right to act in such a responsible post has been questioned."

(*g*) *Alternative remedy*

If an alternative and equally effective remedy is available to the applicant, a writ court may not issue *quo warranto* and relegate him to avail of that remedy. Existence of alternative remedy, however, is not an absolute bar and a writ court has discretion to issue *quo warranto* notwithstanding availability of alternative remedy.[76]

(*h*) *Delay*

Cause of action for a writ of *quo warranto* is a continuous one (*de dei in dium*). If the appointment of an officer is illegal, every day that he acts in that office, a fresh cause of action arises and a petition cannot be dismissed on the ground of delay.[77]

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74. ***Rameshwar*** **v. *State*, AIR 1961 SC 816: (1961) 2 SCR 874.**
75. ILR 1958 Bom 113 (126): (1957) 59 Bom LR 1088 (1096).
76. *Halsbury's Laws of England*, 4th Edn., Vol. I, para 177, p. 167; *Jyoti Prokash* v. *Chief Justice, Calcutta HC*, AIR 1965 SC 961: (1965) 2 SCR 53.
77. *Baij Nath* v. *State of U.P.*, AIR 1965 All 151; *Sonu Sampat* v. *Jalgaon Borough Municipality*, ILR 1958 Bom 113: 59 Bom LR 1088.

(*i*) *De facto doctrine*

An officer *de jure* is one who, possessing the legal qualifications, has been lawfully chosen to the office in question and has fulfilled all the conditions precedent to the performance of its duties. An officer *de facto* is one who, by some colour of right is in possession of an office for the time being and performs its duties with public acquiescence, though having no right in law.[78]

No one is under an obligation to recognize or respect the acts of an intruder, and for all legal purposes they are absolutely void. But for the sake of order and regularity, and to prevent confusion in the conduct of public business and in security of private rights, the acts of officers *de facto* cannot be questioned in a court of law. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers their title could be called in question.[79]

It should not, however, be forgotten that by application of the *de facto* doctrine, the appointment of an officer *de facto* does not become legal, valid or lawful nor can he be allowed to continue in the said office. As soon as the attention of the court is drawn to the fact that a person who is not entitled to hold a public office is holding the public office contrary to law, it is not only the power but the duty of the court to declare that he is not entitled to hold that office and to restrain him from acting as such.[80]

(*j*) *Conclusions*

From the above discussion, it becomes clear that an usurper or an intruder cannot be allowed to retain a public office any more. As soon as the attention of the court is drawn to this fact, it is not only the power but the duty of the court to declare that he is not entitled to hold such office and to restrain him from acting as such.[81]

3. CONSTITUTIONAL REMEDIES

Under the Constitution of India, the following remedies are available to a person aggrieved by an action of administrative authority:

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78. *Gokaraju Rangaraju* v. *State of A.P.*, (1981) 3 SCC 132: AIR 1981 SC 1473.
79. *Id.* see also *State of Haryana* v. *Haryana Coop. Transport Ltd.*, (1977) 1 SCC 271: AIR 1977 SC 237; *Pushpadevi* v. *Wadhwan*, (1987) 3 SCC 366: AIR 1987 SC 1748.
80. *Id.* for detailed discussion and leading cases, *see* V.G. Ramachandran: *Law of Writs*, 1993, pp. 802-08.
81. *State of Haryana* v. *Haryana Coop. Transport Ltd.*, (1977) 1 SCC 271(278): AIR 1977 SC 237.

(a) Extraordinary remedies

As already discussed, an aggrieved party has a right to approach the Supreme Court under Article 32 or a High Court under Article 226 of the Constitution of India for an appropriate writ, direction or order. They are extraordinary or prerogative remedies.

(b) Appeals to Supreme Court

Articles 132 to 135 of the Constitution deal with appellate powers of the Supreme Court in constitutional matters and in civil and criminal cases. Article 139A enables the Supreme Court to withdraw or transfer cases from one court to another court.

(c) Special leave petitions[82]

(i) Constitutional provisions

Article 136 of the Constitution of India confers extraordinary powers on the Supreme Court to grant special leave to appeal from any judgement, decree, determination, sentence or order passed by any court or tribunal. It reads as under:

> "136. *Special leave to appeal by the Supreme Court.*—
>
> (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
>
> (2) Nothing in clause (1) shall apply to any judgement, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

(ii) Object

The rapid growth of administrative law has brought into existence many administrative tribunals and adjudicatory bodies. They are invested with wide judicial and quasi-judicial powers thereby necessitating effective control. With this object in mind, the framers of the Constitution have conferred very wide and extensive powers on the Supreme Court.[83]

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82. I have used the simple expression "*Special leave petitions*" instead of "*Special Leave to appeal by the Supreme Court*" used in Article 136 of the Constitution, since even in the Supreme Court, such petitions are known and described as "*Special Leave Petitions*" (SLPs).

83. For detailed discussion and case-law, *see* C.K. Thakker: *Administrative Law*, 1996, pp. 435-56.

(iii) Nature and scope

This provision confers very wide and plenary powers on the Supreme Court. It is not subject to any limitation. Moreover, as the said power is constitutional, it cannot be diluted or curtailed by ordinary parliamentary process. The article commences with the words "Notwithstanding anything in this Chapter". These words indicate that the intention of the Founding Fathers of the Constitution was to disregard in extraordinary cases the limitations contained in the previous articles on the power of the Supreme Court to entertain appeals. The Supreme Court can grant special leave and hear appeals even though no statute makes provision for such an appeal, or under the relevant statute an alternative remedy is provided, or an order passed by the tribunal is made final.

It should, however, be noted that Article 136 does not confer a right on any party but confers a discretionary power on the Supreme Court. In other words, a party cannot approach the Supreme Court under Article 136 *as of right*. The grant of special leave to appeal is, thus, entirely a matter of discretion of the Supreme Court. In short, exercise of power under Article 136 of the constitution is 'pleasurable jurisdiction' of the Supreme Court.

(iv) Extent and applicability

The language of Article 136 is very wide and comprehensive. It vests in the Supreme Court a plenary jurisdiction in matters of entertaining and hearing of appeals by granting special leave against any judgment, decree or order of any court or tribunal in any case or matter. The Article is worded in the widest terms possible.[84] The powers of the Supreme Court under Article 136 are much wider than the powers of High Courts under Article 226 of the Constitution.[85] They are special or residuary powers exercisable outside the perview of ordinary law where the needs of justice demand. *'The Constitution for the best reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way.'*[86] (emphasis supplied)

(v) When Supreme Court may refuse leave

Though this power is comprehensive and undefined, the court has imposed certain limitations upon its own powers. This power is extraor-

84. *Bharat Bank Ltd.* v. *Employees*, AIR 1950 SC 188: 1950 SCR 459.

85. *Sharma* v. *State Bank of India*, AIR 1968 SC 985: (1968) 3 SCR 91.

86. *Durga Shankar* v. *Raghuraj Singh*, AIR 1954 SC 520(522): (1955) 1 SCR 267(273). For detailed discussion see V.G. Ramachandran: *Law of Writs*, (1993), pp. 838-84.

dinary and it should be exercised only in exceptional circumstances. Thus, the Supreme Court would not ordinarily grant a leave against the order of a tribunal where the alternative remedy is available, or finding of fact is challenged, or the matter falls within the discretion of the authority, or where a new point is raised for the first time before the Supreme Court, or where the petitioner is unable to show the presence of special circumstances to grant special leave.[87]

(vi) When Supreme Court may grant leave

On the other hand, in the following circumstances the Supreme Court would entertain the appeal under Article 136: Where the tribunal has acted in excess of jurisdiction or has failed to exercise jurisdiction vested in it; or where there is error apparent on the face of the record; or where the order is against the principles of natural justice; or where irrelevant considerations have been taken into account or relevant considerations have been ignored; or where the findings of the tribunals are perverse; or where there is miscarriage of justice.[88]

(vii) Constitution (42nd) Amendment

The Constitution (42nd Amendment) Act, 1976, radically changed the position. Prior to the amendment, the aggrieved person had other remedies available to him and the Supreme Court in those circumstances rightly did not grant special leave to appeal under Article 136. But by the 42nd Amendment, the High Court's power of superintendence over tribunals were taken away by amending Article 227 and also by adding Articles 323-A and 323-B. Administrative Tribunals were placed ''more or less'' in the position of 'final' adjudicatory bodies.[89]

(viii) Constitution (44th) Amendment

Of course, the above position, now no more continues. In view of the Constitution (44th Amendment) Act, 1978 restoring jurisdiction of High Courts over tribunals under Article 227 of the Constitution and after the decision of the Supreme Court in *Chandra Kumar* v. *Union of India*,[90] Administrative Tribunals created under Articles 323-A and 323-B of the Constitution have no more remained as 'final' adjudicatory institutions.[91]

87. *Id.* see pp. 456-57, 459.
88. *Id. see* pp. 457, 459-60.
89. For detailed discussion, see C.K. Thakker: *Administrative law*, 1996, pp. 250-56, 466; V.G. Ramachandran: *Law of Writs*, 1993, pp. 306-15, 873-74.
90. (1997) 3 SCC 261: AIR 1997 SC 1125.
91. For detailed discussion of 'Administrative Tribunals', see Lecture VII (*supra*).

(ix) Limitation

A petition for special leave to appeal can be filed in the Supreme Court within sixty days from the date of judgement, final order or sentence involving death sentence; or from the date of the refusal of a certificate by the High Court; or within ninety days from the date of the judgement or order sought to be appealed.[92] An application for special leave filed after the prescribed period may, however, be entertained by the Supreme Court at its discretion, if sufficient cause for condonation of delay is shown.[93]

(x) Conclusions

It is submitted that the correct principle is laid down by Mahajan, C.J. in *Dhakeswari Cotton Mills* v. *CIT*[94], in the following words:

> "It is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in this court by the constitutional provision made in Article 136. The limitations, whatever they be, are implicit in the nature and the character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations. *Beyond that it is not possible to fetter the exercise of this power by any set formula or rule.*"[95]
>
> (emphasis supplied)

(d) Supervisory jurisdiction of High Courts

(i) Constitutional provisions

Article 227 of the Constitution confers on every High Court the power of superintendence over all the subordinate courts and inferior tribunals in the State. It reads as under:

> "227. *Power of Superintendence over all courts by the High Court.*—(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

92. Article 133 (*a*), (*b*), (*c*), Limitation Act, 1963.
93. *Venkataraman* v. *State of Mysore*, AIR 1958 SC 255: 1958 SCR 895; *Sandhya Rani* v. *Sudha Rani*, (1978) 2 SCC 116: AIR 1978 SC 537; *Mewa Ram* v. *State of Haryana*, (1986) 4 SCC 151: AIR 1987 SC 45.
94. AIR 1955 SC 65: (1955) 1 SCR 941.
95. *Id.* at p. 69 (AIR); see also *Bharat Bank* v. *Employees*, AIR 1950 SC 188(193-94): 1950 SCR 459; *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27(106): 1950 SCR 88; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625(677-78): AIR 1980 SC 1789(1925-26); *Fertilizer Corpn. Kamgar Union* v. *Union of India*, (1981) 1 SCC 568(574-75): AIR 1981 SC 344(347).

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(*a*) call for returns for such courts;

(*b*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(*c*) prescribe forms in which books, entries and accounts shall be kept by the officer of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

(ii) Object

The underlying object of this provision to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the authorities mentioned therein. This jurisdiction extends to keeping the subordinate courts and inferior tribunals within the limits of their authority and to seeing that they obey the law and they do what their duty requires and they do it in a legal manner. This jurisdiction cannot be limited or fettered by any Act, except by a constitutional amendment.[96]

(iii) Nature and scope

Article 227 of the Constitution confers on every High Court, a special power and responsibility over all subordinate courts and tribunals within its territorial jurisdiction, with the object of securing that all such institutions exercise their powers and discharge their duties properly and in accordance with law. The power of superintendence over inferior courts and tribunals conferred on High Courts is judicial as well as administrative. The powers conferred by this provision on every High Court is unlimited and unfettered.[97]

96. *Jodhey* v. *State*, AIR 1952 All 788 (792): 1952 Cri LJ 1282; *State of Gujarat* v. *Vakhatsinghji*, AIR 1968 SC 1481 (1488): (1968) 3 SCR 692.

97. *Waryam Singh* v. *Amarnath*, AIR 1954 SC 215: 1954 SCR 565; *Banerji* v.

It should not, however, be forgotten that in exercising the supervisory power, the High Court does not act as a court of appeal. It will not review, re-appreciate or reweigh the evidence upon which the determination of the inferior tribunal purports to be based or to correct errors of fact or even of law and to substitute its own decision for that of the inferior court or tribunal.[98]

(iv) Alternative remedy

The supervisory power under Article 227 is extraordinary in nature and it cannot be claimed as of right by the party. It is in the discretion of the High Court to exercise such power and normally, when alternative remedy is available to the applicant, the High Court may refuse to exercise the power. Thus, the High Court may refuse relief under Article 227, when a remedy by way of appeal or of revision or of election petition or of filing a suit, is available to the applicant.[99]

However, the existence of alternative remedy is not a constitutional bar to the exercise of power under Article 227 and when such an alternative remedy is not equally efficacious, convenient, effective or speedy, the High Court may exercise powers under Article 227. Similarly, the High Court may also interfere under Article 227 in case of absence or excess of jurisdiction, or where there is an error apparent on the face of the record, or in case of violation of the principles of natural justice, or in case of arbitrary or capricious exercise of power or discretion, or where the finding is perverse or patently unreasonable or is based on 'no evidence', or where the inferior court or tribunal does not follow the decision of the High Court of a State, or where there is miscarriage of

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Mukherjee, AIR 1953 SC 58: 1953 SCR 302; *Nagendra Nath Bora* v. *Commr. of Hills Division*, AIR 1958 SC 398: 1958 SCR 1240; *Satyanarayan* v. *Mallikarjun*, AIR 1960 SC 137: (1960) 1 SCR 890; *State of Gujarat* v. *Vakhatsinghji*, AIR 1968 SC 1481: (1968) 3 SCR 692; *Ahmedabad Mfg. and Calico Printing Co. Ltd.* v. *Ram Tahel*, (1972) 1 SCC 898: AIR 1972 SC 1598; *Babhutmal* v. *Laxmibai*, (1975) 1 SCC 358: AIR 1975 SC 1297; *Trimbak Gangadhar* v. *Ramchandra Ganesh*, (1977) 2 SCC 437: AIR 1977 SC 1222.

98. *Satyanarayan* v. *Mallikarjun*, AIR 1960 SC 137: (1960) 1 SCR 890; *State of Orissa* v. *Murlidhar*, AIR 1963 SC 404; *State of A.P.* v. *Rama Rao*, AIR 1963 SC 1723: (1964) 3 SCR 25; *Union of India* v. *H.C. Goel*, AIR 1964 SC 364: (1964) 4 SCR 718; *Lonad Gram Panchayat* v. *Ramgiri*, AIR 1968 SC 222: (1967) 3 SCR 774.

99. *Maneck Custodji* v. *Sarafagali*, (1977) 1 SCC 227: AIR 1976 SC 2446; *Bhutnath* v. *State of W.B.*, (1969) 3 SCC 675; *Major S.S. Khanna* v. *Brig Dillon*, AIR 1964 SC 497: (1964) 4 SCR 409; *Shankar* v. *Krishnaji*, (1969) 2 SCC 74: AIR 1970 SC 1; *Nanhoo Mal* v. *Hira Mal*, (1976) 3 SCC 211: AIR 1975 SC 21.

justice.[1] But if there are two modes of invoking the jurisdiction of the High Court and one of them had been chosen and already exhausted, it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate court.[2]

(v) *Binding nature of decisions of High Courts*

Article 141 of the Constitution proclaims that "the law declared by the Supreme Court shall be binding on all courts within the territory of India." There is no provision corresponding to Article 141 with respect to the law declared by the High Court. It is, however, well settled that the law declared by the highest court in the State (High Court) is binding on all subordinate courts, inferior tribunals and other authorities falling within the supervisory jurisdiction of the High Court. Judicial discipline requires and decorum known to law warrants that the directions of a High Court should be taken as binding and must be followed. Such obedience would be conducive to their smooth working. Otherwise there would be chaos and confusion in administration of law. In the hierarchial system of courts, it is necessary for each lower tier to accept loyally the decision of the higher tiers.[3] As has been rightly stated: "*the judicial system only works if someone is allowed to have the last word and if that last word once spoken, is loyally accepted.*"[4]
(emphasis supplied)

(vi) *Exclusion of Jurisdiction*[5]

(vii) *Conclusions*

The power of judicial review vested in the High Courts under Article 226 of the Constitution is integral and essential feature of the Constitution and a part of basic structure thereof. Likewise, the power of superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of basic structure of the Constitution. The con-

1. *Id.* see also *Nagendra Nath Bora* v. *Commr. of Hills Division*, AIR 1958 SC 398: 1958 SCR 1240; *State of U.P.* v. *Mohd. Nooh*, AIR 1958 SC 86 (93): 1958 SCR 595; *Ganpat Ladha* v. *Shashikant*, (1978) 2 SCC 573: AIR 1978 SC 955; *Gujarat Steel Tubes Ltd.* v. *Mazdoor Sabha*, (1980) 2 SCC 593: AIR 1980 SC 1896.
2. *Shankar* v. *Krishnaji*, (1969) 2 SCC 74 (78): AIR 1970 SC 1 (4-5).
3. *East India Commercial Co. Ltd.* v. *Collector of Customs*, AIR 1962 SC 1893: (1963) 3 SCR 338, *Prishnu Ram* v. *Parag Saikia*, (1984) 2 SCC 488: AIR 1984 SC 898, *Jain Exports* v. *Union of India*, (1988) 3 SCC 579.
4. *Cassel* v. *Broom*, (1972) 1 All ER 801 (874): (1972) 2 WLR 645.
5. For detailed discussion, see Lecture VII (*supra*).

stitutional protection afforded to citizens would become illusory if it were left to the executive to determine the legality of its action.[6]

It is well established that the powers conferred on High Courts under Article 227 of the Constitution cannot be limited or circumscribed by any statute. It is submitted that the following observations in *Jodhey* v. *State*[7] correctly describe the ambit and extent of supervisory powers of the High Court;

> "There are no limits, fetters or restrictions placed on this power of superintendence in this clause and the purpose of this Article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein."[8]

4. STATUTORY REMEDIES

In addition to the remedies available under the Constitution of India, different statutes also provide remedies to the aggrieved persons. As statutory provisions are not similar with regard to remedies provided, it is not possible to generalise the circumstances in which the said remedies are available. But they may be classified as under:

(*a*) Civil suits;

(*b*) Appeals to courts; and

(*c*) Appeals to tribunals.

(a) Civil suits

This is the traditional remedy available to a person to vindicate his legal right if he is aggrieved by any action of an administrative authority. Section 9 of the Code of Civil Procedure, 1908 declares that courts shall have jurisdiction to try all suits of a civil nature excepting suits in which their cognizance is either expressly or impliedly barred. Thus, if the dispute is of a *'civil nature'*, under Section 9 of the Code, a civil court can entertain, deal with and decide the said dispute, unless the jurisdiction of a civil court is barred either *expressly* or by *necessary implication*. In *Ganga Bai (Smt)* v. *Vijay Kumar*[9], the Supreme Court stated:

> "There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute one may, at one's

6. *Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261(301-02): AIR 1997 SC 1125.
7. AIR 1952 All 788: 1952 Cri LJ 1282: 1952 All LJ 493.
8. *Id.* at p. 792 (AIR) (Per Nasir Ullah Beg, J.). For detailed discussion of 'Supervisory Jurisdiction of High Courts', see V.G. Ramachandran: *Law of Writs*, (1993), pp. 811-37.
9. (1974) 2 SCC 393: AIR 1974 SC 1126.

peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. *A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit.*''[10] (emphasis supplied)

(b) Appeals to courts

In a number of statutes provisions are made for filing appeals or revisions or making references to 'ordinary' courts of law against the decisions taken by administrative authorities. For example, under the provisions of the Workmen's Compensation Act, 1923, a person aggrieved by the order passed by the Commissioner may file an appeal in the High Court on a 'substantial question of law', or an appeal lies to the High Court against the award made by the Motor Accident Claims Tribunal under the Motor Vehicles Act, 1988, or a reference to the District Court is competent under the Land Acquisition Act, 1894 against the award made by the Land Acquisition Officer, or to the High Court against the order passed by the Income Tax Tribunal under the Income Tax Act, 1961.

(c) Appeals to tribunals

Sometimes a statute creates an appellate tribunal and provides for filing an appeal against orders passed by the administrative officers in exercise of their original jurisdiction. For example, under the Customs Act, 1962, an appeal against the order passed by the Collector of Customs lies to the Central Board of Customs and Excises, or an appeal lies to the Rent Control Tribunal against the order passed by the Rent Controller under the Delhi Rent Control Act, 1958, or to the Copyright Board against any decision of the Registrar of Copyrights under the Copyright Act, 1957. Generally, at this stage, the jurisdiction of the appellate tribunal is not restricted and appeal can be heard on questions of fact and law. In many cases, further appeal on point of law is provided either to a tribunal or to a regular court of law. For example, a second appeal lies to the High Court against the order of the Rent Control Tribunal under the Delhi Rent Control Act, 1958 on substantial questions of law only.

5. EQUITABLE REMEDIES

(a) General

Against any arbitrary action of administrative authorities, generally prerogative remedies are available to the aggrieved persons. But apart from England, U.S.A. and India, the said remedy is not pressed into aid

10. *Id.* at p. 397 (SCC); 1129 (AIR). For detailed discussion, *See* C.K. Takwani: *Civil Procedure*, 1997, pp. 271-72.

in other countries. Moreover, issue of writs is an extraordinary remedy and is subject to the discretionary power of the court. In these circumstances ordinary equitable remedies can be obtained against the administration. Here, the following remedies are available to the aggrieved person:

(1) Declaration; and

(2) Injunction.

(b) Declaration

In a declaratory action, the rights of the parties are declared without giving any further relief. The essence of a declaratory judgment is that it states the rights or the legal position of the parties as they stand, without altering them in any way though it may be supplemented by other remedies in suitable cases. A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not amount to contempt of court.[11] The power of a court to render a purely declaratory judgment is particularly valuable in cases where a legal dispute exists but where no wrongful act entitling either party to seek coercive relief has been committed. By making an order declaratory of the rights of the parties the court is able to settle the issue at a stage before the *status quo* is disturbed. Inconvenience and the prolongation of uncertainty are avoided.[12]

In the field of administrative law, the importance of declaratory action cannot be underestimated. de Smith[13] states: "A public authority uncertain of the scope of powers which it wishes to exercise but which are disputed by another party may be faced with the dilemma of action at the risk of exceeding its powers or inaction at the risk of failing to discharge its responsibilities, unless it is able to obtain the authoritative guidance of a court by bringing a declaratory action. It is equally for the public benefit that an individual whose interests are immediately liable to sustain direct impairment by the conduct of the Administration should be able to obtain in advance a judicial declaration of the legal position."

The distinction between a declaratory order and other judicial order lies in the fact that while the latter is enforceable, the former is not. In private law this is a serious defect; in public law it is insignificant, as 'no administrative agency can afford to be so irresponsible as to ignore an adverse decision of a High Court judge'.[14]

11. Wade: *Administrative Law*, 1994, pp. 591-95.
12. de Smith: *Judicial Review of Administrative Action*, 1995, pp. 735-55.
13. *Id.* at p. 735.
14. Garner: *Administrative Law*, 1985, p. 185.

In *Barnard* v. *National Dock Labour Board*[15], some dock workers had been suspended from employment. Their appeal to the tribunal failed and they were dismissed from employment. In an action for declaration, discovery was ordered. It was revealed at that time that their suspension and dismissal were not in accordance with law. They, therefore, succeeded. Had they applied for *certiorari*, they would probably have failed since *certiorari* was "hedged round by limitations".[16]

Similarly, a declaration can be sought by the plaintiff that his nomination paper at a municipal election has been illegally rejected,[17] or that an order compulsorily retiring him is illegal and *ultra vires*.[18]

This is a discretionary relief and the object of granting declaration is removal of existing controversy and to avoid chances of future litigation. The courts are not acting as 'advisory' bodies and they can refuse to grant declaration if the question is academic and has not actually arisen. Thus, in *Barnanto, Re*,[19] when trustees desired to ascertain whether, if they took certain steps, the trust fund would be liable to estate duty, and posed a hypothetical question of law, the prayer for declaration was refused. But in *Bai Shri Vaktuba* v. *Thakore*[20], the plaintiff-husband prayed for declaration that a boy aged two years born to the defendant-wife was not his son and to restrain his wife from proclaiming him to be such son and claiming maintenance in that behalf. In spite of the objection by the wife that the suit was premature as neither maintenance nor rights in the plaintiff's property were being claimed, the declaration was granted. But if no controversy has arisen, the court will not grant declaration in vacuum. As early as in 1847, Bruce, V.C.[21] rightly observed:

> "Nakedly to declare a right, without doing or directing anything else relating to the right, does not, I conceive, belong to the functions of this court."[22]

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15. (1953) 2 QB 18: (1953) 1 All ER 1113: (1953) 2 WLR 995.
16. Wade: *Administrative Law*, 1994, p. 671; see also *Dyson* v. *Attorney General*, (1911) 1 KB 410: 81 LJKB 217; *Vine* v. *National Dock Labour Board*, (1957) AC 488: (1956) 3 All ER 939: (1957) 2 WLR 106.
17. *Sat Narain* v. *Hanuman Prasad*, AIR 1946 Lah 85.
18. *Union of India* v. *Kedareshwar*, AIR 1959 HP 32.
19. (1949) 1 All ER 515: (1949) Ch D 258.
20. ILR (1910) 34 Bom 676.
21. *Clough* v. *Ratcliffe*, (1847) 1 De G & S 164.
22. *Id.* at pp. 178-79; *see also* similar observation of Cozens-Hardy, M.R.: "Wait until you are attacked and then raise your defence"; *Dyson* v. *Attorney General*, (1911) 1 KB 410 (417).

Section 34 of the Specific Relief Act, 1963 provides for a declaratory action in respect of any legal character or any right as to any property where it is questioned.

Generally, a declaration cannot be obtained without praying for consequential relief. The proviso to Section 34 of the Specific Relief Act requires the plaintiff to claim further relief if he can. The object of the said provision is to avoid multiplicity of proceedings. If the consequential reliefs are not claimed by the plaintiff, the suit for declaration is liable to be dismissed.

(c) Injunction

(i) Definition

An injunction is an order of a court addressed to a party to proceedings before it, requiring it to refrain from doing, or to do, a particular act.[23]

Injunction is an equitable remedy. It is a judicial process by which one who has invaded, or is threatening to invade the rights, legal or equitable, of another, is refrained from continuing or commencing such wrongful act.[24]

(ii) Types

Injunctions are of two types:

(*i*) Prohibitory injunction; and

(*ii*) Mandatory injunction.

Sometimes, prohibitory injunction is also divided into two categories—(*a*) Temporary injunction, and (*b*) Perpetual injunction.

(iii) Principles

Generally, injunction is a negative remedy and in administrative law, it is granted when an administrative authority does or purports to do anything *ultra vires*. But in some cases the remedy may be positive and mandatory in nature and an administrative authority may be ordered to do a particular act which it is bound to do. But mandatory injunctions are rare, and in particular they play little part in public law because there is a special procedure for enforcing the performance of a public duty in the prerogative remedy of *mandamus*[25].

In the leading case of *Metropolitan Asylum District* v. *Hill*[26], the relevant Act empowered the authority to build a hospital for children for

23. de Smith: *Judicial Review of Administrative Action*, 1995, p. 705.
24. Wade: *Administrative Law*, 1994, p. 581.
25. *Id.* at pp. 585-86.
26. (1881) 6 AC 193: 50 LJ QB 353.

treatment of small-pox. A prohibitory injunction was obtained by the neighbouring inhabitants on the ground of nuisance. Similarly, in *Harrington* v. *Sendall*[27], the plaintiff was not present at a general meeting of the club. A majority of the members, in breach of the rule of the club (which made unanimous concurrence a prerequisite) increased the annual subscription for existing members. As the plaintiff did not pay the increased subscription, he was expelled. An injunction was granted to prevent such expulsion. Likewise, in *Administrator of the City of Lahore* v. *Abdul Majid*[28], the plaintiff submitted a building plan to the municipal authorities for necessary permission. The permission was initially granted but thereafter revoked even though such permission was granted in respect of other buildings. The order of mandatory injunction was issued against the municipal authorities.

An injunction is a discretionary remedy, but the discretion must be exercised judicially. The plaintiff must be 'an aggrieved person'. Since this is an equitable relief it may not be granted if the conduct of the plaintiff disentitles him from the assistance of the court or if some alternative remedy is available to him. But if there is violation of any provision of law, the courts will not hesitate to take the 'drastic step' of issuing an order of injunction, and they will not be deterred by the fact that it will bring the machinery of the Government to a standstill.

In *Bradbury* v. *London Borough Council*[29], a local authority's scheme for setting up comprehensive schools was held to be illegal since no public notice had been given to object as required by the relevant statute. It was contended by the authorities that if the injunction would be granted, there would be administrative chaos. Lord Denning, M.R. stated: "I must say this: If a local authority does not fulfil the requirements of the law, this court will see that it does fulfil them. It will not listen readily to suggestions of 'chaos'. The department of education and the council are subject to the rule of law and must comply with it, just like everyone else. *Even if chaos should result, still law must be obeyed.*"[30]

(emphasis supplied)

The above principle laid down in *Bradbury* has been followed by the Supreme Court also. In the well-known case of *Prabhakar Rao* v.

27. (1908) 1 Ch 921.
28. ILR 1947 Lah 382. See also *Vaish Degree College* v. *Lakshmi Narain*, (1976) 2 SCC 58: AIR 1976 SC 888; *Tiwari* v. *Jawala Devi*, (1979) 4 SCC 160: AIR 1981 SC 122.
29. (1967) 3 All ER 434: (1967) 1 WLR 1311.
30. *Id.* at p. 441 (AER).

State of A.P.[31], the age of superannuation of government servants was reduced from 58 to 55 years. After sometime, however, the Government again restored the age of superannuation to 58 years. But during the interregnum period, certain employees who reached the age of 55 years, retired. They, thus, could not get the benefit of enhanced age of retirement. The question before the court was whether they were entitled to reinstatement and back wages. A contention was raised on behalf of the State Government that 'there would be considerable chaos in the administration if those who have already retired are now directed to be reinducted into service'. The said contention was negatived by the court on the principle that 'those that have stirred up a hornet's nest cannot complain of being stung'[32].

In India, the law relating to perpetual injunction is discussed in Sections 36, 37 and 38 of the Specific Relief Act, 1963 and mandatory injunction in Section 39 of the said Act, while the law relating to temporary injunction is laid down in Order XXXIX of the Code of Civil Procedure, 1908.[33]

6. COMMON LAW REMEDIES

Common law remedies include liability of the Government for the breach of contract and for tortious acts of its servants and employees.[34]

7. PARLIAMENTARY REMEDIES

England and India are democratic countries having parliamentary form of Government. There is effective control of Parliament over the executive. The Ministers are responsible to Parliament. Garner[35] rightly states, the 'natural' remedy open to a subject aggrieved as a consequence of a policy decision taken by an agency of Government, is for him to write to his Member of Parliament in an attempt to obtain redress. The Member may then raise the matter informally with the Minister concerned, or formally in the House of Commons, usually by question or exceptionally on a motion for adjournment of the House, or in the course of a Supply Debate. Where the grievance is considered to be of sufficient public importance, the Member may press for a special court of inquiry to be set up to investigate the matter, under the Tribunals of Inquiry (Evidence) Act, 1921.

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31. 1985 Supp SCC 432: AIR 1986 SC 210.
32. *Id.* at p. 462 (SCC): 226 (AIR).
33. For detailed discussion about 'Temporary Injunction', *see* C.K. Takwani: *Civil Procedure*, 1997, pp. 196-205.
34. For detailed discussion *see* Lecture X (*infra*).
35. *Administrative Law*, 1985, pp. 81-82.

Even this parliamentary procedure is not free from defects. And though it is an effective instrument in theory, many defects in it are patent in its exercise.

(*i*) After the complaint has been made by the aggrieved person to the Member, the result depends very largely on the persistence, ability and status of the said Member.

(*ii*) If the Member is of the opposition party, he may attack the Minister vigorously, but his protests would be much milder if he belonged to the ruling party.

(*iii*) Again, if the Member is a leader of the opposition party or a member of opposition's 'Shadow Cabinet', there are greater chances of getting substantial results, but it would not be so in case of an 'obscure back-bencher'.

(*iv*) In the course of discussion in the House, political considerations may affect the issue to such an extent that the personal element in the original complaint may be forgotten and the complainant may not get appropriate relief.

(*v*) There is a wide range of administrative activity and no Minister can be held responsible for decisions taken by public corporations and other local authorities.

(*vi*) Even where the ground of complaint falls within the sphere of responsibility of the Minister concerned and he undertakes to investigate the matter, the process of obtaining a remedy is slow and cumbersome. "Many Members are too busy or preoccupied with other interests, to be able to spare the time to pursue a matter of this kind to any considerable extent. *There are, of course, many exceptions to this observation, but it is certainly no fault of the original complainant if his Member is not one of the exceptions.*[36] (emphasis supplied)

8. CONSEIL D'ETAT

In France, there are two types of laws and two sets of courts independent of each other. The ordinary law courts administer the ordinary civil law as between subjects. The administrative courts administer the law as between the subjects and the State. Although, technically speaking *Conseil d'Etat* is a part of the administration, in practice and reality, it is very much a court. The actions of the administration are not immune from judicial control of this institution. It is staffed by Judges and pro-

36. *Id.* at p. 84 (The House of Commons is more a forum for the *ventilation* of grievances than for securing their *redress*.)

fessional experts. In fact, *Conseil d'Etat* provides expeditious and inexpensive relief and better protection to the subjects against administrative acts or omissions than the common law courts. It has liberally interpreted the maxim *ubi jus ibi remedium* and afforded relief not only in cases of *injuria sine damno* but also in cases of *damnum sine injuria.*[37]

9. OMBUDSMAN

(a) Meaning

'Ombudsman' means 'a delegate, agent, officer or commissioner'. A precise definition of 'Ombudsman' is not possible, but Garner[38] rightly describes him as "an officer of Parliament, having as his primary function, the duty of acting as an agent for Parliament, for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executive".

(b) Importance

In *Justice Report*[39], it is observed:

> "He is not a super-administrator to whom an individual can appeal when he is dissatisfied with the discretionary decision of a public official in the hope that he may obtain a more favourable decision. His primary function ... is to investigate allegations of maladministration."

(c) Historical growth

This institution originated in Sweden in 1809 and thereafter it has been accepted in other countries including Denmark, Finland, New Zealand, England (Parliamentary Commissioner) and India (Lokpal and Lokayukta).

(d) Powers and duties

The Ombudsman inquires and investigates into complaints made by citizens against abuse of discretionary power, maladministration or administrative inefficiency and takes appropriate actions. For that purpose, very wide powers are conferred on him. He has access to departmental files. The complainant is not required to lead any evidence before the Ombudsman to prove his case. It is the function and duty of the Ombudsman to satisfy himself whether or not the complaint was justified. He can even act *suo motu*. He can grant relief to the aggrieved person as unlike the powers of a civil court, his powers are not limited.

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37. For detailed discussion *see* Lecture II (*supra*); *see also* C.K. Thakker *Administrative Law*, 1996, pp. 472-73.
38. *Administrative Law*, 1985, p. 85.
39. Para 18 (quoted by Garner). *Id.* at p. 85.

(e) Status

Generally, the Ombudsman is a judge or a lawyer or a high officer and his character, reputation and integrity are above board. He is appointed by Parliament and thus, he is not an officer in the administrative hierarchy. He is above party politics and is in a position to think and decide *objectively*. There is no interference even by Parliament in the discharge of his duties. He makes a report to Parliament and sets out reactions of citizens against the administration. He also makes his own recommendations to eliminate the causes of complaints. Very wide publicity is given to those reports. All his reports are also published in the national newspapers. Thus, in short, he is the 'watchdog' or 'public safety valve' against maladministration, and the "protector of the little man".

(f) Defects

Of course, there are some arguments against setting up of the office of the Ombudsman.

(*i*) It is argued that this institution may prove successful in those countries which have a comparatively small population, but it may not prove very useful in populous countries, like U.S.A. or India, as the number of complaints may be too large for a single man to dispose of.

(*ii*) It is also said that the success of the institution of Ombudsman in Denmark owes a great deal to the personality of its first Ombudsman Professor Hurwitz. He took a keen interest in the complaints made to him and investigated them personally. Prestige and personal contact would be lost if there are a number of such officers, or if there is a single officer who has always to depend upon a large staff and subordinate officers.

(*iii*) According to Mukherjea, J.[40], in India this institution is not suitable. He describes it as "an accusatorial and inquisitorial institution—a combination unprecedented in democracy with traditions of independent judiciary". It is an 'impracticable and disastrous experiment' which will not fit into the Indian Constitution.

(g) Conclusions

In a democratic Government, it is expected that the subjects have adequate means for the redress of their grievances. Since the present judicial system is not sufficient to deal with all cases of injustices, an institution like Ombudsman may help in doing full and complete justice

40. Quoted by S. Rajgopalan: *Administrative Law*, 1970, p. 55.

to aggrieved persons. But Ombudsman is not a "panacea for all the evils of bureaucracy." His success depends upon the existence of a reasonably well-administered State. He cannot cope with the situation where administration is riddled with patronage and corruption.[41]

Indian Parliament so far has not enacted any Act though a proposal to constitute an institution of Ombudsman (*Lokpal*) was made by the Administrative Reforms Commission as early as in 1967. Some States, however, have enacted statutes and appointed *Lokayukta*.

10. SELF-HELP

An aggrieved person is also entitled to resist an illegal or *ultra vires* order of the authority. If any person is prosecuted or any action is sought to be taken against him, he can contend that the bye-law, rule or regulation is *ultra vires* the power of the authority concerned. In case of 'purported' exercise of power, he may disobey the order passed against him.

Benjamin Curtis, a former Judge of the Supreme Court of the United States, while arguing before the Senate on behalf of President Andrew Johnson during the latter's impeachment trial, said: "I am aware that it is asserted to be the civil and moral duty of all men to obey those laws which have been passed through all the forms of legislation until they shall have been decreed by judicial authority not to be binding; but this is too broad a statement of the civil and moral duty incumbent either upon private citizens or public officers. If this is the measure of duty there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it. I submit to Senators that not only is there no such rule of civil or moral duty, but that it may be and has been a high and patriotic duty of a citizen to raise a question whether a law is within the Constitution of the country."[42]

This view has been adopted by the California Supreme Court. One *Y* entered the country unlawfully. He was, therefore, arrested by the Dy. Sheriff without authority to arrest. *Y* escaped from the custody, and his abettor in the escape was convicted by the lower court. Reversing the order of conviction, the California Supreme Court held that since the order of imprisonment was unlawful, the escape was no offence.

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41. Prof. Gellhorn; see also Massey: *Administrative Law*, 1995, p. 373.
42. Kadish and Kadish: *Discretion to Disobey* , quoted in *Nawabkhan* v. *State of Gujarat* (*infra*).

In *Nawabkhan* v. *State of Gujarat*[43], an order of externment was passed against the petitioner on September 5, 1967 under the Bombay Police Act, 1951. In contravention of the said order, the petitioner re-entered the forbidden area on September 17, 1967 and was, therefore, prosecuted for the same. During the pendency of this criminal case, the externment order was quashed by the High Court under Article 226 of the Constitution of India on July 16, 1968. The trial court acquitted the petitioner but the High Court convicted him, because according to the High Court, the contravention of the externment order took place when the order was still operative and was not quashed by the High Court. Reversing the decision of the High Court, the Supreme Court held that as the externment order was illegal and unconstitutional, it was of no effect and the petitioner was never guilty of flouting 'an order which never legally existed'.

In *Stroud* v. *Bradbury*[44], the Sanitary Inspector entered the house of the appellant under the provisions of the Public Health Act, 1936. Even though there was a provision regarding giving of prior notice, that requirement was not heeded by the Inspector. The appellant obstructed the entry of the Sanitary Inspector. The court held that the appellant had the right to obstruct the entry of the Inspector as 'the Sanitary Inspector had not done that which the statute required him to do before he had a right of entry'.

But in *Kesho Ram* v. *Delhi Admn.*[45], the Section Inspector of the Municipality went to the house of the appellant in the discharge of his duty to seize the appellant's buffalo as he was in arrears of milk tax. The appellant struck the Inspector on the nose causing a fracture. A criminal case was, therefore, filed against the appellant. The appellant's main contention was that the recovery of the tax was illegal inasmuch as no notice of demand as required by the statute was given to him. Negativing the contention, the Supreme Court held that the Inspector was acting in good faith and was honestly exercising his statutory duty and had '*sadly*' erred in the exercise of his powers. According to the court, the Inspector 'could not be fairly presumed to know that a notice ... must precede any attempt to seize the buffalo' and therefore, the right of private defence was not available to the appellant. Although it appears that *Bradbury* was not brought to the notice of the court, it could have been distinguished on the ground that in that case, the appellant had merely

43. (1974) 2 SCC 121: AIR 1974 SC 1471.
44. (1952) 2 All ER 76.
45. (1974) 4 SCC 509: AIR 1974 SC 1158.

obstructed the entry of the Inspector, whereas in the case before the Supreme Court, the appellant had assaulted the Inspector. Had he merely obstructed the entry of the Section Inspector, probably, relying upon *Bradbury*, he could have justified his action, contending that 'the Section Inspector had not done that which the statute required him to do before he had a right of entry'.