CONTENTS

Chapters	Page No.
1. Introduction	1
2. Administrative Powers and Process (Administrative Agencies)	43
3. Practice and Procedure of Administrative Adjudication: Rules of Natural Justice	57
4. Mechanism for Control of Administrative Agencies	84
5. The Citizen and the Administrative Faults	136
6. Global Administrative Law	164
7. Indian Civil Service Law: An Overview	201

SYLLABUS

ADMINISTRATIVE LAW

MH-432

Chapter-1 **Introduction**

A. Definition and Purpose of Administrative Law.
B. Nature, Origin and Development of Administrative Law.
C. Relation between Administrative Law and other Branches of Public Law.
D. Direct Administrator.
E. Fundamental Constitutional Principles Related to Administrative Law.
1. Separation of Powers.
2. Due Process of Law.
3. Rule of Law.

Chapter-2 **Administrative Powers and Process (Administrative Agencies)**

(A) Rule Making
(i) Need for Administrative Rule Making.
(ii) Classification of Administrative Rule Making Power or Delegated Legislation.
(B) Adjudicatory.
(C) Executive.

Chapter-3 **Practice and Procedure of Administrative Adjudication : Rules of Natural Justice**

A. Rule Against Bias.
B. Audi Alteram Pattern
C. Post Decisional Hearing
D. Exceptions to the rule of Natural Justice

Chapter-4 **Mechanism for control of Administrative Agencies**

A. Need for Control
B. Mechanism of Control
(a) Government Control
i. Legislative Control
ii. Procedural Control
iii. Justice Control
(b) Non Government Control
i. Civil Society
ii. NGO

Chapter-5 **The Citizen and the Administrative Faults**

1. Ombudsman: Lokepal and Lokeayukta.
2. Central Vigilance Commission.
3. Transparency and Right to Information.
4. Public Interest Litigation.

Chapter-6 **Global Administrative Law**

Chapter-7 **Indian Civil Service Law: An Overview.**

CHAPTER – 1

INTRODUCTION

STRUCTURE

1.1 Learning Objectives
1.2 Introduction
1.3 Need for the Administrative Law : Its Importance and Functions
1.4 Nature and Definition of Administrative Law
1.5 Scope and Sources of Administrative Law
1.6 Future Role of Administrative Law
1.7 Administrative Law Vs. Constitutional Law
— Characteristics of Administrative Law
— Characterisitcs of Constitutional Law
— Similarities between Administrative Law and Constitutional Law
— Contrasts Between Administrative and Constitutional Law
1.8 Approaches and Process of Administrative Law
— English Approach
— American Approach
1.9 Development of Administrative Law
1.10 Administrative Law in India
1.11 Fundamental Constitutional Principles Related to Administrative Law
— Separation of Power
— Rule of Law
— Droit Administratif
1.12 Summary
1.13 Review Questions
1.14 Further Readings

1.1 LEARNING OBJECTIVES

After studying the chapter, students will be able to :

- State the meaning, definition, nature and scope of administrative law;
- Understand the important approaches of administrative law;
- Explain the recent trends in the administrative law;
- Discuss the the fundamental constitutional principles related to administrative law such as separation of power, rule of law etc.

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1.2 INTRODUCTION

Amongst the several categories of law, public law is one. Public law is the branch of law regulating the relationship between the citizen and the State. Administrative law is a public law category in the sense that it deals with the intercourse between governmental institutions on the one hand and private individuals or corporations on the other. Because of the involvement of the modern State in activities hitherto the exclusive domain of non-governmental actors, there has been the need for governments to establish many agencies, that is, ministries, parastatals, bureaus, departments, etc for the actualization and implementation of governmental projects and programmes.

Since the traditional governmental structure only envisages the three arms of government – legislature, executive and the judiciary – the creation of the agencies has had to contend with relevance and constitutionality.

Administrative law is all about administration of state affairs by the afore-mentioned agencies. More specifically, administrative law, *inter alia* :

(a) Relates to the power and procedures of administrative agencies and the remedies available to persons who may be aggrieved by the conduct of these agencies;

(b) Deals with the transfer of power from legislatures to agencies; the exercise of such power by the agencies, and the judicial review of administrative action;

(c) Concerns the organization, functions, powers or authority of governmental agencies; and

(d) Regulates the relationship amongst administrative agencies, and the relationship between their employees and the public.

1.3 NEED FOR THE ADMINISTRATIVE LAW : ITS IMPORTANCE AND FUNCTIONS

The emergence of the social welfare has affected the democracies very profoundly. It has led to state activism. There has occurred a phenomenal increase in the area of sate operation; it has taken over a number of functions, which were previously left to private enterprise. The state today pervades every aspect of human life. The functions of a modern state may broadly be placed into five categories, *viz*, the state as :

- protector,
- provider,
- entrepreneur,
- economic controller and
- arbiter.

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Administration is the all-pervading feature of life today. The province of administration is wide and embrace following things within its ambit :

- It makes policies,
- It provides leadership to the legislature,
- It executes and administers the law and
- It takes manifold decisions.
- It exercises today not only the traditional functions of administration, but other varied types of functions as well.
- It exercises legislative power and issues a plethora of rules, bye- laws and orders of a general nature.

The advantage of ***the administrative process*** is that it could evolve new techniques, processes and instrumentalities, acquire expertise and specialization, to meet and handle new complex problems of modern society. Administration has become a highly complicated job needing a good deal of technical knowledge, expertise and know-how. Continuous experimentation and adjustment of detail has become an essential requisite of modern administration. If a certain rule is found to be unsuitable in practice, a new rule incorporating the lessons learned from experience has to be supplied.

The Administration can change an unsuitable rule without much delay. Even if it is dealing with a problem case by case (as does a court), it could change its approach according to the exigency of the situation and the demands of justice. Such a flexibility of approach is not possible in the case of the legislative or the judicial process. Administration has assumed such an extensive, sprawling and varied character, that it is not now easy to define the term " administration" or to evolve a general norm to identify an administrative body. It does not suffice to say that an administrative body is one, which administers, for the administration does not only put the law into effect, but does much more; it legislates and adjudicates. At times, administration is explained in a negative manner by saying that what does not fall within the purview of the legislature or the judiciary is administration.

In such a context, a study of administrative law becomes of great significance. The increase in administrative functions has created a vast new complex of relations between the administration and the citizen. The modern administration impinges more and more on the individual; it has assumed a tremendous capacity to affect the rights and liberties of the people. There is not a moment of a person's existence when he is not in contact with the administration in one-way or the other. This circumstance has posed certain basic and critical questions for us to consider :

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- Does arming the administration with more and more powers keep in view the interests of the individual?
- Are adequate precautions being taken to ensure that the administrative agencies follow in discharging their functions such procedures as are reasonable, consistent with the rule of law, democratic values and natural justice?
- Has adequate control mechanism been developed so as to ensure that the administrative powers are kept within the bounds of law, and that it would not act as a power drunk creature, but would act only after informing its own mind, weighing carefully the various issues involved and balancing the individual's interest against the needs of social control?

It has increasingly become important to control the administration, consistent with the efficiency, in such a way that it does not interfere with impunity with the rights of the individual. Between individual liberty and government, there is an age-old conflict the need for constantly adjusting the relationship between the government and the governed so that a proper balance may be evolved between private interest and public interest. It is the demand of prudence that when sweeping powers are conferred on administrative organs, effective control- mechanism be also evolved so as to ensure that the officers do not use their powers in an undue manner or for an unwarranted purpose. It is the task of administrative law to ensure that the governmental functions are exercised according to law, on proper legal principles and according to rules of reason and justice fairness to the individual concerned is also a value to be achieved along with efficient administration.

The goal of administrative law is to redress this inequality to ensure that, so far as possible, the individual and the state are placed on a plane of equality before the bar of justice. In reality there is no antithesis between a strong government and controlling the exercise of administrative powers. Administrative powers are exercised by thousands of officials and affect millions of people. Administrative efficiency cannot be the end-all of administrative powers. There is also the questions of protecting individual's rights against bad administration will lead to good administration.

A democracy will be no better than a mere façade if the rights of the people are infringed with impunity without proper redressed mechanism. This makes the study of administrative law important in every country. For India, however, it is of special significance because of the proclaimed objectives of the Indian polity to build up a socialistic pattern of society. This has generated administrative process, and hence administrative law, on a large scale. Administration in India is bound to multiply further and at a quick pace. If exercised properly, the vast powers of the administration may lead to the welfare state; but, if abused, they may lead to

administrative despotism and a totalitarian state. A careful and systematic study and development of administrative law becomes a desideratum as administrative law is an instrument of control of the exercise of administrative powers.

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1.4 NATURE AND DEFINITION OF ADMINISTRATIVE LAW

Administrative Law is, in fact, the body of those which rules regulate and control the administration. Administrative Law is that branch of law that is concerned with the composition of power, duties, rights and liabilities of the various organs of the Government that are engaged in public administration. Under it, we study all those rules, laws and procedures that are helpful in properly regulating and controlling the administrative machinery.

There is a great divergence of opinion regarding the definition/conception of administrative law. The reason being that there has been tremendous increase in administrative process and it is impossible to attempt any precise definition of administrative law, which can cover the entire range of administrative process.

Let us consider some of the definitions as given by the learned jurists.

Austin has defined administrative Law. As the law, which determines the ends and modes to which the sovereign power shall be exercised. In his view, the sovereign power shall be exercised either directly by the monarch or directly by the subordinate political superiors to whom portions of those are delegated or committed in trust.

Holland regards Administrative Law "one of six" divisions of public law. In his famous book "Introduction to American Administrative Law 1958",

Bernard Schawartz has defined Administrative Law as "the law applicable to those administrative agencies which possess of delegated legislation and administrative judicatory authority."

Jennings has defined Administrative Law as "the law relating to the administration. It determines the organization, powers and duties of administrative authorities."

Dicey in 19th century defines it as – **Firstly**, portion of a nation's legal system which determines the legal statues and liabilities of all State officials. **Secondly**, defines the right and liabilities of private individuals in their dealings with public officials. **Thirdly**, specifies the procedure by which those rights and liabilities are enforced.

This definition suffers from certain imperfections. It does not cover several aspects of administrative law, *e.g.*, it excludes the study of several administrative authorities such as public corporations which are not included within the expression "State officials," it excludes the study of various powers and functions

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of administrative authorities and their control. His definition is mainly concerned with one aspect of administrative law, namely, judicial control of public officials.

A famous jurist **Hobbes** has written that there was a time when the society was in such a position that man did not feel secured in it. The main reason for this was that there were no such things as administrative powers. Each person had to live in society on the basis of his own might accordingly to Hobbes, "In such condition, there was no place for industry, arts, letters and society. Worst of all was the continual fear of danger, violent death and life of man solitary poor, nasty and brutish and short.

The jurists are also of the view that might or force as a means for the enforcement of any decision by man could continue only for some time. To put it is other words, the situation of "might is right" was only temporary. It may be said to be a phase of development. This can be possible only through the medium of law. Hence, law was made and in order to interpret it and in order to determine the rights and duties on the basis of such interpretation, this work was entrusted to a special organ that we now call judiciary. The organ, which was given the function of enforcing the decision of judicial organ, is called executive. It has comparatively a very little concern with the composition of the executive organ.

K.C. Davis has defined administrative law in the following words :

> " Administrative Law is the law concerning the powers and procedures of administrative agencies including specially the law governing judicial review of administrative action."

In the view of *Friedman*, Administrative Law includes the following.

- The legislative powers of the administration both at common law and under a vast mass of statutes.
- The administrative powers of the administration.
- Judicial and quasi-judicial powers of the administration, all of them statutory.
- The legal liability of public authorities.
- The powers of the ordinary courts to supervise the administrative authorities.

The Indian Institution of Law has defined Administrative Law in the following words;

> " Administrative Law deals with the structure, powers and functions of organs of administration, the method and procedures followed by them in exercising their powers and functions, the method by which they are controlled and the remedies which are available to a person against them when his rights are infringed by their operation."

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A careful perusal of the above makes it clear that Administrative Law deals with the following problems :

A. Who are administrative authorities?

B. What is the nature and powers exercised by administrative authorities?

C. What are the limitations, if any, imposed on these powers?

D. How the administration is kept restricted to its laminose?

E. What is the procedure followed by the administrative authorities?

F. What remedies are available to persons adversely affected by administration?

Thus the concept of administrative law has assumed great importance and remarkable advances in recent times. There are several principles of administrative law, which have been evolved by the courts for the purpose of controlling the exercise of power. So that it does not lead to arbitrariness or despotic use of power by the instrumentalities or agencies of the state. During recent past judicial activism has become very aggressive. It was born out of desire on the part of judiciary to usher in rule of law society by enforcing the norms of good governance and thereby produced a rich wealth of legal norms and added a new dimension to the discipline administrative law.

In view of above discussion we can derive at the following conclusions so far as nature and scope of administrative law is concerned :

- The administrative law has growing importance and interest and the administrative law is the most outstanding phenomena in the welfare state of today. Knowledge of administrative law is as important for the officials responsible for carrying on administration as for the students of law.
- Administrative law is not codified like the Indian Penal code or the law of Contracts. It is based on the constitution. No doubt the Court of Law oversees and ensure that the law of the land is enforced. However, the "very factor of a rapid development and complexity which gave rise to regulation made specific and complete treatment by legislation impossible and, instead, made necessary the choice of the body of officers who could keep abreast of the novelties and intricacies which the problems presented."
- Administrative law is essentially Judge made law. It is a branch of public law as compared to private law-relations inter-se. Administrative law is an ever-expanding subject in developing society and is bound to grow in size as well as quality in coming the decades. We need an efficient regulatory system, which ensures adequate protection of the people's Rights.
- Principles of administrative law emerge and development whenever any person becomes victim of arbitrary exercise of public power. Therefore administrative law deals with relationship individual with power.

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- The administrative agencies derive their authority from constitutional law and statutory law. The laws made by such agencies in exercise of the powers conferred on them also regulate their action. The principle features are: *(a)* transfer of power by legislature to administrative authorities, *(b)* exercise of power by such agencies, and *(c)* judicial review of administrative decisions.
- Administrative law relates to individual rights as well as public needs and ensures transparent, open and honest governance, which is more people-friendly.
- Inadequacy of the traditional Court to respond to new challenges has led to the growth of administrative adjudicatory process. The traditional administration of justice is technical, expensive and dilatory and is not keeping pace with the dynamics of everincreasing subject matter. Because of limitation of time, the technical nature of legislation, the need for flexibility, experimentations and quick action resulted in the inevitable growth of administrative legislative process.
- Administrative law deals with the organization and powers of administrative and powers quasi-administrative agencies Administrative law primarily concerns with official action and the procedure by which the official action is reached.
- Administrative law includes the control mechanism (judicial review) by which administrative authorities are kept within bounds and made effective.

1.5 SCOPE AND SOURCES OF ADMINISTRATIVE LAW

Administrative law, in its broad sense, covers the whole of public administrative and governmental powers in relation to the citizens. Taken in this sense, the scope of administrative law would be in direct proportion to the scope of public administrative. This is the chief reason why public administrative has been largely studied under the name of administrative law in the continental countries. The committee on public administrative of the social council, USA, mentioned the following as the scope of administrative law :

(i) Problems of public personnel,

(ii) Problems of fiscal administrative,

(iii) Legal conditions in administrative discretion,

(iv) Administrative regulation,

(v) Administrative law and administrative courts,

(vi) Administrative examination,

(vii) Government contracts,

(viii) Claims against governments,

(ix) Remedies against administrative action,

(x) Law relating to the status and recognition of professional association,

(xi) Legal rules governing actions of plural-headed administrative bodies.

Further Jemes Hart bifurcates the scope of administrative law into :

(a) Law of internal administrative, and

(b) Law of external administrative.

Under the law of internal administrative he includes such topics as legal qualification for office, legal disqualification for officers, legal aspects of hierarchical form of departmental organisation, the legal relation of administrative superior to the subordinate, and the legal relation between the power of removal and administrative management. Under the law of external administrative, Hart includes powers and duties of administrative authority related directly to private interests, the scope and limits of such powers, sanctions (i.e., means of enforcement) attached to official decisions, and the remedies against official action.

Moreover, a brief, elaborate, systematic and clearer outline of the scope of administrative law would be to divide in into two parts of M.P. Sharma :

(a) Law of official powers :

(i) Non-coercive,

(ii) Semi-coercive-inspection, licensing etc.,

(iii) Coercive-sanctions, legal and extra-legal,

(iv) Delegated legislation, administrative orders,

(v) Administrative adjudication.

(b) Law of Administrative Responsibility :

(i) To the executive,

(ii) To the legislature,

(iii) To the electorate

(iv) To the law courts

(v) Judicial review of administrative acts

(vi) Claims against administrative authorities.

(vii) Remedies against administrative acts.

Source of Administrative Law

Sources of administrative law would differ from country to country. Moreover, administrative law consists of large number of statues, rules, regulations and procedures as also those resolutions, orders decisions etc., which are meant for running smooth administration. In fact, administration is both a child and

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parent of administrative law. However, the chief sources of administrative law are :

(a) The constitutional law of the country is the most important source.

(b) The statues, acts, resolutions etc., passed by the legislature of the country.

(c) Characters, local bodies Acts granted and enacted by the legislature,

(d) Ordinance, rules, regulation, resolutions, orders,

(e) Decision of courts, tribunals etc.,

(f) Commentaries of eminent jurists,

(g) Customs and conversions.

1.6 FUTURE ROLE OF ADMINISTRATIVE LAW

The administrative law has come to stay because it provides an instrument of control of the exercise of administrative powers. The administrative law has to seek balance between the individual right and public needs. As we know in the society there exists conflict between power and justice wherever there is power, there exist probabilities of excesses in exercise of the power. One way is to do nothing about this and let the celebrated Kautilyan Matsanayaya (big fish eating little fish) prevail. The other way is to try and combat this. Administrative law identifies the excesses of power and endeavors to combat there. The learned Author, Upender Baxi, while commenting on the administrative law has rightly observed in. (The Myth and reality of the Indian administrative law, Introduction by Upendra Baxi in administrative law ed. by I.P. Massey 2001 at XVIII) –

> "to understand the stuff of which administrative law is made one has to understand relevant domains of substantive law to which courts apply the more general principles of legality and fairness. In this way a thorough study of administrative law is in effect, a study of the Indian legal system a whole. More importantly, it is study of the pathology of power in a developing society."

Growth in science and technology and modernization has resulted in great structural changes accompanied with increase in the aspirations of people as to quality of life. We know socio-eco-politico and multi dimensional problems which people face due to technological development cannot solved except by the growth of administration and the law regulating administration. No doubt the principles evolved by the court for the purpose of controlling the misuse of governmental of power is satisfactory. Yet it is said that the administrative law in India is an instrument in the hands of middle class Indians to combat administrative authoritarianism through the instrumentality of the court and there is need to make administrative law a shield for the majority of Indians living in rural area

and people under poverty line. Therefore **easy access to justice** is considered important form of accountability this may include –

- informal procedure,
- speedy and less expensive trial,
- legal aid,
- public interest litigation,
- easy bail etc.

Further, the multifarious activities of the state extended to every social problems of man such as health education employment, old age pension production, control and distribution of commodities and other operations public utilities. This enjoins a new role for administration and also for the development of administrative law.

1.7 ADMINISTRATIVE LAW VS. CONSTITUTIONAL LAW

For a long time the similarity between constitutional law and administrative law had led to confusion between both because the latter was, until very recently, treated as an appendage of or annexure to the former. One of the reasons therefor is that the two were fused for a long time because English scholars such as Austin and Maitland hesitated to see administrative law as a body of law distinct from constitutional law.

Also A.V. Dicey's denial of the existence of administrative law in the UK in his exposition on the rule of law worsened the non-recognition of administrative law as an autonomous course of study. Moreover, this blurred relationship between administrative law and constitutional law was not helped by the fact that the UK operates an unwritten constitution.

Thus, it was usual for textbooks on constitutional law and administrative law to contain much of constitutional law and little of administrative law. However, with the recognition of administrative law as an independent course of study, the situation has since improved as we now find books that are exclusively devoted to administrative law and, more importantly, administrative law is no longer tied to the apron string of constitutional law.

Characteristics of Administrative Law

There are certain characteristics which stand administrative law out. Some of them are itemized below :

(a) Administrative law is the law that regulates the activities of administrative agencies;

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(b) It deals with the power of agencies to exercise legislative, executive, judicial and quasi-judicial functions and the procedures for so doing;

(c) It concerns itself with providing remedies for persons who are victimized by administrative misuse or abuse of power;

(d) Administrative law acts as government image-maker. This is because the rules, regulations, byelaws, policies, etc, that administrative agencies make and implement are either to the benefit or detriment of most people on daily basis. It is important to note that the only contact such people may have with governmental institutions are through the medium of administrative agencies;

(e) It relates to the delegation of power and delegated legislation.

Characteristics of Constitutional Law

In contradistinction to administrative law, constitutional law is the branch of public law that relates to, as the name implies, the constitution. The Constitution is the supreme document enacted to be a working document for governance. Some of its features are as follows :

(a) Constitutional law regulates the relationship amongst the three arms of government, that is, the legislature, the executive and the judiciary;

(b) It distributes governmental power amongst the three arms;

(c) It codifies and protects the fundamental rights of citizens;

(d) It operates at the level of generality. Most people cannot really understand what it means to have a constitution because they do not really have any contact with it often.

Similarities between Administrative Law and Constitutional Law

Administrative law and constitutional law are of common public law ancestry. They are both about power and accountability – power of legislation and the accountability of those vested with the authority of enactment and enforcement. Administrative law and constitutional law border on the distribution and exercise of power within the State, and the relationship between the State and the individual.

Also, both operate with statutes, case-law, principles, rules, maxims. Similarly, the implementation of both administrative law and constitutional law is made possible by the same governmental/administrative structures. They differ from private law courses such as contract, trust, land law, etc, to the extent that the latter relate to relationships between private individuals.

Contrasts between Administrative Law and Constitutional Law

Nonetheless, some differences are still identifiable between the two. Constitutional law is the law relating to the Constitution of a State, distribution

of powers amongst the arms of government, and human rights for its citizens. From all that we have said so far, we can deduce that administrative law is about so many things including the following :

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(a) Administrative law relates to the power and procedures of administrative agencies and the remedies available to persons who may be aggrieved by the conduct of these agencies;

(b) It concerns the organization, functions, powers or authority of governmental agencies;

(c) Delegation of powers and delegated legislation;

(d) Exercise of power and discretion in public administration;

(e) It regulates the relationship amongst administrative agencies, and the relationship between their employees and the public; and

(f) Administrative adjudication.

1.8 APPROACHES AND PROCESS OF ADMINISTRATIVE LAW

Administrative law has been characterized as the most "outstanding legal development of the 20th century". It does not mean the absence of the concept before 20th century but it signifies that **administrative law has grown and developed tremendously, in quantity, qualify and relative significance, in the twentieth century,** that it has become more articulate and definite as a system in democratic countries.

The rapid growth of administrative law in modern times is the direct result of the growth of administrative powers and functions. This developments can be attributes mainly of **two factors.**

Firstly, to the critical international and internal situation creating a sense of insecurity which compels the govt. to acquire vast powers to provide for the defence and internal security of the country.

Secondly, to a change of philosophy as to the role and function of the state. That is the shift of the role of the state from laissez-faire to "social welfare states".

It is difficult to evolve a satisfied definition of administrative law so as to demarcate articulately its Nature, Scope and content because in almost every country irrespective of its political philosophy, the administrative process has increased so tremendously that today we are living not in its shade but shadow. Let's examine various approaches to the definition of administrative law.

English Approach

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

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The British approach to administrative law is depicted by the following definition formulated by Sir Ivor Jennings. According to him "Administrative Law is the law relating to administration. It determines the organisation, powers and duties of administrative authorities". This formulation does not differentiate between administration and constitutional law. It lays entire emphasis on the organisation, power and duties to the exclusion of the manner of their exercise. A student of Administrative Law is not concerned with how a minister is appointed but only with how a minister discharge his function in relation to an individual or a group.

The Secondly infirmity of Jennings formulation is that it leaves many aspects of Administrative Law untouched, especially the control mechanism.

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

Dicey was obsessed with the French "droit administratif" and therefore his formulation mainly concentrated on judicial remedies against state officials. Secondly, the definition is narrow and restrictive in so far as it leaves out of consideration many aspects of administrative law e.g.; it excludes many administrative authorities which, strictly speaking, are not officials of the states such as public corporations, it also excludes procedures of administrative authorities or their various powers and functions, or their control by parliament or in other ways.

American Approach

The American approach is significantly different from the early English approach in that it recognised administrative law as **an independent branch of the legal discipline.** The profounder of the American approach is the leading scholar Kenneth Culp Davis. According to him, administrative law is the law governing judicial review of administrative action. It does not included the enormous mass of substantive law produced by the agencies. An administrative agency according to him is a governmental authority other than a court and legislative body, which affects the rights of private parties either through adjudication or rule making.

Hence, with in his formulation, Davis includes the study of administrative rule-making and rule-adjudication but excludes rule application which according to him belongs to the domain of public administration. This formulation of Davis suffers from two deficiencies.

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Firstly, On the face of it, does not include the consideration of purely discretionary functions not falling with in the category of legislative and quasi judicial. In modem Administrative Law, discretionary administrative functions are vast in scope and range.

Secondly, the emphasis in the definition is on judicial control of administrative agencies. But other control mechanisms, like the Parliamentary control of delegated legislation, control through administrative appeals and through the ombudsman type of institution, are quite important and significant and need to be studied for a fuller comprehence of administrative law.

Difference between the two Approaches

The **basic difference between** the two is that the **English administrative law does not lay so much emphasis on procedures** of administrative bodies as the American administrative law. The procedure have great significance in administrative law because proper procedures are necessary for proper discharge of administrative powers and that it is in the area of procedures that safeguards can be incorporated for the individual against the administrative process with any success rather than seeking to control the administrative power through other means. Evolution of fair procedures is thus necessary to minimise the abuse to administrative powers.

It is the realisation which had led the American administrative law to place emphasis upon procedural safeguards to ensure a proper exercise of the administrative power. Recently more attention is being devoted in England of administrative procedures. Some Indian Scholars tried to make a generalisation when they say that the administrative law deals with the structure, powers, functions of the organs of administration; the limits of their power the methods and procedures followed by them in exercising their powers and functions; the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation.

Prof Upendra Baxi lays special stress on the protection on the "little man" from the arbitrary exercise public power. According to him administrative law is a study of the pathology of power in developing society. Accountability of the holders of public power for the ruled is thus the focus point of this formulation. The basic expectation in a rule-of-law society is that holders of public power and authority must be able to publicity justify their action as legally valued and socially wise and just.

Analysis

- Administrative law is a law in the realistic sense of the term which includes statue law, administrative rule making, precedents, customs, administrative directions.

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- Administrative law is a branch of public law in contradistinction with private law which deals with the relationship of individuals inter se. Therefore, it primarily deals with the relationship of individuals with the organised power.
- Administrative Law deals with the organisation and powers of administrative and quasi-administrative agencies such as corporation, Boards. Universities, independent domestic agencies and the like.
- Administrative Law includes the study of the existing principles and also of the development of certain new principles which administrative and quasi-administrative agencies must follow while exercising their powers in relation to individuals, *i.e.*, the principles of natural justice, reasonableness and fairness.
- Administrative Law primarily concerns itself with the official action which may be rule-making action, rule decisions action and adjudicatory action, rule-application etc.
- One of the main thrusts of the study of administrative law is on the procedure by which the official action is reached. Such procedure may be laid down;

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

  (ii) in a separate procedure code which every administrative agency is bound to follow *i.e.*, Administrative procedure Act, 1946 in USA and Tribunals and Enquires Act, 1958 in England.
- Administrative Law also includes within its study the control mechanism by which the administrative agencies are kept with in the bounds and made effective in the service of the individuals. This control mechanism is technically called the "review process".
- The study of Administrative Law is not an end in itself but a means to an end. The focal point of the study of administration law is the reconciliation of power with liberty.

Viewed against this perspective it becomes an all pervasive legal discipline Principles of administration emerge and develop whenever and wherever any person becomes the victim of the arbitrary exercise of public power.

Administrative Process

Though the words administrative law and administrative process has been used interchangeably by some scholars, there is a difference between the two concepts. To understand the administrative process with which administrative law is ritually concerned, it is necessary to draw a distinction between "administration" and policy, as that distinction works out in practise.

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Policy lays down a general principle; the administrative process involves application of that principles to particular facts or sets of circumstances, and at times also requires the taking of minor discretionary decisions within the framework of the general policy.

Take the case of the Industries (Development of Regulation) Act, 1951. The Central Govt. as a matter of policy, decided that all persons should be required to obtain a licence as a condition of establishing any new industrial undertaking after the commencement of this Act. It then become a matter of administration to draft the necessary law (either an act of parliament or some form of subordinate legislation) and to apply that law in particular cases, to draft any necessary application forms and licences, to arrange for and carry out only enquiry considered necessary, to collect and account for any fees payable to issue and second the licenses etc.

Under Section 15 of the Act the central govt, has been given the power to investigate into the affairs of the company of the industrial establishment. Investigating procedure is an example of administrative process.

Under Section 18 the central govt, has been given the power to control supply, distribution, prize of certain articles for securing the equitable distribution and availability at fair process of those article. To evolve the procedure for achieving the above policy objective is the domain of administrative process.

There is a provision in the Act which says the Development councils will act as liaison authority between the public and the govt. How the councils will perform this job is a matter of administrative process.

There is of course no clear line between policy and administration in theory as distinct from practice, for at any time a particular aspect of administration may be taken out of the hands of administration by the policy-makers, and a new or additional policy laid down.

For instance, in case of newly established undertakings it may be decided as a matter of policy that in future no fee shall be charged for the issue of a licence. Whereas previously the charging of a reasonable fee may have been left to the administrators. The borderline between policy and administration may also be different types or sizes of govt. agencies and the borderline may even shift within the same agency.

Although the distinction between policy and administration is thus often not clear the distinction between the policy-maker and the administrator is much more obvious. Policy is habitually entrusted to amateurs-the representative of the people or the man in the street whilst the administrative is normally a professional with a career.

NOTES

1.9 DEVELOPMENT OF ADMINISTRATIVE LAW

Today the administration is ubiquitous and impinges freely and deeply on every aspect of an individual's life. Therefore, administrative law has become a major area for study and research. It is an established fact that administrative law has evolved to a great extent and is still evolving but there is no uniformity of its evolvement in all parts of the world. Let's examine how it developed and in what way in some important regions of the globe.

France : Droit Administrative

In France and some other continental countries, the distinction between public law and private law was observed not only in science of jurisprudence but also in practice in so far as there existed all along, a separate system of tribunals for the administration of public law. Droit administration. This law is administered by special tribunals or "administrative courts".

The system of "Droit Administrative according to Dicey, is based on two leading principles which are alien to the conception of English law :

Firstly, the government and every servant of the government possess, as representatives of the nation, a whole body of special rights, privilege or prerogatives as against private citizens.

Secondly, the theory of "Separation Powers", according to which the executive the legislature and the courts, for the sake of liberty, be prevented form enforcing on one another's province.

From these two general principles follow our distinguishing characteristics of French Administrative Law :

Firstly, the relation of the government and its officials towards private citizens must be regulated by a body of special rules which may differ considerably from laws which govern the relation of one private person to another.

Secondly, the ordinary courts which determine ordinary case between private individuals have no justification in matters at issue between a private individual and the state and that such questions of administrative law are determined by "Administrative Courts".

Thirdly, if a conflict a jurisdiction arises between the two systems of courts, it is selected by a special tribunal and not by ordinary courts.

Fourthly, Droit Administrative has a tendency to protect from the supervision or control of the ordinary law courts any servant of the state who is guilty of an act, however illegal, whilst acting on bonafide obedience to the orders of his superiors, and in the discharge of his official duties.

Reforms in 1953 and 1962 have however, improved the organization of the French administrative tribunals making it more effective.

NOTES

ENGLAND

In England, administrative law was not differentiated as separate branch of law in practice so long as the same hierarchy of judicial tribunals used to administer both public and private law. This led Dicey, writing in 1885, to observe that there was no administrative law in England.

But this fundamental assumption of Dicey has been belied since his death in as much as judicial power has been vested in various bodies other than the "ordinary courts" of the land which are traditionally entitled to exercise the judicial function. The administrative authorities who have thus been conferred judicial powers, in England belong to different categories.

1. Special Tribunals

Though these tribunals are not courts of law, they have not to exercise any administrative function other than adjudication of questions referred to them and they possess a high degree of independence from the ministers. To this class belong the Industrial courts, the Rent Tribunals, commissioner of I.T. National Tribunals.

2. Quasi-judicial officers

Certain officers or civil servants exercise judicial powers by virtue of statutory provisions which even provide for regular appeal from their decisions of points of view to that superior courts and ministers cannot interfere with these quasi-judicial decisions even though the officers themselves may be under their administrative control. Ex. Chief Register of Friendly Societies.

3. Ministerial Tribunals

These are of the nature of special tribunals but they are not independent of the minister and, on the other hand, sometimes appeal lies from their divisions not to the superior courts but to the ministers in charge of the departments concerned Ex : National Health Service Tribunal.

4. Ministers with quasi-judicial Power

Some of the ministers themselves possess quasi-judicial powers. Ex : The Ministers of Health hears appeals from the decisions of the National Health Service Tribunal.

Sub-ordinate legislation

The other assumption of prof. Dicey, namely, that parliament was the sole legislative authority and that every person was subject to the ordinary law as made by that parliament, has also been displaced by the practice of delegated legislation resorted to by parliament itself, leading to a vast mass of sub-ordinate legislation or statuary instruments made by administrative authorities or authorities other than parliament.

NOTES

Committee on Minister's Powers

The British parliament in 1931 appointed a select committee, called the committee on minister's powers on the "Donoughmore committee" to inquire into the problem inherent in sub-ordinate legislation. The recommendation made by this committee as to the need for better publication and control sub-ordinate legislation was implemented by enacting the statutory instruments Act, 1946.

Another fruitful result of the recommendations of the committee on ministers powers was the passing of the crown proceeding Act, 1947, which abolished the immunity of the crown and its agencies from liability in torts. The enactment of this statue obviously expands the scope of administrative law in England.

Tribunals and Inquiries Act, 1958

Parliament adopted the main recommendations of the Franks committee, appointed to inquire into the problem in subordinate legislation more comprehensively by enacting the tribunals and inquires act, 1958. This enactment forms a land mark in the history of English administrative law. By this Act was set up the council on tribunals to keep the statuary tribunals under review, and to report to the Lord Chancellor.

The next landmark development of administrative law in England has been the passing of the parliamentary commissioner Act in 1967, which has installed an ombudsman of the Norwegian type. Next comes the supreme court act, 1981., which not only codifies the Rule of practice adopted by the Supreme Court in 1977, but widens the avenues of judicial review over administrative action by all kinds of public authorities and in one proceeding.

Side by side with these legislative changes, the judiciary has been advancing the development of administrative law by revolutionizing the common law on the following points, inter alia

(a) By bringing in the entire gamut of administrative action under the control of judicial review, by substituting the test of action affecting the rights and liberties of an individual for the old-fashioned test of "quasi-judicial obligation".

(b) By liberalizing the conditions of locus stand in public interest litigation.

United States of America

In the United States, the attention to administrative law as a subject of study was drawn by the publication of Goodnow's comparative administrative law in the year 1893 and principles of the administrative law of the United States in 1905. it was the report of the Attorney General's committee appointed to investigate "the need for procedural reform in the field of administrative law"

which resulted in the enactment of the administrative procedure act of 1946. It may be said to constitute a statutory code relating to the judicial control of administrative action in the U.S.A.

The Federal Administrative Procedure Act, 1946, constitutes a great landmark in the development of administrative law as compared to that in other countries in as much as it condifies in one comprehensive statue the various functions of administrative bodies and the procedure to be followed while exercising each of these functions and also provides for definite avenues of judicial review of these administrative actions.

Inspired by the utility of the Federal Administrative Procedure Act the American Bar Association draw up a model act of the same nature for the states in 1961, and since then many states have enacted administrative procedure statues on the lines of the model act.

In the result, we have in the U.S.A. a massive body of federal and state judicial decisions establishing a full fledged system of administrative law, protecting the citizen from arbitrary administrative action affecting his liberty and property.

Administrative Law in India : Development

Administrative Law is not a new phenomenon in India. Its existence can be traced right since the early days of the British rule over India. Thus the stage carriage Act, 1861, which prohibited the playing of stage carriages without a license indicates the beginning of administrative licensing. Delegated legislation was authorized by the Northern India canal and Drainage ACt, 1873 and the opium Act, 1878.

Till 1918 the British India Government was primarily concerned power was given to the executive officials for the purpose of protecting public health, morality and public safety.

In India, the earliest literature on the subject of administrative law was N.N. Ghose's comparative law, the Tagore Law lectures of the Calcutta University for the year 1918. The study of administrative law as a separate subject did not, however, receive impetus until the adoption of the written constitution for Independent India (1947). Elaborate as this constitution is, it could not possibly deal with the problem of legal control over the administrative system set up by it.

Thus, through Art, 226 of the constitution provided that the govt, or any public authority would be in an action before the courts cannot be found in the constitution.

The existence of subordinate legislation is acknowledged in some provisional of the constitution aspects of judicial control over these matters is beyond the scope of the constitution.

NOTES

Law Commission

The Reports of the law commission of India, constituted in 1955, have also drawn the attention of the public, the govt. and the legislature to different aspects of administrative law of these the need for a greater judicial control over the administrative agencies has been emphasized by the commission.

ARC Report

Realizing that there may be matters beyond the reach of the courts where an individual aggrieved by the action of an administrative authority may be without any remedy the question of extra-judicial bodies to control the administrative has also been in Parliament in recent times, particularly in view of allegations of corruption against people at the top, which led to the appointment of an administrative reforms commission in January, 1966.

The commission in Oct., 1966, issued an interim report on the problems of redress of citizens "Grievances" and recommend the creation of two institutions modeled on the Scandinavian ombudsman, to look into complaints against the administrative acts of ministers and other authorities at the centre and each state.

1.10 ADMINISTRATIVE LAW IN INDIA

Administrative law is the bye-product of the growing socio-economic functions of the State and the increased powers of the government. Administrative law has become very necessary in the developed society, the relationship of the administrative authorities and the people have become very complex. In order to regulate these complex, relations, some law is necessary, which may bring about regularity certainty and may check at the same time the misuse of powers vested in the administration. With the growth of the society, its complexity increased and thereby presenting new challenges to the administration we can have the appraisal of the same only when we make a comparative study of the duties of the administration in the ancient times with that of the modern times. In the ancient society the functions of the state were very few the prominent among them being protection from foreign invasion, levying of Taxes and maintenance of internal peace & order. It does not mean, however that there was no administrative law before 20th century. In fact administration itself is concomitant of organized Administration. In India itself, administrative law can be traced to the well-organized administration under the Mauryas and Guptas, several centuries before the Christ, following through the administrative, system of Mughals to the administration under the East India Company, the precursor of the modern administrative system. But in the modern society, the functions of the state are manifold, In fact, the modern state is regarded as the custodian of social welfare and consequently, there is not a single field of activity which is free from direct or indirect interference by the state. Along with duties, and powers the state has to

shoulder new responsibilities. The growth in the range of responsibilities of the state thus ushered in an administrative age and an era of Administrative law.

NOTES

The development of Administrative law is an inevitable necessity of the modern times; a study of administrative law acquaints us with those rules according to which the administration is to be carried on. Administrative Law has been characterized as the most outstanding legal development of the 20th-century.

Administrative Law is that branch of the law, which is concerned, with the composition of powers, duties, rights and liabilities of the various organs of the Government.

The rapid growth of administrative Law in modern times is the direct result of the growth of administrative powers. The ruling gospel of the 19th century was *Laissez faire* which manifested itself in the theories of individualism, individual enterprise and self help. The philosophy envisages minimum government control, maximum free enterprise and contractual freedom. The state was characterized as the law and order state and its role was conceived to be negative as its internal extended primarily to defending the country from external aggression, maintaining law and order within the country dispensing justice to its subjects and collecting a few taxes to finance these activities. It was era of free enterprise. The management of social and economic life was not regarded as government responsibility. But *laissez faire* doctrine resulted in human misery. It came to be realized that the bargaining position of every person was not equal and uncontrolled contractual freedom led to the exploitation of weaker sections by the stronger *e.g.*, of the labour by the management in industries. On the one hand, slums, unhealthy and dangerous conditions of work, child labour wide spread poverty and exploitation of masses, but on the other hand, concentration of wealth in a few hands, became the order of the day. It came to be recognized that the state should take active interest in ameliorating the conditions of poor. This approach gave rise to the favoured state intervention in and social control and regulation of individual enterprise. The state started to act in the interests of social justice; it assumed a " positive" role. In course of time, out of dogma of collectivism emerged the concept of " Social Welfare State" which lays emphasis on the role of state as a vehicle of socio-economic regeneration and welfare of the people.

Thus the growth of administrative law is to be attributed to a change of philosophy as to the role and function of state. The shifting of gears from ***laissez faire state*** to ***social welfare state*** has resulted in change of role of the state. This trend may be illustrated very forcefully by reference to the position in India. Before 1947, India was a police state. The ruling foreign power was primarily interested in strengthening its own domination; the administrative machinery was used mainly with the object in view and the civil service came to be designated as the "steel frame". The state did not concern itself much with the welfare of the

NOTES

people. But all this changed with the advent of independence with the philosophy in the Indian constitution the preamble to the constitution enunciates the great objectives and the socioeconomic goals for the achievement of which the Indian constitution has been conceived and drafted in the mid-20th century an era when the concept of social welfare state was predominant. It is thus pervaded with the modern outlook regarding the objectives and functions of the state. it embodies a distinct philosophy which regards the state as on organ to secure good and welfare of the people this concept of state is further strengthened by the Directive Principles of state policy which set out the economic, social and political goals of Indian constitutional system. These directives confer certain non-justiceable rights on the people, and place the government under an obligation to achieve and maximize social welfare and basic social values of life education, employment, health etc. In consonance with the modern beliefs of man, the Indian constitution sets up machinery to achieve the goal of economic democracy along with political democracy, for the latter would be meaningless without former.

Therefore, the attainment of socio-economic justice being a conscious goal of state policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with state powerholder. The Administrative law is an important weapon for bringing about harmony between power and justice. The basic law of the land *i.e.*, the constitution governs the administrators.

Administrative law essentially deals with location of power and the limitations thereupon. Since both of these aspects are governed by the constitution, we shall survey the provisions of the constitution, which act as sources of limitations upon the power of the state. This brief outline of the Indian constitution will serve the purpose of providing a proper perspective for the study of administrative law.

India's Constitution is a very lengthy, elaborate and detailed document. It consists of 395 Articles arranged under 22 parts and 9 schedules. It is probably the longest of the organic law now extant in the world. Several reasons have contributed to the prolixity of the Indian Constitution.

Firstly, the Constitution deals with the organization and structure not only of the central Government but also of the states.

Secondly, in a federal constitution, Center-State relationship is a matter of crucial importance. While other federal constitutions have only skeletal provisions on this matter the Indian Constitution has detailed norms.

Thirdly, the Constitution has reduced to writing many unwritten conventions of the British Constitution as for example, the principle of collective responsibility of the Ministers, parliamentary procedure etc.

NOTES

Fourthly, there exist various communities and groups in India. To remove mutual distrust among them, it was felt necessary to include in the Constitution detailed provisions on Fundamental Rights, safeguards to minorities, Scheduled tribes scheduled castes and backward classes.

Fifthly, to promote the social welfare concept on which the state of India is to be based. The constitution includes Directive Principles of State Policy.

Lastly, the Constitution contains not only the fundamental principles of governance but also many administrative details, such as the provisions regarding citizenship, official languages, government services, electoral machinery etc. In other constitutions, these are usually left to be regulated by the ordinary law of the land. The framers of the Indian Constitution however felt that unless these provisions were contained in the Constitution, an infant democracy might find itself in difficulties, and the smooth and efficient working of the Constitution and the democratic process in the country might be jeopardized. The form of administration has a close relation with the form of the Constitution and the former must be appropriate to the latter. It is quite possible to pervert the constitutional mechanism, without changing its form, by merely changing the form of the administration and making it inconsistent with, and opposed to, the spirit of the constitution. Since India was emerging as an independent country after a long spell of foreign rule, the country lacked democratic values. The constitution-makers therefore thought it prudent not to take unnecessary risks, and to incorporate in the constitution itself the from of administration as well, instead of leaving it to the legislature, so that the whole mechanism may become viable.

The preamble to the Constitution declares India to be a Sovereign Democratic Republic. The term 'Sovereign' denotes that India is subject to no external authority. The term 'democratic' signifies that India has a parliamentary from of government, which means a government responsible to an elected legislature.

The preamble to the Constitution enunciates the great objectives and the socio-economic goals for the achievement of which the Indian Constitution has been established. These are: to secure to all citizens of India social, economic and political justice; to secure to all Indian citizens liberty of thought, expression, belief, faith and worship; to secure to them equality of status and opportunity, and to promote among them fraternity so as to secure the dignity of the Individual and the unity of the nation. The Indian Constitution has been conceived and drafted in the mid-twentieth century-an era when the concept of social welfare state is predominant. It is thus pervaded with the modern outlook regarding the objectives and functions of the state. It embodies a distinct philosophy of government, and, explicitly declares that India will be organized as a social welfare

NOTES

state, *i.e.*, a state that renders social services to the people and promotes their general welfare. In the formulations and decelerations of the social objectives contained in the preamble, one can clearly discern the impact of the modern political philosophy, which regards the state as an organ to secure the good and welfare of the people. This concept of a welfare state is further strengthened by the Directive Principles of State Policy, which set out the economic, social and political goals of the Indian constitutional system. These directives confer certain non-justiceable rights on the people, and place the governments under an obligation to achieve and maximize social welfare and basic social values like education, employment, health etc. In consonance with the modern beliefs of man, the Indian Constitution sets up a machinery to achieve the goal of economic democracy along with political democracy, for the latter would be meaningless without the former in a poor country like India.

India is a country of religions. There exist multifarious religious groups in the country but, in spite of this, the Constitution stands for a secular state of India.. The essential basis of the Indian Constitution is that all citizens are equal, and that the religion of a citizen is entirely irrelevant in the matter of his fundamental rights. The Constitution answers equal freedom for all religions and provide that the religion of the citizen has nothing to do in socio-economic maters.

The Indian Constitution has a chapter on Fundamental Rights and thus guarantees to the people certain basic rights and freedoms, such as, inter alia, equal protection of laws, freedom of speech and expression freedom of worship and religion. Freedom of assembly and association, freedom to move freely and to reside and settle an where in India, freedom to follow any occupation, trade or business, freedom of person, freedom against double jeopardy and against export facto laws. Untouchables, the age-old scourge afflicting the Hindu society, have been formally abolished. The people can claim their Fundamental Rights against the state subject to some restrictions, which the state can impose in the interests of social control. These restrictions on Fundamental Rights are expressly mentioned in the Constitution itself and, therefore, these rights can be qualified or a bridged only to the extent laid down. These rights, in substance, constitute inhibitions on the legislative and executive organs of the state. No law or executive action infringing a Fundamental Right can be regarded as valid. In this way, the Constitution demarcates an area of individual freedom and liberty wherein government cannot interfere. The judiciary ensures an effective and speedy enforcement of these rights. Since the inauguration of the Constitution, many significant legal battles have been fought in the area of Fundamental Rights and, thus, a mass of interesting case law has come into being in this area.

The Indian society lacks homogeneity, as there exist differences of religion, language, culture, etc. There are sections of people who are comparatively weaker

NOTES

than others-economically, socially and culturally and their lot can be ameliorated only when the state makes a special effort to that end. Mutual suspicion and distrust exist between various religious and linguistic groups. To promote a sense of security among the minorities, to ameliorate the conditions of the depressed and backward classes, to make them useful members of society, to weld the diverse elements into one national and political stream, the Constitution contains a liberal scheme of safeguards to minorities, backward classes and scheduled castes. Provisions have thus been made, inter alia, to reserve seats in the State Legislatures and Lok Sabha and to make reservations services, for some of these groups, to promote the welfare of the depressed and backward classes and to protect the languages and culture of the minorities.

India has adopted adult suffrage as a basis of elections to the Lok Sabha and the State Legislative Assemblies. Every citizen, male or female, who has reached the age of 18 years or over, has a right to vote without any discrimination. It was indeed a very bold step on the part of the constitutionmakers to adopt adult suffrage in a country of teeming millions of illiterate people, but they did so for some very sound reasons. If democracy is to be broad-based and the system of government is to have the ultimate sanction of the people as a whole, in a country like India where large masses of people are poor an illiterate, the introduction of any property or educational qualification for exercising the franchise would have amounted to a negation of democratic principles. Any such qualification would have disenfranchised a large number of depressed people. Further, it cannot be assumed that a person with a bare elementary education is in a better position to exercise the franchise are and choose his representatives accordingly.

A notable feature of the Constitution is that it accords a dignified and crucial position to the judiciary. Well-ordered and well-regulated judicial machinery had been introduced in the country with the Supreme Court at the apex. The jurisdiction of the Supreme Court is very broadly worded. It is a general court of appeal from the High Court, is the ultimate arbiter in all-constitutional matters and enjoys an advisory jurisdiction. It can hear appears from any court or tribunal in the country and can issue writ for enforcing the Fundamental Rights. There is thus a good deal of truth in the assertion that the highest court in any other federation. There is a High Court in each State.

The High Courts have wide jurisdiction and have been constituted into important instruments of justice. The most signification aspect of their jurisdiction is the power to issue writs.

The judiciary in India has been assigned role to play. It has to dispense justice not only between one person and another, but also between the state and the citizens. It interprets the constitution and acts as its protector and guardian by keeping all authorities legislative, executive, administrative, judicial and

NOTES

quasijudicial-within bounds. The judiciary is entitled to scrutinize any governmental action in order to assess whether or to it conforms to the constitution and the valid laws made there under. The judiciary has powers to protect people's Fundamental Rights from any unreasonable encroachment by any organ of the state. The judiciary supervises the administrative process in the country, and acts as the balance wheel of federalism by settling disputes between the center and the states or among the state inter se.

India's Constitution is of the federal type. It established a dual polity, a two tier governmental system with the Central Government at one level and the state Governments at the other. The Constitution marks off the sphere of action of each level of government by devising an elaborate scheme of distribution of legislative, administrative, and financial powers between the Centre and the States. A government is entitled to act within its assigned field and cannot go out of it, or encroach on the field assigned to the other government.

Thus the **Constitution of India** is having significant effect on laws including **administrative law**. It is under this fundamental laws are made and executed, all governmental authorities and the validity of their functioning adjudged. No legislature can make a law and no governmental agency can act, contrary to the constitution no act, executive, legislative, judicial or quasijudicial, of any administrative agency can stand if contrary to the constitution. The constitution thus conditions the whole government process in the country. The judiciary is obligated to see any governmental organ does not violate the provisions of the constitution. This function of the judiciary entitles it to be called as guardian of the constitution.

Today in India, the Administrative process has grown so much that it will not be out of place to say that today we are not governed but administered. It may be pointed out that the constitutional law deals with fundamentals while administrative with details. The learned author, Sh. I.P. Messey, has rightly pointed out, whatever may be the arguments and counter arguments, the fact remains that the administrative law is recognized as separate, independent branch of legal discipline.

Though at times the disciplines of constitutional law and administrative law may over lap. Further clarifying the point he said the correct position seems to be that if one draws two circles of administrative law and constitutional law at a certain place they may over lap and this area may termed as watershed in administrative law.

In India, in the Watershed one can include the whole control mechanism provided in the constitution for the control of the administrative authorities that is article 32, 226,136,300 and 311.

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1.11 FUNDAMENTAL CONSTITUTIONAL PRINCIPLES RELATED TO ADMINISTRATIVE LAW

We are much used to the division of governmental power amongst the traditional three arms of government – the legislature, the executive and the judiciary. Under the doctrine of separation of powers, each of the three-some is restricted to perform within the ambit of its functions without, in any way, interfering with the duty of another. But further constitutional provisions limit the applicability of the doctrine in its classical manifestation.

However, in administrative law, the doctrine is inapplicable. Administrative agencies perform the duties that the three organs of government perform, that is, law-making, implementation, and enforcement. Because an agency is created not to observe the doctrine and since its activities negate any commitment to the doctrine, it is, therefore, right to conclude that the doctrine is irrelevant to it.

What we have said about administrative agencies is more or less equally true for the military regimes. Operating under the doctrine of legislative supremacy, the military establishment fuses legislative functions with executive functions so much so that members of the legislature are almost invariably members of the executive.

Separation of Power

The doctrine of Separation of Powers is of ancient origin. The history of The origin of the doctrine is traceable to Aristotle. In the 16th and 17th Centuries, French philosopher John Boding and British Politician Locke respectively had expounded the doctrine of separation of powers. But it was Montesquieu, French jurist, who for the first time gave it a systematic and scientific formulation in his book 'Esprit des Lois' (The spirit of the laws).

Montesquieu's view Montesquieu said that if the Executive and the Legislature are the same person or body of persons, there would be a danger of the Legislature enacting oppressive laws which the executive will administer to attain its own ends, for laws to be enforced by the same body that enacts them result in arbitrary rule and makes the judge a legislator rather than an interpreter of law. If one person or body of persons could exercise both the executive and judicial powers in the same matter, there would be arbitrary powers, which would amount to complete tyranny, if the legislative power would be added to the power of that person. The value of the doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons. The different organs of government should thus be prevented from encroaching on the province of the other organ.

This theory has had different application in France, USA and England. In France, it resulted in the rejection of the power of the courts to review acts of the

NOTES

legislature or the executive. The existence of separate administrative courts to adjudicate disputes between the citizen and the administration owes its origin to the theory of separating of powers. The principle was categorically adopted in the making of the Constitution of the United States of America. There, the executive power is vested in the president. Article the legislative power in congress and the judicial power in the Supreme Court and the courts subordinates thereto. The President is not a member of the Congress. He appoints his secretaries on the basis not of their party loyalty but loyalty to himself. His tenure does not depend upon the confidence of the Congress in him: He cannot be removed except by impeachment, However, the United States constitution makes departure from the theory of strict separation of powers in this that there is provision for judicial review and the supremacy of the ordinary courts over the administrative courts or tribunals.

In the ***British Constitution*** the Parliament is the Supreme legislative authority. At the same time, it has full control over the Executive. The harmony between the Legislator and the (Executive) is secured through the Cabinet. The Cabinet is collectively responsible to the Parliament. The Prime Minister is the head of the party in majority and is the Chief Executive authority. He forms the Cabinet. The Legislature and the Executive are not quite separate and independent in England, so far as the Judiciary is concerned its independence has been secured by the Act for Settlement of 1701 which provides that the judges hold their office during good behaviour, and are liable to be removed on a presentation of addresses by both the Houses of Parliament. They enjoy complete immunity in regard to judicial acts.

In India, the executive is part of the legislature. The President is the head of the executive and acts on the advice of the Council of Ministers. Article 53 and 74 (1) He can be impeached by Parliament. Article 56 (1) (b) read with Art 61, Constitution. The Council of Ministers is collectively responsible to the Lok Sabha Article 75 (3) and each minister works during the pleasure of the President. Article 75 (2) If the Council of Ministers lose the confidence of the House, it has to resign.

Functionally, the President's or the Governor's assent is required for all legislations. (Articles 111,200 and Art 368). The President or the Governor has power of making ordinances when both Houses of the legislature are not in session. (Articles 123 and 212). This is legislative power, and an ordinance has the same status as that of a law of the legislature. ***(AK Roy v Union of India AIR 1982 SC 710)*** The President or the Governor has the power to grant pardon (Articles 72 and 161) The legislature performs judicial function while committing for contempt those who defy its orders or commit breach of privilege (Articles 105 (3) 194 (3) Thus, the executive is dependent on the Legislature and while it performs some

legislative functions such as subordinate it, also performs some executive functions such as those required for maintaining order in the house.

There is, however, considerable institutional separation between the judiciary and the other organs of the government. *(See Art 50)*

The Judges of the Supreme Court are appointed by the President in consultation with the Chief justice of India and such of the judges of the supreme Court and the High Courts as he may deem necessary for the purpose. *(Article 124 (2))*

The Judges of the High Court are appointed by the President after consultation with the Chief Justice of India, the Governor of the state, and, in the case of appointment of a judge other than the Chief justice, the Chief Justice of the High Court(Article 217 (1).)

It has now been held that in making such appointments, the opinion of the Chief justice of India shall have primacy. (Supreme Court Advocates on Record Association.) The judges of the high Court and the judges of the Supreme Court cannot be removed except for misconduct or incapacity and unless an address supported by two thirds of the members and absolute majority of the total membership of the House is passed in each House of Parliament and presented to the President Article 124 (3) An impeachment motion was brought against a judge of the Supreme court, Justice Ramaswami, but it failed to receive the support of the prescribed number of members of Parliament. The salaries payable to the judges are provided in the Constitution or can be laid down by a law made by Parliament. Article 125 (1) and Art 221 (1).

Every judge shall be entitled to such privileges and allowances and to such rights in respect of absence and pension, as may from time to time be determined by or under any law made by Parliament and until so determined, to such privileges, allowance and rights as are specified in the Second Schedule. Neither the privileges nor the allowance nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

Appointments of persons to be, and the posting and promotion of, district judges in any state shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such state (Article 233) The control over the subordinate courts is vested in the acts of the Legislature as well as the executive. The Supreme Court has power to make rules (Article 145) and exercises administrative control over its staff.

The judiciary has power to enforce and interpret laws and if they are found in violation of any provision of the Constitution, it can declare them unconstitutional and therefore, void. It can declare the executive action void if it is found against any provisions of the Constitution. Article 50 provides that the State shall take steps to separate the judiciary from the executive.

NOTES

Thus, the three organs of the Government (*i.e.*, the Executive, the Legislature and the Judiciary) are not separate. Actually the complete demarcation of the functions of these organs of the Government is not possible.

The Constitution of India does not recognize the doctrine of separation of power in its absolute rigidity, but the functions of the three organs of the government have been sufficiently differentiated. ***(Ram Jawaya v. State of Punjab, AIR 1955 SC 549)*** None of the three of organs of the Government can take over the functions assigned to the other organs.***(Keshanand Bharti v. State of Kerala, AIR 1973 SC 1461, Asif Hameed v. State of J&K 1989 AIR, SC 1899)***

In State of Bihar v. Bihar Distillery Ltd., ***(AIR 1997 SC 1511)*** the Supreme Court has held that the judiciary must recognize the fundamental nature and importance of the legislature process and must accord due regard and deference to it. The Legislative and Executive are also expected to show due regard and deference to the judiciary. The Constitution of India recognizes and gives effect to the concept of equality between the three organs of the Government. The concept of checks and balance is inherent in the scheme.

Rule of Law

The Expression " Rule of Law" plays an important role in the administrative law. It provides protection to the people against the arbitrary action of the administrative authorities. The expression 'rule of law' has been derived from the French phrase 'la Principle de legality'. *i.e.*, a government based on the principles of law. In simple words, the term 'rule of law, indicates the state of affairs in a country where, in main, the law rules. Law may be taken to mean mainly a rule or principle which governs the external actions of the human beings and which is recognized and applied by the State in the administration of justice.

Historical Background

This concept of rule of law (which is synonymously referred to as *supremacy of law* or *constitutional supremacy*) is of great antiquity dating back to Greek times. The Greek philosopher, Aristotle said that the rule of law is preferable to the rule of any individual. There was a time when the king could do no wrong. It was not really a factual statement to say for all it meant was that the king was above the law. But Henry De Bracton wrote in the 13th century that "the world is governed by law, human or divine" and stated further that :

> "The King himself ought not to be subject to man, but subject to God and to the law, because the law makes him King."

Of course Bracton was right for saying the King can do no wrong. That was then. But in contemporary times, that statement belongs to the trashcan of history. Notice how erstwhile government officials' individual responsibility is frequently

being engaged domestically and internationally for their ignoble role in violating the human rights of other persons. Note that rule of law is closely connected with such concepts as due process, natural law, democracy, fairness, etc.

Meaning of Rule of Law

Rule of law primarily means that everything must be done in accordance with the law. This implies that governmental organs and agencies must act in such a way that their conduct against the life, liberty and property of persons are legally justified or founded. One of the most notable exponents of the concept is Albert Venn Dicey, Professor of English Law at Oxford. He recognized rule of law as comprising three meanings as follows :

(a) That everything must be done according to law, that is, that there is the absolute predominance of regular laws which excludes arbitrariness, prerogative or wide discretionary powers. It means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government ... a man may be punished for a breach of law, but he can be punished for nothing else.

(b) Equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.

Recall that Dicey contrasted the rule of law with the *droit administratif* of France. In the system obtainable in France, there are specialized courts established to hear matters involving government officials. In other words, the courts that determined issues amongst private persons were different from the ones that handled matters concerning public officials. This practice was declared by Dicey to be inconsistent with the rule of law. And because such dual court system was non-existent in the United Kingdom, he had erroneously declared the latter to be lacking in administrative law. He was wrong.

He wrote in criticism of the French administrative system which he used as a basis for rejecting the emergence of an administrative arm of government in England. However, the administrative arm of government has become an indispensable or inevitable hallmark of modern system of government with more and more powers entrusted to administrators to do. This is because of the need for the government to be more responsible for the proper functioning of the socio-economic and political system, and the welfare needs of the people.

(c) Ensuring that certain basic rights are guaranteed.

NOTES

Rule of Law is a Dynamic Concept

It does not admit of being readily expressed. Hence, it is difficult to define it. Simply speaking, it means supremacy of law or predominance of law and essentially, it consists of values.

The concept of the rule of Law is of old origin. Edward Coke is said to be the originator of this concept, when he said that the King must be under God and Law and thus vindicated the supremacy of law over the pretensions of the executives. Prof. A.V. Dicey later developed on this concept in the course of his lectures at the Oxford University. Dicey was an individualist; he wrote about the concept of the Rule of law at the end of the golden Victorian era of laissez-faire in England. That was the reason why Dicey's concept of the Rule of law contemplated the absence of wide powers in the hands of government officials. According to him, wherever there is discretion there is room for arbitrariness. Further he attributed three meanings to Rule of Law.

(1) The First meaning of the Rule of Law is that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. ***(The view of Dicey, quoted by Garner in his Book on 'Administrative Law'.)***

(2) The Second Meaning of the Rule of Law is that no man is above law. Every man whatever be his rank or condition. is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals *(Ibid).*

(3) The Third meaning of the rule of law is that the general principle of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the court. ***(View of Dicey, quoted by Garner in his book on Administrative Law, p.11.)***

The view of Dicey as to the meaning of the Rule of Law has been subject of much criticism. The whole criticism may be summed up as follows.

Dicey has opposed the system of providing the discretionary power to the administration. In his opinion providing the discretionary power means creating the room for arbitrariness, which may create as serious threat to individual freedom. Now a days it has been clear that providing the discretion to the administration is inevitable. The opinion of the Dicey, thus, appears to be outdated as it restricts the Government action and fails to take note of the changed conception of the Government of the State.

Dicey has failed to distinguish discretionary powers from the arbitrary powers. Arbitrary power may be taken as against the concept of Rule of Law . In modern times in all the countries including England, America and India, the

NOTES

discretionary powers are conferred on the Government. The present trend is that discretionary power is given to the Government or administrative authorities, but the statute which provides it to the Government or the administrative officers lays down some guidelines or principles according to which the discretionary power is to be exercised. The administrative law is much concerned with the control of the discretionary power of the administration. It is engaged in finding out the new ways and means of the control of the administrative discretion.

According to Dicey the rule of law requires that every person should be subject to the ordinary courts of the country. Dicey has claimed that there is no separate law and separate court for the trial of the Government servants in England. He critcised the system of droit administratif prevailing in France. In France there are two types of courts Administrative Court and Ordinary Civil ourts. The disputes between the citizens and the Administration are decided by the Administrative courts while the other cases, (*i.e.,* the disputes between the citizens) are decided by the Civil Court. Dicey was very critical to the separation for deciding the disputes between the administration and the citizens.

According to Dicey the Rule of Law requires equal subjection of all persons to the ordinary law of the country and absence of special privileges for person including the administrative authority. This proportion of Dicey does not appear to be correct even in England. Several persons enjoy some privileges and immunities. For example, Judges enjoy immunities from suit in respect of their acts done in discharge of their official function. Besides, Public Authorities Protection Act, 1893, has provided special protection to the official. Foreign diplomats enjoy immunity before the Court. Further, the rules of 'public interest privilege may afford officials some protection against orders for discovery of documents in litigation.' Thus, the meaning of rule of law taken by Dicey cannot be taken to be completely satisfactory.

Third meaning given to the rule of law by Dicey that the constitution is the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts is based on the peculiar character of the Constitution of Great Britain.

In spite of the above shortcomings in the definition of rule of law by Dicey, he must be praised for drawing the attention of the scholars and authorities towards the need of controlling the discretionary powers of the administration. He developed a philosophy to control the Government and Officers and to keep them within their powers. The rule of law established by him requires that every action of the administration must be backed by law or must have been done in accordance with law. The role of Dicey in the development and establishment of the concept of fair justice cannot be denied.

NOTES

The concept of rule of law, in modern age, does not oppose the practice of conferring discretionary powers upon the government but on the other hand emphasizing on spelling out the manner of their exercise. It also ensures that every man is bound by the ordinary laws of the land whether he be private citizens or a public officer; that private rights are safeguarded by the ordinary laws of the land *(See Journal of the Indian law Institute, 1958-59, pp. 31-32).*

Thus the rule of law signifies that nobody is deprived of his rights and liberties by an administrative action; that the administrative authorities perform their functions according to law and not arbitrarily; that the law of the land are not unconstitutional and oppressive; that the supremacy of courts is upheld and judicial control of administrative action is fully secured.

Basic Principles of the Rule of Law

- Law is Supreme, above everything and every one. No body is the above law.
- All things should be done according to law and not according to whim.
- No person should be made to suffer except for a distinct breach of law.
- Absence of arbitrary power being hot and sole of rule of law.
- Equality before law and equal protection of law.
- Discretionary should be exercised within reasonable limits set by law.
- Adequate safeguard against executive abuse of powers.
- Independent and impartial Judiciary.
- Fair and Justice procedure.
- Speedy Trial.

Rule of Law and Indian Constitution

In India the Constitution is supreme. The preamble of our Constitution clearly sets out the principle of rule of law. It is sometimes said that planning and welfare schemes essentially strike at rule of law because they affect the individual freedoms and liberty in many ways. But rule of law plays an effective role by emphasizing upon fair play and greater accountability of the administration. It lays greater emphasis upon the principles of natural justice and the rule of speaking order in administrative process in order to eliminate administrative arbitrariness.

Rule of Law and Case law

In an early case S.G. Jaisinghani V. Union of India and others, *(AIR 1967 SC 1427)* the Supreme Court portrayed the essentials of rule of law in a very lucid manner. It observed: " The absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion when conferred upon executive authorities must be continued within clearly defined limits. The rule of law from this points

of view means that decisions should be made by the application of known principles and rules and, in general such decision should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is antithesis of a decision taken in accordance with the rule of law".

The Supreme Court in a case, namely, Supreme Court Advocates on Record Association V. Union of India, *(AIR 1994 SC 268 at p.298)* reiterated that absence of arbitrariness is one of the essentials of rule of law. The Court observed. "For the rule of law to be realistic there has to be rooms for discretionary authority within the operation of rule of law even though it has to be reduced to the minimum extent necessary for proper, governance, and within the area of discretionary authority, the existence of proper guidelines or norms of general application excludes any arbitrary exercise of discretionary authority. In such a situation, the exercise of discretionary authority in its application to individuals, according to proper guidelines and norms, further reduces the area of discretion, but to that extent discretionary authority has to be given to make the system workable.

The recent expansion of rule of law in every field of administrative functioning has assigned it is a place of special significance in the Indian administrative law. The Supreme Court, in the process of interpretation of rule of law *vis-à-vis* operation of administrative power, in several cases, emphasized upon the need of fair and just procedure, adequate safeguards against any executive encroachment on personal liberty, free legal aid to the poor and speedy trail in criminal cases as necessary adjuncts to rule of law. Giving his dissenting opinion in the Death penalty case, Mr. Justice Bhagwati explains fully the significance of rule of law in the following words :

> "The rule of law permeates the entire fabric of the Constitution and indeed forms one of its basic features. The rule of law excludes arbitrariness, its postulate is 'intelligence without passion' and reason free from desire. Wherever we find arbitrariness or unreasonableness there is denial of the rule of law. Law in the context of rule of law does not mean any law enacted by legislative authority, howsoever arbitrary, despotic it may be, otherwise even in dictatorship it would be possible to say that there is rule of law because every law made by the dictator, however arbitrary and unreasonable, has to be obeyed and every action has to be taken in conformity with such law. In such a case too even where the political set-up is dictatorial it is the law that governs the relationship between men."

The modern concept of the Rule of Law is fairly wide and, therefore, sets up an idea for government to achieve. This concept was developed by the

NOTES

International Commission of Jurists, known as Delhi Declaration, 1959, which was later on confirmed at Lagos in 1961. According to this formulation, the Rule of Law implies that the functions of the government in a free society should be so exercised as to create conditions in which the dignity of man as an individual is upheld.

During the last few years the Supreme Court in India has developed some fine principles of Third World jurisprudence. Developing the same new constitutionalism further, the Apex Court in Veena Seth v. State *(AIR 1983 SC 339)* of Bihar extended the reach of the Rule of Law to the poor and the downtrodden, the ignorant and the illiterate, who constitute the bulk of humanity in India, when it ruled that the Rule of Law does not exist merely for those who have the means to fight for their rights and very often do so for the perpetuation of the status quo, which protects and preserves their dominance and permits them to exploit a large section of the community. The opportunity for this ruling was provided by a letter written by the Free Legal Aid Committee, Hazaribagh, Bihar drawing its attention to unjustified and illegal detention of certain prisoners in jail for almost two or three decades.

Recent aggressive judicial activism can only be seen as a part of the efforts of the Constitutional Courts in India to establish rule-of-law society, which implies that no matter how high a person, may be the law is always above him. Court is also trying to identify the concept of rule of law with human rights of the people. The Court is developing techniques by which it can force the government not only to submit to the law but also to create conditions where people can develop capacities to exercise their rights properly and meaningfully. The public administration is responsible for effective implementation of rule of law and constitutional commands, which effectuate fairly the objective standards laid down by law. Every public servant is a trustee of the society and is accountable for due effectuation of constitutional goals. This makes the concept of rule of law highly relevant to our context.

Droit Administratif

French administrative law is known as *Droit Administratif* which means a body of rules which determine the organization, powers and duties of public administration and regulate the relation of the administration with the citizen of the country. *Droit Administrative* does not represent the rules and principles enacted by Parliament. It contains the rules developed by administrative courts.

Napoleon Bonaparte was the founder of the *Droit administrative*. It was he who established the Conseil d'Etat. He passed an ordinance depriving the law courts of their jurisdiction on administrative matters and another ordinance that such matters could be determined only by the Conseil d'Etat.

NOTES

Waline, the French jurist, propounds three basic principles of *Droit administrative* :

1. the power of administration to act *suo motu* and impose directly on the subject the duty to obey its decision;
2. the power of the administration to take decisions and to execute them *suo motu* may be exercised only within the ambit of law which protects individual liberties against administrative arbitrariness;
3. the existence of a specialized administrative jurisdiction.

One good result of this is that an independent body reviews every administrative action The ***Conseil d'Etat*** is composed of eminent civil servants, deals with a variety of matters like claim of damages for wrongful acts of Government servants, income-tax, pensions, disputed elections, personal claims of civil servants against the State for wrongful dismissal or suspension and so on. It has interfered with administrative orders on the ground of error of law, lack of jurisdiction, irregularity of procedure and *detournement depouvior* (misapplication of power). It has exercised its jurisdiction liberally.

Main Characteristic Features of Droit Administratif

The following characteristic features are of the *Droit Administratif* in France:

1. Those matters concerning the State and administrative litigation falls within the jurisdiction of administrative courts and cannot be decided by the land of the ordinary courts.
2. Those deciding matters concerning the State and administrative litigation, rules as developed by the administrative courts are applied.
3. If there is any conflict of jurisdiction between ordinary courts and administrative court, it is decided by the tribunal des conflicts.
4. *Conseil d'Etat* is the highest administrative court.

Prof. Brown and *Prof. J.P. Garner* have attributed to a combination of following factors as responsible for its success —

(i) The composition and functions of the Conseil d'Etat itself;

(ii) The flexibility of its case-law;

(iii) The simplicity of the remedies available before the administrative courts;

(iv) The special procedure evolved by those courts; and

(v) The character of the substantive law, which they apply.

Despite the obvious merits of the French administrative law system, *Prof. Dicey* was of the opinion that there was no rule of law in France nor was the system so satisfactory as it was in England. He believed that the review of administrative action is better administered in England than in France.

NOTES

The system of *Droit Administratif* according to Dicey, is based on the following two ordinary principles which are alien to English law—

Firstly, that the government and every servant of the government possess, as representative of the nation, a whole body of special rights, privileges or prerogatives as against private citizens, and the extent of rights, privileges or considerations which fix the legal rights and duties of one citizen towards another. An individual in his dealings with the State does not, according to French law; stand on the same footing as that on which he stands in dealing with his neighbor.

Secondly, that the government and its officials should be independent of and free from the jurisdiction of ordinary courts.

It was on the basis of these two principles that Dicey observed that *Droit Administratif* is opposed to rule of law and, therefore, administrative law is alien to English system. But this conclusion of *Dicey* was misconceived. *Droit Administratif,* that is, administrative law was as much there in England as it was in France but with a difference that the French *Droit Administratif* was based on a system, which was unknown to English law. *In his later days after examining* the things closely, *Dicey* seems to have perceptibly modified his stand.

Despite its overall superiority, the French administrative law cannot be characterized with perfection. Its glories have been marked by the persistent slowness in the judicial reviews at the administrative courts and by the difficulties of ensuring the execution of its last judgment. Moreover, judicial control is the only one method of controlling administrative action in French administrative law, whereas, in England, a vigilant public opinion, a watchful Parliament, a self-disciplined civil service and the jurisdiction of administrative process serve as the additional modes of control over administrative action. By contrast, it has to be conceded that the French system still excels its counterpart in the common law countries of the world.

1.12 SUMMARY

- Administrative Law is, in fact, the body of those which rules regulate and control the administration. Administrative Law is that branch of law that is concerned with the composition of power, duties, rights and liabilities of the various organs of the Government that are engaged in public administration.
- *Austin* has defined administrative Law. As the law, which determines the ends and modes to which the sovereign power shall be exercised. In his view, the sovereign power shall be exercised either directly by the monarch or directly by the subordinate political superiors to whom portions of those are delegated or committed in trust.

- Administrative law and constitutional law are of common public law ancestry. They are both about power and accountability – power of legislation and the accountability of those vested with the authority of enactment and enforcement. Administrative law and constitutional law border on the distribution and exercise of power within the State, and the relationship between the State and the individual.
- Administrative law has been characterized as the most "outstanding legal development of the 20th century". It does not mean the absence of the concept before 20th century but it signifies that **administrative law has grown and developed tremendously, in quantity, qualify and relative significance, in the twentieth century,** that it has become more articulate and definite as a system in democratic countries.
- The doctrine of Separation of Powers is of ancient origin. The history of The origin of the doctrine is traceable to Aristotle. In the 16th and 17th Centuries, French philosopher John Boding and British Politician Locke respectively had expounded the doctrine of separation of powers. But it was Montesquieu, French jurist, who for the first time gave it a systematic and scientific formulation in his book 'Esprit des Lois' (The spirit of the laws).
- Rule of law primarily means that everything must be done in accordance with the law. This implies that governmental organs and agencies must act in such a way that their conduct against the life, liberty and property of persons are legally justified or founded.
- Administrative Law is not a new phenomenon in India. Its existence can be traced right since the early days of the British rule over India. Thus the stage carriage Act, 1861, which prohibited the playing of stage carriages without a license indicates the beginning of administrative licensing. Delegated legislation was authorized by the Northern India canal and Drainage ACt, 1873 and the opium Act, 1878.

1.13 REVIEW QUESTIONS

1. Why is administrative law needed? Discuss.
2. What are the major characteristics of administrative law?
3. What are the main sources of administrative law?
4. State the comparision and contrast between administrative and constitutional law.
5. Discuss the development of administrative law.

6. *What do you understand by seperation of power?*

1.14 FURTHER READINGS

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CHAPTER— 2

ADMINISTRATIVE POWERS AND PROCESS (ADMINISTRATIVE AGENCIES)

STRUCTURE

2.1 Learning Objectives
2.2 Introduction
2.3 Rule Making or Administrative Action
2.4 Delegated Legislation
— Meaning and Definition
— Reasons for the Growth of Delegated Ligislation
— Types of Delegated Legislation
— Advantages of Delegated Legislation
— Disadvantages of Delegated Legislation
2.5 Nature and Scope of Delegated Legislation
2.6 Types of Delegated Legislative Power in India
2.7 Summary
2.8 Review Questions
2.9 Further Readings

2.1 LEARNING OBJECTIVES

After studying the chapter, students will be able to :

- State the process of rule making or administrative action;
- Explain the meaning and importance of delegated legilation;
- Discuss the nature and scope of delegated legislation;
- Understand the advantages and disadvantages of delegated legislation.

2.2 INTRODUCTION

We have seen that the Constitution or the legislature can delegate power to an administrative agency. In exercising such power, the agency enacts delegated legislation by making rules, regulations, etc. But, for the agency to do this, there are processes or procedures it must follow. That is the crux of decision and rule making.

NOTES

Administrative decision or rule in an inclusive and enumerative manner, it means or includes :

(a) Administrative laws, rules and regulations;

(b) Administrative decision, policy, determinations, or directives to act one way or another; and

(c) The choice of a course of action from among alternatives to deal with a public problem.

2.3 RULE MAKING OR ADMINISTRATIVE ACTION

Administrative action is a comprehensive term and defies exact definition. In modern times the administrative process is a by-product of intensive form of government and cuts across the traditional classification of governmental powers and combines into one all the powers, which were traditionally exercised by three different organs of the State.

Therefore, there is general agreement among the writers on administrative law that any attempt of classifying administrative functions or any conceptual basis is not only impossible but also futile. Even then a student of administrative law is compelled to delve into field of classification because the present-day law especially relating to judicial review freely employs conceptual classification of administrative action. Thus, speaking generally, an administrative action can be classified into four categories :

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

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

(iii) Rule-application action or administrative action.

(iv) Ministerial action.

(i) Rule-making action or quasi-legislative action – Legislature is the law-making organ of any state. In some written constitutions, like the American and Australian Constitutions, the law making power is expressly vested in the legislature. However, in the Indian Constitution though this power is not so expressly vested in the legislature, yet the combined effect of Articles 107 to III and 196 to 201 is that the law making power can be exercised for the Union by Parliament and for the States by the respective State legislatures. It is the intention of the Constitution-makers that those bodies alone must exercise this law-making power in which this power is vested. But in the twentieth Century today these legislative bodies cannot give that quality and quantity of laws, which are required for the efficient functioning of a modern intensive form of government. Therefore, the delegation of law-making power to the administration is a compulsive necessity. When any administrative authority exercises the law-making power delegated to it by the legislature, it is known as the rule-making power delegated to it by the legislature,

it is known as the rule-making action of the administration or quasi-legislative action and commonly known as delegated legislation.

Rule-making action of the administration partakes all the characteristics, which a normal legislative action possesses. Such characteristics may be generality, prospectivity and a behaviour that bases action on policy consideration and gives a right or a disability. These characteristics are not without exception. In some cases, administrative rule-making action may be particularised, retroactive and based on evidence.

(ii) Rule-decision action or quasi-judicial action – Today the bulk of the decisions which affect a private individual come not from courts but from administrative agencies exercising ad judicatory powers. The reason seems to be that since administrative decision-making is also a by-product of the intensive form of government, the traditional judicial system cannot give to the people that quantity of justice, which is required in a welfare State.

Administrative decision-making may be defined, as a power to perform acts administrative in character, but requiring incidentally some characteristics of judicial traditions. On the basis of this definition, the following functions of the administration have been held to be quasi-judicial functions :

1. Disciplinary proceedings against students.
2. Disciplinary proceedings against an employee for misconduct.
3. Confiscation of goods under the sea Customs Act, 1878.
4. Cancellation, suspension, revocation or refusal to renew license or permit by licensing authority.
5. Determination of citizenship.
6. Determination of statutory disputes.
7. Power to continue the detention or seizure of goods beyond a particular period.
8. Refusal to grant 'no objection certificate' under the Bombay Cinemas (Regulations) Act, 1953.
9. Forfeiture of pensions and gratuity.
10. Authority granting or refusing permission for retrenchment.
11. Grant of permit by Regional Transport Authority.

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

(iii) Rule-application action or administrative action – Though the distinction between quasi-judicial and administrative action has become blurred, yet it does not mean that there is no distinction between the two. If two persons are wearing a similar coat, it does not mean that there is no difference between them. The

NOTES

difference between quasi-judicial and administrative action may not be of much practical consequence today but it may still be relevant in determining the measure of natural justice applicable in a given situation.

In A.K. Kraipak v. Union of India, the Court was of the view that in order to determine whether the action of the administrative authority is quasi-judicial or administrative, one has to see the nature of power conferred, to whom power is given, the framework within which power is conferred and the consequences.

Therefore, administrative action is the residuary action which is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. It does not decide a right though it may affect a right. However, it does not mean that the principles of natural justice can be ignored completely when the authority is exercising "administrative powers". Unless the statute provides otherwise, a minimum of the principles of natural justice must always be observed depending on the fact situation of each case.

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

(1) Making a reference to a tribunal for adjudication under the Industrial Disputes Act.

(2) Functions of a selection committee.

Administrative action may be statutory, having the force of law, or non statutory, devoid of such legal force. The bulk of the administrative action is statutory because a statute or the Constitution gives it a legal force but in some cases it may be non-statutory, such as issuing directions to subordinates not having the force of law, but its violation may be visited with disciplinary action. Though by and large administrative action is discretionary and is based on subjective satisfaction, however, the administrative authority must act fairly, impartially and reasonable.

Therefore, at this stage it becomes very important for us to know what exactly is the difference between Administrative and quasi-judicial Acts. Thus broadly speaking, acts, which are required to be done on the subjective satisfaction of the administrative authority, are called 'administrative' acts, while acts, which are required to be done on objective satisfaction of the administrative authority, can be termed as quasi-judicial acts. Administrative decisions, which are founded on pre-determined standards, are called objective decisions whereas decisions which involve a choice as there is no fixed standard to be applied are so called subjective decisions. The former is quasi-judicial decision while the latter is administrative decision. In case of the administrative decision there is no legal

obligation upon the person charged with the duty of reaching the decision to consider and weigh, submissions and arguments or to collate any evidence. The grounds upon which he acts and the means, which he takes to inform himself before acting, are left entirely to his discretion. The Supreme Court observed, "It is well settled that the old distinction between a judicial act and administrative act has withered away and we have been liberated from the pestilent incantation of administrative action.

(iv) Ministerial action – A further distillate of administrative action is ministerial action. Ministerial action is that action of the administrative agency, which is taken as matter of duty imposed upon it by the law devoid of any discretion or judgment. Therefore, a ministerial action involves the performance of a definitive duty in respect of which there is no choice. Collection of revenue may be one such ministerial action.

1. Notes and administrative instruction issued in the absence of any,
2. If administrative instructions are not referable to any statutory authority they cannot have the effect of taking away rights vested in the person governed by the Act.

2.4 DELEGATED LEGISLATION

A trend very much in vogue today in all democratic countries is that only a relatively small part of the total legislative output emanates directly from the legislature. The bulk of the legislation is promulgated by the executive known as administrative rule making or delegated legislation. It simply refers to all law making which takes place outside the legislature *i.e.*, in government departments.

Meaning and Definition

Delegated legislation is known by various names such as administration law or rule-making, administrative legislation, sub-ordinate legislation or quasi-legislation. It may be defined as a body of law which is made administratively by means of rule, regulations and orders framed and promulgated by the govt, or some executive authority in pursuance of power conferred on it by an act of legislature.

The committee on ministers power clarifies that the expression "delegated legislation" is used in two senses. In one sense delegated legislation means the exercise of the power of rule-making, delegated to the executive by the legislature, in the second sense, it means the output of the exercise of that power, vis., rules, regulations, order, ordinances, etc. The expression is used here in both the senses. Where the emphasis is one the limits of constitutionally of exercise of such power, the term is used in the first sense; where the emphasis is one the output of concrete rules the term is employed in the second sense.

NOTES

The committee on Ministers Power defined it "as the exercise of minor legislative power by subordinate authorities and bodies in pursuance of statutory authority given by the parliament itself". The situation today has reached a point where delegated legislation outnumbers the legislative enactments. Prof Upendra Baxi has rightly observed that "the Indian Parliament enacted from the period 1973 to 1977 a total number of 302 laws, as against this the total number of statutory orders and rules passed in the same period was approximately 25, 414."

Reasons for the Growth of Delegated Legislation

A number of factors have been responsible for the growth of delegated legislation in the modem democratic state. The modern state functions on a very wide front and manages the day to day lives of people to a very large extent. It directs a major part of the socio-economic development of the people. In 19th century, the state was a negative laissez faire state. Now the concept of Laissez faire state has turned into a welfare state. All this has evolved the necessity of entrusting the executive with greater powers including that of delegated legislation.

The circumstances favouring delegated legislation are as follows :

(1) Pressure on Legislature (Welfare State)

Legislature is too busy a body. It is overburdened with the legislative work. Legislation on everwidering fronts of a modern welfare and service state is not possible without the technique of delegation. It is trite but correct to say that even if today parliament sits all the 365 days in a year and all the 24 hours, it may not give that quantity and quality of law which is required for the proper functioning of a modern govt. Therefore delegation of rule-making power is compulsive necessity.

Lord Thring's has rightly observed, "the necessity for delegation to ministers and others lies in the fact that Parliament has simply no time for the details of the legislation it passes. It is probably the only way in which parliamentary government could, as regards its legislative functions, be carried on.

(2) Technically of Subject Matter

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

(3) Lack of viability and experimentation

Ordinary legislative process suffers from the limitation of lack of viability and experimentation. A law passed by parliament has to be in force till the next

session of Parliament when it can be repealed. Therefore, in situations which require adjustments frequently and experimentation, administrative rule-making is the only answer.

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(4) To meet Unforseen contingencies

Parliament has to provide adequate authority through delegated legislation to take care of emergencies like war, epidemics, floods, earthquakes, drought, violent communal outbursts etc.

(5) Expendiency and Flexibility

Ruler made be departments under delegated legislation can more easily be changed in the light of changing conditions and experience. Delegated legislation, therefore, makes for flexibility and avoids the rigidity of legislative enactments which cannot be amended so easily and quickly.

(6) Public Participation

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

Because of the above factors, delegated legislation, as a technique of modern administration, is now regarded as useful, inevitable and indispensable. It is now characterized as the natural reflection in the sphere of constitutional law of change brought in our lives due to scientific discoveries and technological advances. Hood Phillips observes. The great increases in delegated legislation in modern times is due partly to collectivism and the development of the welfare state and partly to the need to cope with emergencies of various kinds, such as strikes, economic crisis and epidemics".

Types of Delegated Legislation

Classification of administrative rule-making has been done by taking into account different criteria. The committee on Minister's powers distinguished two types of Parliamentary delegation.

(1) Normal Delegation

Normal delegation refers to the subletting of the laws to the executive which does not empower it to deal with the matter of policy, taxation, imprisonment, modification of parliamentary acts etc.

In the normal type of delegated legislation there are two classifications : *(i)* Positive *(ii)* Negative. In positive type areas are defined only on which administrative has to legislate. In negative type areas are defined on which administration can not legislate.

NOTES

(2) Exceptional Type

There are certain exceptional instances of delegated legislation which may be conveniently classified as follows :

(a) Powers to legislate on matters of Principle

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

(c) Power to amend Acts of Parliament.

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

Such exceptional delegation is also known as Henry VIII clause. He was the king of England in the 16th century. He imposed his autocratic will through the instrumentality of Parliament, so he is described as "despot under the forms of law".

Under this clause very wide powers are given to the administrative agencies to make rules including power to amend and repeal. This type of delegation is "delegation running riot". Even extraordinary Henry VIII clause is article 372 (2) of the constitution of India under which the President has been delegated the power to adopt, amend and repeal any law in force to bring it in line with provisions of the constitution and the exercise of such power has been made immune from the scrutiny of the courts.

ADVANTAGES OF DELEGATED LEGISLATION

Delegated legislation, as a technique of modern administration is now regarded as useful, inevitable and indispensable. (committee on ministers powers report). As the British Committee on Ministers powers stated in its report, "the truth is that if parliament were not willing to delegate law making powers parliament would be unable to pass the king and quantity, of legislation which modern public opinion requires". On this reasoning delegated legislation is essential element in the democratic process today.

The advantages of delegated legislation are substantial which may be enumerated as follows :

(1) Delegated legislation saves the time of the Parliament and freeing it from the burden of details, enables it to concentrate on the general principles and important issues of policy.

(2) Delegated legislation can be easily done in consultation with the interest affected. The drafting of the rule may and often does permit meeting between the govt. and the parties at interest and consequently a broad agreement which tends towards voluntary compliance.

(3) Delegated legislation makes for flexibility. Since details are left to be filled up by the executive they may be easily changed in response to fast changing

needs, without necessitating a formal amendment of the act. This elasticity is particularly desirable in field that are undergoing rapid changes as result of quick scientific and technological advances.

(4) Delegated legislation provides for expert legislation. The rules are drafted by experts in the appropriate department who are familiar with the actual conditions. The details can be much better worked out by them than by the ordinary members of the legislature.

(5) Parliament is not always in session. Emergencies, which are not unlikely phenomenons calls for prompt action, therefore it is best to clothe the administrative agencies with the necessary to deal with them by rule-making.

(6) The system of delegated legislation permit experiment being made and thus affords an opportunity, otherwise difficult to ensure. Indeed, making of experiments is possible through rule-making in fields as rural-development, urban planning, land reforms etc.

(7) To meet emergencies like war, cyclone, earthquake, flood, famine, etc., it is essential to give full powers to the executive including the power of regulation by rule-making.

Disadvantages of Delegated Legislation

All over the world there has been a tremendous growth of delegated legislation which means that the legislature is delegating legislative initiative to the administration and that the ministers have been increasingly entrusted with.

And this tendency has been characterised as "New Despotism" or "Bureaucracy Triumphant". This is a threat to individual liberty.

The following criticism are advanced against delegated legislation.

(1) In spite of the inevitability of delegated legislation in the modern state it has to be admitted that the system presents a serious danger to free society. So wide a discretion given to officials creates a bureaucratic regime and may even turn a democracy into despotism and arbitrary rule.

Lord Hewart had in his famous book "New Despotism" very strongly pleaded the practice of delegated legislation. He condemned it because it increases governmental interference in individual activity and liberty. Wide powers of legislation entrusted upon the executive lead to tyranny or absolute despotism.

(2) Even if it is recognised that delegation of certain powers of subordinate legislation are necessary, there still remains the danger of the legislature delegating unlimited powers. The danger is real in India where the Union

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Parliament and state legislature have passed certain "skeleton" laws which confer blanket power upon the executive.

(3) Rule-Making by bureaucracy may over look what is politically feasible. The official may not be able to see what the people do not want to have.

(4) A great power of rule-making into the land of administrative officials may corrupt the administration and ultimately the whole society. Rule makers may be subjected to political pressure and turn the rules to special or private instead of public purposes.

(5) The advantage of flexibility in law may bring about instability and chaos by too frequent changes in rules. The multiplicity of rules and amendments may exhaust the patience and defy the endurance of those who would understand them.

(6) Another danger in the system of delegated legislation is that it may be used to serve the interests of the interested and influential parties as against the interest of the people as a whole.

(7) Delegation may be in such terms as to exclude the control of the courts and deprive the citizens of the protection by the courts. Moreover, even where the courts have the power to protect the citizens, he may find it difficult to avail himself of judicial remedy on account of the procedural difficulties, cost and delay involved.

(8) Inadequate scrutiny by parliament of the rules and regulations makes delegated legislation grow into despotism. It is generally observed that parliamentary scrutiny of delegated legislation has not been adequate and critical and has failed to keep the executive on the rails. The Donoughmore Committee observed that "there is a danger that the servant may be transformed into the master".

(9) Sometimes, the people suffer a loss because the rules and regulation are not known to them. The govt, may take Shelter behind the common law maximum that ignorance of law is no excuse. Though very often the enabling act provides for giving proper publicity to the rules and regulations, but when the arrangements for publicity are inadequate, the interest of the people suffer.

2.5 NATURE AND SCOPE OF DELEGATED LEGISLATION

Delegated legislation means legislation by authorities other than the Legislature, the former acting on express delegated authority and power from the later.

Delegation is considered to be a sound basis for administrative efficiency and it does not by itself amount to abdication of power if restored to within proper limits. The delegation should not, in any case, be unguided and uncontrolled. Parliament and State Legislatures cannot abdicate the legislative power in its essential aspects which is to be exercised by them. It is only a nonessential legislative function that can be delegated and the moot point always lies in the line of demarcation between the essential and nonessential legislative functions.

The essential legislative functions consist in making a law. It is to the legislature to formulate the legislative policy and delegate the formulation of details in implementing that policy. Discretion as to the formulation of the legislative policy is prerogative and function the legislature and it cannot be delegated to the executive. Discretion to make notifications and alterations in an Act while extending it and to effect amendments or repeals in the existing laws is subject to the condition precedent that essential legislative functions cannot be delegated authority cannot be precisely defined and each case has to be considered in its setting.

In order to avoid the dangers, the scope of delegation is strictly circumscribed by the Legislature by providing for adequate safeguards, controls and appeals against the executive orders and decisions.

The power delegated to the Executive to modify any provisions of an Act by an order must be within the framework of the Act giving such power. The power to make such a modification no doubt, implies certain amount of discretion but it is a power to be exercised in aid of the legislative policy of the Act and cannot

(i) travel beyond it, or

(ii) run counter to it, or

(iii) certainly change the essential features, the identity, structure or the policy of the Act.

Under the constitution of India, articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The delegation of legislative power was conceived to be inevitable and therefore it was not prohibited in the constitution. Further, Articles 13(3)(a) of the Constitution of India lays down that law includes any ordinances, order bylaw, rule regulation, notification, etc. Which if found inviolation of fundamental rights would be void. Besides, there are number of judicial pronouncements by the courts where they have justified delegated legislation. For *e.g.*,

In re Delhi Laws Act case, AIR 1961 Supreme Court 332; Vasantlal Magan Bhaiv. State of Bombay, air 1961 SC 4; S. Avtar Singh v. State of Jammu and Kashmir, AIR 1977 J&K 4.

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While commenting on indispensability of delegated legislation JusticeKrishna Iyer, J. rightly observed in the case of Arvinder Singh v. State of Punjab, AIR A1979 SC 321, *that the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility that our massive legi*slature may not get off to a start if they must directly and comprehensively handle legislative business in their plentitude, proliferation and particularization Delegation of some part of legislative power becomes a compulsive necessity for viability.

A provision in a statute which gives an express power to the Executive to amend or repeal any existing law is described in England as Henry viii Clause because the King came to exercise power to repeal Parliamentary laws. The said clause has fallen into disuse in England, but in India some traces of it are found here and there, for example, Article 372 of the Constitution authorizes the president of India to adopt pro Constitutional laws, and if necessary, to make such adaptations and modifications, (whether by way of repeal or amendment) so as to bring them in accord with the provisions of the Constitution. The State Reorganization Act, 1956 and some other Acts similar thereto also contain such a provision. So long as the modification of a provision of statute by the Executive is innocuous and immaterial and does not effect any essential change in the matter.

2.6 TYPES OF DELEGATION OF LEGISLATIVE POWER IN INDIA

There are various types of delegation of legislative power.

1. Skeleton delegation : In this type of delegation of legislative power, the enabling statutes set out broad principles and empowers the executive authority to make rules for carrying out the purposes of the Act. A typical example of this kind is the Mines and Minerals (Regulation and Development) Act, 1948.

2. Machinery type : This is the most common type of delegation of legislative power, in which the Act is supplemented by machinery provisions, that is, the power is conferred on the concerned department of the Government to prescribe–

(i) The kind of forms,

(ii) The method of publication,

(iii) The manner of making returns, and

(iv) Such other administrative details.

In the case of this normal type of delegated legislation, the limits of the delegated power are clearly defined in the enabling statute and they do not include such exceptional powers as the power to legislate on matters of principle or to impose taxation or to amend an act of legislature. The exceptional type covers cases where –

(i) the powers mentioned above are given , or

(ii) the power given is so vast that its limits are almost impossible of definition, or

(iii) while limits are imposed, the control of the courts is ousted.

Such type of delegation is commonly known as the Henry VIII Clause.

An outstanding example of this kind is Section 7 of the Delhi Laws Act of 1912 by which the Provincial Government was authorized to extend, with restrictions and modifications as it thought fit any enactment in force in any part of India to the Province of Delhi. This is the most extreme type of delegation, which was impugned in the Supreme Court in the Delhi Laws Act case. A.I.R. 1951 S.C.332. It was held that the delegation of this type was invalid if the administrative authorities materially interfered with the policy of the Act, by the powers of amendment or restriction but the delegation was valid if it did not effect any essential change in the body or the policy of the Act.

That takes us to a term "bye-law" whether it can be declared ultra vires? if so when ? Generally under local laws and regulations the term bye-law is used such as —

(i) public bodies of municipal kind,

(ii) public bodies concerned with government, or

(iii) corporations, or

(iv) societies formed for commercial or other purposes.

The bodies are empowered under the Act to frame bye-laws and regulations for carrying on their administration. There are five main grounds on which any bye-law may be struck down as ultra vires. They are :

(a) That is not made and published in the manner specified by the Act, which authorises the making thereof;

(b) That is repugnant of the laws of the land;

(c) That is repugnant to the Act under which it is framed;

(d) That it is uncertain ; and

(e) That it is unreasonable.

2.7 SUMMARY

- Administrative action is a comprehensive term and defies exact definition. In modern times the administrative process is a by-product of intensive form of government and cuts across the traditional classification of governmental powers and combines into one all the powers, which were traditionally exercised by three different organs of the State *i.e.*, legislature, judiciary and administration.

NOTES

- Legislature is the law-making organ of any state. In some written constitutions, like the American and Australian Constitutions, the law making power is expressly vested in the legislature. However, in the Indian Constitution though this power is not so expressly vested in the legislature, yet the combined effect of Articles 107 to III and 196 to 201 is that the law making power can be exercised for the Union by Parliament and for the States by the respective State legislatures.
- A trend very much in vogue today in all democratic countries is that only a relatively small part of the total legislative output emanates directly from the legislature. The bulk of the legislation is promulgated by the executive known as administrative rule making or delegated legislation. It simply refers to all law making which takes place outside the legislature *i.e.,* in government departments.
- Delegated legislation is known by various names such as administration law or rule-making, administrative legislation, sub-ordinate legislation or quasi-legislation. It may be defined as a body of law which is made administratively by means of rule, regulations and orders framed and promulgated by the govt, or some executive authority in pursuance of power conferred on it by an act of legislature.

2.8 REVIEW QUESTIONS

1. Classify administrative action and explain it also.
2. What are the quasi-judicial functions? Discuss.
3. What do you understand by delegated legislation?
4. What are the advantages and disadvantages of delegated ligislation?
5. Discuss the nature of delegated legislation.

2.9 FURTHER READINGS

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CHAPTER– 3

PRACTICE AND PROCEDURE OF ADMINISTRATIVE ADJUDICATION : RULES OF NATURAL JUSTICE

STRUCTURE

3.1 Learning Objectives
3.2 Introduction
3.3 Meaning and Development of Natural Justice
— Co-relationship Between Law and Natural Justice
3.4 Principles of Natural Law and Natural Justice
3.5 Applicability of the Principles of Natural Justice
3.6 Doctrine of Bias
3.7 Audi Alteram Partem
— Ingredients of Fair Hearing
3.8 Institutional Decision
— Post Decisional Hearing
— Reasoned Decision
3.9 Natural Justice and Indian Constitution
3.10 Effect of Failure of Natural Justice
3.11 Summary
3.12 Review Questions
3.13 Further Readings

3.1 LEARNING OBJECTIVES

After studying the chapter, students will be able to :

- State the meaning and development of natural justice;
- Explain applicability of the principles of natural justice;
- Discuss the doctrine of bias;
- Understand meaning and elements of *Audi Alteram Partem;*
- Describe the important aspects of institutional decision.

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3.2 INTRODUCTION

The concept of natural justice is the backbone of law and justice. In the quest for justice the principles of natural justice have been utilized since the dawn of civilization. Principles of natural justice trace their ancestry to ancient civilization and centuries long past. Initially natural justice was conceived as a concomitant of universal natural law. Judges have used natural justice as to imply the existence of moral principles of self evident and unarguable truth. To justify the adoption, or continued existence, of a rule of law on the ground of its conformity to natural justice in this sense conceals the extent to which a judge is making a subjective moral judgment and suggests on the contrary, an objective inevitability.

> Natural Justice used in this way is another name for natural law although devoid of at least some of the theological and philosophical overtones and implications of that concept. This essential similarity is clearly demonstrated by Lord Esher M.R's definition of natural justice as, " the natural sense of what right and wrong." *(Voinet v Barrett, (1885) 55, L.J. Q. B, 39, 41).*

Most of the thinkers of fifteenth to eighteenth century considered natural law and justice as consisting of universal rules based on reason and thus were immutable and inviolable. The history of natural law is a tale of the search of mankind for absolute justice and its failure. Again and again in the course of the last 2500 years the idea of natural law has appeared in some form or the other, as an expression for the search for an ideal higher than positive law. *(W.G. Friedman, Legal Theory 95. 5th ed. 1967).*

Greek thinkers laid the basis for natural law. The Greek philosophers traditionally regarded law as closely to both justice and ethics.

> ***Roman society was highly developed commercial society and Natural law played a creative and constructive role, thereby jus civil, was adopted to meet new demands.***

Similarly in the middle Ages, the Christian legal philosophy, considered natural law founded on reasons and a reflection of eternal laws. In the seventeenth and eighteenth century, the authority of church was challenged and natural law was based on reason and not divine force.

The use of natural law ideas in the development of English law revolves around two problems: the idea of the supremacy of law, and, in particular, the struggle between common law judges and parliament for legislative supremacy on one hand, and the introduction of equitable considerations of "Justice between man and man" on the other. The first ended in a clear victory for parliamentary supremacy and the defeat of higher law ideas; the latter, after a long period of

comparative stagnation, is again a factor of considerable influence in the development of the law.

A number of cases are evidenced with the beginning of seventeenth century wherein a statute was declared void and not binding for not being inconformity with the principles of Natural Justice.

The concept of natural justice can be traced from Biblical Garden of Eden, as also from Greek, Roman and other ancient cultures like Hindu. The Vedic Indians too were familiar with the natural theory of law. The practice of confining the expression natural justice to the procedural principles (that no one shall be judge in his own case and both sides must heard) is of comparatively recent origin and it was always present in one way or the other form. The expression was used in the past interchangeably with the expressions Natural Law, Natural enquiry, the laws of God, Sampan jus and other similar expressions. *(H.H. Marshall, Natural Justice 5 (1959) London)*

Thus, the widespread recognition, in many civilizations and over centuries the principle of natural justice belong rather to the common consciousness of the mankind than to juridical science.

3.3 MEANING AND DEVELOPMENT OF NATURAL JUSTICE

Natural justice or **procedural fairness** is a legal philosophy used in some jurisdictions in the determination of just, or fair, processes in legal proceedings. Natural justice operates on the principles that man is basically good and therefore a person of good intent should not be harmed, and one should treat others as one would like to be treated. "Natural Justice" imposes a code of fair procedure, including the right to be given a fair hearing and the opportunity to present one s case, the right to have a decision made by an unbiased or disinterested decision maker and the right to have that decision based on logically probative evidence. Natural justice in essence could just be referred to as Procedural Fairness , with a purpose of ensuring that decision-making is fair and reasonable.

The principles of Natural Justice are a part of the legal and judicial procedures and it comprises of two concepts, namely —

(a) Audi alteram partem, or the right to fair hearing,

(b) Nemo judex in sua causa, or the no man can be a judge in his own cause.

Administrative law is that body of law which applies for hearings before quasi-judicial or quasi-judicial organizations or administrative tribunals and which supplements the rules of natural justice with their own detailed rules of procedure. It is synonymous with natural justice.

NOTES

As a body of law, administrative law deals with the decision-making of administrative units of government (*e.g.*, tribunals, boards or commissions) that are part of a national regulatory scheme in such areas as police law, international trade, manufacturing, the environment, taxation, broadcasting, immigration and transport. Administrative law expanded greatly during the twentieth century, as legislative bodies worldwide created more government agencies to regulate the increasingly complex social, economic and political spheres of human interaction.

A comprehensive definition of natural justice is yet to be evolved. However, it is possible to enumerate with some certainty the main principles constituting natural justice in modern times. English and Indian courts have frequently resorted to such alternatives to natural justice as "fair play in action", *(Ridge V. Baldwin, (1963) 2 all E.R. 66; Wisemen V. Borneman (1969), 3 all E.R. 215; Mohinder Singh Gill V. Chief Election Commissioner, A. I. R 1978 S.C. 851.)* Common fairness, (R.V. Secretary of State for the Home Department, exp. Hose ball, *(1977) 1 W.L..R 766, 784).* or the fundamental principles of a fair trail.*(Tameshwar V The Queen, (1957) A. C. 476-486; Maneka Gandhi V Union of India A. I. R 1978 S.C 597).*

In Spackman's case, (Spackman V. Plumstead District Board of Works, (1885) 10 App case 229, 240). Earl of Selborne, L.C observed that no doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not the judge in the proper sense of the word but he must give the parties an opportunity of being heard before him and stating their case and their view. There would be no decision within the meaning of the statute, if there were anything of that sort done contrary to essence of justice.

Emphasizing for observance of natural justice again is Lesson's case, *(Lesson V. General Council of Medical Education (1889) US Ch. D 366, 383.* Brown C.J using the term 'natural justice' stressed that the statute imparts that substantial element of natural justice must be found to have been present at the enquiry. The accused person must have notice of what he is accused and must be given an opportunity of being heard.

The courts took these procedural safeguards in the past among different words. Conveying meaning *i.e.*, the eternal justice or natural justice. The list of the words is long which were as :

- Substantial justice;
- The essence of justice;
- Fundamental justice;
- Universal justice and
- Rational justice etc.

So the term natural justice has very impressive ancestry and has been retained all over the world with some modifications. The very basic thing, which emerges from it, is. Fairness in the administration of justice, more than any other legal principle is not susceptible to concise definition. It has a different meaning in different countries. History and tradition shape and distort it. To judge these divergent procedures according to a common standard of fairness is therefore no easy matter. What fair means will surely irritate governments and plague jurists. Fair hearing, some say it constitutes as fifth freedom supplementing freedom of speech and religion, freedom from want and fear. Robert Jackson, J., remains us that procedural fairness and regularity are of indispensable essence of liberty.

The concept of natural justice is not fixed one but has been changing from time, keeping its spirit against tyranny and injustice. Despite the many appellations applied to it and the various meanings attributed to it, through the ages, one thing remains constant. It is by its very nature a barrier against dictatorial power and therefore has been and still is an attribute of an civilized community that aspires to preserve democratic freedom. *(Rene Dussault, "Judicial Review of Administrative Action in Quebec," Can Bar Rev. 79 (1967).* The concept of natural justice is flexible and has been interpreted in many ways to serve the ends of justice.

Thus the doctrine of natural justice is the result of a natural evolution. So let us try to find out what does natural justice mean?

- Natural Justice is rooted in the natural sense of what is right and wrong. It mandates the Adjudicator or the administrator, as the case may be, to observe procedural fairness and propriety in holding/conducting trail, inquiry or investigation or other types of proceedings or process.
- The object of Natural Justice is to secure Justice by ensuring procedural fairness. To put it negatively, it is to prevent miscarriage of Justice.
- The term "Natural Justice" may be equated with "procedural fairness" or "fair play in action".
- It is concerned with procedure and it seeks to ensure that the procedure is just, fair and reasonable.
- It may be regarded as counterpart of the American "Due Process".

Co-relationship between Law and Natural Justice

(a) Law is the means, Justice is the end. Law may be substantive as well as procedural.

(b) Natural Justice also aims at Justice. It, however, concerns itself only with the procedure. It seeks to secure justice by ensuring procedural fairness. It creates conditions for doing justice.

(c) Natural justice humanizes the Law and invests the Law with fairness.

NOTES

(d) Natural Justice supplements the Law but can supplant the Law.

(e) Natural Justice operates in areas not specifically covered by the enacted law. An omission in statute, likely to deprive a procedure of fairness, may be supplied by reading into the relevant provision the appropriate principle of Natural Justice.

3.4 PRINCIPLES OF NATURAL LAW AND NATURAL JUSTICE

The principles of natural justice have evolved under common law as a check on the arbitrary exercise of power by the State. As the State powers have increased, taking within their ambit not just the power of governance but also activities in areas such as commerce, industry, communications and the like, it has become increasingly necessary to ensure that these powers are exercised in a just and fair manner. The common law, which is a body of unwritten laws which govern the legal systems of England, USA, Canada, Australia and other commonwealth countries including India, has responded to this need to control the exercise of State powers through applying the principles of natural justice to the exercise of such powers.

There is only one more principle that has slowly taken root as a part of natural justice. This is the principle that every decision must contain reasons for the decision. *Reasons may be elaborate or may be brief. But these are beginning* to be considered necessary to ensure fair decision making.

What exactly are these principles? Basically, these are principles which are necessary for a just and fair decision making. These principles are often embedded in the rules of procedure which govern the judiciary. For example, the Civil Procedure Code prescribes a detailed procedure under which the Defendant has the right to reply to the Plaint; both sides have the right to inspect the documents relied upon by the other side and both sides have the right to cross-examine one another's witnesses. The judgment must give reasons for the decision.

People have drawn their criteria of justice from many sources; i.e. from the nature of things, from the nature of man and from the nature of God. Natural law is the outcome of man s quest from an absolute standard of Justice.

Natural law, according to scholars, is that objective, eternal and immutable hierarchy of moral values which are a source of obligation with regard to man because they have been so ordained by the creator of nature. The law confirms to the essence of human nature. As Max Weber said :

> "Natural law is the sum total of all those norms which are valid independently of, and superior to, any positive law and which owe their dignity not to arbitrary enactment but, on the contrary, provide

the very legitimation for binding force of positive law" Thus, Natural law cannot be proved by employing the methods of scientific realism. By its definition it reflects the true dignity of individual man and is the very foundation of human justice.

The Two Fundamental Principles of Natural Justice

There are two fundamental principles of Natural Justice. They are :

(i) Nemo Judex in Causa Sua :

(a) Rule against bias,

(b) None should be a Judge in his own cause.

(ii) Audi Alter am Par tem

(a) Hear the other side.

(b) Hear both sides.

(c) No person should be condemned unheard.

3.5 APPLICABILITY OF THE PRINCIPLES OF NATURAL JUSTICE

The natural justice principles in India are transmigration of common law to the sub-continent during the British rule. Before the commencement of constitution the courts in India insisted on fair hearing where punishments were awarded under the statutory provisions and they demanded fair hearing, even in statutory requirements. But the decision of the Privy Council in the Shanker Sarup's (28 1.A 203 P.C) case, held an order of distribution under Section 295 CPC to be in the nature of administrative Act, though right of the individual was affected. Similar other cases dealing with the orders of the administrative officer were held administrative in character. Such decisions subjected the working of the common law principle of hearing and this tendency continued to shape the Indian law. The principle established in the above cases clearly shows that the principles of natural justice were confined to judicial proceedings.

So Indian courts clung to the traditional distinction between judicial, quasijudicial and administrative functions. The application of natural justice was for considerable time confined to the judicial and quasi-judicial proceedings. The meaning and connotations of term quasi-judicial has engaged judicial attention repeatedly to determine questions affecting the rights of subjects and having the duty to act judicially is said to be exercising a quasi-judicial functions.

The decision of the House of Lords in Ridge's case and subsequent cases has influenced most of the development of law in this respect in India. The influence of Ridge's case judgment has been of considerable and valuable importance "in deciding the scope of the application of principles of natural justice." In state of Bina Pani's case (AIR 1967 S.C. 1259) the Supreme Court has tried to abandon

NOTES

the traditional view of first holding an act judicial and then to observe the principles of natural justice and stated :

> ***" It is true that the order is administrative in Character but even an administrative order must be made consistently with the rules of natural justice."***

The dichotomy between administrative and quasi-judicial proceedings vis-à-vis the doctrine of natural justice was finally discarded as unsound by the court in Re-H (K) (infant) and Schmidt cases in England. This development in the law had its parallel in India in the form of Associated Cement Companies Ltd.'s case, where in the Supreme Court with approval referred to the decision in Ridge's case and latter in the Bina Pani's case.

The decision of Supreme Court in A.K.Kripak's case (AIR 1973 S.C. 150) is landmark in the application of principles of natural justice. In the instant case court held :

> ***" the dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated."***

The observations of Hegde,J are remarkable. The learned judge after examining various English and Indian cases has tried to remove all the clouds of doubt relating to application of natural justice. To his Lordship, the concept of rule of law would loose its vitality if the instrumentalities of the state are not charged with the duty of discharging their functions in a fair and just manner.

In D.F.O South Kheri's case, (AIR 1973 S.C. 203) the court reiterated that law must now be taken to be settled, that even in administrative proceedings, which involve civil consequences, the doctrine of natural justice must be held to be applicable.

In order to put the controversy at rest Bhagwati,J. in Maneka's case emphasized that enquiries which were considered administrative at one time are now considered quasi-judicial in character. Arriving at a just decision is the aim of both administrative and quasi-judicial enquiries. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. From the above discussion, so hear the other side is a rule of fairness. Fairness is a component of rule of law, which pervades the constitution. The dispensation of natural justice by statute will render any decision without observance of natural justice as unjust and hence is not acceptable.

3.6 DOCTRINE OF BIAS

One of the essential elements of judicial process is that administrative authority acting in a quasi- judicial manner should be impartial, fair and free

from bias. Rules of judicial conduct, since early times, have laid down that the deciding Officer should be free from any prejudices. Where a person, who discharges a quasi-judicial function, has, by his conduct, shown that he is interested, or appears to be interested, that will disentitle him from acting in that capacity.

In this connection the Supreme Court pointed out that one of the fundamental principles of natural justice is that in case of quasi-judicial proceedings, the authority, empowered to decide the dispute between opposing parties must be one without bias, by which is meant an operative prejudice, whether conscious or unconscious towards one side or the other in the dispute. *(Wade, Administrative Law, Page 311, (1982) de Smith. Judicial Review of Administrative Action 151 (1980)).*

No tribunal can be Judge in his own cause and any person, who sits in judgment over the rights of others, should be free from any kind of bias and must be able to bear an impartial and objective mind to the question in controversy.

Bias and Mala Fide

In case of mala fide, Courts insist on proof of mala fide while as in case of bias, proof of actual bias is not necessary. What is necessary is that there was "real likelihood" of bias and the test is that of a reasonable man. " The reason underlying this rule", according to prof. M.P. Jain, is that bias being a mental condition there are serious difficulties in the path of proving on a balance of probabilities that a person required to act judicially was in fact biased.

Bias is the result of an attitude of mind leading to a predisposition towards an issue. Bias may arise unconsciously. It is not necessary to prove existence of bias in fact, what is necessary is to apply the test what will reasonable person think about the matter? Further, justice should not only be done but seem to be done. Therefore, the existence of actual bias is irrelevant. What is relevant is the impression which a reasonable man has of the administration of justice." *(M.P. Jain ' Evolving Indian administrative Law')*

Rule of bias is only a principle of judicial conduct and is imposed strictly on the exercise of the judicial or quasi- judicial authorities. In the matters of sole discretion of the authority or in the matters depending upon the subjective satisfaction of the authority concerned, the Court will not issue any order on the ground of bias for quashing it. The search for mala fide intention and scrutinizing the honest intention of the administrative authorities have always been subject-matter of judicial review by the English Courts. *(Griffith and Street "Principles of Administrative Law")*

NOTES

Bias and Prejudice

Of a slightly lesser type of evil is prejudice. It is nearer to bias and sometimes it is likely to be misunderstood for bias. Judicial pronouncements on this aspect have made the distinction clear. The compilation of the words and phrases, which have been judicially defined, made by the West Publishing Co., mentions; Bias and prejudice are not synonymous terms.

Prejudice is defined by Webster as to prepossess unexamined opinion or opinions formed without due knowledge of the facts and circumstances attending to the question, to bias, the mind by hasty and incorrect notion, and to give it an unreasonable bent to one side or other of a cause. Bias is the leaning of the mind, inclination, prepossession, and propensity towards some persons or objects, not leaving the mind indifferent.

Bias is a particular influential power, which sways the judgment, the inclination of mind towards a particular object and is not synonymous with prejudice. A man may not be prejudiced without being biased about another, but he may be biased without being prejudiced.

Thus bias is usually of three types :

(1) Pecuniary bias;

(2) Personal bias; and

(3) Bias as to subject matters.

(1) Pecuniary Bias

A series of consistent decisions in English Courts have laid down the rule that the pecuniary interest, howsoever small, will invalidate the proceedings. So great enthusiasm was there in the minds of the English Judges against the pecuniary interest that very small amount and negligible quantity of interest were considered to be a valid ground, for reversing the judgment of Lord Chancellor Cottenham by the Appellate Court in Dimes case. *(1852, 3 hlr 759)* In this case the appellant was engaged in prolonged litigations against the respondent company. Against a decree passed by the V. C. Dimes he appealed before the Lord Chancellor, who gave the decision against him. It later came to the knowledge of the appellant that Lord Chancellor had a share in the respondent company. In appeal, their Lordships of House of Lords held that through Lord Chancellor forgot to mention about the interest in the company by mere inadvertence, yet the interest was sufficient to invalidate the decision given by the Lord Chancellor.

Indian Courts also invariably followed the decision in Dimes' case. The Privy Council made a reference to this famous case in the case of Vassilliadas. *(AIR 1945 SC 38)* .Thus a pecuniary interest, howsoever insufficient, will disqualify a person from acting as a Judge.

(2) Personal Bias

Personal bias has always been matter of judicial interpretation. It can be claimed that no other type of bias came for judicial scrutiny as much as this type At least for a full century. With the growing interdependability of human relations, cases of personal bias favouring one or the other party, have grown tremendously. Personal bias can be of two types *viz.* —

(a) Where the presiding officer has formed the opinion without finally completing the proceeding.

(b) Where he is interested in one of the parties either directly as a party or indirectly as being related to one of the parties. In fact, there are number of situations which may create a personal bias in the Judge's mind against one party in dispute before him. He may be friend of the party, or hostility against one of the parties to a case. All these situations create bias either in favour of or against the party and will operate as a disqualification for a person to act as a Judge.

The leading case on the point is Mineral Development Ltd. V. State of Bihar, *(AIR 1960 SC 468)* in this case, the petitioner company was owned by Raja Kamkshya Narain Singh, who was a lessee for 99 years of 3026 villagers, situated in Bihar, for purposes of exploiting mica from them. The Minister of Revenue acting under Bihar Mica Act cancelled his license. The owner of the company raja Kamalkshya Narain singh, had opposed the Minister in general election of 1952 and the Minister had filed a criminal case under section 500, Indian Penal Code, against him and the case was transferred to a Magistrate in Delhi. The act of cancellation by the Minister was held to be a quasi- judicial act. Since the personal rivalry between the owner of the petitioner's company and the minister concerned was established, the cancellation order became vitiated in law.

The other case on the point is Manek Lal v. Prem Chand (AIR 1957 S.C. 425) Here the respondent had filed a complaint of professional misconduct against Manek Lal who was an advocate of Rajasthan High Court. The chief Justice of the High Court appointed bar council tribunal to enquire into the alleged misconduct of the petitioner. The tribunal consisted of the Chairman who had earlier represented the respondent in a case. He was a senior advocate and was once the advocate-General of the State. The Supreme Court held the view that even though Chairman had no personal contact with his client and did not remember that he had appeared on his behalf in certain proceedings, and there was no real likelihood of bias, yet he was disqualified to conduct the inquiry. He was disqualified on the ground that justice not only be done but must appear to be done to the litigating public. Actual proof of prejudice was not necessary; reasonable ground for assuming the possibility of bias is sufficient. A Judge should be able to act judicially, objectively and without any bias. In such cases what the court should see is not

NOTES

whether bias has in fact affected the judgment, but whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal.

(3) Bias as to the Subject-matter

A judge may have a bias in the subject matter, which means that he is himself a party, or has some direct connection with the litigation, so as to, constitute a legal interest. "A legal interest means that the Judge is in such a position that bias must be assumed." The smallest legal interest will disqualify the Judge.

Thus for example, members of a legal or other body, who had taken part in promulgating an order or regulation cannot afterwards sit for adjudication of a matter arising out of such order because they become disqualified on the ground of bias. Subject to statutory exceptions persons who once decided a question should not take part in reviewing their own decision on appeal.

To disqualify on the ground of bias there must be intimate and direct connection between adjudicator and the issues in dispute.

To vitiate the decision on the ground of bias as for the subject matter there must be real likelihood of bias such bias has been classified by Jain and Jain into four categories :

(a) Partiality of connection with the issues;

(b) Departmental or official bias;

(c) Prior utterances and pre-judgement of Issues;

(d) Acting under dictation.

3.7 AUDI ALTERAM PARTEM

The second principle of natural justice is audi alteram partem (hear the other side) *i.e.*, no one should condemned unheard. It requires that both sides should be heard before passing the order. This rule insists that before passing the order against any person the reasonable opportunity must be given to him. This rule implies that a person against whom an order to his prejudice is passed should be given information as to the charges against him and should be given opportunity to submit his explanation thereto. *(National Central Cooperative Bank v. Ajay Kumar, A.I.R. 1994 S.C. 39).*

Ingredients of Fair Hearing

Hearing' involves a number of stages. Such stages or ingredients of fair hearing are as follows :

1. Notice : Hearing starts with the notice by the authority concerned to the affected person. Consequently, notice may be taken as the starting point of hearing. Unless a person knows the case against him, he cannot defend himself. Therefore, before

the proceedings start, the authority concerned is required to give to the affected person the notice of the case against him. The proceedings started without giving notice to the affected party, would violate the principles of natural justice. The notice is required to be served on the concerned person properly.

However, the omission to serve notice would not be fatal if the notice has not been served on the concerned person on account of his own, fault. For example, in a case some students were guilty of gross violence against other students. The notice could not be served on them because they had absconded. The action of the authority was held to be valid as the notice could not be served on the students on account of their own fault.

The notice must give sufficient time to the person concerned to prepare his case. Whether the person concerned has been allowed sufficient time or not depends upon the facts of each case. The notice must be adequate and reasonable.

The notice is required to be clear and unambiguous. If it is ambiguous or vague, it will not be treated as reasonable or proper notice. If the notice does not specify the action proposed to be taken, it is taken as vague and therefore, not proper.

2. Hearing : An important concept in Administrative law is that of natural justice or right to fair hearing. A very significant question of modern Administrative law is, where can a right to hearing be claimed by a person against whom administrative action is prepared to be taken?

We know that right to hearing becomes an important safeguard against any abuse, or arbitrary or wrong use, of its powers by the administration in several ways. A large volume of present day case law revalues around the theme, wherein courts are called upon to decide whether or not, in a particular situation, failure on the part of the administration to give as hearing is fatal to the action taken. There is no readymade formula to judge this question and every case is to be considered on its own merits.

The right to hearing can be claimed by the individual affected by the administrative action from 3 sources.

Firstly, the requirement of hearing may be spelt out of certain fundamental rights granted by constitution.

Secondly, the statute under which an administrative action is being taken may itself expressly impose the requirements of hearing. Thus Art. 311 of constitution lays down that no civil servant shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action.

According to the prevalent principles of judicial review of administrative action, courts have far greater control over administrative action involving a

NOTES

hearing (or "fair hearing" to be sure) than they have otherwise. Thus, a more effective control-mechanism comes into force.

Thirdly, it has been reiterated over and over again that a quasijudicial body must follow principles of natural justice. But this gives rise to another intricate question: what is quasi-judicial? Answer to this question is not easy as no " quasi-judicial" from " administrative". A general test sometimes adopted for the purpose is that " any person or body having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially" acts in a quasi-judicial manner. But it is not clearly defined as to what is meant by "acting judicially." This proposition is vague in the extreme; it is even a tautology to say that the function is quasi- judicial if it is to be done judicially. How is one to ascertain whether an authority is required to act judicially or not? The statutes, it becomes a matter of implication or inference fro the courts to decide, after reading a statute, whether the concerned authority acting under it is to act judicially. In the absence of any such explicit indication in a statute, it becomes a matter of implication or inference for the courts to decide, after reading a statute, whether the concerned authority is to act judicially or not. The courts make the necessary inference from "the cumulative effect of the courts make the necessary inference from "the cumulative effect of the nature of the right affected, the manner of the disposal provided, the objective criteria to be adopted, the phraseology use, the nature of the power conferred, of the duty imposed on the authority and the other indication afforded by the statute. "This prime facie is too broad a generalization, which is hardly adequate or articulate to predicate the nature of a function or a body with any certainty. The personality of a judge could make a substantial difference in the end-result, for one judge may be more inclined to lean towards a quasi-judicial approach by the administration in a particular context than another judge.

The extension of the right of hearing to the person affected by administrative process has been consummated by extension of the scope of quasi-judicial and natural justice as well as by discarding the distinction between "quasi-judicial' and 'administrative' and invoking the concept of fairness in administrative action. Hearing has thus become the norm, rather than an exception, in administrative process at the present day.

Requirements of fair hearing: A hearing will be treated as fair hearing if the following conditions are fulfilled :

1. Adjudicating authority receives all the relevant material produced by the individual

A hearing to be treated a fair hearing the adjudicating authority should provide the person-affected opportunity to produce all the relevant materials, which he wishes to produce. If the adjudicating authority does not allow the

person affected to produce material evidence, the refusal will be violative of the rule of fair hearing. If the adjudicating authority refuses to hear a person who does not appear at the first hearing but appears subsequently during the course of hearing. It would be against the principle of natural justice.

2. The adjudicating authority discloses the individual concerned evidence or material which it wishes to use against him

It is the general principle that all the evidence which the authority wishes to use against the party, should be placed before the party for his comment and rebuttal. If the evidence is used without disclosing it to the affected party, it will be against the rule of fair hearing.

The extent and context and content of the information to be disclosed depend upon the facts of each case.

Ordinarily the evidence is required to be taken in the presence of the party concerned. However, in some situations this rule is relaxed. For example, where it is found that it would be embarrassing to the witness to testify in the presence of the party concerned, the evidence of the witness may be taken in the absence of the party.

3. The adjudicating authority provides the person concerned an opportunity to rebut the evidence or material which the said authority issues to use against him

The hearing to be fair the adjudicating authority is not required only to disclose the person concerned the evidence or material to be taken against him but also to provide an opportunity to rebut the evidence or material.

Cross-examination: The important question is, does it include right of cross-examination of witnesses? Whether it includes the right to crossexamination or not depends upon the provisions of the statute under which the hearing is being held and the facts and circumstances of the each case. Where domestic enquiry is made by the employees, right of cross examination is regarded as an essential part of the natural justice. In the case disciplinary proceedings initiated by the Government against the civil servants, the right to cross examination is not taken orally and enquiry is only a fact finding one.

Hira Nath Mishra v. Rajendra Medical College, *(A.I. R 1973 S.C. 1260)* in this case some male students were charged of some indecent behaviour towards some girl students. The accused male students were not allowed to cross-examine the girl students. The refusal allow the accused male students to cross examine the girl students was upheld and was not treated as violation of natural justice because allowing them the right of cross examination would have been embarrassing for the girl students. The refusal was necessary for protecting the girl students from any harassment later on.

NOTES

Sometimes the identity of the witness is required to be kept confidential because the disclosure thereto may be dangerous to their person or property. In a case the extermment order was served on a person by the Deputy Commissioner under the Bombay Police act. The said person was not allowed to cross-examine the witnesses. The refusal was not taken as violation of the natural justice because the witnesses would not like to give evidence openly against the persons of bad characters due to fear of violence to their person or property.

Similarly in another case the business premises of a persons where searched and certain watched were confiscated by the authority under Sea Customs Act. The said person was not allowed to cross-examine the persons who gave information to the authority. There was no violation of the natural justice. The court held that the principles of natural justice do not require the authority to allow the person concerned the right to cross-examine the witnesses in the matters of seizure of goods under the Sea Customs Act. If the person concerned is allowed the right to crossexamine, it is not necessary to follow the procedure laid down in the Indian Evidence Act.

Legal Representation: An important question is whether right to be heard includes right to legal representation? Ordinarily the representation through a lawyer in the administrative adjudication is not considered as an indispensable part of the fair hearing. However, in certain situations denial of the right to legal representation amounts to violation of natural justice. Thus where the case involves a question of law or matter which is complicated and technical or where the person is illiterate or expert evidence is on record or the prosecution is conducted by legally trained persons, the denial of legal representation will amount to violation of natural justice because in such conditions the party may not be able to meet the case effectively and therefore he must be given some protect ional assistance to make his right to be heard meaningful.

3.8 INSTITUTIONAL DECISION

In ordinary judicial proceedings, the person who hears must decide. In the judicial proceedings, thus the decision is the decision of the specific authority. But in many of the administrative proceedings the decision is not of one man or one authority i.e. it is not the personal decision of any designated officer individually. It is treated as the decision of the concerned department. Such decision is called institutional decisions. In such decision often one person hears and another person decides. In such decision there may be division in the decision making process as one person may hear and another person may decide.

In Gullapalli Nageswara Rao v. A. P. State Road Transport Corporation the Supreme Court the hearing by one person and decision by another person has been held to be against the rule of fair hearing.

But the actually the Administrative practice continues to permit the hearing by one person and decision by another.

Post Decisional Hearing

Post decisional hearing may be taken to mean hearing after the decision sometimes public interest demands immediate action and it is not found practicable to afford hearing before the decision or order. In such situation the Supreme Court insists on the hearing after the decision or order. In short, in situations where prior hearing is dispensed with on the ground of public interest or expediency or emergency the Supreme Court insists on the post decisional hearing.

In Charan Lal Sadu V. Union of India the Supreme Court has held that where a statute does not in terms exclude the rule of predecisional hearing but contemplates a post decisional hearing amounting to a full review of the original order on merits it would be construed as excluding the rule of audi alteram partem at the pre-decisional stage. If the statute is silent with regard o the giving of a pre decisional hearing, then the administrative action after the post decisional hearing will be valid.

The opinion of Chief Justice P. N. Bhagwati with regard to the post decisional hearing is notable. In his foreword to Dr. I. P. Massey's book Administrative Law, he has stated that the Supreme Court's decisions in Mohinder Singh Gill V. E. C. (A.I.R. 1978 S.C. 851) and Maneka Gandhi V. Union of India (A.I.R. 1978 S.C. 597) have been misunderstood. It is clear that if prior hearing is required to be given as part of the rule of natural justice, failure to give it would indubitably invalidate the exercise of power and it cannot be read into the statute because to do so would be to defeat the object and purpose of the exercise of the power, that past decisional hearing is required to be given and if that is not done, the exercise of the power would be vitiated. (Management of M/S M.S. Nally Bharat Engineering Co. Ltd. v. State of Bihar 1990 S.C.C. 48)

In normal cases pre-decisional hearing is considered necessary, however in exceptional cases, the absence of the provision for predicisional hearing does not vitiate the action if there is a provision for post decisional hearing.

Reasoned Decision

Reasoned decision may be taken to mean a decision which contains reason in its support. When the adjudicators bodies give reasons in support of their decisions, the decisions are treated as reasoned decision. A decision, thus supported by reasons is called reasoned decision. It is also called speaking order. In such condition the order speaks for itself or it tells its own story.

NOTES

The reasoned decision introduces fairness in the administrative powers. It excludes or at least minimizes arbitrariness.

- The right to reasons is an indispensable part of sound judicial review. The giving of reasons is one of the fundamental of good administration.
- It has been asserted that a part of the principle of natural justice is that a party is entitled to know the reason for the decision apart from the decision itself.
- In another words, a party is entitled to know the reason, for the decision, be it judicial or quasi-judicial. This requirement to give reasons, however, is an approach quite new to administrative law, as the prevailing law is that the quasi-judicial bodies need not give reasons in support of their decisions, although in some cases, the court did insist upon making ' speaking orders'. But a change in the approach is being noticed since last few years and a growing emphasis is being laid on these bodies to give reasons for their decisions.
- The reasoned decision gives satisfaction to the person against whom the decision has been given. It will convince the person against whom the decision has been given that the decision is not arbitrary but genuine. It will enable the person against whom the decision has been given to examine his right of appeal. If reasons are not stated, the affected party may not be able to exercise his right of appeal effectively.

Thus, the giving of reasons in support of the decision is now considered one of the fundamentals of good administration.

In Sunil Batra v. Delhi adininistration, the Supreme Court while interpreting section 56 of the prisons act, 1894, observed that there is an implied duty on the jail superintendent to give reasons for putting bar fetters on a prisoner to avoid invalidity of that provision under article 21 of the constitution. Thus the Supreme Court laid the foundation of a sound administrative process requiting the ad judicatory authorities to substantiate their order with reasons. The court has also shown a tendency to emphasize upon the fact that the administrative order should contain reasons when they decide matters affecting the right of parties.

3.9 NATURAL JUSTICE AND INDIAN CONSTITUTION

The principles of natural justice in the modern context describe certain rules of procedure. It supplies the omissions of formulated law. The principles of natural justice are implicit in Article 14 and 21.

The principles of natural justice have come to be recognized as being a part of the guarantee contained in Article 14 of the Constitution because of the new and dynamic interpretation given by the Supreme Court to the concept of equality,

which is the subject matter of that Article. Violation of a rule of natural justice results in arbitrariness, which is the same as discrimination. Where discrimination is the result of State action, it is violation of Article 14. Therefore, a violation of principle of natural justice by a state action is a violation of Article 14. Article 14, however, is not the sole repository of the principles of natural justice. The principles of natural justice apply not only to legislation and Sate action but also where any tribunal, authority or body of men not coming within the definition of "State" in article 12, is charged with the duty of deciding a matter. In such a case, the principles of natural justice require that it must decide such matter fairly and impartially.

The constitution of India, while guaranteeing right to life and personal liberty in Article 21 in the same under "procedure established by law", the expression procedure established by law was substituted by constituent Assembly for due process clause as embodies in American constitution Art. 21 of the constitution envisage.

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

Thus the first attempt to incorporate the American principle (which includes principles of natural justice) in the Indian constitution was failed. Later in the A.K. Gopalan's case, (AIR 1950 S.C 27) Supreme Court held that procedure established by law meant procedure prescribed by the statute. Obviously it implies that law enacted by the state need not be in conformity with the principles of natural justice. Law in Art. 21 meant statute law and nothing more. In case of a procedure prescribed by law it cannot be questioned on the ground that it violates principles of natural justice. There is no guarantee that it will not enact a law contrary to the principles of A learned author was prompted to observe that this position of Art.21of the Indian constitution was more of a statute justice land not natural justice.

The interpretation of Art. 21 given in the Gopalan case in fact placed the liberty of the citizen at the mercy of the party in power. Natural justice supplies the procedural omissions of a formulated law.

According to Jackson J. —

> "It might be preferable to live under Russian law applied by common law Procedures, rather then under the Common law enforced by Russian procedure."

Gopalan's decision dominated the Indian scene for twenty eight years till the decision of Supreme Court in the celebrated case of Monika Gandhi's which revolution the application rules of natural justice in India. In the instant case, a writ petition was filed under Art. 32 challenging the impugned order interlaid

NOTES

amongst other grounds for being impugned for denial of opportunity of being heard prior the impoundment of passport. As per Maneka's rationale, a procedure could no more be a mere enacted or state prescribed procedure as laid down in Gopalan's but had to be fair, just and reasonable procedure. The most notable and innovative holding in Maneka was that the principle of reasonableness legally as well as philosophically is an essential element of equality or non-arbitrariness and pervades Art. 14 like a boarding omnipresence and the procedure contemplated by Art. 21 must stand the test of reasonableness in Art. 14.

Bhagwatil J, for majority referring to audi alteram partem which mandates that no one shall be condemned unheard, remarked :

> "Natural justice is a great humanizing principle intended to invest law with fairness and to secure justice and ever the year it has grown into a widely pervasive rule affecting large areas of administrative action. Thus the soul of natural justice is fair play in action and that is why it has received the widest recognition throughout the democratic world. In the United States, the right to an administrative bearing is regarded as essential requirement of fundamental fairness and in England too it has been held that fair play in action demands that before any prejudicial or adverse action is taken against a person he must be given an opportunity to be heard."

So the rules of natural justice were applicable to administrative proceedings positively. The learned judge emphasized that the Audi alteram rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice or to make the law lifeless, absurd, stultifying, self defeating or plainly contrary to the common sense of the situation.

Further Bhagwai observed that it must not be forgotten that natural justice is pragmatically flexible and is amenable to capsulation under the pressure of circumstances. The core of it must however remain namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine and not an empty public relations exercise. This rule should be sufficiently flexible to suit the exigencies of myriad kinds of situations, which may arise. The learned judge insisted for post decisional hearing in situations was urgency demands prompt action which cannot wait for a formal hearing because than world defeat the very purpose of a action.

> *Thus Maneka decision has resurrected American procedural due process in Art, 21 which was freed from the confines of Gopalan's after about twenty eight years on 'procedure'.*

In one more case of the Mohinder Singh Gill, deserves attention due to observation made by Krishna Iyer, J on the principles of natural justice. The judicial

history of natural justice in England and India has been remarkably traced by Krishana Iyer, J in this case by observing that the natural justice in no mystic testament of judgment juristic, but the pragmatic yet principled, requirement of fair play in action as the norm of civilized justice- system and minimum of good government-crystallized clearly in our jurisprudence by catena of cases here and elsewhere. Further, Krishana Iyer observed in the instant cases :

> *"The rules of natural justice are rooted in all legal systems, not any new theology and are manifested in the twin principles.... while natural justice is universally respected, the standards vary withy situations contracting into a brief, even post-decisional opportunity, or expanding into trial-type trappings...good administration demands fair play in action and this simple desideratum is the foundation of natural justice.*

The rules of natural justice are not rigid norms of unchanging contents. Each of the two main rules embrace a number of sub rules, which may very in their application according to the context. In the words of the Supreme Court, the extent and application of the doctrine of natural justice cannot be imprisoned within the straitjacket of rigid formula. (V.N. Shukla, The Constitution of India, 388 (1974).

Exceptions to Natural Justice

Though the normal rule is that a person who is affected by administrative action is entitled to claim natural justice, that requirement may be excluded under certain exceptional circumstances.

Statutory Exclusion : The principle of natural justice may be excluded by the statutory provision. Where the statute expressly provides for the observance of the principles of natural justice, the provision is treated as mandatory and the authority is bound by it. Where the statute is silent as to the observance of the principle of natural justice, such silence is taken to imply the observance thereto. However, the principles of natural justice are not incapable of exclusion. The statute may exclude them. When the statute. When the statute expressly or by necessary implication excludes the application of the principles of natural justice the courts do not ignore the statutory mandate. But one thing may be noted that in India, Parliament is not supreme and therefore statutory exclusion is not final. The statute must stand the test of constitutional provision. Even if there is not provision under the statute for observance of the principle of natural justice, courts may read the requirement of natural justice for sustaining the law as constitution.

Emergency: In exceptional cases of urgency or emergency where prompt and preventive action is required the principle of natural justice need not be observed. Thus, the pre-decisional hearing may be excluded where the prompt action is

NOTES

required to be taken in the interest of the public safety or public morality, *e.g.*, where a person who is dangerous to peace in the so morality *e.g.*, Where a person who is dangerous to peace in the society is required to be detained or extended or where a building which is dangerous to the human lives is required to be demolished or a trade which is dangerous to the society is required to be prohibited, a prompt action is required to be taken in the interest of public and hearing before the action may delay the administrative action and thereby cause injury to the public interest and public safety. Thus in such situation dine social necessity requires exclusion of the pre-decisional hearing. However, the determination of the situation requiring the exclusion of the rules of natural justice by the administrative authorities is not final and the court may review such determination.

In Swadeshi Cottoin Mills v. Union of India, the Supreme Court held that the word 'immediate" in Section 18AA of the Industries Act does not imply that the rule of natural justice can be excluded.

Public Interest : The requirement of notice and hearing may be excluded where prompt action is to be taken in the interest of public safety, or public health, and public morality. In case of pulling down property to extinguish fire, destruction of unwholesome food etc., action has to be taken without giving the opportunity of hearing.

In Maneka Gandhi v. Union of India the Supreme Court observed that a passport may be impounded in public interest without compliance with the principles of natural justice but as soon as the order impounding the passport has been made, an opportunity of post decisional hearing, remedial in aim, should be given to the person concerned. In the case the court has also been held that " public interest" is a justiciable issue and the determination of administrative authority on it is not final.

Interim Disciplinary Action : The rules of natural justice is not attracted in the case of interim disciplinary action. For example, the order of suspension of an employee pending an inquiry against him is not final but interim order and the application of the rules of natural justice is not attracted in the case of such order.

In Abhay Kumar v. K. Srinivasan an order was passed by the college authority debarring the student from entering the premises of the college and sttending the class till the pendency of a criminal case against him for stabbing a student. The Court held that the order was interim and not final. It was preventive in nature. It was passed with the object to maintain peace in the campus. The rules of natural justice were not applicable in the case such order.

Academic Evolution : Where a student is removed from an educational institution on the grounds of unsatisfactory academic performance, the requirement of pre-decisional hearing is excluded. The Supreme Court has made it clear that if the competent academic authority assess the work of a student over period of time and thereafter declare his work unsatisfactory the rule of natural justice may be excluded. but this exclusion does not apply in the case of disciplinary matters.

Impracticability : Where the authority deals with a large number of person it is not practicable to give all of them opportunity of being heard and therefore in such condition the court does not insist on the observance of the rules of natural justice. In R. Radhakrishna v. Osmania University, the entire M.B.A. entrance examination was cancelled on the ground of mass copying. The court held that it was not possible to give all the examinees the opportunity of being heard before the cancellation of the examination.

3.10 EFFECT OF FAILURE OF NATURAL JUSTICE

In England, for sometimes now, a question of some complexity which has been cropping up before the courts time and again is: When an authority required observing natural justice in making an order fails to do so, should the order made by it be regarded as void or a voidable?

Generally speaking, a voidable order means that the order was legally valid at its inception, and it remains valid until it is set aside or quashed by the courts, that is, it has legal effect up to the time it is quashed. On the other hand, a void order is no order at all from its inception; it is a nullity and void ab initio. The controversy between void and voidable is making the England administrative law rather complicated. Before we go further, it may be necessary to enter into a caveat at this place with respect to a void ab initio, the uncertainties of administrative law are such that in most cases a person affected by such an order cannot be sure whether the order is really valid or not until the court decided the matter. Therefore, the affected person cannot just ignore the order treating it as a nullity. He has to go to a Court for an authoritative determination as to the nature of the order is void.

For example, an order challenged as a nullity for failure of natural justice gives rise to the following crucial question: Was the authority required to follow natural justice?

As the discussion in the previous pages shows, there is quite a good deal of uncertainty on both these points. Meagerly, J., brings out this point clearly.

Nevertheless, conceptually, there is a lot of difference between a void and voidable order. The question arises in various contexts and has a number of ramifications. It has great practical value insofar as the courts have taken recourse to conceptualistic logic to answer a number of questions. For example, the

NOTES

following are some of the question which arises in regard to orders passed infringing natural justice and which the courts have sought to answer by reasoning based on differentiation between void and avoidable orders, though not always with entire satisfaction: can infringement of natural justice be waived by the person affected? Are they protected? What is the effect of privatize clauses on such orders? Are they protected? Can the defect of failure of natural justice be cured later by the same body or by a higher body? Can the court issue a writ (certiorari) to quash such an order without the affected person having taken recourse to the alternative remedy available under the statute in question? Can the person affected ignore such an order without incurring any liability, civil or criminal? Can the government seek to enforce an order challenged as void because of failure of natural justice pending the course decision on the matter? Who can challenge such an over? If the law prescribes a time limit within which the order may be challenged, can it be challenged after the period of limitation? Can an order the challenged in collateral proceedings or only in direct proceedings to set it aside? Usually, a violable order cannot be challenged in collateral proceedings. It has to be set aside by the court in separate proceedings for the purpose. Suppose, a person is prosecuted criminally for infringing an order. He cannot then plead that the order is avoidable. He can raise such a plea if the order is void. But, as de Smith points out the case-law on the point is far being coherent Certiorari and not a declarations regarded as a suitable remedy for setting aside a void able decision.

In India, by and large, the Indian case law has been free from the void/ voidable controversy and the judicial thinking has been that a quasi-judicial order made without following natural justice is void and nullity.

The most significant case in the series is Nawabkhan v. Gujarat S. 56 of the Bombay Police Act, 1951 empowers the Police Commissioner to extern any undesirable person on certain grounds set out therein. An order passed by the commissioner on the petitioner was disobeyed by him and he was prosecuted fro this in a criminal court. During the pendency of his case, on a writ petition filed by the petitioner, the High Court quashed the internment order on the ground of failure of natural justice. The trial court then acquitted the appellant. The government appealed against the acquittal and the High Court convicted him for disobeying the order. The High Court took the position that the order in question was not void ab initio; the appellant had disobeyed the order much earlier than date it was infringed by him; the High Courts own decision invalidating the order I question was not retroactive and did not render it non-ext or a nullity from its inception but it was invalidate only from the date the court declared it to be so by its judgment. Thus, the arguments adopted by the

high Court were consistent with the view that the order in question was void able and not void.

However, the matter came in appeal before the Supreme Court, which approached the matter from a different angle. The order of internment affected a Fundamental Right, art. 19) Of the appellant in a manner which was not reasonable. The order was thus illegal and unconstitutional and hence void. The court ruled definitively that an order infringing a constitutionally guaranteed right made without hearing the party affected, where hearing was required, would be void ab initio and ineffectual to bind the parties from the very beginning and a person cannot be convicted non observance of such an order. "Where hearing is obligated by statute which affects the fundamental right of a citizen, the duty to give the hearing sound in constitutional requirement an failure to comply with such a duty is fatal. The appellant could not this be convicted for flouting the police commissioners order which encroached upon his Fundamental Right and had been made without due hearing and was thus void ab initio and so was never really inexistence.

Nawabkhan raises some critical issues. A few general commons may, however, be made at this place Much for the confusion in Administrative Law India can be avoided if the rule is accepted that an order made ought to have been observed, is void ab intio.

A person disobeys an administrative order at his own risk, for if he disobeys an order, and the court later holds it as not void, then he suffers the consequence, for whether an order is void or not can only be settled conclusively by a court order. Accepting the void ness rule will make authorities take care in passing orders after fulfilling all the necessary formalities. It will also denude the courts of discretion whether to set aside an order or not in case of violation of natural justice. However, there may be some situations when illation of a void order may not be excusable, *e.g.*, when a prisoner escapes from thereon thinking that the administrative order under which he has been detained is void.

It is an area where no general principle can be held applicable to all the varying situations because what has to be reconciled here is public interest with private rights. In most of the cases *i.e.*, staying the implementation of the order challenged until the court is able to decide the question on merits.

3.11 SUMMARY

- The concept of natural justice is the backbone of law and justice. In the quest for justice the principles of natural justice have been utilized since the dawn of civilization. Principles of natural justice trace their ancestry to ancient civilization and centuries long past. Initially natural justice was

NOTES

conceived as a concomitant of universal natural law. Judges have used natural justice as to imply the existence of moral principles of self evident and unarguable truth.

- **Natural justice** or **procedural fairness** is a legal philosophy used in some jurisdictions in the determination of just, or fair, processes in legal proceedings. Natural justice operates on the principles that man is basically good and therefore a person of good intent should not be harmed, and one should treat others as one would like to be treated.
- The principles of natural justice have evolved under common law as a check on the arbitrary exercise of power by the State. As the State powers have increased, taking within their ambit not just the power of governance but also activities in areas such as commerce, industry, communications and the like, it has become increasingly necessary to ensure that these powers are exercised in a just and fair manner.
- One of the essential elements of judicial process is that administrative authority acting in a quasi- judicial manner should be impartial, fair and free from bias. Rules of judicial conduct, since early times, have laid down that the deciding Officer should be free from any prejudices. Where a person, who discharges a quasi-judicial function, has, by his conduct, shown that he is interested, or appears to be interested, that will disentitle him from acting in that capacity.
- Post decisional hearing may be taken to mean hearing after the decision sometimes public interest demands immediate action and it is not found practicable to afford hearing before the decision or order. In such situation the Supreme Court insists on the hearing after the decision or order. In short, in situations where prior hearing is dispensed with on the ground of public interest or expediency or emergency the Supreme Court insists on the post decisional hearing.

3.12 REVIEW QUESTIONS

1. What do you understand by natural justice?
2. State the major principles of natural justice.
3. Discuss the doctrine of bias.
4. What is audi alteram partem?
5. What are the main ingredients of fair hearing?
6. What is the status of natural justice in Indian Constitution?
7. What are te effects of failure of natural justice?

3.13 FURTHER READINGS

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CHAPTER– 4

MECHANISM FOR CONTROL OF ADMINISTRATIVE AGENCIES

STRUCTURE

4.1 Learning Objectives
4.2 Introduction
4.3 Mechanism of Control
— Legislative Control
— Executive Control
4.4 Judicial Control (Judicial Remedies)
— Judicial Review and Its Exclusion
— Constitutional Remedies
— Existence of Alternative Constitutional Remedies
— Suspension of Judicial Review During Emergency
— Remedy through Special Leave to Appeal Under Article 136
— Ordinay Remedies or Equitable Remedies
4.5 Writs
— *Writ of Habeas Corpus*
— Writ of Mandamus
— Writ of Certiorari
— Writ of Quo Warranto
4.6 Public Interest Litigation (PIL)
4.7 Role of Civil Society in Governance
4.8 Summary
4.9 Review Questions
4.10 Further Readings

4.1 LEARNING OBJECTIVES

After studying the chapter, students will be able to :

- State the legilative and executive mechanism of control over administrative actions;
- Explain the various important aspects of judicial control;
- Discuss the mechanism of use of Writs and Public Interest Litigation (PIL);
- Describe the role of civil society in governance.

4.2 INTRODUCTION

The enduring problem usually associated with delegated legislation is the very wide powers vested in administrative agencies. You should recall that these agencies equally exercise wide discretionary powers.

In order to ameliorate the temptation of administrative agencies to slip into excesses, there are several means of control.

4.3 MECHANISM OF CONTROL

The need for control of rule-making power is due to the dangers often associated with such powers. This is because administrative powers are prone to abuse and can easily become arbitrary if unchecked. There are safeguards within and outside the system of administration itself. We are, however, mainly concerned with control outside the administration, which may be parliamentary, presidential, executive or, perhaps, military.

Legislative Control

There are several ways in which the Legislature may control the activities of the executive branch and administrative agencies. Some of them include the following:

(a) Amending the law setting up the administrative agency with a view to making it more effective and responsive to the demands of the people;

(b) Repealing the law establishing such agency and abolishing the agency;

(c) Inviting a minister or head of an agency.

This is usually done where there are grey areas in the operations of the ministry or agency or where there is public outcry against their conduct or, at any rate, where there are unfavourable media reports of their incompetence or insensitivity.

Executive Control

The executive is aware of the need to supervise subordinate legislation in order to keep executive family within the bounds of law. This is essential because of the concept of collective responsibility under the parliamentary system of government which makes it imperative to call the executive to be careful so as to avoid controversy. In England, for example, there's the legal committee of the cabinet which is charged with the screening of subordinate legislation. In the US, the president shares such power with the senate and the situation in Nigeria is similar to that of the U.K in some respect and that of the US as well. The most potent of such powers of control being exercised by the minister on his subordinate is through the appointment of the board of statutory corporations. Though these corporations are in theory independent and charged with dealing with particular

NOTES

social matters, they each have a parent ministry, so that the minister can give general direction as to their operation.

This executive control can also be seen within the hierarchy of control in each setting. More specifically, the executive control administrative powers through the following ways :

(a) Issuing general or specific directives regarding the way administrative agencies should carry out their duties.

(b) Requiring the agency to submit its proposed decision, rules, regulations, budget, etc, for examination or vetting before implementation.

(c) Setting up a panel of inquiry to look into the activities of the relevant agency and to make recommendations to the government. Note that the executive often resorts to this measure although the reports are usually not acted upon because of several reasons including the need not to rock the boat of the influential persons found culpable by those panels

(d) Issuing a query or caution to an erring officer.

(e) Suspending the officer from duty.

(f) Demoting the officer to a lower rank or status.

(g) Transfer or re-deployment of the erring officer from his present office to a different one.

(h) Removal, retirement or termination of service.

Judicial Control of Administrative Action

It is a admitted fact that the administrative authorities now a days are conferred on wide administrative powers which are required to be controlled otherwise they will become new despots. The Administrative Law aims to find out the ways and means to control the powers of the administrative authorities.

In the context of increased powers for the administration, judicial control has become an important area of administrative law, because Courts have proved more effective and useful than the Legislature or the administration in the matter. "It is an accepted axiom" observed Prof. Jain & Jain that "the real kernel of democracy lies in the Courts enjoying the ultimate authority to restrain all exercise of absolute and arbitrary power.

Without some kind of judicial power to control the administrative authorities, there is a danger that they may commit excess and degenerate into arbitrary authorities, and such a development would be inimical to a democratic Constitution and the concept of rule of law."

We will discuss the mechanism of judicial controls in detail in the following sections.

NOTES

4.4 JUDICIAL CONTROL (JUDICIAL REMEDIES)

Judiciary has been given wide powers for controlling the administrative action. The Courts have been given power to review the acts of the legislature and executive (administration) and declare them void in case they are found in violation of the provisions of the Constitution.

In India the modes of judicial control of administrative action can be conveniently grouped into three heads :

(A) Constitutional;

(B) Statutory;

(C) Ordinary or Equitable.

Judicial Review and Its Exclusion

Judicial review, in short, is the authority of the Courts to declare void the acts of the legislature and executive, if they are found in the violation of the provisions of the Constitution. Judicial Review is the power of the highest Court of a jurisdiction to invalidate on Constitutional grounds, the acts of other Government agency within that jurisdiction.

The doctrine of judicial review has been originated and developed by the American Supreme Court, although there is no express provision in the American Constitution for the judicial review. In Marbury v. Madison the Supreme Court made it clear that it had the power of judicial review.

In England there is supremacy of Parliament and therefore, the Act passed or the law made by Parliament cannot be declared to be void by the Court. The function of the judiciary is to ensure that the administration or executive function conforms to the law.

The Constitution of India expressly provides for judicial review. Like U.S.A., there is supremacy of the Constitution of India. Consequently, an Act passed by the legislature is required to be in conformity with the requirements of the Constitution and it is for the judiciary to decide whether or not the Act is in conformity with the Constitutional requirements and if it is found in violation of the Constitutional provisions the Court has to declare it unconstitutional and therefore, void because the Court is bound by its oath to uphold the Constitution.

The Constitution of India, unlike the American Constitution expressly provides for the judicial review. The limits laid down by the Constitution may be express or implied. Articles 13, 245 and 246, etc. provide the express limits of the Constitution.

The Provisions of Article 13 are: — Article 13 (1) provides that all laws in force in the territory of India immediately before the commencement of the Constitution of India, in so far as they are inconsistent with the provision of Part III dealing

NOTES

with the fundamental rights shall, to the extent of such inconsistency, be void. Article 13 (2) provides the State Shall not make any law which takes away or abridges the fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void.

Article 245 makes it clear that the legislative powers of Parliament and of the State Legislatures are subject to the provisions of the Constitution. Parliament may make laws for the whole or any part of the territory of India and the legislature of State may make laws for the whole or any part of the State. No law made by Parliament shall be deemed to be invalid on the ground that it would have been extra-territorial operation. The State Legislature can make law only for the State concerned and, therefore, the law made by the state Legislature having operation outside the State would be beyond its competence and, therefore ultra vires and void.

The doctrine of ultra vires has been proved very effective in controlling the delegation of legislative function by the legislature and for making it more effective it is required to be applied more rigorously. Sometimes the Court's attitude is found to be very liberal.

Supreme Court has held that the legislature delegating the legislative power must lay down the legislative policy and guideline regarding the exercise of essential legislative function, which consists of the determination of legislative policy and its formulation as a rule of conduct. Delegation without laying down the legislative policy or standard for the guidance of the delegate will amount to abdication of essential legislative function by the Legislature. The delegation of essential legislative function falls in the category of excessive delegation and such delegation is not permissible.

The power of judicial review controls not only the legislative but also the executive or administrative act. The Court scrutinizes the executive act for determining the issue as to whether it is within the scope of the authority or power conferred on the authority exercising the power. For this purpose the ultra vires rules provides much assistance in the Court. Where the act of the executive or administration is found ultra virus the Constitution or the relevant Act, it is declared ultra virus and, therefore, void.

The Courts attitude appears to be stiffer in respect of the discretionary power of the executive or administrative authorities. The Court is not against the vesting of the discretionary power in the executive, but it expects that there would be proper guidelines or normal for the exercise of the power. The Court interferes when the uncontrolled and unguided discretion is vested in the executive or administrative authorities or the repository of the power abuses its discretionary power.

The judicial review is not an appeal from a decision but a review of the manner in which the decision has been made. The judicial review is concerned not with the decision but with the decision making process.

The Supreme Court has expressed the view that in the exercise of the power of judicial review the Court should observe the self-restraint and confine itself the question of legality. Its concern should be :

1. *Whether a decision making authority exceeding its power?*
2. *Committed an error of law.*
3. *Committed a breach of the rules of natural justice.*
4. *Reached a decision which no reasonable tribunal would have reached, or*
5. *Abused its power.*

It is not for the Court to determine whether a particular policy or a particular decision taken in the furtherance of the policy is fair. The Court is only concerned with the manner in which those decisions have been taken. The extents of the duty to act fairly vary from case to case. The aforesaid grounds may be classified as under :

(i) Illegality

(ii) Irrationality

(iii) Procedural impropriety.

Mala fide exercise of power is taken as abuse of power : Mala fides may be taken to mean dishonest intension or corrupt motive. In relation to the exercise of statutory power it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently. If its repository intends to achieve an object other than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest. The burden to prove mala fide is on the person who wants the order to be quashed on the ground of mala fide.

The judicial review is the supervisory jurisdiction

It is concerned not with the merit of a decision but with the manner in which the decision was made. The court will see that the decision making body acts fairly. It will ensure that the body acts in accordance with the law. Whenever its act is found unreasonable and arbitrary it is declared ultra vires and, therefore, void. In exercising the discretionary power the principles laid down in article 14 of the Constitution have to be kept in view. The power must be only be tested by the application of Waynesburg's principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides.

The administrative action is subject to judicial review on the ground of **procedural impropriety** also. If the procedural requirement laid down in the

NOTES

statute is mandatory and it is not complied, the exercise of power will be bad. Whether the procedural requirement is mandatory or the Court decides directory. Principles of natural justice also need to be observed. If the order passed by the authority in the exercise of its power affected any person adversely. It is required to observe the principles of natural justice. In case of violation of the principles of natural justice, the order will be held to be void. The principles of natural justice are treated as part of the constitutional guarantee contained by Article 14 and their violation is taken as the violation of Article 14.

Key Points on Judicial Review

- The jurisdiction of the Supreme Court under Articles 32 and 136 and of High Court under Articles 226 and 227 have been proved of tremendous importance in the preservation and enforcement of the rule of law in India. Any statute cannot exclude the jurisdiction under these Articles.
- In several cases, the Supreme Court has observed that the jurisdiction under Articles 32, 136, 226 and 227 cannot be excluded even where the action of the administration is made final by the Constitutional amendment.
- Judicial review is an unavoidable necessity wherever there is a constant danger of legislative or executive lapses and appealing erosion of ethical standards in the society.
- The judicial review is the basic feature of the Constitution, which has been entrusted to the Constitutional Courts, namely, the Supreme Court of India and High Courts under Article 32 and Articles 226 and 227 respectively. It is the Constitutional duty and responsibility of the Constitutional Courts as assigned under the Constitution, to maintain the balance of power between the Legislature, the Execution, and the judiciary.
- The judicial review is life-breath of constitutionalism. Judicial review passes upon constitutionality of legislative Acts or administrative actions. The Court either would enforce valid Acts/actions or refuse to enforce them when found unconstitutional.
- Judicial review does not concern itself with the merits of the Act or action but of the manner in which it has been done and its effect on constitutionalism. It, thereby, creates harmony between fundamental laws namely, the Constitution and the executive action or legislative Act.

The Supreme Court of India has played significant role in the Constitutional development. The Scope of judicial review in India is sufficient to make the Supreme Court a powerful agency to control the activities of both the legislature and the executive.

In Indira Nehru Gandhi v. Raj Narain, *(A.I.R. 1975 S.C. 2299)* the Supreme Court has held that even where the Constitution itself provides that the action of the administrative authority shall be final. The judicial review provided under Articles 32, 136, 226 and 227 is not barred. Judicial review is the part of the basic structure of the Constitution.

Exclusion of Judicial Review (Ouster clause or finality clause)

Finality clause may be taken to mean a section in the statute, which bars the jurisdiction of the ordinary Courts. The modern legislative tendency is to insert such clause to preclude the Courts from reviewing the law. On account of such tendency the danger of infringing the rights of the individuals is increasing. The rule of law requires that the aggrieved person should have right to approach the court for relief and, therefore, Courts do not appear to have accepted the Court or ouster clause in its face value and have evolved several rules to waive such clauses for providing justice to the aggrieved person.

Extent of Judicial Exclusion

The jurisdiction of the Courts is excluded in several ways. Exclusive may be express or implied. For example S.2 of the Foreigners act, 1946 may be mentioned as an example of express exclusion. It provides that the action taken under the act shall not be called in question in any legal proceeding before any Court of law.

In India the position on the **finality clause** is not well settled. It is extremely complex issue. For this purpose the judicial review may be divided into two categories -

Constitutional modes of judicial review and Non-Constitutional modes of judicial review.

The judicial review available under article 32, 136 226 and 227 is taken as Constitutional mode of judicial review, *i.e.,* the judicial review available under Articles 32, 136, 226, 227 cannot be excluded by the finality clause contained in the statute and expressed in any languages. Any statute or ordinary laws cannot take the jurisdiction of the Court under article 32, 136, 226 and 227 as the Constitution of India provides them. Thus, any ordinary law cannot bar the jurisdiction of the Supreme Court under Article 32 and 136 and of the High Court under Articles 226 and 227.

In Keshava Nanda Bharti v. State of Kerala, *(A.I.R. 1973 S.C. 1461)* the Supreme Court has held the Parliament has power to amend the Constitution but it cannot destroy or abrogate the basic structure or framework of the Constitution. Article 368 does not enable Parliament of abrogate or take away Fundamental right or to completely alter the fundamental features of the

NOTES

Constitution so as to destroy its identity. Judicial review therefore it cannot be taken away.

In Indra Nehru Gandhi v. Raj Narain, the validity of Clause (4) of Article 329 – A inserted by the Constitution (39 the Amendment) Act, 1975 was challenged on the ground that it destroyed the basic structure of the Constitution. The said Clause (4) provided that notwithstanding any Court order declaring the election of the Prime Minister or the Speaker of Parliament to be void, it would continue to be void in all respects and any such order and any finding on which such order was based would be deemed always to have been void and of no effect. This clause empowered Parliament to establish by law some authority or body for deciding the dispute relating to the election of the Prime Minister or Speaker. It provides that the decision of such authority or body could not be challenged before the Court. This clause was declared unconstitutional and void as being violation of free and fair election, democracy and rule of law, which are parts of the basic structure of the Constitution. In case judicial review, democracy, free and fair election and rule of law were included in the list of the basic features of the Constitution. Consequently any Constitutional amendment, which takes away, any of them will be unconstitutional and therefore void.

The non-constitutional mode of judicial review is conferred on the civil Courts by statute and therefore it may be barred or excluded by the statute. S. 9 of the Civil Procedure Code, 1908 confers a general jurisdiction to Civil Courts to entertain suits except where its jurisdiction is expressly or impliedly excluded. Implied exclusion of the jurisdiction of the Civil Courts is usually given effect where the statute containing the exclusion clause is a self contained Code and provides remedy for the aggrieved person or for the settlement of the disputes.

When not excluded

However, it is to be noted that the exclusion clause or ouster clause or finality clause does not exclude the jurisdiction of the Court in the condition Stated below :

1. **Unconstitutionality of the statute :** Exclusion clause does not bar the jurisdiction of the Court to try a suit questioning the constitutionality of an action taken there under. If the statute, which contains the exclusion clause, is itself unconstitutional, the bar will not operate. The finality should not be taken to mean that unconstitutional or void laws be enforced without remedy.
2. **Ultra vires Administrative action :** The exclusion clause does not bar the jurisdiction of the Court in case where the action of the authority is ultra vires. If action is ultra vires the powers of the administrative authority; the exclusion clause does not bar the jurisdiction of the Courts. The rule is

applied not only in the case of substantive ultra vires but also in the case of procedural ultra vires. If the authority acts beyond its power or jurisdiction or violates the mandatory procedure prescribed by the statute, the exclusion or finality clause will not be taken as final and such a clause does not bar the jurisdiction of the Court.

3. **Jurisdictional error :** The exclusion or ouster or finality clause does not bar the jurisdiction of the Court in case the administrative action is challenged on the ground of the jurisdictional error or lack of jurisdiction. The lack of jurisdiction or jurisdictional error may arise where the authority assumes jurisdiction, which never belongs to it or has exceeded its jurisdiction indicating the matter or has misused or abused its jurisdiction. The lack of jurisdiction also arises where the authority exercising the jurisdiction is not properly constituted.
4. **Non compliance with the provisions of the statute :** the exclusion clause will not bar the jurisdiction of the Court if the statutory provisions are not complied with. Thus if the provisions of the statute are not complied with, the Court will have jurisdiction inspite of the exclusion or finality clause.
5. **Violation of the Principles of natural Justice :** If the order passed by the authority is challenged on the ground of violation of the principles of natural justice; the ouster clause or exclusion clause in the statute cannot prevent the Court from reviewing the order.
6. **When finality clause relates to the question of fact and not of law :** Where the finality clause makes the finding of a Tribunal final on question of facts, the decision of the Tribunal may be reviewed by the Court on the question of law.

Constitutional Remedies

The judicial control of administrative action provides a fundamental safeguard against the abuse of power. Since our Constitution was built upon the deep foundations of rule of law, the framers of the Constitution made sincere efforts to incorporate certain Articles in the Constitution to enable the courts to exercise effective control over administrative action. Let us discuss those articles of the constitution :

(a) Under article 32, the Supreme Court has been empowered to enforce fundamental rights guaranteed under Chapter III of the Constitution. Article 32 of the Constitution provides remedies by way of writs in this country. The Supreme Court has, under Article 32(2) power to issue appropriate directions, or orders or writs, including writs in the nature of *habeas corpus, certiorari, mandamus, prohibition and quo- warranto* The court can issue not only a writ but can also make any order or give any direction,

NOTES

which it may consider appropriate in the circumstances. It cannot turn down the petition simply on the ground that the proper writ or direction has not been prayed for.

(b) Under article 226 concurrent powers have been conferred on the respective High Courts for the enforcement of fundamental rights or any other legal rights. It empowers every High Court to issue to any person or authority including any Government, in relation to which it exercises jurisdictions, directions, orders or writs including writs of habeas corpus,. mandamus, prohibition, quo warranto and certiorari. In a writ petition, High Court cannot go into the merits of the controversy. For example, in matters of retaining or pulling down a building the decision is not to be taken by the court as to whether or not it requires to be pulled down and a new building erected in its place.

(c) Under Article 136 the Supreme Court has been further empowered, in its discretion, to grant special leave to appeal from any judgment, decree, determination, sentence or order by any Court or tribunal in India. Article 136 conferred extraordinary powers on the Supreme Court to review all such administrative decisions, which are taken by the administrative authority in quasi judicial capacity.

The right to move the Supreme Court in itself is a guaranteed right, and Gajendragadkar, J., has assessed the significance of this in the following manner :

> "The fundamental right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should in the words of ***Patanjali Sastri, J.,*** regard itself as the protector and guarantor of fundamental rights and should declare that it cannot consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringement of such rights."

Since Article 32 is itself fundamental right, it cannot be whittled down by a legislation. It can be invoked even where an administrative action has been declared as final by the statute.

An order made by a quasi-judicial authority having jurisdiction under an Act which is intra virus is not liable to be questioned on the sole ground that the provisions of the Act on the terms of the notification issued there under have been misinterpreted.

The rule of maintainability of petition under Article 32 held above is subject to three exceptions

First, if the statute for a provision thereof *ultra vires* any action taken there under by a quasi-judicial authority which infringes or threatens to infringe a

fundamental right, will give rise to the question of enforcement of that right and petition under Article 32 will lie.

Second, if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing error as to a right, the question of enforcement of that arises and a petition under Article 32 will lie even if the statute is *intra vires.*

Third, if the action taken by a quasi-judicial authority is procedurally *ultra virus,* a petition under Article 32 would be competent.

Under Article 32 of the Constitution the following person may complain of the infraction of any fundamental rights guaranteed by the Constitution :

Any person including corporate bodies who complains of the infraction of any of the fundamental rights guaranteed by the Constitution is at liberty to move the Supreme Court except where the languages of the provision or the nature of the right implies the inference that they are applicable only to natural person.

The right that could be enforced under article 32 must ordinarily be the rights of the petitioner himself who complains of the infraction of such rights and approaches the Court for relief. An exception is as held in the Calcutta Gas Case,(**AIR 1962 SC 1044)** that in case of habeas corpus not only the man who is or detained in confinement but any person provided he is not an absolute stranger, can institute proceeding to obtain a writ of habeas corpus for the purpose of liberation.

The Constitution of India assigns to the Supreme Court and the High Courts the role of the custodian and guarantor of fundamental rights. Therefore, where a fundamental right is involved, the courts consider it to be their duty to provide relief and remedy to the aggrieved person. In matters other than the fundamental rights, generally the jurisdiction of the courts to grant relief is considered to be discretionary. The discretion is, however, governed by the broad and fundamental principles, which apply to the writs in England.

A petition under Art 32 may be rejected on the ground of inordinate delay However, a writ petition made after 12 years by a person belonging to lower echelons of service against the Department which and not counted his service in the officiating capacity, was entertained because the Department had not given reply to his representations.

It was held in one of the decided case (***A.I.R 1964 S.C. 1013; Supreme Court Employees Welfare Association verses union of India A.I.R 1990 334)*** that a petition under Art 32 would be barred by res judicata if a petition on the same cause of action filed before the High Court was earlier rejected.

The Court went further and said that the principle of ***res judicata*** did not apply to successive writ petitions in the Supreme Court and the High Court

NOTES

under Arts 32 and 226 respectively. The Court observed that a petition based on fresh or additional grounds would not be barred by res judicata. A petition under Artic 32, however, will not lie against the final order of the Supreme Court under art 32 of the constitution. It was held that a petition would not lie under Art 32 challenging the correctness of an order of the Supreme Court passed on a special leave petition under Art 136 of the Constitution setting aside the award the award of enhanced solarium and interest under the land acquisition Act, 1894.

Existence of Alternative Constitutional Remedies

When statutory remedies are available for determining the disputed questions of fact or law, such questions cannot be raised through a petition under Art 32.

The Supreme Court would not undertake a fact-finding enquiry in the proceedings under Art 32. If the facts are disputed, they must be sorted out at the appropriate forum. In *Ujjam Bai v. State of UP (AIR 1962 SC 1621)* the Supreme Court held that a petition under Art 32 could not impugned error of law or fact committed in the exercise of the jurisdiction conferred on an authority by law. The Court here made a distinction between acts, which were ultra vires, or in violation of the principles of natural justice and those, which were erroneous though within jurisdiction. While the former could be impugned, the latter could not be impugned in a writ petition under art 32. This dictum was, however, narrowed down by subsequent decisions. It was held that where an error of law or fact committed by a tribunal resulted in violation of a fundamental right; a petition under Art 32 would be maintainable.

The fact that the right to move the Supreme Court for the enforcement of fundamental rights under Art 32 is a fundamental right should not bind us to the reality that such a right in order to be meaningful must be used economically for the protection of the fundamental rights. However, in recent years, with the expansion of the scope of art 21 of the Constitution and the growth of public interest litigation, the threshold enquiry regarding the violation of fundamental rights has become rare. Article 32 has almost become a site for public interest litigation where fundamental rights of the people are agitated. It is under this jurisdiction that the human rights jurisprudence and environmental jurisprudence have developed.

The Court has given such expansive interpretation of art 21 of the Constitution that the question, which seemed to be alien to Art 32, became integral part of it. The right to life and personal liberty came to comprehend such diverse aspects of human freedom such as the right to environment, or the right to gender justice or the right to good governance that questions such as whether the ordinance making power was exercised to defraud the Constitution or whether

judges were appointed in such a way as to enhance the indepenence of the judiciary or who and how should a social service organization undertake the giving of Indian children in adoption to foreigners became matters involving fundamental rights. Since the rights to live guaranteed by Art 21 included the right to live with dignity the right to unpolluted environmental jurisprudence has emerged. With the growth of the public interest litigation, which we will discuss separately, Art 32 has become an important site for the vindication of various group human rights. The Court has even incorporated some of the directive principles of state policy within the compass of the fundamental rights. For example, it declared that the right to primary education was a fundamental right. The Supreme Court entertained a writ petition under Art 32 seeking the implementation of the Consumer Protection Act and appointment of district forums as required there under. The Court also entertained a petition which said that due to large backlogs, the undertrail prisoner remained for an inordinately long periods in jail.

Principles Regarding Writ Jurisdiction Under Article 226

Article 226 empowers the High Courts to issue writs in the nature of habeas corpus, mandamus, prohibition, certiorari and quo warranto or any of them for the enforcement of any of the fundamental rights or for any other purpose. It has been held that the words 'for any other purpose' mean for the enforcement of any statutory or common law rights. The jurisdiction of the High Courts under Art 226 is wider than that of the Supreme Court under Art 32. The jurisdictions under Art 32 and 226 are concurrent and independent of each other so far as the fundamental rights are concerned. A person has a choice of remedies. He may move either the Supreme Court under Art 32 or an appropriate High Court under Art 226. If his grievance is that a right other than a fundamental right is violated, he will have to move the High Court having jurisdiction. He may appeal to the Supreme Court against the decision of the High Court. After being unsuccessful in the High Court, he cannot approach the Supreme Court under Art 32 for the same cause of action because as said earlier, such a petition would be barred by ***resjudicata.*** Similarly, having failed in the Supreme Court in a petition filed under Art 32, he cannot take another chance by filing a petition under Art 226 in the High Court having jurisdiction over his matter because such a petition would also be barred by res judicata.

The High Court's jurisdiction in respect of ' other purposes' is however, discretionary. The courts have laid down rules in accordance with which such discretion is to be exercised. The jurisdiction of the High Court under Art 226 cannot be invoked if :

- The petition is barred by res jusicata;
- If there is an alternative and equally efficacious remedy available and which has not been exhausted;

- If the petition raised questions of facts which are disputed; and
- If the petition has been made after an inordinate delay.

NOTES

These rules of judicial restraint have been adopted by our courts from the similar rules developed by the English courts in the exercise of their jurisdiction to issue the prerogative writs.

Where a civil court had dealt with a matter and the High Court had disposed of an appeal against the decision of the civil court, a writ petition on the same matter could not be entertained. This was not on the ground of res judicata as much as on the ground of judicial discipline, which required that in matters relating to exercise of discretion, a party could not be allowed to take chance in different forums. Withdrawal or abandonment of a petition under Art 226/227 without the permission of the court to file a fresh petition there under would bar such a fresh petition in the High Court involving the same subject matter, though other remedies such as suit or writ petition under Art 32 would be open. The principle underlying Rule 1 of Order 23 of the CPC was held to be applicable on the ground of public policy.

It is a general rule of the exercise of judicial discretion under Art 226 that the High Court will not entertain a petition if there is an alternative remedy available. The alternative remedy however, must be equally efficacious. Where an alternative and efficacious remedy is provided, the Court should not entertain a writ petition under Art 226. Where a revision petition was pending in the High Court challenging the eviction degree passed against a tenant by the court of the Small Causes, it was held that the High Court should not have entertained a writ petition filed by the cousins of the tenants. The petitioners should have exhausted the remedies provided under the Code of Civil procedure before filing the writ petition. Petitions were dismissed on the ground of the existence of an alternative remedy in respect of elections to municipal bodies or the Bar Council.

When a law prescribes a period of limitation for an action, such an action has to be brought within the prescribed period. A court or a tribunal has no jurisdiction to entertain an action or proceeding after the expiration of the limitation period. It is necessary to assure finality to administrative as well as judicial decisions. Therefore, those who sleep over their rights have no right to agitate for them after the lapse of a reasonable time. Even writ petitions under Art 226 are not immune from disqualification on the ground of delay. Although the law of limitation does not directly apply to writ petitions, the courts have held that a petition would be barred if it comes to the court after the lapse of a reasonable time. This is however, not a rule of law but is a rule of practice. Where the petitioner shows that illegality is manifest in the impugned action, and explains the causes of delay, the delay may be condoned.

NOTES

Scope of the High court's Jurisdiction under Article 226

The jurisdiction of the High Court under Art 226 is very vast and almost without any substantive limits barring those such as territorial limitations. Although the jurisdiction of the High Court is so vast and limitless, the courts have imposed certain limits in their jurisdiction in order to be able to cope with the volume of litigation and also to avoid dealing with questions, which are not capable of being answered judicially. There are three types of limitations :

- Those arising from judicial policy;
- Those which are procedural and
- Those because of the petitioner's conduct.

The Supreme Court has held that the extra ordinary jurisdiction should be exercised only in exceptional circumstances.

It was held that the High Court was not justified in going into question of contractual obligations in a writ petition. It was held that the jurisdiction under Art 226 should be used most sparingly for quashing criminal proceedings. The High Court should interfere only in extreme cases where charges ex facie do not constitute offence under the Terrorist and Destructive Activities Act (TADA) It should not quash the proceedings where the application of the Act is a debatable issue.

Power to Review Its Own Judgments

It was held that the High Court had power to review its own judgments given under Art 226. This power, however, must be exercised sparingly and in cases, which fell within the guidelines provided by the Supreme Court. However, review by the High Court of its own order in a writ petition on the ground that two documents which were part of the record were not considered by it at the time of the issuance of the writ under Art 226, especially when the documents were not even relied upon by the parties in the affidavits filed before the High Court was held to be impermissible.

On the death of the petitioner during the pendency of his writ petition against removal from service, the petition abates. The successor cannot continue the petition.

If the petitioner were guilty of mala fide and calculated suppression of material facts, which if disclosed, would have disentitled him to the extra ordinary remedy under Art 226 or in any case materially affected the merits of the case, he would be disentitled to any relief. Where the writ petitioners had themselves invoked the review jurisdiction of the competent officer under the Evacuee Interest (Separation) Act, 1950, to their advantage and to the disadvantage of the appellant, it was held that the petitioner could not be heard to say that the review orders of the authority were void for want of jurisdiction.

NOTES

Rights of the Armed Forces

The Constitution provides two exceptions to the availability of the constitutional remedies given in Art 32, 226 227 and 136. Art 33 of the Constitution says that Parliament may by law determine to what extent any of the rights conferred by Part III shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Suspension of Judicial Review during Emergency

The right to move the court for the enforcement of the fundamental rights be suspended during the emergency. This is the second exception to the availability of constitutional remedies.

Under Art 359 of the Constitution the President may declare that the right to move any court for the enforcement of such of the fundamental rights as may be mentioned in the order and all proceedings pending in any court for the enforcement of those rights shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the Order. By the Constitution (Forty- fourth) Amendment Act, 1978, the words 'except Arts 20 and 21' were added to the above Article. It means that the right to move any court for the enforcement of any of the fundamental rights except the rights guaranteed by Art 20 and the President may suspend 21 during the proclamation of emergency.

The jurisdiction under Art 227 is narrower than that under Art 226 because while under art 226, the High Court can quash any administrative action, under Art 227, it can act only in respect of judicial or at the most quasi- judicial actions. By giving wider meaning to the word 'tribunal' in this Article as well as in Art 136, the courts have included various administrative authorities within the power of superintendence. Clause (4) of art 227, however, excludes the tribunals constituted by or under any law relating to the armed forces from the supervisory jurisdictions of the High Courts. The court martial proceedings under the Military law are not within the power of superintendence of the High Court, though they are subject to judicial review under Art 226.

A petition under Art 227 is not maintainable if there is an adequate alternative remedy. In this matter the same principles will apply as are applicable to petitions filed under the Consumers protection act dismissing a petition for non-appearance would not lie under Art 227 to the High Court since the statutory remedy of appealing under sec. 15 or applying for revision under sec. 17 to the State Commission under that Act was available.

NOTES

REMEDY THROUGH SPECIAL LEAVE TO APPEAL UNDER ARTICLE 136

Articles 132 to 135 of the Constitution deal with ordinary appeals to the Supreme Court in constitutional, civil and criminal matters. Article 136 deals with a very special appellate jurisdiction conferred on the Supreme Court. Under this provision the Supreme Court has power to grant in the discretion, special leave to appeal from —

(a) Any judgment, decree, determination or order;

(b) In any cause or matter;

(c) An order passed or made by any court or tribunal in the territory of India.

The scope of the Article is very extensive and it invests the Court with a plenary jurisdiction to hear appeals. Since the Court has been empowered to hear appeals from the determination or orders passed by the tribunal including all such administrative tribunals and bodies which are not Courts in the strict sense, this has become most interesting aspect of this provision from the point of administrative law. Under the provision, the Court may hear appeals from any tribunal even where the legislature declares the decision of a tribunal final.

A large number of ad judicatory bodies outside the regular judicial hierarchy have sprung up in modern times and it was deemed highly desirable that the Supreme Court should be able to keep some control over such bodies through the technique of hearing appeal there from. Prof. Jain and Jain have rightly observed it in this connection :

> *" It is extremely desirable that there should be some forum correct misuse of power by such bodies. To leave these bodies outside the place of any judicial control would be to create innumerable tiny despots, which could negative the rule of law. The ambit of Supreme Court's jurisdiction under Article 136 is in some respects broader than that under Article 32. Article is confined to the enforcement of fundamental rights only whereas Article 136 is not so. The appellate jurisdiction of the court gives more scope to the Court to intervene with ad judicatory bodies and provides grounds of judicial control. But from another point of view the jurisdiction of the Court under Article 136 is narrower than that under Article 32. Article 136 is available only in cases of tribunals while Article 32 can be invoked when any authority whatsoever infringes a fundamental right. It has been found that the Court has been extremely reluctant to intervene with quasi- judicial bodies. As regard the points of difference between the writ jurisdiction of the High Courts under Article 226 any appellate jurisdiction of the Supreme Court under Article 136, it can be said that a high court can issue a writ to any authority whether quasi-jurisdiction or administrative; whereas the supreme Court under Article 136 can hear appeal only from a court or tribunal. In*

NOTES

this respect writ jurisdiction of a High Court is broader than the appellate scope of the Supreme Court under Article 136. But from another point of view the scope of Article 226 is narrower than Article 136. The Supreme Court can interfere with a decision of a tribunal on wider form than the High Court in its writ jurisdiction, are not so flexible it does not enter into questions of facts while there is no restriction on the powers of the Supreme Court."

General principles relating to the grant of special leave to appeal. The following principles have been evolved on the basis of cases decided by the Court, in connection with the grant of special leave to appeal :

(1) The Court has imposed certain limitations upon its own powers under Article 136, *e.g.*, it has laid down that the power is to be exercised sparingly and in exceptional cases only. The power shall be exercised only where special circumstances are shown to exist.

(2) Ordinarily, the Supreme Court would refuse to entertain appeal under Article 136 from the order of an inferior tribunal where the litigant has not availed himself of the ordinary remedies available to him by law, *e.g.*, a statutory right of appeal or revision or where he has not appealed from the final order of an Appellate Tribunal from the decision of the inferior tribunal. This may be allowed only in exceptional cases e.g., breach of the principles of natural justice by the order appeal to the Supreme Court is on a point, which could not have been decided in the appeal under ordinary law.

(3) The reserve power of the court cannot under Article 136 be exhaustively defined but it is true that the Court has acted arbitrarily or has not given a fair deal to the litigant, will not be handicapped in the exercise of its findings of facts or otherwise.

(4) It is quite plain that the Supreme Court reaches the conclusion that the tribunal or the Court has acted arbitrarily or has not given a fair deal to the litigant, will not be handicapped in the exercise of its findings of facts or otherwise.

(5) The Supreme Court would not permit a question to be raised before it for the first time, if the same has not been raised before the tribunal. But where the question raised for the first time involves a question of law and it arose on admitted facts, then the court may allow the same to be argued before it. The court again said that the point was neither raised in the written statement filed by the appellant in the trail Court nor in the grounds of appeal filed by him in the appellate court cannot be canvassed before the Supreme Court for the first time on appeal by special leave.

(6) In an appeal under this provision, the Supreme Court will not interfere with the award of a Tribunal unless some erroneous principle has been invoked or some important piece of evidence has been overlooked or misapplied.

Remedy against the administrative tribunal under Article 227 : According to Article 227 (1) as it existed before the 42nd amendment of the Constitution every High Court had the power of superintendence over all Courts and tribunals within its territorial jurisdiction except those which are constituted under a law relating to armed forces. Here the word tribunal was read in the same connotation as it has been used in Article 136. The power of superintendence included the power to call returns from such courts, to make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts and prescribe forms in which books, entries, and accounts were to be kept by the officers of such Courts. Now under Fortyforth Amendment act of the Constitution the jurisdiction of the High Court over administrative tribunals has been restored and accordingly the power of superintendence and supervision of the High Courts over them exists as before.

The high Courts were thus empowered to exercise broad powers of superintendence over Courts and tribunals. The power extended not only to administrative but also even to judicial superintendence over judicial or quasijudicial bodies. The power of the High Court under Article 226 differed from power of superintendence exercised by it under Article 227.

Firstly, where it could quash orders of inferior court or tribunal, but the court under Article 226 may quash the order as well as issue further directions in the matter.

Secondly, Under Article 227 the power of interference was limited to seeing that the tribunal function with in the limits of its authority.

Thirdly, the power under Article 227 will only be exercised where the party affected moves the court, while the superintending power under Article 227 could be exercised at the instance of High Court itself.

In exercising the supervisory power under Article 227, the High Court does not act as an appellate tribunal. It did not use to review to reweigh the evidence upon which the determination of the inferior tribunal purported to be based.

Statutory Review

The method of statutory review can be divided into two parts :

(i) ***Statutory appeals*** : There are some Acts, which provide for an appeal from statutory tribunal to the High Court on point of law *e.g.*, Section 30 Workmen's Compensation act, 1923.

NOTES

(ii) *Reference to the High Court or statement of case :* There are several statutes, which provide for a reference or statement of case by an administrative tribunal to the High Court. Under Section 256 of the Income-tax Act of 1961 where an application is made to the Tribunal by the assessee and the Tribunal refuses to state the case the assessee may apply to the High Court and if the High Court is not satisfied about the correctness of the decision of the Tribunal, it can required to Tribunal to state the case and refer it to the Court.)

Ordinary Remedies or Equitable Remedies

Apart from the extra-ordinary (Constitutional Remedies) guaranteed as discuss above there are certain ordinary remedies, which are available to person under specific statutes against the administration. The ordinary courts in exercise of the power provide the ordinary remedies under the ordinary law against the administrative authorities. These remedies are also called equitable remedies. This includes :

(i) Injunction,

(ii) Declaratory Action,

(iii) Action for damages.

In some cases where wrong has been done to a person by an administrative act, declaratory judgments and injunction may be appropriate remedies. An action for declaration lies where a jurisdiction has been wrongly exercised. Or where the authority itself was not properly constituted. Injunction s issued for restraining a person to act contrary to law or in excess of its statutory powers. An injunction can be issued to both administrative and quasi-judicial bodies. Injunction is highly useful remedy to prevent a statutory body from doing an ultra vires act, apart from the cases where it is available against private individuals e.g. to restrain the commission or torts, or breach of contract or breach of statutory duty.

Before discussing these remedies let us find out what is the meaning of equity.

Meaning of Equity

Before we discuss equitable remedies, it is necessary for us to know something about equity. Since the administration of justice has begun on the basis of law in the world, a class of society has always been against the rigidity of law. This class of society is of the opinion that howsoever mature and legally skilled men may make the laws, yet they cannot experience the circumstances which the judges may have to face in future. The circumstances in which the provisions of law may prove to be unjust for the people if is necessary to make the provisions of law flexible, and injustice caused by such rigidity of law should

be stopped. Equity is based on this consideration. Equity is a voice against injustice caused by rigidity of low.

Equity, which is not a synonym of natural justice, demands that justice should be made in accordance with the circumstances. Equities a new and independent system of law which developed in England. It has its own history and origin. It made an important contribution in the English system of law as a supplementary of main legal system till 1873, when it was merged in the common law According to Ashburner. "Equity is a word which has been borrowed by law from morality and which was acquired in law a strictly technical meaning."

Equitable Remedies may be discussed under following headings :

(1) Injunction

An injunction is a preventive remedy. It is a judicial process by which one who has invaded or is threatening to invade the rights of another is restrained from continuing or commencing such wrongful Act.

In India, the law with regard to injunctions has been laid down in the specific Relief Act, 1963. Injunction may be prohibitory or mandatory.

Prohibitory Injunction : Prohibitory injunction forbids the defendant to do a wrongful act, which would infringe the right of the plaintiff. A prohibitory injunction may be interlocutory or temporary injunction or perpetual injunction.

Interlocutory or temporary injunction : Temporary injunctions are such as to continue until a specified time or until the further order of the court. **(S. 37 for the specific Relief Act).** It is granted as an interim measure to preserve status quo until the case is heard and decided. Temporary injunction may be granted at any stage of a suit. Temporary injunctions are regulated by the Civil Procedure Code. Temporary injunction is provisional in nature. It does not conclude or determine a right. Besides, a temporary injunction is a mere order. The granting of temporary injunction is a matter of discretion of the court.

Perpetual injunction : A perpetual injunction is granted at the conclusion of the proceedings and is definitive of the rights of the parties, but it need not be expressed to have perpetual effect, it may be awarded for a fixed period or for a flexed period with leave to apply for an extension or for an indefinite period terminable when conditions imposed on the defendant have been complied with; or its operation may be suspended fro a period during which the defendant is given the opportunity to comply with the conditions imposed on him, the plaintiff being given leave to reply at the end of that time.

Mandatory injunction : When to present the breach of an obligation, it is necessary to compel the performance of certain acts which the court in capable of enforcing, the court may in the discretion grant an injunction to prevent the breach

NOTES

complained of an also to compel performance of the requisite acts. **(S. 39 of the Specific Relief Act.)** The mandatory injunction may be taken as a command to do a particular act to restore things to their former condition or to undo, that which has been done. It prohibits the defendant from continuing with a wrongful act and also imposes duty on him to do a positive act. For example construction of the building of the dependant obstructs the light for which the plaintiff is legally entitled. The plaintiff may obtain injunction not only for restraining the defendant from the construction of the building but also to pull down so much of the part of the building, which obstructs the light of the plaintiff.

(2) Declaration (Declaratory Action)

Declaration may be taken as a judicial order issued by the court declaring rights of the parties without giving any further relief. Thus a declaratory decree declares the rights of the parties. In such a decree there is no sanction, which an ordinary judgment prescribes same sanctions against the defendant. By declaring the rights of the parties it removes the existing doubts about the rights and secures enjoyment of the property. It is an equitable remedy. Its purpose is to avoid future litigation by removing the existing doubts with regard to the rights of the parties. It is a discretionary remedy and cannot be claimed as a matter of right.

(3) Action for Damages

If any injury is caused to an individual by wrongful or negligent acts of the Government servant the aggrieved person can file suit for the recovery of damages from the Government concerned. This aspect of law has been discussed in detail under the topic liability of Government or state in torts.

4.5 WRITS

Writs are extra ordinary remedies in cases where there is either no remedy available under the ordinary law or the remedy available is inadequate.

Articles 32 and 226 of our Constitution empower anyone, whose rights are violated, to seek writs, Under Article 32; the Supreme Court can be moved for enforcement of fundamental right only. However, under Article 226. High Court can be moved for enforcement of any right including fundamental right.

Depending upon circumstance, the various types of merits can be issued. Which are discussed below.

Writ of Habeas Corpus

Habeas corpus is a prerogative writ, which was granted to a subject of His Majesty, who was detained illegally in jail. It is an order of release. The words *habeas corpus subi di cendum* literally mean 'to have the body'.

The writ provides remedy for a person wrongfully detained or restrained. By this a command is issued to a person or to jailor who detains another person in

custody to the effect that the person imprisoned or the detenu should be produced before the Court and submit the day and cause of his imprisonment or detention. The detaining authority or person is required to justify the cause of detention. If there is no valid reason for detention, the Court will immediately order the release of the detained person.

The personal liberty will have no meaning in a constitutional set up if the writ of habeas corpus is not provided therein. The writ is available to all the aggrieved persons alike. It is the most effective means to check the arbitrary arrest by any executive authority. It is available only in those cases where the restraint is put on the person of a man without any legal justification.

When a person has been subjected to confinement by an order of the Court, which passed the order after going through the merits of the case the writ of habeas corpus cannot be invoked, however erroneous the order may be. Moreover, the writ is not of punitive or of corrective nature. It is not designed to punish the official guilty for illegal confinement of the detenu. Nor can it be used for devising a means to secure damages.

An application for habeas corpus can be made by any person on behalf of the prisoner as well as by the prisoner himself, subject to the rules and conditions framed by various High Courts.

Thus the writ can be issued for various purposes e. g. —

(a) testing the validity of detention under preventive detention laws;

(b) securing the custody of a person alleged to be lunatic;

(c) securing the custody of minor;

(d) detention for a breach of privileges by house;

(e) testing the validity of detention by the executive during emergency, etc.

When the Writ does not lie then the writ will not lie in the following circumstances :

1. If it appears on the face of the record that the detention of the person concerned is in execution of a sentence on indictment of a criminal charges. Even if in such cases it were open to investigate the jurisdiction of the court, which convicted the petitioner, but the mere jurisdiction would not justify interference by habeas corpus.
2. In habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of institution of the proceedings. It was, thus, held in Gopalan v. State, ***(AIR 1950 SC.27)*** that if a fresh and valid order justifying the detention is made by the time to the return to the writ, the court couldn't release the detenu whatever might have been the defect of the order in pursuance of which he was arrested or initially detained.

NOTES

3. There is no right to habeas corpus where a person is put into physical restraint under a law unless the law is unconstitutional or the order is ultra virus the statute.

4. Under Article 226 a petition for habeas corpus would lay not only where he is detained by an order of the State Government but also when another private individual detains him.

Grounds of Habeas Corpus

The following grounds may be stated for the grant of the writ :

(1) The applicant must be in custody;

(2) The application for the grant of the writ of habeas corpus ordinarily should be by the husband or wife or father or son of the detenu. Till a few years back the writ of habeas corpus could not be entertained if a stranger files it. But now the position has completely changed with the pronouncements of the Supreme Court in a number of cases. Even a postcard written by a detenu from jail or by some other person on his behalf inspired by social objectives could be taken as a writ-petition.

(3) In Sunil Batra v. Delhi Administration (**AIR 1980 SC.1579**) II the court initiated the proceedings on a letter by a coconvict, alleging inhuman torture to his fellow convict. Krishna Iyer, J., treated the letter as a petition for hebeas corpus. He dwelt upon American cases where the writ of habeas corpus has been issued for the neglect of state penal facilities like over-crowding, in sanitary facilities, brutalities, constant fear of violence, lack of adequate medical facilities, censorship of mails, inhuman isolation, segregation, inadequate rehabilitative or educational opportunities.

(4) A person has no right to present successive applications for habeas corpus to different Judges of the same court. As regards the applicability of res judicata to the writ of habeas corpus the Supreme Court has engrafted an exception to the effect that where the petition had been rejected by the High Court, a fresh petition can be filed to Supreme Court under Article 32.

(5) All the formalities to arrest and detention have not been complied with and the order of arrest has been made mala fide or for collateral purpose. When a Magistrate did not report the arrest to the Government of the Province as was required under Section 3(2) of the Punjab Safety Act, 1947, the detention was held illegal.

(6) The order must be defective in substance, *e.g.*, misdescription of detenu, failure to mention place of detention etc. Hence complete description of the detenu should be given in the order of detention.

(7) It must be established that the detaining authority was not satisfied that

the detenu was committing prejudicial acts, etc. It may be noted in this connection that the sufficiency of the material on which the satisfaction is based cannot be subject of scrutiny by the Court.

Where the detaining authority did not apply his mind in passing the order of detention, the court will intervene and issue the order of release of the detenu. Vague and indefinite grounds of detention.__ where the detaining authority furnishes vague and indefinite grounds, it entitles the petitioner to release.

Delay in furnishing ground may entitle detenu to be released

The Court has consistently shown great anxiety for personal liberty and refused to dismiss a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. It has adopted the liberal attitude in view of the peculiar socio-economic conditions prevailing in the country. People in general are poor, illiterate and lack financial resources. It would therefore be not desirable to insist that the petitioner should set out clearly and specifically the ground on which he challenges the order of detention.

The scope of writ of habeas corpus has considerably increased by virtue of the decision of the Supreme Court in *Maneka Gandhi v. Union of India,* and also by the adoption of forty-fourth amendment to the Constitution. Hence the writ of habeas corpus will be available to the people against any wrongful detention.

Writ of Mandamus

A writ of mandamus is in the form of command directed to the inferior Court, tribunal, a board, corporation or any administrative authority, or a person requiring the performance of a specific duty fixed by law or associated with the office occupied by the person.

Mandamus in England is "neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of public duty and specially affects the right of an individual provided there is no other appropriate remedy.

The writ is issued to compel an authority to do his duties or exercise his powers, in accordance with the mandate of law. The authority may also be prevented from doing an act, which he is not entitled to do. The authority, against which the writ is issued, may be governmental or semi-governmental, or judicial bodies. Its function in Indian Administrative Law is as general writ of justice, whenever justice is denied, or delayed and the aggrieved person has no other suitable the defects of justice. An order in the nature of mandamus is not made against a private individual. The rule is now well established that a writ of mandamus cannot be issued to a private individual, unless he acts under some public authority. A writ can be issued to enforce a public duty whether it is imposed on private individual or on a public body.

NOTES

The Court laid down that public law remedy mandamus can be availed of against a person when he is acting in a public capacity as a holder of public office and in the performance of a public duty. It is not necessary that the person or authority against whom mandamus can be claimed should be created by a statute. Mandamus can be issued against a natural person if he is exercising a public or a statutory power of doing a public or a statutory duty.

Grounds of the Writ of Mandamus

The writ of mandamus can be issued on the following grounds :

(i) That the petitioner has a legal right. The existence of a right is the formation of the jurisdiction of a Court to issue a writ of mandamus. The present trend of judicial opinion appears to be that in the case of non-selection to a post, no writ of mandamus lies.

(ii) That there has been an infringement of the legal right of the petitioner;

(iii) That the infringement has been owing to non-performance of the corresponding duty by the public authority;

(iv) That the petitioner has demanded the performance of the legal duty by the public authority and the authority has refused to act;

(v) That there has been no effective alternative legal remedy.

The applicant must show that the duty, which is sought to be enforced, is owed to him and the applicant must be able to establish an interest the invasion of which has been given rise to the action.

The writ of mandamus is available against all kinds of administrative action, if it is affected with illegality. When the action is mandatory the authority has a legal duty to perform it. Where the action is discretionary, the discretion has to be exercised on certain principles; the authority exercising the discretion has mandatory duty to decide in each case whether it is proper to exercise its discretion. In the exercise of its mandatory powers as well as discretionary powers it should be guided by honest and legitimate considerations and the exercise its discretion should be for the fulfillment of those purposes, which are contemplated by the law. If the public authority ignores these basic facts in the exercise of mandatory or discretionary.

Where the duty is not mandatory but it is only discretionary, the writ of mandamus will not be issued. The principles are illustrated in Vijaya Mehta v. State *(AIR 1980 Raj.207)* There a petition was moved in the high Court for directing the state Government to appoint a Commission to inquire into change in climate cycle, flood in the State etc. Refusing to issue the writ, the Court pointed out that under Section 3 of the Commission of Inquiry Act, the Government is obligated to appoint a commission if the Legislature passes a resolution to that effect.

In other situation, the government's power to appoint a commission is discretionary and optional as a commission could only be appointed by the State Government if, in its opinion it is necessary to do so. The petitioner, therefore has no legal right to compel the State Government to appoint a Commission of Inquiry even when there is a definite matter of public importance for the government may not feel inclined to appoint a Commission if it is of the opinion that is not necessary to do so.

If the public authority neglects to discharge mandatory duty he would be compelled by mandamus to do it. The refusal to refer to the High Court questions under statutory provision like section 57 of the Stamp Act may be included in the class of mandatory duties in the light of the decision of the Supreme Court in Maharastra Sagar Mills case.

Mandamus was issued to compel the government to fill the vacant seats in a Medical College as Article 41 of the Constitution, which is a directive principle of State policy, includes the right to medical education.

In Bhopal sugar Industries Ltd. V. income Tax Officer, Bhopal, **(AIR 1961 SC 182)** it was held by the supreme Court that, where the Income Tax Officer had virtually refused to carry out the clear and unambiguous directions which a superior tribunal like the Income tax appellate Tribunal had given to him by its final order in exercise of its appellate power in respect of an order of assessment made by him, such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based on as it is the hierarchy of Courts. In such a case a writ of mandamus should issue ex-debits justifiable to compel the Income-tax Officer to carry out the directions given to him by the Income-tax Appellate Tribunal. The High Court will be clearly in error if it refused to issue a writ on the ground that no manifest injustice has resulted from the order of the Income-tax Officer in view of the error committed by the tribunal itself in its order. Such a view is destructive of, one of the basic principles of the administration of justice.

Thus we find that the Court will not tolerate the omission of mandatory duties by the police authority and it would compel the authority by the writ of mandamus to do what it must.

A writ of mandamus will not be issued unless an accusation of noncompliance with a legal duty or a public duty is leveled. It must be shown by concrete evidence that there was a distinct and specific demand for performance of any legal or public duty cast upon the said party declined to comply with the demand.

When an original legislation by the Union or State exceeds its legislative orbit and injuries private interests, the owner of such interests can have a

NOTES

mandamus directing the States not to enforce the impugned law "against the petitioners in any manner whatsoever." The duty of this writ becomes more onerous as it attempts to face different phases and types of ultra vires administrative action, whether with regard to internment or election, taxation or license fees, evacuee property or dismissal of public officers.

Grounds on which writ of mandamus may be refused

The relief by way of the writ of mandamus is discretionary and not a matter of right. The Court on any of the following grounds may refuse it :

The Supreme Court has held in Daya v. Joint Chief Collector ***(AIR 1962 SC1796),*** *that where the act against which mandamus is sought has been completed, the writ if issued, will be in fructuous. On the same principle, the Court would refuse a writ of mandamus where it would be meaningless, owing to lapse or otherwise.*

Who may apply for mandamus?

It is only a person whose rights have been infringed who may apply for mandamus. It is interesting to note that the rule of locus stand has been liberalized by the Supreme Court so much as to enable any public-spirited man to move the court for the issue of the writ on behalf of others.

General principles relating to mandamus to enforce public duties In considering general principles the following points have to be considered :

(a) That the duty is public. In this connection an important case, Ratlam Municipality v. Vardhi Chand **(AIR 1980 SC 1622)** came to be decided by the Supreme Court in 1980, in which it compelled a statutory body to exercise its duties to the community. Ratlam Municipality is a statutory body. A provision in law constituting the body casts a mandate on the body " to undertake and make reasonable and adequate provision" for cleaning public streets and public places, abating all public nuisances and disposing of night soil and rubbish etc. The Ratlam Municipality neglected to discharge the statutory duties.

(b) That it is a duty enforced by rules having the force of law. Thus

(i) Where an administrative advisory body is set up (without the sanction of any statute) mandamus will not be issued against such body even through the functions of the body relate to public matters;

(ii) Though executive or administrative directions issued by a superior authority are enforceable against an inferior authority by departmental action, they have no force of law and are, accordingly not enforceable by mandamus.

(iii) An applicant for mandamus must take the position that the person against whom an order is sought is holding a public office under some

law, and his grievance is that he is acting contrary to the provisions of that law.

In short, mandamus will be issued when the Government or its officers either overstep the limits of the power conferred by the statute, or fails to comply with the conditions imposed by the statute for the exercise of the power.

NOTES

Against whom a Writ of Mandamus cannot be issued?

Writ of mandamus is issued generally for the enforcement of a right of the petitioner. Where the applicant has no right the writ cannot be issued. It cannot lie to regulate or control the discretion of the public authorities.

The writ of mandamus will not be issued if there is mere omission or irregularity committed by the authority. It will not lie for the interference in the internal administration of the authority. In the matters of official judgment, the High Court cannot interfere with the writ of mandamus.

Writ of Certiorari

Certiorari is a command or order to an inferior Court or tribunal to transmit the records of a cause or matter pending before them to the superior Court to be dealt with there and if the order of inferior Court is found to be without jurisdiction or against the principles of natural justice, it is quashed :

> *"Certiorari is historically an extraordinary legal remedy and is corrective in nature. It is issued in the form of an order by a superior Court to an inferior civil tribunal which deals with the civil rights of persons and which is public authority to certify the records of any proceeding of the latter to review the same for defects of jurisdiction, fundamental irregularities of procedure and for errors of law apparent on the proceedings."*

The jurisdiction to issue a writ of certiorari is a supervisory one and in exercising it, the Court is not entitled to act as a Court of appeal. That necessarily means that the findings of fact arrived at by the inferior Court or tribunal are binding. An error of law apparent on the face of the record could be corrected by a writ of certiorari, but not an error of fact; however grave it may appear to be.

Certiorari is thus said to be corrective remedy. This is, of course, its distinctive feature. The very end of this writ is to correct the error apparent on the face of proceedings and to correct the jurisdictional excesses. It also corrects the procedural omissions made by inferior courts or tribunal. If any inferior court or tribunal has passed an order in violation of rules of natural justice, or in want of jurisdiction, or there is an error apparent on the face of proceeding, the proper remedy so through the writ of certiorari.

Certiorari is a proceeding in personam

Unlike the writ of habeas corpus the petition for certiorari should be by the person aggrieved, not by any other person. The effect of the rule of personam

NOTES

is that if the person against whom the writ of certiorari is issued does not obey it, he would be committed forthwith for contempt of court.

Certiorari is an original proceeding in the superior Court. It has its origin in the court of issue and therefore the petition in India is to be filed in the High Court under Article 226 or before the Supreme Court under Article 32 of the Constitution.

Against whom it can be issued

As regards the question against whom the writ can be issued, it is well settled that the writ is available against nay judicial or quasi-judicial authority, acting in a judicial manner. It is also available to any other authority, which performs judicial function and acts in a judicial manner. Any other authority may be Government itself. But the conditions allied with it are that Government acts in a judicial manner and the issue is regarding the determination of rights or title of a person. Previously the question was in doubt whether it was available against Central and Local Governments. The majority of judgment is there, when the grant of certiorari against the Government has been denied. The Madras High Court in 1929 and again in 1940 in Chettiar v. Secretary to the Government of Madras ***(ILR1940 Mad.205.)*** held that a writ of certiorari would not lie against Madras Government. The Assam High Court has held that the writ of certiorari will be issued to an authority or body of persons who are under a duty to act judicially. It will not be available against the administrative order or against orders of non-statutory bodies.

Necessary conditions for the issue of the Writ

When any body persons –

(a) Having legal authority,

(b) To determine questions affecting rights of subjects,

(c) Having duty to act judicially,

(d) Acts in excess of their legal authority, writ of certiorari may be issued. Unless all these conditions are satisfied, mere inconvenience or absence of other remedy does not create a right to certiorari.

Grounds of Writ of Certiorari

The writ of certiorari can be issued on the following grounds :

(1) Want of jurisdiction, which includes the following :

(a) Excess of jurisdiction.

(b) Abuse of jurisdiction.

(c) Absence of jurisdiction.

(2) Violation of Natural justice.

(3) Fraud.

(4) Error on the face of records.

(1) Want of jurisdiction : The Supreme Court has stated in Ebrahim Abu Bakar v. Custodian- General of Evacuee Property *(111952 SCJ 488),* that want of jurisdiction may arise from.

(1) The nature of subject matter.

(2) From the abuse of some essential preliminary, or

(3) Upon the existence of some facts collateral to the actual matter, which the Court has to try, and which is the conditions precedent to the assumption of jurisdiction by it. It may be added that jurisdiction also depends on the character and constitution of the tribunal.

There have been a good number of cases in Indian Administrative Law where the use of jurisdiction has been corrected through the writ of certiorari. Thus the orders of tribunals which did not wait even for 15 minutes to hear a party and which resorted to its own theories to assess the premises of people and acted under the influence of political considerations, have been quashed. The Court does not interfere in the cases where there is a pure exercise of discretion, and which is not arbitrary if it is done in good faith. They do not ignore the legislative intention in the statute which might give a wide aptitude of powers to the administrative authority or the social needs, which demand the bestowal of some wider jurisdiction, or the historical circumstances under which a certain tribunal got exclusive jurisdiction of a particular subject-matter.

(2) Violation of Natural Justice : The next ground for the issue of writ of certiorari is the violation of natural justice and has a recognized place in Indian legal system as discussed in the earlier part of the reading material.

(3) Fraud : there are no cases in India where certiorari has been asked on account of fraud. The cases are found in British Administrative law where on the ground of fraud the Court has granted the writ of certiorari. The superior Courts have an inherent jurisdiction to set aside orders of convictions made by inferior tribunals if they have been procured by fraud or collusion a jurisdiction that now exercised by the issue of certiorari to quash Where fraud is alleged, the Court will decline to quash unless it is satisfied that the fraud was clear and manifest and was instrumental in procuring the order impugned.

(4) Error of law apparent on the face of record : "An error in decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceeding *e.g.,* when it is based on clear ignorance or disregard of the provision of law." In other words; it is a patent error, which can be corrected by certiorari but not a mere wrong decision. *(T. C. Basappa v. T. Nagappa AIR1954 SC 440).* It was for the first time when the Supreme Court issued the writ of certiorari on the only ground that the decision

NOTES

of the election tribunal clearly presented a case of error of law, which was apparent on the face of the record. The error must be apparent on the face of the records.

Writ of Quo Warranto

The term quo warranto means "by what authority." Whenever any private person wrongfully usurps an office, he is prevented by the writ of quo warranto from continuing in that office.

The basic conditions for the issue of the writ are that the office must be public, it must have been created by statute or Constitution itself, it must be of a substantive character and the holder of the office must not be legally qualified to hold the office or to remain in the office or he has been appointed in accordance with law.

A writ of quo warranto is never issued as a matter of course and it is always within the discretion of the Court to decide.

The Court may refuse to grant a writ of quo warranto if it is vexatious or where the petitioner is guilty of larches, or where he has acquiesced or concurred in the very act against which he complains or where the motive of the relater is suspicious.

As to the question that can apply for writ to quo warranto, it can be stated that any private person can file a petition for this writ, although he is not personally aggrieved in or interested in the matter.

Ordinarily, delay and lashes would be no ground for a writ of quo warranto unless the delay in question is inordinate.

An unauthorized person issues the writ in case of an illegal usurpation of public office. The public office must be of a substantive nature. The remedy under this petition will go only to public office private bodies the nature of quo warranto will lie n respect of any particular office when the office satisfies the following conditions :

(1) The office must have been created by statute, or by the Constitution itself;

(2) The duties of the office must be of public nature;

(3) The office must be one of the tenure of which is permanent in the sense of not being terminable at pleasure; and

(4) The person proceeded against has been in actual possession and in the user of particular office in question.

Another instance of granting the writ of quo waarrnto is where a candidate becomes subject to a disqualification after election or where there is a continuing disqualification.

In cases of office of private nature the writ will not lie. In Jamalpur Arya Samaj Sabha v. Dr. D. Rama, ***(AIR 1954 Pat 297)*** the High Court of Patna refuse

to issue the writ of quo warranto against the members of the Working Committee of Bihar Raj Arya Samaj Pratinidhi Sabha- a private religious association. In the same way the writ was refused in respect of the office of a doctor of a hospital and a master of free school, which were institutions of private charitable foundation, and the right of appointment to offices therein was vested in Governors who were private an don't public functionary.

It will not lie for the same reason against the office of surgeon or physician of a hospital founded by private persons. Similarly, the membership of the Managing Committee of a private school is not an office of public nature; therefore writ of quo warranto will not lie.

In Niranjan Kumar Goenka v. ***(AIR 1973 Pat 85)*** The University of Bihar, Muzzafarpur the Patna High Court held that writ in the nature of quo warranto cannot be issued against a person not holding a public office.

Acquiescence is no ground for refusing quo warranto in case of appointment to public office of a disqualified person, though it may be a relevant consideration in the case of election When the office is abolished no information in the nature of quo warranto will lie.

4.6 PUBLIC INTEREST LITIGATION (PIL)

Good governance is the *sine qua non* of any State, particularly a democratic polity that would have three organs of government, namely, executive, legislative and judiciary. These three organs constitute as it were three pillars of the good and effective governance with the judiciary functioning as the watchdog for maintenance of the Constitutional balance as the powers and responsibilities of the various machineries of state, *vis-à-vis* one another, and the people.

Meaning Public Interest Litigation

An individual who does it out of concern for public interest initiates it. But after having initiated it, once the Court admits a matter, it no longer remains the concern only of the person who has initiated it.

For example, Sheela Barse, a journalist, had initiated a PIL on behalf of the children who were languishing in remand homes. The respondents were the State governments who prolonged the litigation by not filing their affidavits in time. Sheela Barse had to rush from her home in Bombay to Delhi to attend the Supreme Court every time a date was fixed for a hearing. Exasperated with the willful delay caused by the State Governments, which was not adequately checked by the Court, when threatened to withdraw the petition.

Although her frustration was understandable, the court could not allow her to withdraw the petition. Even if she withdrew from the matter, the Court could continue to examine the contentions made by her in the petition and deliver

NOTES

the orders. Although a person may be accorded standing to bring a public interest matter in Court, such a person cannot withdraw proceedings on the ground that she was disassociating herself from that matter. Justice Venkatachaliah (as he then was) speaking for himself and Ranganath Misra J (as he then was) observed that :

If we acknowledge any such stands of a dominos lit is to a person who brings a public interest litigation, we will render the proceedings in public interest litigation vulnerable to and susceptible of a new dimension which might, in conceivable cases, be used by persons for personal ends resulting in prejudice to the public weal.

Constraints on Public Interest Litigation

Although the courts have been liberal in conceding locus standi to public spirited citizens to espouse petitions involving public interest, such public interest litigation has got to be constrained by considerations of feasibility as well as propriety. The constraints of feasibility restrain the courts from over admitting matters, which might go beyond its resources to deal with. The consideration of propriety persuades the courts from not undertaking issues, which are better, dealt with by the other co-ordinate organs of the government such as the legislature or the executive.

It's Area of Operation

While this may be true, as far as popular perception is concerned, the truth, in a deeply vital sense, is that if certain infringement of law, injury to public interest, public loss due to official apathy, inaction or manipulation or dereliction of duty as ordained by the authoritative rules or statutes—which are co relatable to public interest, being offensive to or destructive of it, will all fall within the PIL jurisdiction and judgment given in such cases, in view of their impact and end-result or even visibility in forms of reduction or elimination of the "original sin" are often categorized as pronouncements belonging to the area of the " judicial activism". Some of the areas where sotermed judicial activism, emanating from PIL, has been in evidence cover subjects like environment pollution, social ills — like dowry death/bride burning, bonding labour, child labour, custodial death police torture (Bhagalpur blinding case) and other forms of atrocities on prisoners/ jail inmates, non-payment on the part of Ministers/Prime Ministers for private use of public (Air force) air crafts, public compensations, dereliction or abnegation of essential statutory duties by public Institutions/corporations or official bodies. There have been cases where other individual fundamental rights as enshrined in Part III of the Constitution have formed part of PIL as they had under public repercussions. Such PIL cases may be taken directly to Supreme Court where

constitutional infringement is involved private, *i.e.*, individual rights included. They can also be taken up in High Courts.

It's Rationale

NOTES

Usually, the courts take cognizance of a case when the person affected makes complaint. This is the question of *locus standi*, that is, whether a person not involved or affected in any case has any legal justification or ground to take up someone else's case in the constitution on others behalf.

The courts were reluctant to accept or admit such cases. But in the early 80s (or may be a little earlier), the Supreme Court made a relaxation of this principle and started accepting genuine and appropriate cases even through complainant was someone different from the person affected. Of course, the admissions done only after a very strict scrutiny of the points involved, the motive or motivation of the complainant and the purpose, which the case, if decided, would serve. It is only after a full satisfaction of the court that such a case is accepted as a PIL.

There are many reasons, which dictate the rationale for PIL. In a country like ours, where :

(1) Poverty is abysmal.

(2) Illiteracy is acute.

(3) Society is case ridden.

(4) Backwardness is widespread,

(5) Fear of the high and might is deep

(6) Three M's (money, muscles and mind) have a sway

(7) Communications system is poor,

(8) Judicial process is cumbersome and costly, and

(9) Justice is denied through delay.

It is idle to except that poor, illiterate, disprivileged, weak and vulnerable sections of society, utterly ignorant of the law and the processes of law would come out openly against the abuses of their personal or group rights (al bit legally bestowed), fighting the very people who are often treated, in remote interiors of the country, as Mai-baap (because they are rich, high caste, powerful and brutal). Fighting the government can never cross the mind of majority of our people - as being possible, feasible, desirable or profitable.

The only way such a situation can be tackled is if some public-spirited men take up cudgels on their behalf and bring up before law courts cases of law infringement or non-implementation on statutory provisions affecting adversely people or public. The alternative is that the courts suo moto take up some such cases either on the basis of reports, communications or other verifiable evidences. As of now, the courts are well disposed towards this form or course of litigation.

NOTES

They do not or would not reject such a course outright but would take cognizance, even if ultimately they way as well dispose of them or discuss them on good and sufficient grounds.

PIL, thus, represents the arguments of both liberals and conservations upholding the soul and sprit of justice through following on initiatory procedure not traditionally preferred or favoured. The former Chief Justice of India, P.N. Bhagwati, sitting with Justice O.A. Desai in 1982 described the diatribe against PIL as :

> The criticism is based on a highly elitist approach and proceeds from a blind obsession with the rites and rituals sanctified by an out-moded Anglo-Saxom jurisprudence.

This aroused the judicial conscience of others. Justice fazal Ali, sitting with Justice S. S. Venkataramiah in the same year referred to the whole gamut of PLIL and the courts' jurisdiction to a five Judges Bencdh- sensing the importance and relevance of the new reality. Infect, one of the questions formulated was :

Can a stranger to a cause - be he a journalist, social worker, advocate or an association of such persons initiate action before the court in matters alleged to be involving public interest or should a petition have some interest in common with others whose rights are infringed by some governmental action or inaction in order to establish the locus stand to make such a complaint?

Now, it is no longer in doubt. Even a post card received from a far away place from an unknown man can e treated ass a petition (so goes the report) if it contains valid points worthy of being taken cognizance by the Court. Time have changed, approaches have changed and so have the Courts' systems – though they are still bogged down in perhaps avoidable rituals which make for delay, add to cost and dilute justice at times. The gradual erosion in principles and values in public life since Nehru and Shastri era in India have brought into sharp focus the constitutional mandate and Supreme Court of India, arousing public interest in the on-going debate over the intentions behind Constitutional provision. It was being widely felt and publicly perceived that the declining values, lack of access to social justice and judicial system, States' arbitrariness, corrupt practices, attack on rights, grossly deviant social and economic activities, and murder of moral mores cannot make India an honest, progressive and a prosperous society.

PIL as a Tool for Access of Poor Man to Justice

No less a person than the former Chief Justice of India, A.M Ahmadi, had once described the Supreme Court as the world's powerful court because of its wide-ranging, vast jurisdiction. Apart from its original, appellate, civil criminal and advisory jurisdictions, it has the power to entertain petitions even from ordinary people who otherwise cannot approach it due to financial and a host of

other constraints. In the Fertilizer Corporation Manager Union v. Union of India case, the eminent jurist V.R. Krishna Iyer, the initiator of this innovative process of PIL, described law as " a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction of the Court".

In the same vein, the former Chief Justice P.N Bhagwati, picking up the thread from where Iyer left it, propounded in S.P. Gupta's case, "the court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights, the only way in which this can be done is by entertaining writ petitions and even letters from public spirited citizens seeking judicial redress on behalf of those who have suffered a legal wrong or an injury". At last, the problem of providing justice to millions of helpless and hapless men got recognition PIL fast became one of the most effective and powerful instruments of justice for protecting the weak, the deprived the prosecuted be they women in protective custody, children in juvenile institutions under trial prisoners in jails, unorganized workman, landless labourers, slum and pavement dwellers or people belonging to schedule castes/scheduled tribes. It is the PIL which exposed the brutality of Bhagalpur blinding, merciless exploitation of bonded labour, river (Jamuna) pollution through industrial effluents, environmental degradation, health hazard issues, education capitation rackets and so on.

Not remaining confined to righting the wrongs alone, judicial activism has made its presence felt by entering areas traditionally believed to be in the domains of legislature and executive. For instance, the apex judiciary can ask for the records based on which the president and the Governors may have reached their subjective satisfaction' with regard to, say, failure of constitutional machinery in a state. This, in effect, means that such decisions can be challenged on various grounds like malafides, extraneous considerations, and unreasonableness. Governance, a clear executive function, is now a good subject of judicial activism.

Similarly, justice Kuldeep Singh's directive to the union government for in acting a uniform civil code, one of the unenforceable directive principles of State Policy (Part IV of the constitution) is another example of excessive judicial zeal.

Again, certain other constitutional provisions, such as the pleasure of the president contained in articles 310, 311 and 312 of the constitution, as well as section 18 of Army Act, which deal with civil services and armed forces respectively, have been brought under judicial control through the 'creative interpretation' of articles 14 and 19 of the constitution. The recent "santusti"case is also a case in point. If only establishes the fact that if the constitution provides for any absolute power, it is judiciary's own authority of judicial review, to say the least. Though such review attempts cannot be branded as "grossly undemocratic", critics

NOTES

maintain that the courts, ordained as a judicial body, cannot at the same time be looked to as a "general heaven for reform movements". It cannot, even so, be gainsaid that the need and desirability of judicial activism have clearly been established on the ground; for, more than once, —

- It has brought out skeletons from administration's cupboard which remained unexposed for years and would have otherwise remained so for years on end;
- It has shown that those in authority abuse and misuse power without compunction for noxious purposes and hide them from public gaze;
- All that glitters in the legislative and executive world is not gold. Arbitrariness, greed, corruption, Reports, patronage, the notorious 'in-law and out-law' syndrome, 'private-gain-at public expense' considerations, malafide motive and many other vilest vices do reign supreme in places and persons who were earlier considered to be 'paragons of virtue'.

4.7 ROLE OF CIVIL SOCIETY IN GOVERNANCE

Civil society is composed of the totality of voluntary civic and social organizations and institutions that form the basis of a functioning society as opposed to the force-backed structures of a state (regardless of that state's political system) and commercial institutions of the market.

An independent civil society is a vital to any aspiring democracy and can really help to consolidate it and raise its credibility both at home and abroad. Civil society tends to be voluntary, pluralistic, and participatory, and can serve as a medium through which the governed can organize, assemble, discuss, and criticize governmental actions or other matters of societal concern. Civil society organizations can be formal or informal, of political, religious, social, cultural, or ethnic nature. However, they usually exclude profit-making business groups, political society, and family or individual organizational life. It is important to note that civil society is foremost a "public sphere" where the public good tends to be pursued over primarily private gains.

One of the most important ways civil society contributes to democracy is that it provides a means of participation for the masses that separates them from political society and governing institutions. Associations should be able to organize and assemble, treat of any subject that is conformed to the country's constitution and laws without being harassed or questioned by the government. Another element that must be present in a democratic civil society is voluntary participation. Citizens must be free to decide whether they join organizations and associations and how much time and money they contribute. In order to reach this level of autonomy, civil society is constantly struggling and lobbying in order to change

laws and advance their interests. Ultimately this can only benefit democracy because it instills non-violent and democratic practice within a society and its citizens.

A democratic civil society is also primordial in an emerging democracy because it provides the following: avenues through which regular citizens can pressure the political elites to review or change public policy; a public sphere in which different layers of society can participate in a plurality of ways; a medium through which divergent groups (ethnic, religious, political) can discuss solutions without resorting to violence and extreme means. Also, a thriving civil society is important to democracy because an independent media can serve an important public good of providing information, reporting on government and associational actions to other organization; which is a good way for different groups to keep members of the government elite and politicians in check.

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Also with the voluntary all-encompassing nature of civil society, citizens will have more trust and confidence in their governments, thus circumventing passivity. Civil society can also provide services at levels that the government can't reach. This is especially true of religious groups. A vibrant civil society can serve to legitimize some democracies by showing an alternative way citizens take power in participation. In addition, civil society groups may help consolidate democracy by exhorting people to go out and vote in elections and run for office, and generally advance peaceful democratic practices. Finally, civil society has a snowball effect in that it empowers people to think independently and fight for their interests. Once this is done, the same people can never be expected to have their interests and organizations subverted ever again.

The roots of an Indian autonomous civil society is not to be found in the contemporary rise of a modern state but foremost in the ancient and medieval history of the country. Cast "panchayats", village "panchayats", or traders guilds all illustrates forms of local institutions that had long been untouched by the vicissitudes of the political spheres and remained autonomous from state control. Indian society had been characterised in pre-colonial times by a form of "insularity" that thus ensured an certain independence from state power but also resulted in a stagnation and an impossible unity of the population. However, the modern definition of an Indian civil society has to confront the radical transformation of the State and its consequences on the role of the non-state actors.

The transition to independence was accompanied with the rise of a welfare state, extending state powers into areas that had been previously left to civil society. This "intrusion" of the State and its monopoly on new spheres as education, health or security resulted in a form of state monopoly in almost all public goods, giving to the state the role of first employer of organized workers in the country. The generalisation of taxes, the ownership of public utilities transformed the state into an arbiter between individuals. But this rise of a welfare state pointed out in the same time its dysfunctions and its failures.

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Corruption and nepotism put into question the legitimacy of the state power and give a pejorative connotations to the word "politics". Distribution of licenses, subsidies for the poor, control of the crime order are said to be "the plaything of state functionaries" that have lifetime security. The huge amount of discretionary fund received by the Members of Parliament and Members of Legislatives Assembly to implement economic development programs in their constituencies illustrates this generalisation of the corruption.

The situation of political parties is also perverted by a form of selection of its members by the leaders that constitute an obstacle for the participations of the citizens to the political process. The electoral process itself is put into question by the irregularities of the polls but also by the biased aspect of local elections that are mostly determined by cast belongings and the money involved in the campaign.

This centralized political system make political process inaccessible to a large part of the population, and alienate the potential existence of a form of civil society.

What role can civil society play in this specific political framework?

Considering that situation of monopoly, the role of civil society as challenging the State in three different ways.

- Faced to the centralised power of the State, civil society first has a role of enabling the hitherto voiceless and unorganised communities interests to be represented. In other term, the sphere of civil society has a goal of empowerment for local communities. In that specific function, civil society can be considered as a "space" that is free and accessible to everybody.
- Civil society can also be considered as a "movement" that has to influence public negotiation on public issues like health, education or security. Contesting the frameworks of development programs, criticising the long-term effect of a large displacement of people are examples of this vision of civil society as a contestation movement.
- Civil society finally has a role of "ensuring the accountability" of the State in different spheres. Ensuring the right to access to information is a first step into the State accountability, in a country where the Official Secret Act predominates. In a more general way, civil society has the monitoring function of holding "the law and order machinery accountable". This function implies the control of political parties and electoral process, the control of local bodies etc.

In a context where political participation process is increasingly plebiscitary and illustrates the discredit of the political sphere, the purpose of civil society is to build the framework of a real form of governance, in which both State and citizens are accountale to each other.

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Definition and Significance of the Civil Society

Recent years have witnessed a significant upsurge of organized private, non-profit activity in countries of Asia, Africa and Latin America *(Salamon and Anheier, 1997; Salamon, 1994; Fisher, 1993; Brown and Karten, 1991)*. Long recognized as providers of relief and promoter of human rights, such organizations are now increasingly viewed as critical contributors to economic growth and civic and social infrastructure essential for a minimum quality of life for the people *(Salamon and Anheier, 1997; Fukuyama, 1995; OECD, 1995)*.

Despite the growing importance, civil society organizations in the developing world remain only partially understood. Even basic descriptive information about these institutions – their number, size, area of activity, sources of revenue and the policy framework within which they operate – is not available in any systematic way. Moreover, the civil society sector falls in a conceptually complex social terrain that lies mostly outside the market and the state. For much of the recent history, social and political discourse has been dominated by the 'twosector model' that acknowledges the existence of only two actors – the market (for profit private sector) and the state. This is reinforced by the statistical conventions that have kept the "third sector" of civil society organizations largely invisible in official economic statistics (Salamon, Sokolowski and Associates, 2003). On top of this, the sector embraces entities as diverse as village associations, grass roots development organizations, agricultural extension services, self help cooperatives, religious institutions, schools, hospitals, human rights organizations and business and professional associations. As such, a comprehensive and representative understanding of the role and significance of the civil society sector continues to be a major gap in the literature, particularly in the context of developing countries.

The purpose of this section is to put the civil society sector in perspective in terms of its definition, dimensions and factors that inhibit its development in developing countries.

Definition of Civil Society

The concept of civil society goes back many centuries in Western thinking with its roots in Ancient Greece. The modern idea of civil society emerged in the 18th Century, influenced by political theorists from Thomas Paine to George Hegel, who developed the notion of civil society as a domain parallel to but separate from the states (Cerothers, 1999). The 90s brought about renewed interest in civil society, as the trend towards democracy opened up space for civil society and the need to cover increasing gaps in social services created by structural adjustment and other reforms in developing countries.

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How is civil society as we know it today defined and what are some of its key elements?

> "Civil society is a sphere of social interaction between the household (family) and the state which is manifested in the norms of community cooperative, structures of voluntary association and networks of public communication ... norms are values of trust, reciprocity, tolerance and inclusion, which are critical to cooperation and community problem solving, structure of association refers to the full range of informal and formal organization through which citizens pursue common interests" *(Veneklasen, 1994).*
>
> "Civil society is composed of autonomous associations which develop a dense, diverse and pluralistic network. As it develops, civil society will consist of a range of local groups, specialized organizations and linkages between them to amplify the corrective voices of civil society as a partner in governance and the market" *(Connor, 1999).*

The key features of successful civil societies which emanate from various definitions include the following: separation from the state and the market; formed by people who have common needs, interests and values like tolerance, inclusion, cooperation and equality; and development through a fundamentally endogenous and autonomous process which cannot easily be controlled from outside.

The experience of developing countries highlights a wide range of such organizations, from large registered formal bodies to informal local organizations, the latter being far more numerous and less visible to outsiders. These include traditional organizations *(e.g.,* religious organizations and modern groups and organizations, mass movements and action groups, political parties, trade and professional associations, non-commercial organizations and community based organizations). Civil society should not be equated to non-government organizations (NGOS). NGOs are a part of civil society though they play an important and sometimes leading role in activating citizen participation in socio-economic development and politics and in shaping or influencing policy. Civil society is a broader concept, encompassing all organizations and associations that exist outside the state and the market.

Role of Civil Society

Civil society has been widely recognized as an essential 'third' sector. Its strength can have a positive influence on the state and the market. Civil society is therefore seen as an increasingly important agent for promoting good governance like transparency, effectiveness, openness, responsiveness and accountability.

Civil society can further good governance, first, by policy analysis and advocacy; second, by regulation and monitoring of state performance and the

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action and behavior of public officials; third, by building social capital and enabling citizens to identify and articulate their values, beliefs, civic norms and democratic practices; fourth, by mobilizing particular constituencies, particularly the vulnerable and marginalized sections of masses, to participate more fully in politics and public affairs; and fifth, by development work to improve the wellbeing of their own and other communities.

Dimensions of the Civil Society Sector

Given the importance of its potential contribution, the question that arises, is there enough presences of such organizations to make a meaningful contribution? A clear answer to this question is difficult, if not impossible. This is because of the paucity of existing quantitative and qualitative information, particularly in the context of developing countries, on the dimensions of civil society. There are, however, fragmented pieces of research, which throw some light on the size of the sector in different countries/regions.

The number of CSOs is impossible to calculate but it is safe to say it is very large. In a report by the Commonwealth Foundation, Britain alone has over 500,000 NGOs. The turnover of the 175,000 registered charities in the UK was 17 billion pound sterling a year. According to an estimate, in India alone there are 100,000 NGOs, with 25,000 registered grass-roots organizations in the state of Tamil Nadu. UNDP estimates that the total number of people 'touched' by NGOs in developing countries across the world is probably 250 million, although this almost certainly underestimates the case if account is taken of the NGO influence on public policy making *(Adair, 2004)*.

According to a recent study of 36 developed, developing and transitional countries, undertaken by the John Hopkin Comparative Nonprofit Sector Project, the civil society sector emerged as a important economic force with an expenditure of $ 1.3 trillion, equivalent to 5.4 percent of the combined GDP of the countries studied and a major employer (45.5 million full-time equivalent (FTE) workers) accounting for 4.4 percent of the economically active population. Out of the 45.5 million FTE civil society workers, over 20 million, or 44 percent, are volunteers. This demonstrates the ability of CSOs to mobilize sizable amount of volunteer effort. Since most volunteers work fewer hours than paid workers, the actual number of people working in civil society sector exceeds this number. Estimates show that this number may be as high as 132 million, amounting to about 10 percent of the adult population in these countries.

Countries, however, vary greatly in the overall scale of their civil society workforce. For the 36 countries studied, CSO workforce as a percentage of economically active population ranged from 14.4 percent in the case of Netherlands to 0.4 percent in Mexico. Overall, civil society workforce in developed

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countries is, on average, more almost four times larger than that in the developing and transitional countries (8 percent vs. 2 percent). This is not to say that there is an absence of helping relations in developing countries. In many of these countries, there is a strong tradition of family, tribal, clan or village networks that perform many of the same functions as civil society institutions in a less formally organized and structured way.

Empirical research on CSOs reveals that they are performing a number of functions. On average, about 64 percent of the total paid and volunteer full-time equivalent workforce in the countries studied are primarily engaged in the service functions. Education and social services (including child welfare, service for elderly and handicapped, emergency and relief services and income support and maintenance) dominate with a share of about 43 percent within the service function.

Also important is the advocacy role of civil society. This includes its role in identifying unaddressed problems and bringing them to public attention, in protecting basic human rights and in giving voice to the wide range of political, environmental, social and community interests and concerns. Beyond political and policy concerns, civil society also performs a broader expressive function, providing the vehicle through which artistic, spiritual, cultural, ethnic, occupational, social and recreational sentiments find expression. Opera companies, soccer clubs, book clubs, places of worship, professional associations constitute example of such forum, which enrich human existence and contribute to the social and cultural vitality of community life. Altogether, about 32 percent of the civil society workforce is engaged in performing the expressive function.

CSOs are also important in creating what is increasingly referred to as 'social capital'. "Social capital is... the web of associations, networks and norms (such as trust and tolerance) that enable people to cooperate with one another for the common good. Like economic and human capital, social capital is a productive asset that accumulates with use... the institutional arrangements and values which make up social capital constitute the foundation for good governance, economic prosperity and healthy socities" *(Vaneklasen, 1994).*

Are there any variations in the structure and nature of CSOs' activity between developed and developing countries? While service functions of civil society sector on average absorb the largest share of CSOs' workforce in developed as well as developing countries (64 percent and 63 percent respectively), there exist significant variations among countries. In Peru, 95 percent of the CSO workforce is in the service sector, while in Poland this percentage falls to less than half. Also, in developing countries, most of paid staff performs service functions while volunteer staff tends to focus on expressive functions. In developing

countries, however, both paid and volunteer efforts alike go mostly into service functions.

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Another important insight into the civil society sector relates to the financing patterns of these institutions. Over half of CSOs' income, on average is generated from fees and charges for the services rendered and income they receive from investments, dues and other commercial sources; 34% comes from public sector sources, either through grants and contracts or reimbursement payment made by governmental or quasi-governmental organizations such as publicly financed social security and health agencies; while about 12 percent comes from private philanthropy, individuals, foundations and corporations. Interestingly, the pattern of financing is quite different for developed and developing and transitional countries. In the former, reliance on government sources is much greater, with the highest revenue share at 48 percent, than in the latter, where the share is only 22 percent. Compared to this, dependence on fees and philanthropy is much higher in developing countries (61 percent and 17 percent respectively) than in developed countries (45 percent and 7 percent respectively).

The picture of CSO revenues portrayed above changes somewhat when the contribution of time represented by volunteers is added to the contribution of money and treated as philanthropy. The share of philanthropy rises from 12 percent to 31 percent, making it the second largest support base to CSOs globally, ahead of public sector payments, (with share of 26 percent), through still behind fees and charges, (with share of 42 percent). In the case of developing and transitional economies, the contribution of philanthropy doubles to 33 percent. The big difference, however, is in the context of developed countries where the share of philanthropy rises to 29 percent (from 7 percent). This reflects the substantial volunteer presence in the workforce of the civil society sector in these countries.

Impediments to Growth of Civil Society in Developing Countries

The issue of the small scale of the civil society sector in developing countries, where their potential contribution to the achievement of MDGs is high, deserves further attention. If these organizations are to be strengthened, it is important to understand what factors have historically hindered their growth.

Variation in the scale and nature of civil society sector in different countries is largely affected by the historical, cultural, social and political environment, a number of impediments to growth of CSOs can be identified as follows :

Authoritarian Political Control: Perhaps the most basic factor accounting for the generally retarded pattern of the third sector development in many developing countries is the long history of authoritarian rule. In Latin America, for example, the nonprofit sector in Brazil has taken shape in the historical context characterized

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by a strong state and a weak civil society. As Landim (1998) puts it, "In Brazil, the state has always taken on itself the task of creating society, whether by arranging groups and individuals... or by intervening to destroy autonomy." Strong state control also figured prominently in the histories of Egypt and Ghana, in Africa. First under the Ottoman Empire and later under British colonial rule, Egypt was ruled by a succession of authoritarian leaders with only limited opportunity for effective democratic involvement. Similarly, in Ghana the pre-colonial societies were organized in traditional tribal form with local chieftains exercising dominant control. In India, Bangladesh, Nepal and Pakistan (in South Asia) history is dominated by successive empires that rose, flourished and declined, with a hierarchical social form, with limited social organization outside the control of the state.

Given this pattern of authoritarianism, little room was left for a truly independent third sector in these societies. What charitable institutions emerged therefore had to fit within the prevailing structures of political and social power and avoid posing serious challenge to the dominant political authorities. Passivity and dependence rather than empowerment and autonomy thus became the early watchword of nonprofit sector activity.

Authoritarian political control did not end in these countries with independence. Rather, it persisted. The upshot has been a persistent atmosphere of distrust between the nonprofit sector and the State in many of these countries. The State remains highly watchful of its power and too easily interprets the emergence of CSOs as a challenge to its very legitimacy. In Egypt, for example, this distrust is currently fueled by the antagonism between a strong secular State and Islamic fundamentalist groups that are using civil society institutions as a way to strengthen their links with the urban poor. In Brazil, State distrust is a residue of a recent authoritarian past and a social and economic policy that seeks to build up the private business sector and still views the "citizen sector" as an antagonist. In Thailand and India, a stronger tradition of partnership in emerging, though not without deep-seated reservations about the bonds that have formed between indigenous nonprofit institutions and their foreign supporters. In Pakistan, the new NGO Bill is a reflection of the continued effort by government to "keep a close eye" on the CSOs.

Religion: Religion has a multiple impact on the development of the nonprofit sector. In addition to the basic creed and the support it gives to acts of charity, crucial other facets of religion's impact need to be taken into account – its posture toward individualism, its commitment to institution building, and its relationship with State authorities. Indications are that while religions can share a positive orientation toward philanthropy, they may not generally be supportive of the emergence of CSOs.

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For example, the church in Brazil functioned historically to reinforce secular authority and a monolithic system of social and cultural control, thereby sharply reducing the opportunities for developing an independent nonprofit sector. In Pakistan, human right CSOs, particularly working on issues like women's rights, are constantly challenged and sometimes threatened by the dominant religious fundamentalist segments of society which continue to have influence over the state.

Colonialism: Another factor that helps to explain the generally retarded pattern of third sector development in the third world is the recent history of colonial control. Like religion, however, colonialism's impact on third sector development has been multi-dimensional. What is more, it has varied somewhat depending on the national traditions and values of the colonial power. Colonialism has tended to undermine the independence of local social classes that might have provided the rallying point for civil society institutions. This was particularly true of the Spanish and Portuguese colonial traditions, which created especially authoritarian political and social structures in their respective colonies. In much of Latin America, colonialism created a highly inhospitable environment for the emergence of truly autonomous civil society institutions that might have challenged the monopolistic power of the colonial regime and its local allies.

Low Income and Constrained Social Development: Perhaps the most important impact of colonialism on some of the countries was the constraint it exercised on social development. One of the principal consequences of the colonial experience, in fact, was to limit the space that indigenous middle class elements could occupy in the developing world. This was so because the colonial administration handled many governmental and commercial functions that might otherwise have been performed by the indigenous people, thereby restricting middle class professional opportunities. What middle class cadre emerged in these countries thus tended to be tightly bound to the colonial administrations and therefore lacked the independence characteristic of the urban commercial and professional middle class elements that emerged in Western Europe during the dawn of the industrial era.

This situation persisted because of the general poverty and lack of development in these countries. As growth had gathered momentum in at least some regions, however, this situation is changing. Indeed, the significant upsurge of nonprofit activity in countries like Brazil, Thailand and Egypt over the past two decades can be attributed in part to the emergence of a sizable new urban middle class as a result of recent economic growth.

Limited Resources: An important factor hindering the growth of the civil society sector is the scarcity of financial resources. Funding constraints limit the scale

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and functioning of CSOs, significantly impairing their ability to deliver and maintain services. In case of large NGOs, in particular, heavy reliance is frequently placed on funding from foreign donors. This is making CSOs more reflective of donor interests than those of their communities or designated target groups. Many CSOs have to review their missions or undertake work outside their mandate just to survive. The difficult economic conditions make local fundraising very difficult. Competition for scare resources is also limiting opportunities for coalition-building, long-term institutional development and other aspects of local capacity building. Their performance in terms of poverty reach and popular participation is also compromised. "In some instances they have neglected the landless, and other marginalized people, thereby failing to reach the poorest of the poor" (UN-NADAF, 1990-2001). Sometimes only certain regions are serviced by well-equipped CSOs, neglecting other areas more desperately in need.

Legal Treatment: A further factor impending the development of the nonprofit sector in some developing countries has been the legal environment within which nonprofits must operate. Certainly in civil law countries such as Brazil, Thailand, and Egypt, where no "basic" right to organize is automatically recognized in law, formal law can shape the environment for action rather fundamentally. Reflecting the generally authoritarian politics that have characterized these countries during much if their recent history, the legal structure for civil society activity has been quite restrictive. For example, the Religious Bodies Registration Act of 1981 in Ghana revoked the legal status of all religious CSOs and required them to reapply through a highly restrictive registration procedure. In Brazil, Law 91 of 1935, regulating the public utility statues of CSOs, was used as a means of political control and favoritism. In Egypt, Law 32 of 1964 establishes de facto government control of large segments of the civil society sector and in Thailand, the Cremation Welfare Act of 1974 was passed by the military government to preempt feared infiltration by communists. The Act required all existing local cremation and related communal welfare societies to register with the central authorities in Bangkok and to submit to State supervision.

In other cases, the basic legal provision affecting CSOs in India, Pakistan and Ghana were borrowed from those in force in late 19th and early 20th century England through a system of legal ordinances. The environment for CSOs in these countries therefore appears quite open. To get around these general legal provisions, however, governments have added various restrictions to limit their general thrust and make them more cumbersome. Thus, for example, tax laws and related legislation often establish significant obstacles to the operation of CSOs. What this makes clear is that establishing an enabling legal environment for civil society action is only a first step towards opening a way for a viable civil

society sector. A variety of other obstacles can easily frustrate the intent of even the most supportive legal provisions.

The Development Paradigm: One other factor helping to explain the historically constrained pattern of civil society sector development in the third world is the changing fashion in development policy and development ideology. During the 1950s and 1960s, development thinking emphasized the importance of a State as the principal agent of modernizing reforms. As a consequence, considerable effort went into differentiating a sphere of State action outside the pre-modern structures of tribe or community, and into creating modern, secular administrative structures that could effectively operate in this sphere. This development framework included a sphere of business in addition to that of government, but it downplayed, if not excluded, CSOs which were viewed as only marginal in the frame of affairs.

The shift to "structural adjustment" in the 1980s did not change this fundamentally. To the contrary, the "structural adjustment" paradigm of development merely replaced government with the private business community as the mode of development. In the process, however, it reinforced an essentially two-sector model of society that left little room for a vibrant civil society sector. The lack of civil society growth is thus understandable given that it been historically neglected in the central policy debate.

In short, the development of the third sector seems to have been inhibited by a long history of authoritarianism; by colonial heritage and a history of limited economic growth that restricted the growth of an independent urban middle class; by religious traditions that placed less emphasis on "modularity" and the fostering of independent institutional structures; by legal structures that often placed impediments in the way of civil society formation; and by development policies that stressed the creation of a modernizing State and later the development of private enterprise rather the promotion of independent institutions outside the confines of the market and the State.

4.8 SUMMARY

- The need for control of rule-making power is due to the dangers often associated with such powers. This is because administrative powers are prone to abuse and can easily become arbitrary if unchecked.
- Judiciary has been given wide powers for controlling the administrative action. The Courts have been given power to review the acts of the legislature and executive (administration) and declare them void in case they are found in violation of the provisions of the Constitution.
- Article 13 (1) provides that all laws in force in the territory of India immediately before the commencement of the Constitution of India, in

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so far as they are inconsistent with the provision of Part III dealing with the fundamental rights shall, to the extent of such inconsistency, be void.

- The judicial review available under article 32, 136 226 and 227 is taken as Constitutional mode of judicial review, *i.e.*, the judicial review available under Articles 32, 136, 226, 227 cannot be excluded by the finality clause contained in the statute and expressed in any languages. Any statute or ordinary laws cannot take the jurisdiction of the Court under article 32, 136, 226 and 227 as the Constitution of India provides them. Thus, any ordinary law cannot bar the jurisdiction of the Supreme Court under Article 32 and 136 and of the High Court under Articles 226 and 227.
- Habeas corpus is a prerogative writ, which was granted to a subject of His Majesty, who was detained illegally in jail. It is an order of release. The words *habeas corpus subi di cendum* literally mean 'to have the body'.
- A writ of mandamus is in the form of command directed to the inferior Court, tribunal, a board, corporation or any administrative authority, or a person requiring the performance of a specific duty fixed by law or associated with the office occupied by the person.
- The term quo warranto means "by what authority." Whenever any private person wrongfully usurps an office, he is prevented by the writ of quo warranto from continuing in that office.
- Civil society has been widely recognized as an essential 'third' sector. Its strength can have a positive influence on the state and the market. Civil society is therefore seen as an increasingly important agent for promoting good governance like transparency, effectiveness, openness, responsiveness and accountability.

4.9 REVIEW QUESTIONS

1. Discuss the elements of legilative and executive control upon administrative agencies.
2. What are the key points of judicial review?
3. What are the constitutional weapons for judicial control?
4. What do you understand by Habeas Corpus?
5. When is Mandamus used? Explain.
6. What are the roles of civil societies in governance?
7. What are the constraints in the effective use of PIL? Discuss.

4.10 FURTHER READINGS

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CHAPTER– 5

THE CITIZEN AND THE ADMINISTRATIVE FAULTS

STRUCTURE

5.1 Learning Objectives
5.2 Introduction
5.3 Ombudsman in India
— Status of *Ombudsman in India*
— Working of Lokayuktas in the State
5.4 Central Vigilance Commission (CVC)
5.5 Right to Know
5.6 Transparency and Right to Information
— Transparency and Open Information Systems
— Participation
— Right to Information
5.7 Right to Information Act
5.8 Summary
5.9 Review Questions
5.10 Further Readings

5.1 LEARNING OBJECTIVES

After studying the chapter, students will be able to :

- State the history, scope and importance of Ombudsman in India and across the globe;
- Explain the institutiton and functions of Central Vigilance Commission;
- Discuss the role of right to information in transparent governance;
- Understand the important aspects of Right to Information Act.

5.2 INTRODUCTION

After independence setting up of a democratic system of Government raised tremendous hopes and high expectations among people. From a purely regulatory and police administration, the government came to be entrusted with the responsibility of economic and social transformation and that too in a hurry. The

state entered economic field in a big way and a number of regulations were brought into play to promote socialistic pattern of the society and to ensure distributive justice.

Now let us try to find out the effect of the above upon the lives of the citizens and the type of interface between the government and the citizens it created. The Gandhian principle that, "that governments is the best which governs the least was substituted by a government which was as the American saying goes, a 'big government' affecting the lives of citizens from cradle to grave if not from conception itself.

The committee on "Prevention of Corruption" (popularly known as the **Santhanam Committee)** in its report gave special attention to create machinery in the government, which should provide quick and satisfactory redress of public grievances. Accordingly, the Government on June 29, 1964 providing, inter alia, issued detailed instructions :

1. It is the basic proposition that the prime responsibility for dealing with a complaint from the public lies with the government organization whose activity or lack of activity gives rise to the complaint. Thus; the higher levels of the hierarchical structure of an organization are expected to look into the complaints against lower levels. If the internal arrangements within each organization are effective enough, there should be no need for a special 'outside' machinery to deal with complaints.
2. For dealing with grievances involving corruption and lack of integrity on the part of government servants; special machinery was brought into existence in the form of the **Central Vigilance Commission.**
3. For dealing with grievances, while outside machinery was not considered necessary of feasible for the present, the organizations and the departments should provide for quickest redressal of such grievances.
4. The internal arrangement for handling complaints and grievance should be quickly reviewed by each ministry, special care being bestowed on the task by those ministries whose work brings them in touch with the public. Every complaint should receive quick and sympathetic attention leaving in the outcome, as far as possible, no ground in the mind of the complaint for a continued feeling of grievance.
5. For big organizations having substantial contact with the public, there should be distinct cells under a specially designated senior officer which should function as a sort of outside complaint agency within the organization and, thus, act as a second check on the adequacy of disposal of complaints.

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Simultaneously, a demand articulated in many, from time to time, for setting up an independent authority with power and responsibility of dealing with major grievances affecting large sections of the people. It was averred that the hierarchical type of remedy for grievances of citizens should be improved by tightening up the existing arrangements and by providing an internal 'outside' check to keep things up to the mark. Since the main limitation of the hierarchical remedy is that the various authorities act too departmental check system. A proposal was placed before the Cabinet to the effect that this "extra-departmental check" should operate through a commissioner for redress of Citizens' grievances, whose main functions should be to ensure that arrangements are made in each ministry/ department/office. For receiving and dealing with the citizens' grievances and that they work efficiently. In exercise of this function, the Commissioner should inspect these units, advise those who hold charge of these units and communicate his observations to the Head of Department or to the Secretary as may be necessary. He should also keep the minister informed of how the arrangements in the department under the minister are working. The proposal in essence was that the Commissioner would be an inspector and supervisor under each minister although located outside. The location for the Commissioner was suggested to be in the Home Ministry from where he would provide a common service. The proposal made it clear that the proposed Commissioner would not be anything like an Ombudsman.

Firstly, he would be appointed by the government and not elected by Parliament.

Secondly, he would only be an inspector and supervisor of the existing hierarchical arrangements and not an independent investigating authority, like an Ombudsman.

Thirdly, the Commissioner would be very much a part of the Government machinery and not an outside agency although he would e outside the individual ministries/departments.

The Cabinet approved creation of a Commissioner for Public grievances and an officer of the rank of Additional Secretary was appointed against the post in March, 1966. This arrangement continued for about a year-and-a-half. However, in 1968, the proposal for creation of the institutions of **Lokpal** and **Lokayukta** was brought forward in the form of a Bill. During this period, the incumbent in the post moved elsewhere and as an interim measure, pending deliberations on the Bill, the Secretary in the Department of Personnel was asked to perform the functions of the Commissioner. No decision as taken thereafter. Arrangements of the Secretary in the Department of Personnel concurrently functioning as a Commissioner fell into disuse.

NOTES

The system introduced as stated above functioned till March 1985 when a separate Department of Administrative Reforms and Public grievances was set up. A review of the functioning of this system at this stage would be relevant.

Reasons of Complaints

Before appraising and pronouncing a judgment on the then existing arrangements, let us first broadly list out reasons due to which grievances normally arise. These can be one or more of the following :

1. Delay in disposal of various matters;
2. Dilatory procedures which do not discriminate between routine and urgent;
3. Observance of rules for the sake of their observance without appreciating their effect on the end results;
4. Administrative orders in exercise of discretion by executive which may be open to question either on the ground of misuse or abuse of power resulting in injustice;
5. Prevalence of corruption and outside influence;
6. Arbitrariness in executor of authority; and
7. Misconduct and misbehavior.

Though no empirical data and evidence is available yet the perception of the general public of administrative machinery is not at all a happy one. There is an overwhelming feeling that the procedures take precedence over results; there is no time frame to deal with maters; guidance to the public is inadequate; and that officials deny even simple courtesy to the public. The common man feels alienated from the public because grievances genuine or otherwise are not answered and remedied by the Government. This situation exists because :

1. Grievance Officers merely act as a passive agency and they are not vested with authority to redress grievance;
2. Considerable time is taken to provide redress (a sample analysis has revealed that the time taken ranged room six months to six years);
3. The present arrangements are mostly ministry-based and deal with only letters and representations;
4. Too defensive an approach is adopted in dealing with complaints and the tendencies is to justify the action taken already;
5. In spite of many instructions on the subject, the complaint is not given a 'speaking reply', *i.e.*, indicating why a particular matter was dealt within a particular fashion;
6. There is room for more active involvement of senior officers in monitoring of grievances disposal; and
7. Publicity to make people aware of the channels of redress needed stepping up.

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As mentioned earlier, the institution of commissioner for Public Grievances fell into disuse and there was no central agency to oversee and monitor the working of internal machinery in different organizations. Thus, as rightly pointed by the learned author, Mr. Malhotra, the scenario described above is indeed not a flattering one for the Government.

Before concluding discussion on this phase, a reference to the report of the Administrative Reforms Commission will not be out of place. The Commission submitted its report on Machinery floor Redress of Public grievances in August 1966. The central theme of this report was to create the twin institutions of Lokpal and Lokayukta with authority to investigate both complaints against corruption and grievances.

Any progressive system of administration presupposes the existence a mechanism for handling grievances against administrative faults, and the recognition of a right of every member of the public to know what passes in government files. Therefore, the treatment of this subject involves the study of the following topics :

1. **Ombudsman.**
2. **Central Vigilance Commission.**
3. **Right to know.**
4. **Discretion to disobey.**

Any good system of administration, in the ultimate analysis, has to be responsible and responsive to the people. Because, the chances of administrative faults affecting the rights of the persons, personal or property have tremendously increased and the chances of friction between government and the Private citizen have multiplied manifold therefore, the importance institution like Ombudsman to protect the people against administrative fault cannot be over emphasized.

In the mid-nineties the main thrust of the court was public accountability to tackle the problem of corruption high places which was eating into the vitals of the polity. However, in late nineties the emphasis shifted to keeping balance between the needs of public accountability and the demands of individual rights. The canvas grievance redress strategies must be spread wide to include 'right to know' and 'discretion to disobey' besides other judicial and administrative techniques if the rampant corruption and the abuse of power is to be checked effectively before the people lose complete faith in democracy in India.

5.3 OMBUDSMAN IN INDIA

About three decades back, people in parliamentary democracies had firm conviction that the parliamentary process, press and public debates, along with the provisions for the redress by way of the petition to the Government and to

the Parliament could adequately remedy the 'citizens' grievances and control the arbitrariness of the Executive. Whenever a citizen feels aggrieved by an action of the Government, he could get remedies in the courts and where no action lay in the courts of law, he could ventilate his grievances through petitions, through members of Parliament and finally by voting down the Government in general election if it Is not responsive to his grievances.

In past few decades there has been an intensive increase in the Governmental activities. Wide discretionary powers have been given to them, which are susceptible to misuse. It has also multiplied the occasions of individual grievances. Now there are more and more complaints of maladministration, corruption, nepotism, administrative inefficiency, delay, negligence, bias, unfair preferences or dishonesty. The Justice Report (Justice represents the British Section of the International Commission of Jurists. Its report, was published in 1961) said :

> "There appears to be a continuous flow of relatively minor complaints not sufficient in themselves to attract public interest but nevertheless of great importance to the individuals concerned, which gives rise to the feelings of frustration and resentment because of the inadequacy of the existing means of seeking redress." Report P. 37.

It has been found that the existing democratic processes under the law are inadequate to deal with the complaints of citizens against the Government. The present scope for judicial review of administrative action is also very meager. There are no proper means of correcting an erroneous decision of facts or investigating into complaints of misconduct, inefficiency, delay or negligence.

The only remedy in such cases is to approach the Minister, or to draw the attention by putting questions in the Parliament. It is difficult for an ordinary citizen to do that much. Moreover, in cases of perversity and misconduct of a Minister, the remedy is not clear. Out of two alternatives, namely, to have the *'Counseil-d-Etat'* under French system of *'droit administratiff'* or the Ombudsman in the Scandinavian system, most of the modern countries of the world have preferred the latter one as a suitable means for redressing innumerable wrongs of the Government officials.

The problems of citizen's grievance that have been germinated by a welfare State have caught the attention of the world for establishing an institution like Ombudsman. *Prof. Rawat* has rightly predicated that the "Ombudsman institution or its equivalent will become a standard part of the machinery of Government throughout democratic world."

Ombudsman originated in Sweden in 1809 was adopted in Finland in 1919 and Denmark in 1955. It was set up in New Zealand, a commonwealth country

NOTES

with parliamentary form of government in 1962. The 'Justice', a British wing of the international Commission of Jurists recommended that it be set up in England and the Parliamentary Commissioner's Act, 1967 was passed. Ombudsman has come to stay in England.

The Ombudsman type of machinery has been found to be useful for redressing the grievances of citizens, which fall in the above description. It contains some of the qualities of *droit administratif.*

The Ombudsman is an officer of Parliament who investigates complaints from citizens, against government departments, that they have been unfairly dealt with and if he finds that the complaint is justified, helps to obtain a remedy. He has usually a high status- that of a judge of the highest court and can investigate act involving corruption and maladministration by government officials, sometimes including ministers.

The Ombudsman system is highly flexible. This is demonstrated by its successful adaptation in four Scandinavian countries, which have significant governmental and legal difference, and in New Zealand and the United Kingdom, which have an entirely different constitutional system. The Ombudsman of each country has been designed to suit the local needs and conditions. Hence there are differences in them with respect to jurisdiction as well as functions. For example, the Swedish and Finnish Ombudsmen have jurisdiction over the judiciary. The Ombudsman in New Zealand, Denmark and Norway has no authority over the judiciary. The Swedish Ombudsman has no jurisdiction over the ministers. His function is generally to supervise how judges, government officials and other civil servants observe the laws and to prosecute those who have acted illegally or neglected their duties. The Danish Ombudsman has authority over the ministers as well as the judges. The Norwegian Ombudsman has authority to scrutinize the acts of ministers, which they perform as heads of a Ministry. The Finnish Ombudsman not only has jurisdiction over the Cabinet Ministers but also has authority to prosecute them.

Status of Ombudsman in India

Thus we have seen that the establishment of the institution of Ombudsman is the demand of time. It will be much useful in redressing the grievances of the citizens against the administration. Attempts have been made to establish the institution like Ombudsman (called Lokpal) but unfortunately it has not been established so far. However the institution of Lokayukta is functioning in some Indian States.

The system of Ombudsman enables Parliament and Ministers both to correct the faults in the administration. The ministerial responsibility appears to have resulted in sheltering the mistakes in the administration. Often they make

NOTES

defensive answer in Parliament and found reluctant in admitting mistakes. In such a situation the system of Ombudsman is of much use. The existence of Ombudsman will encourage the administration to be sensitive to the public opinion and the demands of fairness. It will help in controlling the administration.

The Administrative Reform commission has recommended for the establishment of Ombudsman type of institution in India. A Draft Bill was appended to the Interim Report of the administrative Law Commission. In 1968 a Bill called the Lokpal and Lokayuktas Bill was introduced in the Lok Sabha but before it could be passed, the Lok Sabha was dissolved and therefore the Bill lapsed. In 1971 and another Bill was introduced in the Lok Sabha but again the Bill lapsed on account of the dissolution of the Lok Sabha. In 1977 a new Bill called Lokpal Bill, 1977 was introduced in the Lok Sabha. The Bill was referred to the Joint Select Committee of the two House of Parliament but the Bill again lapsed on account of the dissolution of the Lok Sabha. Again Lok Pal Bill, 1985 was introduced in the Lok Sabha and it also lapsed because before its passage the term of the Lok Sabha ended. Again features of the Lokpal Bill, 1989 are as follows:

This Bill seeks to establish the institution of Lokpal. The institution of Lokpal shall consist of a Chairman and two members who may be either sitting or retired Judges of the Supreme Court. Where all or any of the allegation have been substantiated against a Minister, the Prime Minister will decide the action to be taken on the recommendation of the Lokpal and in the case of Prime Minister the Lok sabha will decide the action to be taken thereon. In case the allegation is not substantiated wholly or partly, the Lokpal will close the case. The Lokpal has not been given jurisdiction to enquire into the allegation against the President, the Vice President, the Speaker of Lok Sabha, the Chief Justice or any Judge of the Supreme Court, the Comptroller and auditor General, the Chief Election Commissioner or Election Commissioner, the Chairman or any Member of the Union Public Service Commission. The Institution cannot enquire into any matter concerning any person if the Lokpal or any member thereof has any bias in respect of the person or matter. Lokpal cannot enquire into any matter referred for enquiry under the Commission of Enquiries Act. Besides, Lokpal cannot enquire into any complaint made five years after the date of offence stated in the complaint.

The salary, service conditions and removal from the office in the case of the Chairman will be the same as those of the Chief Justice of India and in the case of other member will be as those of the Judges of the Supreme Court. These provisions have been made to ensure the independence of the institution of Ombudsman. The Bill also provides that a member of the Lokpal cannot be a Member of Parliament or State legislature or a political party. It also provides that a member thereof should not hold any office of trust or profit or he should not

NOTES

carry on any business or practice any profession. The Bill also makes provision for the appointment of staff to assist the Lokpal.

The Lokpal can entertain a complaint from any person other than a public servant. The Bill has empowered the Lokpal to require a public servant or any other person to give such information as may be desired or to produce such documents, which are relevant for the purposes of investigation. He will have the powers of a Civil Court under the Civil Procedure Code, 1908 with respect :

(i) to summon a person and examine him on oath;

(ii) to require a person to disclose and produce a document;

(iii) to take evidence on oath;

(iv) to require any public document or recorded to be placed before him;

(v) to issue commission for the examination of evidence and documents;

(vi) any other matters as may be provided.

In August 1998 the Prime Minister Atal Bihari Bajpae presented the Lok Pal Bill in the Lok Sabha. The Prime Minister has also been brought within the jurisdiction or power of LokPal. Under the Bill the LokPal was empowered to make enquiries in the charges of completion brought before, it against any Minister or Prime Minister or Member or either House of Parliament. However, he was not empower thereon the Bill to make enquires in the charges of corruption against the President, Vice-President, Speaker of Lok Sabha, Comptroller and Auditor general, Chief Election Commissioner and other Election Commissioner, Judges of the Supreme Court and Members of the Union Public Service Commission. Under this Bill the institution of Lok Pal was to consist of three members including its Chairman. Only the sitting or retired Chief Justice of India or any Judge of the Supreme Court could be appointed its Chairman while any sitting or retired Judge of the Supreme Court of Chief Justice of any High Court could be appointed its members.

The appointment was to be made by President on the recommendation of the selection committee consisting of seven members. The Vice-President would be the Chairman of this selection committee.

The Bill has not been enacted into Act

The establishment of Ombudsman in India is the demand of time. The consciousness of the existence of Ombudsman will make the administration more sensitive to the public opinion and to the demands of fairness.

- It is better to give Constitutional status to the institution of Ombudsman.
- The functioning of the proposed institution of Lokpal may be greatly improved by securing for him a constitutional position like the Election Commission under Article 324.

It must be noted that though the Ombudsman may take pressure off the courts and prevent legal principles being strained, yet he is not a panacea for all the evils of bureaucracy. His function is to tidy up and improve administration. His success depends on the existence of a reasonably welladministered State. He cannot cope with the situation where the administration is riddled with patronage and corruption.

Though the birth of an Ombudsman in the Centre is still doubtful, but for the States it has become a cherished institution.

The institution of Lokayukta is functioning in 13 States. These States are: Andhra Pradesh, Assam, Bihar, Gujrat, Himachal Pradesh, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan, Uttar Pradesh, Orissa, Punjab and Haryana.

In Tamil Nadu and Jammu & Kashmir different investigating agencies are functioning [see the Tamil Nadu Public Men (Criminal Misconduct) Act, 1973 and the Jammu & Kashmir Government Servants (Prevention of Corruption) Act, 1975]. A similar proposal is pending in the State of Kerala [See Public Men (Investigation About Misconduct) Bill, 1977]. Delhi has also established the institution of Ombudsman..

Working of Lokayuktas in the State

The fact of the establishment of the institution of Ombudsman in States proves beyond doubt that the assumption of accepting the "system of responsible government" and the consequential "ministerial responsibility" as a means of providing continuous oversight over the administration is not wholly correct. A Lokayukta can be much more effective than a member of Parliament or State Legislature because of his freedom from political affiliation land because of access to departmental documental. The following tables would show the working of the Lokayuktas in various states.

It is clear beyond doubt that the number of complaints received by the Lokyuktas is constantly increasing. But a large number of them are fielded because of various reasons, which may include :

- Lack of jurisdiction,
- Triviality,
- Baselessness,
- Anonymity or
- Pseudonym, etc.

This indicates that the people while filing complaints have not acted with restraint and responsibility. Another important fact is that the cases in which grievances were redressed is highly negligible. This establishes at the practical ineffectiveness of this institution in the Indian situation was lack of administrative

NOTES

cooperation and the apathy of political high-up is significantly marked. However, it has no reflection on the Lokayukta therapy if properly administered.

Much information is not available about the types of complaints received by the Lokayuktas in various States but whatever information is available clearly indicates that the main areas of grievance include police action or inertia, prison torture, mala fide exercise of power and demand or acceptance of illegal gratification.

A survey of state enactments relating to Lokayukta indicates that there is no uniformity in the provisions of these enactments. In some states, grievances against administration are within the jurisdiction of Lokayukta, while in other states such grievances are kept out of its jurisdiction. In some enactments jurisdiction of Lokayukta extends to only a limited number of public functionaries while in others even vice-chancellors and Registrars of the Universities have been brought under its jurisdiction. In some states the Chief Minister has been brought within the purview of the Act, while in some cases he is not. Similar is the cases with the members of the legislatures. There is no uniformity in the qualification, emoluments. allowance, status and powers of Lokayukta. Only in some enactments power of search and seizure and power to take action *suo motu* have been given to Lokayukta. in some states budget of the Lokayukta office is charged on the consolidated funds of the state but in others it id not done. Power to punish for its contempt is conferred upon the institution of Lokayukta in some states only. In the same manner only a few states have put independent investigative machinery at the disposal of Lokayukta.In some states Lokayukta has been given some other additional functions to perform also in order to make the institution costeffective. Besides these, there are various other matters where there is no uniformity in state enactments.

Institution of Lokayukta has not been given any constitutional status, hence, its existence and survival completely depends at the sweet-will of the state government. For political reasons State of Orissa issued an ordinance in 1992 for the abolition of Lokayukta institution. It for same reason Haryana repealed Lokayukta Act in 1999.

It is tragic that in some states this institution was established not for prevention of corruption but for harassing and intimidating political opponents and for protecting the ruling elite. it is for this reason that the government are keen that the lokayukta should be their own nominee. Supreme Court had to quash the appointment of Lokayukta of Punjab, Justice H. S. Rai, because the Chief Justice of the High Court had not been consulted.

In the same manner Justice vanish was removed from the office of Lokayukta of Haryana by repealing the Act because the Act had made removal of

Lokayukta cumbersome by the outgoing government. This is a dangerous sign when a good institution is being allowed to be destroyed in party politics.

Whether the recommendations of the Lokayuta or Upa-Lokayukta are mere recommendations or have a binding effect is a question, which deserves serious consideration.

The Apex Court in Lokayukta/Upa-Lokayukta v. T. R. S. Reddy32 (1997) 9 SCC 42.) opined that since the Lokayuktas/Upa-Lokayuktas are high judicial dignitaries it would be obvious that they should be armed with appropriate powers and sanctions so that their opinions do not become mere paper directions. Proper teeth and claws so that the efforts put in by them are not wasted and their reports are not shelved.

5.4 CENTRAL VIGILANCE COMMISSION (CVC)

In any system of government, improvements in the grievance redressal machinery have always engaged the attention of the people. This system no matter, howsoever, ineffective completely fails when inertia and corruption filter from the top. It was against this backdrop that the establishment of the Central vigilance Commission (CVC) was recommended by the Committee on Prevention of Corruption, the Santhanam Committee. The committee now after the name of its Chairman was appointed in 1962. It recommended the establishment of a Central Vigilance Commission as the highest authority at the head of the existing anti-corruption organization consisting of the Directorate of General Complaints and Redress, the Directorate of Vigilance and the Central Police Organization.

The jurisdiction of the Commission and its powers are co-extensive with the executive powers of the Center. The government servants employed in the various ministries, and departments of the Government of India and the Union territories, the employees of public sector undertakings, and nationalized banks, have been kept within its purview. The Commission has confined itself to cases pertaining only : *(i)* to gazetted officers, and *(ii)* employers of public undertakings and nationalized banks, etc. drawing a basic pay of Rs. 1,000 per month and above.

Service Conditions and Appointment of Vigilance Commissioner

The Central Vigilance Commissioner is to be appointed by the President of India. He has the same security of tenure as a member of the Union Public Service Commission. Originally he used to hold office for six years but now as a result of the resolution of the Government in 1977, his interest for not more than two years. After the Commissioner has ceased to hold office, he cannot accept any employment in the Union or State Government or any political, public office.

NOTES

He can be removed or suspended from the office by the President on the ground of misbehavior but only after the Supreme Court has held an inquiry into his case and recommended action against him.

Procedure

The Commission receives complaints from individual persons. It also gather information about corruption and malpractices or misconduct from various sources, such as, press reports, information given by the members of parliament in their speeches made in parliament, audit objections, information or comments appearing in the reports of parliamentary committees, Audit Reports and information coming to its knowledge through Central Bureau of Investigation. It welcomes the assistance of voluntary organizations like Sadachar Samiti and responsible citizens and the press.

The Commission often receives complaints pertaining to maters falling within the scope of the State Governments. Where considered suitable, such complaints are brought to the notice of state vigilance commissioners concerned for necessary action. Similarly, they forward complaints received by the State Vigilance Commission in regard to matter falling within the jurisdiction of the Central Government, to the Central Vigilance Commission for appropriate action.

The Central vigilance Commission has the following alternatives to deal with these complaints :

(a) It may entrust the matter for inquiry to the administrative Ministry/ Department concerned.

(b) It may ask the Central Bureau of Investigation (C. B. I) to make an enquiry.

(c) It may ask the Director of the C. B. I to register a case an investigate it.

It had been given jurisdiction and power to conduct an enquiry into transaction in which publics servant are suspected of impropriety and corruption including misconduct, misdemeanor, lack of integrity and malpractices against civil servants. The Central Bureau of Investigation (CBI) in its operations assisted the Commission. The CVC has taken a serious note for the growing preoccupation of the CBI with work other than vigilance. Thus when the CBI is extensively used for non-corruption investigation work such as drugtrafficking, smuggling and murders it hampers the work of the CVC.

But how effective this institution has proved in uprooting corruption depends on various factors, the most important being the earnestness on the part of the government, citizens and institutions to clean public life.

In its efforts to check corruption in public life and to provide good governance the Apex Court recommended measures of far-arching consequences while disposing a public interest litigation petition on the *Jain Hawala Case*. Three-

NOTES

Judge Bench separated four major investigating agencies from the control of the executive. These agencies are :

- *Central Bureau of Investigation;*
- *Enforcement Directorate;*
- *Revenue Intelligence Department and*
- *The Central Vigilance Commission.*

The Court has shifted the CBI under the administrative control of the CVC. The Central Vigilance Commission, until now, was under the Home Ministry entrusted with the task of bringing to book cases of corruption and sundry wrongdoings and suggesting departmental action. Now the CVC is to be the umbrella agency and would coordinate the work of three other investigating arms.

In order to give effect to the view of the Supreme Court, the movement issued an ordinance on August 25, 1998. However, this measure had diluted the views of the Supreme Court by pitting one view against the other. Therefore, what ought to have been visualized as a reformative step had begun to seen as a cleaver bureaucratic legalese.

It was when the Supreme Court expressed concern over these aspects of the Ordinance in the hearing relating to its validity that the government decided to amend the Ordinance and thus, on October27, 1998 **Central Vigilance Commission (Amendment) Ordinance** was issued. The Commission was made a four-member body and its membership was opened to other besides bureaucrats. In the same manner the single directive of prior permission was deleted and the membership of Secretary Personnel, Government of India was deleted.

It is too early to comment on the functioning of the reconstituted statutory Central Vigilance Commission but one thing is certain that no commission can root out corruption, which has sunk so deep in the body politic. It can only act as a facilitator and propellant.

Central Bureau of Investigation

Apart from vigilance organization in every ministry and department, the centralized agency of anti-corruption work viz. the Central Bureau of Investigation, which functions administratively under the Department of Personnel and administrative Reforms. The latter formulates all policy matters pertaining to vigilance and discipline among public servants. It also coordinates the activities of various heads of departments and functions as the nodal authority in the matter of administrative vigilance. It also deals with *(i)* vigilance cases against the officers belonging to the Indian Administrative Service and the Central

NOTES

Secretariat Service (Grade-I) and above of the service); and administrative matters connected with the Central Bureau of Investigation and the Central Vigilance Commission as also with the policy matters relating to powers and functions of the Commission.

The role of the Central Bureau of Investigation may be shortly described as follows:

(1) It can take up investigations against the higher levels and in complex cases.

(2) It is resourceful and can get material from various sources which may not be available to normal departmental machinery.

(3) Even if its cases in the early year proved to be weak, it is now encouraging to see that the Central Bureau of Investigation takes up only those cases for prosecution which are sound and strong.

The most important need in the interest of efficiency and progress is to fix a time schedule for a case to demarcate clear fields of responsibility between the Central Bureau of Investigation and the Central Vigilance commission.

5.5 RIGHT TO KNOW

Government openness is a sure technique to minimize administrative faults. As light is a guarantee against theft, so governmental openness is a guarantee against administrative misconduct.Openness in government is gaining lot of foothold in recent years. It is a topic of growing importance in administrative law.The goal of open government is being pursued by U.S.A, Aaustralia Newzealand and other liberal democracies of the world. Openness in government is bound to act as a powerful check on the abuse of power by the government. The objective of openness in government is ensured by giving access to by the individual to governmental information so that governmental activity is not shrouded in mistery and secrecy.

American Constitution, the oldest written constitution of the world, does not contain specific right to information. However, the US Supreme Court has read this right into the First amendment of the Constitution and granted access to information where there is a tradition of openness to information in question and where access contributes to the functioning of the particular process involved. **Administrative Procedure Act, 1946 (APA)** was the first enactment, which provided a limited access to executive information. The Act was vague in language and provided many escape clauses.

Taking these deficiencies into consideration the Congress in 1966 passed **Freedom of Information Act, 1966**, which gives every citizen a legally enforceable right of access to government files and documents, which the administrators

may be tempted to keep confidential. If any person is denied this right, he can seek injunctive relief from the court.

1. Information specifically required by executive order to be kept secret in the interests of national defense or foreign policy.
2. Information related solely to internal personal use of the agency.
3. Information specifically exempted from disclosure by statute.
4. Information relating to trade, commercial or financial secrets.
5. Information relating to inter-agency on intra-agency memorandums or letters.
6. Information relating to personal medical files.
7. Information complied for law enforcement agencies except to the extent available by law to a party other than the agency.

After investigating the operation of this Act, Congress in 1974 amended it. Amendments provided :

(i) For disclosure of "any reasonably segregably portion" of otherwise exempted records;

(ii) For mandatory time limit of 10 to 30 days for responding to information requests;

(iii) For rationalized procedure for obtaining information, appeal and cost. Statistics show that maximum (80%) use of this act is being made by business executives their lawyers an editors, authors, reporters and broadcasters whose job is to inform the people have made very little use of this Act.

The judiciary In USA shares the same concern of the Congress, which is reflected in the Freedom of Information Act, 1966.

Justice Douglas observed: "Secrecy in government is fundamentally antidemocratic, perpetuating bureaucratic errors. Open discussing based on full information debate on public issues is vital to our national health."

In order to provide access to Federal government meetings, the Congress passed **Sunshine Act, 1977.**

In England the thrust of the legislations on 'information' but secrecy the present law is contained in the Official secrets acts, 1911, 1920 and 1939. Keeping in view the desirability of openness of governmental affairs in a democratic society, the **Franks Committee** recommended a repeal Section 2 of the 1911 Act and its replacement by the Official information Act. The proposals restricted criminal sanctions to defined areas of major importance : wrongful disclosures of *(i)* information of major national importance in the fields of defense security foreign relations, currency and reserves, *(ii)* cabinet documents, and *(iii)* information

NOTES

facilitating criminal activity or violating the confidentiality of information supplied to the government by or about individuals, and these of information for private gains.

In 1993, the government in England published a white paper on 'open government' and proposed a voluntary code of practice of providing information. This code is voluntary and thus cannot be equated to statutory law on access to information.

The local government (Access to Information) Act, 1985 is the only statutory law providing legal right to information against local's governors. The Act provides for greater public access to meetings and documents of the major local councils. However, this Act leaves much to the discretion of the councils and mentions at least fifteen categories of exempted information. Individual seeking information has no adequate legal redress. It is certainly strange that a democratic country should be so secretive. It appears that this situation cannot last long because of mounting popular pressure and citizens charter.

The Official Secrets Act, 1923 in India makes all disclosures and use of official information a criminal offence unless expressly authorized.

Courts in India and England have rejected the concept of conclusive right of the government to withhold a document. But still there is too much secrecy, which is the main cause of administrative faults.

India Constitution does not specifically provide for the right to information as a fundamental right though the constitutional philosophy amply supports it.

In the same manner arts. 19 (a) freedom of thought and expression and 21 right to life and personal liberty would become redundant if information is not freely available Art. 39(a), (b), (c) of the Constitution make provision for adequate means of livelihood, equitable distribution of material resources of the community to check concentration of wealth and means of production. As today information is wealth, hence, need for its equal distribution cannot be over emphasized. Taking a cue from this Constitutional philosophy, the Supreme Court of India found a habitat for freedom of information in Arts. 19(a) and 21 of the Constitution.

It is heartening to note that the highest Bench in India while recognizing the efficacy of the 'right to know' which is a sine qua not of a really effective participatory democracy raised the simple 'right-to know' to the status of a fundamental right.

In *S. P. Gupta v. Union of India,* the court held that the right to know is implicit in the right of free speech and expression guaranteed under the Constitution in Article 19 (1) (a). The right to know is also implicit in Article 19(1)(a) as a corollary to a free press, which is included in free speech and

expression as a fundamental right. The Court decided that the right to free speech and expression includes —

(i) Right to propagate one's views, ideas and their circulation;

(ii) Right to seek, receive and impart information and ideas;

(iii) Right to inform and be informed;

(iv) Right to know;

(v) Right to reply; and

(vi) Right to commercial speech and commercial information.

Furthermore, by narrowly interpreting the privilege of the government to withhold documents under Section 123 of the Evidenced Act, the Court has widened the scope for getting information from government file. In the same manner by narrowly interpreting the exclusionary rule of art. 72 (2) of the Constitution, the Court ruled that the Court could examine the material on which cabinet advice to the President is based. However, this judicial creativity is no substitute for a constitutional or a statutory right to information.

With the judicial support, the right to information has now become a cause of public action and there is a strong demand for a formal law on freedom of information. States of Goa, Tamil Nadu and Rajasthan have, since 1997, enacted laws ensuring public access to information, although with various restraints and exemptions. There is a pressure on the Central Governments also to enact law-granting right to information. Various drafts were submitted fro consideration by empowered bodies like the Press Council of India and by independent citizens' groups. but the Freedom of Information Bill, which has finally reached Parliament in 1999, has disappointed almost all who campaigned for its introduction.

This Press Council of India Bill, 1996 had provided three exemptions, which included:

(1) *Information, disclosure of which will have prejudicial effect on sovereignty and integrity of India, security of State and friendly relations with foreign states, public order, investigation of an offence which leads to incitement to an offence;*

(2) *Information which has no relationship to any public activity and would constitute a clear and unwarranted invasion of personal privacy;*

(3) *Trade and commercial secrets protected by law.*

However, the information, which cannot be denied to Parliament or State Legislator, shall not be denied to any citizen. Present government bill tightens all these exemptions while adding several more. One such exemption is in respect of cabinet papers, including records of deliberations of Council of Ministers, Secretaries and other officers. This would make the conduct of all officers of stat immune from public scrutiny. Another exemption relates to the legal advice,

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opinion or recommendations made by an executive decision or policy formulation this confers too far-reaching immunity on officials. However, in one respect the bill marks a definitive advance over the initial draft in doing away with the exemption on information connected to the management of personnel of public authorities. This makes information available relating to recruitment process on public agencies, which is often riddled with corruption and nepotism. The bill is highly inadequate in respect of credible process of appeal and penalties for denial of information. The jurisdiction of the courts has been ruled out since the bill makes provision for an administrative appeal only. The officers who would deal with the requests for information are totally unencumbered by the prospects of any penalty for willful denial of any access. Nevertheless, in spit of these limitations, the proposed Bill is a right step in the right direction.

Right to know also has another dimension. The Bhopal gas tragedy and its disaster syndrome could have been avoided had the people known about the medical repercussions and environmental hazards of the deadly gas leaked from the Union Carbide chemical plant at Bhopal.

In India bureaucrats place serious difficulties in the way of the public's legitimate access to information. The reason for this can be found in colonial heritage.

Today in India secrecy prevails not only in every segment of governmental administration but also in public bodies. Statutory or non-statutory. There is a feeling everywhere that it pays to play safe. Even routine reports on social issues continue to be treated as confidential long after the you are submitted. What is given out is dependent on the whims of a minister or a bureaucrat. The result is that there is no debate on important matters and no feedback to the government on the reaction of the people. The stronger the efforts at secrecy, the greater the chance of abuse of authority by functionaries.

There is need for administrative secrecy in certain cases. No one wants classified documental concerning national defiance and foreign policy to be made public till after the usual period of 35 years is over. Secrecy may also be claimed for other matters enumerated in the Freedom of Information Act, 1966. But the claims of secrecy, generally by the government and public bodies, may play havoc with the survival of democracy in India.

Some legislation, therefore, is necessary which recognizes the right to know, makes rules fro the proper 'classification of information' and makes the government responsible to justify secrecy. This will not only strengthen the concept of open government, but also introduce accountability in the system of government., Outside the government, there is no justification for secrecy in public undertakings except within a very limited area of economic espionage.

Sometime there appears to be a conflict between the right to know and the right to privacy of public figures through whom the machinery of government moves. Our experience in India suggests that a public figure should not be allowed protection against exposure of his private life, which has some relevance to the public duties on the plea that he has a right to privacy. Right to privacy should not be allowed as a pretext to suppress information.

5.6 TRANSPARENCY AND RIGHT TO INFORMATION

Transparency, as used in the Administrative and in a social context more generally, implies openness, communication, and accountability. It is a metaphorical extension of the meaning a "transparent" object is one that can be seen through. Transparent procedures include open meetings, financial disclosure statements, freedom of information legislation, budgetary review, audits, etc.

An informed public is essential to democracy and can help create a more effective, accountable government. Transparency is a powerful tool to demonstrate to the public that the government is spending our money wisely, that politicians are not in the pocket of lobbyists and specials interest groups, that government is operating in an accountable manner, and that decisions are made to ensure the safety and protection of all Indians.

Effective transparency means that the public has access to timely, accurate information in usable formats. It also means such information is easily findable, thereby allowing the public to utilize commercial or government sources to access the accurate information pertaining to the functioning and performance of the Government Agencies.

In recent years, transparency, openness and disclosure have become all-too-familiar subjects of discussion, taken up as issues of utmost importance when considering how the public sector and policies should be. In the traditional arena of fiscal and monetary policies, for instance, transparency in budget formulation processes or in the central bank's policymaking processes has been drawing much attention from an institutional point of view.

The issue of transparency can be better understood by focusing on "information asymmetry." A situation in which information asymmetry exists is described as a "lack of transparency" or "opaqueness". In other words, the improvement of transparency means a mitigation of "information asymmetry" or "uneven distribution of information."

The lower the transparency of a government, the greater the cost of information gathering and this negatively affects voter participation in politics. Furthermore, it also hampers political competition among parties. When the incumbent government's information disclosure is insufficient, it increases the uncertainty felt by a nonruling party as to how much it can improve the

"management" of the government in the event of its taking the helm of (taking over) political rule.

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For instance, with regard to fiscal policies, had the outgoing government been tactfully hiding fiscal deficits which would leave a burden on future generations, the incoming government would be bound to a limited scope of fiscal policy options and forced to bear huge costs. In other words, the low transparency of a government increases regime "takeover costs," and thus the incumbent ruling party and government are able to maintain a politically advantageous position by strategically limiting information disclosure and keeping its affairs vague.

Transparency and Open Information Systems

Transparency is an important aspect of good governance, and transparent decision making is critical for the private sector to make sound decisions and investments. Accountability and the rule of law require openness and good information so higher levels of administration, external reviewers and the general public can verify performance and compliance to law.

Governments have access to a vast amount of important information. Dissemination of this information through transparency and open information systems can provide specific information that firms and individuals need to have to be able to make good decisions. Capital markets depend for example on information openness.

Participation

Participation can involve consultation in the development of policies and decision-making, elections and other democratic processes. Participation gives governments access to important information about the needs and priorities of individuals, communities and private businesses. Governments that involve the public, will be in a better position to make good decisions, and decisions will enjoy more support once taken. While there may not be direct links between democracy and every aspect of good governance, clearly accountability, transparency and participation are reinforced by democracy, and themselves are factors in support of democratic quality.

Right to Information

'Information' as a term has been derived from the Latin words 'Formation' and 'Forma' which means giving shape to something and forming a pattern, respectively.

Information adds something new to our awareness and removes the vagueness of our ideas.

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Information is Power, and as the Prime Minister Atal Behari Vajpayee stated, the Government wants to share power with the humblest; it wants to empower the weakest. It is precisely because of this reason that the Right to Information has to be ensured for all.

Constitutional Aspect of the Right to Information

Article 19(1) (a) of the Constitution guarantees the fundamental rights to free speech and expression. The prerequisite for enjoying this right is knowledge and information. The absence of authentic information on matters of public interest will only encourage wild rumours and speculations and avoidable allegations against individuals and institutions. Therefore, the Right to Information becomes a constitutional right, being an aspect of the right to free speech and expression which includes the right to receive and collect information. This will also help the citizens perform their fundamental duties as set out in Article 51A of the Constitution. A fully informed citizen will certainly be better equipped for the performance of these duties. Thus, access to information would assist citizens in fulfilling these obligations.

Right to Information is not Absolute

As no right can be absolute, the Right to Information has to have its limitations. There will always be areas of information that should remain protected in public and national interest. Moreover, this unrestricted right can have an adverse effect of an overload of demand on administration. So the information has to be properly, clearly classified by an appropriate authority.

The usual exemption permitting Government to withhold access to information is generally in respect of the these matters: (1) International relations and national security; (2) Law enforcement and prevention of crime; (3) Internal deliberations of the government; (4) Information obtained in confidence from some source outside the Government; (5) Information which, if disclosed, would violate the privacy of an individual; (6) Information, particularly of an economic nature, when disclosed, would confer an unfair advantage on some person or subject or government; (7) Information which is covered by legal/professional privilege, like communication between a legal advisor and his client and (8) Information about scientific discoveries and inventions and improvements, essentially in the field of weapons.

These categories are broad and information of every kind in relation to these matters cannot always be treated as secret. There may be occasions when information may have to be disclosed in public interest, without compromising the national interest or public safety. For example, information about deployment and movement of armed forces and information about military operations, qualify for exemption. Information about the extent of defence expenditure and

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transactions for the purchase of guns and submarines and aircraft cannot be totally withheld at all stages.

Need for Right to Information

The Right to Information has already received judicial recognition as a part of the fundamental right to free speech and expression. An Act is needed to provide a statutory frame work for this right. This law will lay down the procedure for translating this right into reality.

Information is indispensable for the functioning of a true democracy. People have to be kept informed about current affairs and broad issues – political, social and economic. Free exchange of ideas and free debate are essentially desirable for the Government of a free country.

In this Age of Information, its value as a critical factor in socio-cultural, economic and political development is being increasingly felt. In a fast developing country like India, availability of information needs to be assured in the fastest and simplest form possible. This is important because every developmental process depends on the availability of information.

Right to know is also closely linked with other basic rights such as freedom of speech and expression and right to education. Its independent existence as an attribute of liberty cannot be disputed. Viewed from this angle, information or knowledge becomes an important resource. An equitable access to this resource must be guaranteed.

Soli Sorabjee stressing on the need of Right to Information aim at bringing transparency in administration and public life, says, "Lack of transparency was one of the main causes for all pervading corruption and Right to Information would lead to openness, accountability and integrity".

According to Mr. P.B. Sawant, "the barrier to information is the single most cause responsible for corruption in society. It facilitates clandestine deals, arbitrary decisions, manipulations and embezzlements. Transparency in dealings, with their every detail exposed to the public view, should go a long way in curtailing corruption in public life."

Right to Information in Other Countries

In recent years, many Commonwealth countries like Canada, Australia, and New Zealand have passed laws providing for the right of access to administrative information. USA, France and Scandinavian countries have also passed similar laws. US Freedom of Information Act ensures openness in administration by enabling the public to demand information about issues as varied as deteriorating civic amenities, assets of senators and utilisation of public funds.

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It is not only the developed countries that have enacted freedom of information legislation, similar trends are seen in the developing countries as well. The new South Africa Constitution specifically provides the Right to Information in its Bill of Rights—thus giving it an explicit constitutional status. Malaysia operates an on-line data base system known as Civil Services Link, through which a person can access information regarding functioning of public administration. There is thus a global sweep of change towards openness and transparency.

In USA, the first amendment to the Constitution provided for the freedom of speech and expression. The country had already passed the Freedom of Information Reform Act 1986, which seeks to amend and extend the provisions of previous legislation on the same subject. But this right is not absolute. Recently, the US Supreme Court struck down two provisions of the Communications Decency Act (CDA), 1996, seeking to protect minors from harmful material on the Internet precisely because they abridge the freedom of speech protected by the first amendment. Moreover, the vagueness in the CDA's language, the ambiguities regarding its scope and difficulties in adult-age verification, make CDA unfeasible in its application to a multifaceted and unlimited form of communications such as Internet.

Sweden has been enjoying the right to know since 1810. It was replaced in 1949 by a new Act which enjoyed the sanctity of being a part of the country's Constitution itself. The principle is that every Swedish citizen should have access to virtually all documents kept by the State or municipal agencies.

In Australia, the Freedom of Information Act was enacted in December 1982. It gave citizens more access to the Federal Government's documents. With this, manuals used for making decisions were also made available. But in Australia, the right is curtailed where an agency can establish that non-disclosure is necessary for protection of essential public interest and private and business affairs of a person about whom information is sought.

Even the Soviets, under Mikhail Gorbachev, have realised that "the State does not claim monopoly of truth any longer". Glasnost has cast away the cloud of secrecy and stresses the priority of human values.

Even as steps are taken to ensure openness in matters affecting the public, there has to be a greater sense of responsibility on the part of users of information in the media and elsewhere. Journalists must ensure that they seek information in public interest and not as agents of interested parties.

India has so far followed the British style of administration. In Great Britain, Official Secrets Act, 1911 and 1989 are intended to defend national security by rendering inaccessible to the public certain categories of official information. However, the government recognises that access to information is an essential

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part of its accountability. A recent legislation governing access to public information includes Local Government (Access to Information) Act, 1985; the Environment and Safety Information Act, 1988, and the Access to Health Records Act 1990 are such laws. On the other hand, Data Protection Act, 1984; the Access to Personal File Act; the Access to Medical Reports Act, 1988, and the Consumer Credit Act, 1974, all provide some protection for different aspects of personal information.

5.7 RIGHT TO INFORMATION ACT

The Right to Information Act (RTI) is a law enacted by the Parliament of India "to provide for setting out the practical regime of right to information for citizens. The Act applies to all States and Union Territories of India, except the State of Jammu and Kashmir - which is covered under a State-level law. Under the provisions of the Act, any citizen (excluding the citizens within J&K) may request information from a "public authority" (a body of Government or "instrumentality of State") which is required to reply expeditiously or within thirty days. The Act also requires every public authority to computerise their records for wide dissemination and to proactively publish certain categories of information so that the citizens need minimum recourse to request for information formally.

This law was passed by Parliament on 15 June 2005 and came fully into force on 13 October 2005. Information disclosure in India was hitherto restricted by the Official Secrets Act 1923 and various other special laws, which the new RTI Act now relaxes.

Information

The Act specifies that citizens have a right to :

- Request any information (as defined).
- Take copies of documents.
- Inspect documents, works and records.
- Take certified samples of materials of work.
- Obtain information in form of printouts, diskettes, floppies, tapes, video cassettes 'or in any other electronic mode' or through printouts.

What is not open to disclosure?

The following is exempt from disclosure :

- Information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic" interests of the State, relation with foreign State or lead to incitement of an offence;

- Information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
- Information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
- Information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
- Information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
- Information received in confidence from foreign Government;
- Information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
- Information which would impede the process of investigation or apprehension or prosecution of offenders;
- Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers;
- Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual (but it is also provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied by this exemption);
- Notwithstanding any of the exemptions listed above, a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

5.8 SUMMARY

- Ombudsman originated in Sweden in 1809 was adopted in Finland in 1919 and Denmark in 1955. It was set up in New Zealand, a commonwealth country with parliamentary form of government in 1962. The 'Justice', a British wing of the international Commission of Jurists recommended that it be set up in England and the Parliamentary Commissioner's Act, 1967 was passed. Ombudsman has come to stay in England.
- The Ombudsman is an officer of Parliament who investigates complaints from citizens, against government departments, that they have been

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unfairly dealt with and if he finds that the complaint is justified, helps to obtain a remedy. He has usually a high status- that of a judge of the highest court and can investigate act involving corruption and maladministration by government officials, sometimes including ministers.

- It will be much useful in redressing the grievances of the citizens against the administration. Attempts have been made to establish the institution like Ombudsman (called Lokpal) but unfortunately it has not been established so far. However the institution of Lokayukta is functioning in some Indian States.
- In 1968 a Bill called the Lokpal and Lokayuktas Bill was introduced in the Lok Sabha but before it could be passed, the Lok Sabha was dissolved and therefore the Bill lapsed. In 1971 and another Bill was introduced in the Lok Sabha but again the Bill lapsed on account of the dissolution of the Lok Sabha. In 1977 a new Bill called Lokpal Bill, 1977 was introduced in the Lok Sabha. The Bill was referred to the Joint Select Committee of the two House of Parliament but the Bill again lapsed on account of the dissolution of the Lok Sabha. Again Lok Pal Bill, 1985 was introduced in the Lok Sabha and it also lapsed because before its passage the term of the Lok Sabha ended.
- The Central Vigilance Commissioner is to be appointed by the President of India. He has the same security of tenure as a member of the Union Public Service Commission. Originally he used to hold office for six years but now as a result of the resolution of the Government in 1977, his interest for not more than two years. After the Commissioner has ceased to hold office, he cannot accept any employment in the Union or State Government or any political, public office.
- Openness in government is gaining lot of foothold in recent years. It is a topic of growing importance in administrative law.The goal of open government is being pursued by U.S.A, Aaustralia Newzealand and other liberal democracies of the world. Openness in government is bound to act as a powerful check on the abuse of power by the government. The objective of openness in government is ensured by giving access to by the individual to governmental information so that governmental activity is not shrouded in mistery and secrecy.
- The Right to Information Act (RTI) is a law enacted by the Parliament of India "to provide for setting out the practical regime of right to information for citizens. The Act applies to all States and Union Territories of India, except the State of Jammu and Kashmir - which is covered under a State-level law. Under the provisions of the Act, any citizen (excluding the citizens

within J&K) may request information from a "public authority" (a body of Government or "instrumentality of State") which is required to reply expeditiously or within thirty days. This law was passed by Parliament on 15 June 2005 and came fully into force on 13 October 2005.

5.9 REVIEW QUESTIONS

1. Discuss the circumstances under which Ombudsman instituted in India.
2. What is the Ombudsman in India?
3. State the functions of Central Vigilance Commission?
4. What do you understand by transparency in governance?
5. How is Right to Information empower citizens? Discuss.

5.10 FURTHER READINGS

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CHAPTER— 6

GLOBAL ADMINISTRATIVE LAW

STRUCTURE

6.1 Learning Objectives
6.2 Introduction
6.3 Concept, Definition and Sources of Global Administrative Law
6.4 Emerging Concept of Global Administrative Law
— Factor Responsible for Emergence of Global Administrative Law
— Composite Administration and Global Administrative Law
— Changing Dimension of International Law and GAL
6.5 Institutional Design of GAL
6.6 The Case for Positivist Concepts of 'Law' as a Starting Point for GAL
6.7 Publicness : General Principles of Public Law
6.8 Three Categories of Public Global Administrative Activity and the Concept of 'Law'
6.9 Generality of Law and the Problem of Administration
6.10 The Challenges for 'Private Ordering' for a Concept of Law in GAL
6.11 Conclusion : Global Administrative Law as Inter-Public Law
6.12 Summary
6.13 Review Questions
6.14 Further Readings

6.1 LEARNING OBJECTIVES

After studying the chapter, students will be able to :

- Understand concept, definition and sources of Global Administrative Law (GAL);
- Explain emergence of Global Administrative Law (GAL);
- Discuss the institutional design of GAL;
- Describe various other important aspects of GAL.

6.2 INTRODUCTION

What justification is there for using the term 'law' in the theory and practice of the emerging field designated 'global administrative law'? It was fairly observed of one of the pioneering efforts in the late 19th century that :

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> "The concept of international administrative law (*internationales Verwaltungsrecht*) as originally conceived by Lorenz von Stein in 1866 described an ensemble of legal rules based partially on international sources and partially on domestic sources dealing with administrative activity in the international field as a whole. Von Stein's interest, here as elsewhere, was to capture and describe the reality of public administration rather than its underlying legal basis."

A similar assessment could be made of the concept of 'global administrative law' (GAL) as used in the burgeoning renewal of this field in the early 21st century. The broad ambit given to GAL in these recent works reflects an inductive methodology that begins with analysis of highly diverse arrangements and norms actually found in the practice of global governance, and with dynamic interactions among these as well as rapid change, rather than with problems of their legal basis or taxonomical efforts to delineate their precise legal characters. This wide approach to the relevant phenomena, and investigation of connections that may tie them together apart from unity of legal sources, also provides a foundation for positive social science assessment of the causes and consequences of global administrative law phenomena, and for philosophical and political normative assessments of which interests are served and disserved, and what the implications have been or might be in relation to various conceptions of justice. These phenomena must also be examined from the standpoint of their legal basis and other qualities associated with law. This is the focus of the present article. The method used here is one which seeks to build mutual elucidation and interrogation between theoretical propositions and materials concerning practice.

To situate the argument, a very brief introduction to current views of global administrative law is offered. The idea of the emerging global administrative law is animated in part by the view that much of global governance (particularly global regulatory governance) can usefully be analysed as administration. Instead of neatly separated levels of regulation (private, local, national, inter-state), a congeries of different actors and different layers together form a variegated 'global administrative space' that includes international institutions and transnational networks, as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects. The idea of a 'global administrative space' marks a departure from those orthodox understandings of international law in which the international is largely inter-governmental, and there is a reasonably sharp separation of the domestic and the international. In the practice of global governance, transnational networks of rule-generators, interpreters and appliers cause such strict barriers to break down. This global administrative space is increasingly occupied by transnational private regulators, hybrid bodies such as publicprivate partnerships involving states or

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inter-state organizations, national public regulators whose actions have external effects but may not be controlled by the central executive authority, informal inter-state bodies with no treaty basis (including 'coalitions of the willing'), and formal interstate institutions (such as those of the United Nations) affecting third parties through administrative-type actions. A lot of the administration of global governance is highly decentralized and not very systematic. Some entities are given roles in global regulatory governance which they may not wish for or be particularly designed or prepared for. For instance, national courts may find themselves reviewing the acts of international, transnational and especially national bodies that are in effect administering decentralized global governance systems, and in some cases the national courts themselves form part not only of the review but of the practical administration of a global governance regime.

Global administrative law is emerging as the evolving regulatory structures are each confronted with demands for transparency, consultation, participation, reasoned decisions and review mechanisms to promote accountability. These demands, and responses to them, are increasingly framed in terms that have a common normative character, specifically an administrative law character. The growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of governance. The sense that there is some unity of proper principles and practices across these issue areas is of growing importance to the strengthening, or eroding, of legitimacy and effectiveness in these different governance regimes. Endeavouring to take account of these phenomena, one approach understands global administrative law as the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make. This is described as 'global' rather than 'international' to avoid implying that this is part of the recognized *lex lata* or indeed *lex ferenda*, and instead to include informal institutional arrangements (many involving prominent roles for non-state actors) and other normative practices and sources that are not encompassed within standard conceptions of 'international law'. The normative practices addressed under the GAL moniker in the current literature go beyond the recognized sources of 'international law'.

The term GAL is applied to shared sets of norms and norm-guided practices that are in some cases regarded as obligatory, and in many cases are given some weight, even where they are not obviously part of national (state) law or standard inter-state law. The analysis is further complicated because global administrative law is practised at multiple sites, so GAL norms are also meshed with other sources

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of obligation applicable to that site – sources which may include the national law of the place, the constituent instrument and regulations of the norm-applying institution, contracts establishing private rights, or rules of international law on other matters. If a claim to 'law' is made in applying the label GAL in some of these situations, it is a claim that diverges from, and can be sharply in tension with the classical models of consent-based inter-state international law and most models of national law. This provides all the more reason to take steps toward the careful elucidation of the concept(s) of law that is (or are) implicated in the prevalent understanding of GAL.

Three elements of the approach that will be taken here to the concept (or concepts) of law may be stipulated at the outset. First, the concept of law is here not regarded as unrelated to normative evaluation: 'this is what it means to be law' is not a value-neutral statement. The articulation of a concept of law to clarify and describe the phenomenon to be evaluated is an element in the evaluation of law.

Second, concepts of law may have *political* significance. The concepts of law actually held by judges or jurists or relevant officials or the wider public vary within each national system, and the variation is vast across the heterogeneous domains of global governance. Some embrace positivist concepts in their rhetoric, but not in their practice (thus a judge may articulate a concept of law that separates law from morality, but then incorporate moral considerations into the announced decision.) Others embrace non-positivist concepts of law, such as that developed by Ronald Dworkin. Some derive concepts of law from political theory; others derive concepts of law from other concepts. The choice among such approaches is a political choice with political implications. Attempts to establish agreement on the applicable concept of law, or at least overlap among competing concepts of law, are particularly important in situations where there is no single agent who can decisively resolve the issue for practical purposes, even *pro tem*.

Third, understanding global administrative law as 'law' involves not only questions of validity ('is this a valid legal rule?'), but also assessments of weight ('what weight should Public Entity X give to a norm set by Public Entity Y?'). Whereas positivist thought within a unified legal system has focused on the binary validity/invalidity, or binding/non-binding, the absence of a very organized hierarchy of norms and institutions in global governance, and the dearth of institutions with authority and power to determine such questions in most cases, means the actual issues in global administrative law often go to the weight to be given to a norm or decision. Law is a social practice, and it is a feature of the particular social practices involved in GAL that both validity and weight are important. A useful concept of law in global administrative law must elucidate both aspects.

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6.3 CONCEPTS, DEFINITION AND SOURCES OF GLOBAL ADMINISTRATIVE LAW

Global Administrative Law may be defined as comprising the Mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decisions and legality and by providing effective review of the rules and decisions they make. In essence GAL is nothing but the application of some administrative law principles to global governance. Therefore GAL must of course, draw on legal principles and practices from many domestic and regional legal systems and traditions, as well as from sources in international Law. The past several decades have witnessed an explosive development of a great variety of international economic and social regulatory regimes. These regulatory regimes respond to the failures of both markets and of decentralized national systems of regulation to the failures of both markets and of decentralized national systems of regulation to secure important economic and social values. They also often include bodies that are administrative in character and that make regulatory decisions and create regulatory law that is domestically implemented. The traditional paradigms of international law and of administrative law at the domestic level cannot adequately account for or address these new global regulatory regimes, which are creating a new field of global administration and administrative law. How can these global regulatory regimes be made accountable to the actors or public whose interests they are supposed to serve is became a major issue. GAL is solution of this issue. The authority of international administrative law functions differently. It does not set limits upon individuals, but rather upon states. It is a higher law that imposes procedural obligations upon national authorities. Its function is the inverse of domestic administration. International administrative law serves to widen rather than to narrow, the sphere of private liberty by limiting the action of the state. This reversal in the function of international administrative law compared to its domestic counterpart requires a reconsideration of the principles that ground the two systems, taking care not to apply them mechanically in extraneous contexts.

Administrative Law, which governs the exercise of power by public officials, is the body of rules and principles to ensure that when public officials act, they act in accordance with the rule of law. GAL is also in the some way such rules and principles which ensure that the Global Administrative authority, when they act must act in accordance with the rule of Law. The development of concept of global governance as administration focuses the attention of scholars of global governance to several accountability mechanisms for administrative decision making, including administrative law, that in domestic systems operate alongside,

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although not independently from, classical democratic procedures such as elections and parliamentary and presidential control. It also incorporates the mechanisms of procedural participation and review, taken for granted in domestic administrative action. It also invites the development of institutional procedures, principles and remedies with objectives of development of global administrative law. In this aspect the GAL may be described as a branch of public law that, examining the legal phenomena, which together constitute international administration, seeks to discover and specify the norms that govern this administration and to supplement them. In this way, GAL covers all the rule and procedures that help to ensure the accountability of global administration, and it focuses in particular on administrative structures, on transparency or participatory elements in the administrative procedure, on principles of reasoned decision making and on mechanisms of review. Thus the field of GAL could encompass the totality of global rules governing administrative action by the global administrative bodies. This would include substantive law that defines the powers and limits of regulators like Human Rights treaties and case law defining the conditions under which state organs can interfere with individual liberties. However the field of global administrative law is not restricted to the specific context of substantive rules, but rather the operation of existing or possible principles, procedural rules, review mechanisms and other mechanisms relating to transparency, participation, reasoned decision making and assurance of legality in global governance.

Source of GAL

The sources of GAL include apart from the rules and regulations of International organizations, the classical sources of public international law, which includes treaties, custom and general principles. These sources lay down the normative and procedural practices, which provide the scope for the development of GAL. One of the examples is treaty which addresses the issues of administrative law by spelling out principles of administrative procedure and substantive rights. Further the customary international law, which establishes normative standards also provides the scope of GAL, inform of fairness and transparency. Further the use of general principle of law as a source of international law such as *Res Judicata, Estoppels* also provides procedural standard and thus towards the development of GAL. Although the acceptance of general principles of law in the practice of formal International Law has been low but it can be used as GAL principle to test the functioning of international organizations.

Thus among the traditional sources of public international law, there might be room for development of norms relevant to GAL. For example, in the case of treaty law it might be possible to adopt the approach developed by the European

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court of Human Rights (ECtHR) under which the ECtHR requires member states to ensure that the institutions on which they confer powers provide a level of protection equivalent to the protection provided by the ECHR. Applying such an approach would supply a basic set of standards for global administrative bodies.

Domestic law may also be a source of GAL. Domestic law is a controlling source of law for domestic administration and thus for national administrative agencies either implementing global law or acting as a part of global administrative structures or both. Domestic Courts may also provide a forum for redress when global administrative bodies act directly on private parties. Through these means, domestic law can help ensure accountability of global administration, and a subtle architecture of accountability centered on domestic mechanisms in the GAL. However, the courts are by no means the only domestic institutions involved in making global administration more accountable. For example, in the United States, some federal regulatory officials afford notice and comment when participating in international standard setting on certain topics.

Global Institutions are also one of the sources of GAL when they adopted internal mechanisms for participation and Accountability. The establishment by the Security Council of a limited administrative procedure for the listing and de-listing of Individuals targeted by U.N. sanction is fine example. This procedure introduces some requirements for reasoned decision making and review into the work of Security Council committees, which usually consider themselves purely political bodies, in no way comparable to administrative agencies.

Intergovernmental agencies have also worked as source of GAL. The WTO Appellate Body's first ruling in the Shrimp - Turtle case is fine example. In this case the Appellate Body ruled that in order for process based import restrictions to be sustainable under the GATT Art. XX exceptions, a state must show that the countries and foreign producers affected were provided with some form of due process. It also said that such measures are not to be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same condition prevail, or a disguised restriction on International Trade.

6.4 EMERGING CONCEPT OF GLOBAL ADMINISTRATIVE LAW

Globalization which has integrated the whole world into a unit by vast range of regulatory regime, has led to emergence of global state through international institutions. These Institutions regulate the social, economic and Political life of states. Therefore it has led to emergence of concept of Global Governance. This concept of Global Governance has led to development of the concept of Global Administrative Law. This GAL concept is based on the idea of

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understanding global governance as administration, which can be organized and shaped by principles of an administrative law character. In this way Global Administrative Law is related to trans governmental regulation and administration designed to address the consequences of Globalize interdependence in such fields as security, trade conditions on development and financial assistance, banking and financial regulations, Intellectual Property Rights, Labour standards, cross border movements of populations, including refugees.

Factor Responsible for Emergence of Global Administrative Law

In this era of globalization, a global state is in the process of emerging through international institutions that regulate social economic and political life of states. It has also compelled to the states to cede sovereign economic, social and cultural space to international institutions'. For example, the World Bank's policies on good governance, whether designated as 'advice' or as conditions of financial aid to developing countries, have generated extensive codes of principles and rules for the organization of procedures of domestic administration ranging from measures to combat corruption to practices of greater transparency and procedural guarantees for market actors. In this process a Global Administration is taking shape. Now under this global administration the states are becoming an administrative unit of the International Institutions. The International body is taking administrative decisions in relation to the states. These things necessarily requires adherence to certain fundamental principles and procedures of administrative law, to establish uniform global standards. for example, in the context of WTO, there are emerging signs that the Dispute Settlement Body regards member states as administrative agencies within this system. In order to promote a reasoned and predictable system of international trade regulation, the DSB has required member states to adopt trade restrictive measures to provide decisional transparency, opportunity for affected party to be heard and reasoned justification for decisions made to theorize the consequences of emerging global state. Now International Institutions are making decisions for states and which have implication in the national jurisdiction, therefore transparency, participation and accountability in treaty making and also at enforcement level is necessary which provides scope for GAL which can play an important role.

Global Administration is not an occasional matter of sparse agreements, but it seems to be enduring and institutionally dense. Confining attention to intergovernmental organizations with permanent administrative staffs, the world's least integrated country is a formal member of 14 organizations and virtually all other countries are formal member of more than 100 organizations. In addition, there are agreement that establish rights and obligations but do not create administrative capacity. To a substantial and growing extent, then rule making

NOTES

directly, affecting the freedom of action of individuals and nation states, is taking place, undemocratically but not entirely unaccountably in global settings, created by the world's nations but no longer under their effective control. This may be called global administration in the making claim. However this global rule making does not operate in the shadow of a state, and is not subject to an encompassing authority. In general, the principal Agent models that deeply shape our ideas about the effective and legitimate delegation of such authority seem irrelevant to the global administration. Therefore to ensure accountability of an emerging global administration will require the elaboration and defusion of new norms of governance. The first step in this area may be establishing new forms of accountability at the global level. Because the nature of global administration connects it with national rule making, reshape national politics, perhaps to reinvigorate democracy thereby opening areas of domestic rule making to a wider range of information experience and argument.

The second step in this area may be, search for the process norms arising from organization of interdependence and co-operation through accountability including transparency, reason giving, standing of those affected. It can be ensured if we understand the global-administration in the making claim as asserting both that GAL is a relatively autonomous source of rules for individuals and states and because it is, it triggers procedural and substantive norms to which that rule making needs to be accountable.

Composite Administration and Global Administrative Law

The composite nature of Global Administration also led to development of GAL. Since there is absence of the possibility of active judicial intervention, the idea of GAL is developed as an imposition on the concerned field of action. Because the administrative decisions of the international institutions are not without serious consequences for individuals and states. Therefore, the need for a developed GAL is more important because of the democracy deficit that characterizes International Institutions. Even at the domestic level regulatory agencies generally operate at one remove from elected legislatures. Therefore a central issue for administrative law is how to ground the administrative exercise of regulatory authority in electoral based representative government or provide surrogate mechanisms of democratic accountability and responsiveness. This act of grounding becomes even more important, in the case of international regulatory networks and organizations for they operate at and even further remove, often involve many nations and in many cases, international non actors as well. This also makes necessary to identify 'basic process rules' that may be recognized as a common standard of reference in various fields of policy implementation at the international level.

NOTES

CHANGING DIMENSION OF INTERNATIONAL LAW AND GAL

Traditionally, the subjects of International Law are states correlatively global governance is the governance of state's behavior with regard to other states. But now this Dimension has been changed. Now the regulatory programs agreed to at the International Level by states are effectuated through measures taken by governments at the domestic level to regulate private conduct. These domestic regulatory measures are the implementation by states of their international obligations. Private actors are formally addressed only at the implementation stage, and that is solely a domestic matter. But the real addresses of such global regulatory regimes are now increasingly the same as in domestic laws, namely individuals. This characterization is most powerful when International bodies make decisions that have direct legal consequences for individuals. e.g., S.C. Resolution restricting trade, UNHCR determinations of individuals' refugee statuses, and certification of NGOs by UN agencies as being specifically authorized to participate in their procedure. The aim of the International regime is to achieve desired changes in private conduct by imposing regulatory obligations on states and supervising the manner in which states regulate the private actors subject to their jurisdiction. This system is led to development of multilevel governance. Thus the expanding horizon of International Organization and Multinational treaties indicates that important regulatory functions are no longer exclusively domestic in character and have become significantly transnational or global. This is especially true in the area of rule making in which genuinely international action combine with action by national regulators in networks of global coordination to supplement and often determine domestic regulatory programmes and decisions.

Further in more and more cases global decisions directly affect individuals or firms as for example in U.N. Security Council decisions on sanctions and anti-terrorism measures, in UNHCR activities. These things led to recognition of a distinct global administrative space with a classical dichotomy between an administrative space in national polities on the one hand and inter-state coordination in global governance on the other. It is true that the global and the domestic remain politically and operationally separate for many purposes. Nonetheless, the two realms are already closely intertwined in many areas of regulation and administration. The rise of regulatory programs at the global level and their infusion into domestic counterparts means that the decisions of domestic administrators are increasingly constrained by substantive and procedural norms established at the global level, the formal need for domestic implementation thus no longer provides for meaningful independence of the domestic from the international realm. However these global administrative bodies making those decisions enjoy too much defacto independence and discretion. These things

NOTES

require the development of Administrative Law Principles at global level to ensure democracy, accountability, fairness and transparency in the functioning of the global administrative bodies. In this way it provides the scope for Global Administrative space, distinct from the space of inter-state relations governed by International Law and domestic regulatory space governed by domestic administrative law. Further the relative autonomy and distinct character of this global administrative space, and its increasingly powerful decision making bodies also compelled for the recognition and further development of new and distinct principles and mechanisms of accountability through GAL.

There is another dimension in International Law also when regulatory decisions by a domestic authority adversely affect other states, designated categories of individuals or organizations. These regulatory decisions may be challenged as contrary to that government's obligations under an international regime to which it is a party. In response to this aspect the intergovernmental regime have developed administrative law standards and mechanisms to which national administration must conform in order to assure their compliance and accountability to the international regime. In this way the international regulatory institutions, international unions dealing with different matter such as HRs, trade, security, finance, development with rule making power has spurred the idea of GAL.

6.5 INSTITUTIONAL DESIGN OF GAL

Institutional Design of GAL adopts two approaches for development of GAL, which are as follows :

1. The Bottom up Approach

A global administrative law can also be developed through the application of domestic administrative law tools to the decisions of global regulatory regimes. In present era the transnational or global governance institutions are taking over formerly national administrative function that were previously subject to domestic administrative law mechanisms of transparency, participation and review, but are not so constrained at the global level. Previously, global regulatory regimes generally do not have authority to determine or enforce requirements or liability directly against individuals or other non-state actors. But instances of such authority are likely to grow as international regulation intensifies with direct regulation. Therefore, the bottom up approach attempts to ensure legality, accountability and participation in global administration through extending (and adopting) the tools of domestic administrative law. Now under changing dimension of International law, when national regulators participating in the global governance are using it to shelter their actions from effective review at the domestic

NOTES

level. In order to remedy this circumvention of domestic administrative law safeguards, the bottom up approach would apply requirements of transparency, notice and comment procedures and review not only to the international components of domestic administrative decisions, but also to the participation of domestic administrators in global regulatory decision making and it would require decision making transparency in order to support such participation. It would allow for scrutiny of the International regulatory process in judicial review of domestic administrative action that aims at implementing international decisions and possibly also scrutiny of the positions developed by domestic official before and even during their participation in glove –level decision-making. This Bottom up approach is based on the reason that if domestic courts began to review and provide remedies against decisions of global regulatory regimes, the regimes would have strong incentives to develop effective internal systems of administrative law in order to defend or deter such initiative. For example Athletes have brought domestic court actions against anti doping and other disciplinary decisions by international sports federations. In response, the sports federations have developed a fairly elaborate system of procedural rights for athletes charged with wrong doing and review by an independent tribunal. However, this bottom up approach has some fundamentally constrains because domestic administrative law systems provide some valuable ideas, they are not generally applicable as direct models for understanding and problem solving in the quite different conditions presented by the global administrative space. Therefore, GAL while deriving some concepts form domestic administrative law must start from different structural premises in order to build genuinely global mechanisms of accountability. This may imply a different normative starting point one that would perhaps not rely so much on justification through individual rights and democracy but in a pluralist conception, on firmer accountability of global administrators to international regimes and participating states or in solidarity or cosmopolitan conceptions, on ensuring accountability to the emerging international community as such.

By adopting the bottom line approach the GAL has developed some basic legal principles and requirements of both a procedural and substantive character as it normative conception, which are as follow :

(1) Procedural Participation and Transparency:— Decisional transparency and access to information are important foundations for the effective exercise of participation rights and rights of review. It promote accountability directly by exposing administrative decisions and relevant documents to public and peer scrutiny. These principles are increasingly applied in global administrative law. Now, International bodies such as the World Bank, the IMF and the WTO are responding to criticism of decision-making secrecy by providing wider public to internal

NOTES

documents. Involvement of NGOs in decision-making, as in the codex example, is another means of promoting transparency.

2. *Reasoned Decisions* – The requirements of reasons for administrative decisions including responses to the major arguments made by the parties or commentators, has been extended from domestic law into some global or regional institutions. The shrimp Turtle decision and subsequent WTO case law are of central importance in establishing principles of reasoned decision-making for global administrative regulation, as is Security Council's decision to require, at least internally some kind of justification by the proposing country before an individual is included in the lists of those whose assets are to be frozen. Similarly in the global anti-doping regime a written, reasoned decision has been made a requirement for measures against a particular athlete.

3. *Review:*— An entitlement to have a decision of domestic administrative body affecting one's rights reviewed by a court or other independent tribunal is among the most widely accepted features of domestic administrative Law, and this is to some extent mirrored in global administration. Some international Human Rights Instruments treat access to a court to challenge detrimental decisions as a HRs, as for example, Art. 14 of the ICCPR and Article 6 and 13 of the ECHR. In several cases, the European Human Rights bodies have confirmed the importance of this right in relation to administrative decisions by intergovernmental bodies.

4. *Substantive Standards: Proportionality Means – Ends Rationally* — Under Human Rights treaties when Individual Rights are placed at the forefront, GAL might be expected to embody substantive standards for administrative action, like those applied in a domestic context – such as proportionality, rational relation between means and ends, use of legitimate expectations. Proportionality is a central issue in the jurisprudence of some international human rights regimes. In the ECHR, for example, interference with many individual rights can be justified only if the interference is proportionate to the legitimate public objective pursued.

2. Top down Approach

The Top down Approach to GAL create new administrative law mechanisms directly at the level of global regulatory regimes. Under this mechanism individual, groups and states would participate in global administrative procedures, review of decisions would be preformed by independent international bodies and this would include the review of domestic decisions forming part of distributed global administration. But this would also pose new difficulties: it would require legalization and institutionalization of administrative regimes that are at present informal which is difficult to achieve without losing the benefits of informal modes of cooperation and powerful states and economic actor will generally be suspicious of strongly legalized regimes because they reduce their discretionary influence.

NOTES

Further a top down strategy for constructing GAL must confront many of the same difficult challenges as a bottom up approach, including the diffusion of decision making in a multi level system, the often indirect effect of global administrative decision, the difficulty of providing non state actors with rights of participation and review within the state centered orientation of many global administrative regimes, and the significant private element in global administration.

Thus it can be said that now a GAL is taking shape to ensure fairness and transparency in relation to international organizations having imperial character. Specially after coming of the globalization, which is based on free flow of information, mutual assistance, equality of opportunity, requires some mechanism to ensure these principle. GAL may be a proper response to it.

6.6 THE CASE FOR POSITIVIST CONCEPTS OF 'LAW' AS A STARTING POINT FOR GAL

What kinds of approach to the concept of law might be fruitful in addressing global administrative law? The exercise of power beyond the state is fundamentally different from exercise of power by the state and its agencies within the national legal and political order. Only limited direct analogies may be drawn in the global administrative space from concepts of administrative law that apply within the state. Global administrative law cannot be understood as a simple transposition to the global administrative space of the functions performed, let alone of the specific rules and institutional interactions, that have been painstakingly made and remade in the crucibles where national administrative law is produced and refined. In the same way, concepts of law that make sense (if at all) only within the state, or by direct delegation from the state, simply do not address many of the phenomena clustered and studied under the label 'global administrative law'. Some theorists regard this as a limitation of these phenomena; either they are not law at all, or they must be radically rethought to align with existing concepts of law. No doubt there is much sloppy thinking in the practice and especially the legal theorization of global governance. But it is also highly possible that the limitation is not simply (if at all) in the phenomena, but rather in the state-based concepts of law. Taking this possibility seriously calls for the primary focus to be on concepts of law that do not begin and end with the state.

Command theories, under which law consists in the commands of a single determinate sovereign (a person or institution) backed by efficacious sanctions, are unlikely to produce very fruitful or comprehensive results in addressing global administrative law. Hobbes's command theory, for example, reflects his central interest in the legal and political theory of the state as the most likely protector of civil peace against the risks of horrific civil war. This is by no means to say that

NOTES

Hobbes's legal theory does not have much to contribute to international law – his ideas about the relations of natural law and civil law have been interpreted by Noel Malcolm as providing some foundation for a legal theory of international relations, and others have sought to extrude a general theory of rule of law from Hobbes's remarks on promulgation and other pertinent procedural requirements of law and legality. Hobbes was particularly interested in the marks of authority necessary to distinguish laws from situations where private persons with enough power 'publish for Lawes what they please without, or against the Legislative Authority'. The basic idea that determinate identification of the authoritative source for law in any context is essential to the concept of law, and that law emanating from an authoritative source is law properly so-called without regard to its moral content or other substantive attributes, has continued to inspire positivist jurisprudence.

In proposing that a social practice consisting of primary norms of behaviour and secondary rules for recognizing, adjudicating on, and changing the primary rules could be a legal system, provided that the key officials involved accepted the same rule of recognition and felt an internal sense of obligation to obey the rules quite separate from the threats or rewards they associated with compliance, H.L.A. Hart made a decisive break from the Hobbesian (and Austinian) dependence of the concept of law on sovereignty, while retaining the positivist focus on sources and recognition as central to the concept of law. Hart's theory of law thus provides a more promising starting point for a modern positivist approach to the concept of law in international law and in GAL.

Disagreements about concepts of law help explain, and justify, the prevalence of positivist concepts of law in international law writing and practice. Positivist concepts, in which the authoritative source of the norm (in state consent) is decisive for its status as law, provide a baseline acceptability in the absence of agreement on content-based (or truth-based) criteria for determining what is law, and in the absence of an agreed political theory (such as a primal commitment to equal concern and respect in relation to every human individual) that could support any other approach to law. There may indeed be ethical or political reasons to favour a positivist concept of law in the context of international law; this may well be the best way to promote basic order, or non-intervention, or peace, or affirmative liberty for democratic choice or other forms of collective self-government and individual freedom.

In relation to global administrative law, it is proposed that an extended positivist concept of law should be adopted. Several features of Hart's positivist jurisprudential approach in *The Concept of Law* and other works are important to specifying this concept of law in GAL, including Hart's emphasis on social practices, sources of law, and recognition.

NOTES

(i) A 'Social Fact' Conception of Law : A condition for the existence of law must be the internal attitudes actually held by leading participants and by those dealing with and critically evaluating them and their practices. Attitudes of relevant officials (of state, courts, and entities exercising international public authority) help establish: fragmented rules of recognition (see (*iii*) below); specific determinations as to the content and applicability of a putative primary rule and as to whether it is within the scope of such a secondary rule of recognition; and structures for adjudication or resolution of such questions and for establishing new or altered rules in a normgoverned way. Criteria for being a rule or principle of law include a requirement of an internal sense of obligation toward it, as well as agreement among key officials that the source from which it comes is a source capable of generating legal rules.18 Hart thus provides a methodology for empirical identification of law.

(ii) Sources of Law : GAL includes and is shaped by treaties and fundamental customary international law rules, and invokes ideas of *jus cogens*, general international law, and general principles of law. It may also derive from national law in certain circumstances. But a concept of law based on such a catalogue of sources alone is inadequate. Further considerations, bearing also on sources, will be noted in (*iii*) and (*iv*) below.

(iii) Recognition and Rules of Recognition in GAL : Hart was right that the unity of international law calls for a unity of understanding and of justification. To the extent that it goes beyond recognized international law, there is no single legal system of GAL or global governance law with a common rule of recognition. A convincing rule of recognition for a legal system that is not simply the inter-state system has not been formulated, the institutions for 'adjudication' are often non-judicial and sometimes absent, and the processes of change are not easily articulated in terms of rules. 'Global administrative law' is not an established field of normativity and obligation in the same way as 'international law'. It has no great charters, no celebrated courts, no textual provisions in national constitutions giving it status in national law, no significant long-appreciated history. It is possible over a long period that such a unity will develop. But at present, any claims within GAL to be law do not rest on a rule of recognition, shared among relevant participants, that identifies and delimits a unified legal system of GAL. There may well exist, however, different rules of recognition within different social-institutionalsectoral groupings in specific practice areas of global administrative law. There certainly exist recognition practices in such areas, so that recognition is important to law, even if a single shared rule of recognition is difficult to distil.

(iv) Extending Hart's Positivism — Qualities Immanent in Public Law : The Hartian elements of a concept of law already mentioned are necessary but not sufficient.

NOTES

More is now required for law that frames and regulates public authority, as GAL does. Hence an extension (or perhaps a modification) of this positivist approach is proposed.

The key idea is that in choosing to claim to be law, or in pursuing law-like practices dependent on law-like reasoning and attractions, or in being evaluated as a law-like normative order by other actors determining what weight to give to the norms and decisions of a particular global governance entity, a particular global governance entity or regime embraces or is assessed by reference to the attributes, constraints and normative commitments that are immanent in public law. These norms have multiple specific sources, but they are discernible from the practices of public law in different national systems and in transnational and public-international law arenas. They are not simply choices that could have been made or not made in each venue, although in many cases they may have started to obtain prevalence and purchase that way.

Rather, as the layers of common normative practice thicken, they come to be argued for and adopted through a mixture of comparative study and a sense that they are (or are becoming) obligatory. Where they have not been adopted by a great political decision (that is, where they are not directly applicable by treaty or a decisive resolution of the relevant international organization, etc), the usual case for them is that they are justified (and perhaps required) by what is intrinsic to public law as generally understood.

This view is in some tension with Hart's position as ordinarily understood. Certainly a claim that the exercise of public authority in the global administrative space brings with it requirements to adhere to public law norms seems much more consistent with Lon Fuller's view than Hart's. But the potential alignment with the above-mentioned elements of Hart's concept of law is much closer, if the rule of recognition is understood as including a stipulation that only rules and institutions meeting these publicness requirements immanent in public law (and evidenced through comparative materials) can be regarded as law. It may thus be possible to be a Hartian positivist, at least in a loose sense, and also to accept these publicness requirements as necessary to law.

GAL as a social practice has not yet gone so far: typically, compliance with publicness considerations becomes more and more important in determining weight (perhaps even rising to be requirements of validity) the less the established sources criteria are met, the more doubt there is about recognition, the greater the levels of resistance, and the greater the extent to which individuals or other private actors and their basic rights and welfare are affected. The next sections of this article will give some substance and detail to this argument in relation to GAL.

6.7 PUBLICNESS : GENERAL PRINCIPLES OF PUBLIC LAW

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Jurisprudential practices in modern democratic states do not accept that emanation from an agreed source of law is sufficient for law, even in environments where the prevailing concepts of law hold emanation from an accepted source, and a unifying rule of recognition, to be necessary. More than this is now required of law. 'Publicness' is a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related quality of generality, are necessary to the concept of law in an era of democratic jurisprudence.

By publicness is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such. This quality of aspiration to publicness is, as Jeremy Waldron has observed, what Weber misses in his means-oriented definition of the state (as the monopolist of legitimate violence), and what analytical jurisprudence misses in its formal analysis of legal systems. These statements about publicness are modernized and narrower statements of more sweeping arguments made by Rousseau :

> "when the people as a whole makes rules for the people as a whole, it is dealing only with itself; and if any relationship emerges, it is between the entire body seen from one perspective and the same entire body seen from another, without any division whatever. Here the matter concerning which a rule is made is as general as the will which makes it. And *this* is the kind of act which I call a law ... law unites universality of will with universality of the field of legislation."

The quality of publicness in law as specified in this article, should be distinguished from the stronger claim that generality is a requirement for a rule (or decision) to be a rule (or decision) of law. Rousseau argued both for publicness and for a requirement of generality. Such a requirement could lead to the view that much administration (particularly retail case-by-case administration, rather than wholesale administrative rule-making) is not law at all. This view, which has had many supporters, will be considered (and qualified in relation to GAL) in *section 6.6* below.

The idea of law being wrought by, and for, the whole society overlaps with an approach to administrative law in many national systems that emphasizes public service and an objective of the public good, an approach projected also into administration extending beyond the state. Thus Soji Yamamoto defined international administrative law in terms of 'a legal norm inhering in the existing international communities, which realizes continuously *service public international*

NOTES

established by multilateral administrative treaties and influences variously the national administrations through the administrative actions of international institutions'. This idea of a particular purpose for international public authority, namely the pursuit of some conception of the public good (*salus populi*) that is specified and controlled by processes that are not simply those of a national public, does not yet have anything like the significance in GAL that the concept of *service public* has in, for example, French administrative law. Nevertheless, it is an idea that is likely to be carried forward as mechanisms and modalities develop for specifying public entities meeting requirements of publicness in GAL.

General principles of public law combine formal qualities with normative commitments in the enterprise of channelling, managing, shaping and constraining political power. These principles provide some content and specificity to abstract requirements of publicness in law. Principles potentially applicable within any system of public law, and in relations between different systems of public law, may include to different degrees some of the following. This is merely an indicative list, without any comparative or doctrinal analysis, but it is sufficient to suggest that the principles embodied in such a conception of public law are significant. More detailed elements, or requirements, of publicness are the object of much GAL research and practice – some of these (particularly review, reason-giving and publicity/transparency) will be considered in *section 6.5* of this article, as part of a discussion of specific activities of public global administration.

***(i) The Principle of Legality*:.** One major function of public law is the channelling and organizing of power. This is accomplished in part through a principle of legality – which can mean actors within the power system are constrained to act in accordance with the rules of the system. This enables rule-makers to control rule-administrators. The agent is constrained to adhere to the terms of the delegation made by the principal. In a complex system of delegation, it is often preferable to empower third parties to control the agent in accordance with criteria set by the principal, creating the basis for a third-party rights dynamic even in this principal-agent model. In the case of inter-state institutions, the states establishing the institution often style themselves as principals (severally or collectively), with the institution as agent, but their direct control of the agent may be attenuated. Many actors in global governance are primordial, or at least are not delegates. Their claim to legality means their adherence to 'law', including requirements of publicness.

***(ii) The Principle of Rationality*:** The culture of justification has been accompanied by pressure on decision-makers (and in some countries, on rule-makers) to give reasons for their decisions, and to produce a factual record supporting the decision where necessary. This is part of both political and legal culture. In both contexts it

leads those institutions with review power into continuous debates about whether and on what standard to review the substantive rationality of the decision : manifestly unreasonable, incorrect, etc. Review, and reason-giving, are discussed in *section* 6.5.

(iii) The Principle of Proportionality : The requirement of a relationship of proportionality between means and ends has become a powerful procedural tool in European public law, and increasingly in international public law, although some national courts (for instance, in the UK) have only slowly accepted unfamiliar arguments based on it.

(iv) Rule of Law : The demand for rule of law can mean many things. The dominant approach is proceduralist, meaning a general acceptance among officials (and in the society) of particular deliberative and decisional procedures (including the publicity maxim, discussed in *section 6.5*). This is prima facie in tension with a conception of the rule of law as simply a structure of clear rules, reliably and fairly enforced, without regard to their substantive content (the 'rule book' conception); and with 'the ideal of rule by an accurate public conception of individual rights' (the 'rights conception'). Proceduralists argue for adhering to procedures even at the price of unsatisfactory outcomes – but face problems in explaining why any decision taken in accordance with prescribed procedures should not then be part of the law which adherents of the rule of law must uphold. David Dyzenhaus has argued for an approach which shifts the focus of rule of law from law (and rules), to the element of ruling – so a breach of procedural requirements is not unthinkable, but involves a compromise of legality that must be carefully weighed.

(v) Human Rights : Basic rights protection is almost intrinsic (or natural) to a modern public legal system. This category overlaps a lot with the previous four categories, but is listed separately to leave scope for arguments that some human rights (perhaps of bodily integrity, privacy, personality) are likely to be protected by public law as an intrinsic matter (without textual authority), yet without being subsumed into 'rule of law'.

6.8 THREE CATEGORIES OF PUBLIC GLOBAL ADMINISTRATIVE ACTIVITY AND THE CONCEPT OF 'LAW'

The comparative study of general principles immanent in public law indicates a trend to requiring publicness as part of the concept of (public) law. The emerging principles and practices of GAL, in operational contexts, add to this evidence and provide greater specificity. This section examines publicness criteria in three basic categories of GAL, constructed by structured analogy from

NOTES

David Dyzenhaus's distinction among three different categories of administrative law within a national system. Constitutive administrative law is what constitutes the legal authority of any administrative body; in national systems this generally requires a delegation of the authority to act, made by another body that has the authority to delegate a power of the state to act. Substantive administrative law is that established by the administrative body, including its more general (legislative-type) and more particular (adjudicative- or decisional-type) acts.

Procedural administrative law governs how the administrative body can act. Legal activities by public entities other than states in the global administrative space can be divided into categories on somewhat similar lines.

(1) The institutional design, and legal constitution, of the global administrative body (a public entity, other than a state),

(2) The norms and decisions produced by that entity, including norms and decisions that have as their addressees, or otherwise materially affect :

- other such public entities,
- states and agencies of a particular state,
- individuals and other private actors.

(3) Procedural norms for the conduct of those public entities in relation to their rules and decisions, including arrangements for review, transparency, reason-giving, participation requirements, legal accountability and liability.

These categories of global administrative action will now be considered in more detail, from the standpoint of issues concerning the requirements of publicness and its operational meaning in applicable concepts of law.

1. The institutional design, and legal constitution, of the global administrative body (a public entity, other than a state).

Institutional design, and constitutional rules of public entities, are obviously of central importance to the realization of substantive justice (the promotion of human dignity, liberty, capabilities, equality, fairness, welfare, etc.) They are also important to the actual realization of public law values and of the purposes of global administrative law (these probably on average also support the better pursuit of substantive justice, but not necessarily, and studies on these questions are only just beginning). Institutional design and constitutional-type rules (including rules of organizational procedure) can define some of the conditions and costs of exit and voice, shaping strategies of key actors. A constitution which allows for deliberative decision-making in a legislature-like assembly may produce more and better assessment of arguments and public reasoning, but the decision itself may then lack coherent reasons or clarity. A decision process with representation of all key affected interests may succeed even if closed, but a less representative body may function successfully if its rules allow for high

NOTES

transparency and wide consultation with relevant civil society and industry groups. The adequacy of review by a tribunal will depend on rules concerning its jurisdiction, *locus standi*, hearings process, and appointment of its members. A body with a strong lawyerly dispute settlement tribunal may come in practice to shift more of the law-making function to the tribunal, empowering lawyers and legal approaches to the detriment of other actors. Rules of procedure in a deliberative body allowing wide civil society participation may enable new agendas to be taken up quickly, or they may encourage defection by powerful interests to make decisions in a more amenable forum.

From a normative standpoint, institutional design should enhance the possibilities of substantive achievement and good process; insights from GAL, especially when combined with work on positive political theory, provide some guidance about different approaches as well as some prescriptions. Institutional design should also take account of other pathways not captured in the GAL framework or standard rationalist institutionalist logics, such as encouraging imaginative leadership by major political figures in areas of cosmopolitan values (such as environmentalism and climate change) where imaginative actions going beyond pure pursuit of national or sectoral political interests are plausible and may make a difference.

Constitutive power is exercised internationally, most obviously in the constitution of international organizations. The logic, and problems, of *pouvoir constituant* and *pouvoir constitué* hold in such circumstances. In the constituting process of creation of intergovernmental organizations, the problem of representation in the constituent assembly is solved by sending designates chosen by the executive branch of each participating state, nowadays also with some space just inside or outside the margins of the assembly for 'civil society organizations', who may themselves operate certain systems of representation inter se and vis-à-vis their members or supporters. The state representation is deepened if the constitution is a treaty requiring national parliamentary ratification or other wider deliberation. Once constituted, the institution and its agencies typically separate to a certain degree from the original constituting powers. The institution will likely adopt rules of procedure, assert implied powers, claim or refuse responsibility (for example, in relation to breaches of rights of individuals), create subsidiary bodies, engage in joint institution-building with other institutions, and in general take part in a kind of constitution-making which has implications for the creation and application of both substantive administrative law and procedural administrative law.

Embedding such institutions in a stronger and deeper international constitutionalism is much more challenging. The aphorism 'no democracy without a demos' has a parallel in the claim that there can be 'no constitutionalism

NOTES

without a polity'. If there is no completed global polity and nothing approaching a global demos, some scholars believe that institutions, norms, accountability-enhancing measures and associated discursive and reflexive processes operating outside, across and within national polities may help to establish the social and political conditions for global constitutionalism. Whether these institutions and modalities have anything like the strength to bear this burden, outside the European Union and some other special situations, is doubtful in the near term, but this approach nevertheless represents an important motivating aspiration for practical work in this field. Aspirations to constitutionalism are also open to contestation, however. Their telos, the sense of direction toward structural and substantive goals and toward realization of choices such as giving primacy to values over virtues and to rights over responsibilities, is not necessarily reflective of goals that have been agreed or command general support in the current state of the world. Constitutionalism also implies a coherence of structure which global legal and institutional arrangements do not currently have and are unlikely soon to get. It may imply too that a specified minimum set of core functions have been allocated to relevant institutions or actors and are to some extent being performed. But there is not a globally shared political history that produces a tradition of understanding about those functions. For example, there is no global comparator to the history of the legislative power that developed as a political idea and practice in strands of Western political thought, so it is very difficult to see a shared understanding of what a global legislative power might consist in. While constitutive power is certainly exercised internationally, international constitutionalism in its richer forms is still, at most, in *statu nascendi*. Nonetheless, the constitutionalist commitment to publicness is being operationalized.

2. The norms and decisions produced by a global administrative body (a public entity, other than a state) affecting different kinds of actors

A. The substantive external output of global administrative bodies may be further divided into three categories, depending on the kind of actor it is addressed to or otherwise affects. Publicness requirements can apply in each category.

(i) Substantive norms and decisions that have as their addressees, or otherwise materially affect, other global administrative public entities (apart from states).

The field of international standardization provides many illustrations. The World Trade Organization (WTO), whose Technical Barriers to Trade (TBT) Agreement provides that states benefit from a rebuttable presumption of WTO compatibility where their technical restrictions on imports comply with 'international standards', has issued a Code of Good Practice for the Preparation, Adoption and Application of Standards. This in effect sets guidance on the ways in which the International Organization for Standardization (ISO) must operate

NOTES

if ISO standards are to operate as a safe harbour under WTO rules. The International Social and Environmental Accrediting and Labelling Alliance (ISEAL), which consists of eight such organizations including the Forest Stewardship Council (FSC), largely follows the ISO, and has promulgated a code of practice for social and environmental standard-setting. This requires, for example, two rounds of public comments on proposed standards, and a public written response to each material issue raised in such comments. All of these bodies require that standard-setting strive for consensus among a balance of interested parties. ISEAL defines consensus for this purpose as 'General agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process seeking to take into account the views of interested parties'. The FSC (established in 1993), in turn issues an intricate set of standards, the Principles and Criteria for Forest Management, which include detailed standards for specific regional forests, and certifies timber and timber products as conforming to these.

Membership in the FSC is open to all organizations and individuals who subscribe to the FSC's principles. Its General Assembly is organized in three chambers (economic, social, environmental), each of which has equal voting power in the Assembly, and each of which is further divided into a Northern and Southern chamber with equal voice. Since 2002, Government forestry management organizations have also been permitted to join.

(ii) Substantive norms and decisions that have as their addressees, or otherwise materially affect, states and agencies of a particular state.

This category is illustrated by one of the seminal GAL cases, the *Shrimp-Turtle* decisions in the WTO Appellate Body. The US prohibited import of shrimp from India, asserting that Indian shrimp vessels did not meet US statutory requirements concerning protection of turtles. The WTO Appellate Body did not hold that the US acted contrary to GATT in refusing to treat Indian shrimp in the same way as identical shrimp from elsewhere, even though the text of GATT might have seemed to call for this.

The Appellate Body deferred to a US public law decision that demand from US markets for shrimp was not going to be permitted to more grievously threaten turtles. But the Appellate Body held that the way in which the US authorities took their legal decision was arbitrary or unjustifiable, in so far as the US did not provide India with proper notice of its plans to find Indian vessels non-compliant, an opportunity to contest these proposed findings in advance, or a reasoned written decision it could challenge. In effect, the US process did not meet some of the requirements for publicness in law, as these requirements were not limited to a public comprised of US citizens, but included affected Indian interests as well.

NOTES

(iii) Substantive norms and decisions that have as their addressees, or otherwise materially affect, individuals and other private actors.

This is becoming an increasingly important element of global regulatory governance. Significant issues for the concept of law in GAL can arise from situations where the global regime confers rights on individuals, as these rights and their legal validity in turn have implications for legal obligations of other actors, and they also have implications for the weight to be given to rights-respecting or rights-disrespecting norms and decisions of global governance entities. Where a global regime imposes burdens on individuals, an examination of that institution's conduct by reference to GAL criteria is increasingly likely, whether or not there is a direct transitivity (*i.e.*, whether or not the global rule or decision can directly be challenged.) The reform of the Security Council's listing procedures for certain individuals and groups suspected of involvement in terrorist financing, enacted in Security Council Resolution 1822 (30 June 2008) ahead of the anticipated decision of the European Court of Justice in the *Kadi* case (September 2008), illustrates the application of several elements of 'publicness', and possibly even a sense of obligation to enact these. These provisions include an obligation of states seeking listing to provide to the Security Council a detailed statement of the case, with an indication of parts of the statement suitable for public release, as well as procedures to revisit earlier listings and add statements of reasons. They also include provisions for persons listed or delisted to be so notified within one week where practicable, a procedure for annual review of existing listings, and encouragement of use of the existing (non-transparent and not entirely satisfactory) procedure for delisting.

B. The most obvious contrast between these three categories of 'substantive' norms and decisions relates to the possibility of review triggered by the addressed or otherwise affected interest. In international relations, it is extremely rare for a judicial-type body to have competence in a challenge by one international organization to the work of another. Occasionally this may be achieved collaterally, as with the challenge by the European Commission in the European Court of Justice to Ireland's invocation of the jurisdiction of an international arbitral tribunal in the MOX Plant case (the arbitral tribunal suspended its work pending the ECJ decision, although technically the ECJ decision would apply only to Ireland's conduct). The horizontal nature of IO relations means that separate review bodies even with simply political functions are not often available. As institutional hierarchies develop to manage this situation, more formalized review may develop with it, bringing in great scope for publicness criteria to operate also in the initial challenged administrative action. The topic of review as an element of publicness will be addressed more fully below.

NOTES

A second distinction concerns the applicability of Rule of Law protections. It can be argued that these protections apply only to individuals, not to states or IOs, and hence come into play only in the third of the categories listed above.

C. Treating all three categories of substantive norms and decisions together, this kind of administrative action raises basic questions about the applicability of the kind of requirements that Lon Fuller described as an 'inner morality' of law. These requirements are 'inner' to law itself, in the same way as the public law requirements discussed in this paper are. So if in a particular administrative situation Fuller's indicia are not present and realistically could not be, from his standpoint this gives reason to doubt that 'law' is involved. He labelled these eight requirements as :

> "that law should be general – generality; that law should be promulgated or public – publicity; that there should not be abuse of retroactive law – non-retroactivity; that law should be understandable – clarity; that law should not be contradictory – non-contradiction; that law should not require conduct 'beyond the powers of the affected party' – possibility of execution; that law should not be so frequently changed that the 'subject cannot orient his action' – constancy; that 'actual administration' should be congruent with the 'rules as announced' congruence."

Fuller observed that many managerial directives concern primarily the relationships within the administration (superior-subordinates, etc), only collaterally affect the citizenry, adhere only to some of the elements of inner morality that are indicative of law, and adhere to even these elements for reasons of efficacy rather than because they instantiate the reciprocity in relations of ruler and ruled that call forth the need for law as the distinctive mode of order in modern liberal states. David Dyzenhaus has recently applied this analysis to invite more searching examination of the degree to which concepts of 'law' (and hence legality) are really invoked by ideas of administrative law, at least in its various Anglo-American forms.

Significant parts of national administrative 'law', and especially the substantive legal-type outputs (norms, guidelines, decisions) of administrative agencies, do not adhere to all or even most of Fuller's criteria. C*an* they nevertheless make a claim as law? (This is a conceptual question. It folds into, but does not subsume, questions that arise repeatedly in GAL : to what extent *do* they, and to what extent *should* they, make claims to be law?) One answer suggested by US debates on this question, is that intransitive legislation, which confers powers on agencies but in such general terms that it creates really no basis for effective review of any sort, becomes transitive when these powers are used *in concreto* by the administrative body acting in relation to individuals. At that moment, the

NOTES

duty to adhere (more or less) to the requirements for inner morality of law takes hold. Legality is then invoked as the way of framing and understanding the relation between the ruler and the ruled, the administrator and the administrated, the governor and the governed. Dyzenhaus argues that the particular claim to legitimacy that is made by invoking legality depends on adherence to the requirements of the inner morality of law, requirements that may seem largely formal but nevertheless have considerable significance and bite. Adherence to these requirements is what makes putative law legal. Such adherence is achieved and achievable only within a system or order, but it is not being part of a legal system that makes putative law legal. Legality here consists not merely in ex-post accountability (such as by judicial review or judicial determination of legal liability), but in fidelity to law on the part of the officials involved. This means fidelity to the constitutive, substantive and procedural administrative law, even if each is not equally subject to review, as each (to the extent of claiming to be law) makes the claim of legality.

This Fullerian process of rendering transitive the intransitive, works to a reasonable extent in a state where rule of law generally prevails. But does it work outside the state? Dyzenhaus suggests that better and more accurate practices of authorization, or delegation of authority, will be necessary if there is to be much constitutive administrative law beyond the state. This admonition is indicative, however, of a fundamental problem. Much (not all) of the practice of global governance cannot adequately be theorized as authorized or delegated by states or by entities deriving their own authorizing or delegating powers from states. If in many cases (not all) global governance agencies cannot be understood as having this kind of constitutive administrative law (they may of course have other kinds of constitutive law), on what basis can their substantive administrative output, or claimed controls on their procedures, be made transitive or regarded as legal? The legal character of putative global administrative law in such circumstances, like the legal character of administrative law in democracies, is determined not by transitivity, but by Hart's test plus the further requirement of publicness (which includes the principle of legality).

3. Procedural norms for the conduct of those public entities in relation to their rules and decisions, including arrangements for review, transparency, reason-giving, participation requirements, legal accountability and liability.

This is the core of global administrative law as ordinarily understood. These procedural norms give more precision and meaning to the general principles immanent in public law that were introduced in *section 6.4*. The first conceptual problem in assessing this practice is to determine whether an accepted category of sources and a rule of recognition exist within that specific global governance regime or cohort of participants and experts. The second problem is determining

NOTES

whether and to what extent a quality of publicness is built into the prevailing concept of law and the practice in that regime or cohort. A further question then is whether these elements are understood as determinative of the validity of the claim to law, or as factors going rather to weight.

These issues concerning the application of procedural norms have been examined in an increasingly rich set of GAL studies, including important work on accountability and on participation by Richard B. Stewart, Sabino Cassese, and other scholars. This section will consider, from the standpoint of the Hartian requirements and the publicness requirements in the applicable concept of law, three other areas in which procedural norms may be emerging across diverse substantive regimes of global regulatory practice. These are review, reason-giving, and publicity/transparency.

6.9 GENERALITY OF LAW AND THE PROBLEM OF ADMINISTRATION

Is generality a requirement of law under modern conditions? Hobbes saw no need at all for laws to be general in scope. 'For all Lawes are generall Judgements, or Sentences of the Legislator; as also every particular Judgement, is a Law to him, whose case is judged.' Kelsen, focusing on the validity of each norm by reference to its authorization for a logically prior norm, had no difficulty incorporating the action of an official (where duly authorized) in relation to an individual, into the concept of law. Joseph Raz likewise incorporates particular orders (governed by general norms) into his concept of law, although with a strong preference that they be derived from general norms (thus enabling people to plan).

Jeremy Waldron has taken a stand against this jurisprudential position, arguing on Rousseauian lines that generality can be an important protection against arbitrariness and tyranny, and for equality and liberty. This can be framed simply as a desideratum of rule of law. But if pressed further, to become part of the very concept of law (meaning here an evaluative concept of what law is), considerable problems arise about the legal status of much administration.

A. V. Dicey's emphasis on ordinary (private) law rules and actions and his concomitant suspicion of a special *droit administratif* as a means for controlling public administration, influenced legal theory and practice in England and many other countries for decades. Lists of the attributes of law of the kind produced by Lon Fuller also left doubt that much quotidian administration, even if governed by law, should itself be regarded as law. Such views influenced the thinking of international lawyers. Sir Robert Jennings, for example, shortly after retiring as President of the International Court of Justice called for a reorientation in international law scholarship and policy: 'it is the relatively underdeveloped

NOTES

political and administrative side in international law which inevitably inhibits the full development of the legal side.'

Such a view is evident in the International Court of Justice's 1954 advisory opinion, which was concerned with Chapter XV of the UN Charter in relation to UN staff matters. The ICJ commented that the UN General Assembly had 'a power to make regulations, but not a power to adjudicate on, or otherwise deal with, particular instances'. A threefold categorization is implied here: law-making, adjudication, administration. One distinction is between making regulations and adjudicating particular instances; this aligns with the sharp contrast drawn in many national legal systems between legislation and adjudication (so that in these systems a judicial decision, which applies to a single instance, is not legislative – it is not a formal source of law.) A second distinction is between making regulations (legislating) and dealing nonjudicially with particular instances (administration). This classificatory structure thus divides the general (legislation) from the special (dealing with particular instances by way of adjudication or administration.)

It may be doubted whether the exclusion of a great amount of global governance practice from the domain and concept of law is normatively desirable. A feature of much global governance is that there is not the degree and specificity of functional differentiation that exists in some national governmental structures. Law-making and administration thus may at times be the same thing. In this context, it is doubtful that a strong insistence on generality as part of the concept of law is useful for purposes of global administrative law. But is generality nonetheless a necessary requirement for such a concept of law? Three observations are offered by way of partial answer. First, generality as a requirement of the higher levels of law in a chain of authorizations (what might be called the arteries and veins) does not necessarily extend to legal actions taken at what might be called the capillary level, where actions are of high specificity and modest range, yet such actions may well be regarded as law, either for the reasons given by Hobbes and Kelsen or because they meet the other requirements for law. Second, a requirement of generality is difficult to apply without a theoretical and practical account of jurisdiction, which while reasonably uncomplicated for many national legislatures, can be immensely challenging in global governance. Third, the requirement of generality may be considered an element of particular jurisprudence for some legal systems or some types of legal systems (such as legal systems of democratic states with elected and productive legislatures of virtually plenary competence as well as elected executive leaders with power over administration). Generality is not a necessary requirement for a general concept of law applicable to all law as such, and as indicated above there are good reasons why it is not necessarily part of the particular jurisprudence of the law of global administration.

6.10 THE CHALLENGES OF 'PRIVATE ORDERING' FOR A CONCEPT OF LAW IN GAL

NOTES

The proliferation of non-state norms (including inter-firm norms, standardization processes, internal norms of MNEs and IOs, inter-organizational arrangements), and non-state dispute settlement structures (such as arbitration, ethics committees, state-industry-NGO bodies like the Montreal Protocol compliance committee, etc), the increasingly variegated and dense structures of communication between entities, and the complex management of information flows, are part of the purported domain of global administrative law. But the sphere of 'private ordering' poses challenges as to whether any concept of 'law' is applicable even if some of the procedures and patterns of behaviour and justification seem analogous to other spheres of global administrative law. In this sphere, particular doubts about the applicability of the publicness requirements must arise.

Gunther Teubner, wrestling with the problem of identifying law in 21st century practices such as *lex mercatoria* or the law of cyberspace, argues for a concept of law that is more radically unmoored from the state. While it is sometimes posited that 'New world law is primarily peripheral, spontaneous, and social law,' in fact this body of law is increasingly organized and institutionalized, by specialized and expert social sub-spheres. Whereas the formal state-based law, in its applications to global governance (particularly through international law), lacks organized sanctioning power and authentic definition of infringements of law on the basis of known rules, *i.e.*, it is becoming more spontaneous in style.

In the global economy, without a global political system and insofar as there are not global legal institutions (which do occupy increasing parts of the field), the unexpected method of making law has been the self-validating contract. Durkheim pointed out that the binding force of contract must be established in wider social contexts than the contract itself. But Teubner claims that in global economic legal practice, the paradox of self-validation has been brilliantly concealed through :

(1) **time** – iterative legal acts, making a recursive mutual constitution of legal acts and structures; a present contract refers to a pre-existing standardization of rules and a future of conflict regulation, making a self-production process.

(2) **hierarchy** – primary rules of contract, with supposedly meta-rules *i.e.*, secondary rules of identification and interpretation (and entangled hierarchy).

(3) **externalization** – using non-contractual mechanisms *e.g.*, the International

NOTES

Chamber of Commerce, business associations (quasi-courts, quasi-legislatures) even though actually empowered by contract, make a non-official legal order which nevertheless is law because it is premised on the binding/non-binding dichotomy. This is not by delegation of state power, or by delegation of global public power from international law. This *lex mercatoria* is self-legitimating, it is buttressed by, but does not depend on, recognition by other legal orders (*i.e.*, that kind of recognition is not constitutive).

But the 'law' refers to emanates from the operations of heterarchical, connectionistic, network-type communications linkages in organizations and professions, and a weaklycoordinated multiplicity of decentrally-organized legal decision bodies. This makes it very difficult to say in advance which norm actually applies, except in the actually decided or settled case (thus potentially violating the condition of generality, if generality is required to be 'law'). Hence, the identification of the applicable legal norms is weak, and there is a lack of clarity about who the real decider is (so on a question of humanitarian intervention, it includes the media, professional bodies, NGOs, MNEs, various parts of several governments, as well as NATO, the Security Council, etc). There are not adequate corrective or control mechanisms (*e.g.*, by judicial review, or by state regulators, or by foreign ministries) for this to be an adequate mode of law in many areas of global governance.

The theoretical solution proposed by Teubner is a dynamic dualism, between formally organized rationality and informal spontaneity, with neither having institutionalized primacy. Hitherto, such dualism has functioned mainly within the separate states, in the economy (institutions are enterprises, spontaneity is market) and in politics (government is the institution, public opinion is spontaneous). But globalization may be strengthening the spontaneous side of dualisms, so that the institutions are no longer 'condemned to freedom'. Liberal democracies thrive because of the counterpoise between institutions and spontaneous informal ordering in different social fields. This counterpoise emerged in the economic sector in Britain in the industrial revolution, and in politics via the French and US revolutions. Highly rationalized institutions are checked by, but cannot themselves totally control, the decentralized multiplicity of spontaneous communications processes.

This dynamic really operates only in the general economy and in general politics, not so much in other social fields even within a single state. Realization of this kind of democratic counterpoise in global governance forces would depend on a high degree of autonomy and differentiation of different social fields. There may be a few specialist fields in which spontaneous global order is emerging around depoliticization, debureaucratization, and noneconomic competition (such

as competition for status, or for pre-eminence in sheer quality of output); but these are rare.

Global law is not underdeveloped and structurally deficient law, but is fully fledged – it lacks political and institutional support at global level, but has strong structural coupling with highly specialized discourses and socio-economic processes. It is pluralistic, but pluralism is of discourses and networks, not ethnies. 'Legal pluralism is then defined no longer as a set of conflicting social norms but as a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal.') Identification of law (including decentralized heterarchical law, not just state law) should be a matter of code, not function. It would be wrong to collapse into 'law' every kind of social constraint such as global commercial customs, organizational routines of MNEs, or negotiating constraints. However, the test of validity Teubner proposes for this kind of governance is simply one of social coding: legal pluralism is 'a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal'. This is a formal view, which has the great merit of not reducing law merely to function. As he points out, law cannot simply be any arrangement of norms that perform such functions as social control, conflict resolution, coordination of behaviour, shaping expectations, accumulation of power, private regulation, or disciplining and punishing bodies and souls. However, rejection of the relevance of such functional criteria limits the bases on which any content criteria for valid law might be generated.

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This is a major problem in the absence of a unified and adequate system of authoritative sources, an absence that is probably unavoidable given his assumption of pluralism of normative discourse and networks. Teubner recognizes that the ability of diffuse global governance subsystems to identify legal norms, or authoritative deciders, is weak. His idea is that such norms emerge in relatively autonomous cross-border social sub-systems, and are in effect self-validated through practices in these sub-systems that stretch the law over time, operate internal hierarchies, and externalize from the parties to arbitration bodies, professional and business associations, etc.

The areas of normative practice addressed in the last few paragraphs are often labelled 'private ordering'. Analysis of them often begins not with government and governmentality, nor with any claim for the autonomy of the political, but instead with spontaneous orderings in the private sector. However, the writings on contemporary juridification of scholars such as Christian Joerges, Niklas Luhmann, Gunther Teubner, and others do not stop with the private actors. This work anticipates that private orderings and official regulation will proceed not independently, but interdependently. Even if the rate of technological and market change is so quick that official regulation cannot keep pace, still a demand

NOTES

for elements of public regulation accompanies the more and more complex administration of matters affecting a wide public, particularly issues about risk. They can be understood as beginning with private ordering and advancing towards a conception of the public and of public law. Indeed, many of the central issues are about the interaction between formally public institutions and officials – regulators, legislators, courts, etc – and the unofficial practices. The unofficial practices are dubbed 'private orderings', but in many cases they are not simply private. It is in their linkages that global administrative law operates.

The kind of administrative linkage, and the 'law' of such linkages, advocated in some of this writing moves away as far as practicable from rigidified Weberian bureaucracy, and toward the open and flexible models of European Union comitology, the EU's Open Method of Coordination, or perhaps the evolving governance of cyberspace. But even if the form of administration is not particularly Weberian, the new forms are still subject to Weber's insight about administration necessitating the deformation of law. This particular approach to transnational juridification thus casts doubt upon the place for public law in any traditional sense. But Teubner's alternative account of law beyond the state does not overcome the basic problems of sources, recognition, specification of a legal system, and other jurisprudential concerns at the level of concepts. Teubner tries to deal with the problem through antifoundationalist analysis of discourses and social practices. Teubner's strategy is to shift practice out of domains of morality, or ordinary politics, and into sub-specialized communities of interest and expertise that are barely accessible to civil society or even to most of the educated elite. It is difficult to see this as a normatively attractive concept to espouse for law beyond the state under modern democratic conditions. Instead, it is normatively important to emphasize and build the (tempered) requirements of publicness in law. The adoption of an inter-public approach to international law provides the conditions for this to be effectively pursued.

6.11 CONCLUSION : GLOBAL ADMINISTRATIVE LAW AS INTER-PUBLIC LAW

Global administrative law is made by entities that are themselves public – operating under their own constitutions, adhering to their own public law, and oriented toward publicness as a requirement of law. They apply global administrative law in their own practice, and seek to insist on it in the practice of other public entities, at least to the extent that this influences the weight they will give to the norms and decisions of those external entities. The most important of these public entities are likely to be states. They are accustomed to the operation of the principles of public law of the kind in the indicative list sketched earlier. They are each equipped with a raft of institutions operating in a public law

NOTES

environment, and which will be involved in the international law process. Associations and citizens' groups within the state bring similar public values to their participation in international law. However, there is no strong reason to limit the category of global public entities – and of participants in inter-public law – to states. As interactions among all such global public entities increase, situations where they bump up against each other multiply, generating conflicts of laws arrangements in the public law sphere.

As the discussion in this chapter has implied, the operationalization of this view would probably be pursued primarily by specification of the relevant (types of) public *entities*, rather than by routine specification of *publics*. In relation to any particular entity (and especially states), what it means to be a 'public' entity would routinely be evaluated by reference to the relevant entity's legal and political arrangements, which may derive from national law, inter-state agreement, self-constitution, or delegation by other entities. This is similar to the ICJ's conclusion in the *Barcelona Traction* case (1970) that the identity and core governance rules of a 'corporation' depend simply on the national law of the corporation. Thus one state may have a corporatist system, with political groups organized and represented by profession or industry or university, while another state has a mixed system of ethnic and territorial groupings and representation. One global industry governance association may have only regional peak groups as its members, another may have a multitude of local corporations and consumer groups. Global administrative law accepts the heterogeneity of forms and categories of public law entities, and potentially applies to all of them. No robust commitment to political equality among these entities can be expected; any prescription of equality would probably operate only to rule out egregious exclusions and abuses. Political equality would be at best a regulative ideal. Participation rules would also be loose. As at present is the case in global governance, some of the public entities are virtually self-appointed.

Operationalization in terms of entities rather than publics is likely to be juridically much more practicable (much in the way that self-determination in international law has generally been applied to juridical units such as colonially-defined territories with arbitrary borders, rather than to ethno-linguistic peoples). In practice, public entities and publics will often go together. But situations in which the public entity is not an adequate representative of the relevant public are common. For example, a public entity with governing power may decide an issue, with full participation of its public under a deliberative model, and careful framing of arguments and reasons so as genuinely to encompass all of those who spoke; yet the decision may be taken by an entity whose public is not the public truly affected.

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For practices within each of the public entities of global governance, and between them, principles of global administrative law exert an increasing normative pull. These principles arise from shared practices in various public law systems, and are carried into these global public entities through the use of law or law-like techniques in the constitution, substantive norms and decisions, and regulative procedural principles followed by these entities. There is probably not yet a single unifying rule of recognition covering all of GAL (beyond what is encompassed in established international law), but there are specific rules of recognition in particular governance regimes or sectors, and these regimes or sectors increasingly overlap or mesh with one another (in small part through the activities of self-styled global administrative lawyers!) The normative practice of global administrative law involves an increasing commitment to publicness, the meaning of which is becoming more and more fully defined through this normative practice. The pressures and incentives to adhere to requirements of publicness become greater, the less the entity is able to rely on firmly established sources of law and legal recognition to ground its activities and resolve its problems. There is probably no widely shared commitment to generality, nor to other trappings of 'democratic' jurisprudence such as courts or representative legislatures, although these are the directions in which practice may be developing. 'Private ordering' poses special problems, and falls within this concept of law only where it engages with the regulative activities of public institutions.

The choice of any particular concept of law is in part political, and in part conceptual. It has been argued that a Hartian positivist approach, extended to bring into the concept of law requirements of publicness, satisfies both political and conceptual criteria in the challenging conditions under which GAL operates. The methodology used in this paper has been to integrate theoretical considerations with extensive consideration of practical materials.

This reflects the view that purely conceptual or analytic jurisprudential reasoning, and abstract philosophical investigations, are productively deepened, problematized, and transformed when closely confronted with practice, acutely so in the unassimilated and often perplexing circumstances of global governance. Theoretical analysis in turn helps to give meaning, guidance and coherence to unruly practice.

The conclusion from this very preliminary investigation is that, although the picture is uneven, it is reasonable to claim that there is 'law' in global administrative law. More boldly, analysis of global administrative law unmoored from the state may enrich legal theory —including the possibilities of incorporating into Hartian approaches to the concept of law, and even into the rule of recognition, a requirement of publicness.

6.12 SUMMARY

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- Global Administrative Law may be defined as comprising the Mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decisions and legality and by providing effective review of the rules and decisions they make. In essence GAL is nothing but the application of some administrative law principles to global governance.
- Global administrative law is emerging as the evolving regulatory structures are each confronted with demands for transparency, consultation, participation, reasoned decisions and review mechanisms to promote accountability. These demands, and responses to them, are increasingly framed in terms that have a common normative character, specifically an administrative law character.
- Command theories, under which law consists in the commands of a single determinate sovereign (a person or institution) backed by efficacious sanctions, are unlikely to produce very fruitful or comprehensive results in addressing global administrative law. Hobbes's command theory, for example, reflects his central interest in the legal and political theory of the state as the most likely protector of civil peace against the risks of horrific civil war.
- Jurisprudential practices in modern democratic states do not accept that emanation from an agreed source of law is sufficient for law, even in environments where the prevailing concepts of law hold emanation from an accepted source, and a unifying rule of recognition, to be necessary. More than this is now required of law. 'Publicness' is a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related quality of generality, are necessary to the concept of law in an era of democratic jurisprudence.
- The proliferation of non-state norms (including inter-firm norms, standardization processes, internal norms of MNEs and IOs, inter-organizational arrangements), and non-state dispute settlement structures (such as arbitration, ethics committees, state-industry-NGO bodies like the Montreal Protocol compliance committee, etc), the increasingly variegated and dense structures of communication between entities, and the complex management of information flows, are part of the purported domain of global administrative law.

NOTES

6.13 REVIEW QUESTIONS

1. Define Global Administrative Law (GAL).
2. What are the important sources of Global Administrative Law?
3. What are the factors responsible for the emergence of GAL?
4. Discuss the bottom up approach of GAL.
5. Do you see Global Administrative Law as inter-public law? Discuss.

6.14 FURTHER READINGS

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CHAPTER – 7

INDIAN CIVIL SERVICE LAW : AN OVERVIEW

NOTES

STRUCTURE

7.1 Learning Objectives
7.2 Introduction
7.3 Constitutional Protection to Civil Servants
7.4 Disciplinary Action — Meaning
7.5 Causes of Disciplinary Proceedings
7.6 Types of Disciplinary Action
7.7 Mode of Taking Disciplinary Action
7.8 Constitution of India — Dealing with Disciplinary Matters
7.9 Successive Steps Involved in Disciplinary Proceedings
7.10 Issues and Problems
7.11 Rights of Civil Servant
7.12 Administrative Tribunals
7.13 Reasons for the Growth of Administrative Tribunals
7.14 Types of Administrative Tribunals
7.15 Advantages of Administrative Tribunals
7.16 Disadvantages of Administrative Tribunals
7.17 Safeguards in the Working of Administrative Tribunals
7.18 Summary
7.19 Review Questions
7.20 Further Readings

7.1 LEARNING OBJECTIVES

After studying the chapter, students will be able to :

- Discuss the elements of constitutional protection for civil servants in India;
- Explain causes of disciplinary proceedings;
- State the modes of taking disciplinary action;
- Understand the rights of civil servants;
- Describe the evolution, functions and importance of administrative tribunals.

NOTES

7.2 INTRODUCTION

In every organization the conduct and discipline is very important. Every organization, public or private, has certain rules and regulations governing the conduct or behavior of its employees. A high moral standard of conduct among the public servants is of utmost necessity to set an example to the public at large. Integrity and discipline in the service are essential for an efficient personnel system. In order to prevent misuse of powers, a code of conduct to regulate the behaviour of the civil servants is enforced.

With the transformation of passive police state into an active welfare state, drastic changes have been brought in the role of the state. Its administrative machinery influences every aspect of human life in numerous ways. Along with the everincreasing responsibilities of powers of civil servants, administrative inefficiencies, such as red tapism, lethargy, corruption etc. crept into administration.

Rapid growth in the numerical strength, continuos extension in the powers of civil servants, change in the concept of civil neutrality, shift from negative to positive work and increasing emphasis on moral and professional standards have become the modern trends of personnel administration and thus it gained momentum. If the public servants – the backbone of the government – are undermined by indiscipline and misconduct, it will lead to the collapse of administrative machinery.

7.3 CONSTITUTIONAL PROTECTION TO CIVIL SERVANTS

In India government is the biggest provider of jobs to the people. According to an estimate in 1947 the strength of civil servants was 10 lakhs, which rose to 20 lakhs in 1978 and became 30 lakhs in 1993. However, this does not include the jobs in public sector undertakings. Maximum numbers of jobs provided by the government are in defense, railways and post offices.

This tremendous growth in civil services was mainly due to the fact that without a big army of civil servants it was not possible to realize the dream of a Welfare State,which was the cornerstone of the Indian Constitution.

India is the only country where law relating to service matters of the civil servants is provided in the constitution. Therefore Chapter XIV containing Articles from 308 to 323 providing protection to civil servants was included in the Constitution.

However, Article 314 that provided protection to the members of Indian Civil Service was repealed by the Twenty-eight-Constitution Amendment Act, 1972 after the last member to the service retired.

7.4 DISCIPLINARY ACTION – MEANING

Disciplinary action means the administrative steps taken to correct the misbehaviour of the employee in relation to the performance of his/her job. Corrective action is initiated to prevent the deterioration of his/her job. Corrective action is initiated to prevent the deterioration of individual inefficiency and to ensure that it does not spread to other employees.

A distinction needs to be drawn between disciplinary action of civil or criminal procedure. The former deals with the fault committed in office violating, the internal regulations or rules of the administration while the latter is concerned with the violation of law to be dealt with by civil and criminal courts. The following matters are covered in the Conduct Rules. More strictness is observed in those services where more discretion is involved :

(i) Maintenance of correct behaviour official superiors,

(ii) Loyalty to the State,

(iii) Regulation of political activities to ensure neutrality of the personnel,

(iv) Enforcement of a certain code of ethics in the official, private and domestic life,

(v) Protection of the integrity of the officials by placing restrictions on investments, borrowings, engaged in trade or business, acquisition or disposal of movable and immovable valuable property, acceptance of gifts and presents, and

(vi) Restriction on more than one marriage.

7.5 CAUSES OF DISCIPLINARY PROCEEDINGS

The following are the various causes of disciplinary proceedings.

(1) Acts Amounting to Crimes

(a) *Embezzlement,*

(b) Falsification of accounts not amounting to misappropriation of money,

(c) Fraudulent claims (*e.g.*, T.A.),

(d) Forgery of documents,

(e) Theft of Government property,

(f) Defrauding Government,

(g) Bribery,

(h) Corruption,

(i) Possession of disproportionate assets,

(j) Offences against other laws applicable to Government Servants.

NOTES

(2) Conduct Amounting to Misdemeanor

(a) Disobedience of orders,

(b) Insubordination,

(c) Misbehaviour,

(i) with superior officers,

(ii) with colleagues,

(iii) with subordinates,

(iv) with members of public.

(d) Misconduct

(i) violation of conduct rules,

(ii) violation of standing orders,

(iii) intrigues and conspiracy,

(iv) insolvency.

7.6 TYPES OF DISCIPLINARY ACTION

Disciplinary action may be informal or formal. Informal disciplinary action may mean assignment to a less desirable work, closer supervision, loss or withholding of privileges, failure of consultations in relevant matters, rejection of proposals or recommendation. It may includes curtailing of his/her authority and diminishing his/her responsibility The reason for taking informal disciplinary action may be that offences are too slight, or too subtle, or too difficult to prove, to warrant direct and formal action.

Formal disciplinary action follows where the offence is serious and can be legally established. In such cases the penalties that are imposed on a member of the service are;

(1) Minor Penalties

(a) Censure,

(b) Withholding of promotions,

(c) Recovery from pay of the whole or part of any loss caused to Government or to a company, association or body of individuals, And

(d) Withholding of increments of pay.

(2) Major Penalties

(a) Reduction to a lower stage in the time scale of pay for a specified period,

(b) Reduction to a lower time scale of pay, grade or post, and

(c) Compulsory retirement.

In very serious cases of offence, even judicial proceedings against the offender may also be launched.

NOTES

7.7 MODE OF TAKING DISCIPLINARY ACTION

Usually following provisions are made either in the Constitution or in the statute to check the misuse of power to take disciplinary actions :

(a) No employee shall be demoted or dismissed by an officer below in rank to one who had appointed him/her.

(b) No employee shall be punished except for a cause, specified in some statute or departmental regulation.

(c) No employee shall be punished unless he / she has been given reasonable opportunity to defend his / her case.

(d) The employee shall be informed of the charges laid against him / her.

(e) Where a board of Inquiry is appointed, it shall consist of not less than two senior officers, provided that at least one member of such board shall be an officer of the service to which the employee belongs.

(f) After the inquiry against an employee has been completed and after the punishing authority has arrived at any provisional conclusion in regard to the penalty to be imposed, if the penalty proposed is dismissal, removal, reduction in rank or compulsory retirement, the employee charged shall be supplied with a copy of the report of inquiry and be given a further opportunity to show cause why the proposed penalty should not be imposed on him / her.

7.8 CONSTITUTION OF INDIA – DEALING WITH DISCIPLINARY MATTERS

Article 309 provides that the Acts of the appropriate legislature may regulate the recruitment and conditions of service of the persons appointed to public services and posts in connection with the affairs of the Union or of any State. It shall be competent for the President or Governor as the case may be, to make rules regulating and recruitment and conditions of service of public service until provisions are made by an Act of the appropriate legislature.

According to Article 310, every person who is a member of a defence service or the civil service of the Union or an All India Service or holds any post connected with defense or any civil post under the union holds office during the pleasure of the president, and every person who is a member of a civil service of a state or holds a civil post under a state holds office during the pleasure of the Governor of the State. Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or the Governor of the State, any contract under which a person, (not being a member of a defence service or of an All India Service or of a civil service of the Union or a State) is appointed under the Constitution to hold such a post may, if the President or the

NOTES

Governor deems it necessary in order to secure the services of persons having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is required to vacate that post.

Article 311 as amended by Forty-second. Amendment provides that no person who is a member of a civil post under the union or a state, shall be dismissed or removed by an authority subordinate to that by which he / she was appointed. No such person is aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he / she has been informed of the charges against him / her given a reasonable opportunity of being heard in respect of those charges. Where it is proposed after such enquiry to impose upon him / her any such penalty, such penalty may be imposed on the basis of the evidence provided during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed.

This clause shall not apply where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his / her conviction on a criminal charge or where the authority empowered to dismiss or remove a person or to reduce him / her in rank is satisfied that for some reason to hold such enquiry. Or where the President of the Governor, as the case may be, is satisfied that in the interests of the security of the State, it is not expedient to hold such enquiry. If in respect of any such person as aforesaid, a question arises, whether it is reasonably practicable to hold the enquiry mentioned above, the decision thereon of the authority empowered the dismiss or remove such person or reduce him / her in rank shall be final.

7.9 SUCCESSIVE STEPS INVOLVED IN DISPLINARY PROCEEDINGS

The successive steps of the procedure of disciplinary action are :

(i) Calling for an explanation from the employee to be subjected to disciplinary action;

(ii) If the explanation is not forthcoming or is unsatisfactory, framing of charges;

(iii) Suspension of the employee if his / her remaining in the service is likely to prejudice the evidence against him / her;

(iv) Hearing of the charges, and giving opportunity to the employee to defend himself / herself;

(v) Findings and report;

(vi) Giving another opportunity to the employee to defend himself/herself against the purposed punishment;

(vii) Punishment order, or exoneration; and

(viii) Appeal, if any.

7.10 ISSUES AND PROBLEMS

NOTES

There are various problems concerning the disciplinary proceedings. They are as follows :

(i) *Lack of knowledge of the Disciplinary Procedure* — It has been seen many a time that the appointing authorities as well as employees are unaware of the details of the disciplinary procedures resulting in many problems.

(ii) *Delays* — The time taken to take disciplinary action is very long. When an employee knows of the impending action, he / she becomes more and more irresponsible and problematic. Delays cause hardship to the employees.

(iii) *Lack of fair Play* — There is a tendency that the appellate authority generally supports the decision of his / her subordinates. This defeats the purpose of appeal.

(iv) *Withholding of Appeal* — Most of the officers do not like appeals against their decisions. There is a tendency to withhold appeals.

(v) *Inconsistency* — Disciplinary action should be consistent under the same offence. Otherwise it leads to favoritism, nepotism and corruption.

7.11 RIGHTS OF CIVIL SERVANT

The constitutions of different countries guarantee certain fundamental rights to all the citizens irrespective of birth, caste, creed, colour or sex. The public servants are the citizens of the country, constitutions empower the states to regulate their rights and impose obligations on the public servants.

In regard to various rights of public servants, different countries have evolved different systems of rights over a period of time depending upon the genius of their peoples, their historical background, the stage of their economic development and their political and administrative structure.

The public servants are first citizens and then employees. But they have a special duty to maintain the structure of the states' Law and Order. There is a special status of double status applicable to the employees as citizens and as Public Servants. Their position is closely related to the conception of democratic government which expects employees to render faithful service to all the people, without the thought of their own interests. There are also arguments that public employees must be granted the role of the normal citizen even though they are public employees and they cannot be treated as second class citizens.

NOTES

In this section, we will study the fundamental and other rights guaranteed to the citizens and the public servants, restrictions imposed by the government in exercise of the rights by Public Servants and highlight the service rights of the government employees.

Fundamental Rights Guaranteed to the Citizens

The citizens are guaranteed certain fundamental rights by the Constitution. The rights may be classified as under :

(a) Right to Equality

(b) Right to Freedom

(c) Rights against Exploitation

(d) Right to Freedom of Religion

(e) Cultural and Educational Rights

(f) Right to Constitutional Remedies

Some of these rights may not be available to persons serving in the armed services. Moreover fundamental rights except protection against conviction and protection of life and personal liberty may be suspended. Freedoms guaranteed automatically get suspended during emergency. Restrictions are imposed or reservations are made on certain rights with regard to public employment and public services.

Classification of Fundamental Rights and Other Rights

The rights guaranteed to the citizen by the Constitution may be classified into following :

1. Personal Rights
2. Civil Rights
3. Political Rights
4. Trade Union Rights
5. Service Rights

Personal Rights

Some of the personal rights are :

(a) ***Right to life and liberty :*** The private life of an individual is considered a matter of his conscience, freedom of which is guaranteed by all the states. The Constitution of India (Article 21) provides protection of life and liberty to all persons. It includes also the freedom of movement.

(b) ***Equality before law and equal protection of law (Article 14) :*** It means that the state cannot discriminate the citizens on grounds of religion, race,

caste, sex, or place of birth. However, Article 15 provides protective discrimination and reservations for women, children, backward castes, scheduled castes and scheduled tribes as "Socially and Educationally Backward Classes of Citizens" in the matters of education and employment.

(c) ***Right to freedom of Religion (Articles 25-28)*** : Under this right, all persons have the freedom of coscience and the right to profess, practise and propagate religion under certain regulations.

(d) ***Right to private property*** : Under this right all the persons may acquire, hold and dispose property.

(e) Right to practise any profession or to carry out any occupation, trade or business.

The Constitution guarantees all these rights to the citizens, but in regard to the public servants, the state regulates their personal conduct and private relationships which tend to affect their integrity, reputation, confidence and the dignity of the public office. Therefore, the governments through Civil Servants Conduct Rules and Codes prescribed and regulated the required behaviour from the public employees. The relationship between the government and the civil servants rests on contractual basis. Any breach of the code, conduct rules and the contract leads to different types of punishment, dismissal from service. However, the imposition of these restrictions is not an abrogation of their fundamental rights or an invasion of fundamental rights.

Civil Rights

Right to Private Trade and Employment

The civil liberties of the government employees are outlined clearly. With regard to civil servants, civil life, the state regulates their conduct and private relationship in so far as they tend to affect their integrity and reputation. In view of this, certain restrictions are placed on an official's right to take part in private business. In most cases, it is positively forbidden for an official to have any business dealings in the fields with which he/she comes into contact in the ordinary course of his/her duties. The temptations which might arise could place an unreasonable strain on one's integrity, particularly if his official duties require him to control certain branches of business.

Therefore, certain restrictions, limitations are imposed by the Civil Service Regulations. Except with the previous permission of the government, no civil servant can engage in trade or business or in support of the business owned or managed by any members of the family.

American government restricts the personal right of civil servants in the sense that they cannot coach anybody either individually or in group in order to

NOTES

prepare him/her for taking the competitive examinations for entry into government service.

It is improper for any government servant to be associated with any such programme either by way of tuition or in any other manner. The government servants cannot accept the membership of such societies, institutions or clubs which oblige their members to go on strike in pursuance of their objectives. But with the framework of the rules the federal employees have the right to petition to the Congress either individually or collectively.

In France the civil servants enjoy civic rights more than any other country. They may join any political party. They have the right to strike. These rights have wide and far-reaching consequences. The government servants in India, U.K. and U.S.A. do not have such nghts.

Right to Contract

Freedom of contract is a fundamental right of the citizens. In view of the integrity and impartiality, for the civil service this right to contract is restricted. Such as they are not allowed to :

- engage in any speculative investment,
- permit trade by any member of their family,
- lend money to any person living in the locality of their authority,
- borrow money from, any other person with whom they are likely to have official dealings.

Further, they are required to take prior permission of the government for purchase and disposal of their properties exceeding certain limits.

Right to Vindication of his Acts or Character

In parliamentary democracy where the civil servants are expected to be in the background and where they are supposed to be neutral, the minister holds reponsibility for the commissions and omissions of the civil servants. As such, in India, the civil servants are precluded from taking recourse to a law court or to the press for the vindication of any of their official acts which has been subject matter of adverse criticism or attach of defamatory character. However, in France, the civil servants have the right to file suits in the courts against such administrative decisions which have an adverse impact on the collective interests of the civil service and in the event of violation of rules and norms of personnel administration.

The government employees are also required to so manage their personal affairs as to avoid habitual indebtedness of insolvency as it affects their own reputation as well as the government.

Subscriptions and Gifts

Civil servants are not allowed to ask for or accept any contributions or associating themselves with the raising of any fund in pursuance of any object. It was declared that in the interest of maintaining the efficiency and integrity of government employees, it is essential to prevent them from soliciting or receiving funds for any purpose unconnected with his office.

Public employees also cannot accept any gifts. Even their family members are also not permitted to accept any such gifts. They have to report to the government when they accept any gifts and seek permission of the government to accept them.

Freedom of Speech and Expression

In the Commonwealth countries of Australia, Canada, England and India, the Civil servants have to seek prior permission of the competent authorities for publishing a book or article or for speaking to general audiences. However, Australia takes a somewhat more lenient attitude towards the violation of these norms by its civil servants than Canada, India or England.

In the United States of America the Hatch Act of 1939 allowed its federal employees to express their views on political subjects, rather than only to express them privately.

However, at the same time, it proclaimed that the Act was intended to prohibit the same activities that the Civil Service Commission considered legitimate under 1907 Regulations, which allowed only private expression. The second Hatch Act of 1940 extended these regulations to positions in state employment and allowed public employees to express their opinion on 'candidates' as well as on political subjects.

A French official outside his office can criticise the government and express views contrary to the general policy of government. But he cannot express personal criticism directed towards the work of the particular service to which he belongs. Similarly in Germany, outside the service a public servant can express his personal opinions on political questions also. He cannot adopt a standpoint which is in opposition to the government. But he must have a certain regard for his position. The law of 1953 obliges him to exercise that moderation and discretion with regard to political activities which incumbent upon him in his position as servant of the community.

In India, the Civil Servants cannot express against any policy or action of the government. They cannot also express on any matter pertaining to politics of parties and matters of public controversy.

NOTES

Criticism of Government Policy

According to the Civil Service (Conduct) Rules in India, government servants are not permitted to communicate anything to the press, make any public utterance, make any statement of fact or opinion which has the effect of an adverse criticism of any policy of the government or which leads to embarrassing relations between the internal governmental agencies and the governments of foreign states. The employees are also forbidden from giving any evidence without prior permission to any inquiry which is not duly authorised.

The purpose of this restriction is to maintain the political neutrality of the civil services and to keep them away from public controversies and to enable the civil servants to serve the government of the day with all the loyalty.

In Britain, the civil servants have freedom to express their opinions on non-political matters of public importance provided they do not direct their activities towards any party politics.

In U.S.A. the government may restrict the exercise by its employees of their right to criticise government policy. The employees may be disciplined : *(a)* if their criticism is false and is made with actual malice, *(b)* if criticism involves disclosure of information which is confidential, *(c)* if the criticism is made outside the channels prescribed by, or is in violation of a statute, Executive order or regulation, and *(d)* if the criticism adversely affects job performances, discipline, work relationships or the goals of the organisation.

Speech and Expression on Political Matters

In India the civil servants are prohibited from participating in any political activity and movement. They cannot make any public expression of their views other than those of purely literary, scientific or artistic nature. They are restricted from participating in any way in the editing, managing any publication. Thus, they are completely deprived of the freedom of press.

In Britain, the civil servants those who involve in the formulation and execution of public policy (executive group) have no freedom of expression on political matters. However, the Minor and Manipulative Groups, whose duties are of only routine character have freedom to political expression as well as activity.

Unauthorised Commnnication of Official Information

In U.S.A. under the Hatch Act 1939, no employee of the government can use his official authority or influence for the political purposes. Any person violating the provisions of this Act shall be removed from the position held by him.

In India, as per the Conduct Rules, no government servant shall communicate directly or indirectly any official document or information, except in the form prescribed, to any government or person to whom he is not authorised

to communicate. The official Secrets Act 1923 alsp lays down service restrictions on unauthorised communication of official information. The restrictions and severe punishments are necessitated to prevent the employees from communicating such information to the enemy countries or to unsocial elements or to use such information to serve the personal ends of the employees. Therefore, the civil servants are put under special obligation to use and protect official information with the utmost care.

Political Rights

Right to Political Activity

The right of political activities of the public servants in a democratic government is determined by the constitutional theory of government. Political neutrality of civil servants has been regarded as one of the cardinal conditions for the success of a democratic government. The parliamentary form of government demands from civil service not only neutrality and unimpeachable but also integrity and impartiality to conduct.

The question of rights to engage in political activities in U.K. was referred by the government to Masterman Committee in 1948. As per the recommendations of the committee and in consultation with the employees a set of regulations were issued in 1953. While the concept of political neutrality has been kept intact, particularly of the higher civil service, a distinction has been drawn between national and local political activities. The civil servants has been classified into *(a)* the politically free group *(b)* the politically restricted group and *(c)* those who are allowed to participate in national political activity, subject to permission.

In regard to local political activities, barring those civil servants who are required to obtain permission for participation, all others allowed to take part in those activities. A civil servant in the politically free group who is contesting for parliament is obliged to submit his resignation before nomination. He is entitled to be reinstated in the post whether he is elected to parliament or not.

All staff in the intermediate and restricted groups who have not been given permission to engage in any of the political activities are expected at all times to maintain a reserve in political matters and not to put themselves forward prominently on one side or the other.

In U.S.A. regulations are laid down on the political activities of public employees. They prohibited the following activities :

(1) serving as a candidate or alternate to a political party convention,

(2) solicitating or handling political contributions,

NOTES

(3) engaging in electioneering,

(4) being a candidate for elective political office,

(5) leading or speaking to partisan political meetings or rallies.

In India, the government servants, under the conduct Rules are not free to indicate the manner in which they propose to vote or have voted. They are forbidden to canvass or use their influence in an election to any legislature or local authority. The government servants are not expected to attend election meetings organised by any political party except in the official capacity. They cannot stand for election to the parliament or to state legislature. They are required to resign in order to contest elections. Thus, in India, the civil servants are debarred from taking part in politics. They cannot be members of any political party nor even subscribe or assist any political movement or activity.

In many democratic countries with certain exceptions, right to political activities of the civil servants are restricted in one way or the other. They can exercise only the right to vote. The restrictions imposed on the rights of political activities will only show the nature of the democratic government and the expected role of the public employees in the government. It is a part of the evolutionary process of the government.

Right to Contest Elections

France has the most liberal electoral laws. Irrespective of the levels all French Civil Servants are allowed to run for any representative office in the country. During their tenure in the representative assembly they continue to be on the public service rolls and enjoy their seniority and pension rights. Germany and Australia have a great deal of liberalism in this respect. In Germany and Australia public servants have to resign their positions in public service after their election. However, if they lose in the election or else intend to return to public service after the expiry of their term in the legislature they enjoy the privilege of re-instatement to a position equivalent to their previous positions in the public service.

England follows different methods as per the recommendations of Masterman Committee.The entire public service has been divided into three categories. Of the total employees in the state service, 62 per cent including Industrial Staff and most of the Non-Industrial Staff have no restrictions on their political activities; clerical staff, typists and some minor technical staff representing 22 per cent may with the approval of their departmental authorities, take part in all political activities, except contesting for election to parliament. The executive and higher staff representing 16 per cent are debarred from any political activity, but may be granted permission to engage in local political activity.

The electoral rights of civil servants in Canada are relatively more liberal than U.K. The federal public servant in Canada may apply to the Public Service

Commission for a leave of absence without pay for seeking political nomination of federal, provincial or territorial legislature. If a civil servant elected, he ceases to be a public employee.

In the United States of America the Hatch Act of 1939 and 1940 regulates the political activities of the federal and to a limited extent those of provincial and local civil servants. However, they are allowed to run in the local elections so long as their participation in local politics does not affect their efficiency.

In Italy and Spain, the public servant if elected to Parliament is granted indefinite leave of absence and if he ceases to be a member of Parliament, he is entitled either to return to his post or if he is too old he can retire from service. In Denmark, Sweden and Austria the civil servants can remaill in office and also can sit in parliament. In these countries precaution is taken that no civil servant contests in the area of where he had worked last.

Trade Union Rights

Right to Association

The public servants in Australia and France enjoy the right to association with trade unions. In Canada, India, Germany and England certain restrictions are imposed upon public servants' right to association. In Germany its Civil Servants may join or form only those associations whose objectives are in keeping the objectives of existing constitutional order only. In Canada and England the public servants are not allowed to associate with outside unions. In India the right to association has been guaranteed to every citizen. Public Servants, therefore, are free to form associations or join associations already in existence, but the government would consult or negotiate with only those associations which have been recognised by it. In United States the public employees are legally free to form associations and unions and to associate themselves with outside associations or organisations.

Right to Strike

Whether the civil servant's right to strike is granted or not, this right is exercised widely in India, France, Canada, Australia, America and in England.

In England the public servants are not denied the right to strike under the law. In France they have the right to strike. In Germany, however, public servants right to strike does not exist under the law. The penalties for violating the law include loss of one's job. In India all non-industrial public servants are denied the right to strike the law. The public employees in America do not have right to strike, under the provisions of the Act of 1947 strikes by the Government Servants had been declared illegal. In all the countries, wherever the employees go on

NOTES

illegal strikes, penalties or punishments are awarded as per the disciplinary or Conduct Rules.

Service Rights

Civil Service has a special relationship with its government when compared to the relationship between employer and empolyee in private employment. The civil service enjoys good prospects of public employment like the security of tenure, career, service facilities, superannuity benefits. On the other it maintains relations with the public in whom the state sovereignty lies. As such the civil service occupies a key position in the government. Therefore, the state provides certain service rights to the employees to enable them to discharge their rightful job in the right manner.

Appointment

Today, the public employer in democratic countriesguarantees equal protection of the laws to all citizens seeking public employment. However, under the constitutional provisions or executive orders certain 'reservations' are made to the minorities and backward communities and socially weak. The judiciary has viewed such representative public services as desirable. However, the principle of equality of opportunity cannot be denied by the process of selection. But, discriminatory law in respect of residential qualificatiops, age, language, etc., may be enacted by the state. Thus, in India, reservations are provided in public employment of SCs and STs. The state is empowered to require every able-bodied person within its jurisdiction to work for a reasonable period for "public purposes" such as Defence services, Home guards, social services etc. Public employees are expected to serve anywhere under any conditions prescribed by the government.

Life Tenure

Public employment is more attractive due to its life tenure and prestige attached to it. However, the sovereign employer enjoys the pleasure to terminate, dismiss the services of any employee, without assigning any reasons for such kind of action. The principle of 'during the pleasure of the government' has now been converted in practice into 'during the good behaviour'. Therefore, only in cases of 'misconduct', gross negligence or incompetence this provision in exercised. Otherwise the civil service in general, remain in service, irrespective of change of the governments. Thus, the continuity of service under the different rules of the government is ensured. The civil servants are also entitled to certain privileges, facilities, allowances, advancements and promotions under the rules prescribed from time to time. The government cannot alter the conditions of their service to the disadvantage of the employees except by changing the existing Laws and Rules.

Rights and Privileges

Although the service tenure of all government employees is at the pleasure of the government, normally, they hold office during the good behaviour and their terms of service are regulated by Executive Rules and Administrative orders. Such of the Rules l and Orders are issued subject to the provisions of the constitution. Sometimes the government is required to consult the public service commission for their opinion. Therefore, the governments cannot make rules and change rules without constitutional authority, The government is further required to place the'se rules and regulations on the Table of the Legislature for their approval. Thus, the civil servants enjoy privileges and rights guaranteed by the constitution. The civil servants are not at the mercy of the executive government without changing the existing rules.

Procedural Safeguards in the Event of Removal or Dismissal

The constitution and the rules framed under the provisions of the constitution provides certain important procedural safeguards to prevent any injustice. Any punishment can be imported on the civil servant only according to prescribed procedure, which is laid down in India under Classification, Control and Appeal Rules (CCA Rules). As per the Rules no civil servant can be removed or dismissed by an authority subordinate to the one who appointed him. No one can be removed or dismissed until the civil servant has been given a reasonable opportunity of showing cause against the action proposed to be taken. Compulsory retirement before the age of superannuation is not considered removal or dismissal as there is no substantial loss of accrued service benefits like pension etc.

7.12 ADMINISTRATIVE TRIBUNALS

In pursuance of administrative law, there can arise disputes. These disputes require adjudication. There are administrative agencies other than the courts to adjudicate such issues arising in the course of day to day administration.

Administrative adjudication is the resolution of quasi-judicial matters by administrative agencies or commissions established for the purpose. A number of technical issues and disputes emerge in the day-to-day administration. The ordinary courts do not have the technical expertise and it becomes quite dilatory and costly to dispense with cases of administrative nature. It is only the administrative agencies, which are capable of looking into the matters of administrative exigencies. These administrative agencies with the power to adjudicate the disputes arising out of administrative action or inaction are called administrative tribunals.

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According to Servai, 'the development of administrative law in a welfare state has made administrative tribunals a necessity'. In India, and in many other countries, there has been a steady proliferation of administrative tribunals of various kinds. They have, indeed, become a permanent part of the law adjudication machinery of the country. As a system of adjudication they have come to stay, and their number is constantly on the increase.

Administrative tribunals are authorities outside the ordinary court system, which interpret and apply the laws when acts of public administration are questioned in formal suits by the courts or by other established methods. In other words, they are agencies created by specific enactments to adjudicate upon disputes that may arise in the course of implementation of the provisions of relevant enactments.

They are not a court nor are they an executive body. Rather they are a mixture of both. They are judicial in the sense that the tribunals have to decide facts and apply them impartially, without considering executive policy. They are administrative because the reasons for preferring them to the ordinary courts of law are administrative reasons.

They are established by the executive in accordance with statutory provisions. They are required to act judicially and perform quasi-judicial functions. The proceedings are deemed to be judicial proceedings and in certain procedural matters they have powers of a civil court.

They are not bound by the elaborate rules of evidence or procedures governing the ordinary courts. They are independent bodies and are only required to follow the procedure prescribed by the relevant law and observe the principles of 'Natural Justice'. They do not follow the technicalities of rules of procedure and evidence prescribed by the Civil Procedure Code (CPC) and Evidence Act respectively. The administrative tribunals may be more appropriately defined as specially constituted authorities established by law to settle the disputes between the citizen and administration.

The administrative tribunals are the instruments for the application of administrative law. They have distinct advantage over the ordinary courts because they ensure cheapness, accessibility, freedom from technicality, expedition and expert knowledge of the particular subject.

The involvement of experts in administration in regulating administrative actions is necessary to provide justice to the citizens, without sacrificing the institutional needs. What is involved is basically the relative position of two values, that is, the protection of the individual and his legitimate interests and the effective attainment of public purpose.

7.13 REASONS FOR THE GROWTH OF ADMINISTRATIVE TRIBUNALS

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There are many reasons for the growth of administrative tribunals. Some of these are :

Firstly, the administrative tribunals, rendering administrative justice, is a by-product of the Welfare State. In the 18th and 19th centuries when 'laissez faire' theory held sway, the law courts emerged as the custodians of the rights and liberties of the individual citizens. Sometimes they protected the rights of all citizens at the cost of state authority.

With the emergence of Welfare State, social interest began to be given precedence over the individual rights. With the development of collective control over the conditions of employment, manner of living and the elementary necessities of the people, there has arisen the need for a technique of adjudication better fitted to respond to the social requirements of the time than the elaborate and costly system of decision making provided by the courts of law. In brief, 'judicialisation of administration' proved a potential instrument for enforcing social policy and legislation.

Secondly, in view of the rapid growth and expansion of industry, trade and commerce, ordinary law courts are not in a position to cope up with the work-load. With the result, enormous delay in deciding cases either way, takes place. Therefore, a number of administrative tribunals have been established in the country, which can do the work more rapidly, more cheaply and more efficiently than the ordinary courts.

Thirdly, law courts, on account of their elaborate procedures, legalistic forms and attitudes can hardly render justice to the parties concerned, in technical cases. Ordinary judges, brought up in the traditions of law and jurisprudence, are not capable enough to understand technical problems, which crop up in the wake of modern complex economic and social processes. Only administrators having expert knowledge can tackle such problems judiciously. To meet this requirement, a number of administrative tribunals have come into existence.

Fourthly, a good number of situations are such that they require quick and firm action. Otherwise the interests of the people may be jeopardized. For instance, ensuring of safety measures in local mines, prevention of illegal transactions in foreign exchange and unfair business practices necessitate prompt action. Such cases, if are to be dealt with in the ordinary courts of law, would cause immense loss to the state exchequer and undermine national interest. However, the administrative courts presided over by the experts would ensure prompt and fair action.

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7.14 TYPES OF ADMINISTRATIVE TRIBUNALS

There are different types of administrative tribunals, which are governed by the statues, rules, and regulations of the Central Government as well as State Governments. We will discuss the various types of administrative tribunals now.

Central Administrative Tribunal (CAT)

The enactment of Administrative Tribunals Act in '1985 opened a new chapter in administering justice to the aggrieved government servants. It owes its origin to Article 323 A of the Constitution which empowers the Central Government to set up by an Act of Parliament, the Administrative Tribunals for adjudication of disputes and complains with respective recruitment and conditions of service of persons appointed to the public services and posts in connection with the Union and the States.

The Tribunals enjoy the powers of the High Court in respect of service matters of the employees covered by the Act. They are not bound by the technicalities of the Code of Civil Procedure, but have to abide by the Principles of Natural Justice. They are distinguished from the ordinary courts with regard to their jurisdiction and procedures. This makes them free fiom the shackles of the ordinary courts and enables them to provide speedy and inexpensive justice.

The Act provides for the establishment of Central Administrative Tribunal and State Administrative Tribunals. The CAT was established in 1985. The Tribunal consists of a Chairman, Vice-Chairman and Members. These Members are drawn from the judicial as well as the administrative streams. The appeal against the decisions of the CAT lies with the Supreme Court of India.

Customs and Excise Revenue Appellate Tribunal (CERAT)

The Parliament passed the CERAT Act in 1986. The Tribunal adjudicate disputes, complaints or offences with regard to customs and excise revenue. Appeals from the orders of the CERAT lies with the Supreme Court.

***Monopolies and Restrictive Trade Practices Commission* (MRTPC)**

In 1969, the Parliament enacted the MRTP Act by which the Monopolies Commission was set up and given powers to entertain complaints regarding monopolistic and restrictive trade practices and later unfair trade practices by the Amendment Act in 1984. With the introduction of new Industrial Policy (1991), a substantial programme of deregulation has been launched. Industrial licensing has been abolished for all items except for a short list of six industries related to security, strategic or environmental concerns. The MRTP Act has since been amended in order to eliminate the need to seek prior approval of government for expansion of the present industrial units and establishment of new industries by large companies.

A significant number of industries had earlier been reserved for the public sector. Now the ones reserved for the public sector are : *(a)* arms and ammunition and official items of defence equipment, defence aircraft and warships; *(b)* atomic energy; *(c)* subjects specified in the schedule to the notification of the Government of India in the Department of Atomic Energy; *(d)* Railway Transport. Private sector participation can be invited on discriminatory basis even in some of these areas. Under the amended MRTP Act, a three-tier system for settling consumer complaints has been provided. This operates as District Level Forum at the district level, State Commissions at the state levels and National Consumers Disputes Redressal Commission at the national level. The National Commission has power to hear the appeals against State Commissions and also has revisional powers. Appeal from the National Commission lies to the Supreme Court.

Election Commission (EC)

The Election Commission is a tribunal for adjudication of matters pertaining to the allotment of election symbols to parties and similar other problems. The decision of the commission can be challenged in the Supreme Court.

Foreign Exchange Regulation Appellate Board (FERAB)

The Board has been set up under the Foreign Exchange Regulation Act, 1973. A person who is aggrieved by an order of adjudication for causing breach or committing offences under the Act can file an appeal before the FERAB.

Income Tax Appellate Tribunal

This tribunal has been constituted under the Income Tax Act, 1961. The Tribunal has its benches in various cities and appeals can be filed before it by an aggrieved person/s against the order passed by the Deputy Commissioner or Commissioner or Chief Commissioner or Director of Income Tax. An appeal against the order of the Tribunal lies to the High Court. An appeal also lies to the Supreme Court if the High Court deems fit.

Railway Rates Tribunal

This Tribunal was set up under the Indian Railways Act, 1989. It adjudicates matters pertaining to the complaints against the railway administration. These may be related to the discriminatory or unreasonable rates, unfair charges or preferential treatment meted out by the rajlway administration. The appeal against the order of the Tribunal lies with the Supreme Court.

Industrial Tribunal

This Tribunal has been set up under the Industrial Disputes Act, 1947. It can be constituted by both the Central as well as State governments. The Tribunal looks into the dispute between the employers and the workers in matters relating to wages, the period and mode of payment, compensation and other allowances,

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hours of work, gratuity, retrenchment and closure of the establishment. The appeals against the decision of the Tribunal lie with the Supreme Court.

7.15 ADVANTAGES OF ADMINISTRATIVE TRIBUNALS

Administrative adjudication is a dynamic system of administration, which serves, more adequately than any other method, the varied and complex needs of the modem society.

The main advantages of the administrative tribunals are :

(1) Flexibility

Administrative adjudication has brought about flexibility and adaptability in the judicial as well as administrative tribunals. For instance, the courts of law exhibit a good deal of conservatism and inelasticity of outlook and approach. The justice they administer may become out of harmony with the rapidly changing social conditions. Administrative adjudication, not restrained by rigid rules of procedure and canons of evidence, can remain in tune with the varying phases of social and economic life.

(2) Adequate Justice

In the fast changing world of today, administrative tribunals are not only the most appropriate means of administrative action, but also the most effective means of giving fair justice to the individuals. Lawyers, who are more concerned about aspects of law, find it difficult to adequately assess the needs of the modern welfare society and to locate the individuals place in it.

(3) Less Expensive

Administrative justice ensures cheap and quick justice. As against this, procedure in the law courts is long and cumbersome and litigation is costly. It involves payment of huge court fees, engagement of lawyers and meeting of other incidental charges. Administrative adjudication, in most cases, requires no stamp fees. Its procedures are simple and can be easily understood by a layman.

(4) Relief to Courts

The system also gives the much-needed relief to ordinary courts of law, which are already overburdened with ordinary suits.

(5) Experimentation

Experimentation is possible in this field and not in the realm of judicial trials. The practical experience gained in the working of any particular authority can be more easily utilised by amendments of laws, rules and regulations. Amendment of law relating to courts is quite arduous.

In sum, flexibility, accessibility and low cost are the important merits of administrative tribunals. In the words of W.A. Robson, the advantages of administrative tribunals are "cheapness and speed with which they usually work,

the technical knowledge and experience which they make available for the discharge of judicial functions in special fields, the assistance which they lend to the efficient conduct of public administration, and the ability they possess to lay down new standards and to promote a policy of social improvement". Now we will discuss some of the disadvantages of the administrative tribunals.

7.16 DISADVANTAGES OF ADMINISTRATIVE TRIBUNALS

Even though administrative adjudication is essential and useful in modern day administration, we should not be blind to the defects from which it suffers or the dangers it poses to a democratic polity. Some of the main drawbacks are mentioned below.

In the first place, administrative adjudication is a negation of Rule of Law. Rule of Law ensures equality before law for everybody and the supremacy of ordinary law and due procedure of law over governmental arbitrariness. But administrative tribunals, with their separate laws and procedures often made by themselves, put a serious limitation upon the celebrated principles of Rule of Law.

Secondly, administrative tribunals have in most cases, no set procedures and sometimes they violate even the principles of natural justice.

Thirdly, administrative tribunals often hold summary trials and they do not follow any precedents. As such it is not possible to predict the course of future decisions.

Fourthly, the civil and criminal courts have a uniform pattern of administering justice and centuries of experience in the administration of civil and criminal laws have borne testimony to the advantages of uniform procedure. A uniform code of procedure in administrative adjudication is not there.

Lastly, administrative tribunals are manned by administrators and technical heads who may not have the background of law or training of judicial work. Some of them may not possess the independent outlook of a judge.

However, there exist certain safeguards, which can go to mitigate or lessen thesei disadvantages. We will be discussing some of the safeguards to be observed in the working of administrative tribunals.

7.17 SAFEGUARDS IN THE WORKING OF ADMINISTRATIVE TRIBUNALS

Administrative adjudication suffers from many shortcomings that cannot perhaps be denied. But, like delegated legislation, it is an inescapable necessity in a modern complex society. Therefore, to overcome the shortcomings, few

NOTES

safeguards are suggested to make administrative adjudication impartial and certain. These safeguards include :

(1) Administrative tribunals should be manned by persons possessing legal training and experience. To inspire public confidence, the appointment of members should be made in consultation with the Supreme Court.

(2) A code of judicial procedure for administrative tribunals should be devised and enforced. This is important in view of the prevalence of varying procedures of administrative adjudication in India.

(3) Reasons should invariably accompaily decisions by the tribunals. "Good Laws", observed Jeremy Bentham, "are such laws for which good reasons can be given". A reasoned decision goes towards convincing those, who are affected by it, about its innate fairness and is a check against misuse of power.

(4) The jurisdiction of the Supreme Court (as well as the High Courts) should not be curtailed. In other words, the right to judicial review on points of law must remain unimpaired. Some of the administrative tribunals permit appeal to the court of law. Some, however, seek to ban judicial review altogether by making decisions final. According to M.C. Setalvad, former Attorney General of India, the need for judicial review is greater in a nascent democracy like India.

7.18 SUMMARY

- In India government is the biggest provider of jobs to the people. According to an estimate in 1947 the strength of civil servants was 10 lakhs, which rose to 20 lakhs in 1978 and became 30 lakhs in 1993. However, this does not include the jobs in public sector undertakings. Maximum numbers of jobs provided by the government are in defense, railways and post offices.
- India is the only country where law relating to service matters of the civil servants is provided in the constitution. Therefore Chapter XIV containing Articles from 308 to 323 providing protection to civil servants was included in the Constitution. However, Article 314 that provided protection to the members of Indian Civil Service was repealed by the Twenty-eight-Constitution Amendment Act, 1972 after the last member to the service retired.
- Disciplinary action means the administrative steps taken to correct the misbehaviour of the employee in relation to the performance of his/her job. Corrective action is initiated to prevent the deterioration of his/her

job. Corrective action is initiated to prevent the deterioration of individual inefficiency and to ensure that it does not spread to other employees.

- Article 309 provides that the Acts of the appropriate legislature may regulate the recruitment and conditions of service of the persons appointed to public services and posts in connection with the affairs of the Union or of any State. It shall be competent for the President or Governor as the case may be, to make rules regulating and recruitment and conditions of service of public service until provisions are made by an Act of the appropriate legislature.
- Civil Service has a special relationship with its government when compared to the relationship between employer and empolyee in private employment. The civil service enjoys good prospects of public employment like the security of tenure, career, service facilities, superannuity benefits. On the other it maintains relations with the public in whom the state sovereignty lies. As such the civil service occupies a key position in the government.
- In pursuance of administrative law, there can arise disputes. These disputes require adjudication. There are administrative agencies other than the courts to adjudicate such issues arising in the course of day to day administration.
- The administrative tribunals, rendering administrative justice, is a by-product of the Welfare State. In the 18th and 19th centuries when 'laissez faire' theory held sway, the law courts emerged as the custodians of the rights and liberties of the individual citizens. Sometimes they protected the rights of all citizens at the cost of state authority.

7.19 REVIEW QUESTIONS

1. What are the constitutional protections given to civil servants in India?
2. What are the major causes of disciplinary actions?
3. What are the modes of taking disciplinary actions?
4. Discuss the service rights of civil srvants.
5. Expalin the reasons for the growth of administrative tribunals.
6. What are the advantages of administrative tribunals?

7.20 FURTHER READINGS

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