BA LLB 4TH SEM

Paper Code: 208

Administrative Law

Unit – I: Evolution and Scope of Administrative Law

a. Nature, Scope of development administrative law

Definition:

Definition by Ivor Jennings Ivor Jennings in his "The law and the constitution, 1959" provided the following definition of the term "administrative law". According to him, "administrative law is the law relating to the administrative authorities".

This is the most widely accepted definition, but there are two difficulties in this definition.

(1) It is very wide definition, for the law which determines the power and functions of administrative authorities may also deal with the substantive aspects of such powers. For example:- Legislation relation to public health services, houses, town and country planning etc.. But these are not included within the scope and ambit of administrative law, and

(2) It does not distinguish administrative law from constitution law.

According to K. C. Davis, "Administrative law as the law concerns the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action".

Definition by Prof. Wade According to Wade (Administrative Law, 1967) any attempt to define administrative law will create a number of difficulties. But if the powers and authorities of the state are classified as legislative, administrative and judicial, then administrative law might be said "the law which concerns administrative authorities as opposed to the others".

Scope of administrative law

I- Public Law/Private Law Divide The boundaries of administrative law extend only when administrative agencies and public officials exercise statutory or public powers, or when performing public duties. In both civil and common-law countries, these types of functions are sometimes called —public law functions to distinguish them from —private law functions. The former govern the relationship between the state and the individual, whereas the later governs the relationship between individual citizens and some forms of relationships with the state, like relationship based on government contract. For example, if a citizen works in a state owned factory and is dismissed, he or she would sue as a —private law function. However, if he is a civil servant, he or she would sue as a —public law function. Similarly, if residents of the surrounding community were concerned about a decision to enlarge the state- owned factory because of environmental pollution, the legality of the decision could be reviewed by the courts as a —public law function. It is also to be noted that a contract between an individual or business organization with a certain administrative agency is a private law function governed by rules of contract applicable to any individual – individual relationship. However, if it is an administrative contract it is subject to different rules. The point here is that the rules and principles of administrative law are applicable in a relationship between citizens and the state; they do not extend to cases where the nature of the relationship is characterized by a private law function.

B) Substance vs. Procedure

Many of the definition and approaches to administrative law are limited to procedural aspects of the subject. The focus of administrative law is mainly on the manner and procedure of exercising power granted to administrative agencies by the legislature. Fox describes the trend and interaction between substance and procedure as. It is the unifying force of the administrative process – in dramatic contrast to the wide variety of substantive problems with which agencies deal- that has persuaded most administrative law professors to concentrate on agency procedure rather than agency substance. Hence, to a wider extent, the study of administrative law has been limited to analyzing the manner in which matters move through an agency, rather than the wisdom of the matters themselves. With respect to judicial review, the basic question asked is not whether a particular

decision is —right, or whether the judge, or a Minister, or officials have come to a different decision. The questions are what is the legal limit of power or reasonable limit of discretion the law has conferred on the official? That power been exceeded, or otherwise unlawfully exercised? Therefore, administrative law is not concerned with the merits of the decision, but with the decision making process.

Development of Administrative Law

Administrative law was existent in India even in ancient times. Under the Mauryas and Guptas, several centuries before christ, there was well organised and centralise Administration in India. The rule of "Dharma" was observed by kings and Administrators and nobody claimed any exemption from it. The basic principle of natural justice and fair play were followed by the kings and officers as the administration could be run only on those principles accepted by Dharma, which was even a wider word than "Rule of Law" or "Due process of Law", Yet, there was no Administrative law is existence in the sense in which we study it today. With the establishment of East India company (EIC) and event of the British Rule in India. The powers of the government had increased. Many Acts, statutes and Legislation were passed by the British government regulating public safety, health, morality transport and labour relations. Practice of granting Administrative licence began with the State Carriage Act 1861. The first public corporation was established under the Bombay Port Trust Act 1879. Delegated legislation was accepted by the Northrn India Canal and Drainage Act, 1873 and Opium Act 1878 proper and effective steps were taken to regulate the trade and traffic in explosives by the Indian Explosives by the Indian Explosives Act 1884.

In many, statutes, provisions were made with regard to holding of permits and licences and for the settlement of disputes by the Administrative authorities and Tribunals. During the Second World War, the executive powers tremendously increased Defence of India Act, 1939 and the rules made there under conferred ample powers on the property of an individual with little or no judicial control over them, In addition to this, the government issued many orders and ordinances, covering several matters by way of Administrative instructions.

The philosophy of a welfare state has been specifically embodied in the constitution of India. In the constitution itself, the provisions are made to secure to all citizens social, economic and political justice, equality of status and opportunity. The ownership and control of material resources of the society should be so distributed as best to sub serve the common good. The operation of the economic system should not result in the concentration of all these objects.

In Fact, to secure those objects, several steps have been taken by the parliament by passing many Acts, e.g. the Industrial (Development and Regulation) Act 1951, the Requisitioning and Acquisition of Immovable Property Act 1952, the Essential Commodities Act, 1955. The Companies Act 1956, the Banking Companies (Acquisition and Transfer of undertakings) Act, 1969. The Maternity Benefits Act, 1961, The Payment of Bonus Act 1965, The Equal Remuneration Act 1976, The Urban Land (ceiling and Regulation) Act 1976, The Beedi Worker's Welfare Fund Act, 1976 etc.

Even, while interpreting all these Acts and the provisions of the constitution, the judiciary started taking into consideration the objects and ideals social welfare. Thus, in Vellunkunnel Vs. Reserve Bank of India AIR) 1962 SC137), the Supreme Court held that under the Banking Companies Act, 1949 the Reserve Bank was the sole judge to decide whether the affairs of a Banking company where being conducted in a manner prejudicial to the depositors, interest and the court had no option but to pass an order of winding up as prayed for by the Reserve Bank.
In state of Andhra Pradesh Vs. C. V. Rao, (1975) 2 SCC 557 dealing with departmental inquiry, the Supreme Court held that the jurisdiction to issue a writ of certiorari under Article 226 is supervisory in nature. In is not an appellate court and if there is some evidence or record on which the tribunal had passed the order, the said findings cannot be challenged on the ground the evidence for the same is insufficient or inadequate. The adequacy or sufficiency of evidence is within the exclusive jurisdiction of the tribunal.

b. Rule of law and Administrative law

The expression 'Rule of Law' has been derived from the French phrase 'la principle de legalite', i.e. a Government based on the principles of law. It is implied by the state in the administration of justice. The Rule of law, according to Gamer, is of en used simply to describe the state le words, the term 'rule of law' indicates the state of affairs in a country where, in main, the law mules. 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 aloof affairs in a country where, in main, the law is observed and order is kept. It is an expression synonymous with law and order.

The basis of Administrative Law is the 'Doctrine of the Rule of Law'. It was expounded for the first time by Sri Edward Coke, and was developed by Prof. A.V. Dicey in his book 'The law of the Constitution' published in 1885. According Coke, in a battle against King, he should be under God and the Lank thereby the Supremacy of Law is established.

Dicey regarded rule of law as the bedrock of the British Legal System:. 'Fins doctrine is accepted in the constitutions of U.S.A. and India.

According to Prof. Diccy, rules of law contain three principles or it has three meanings as stated below:

1. Supremacy of I.aw or the Firs (meaning of the Rule of Law.
2. Equality before Law or the Second meaning of the Rule of Law: and
3. Predominance of Legal Spirit or the Third meaning of the Rule of Lim.

1. Supremacy of Law: 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. It implies that a man may be punished for a breach of law but cannot be punished for anything else. No man can be punished except for a breach of law. An alleged offence is required to be proved before the ordinary courts in accordance with the ordinary procedure.
2. Equality before Law: - The Second meaning of the Rule of Law is that no man is above law. Every man whatever is his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. Prof. Dicey states that, there must be equality before the law or equal subjection of all classes to the ordinary law of the land. He criticized the French legal system of

droit Administrative in which there were separate administrative tribunals for deciding the cases of State Officials and citizens separately. He criticizes such system as negation of law

3. Predominance of Legal Spirit: - The Third meaning of the rule of law is that the general principles of the constitution are the result of juridical decisions determining file rights of private persons in particular cases brought before the Court. Dicey states that many constitutions of the states (countries) guarantee their citizens certain rights (fundamental or human or basic rights) such as right to personal liberty, freedom from arrest etc. According to him documentary guarantee of such rights is not enough. Such rights can be made available to the citizens only when they are properly enforceable in the Courts of law, For Instance, in England there is no written constitution and such rights are the result judicial decision.

Rule of Law under the Constitution of India: - The doctrine of Rule of Law has been adopted in Indian Constitution. The ideals of the Constitution, justice, liberty and equality are enshrined (embodied) in the preamble. The Constitution of India has been made the supreme law of the country and other laws arc required to be in conformity with the Constitution. Any law which is found in violation of any provision of the Constitution is declared invalid. Part III of the Constitution of India guarantees the Fundamental Rights. Article 13(l) of the Constitution makes it clear that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provision of Part ill dealing with the Fundamental Rights, shall, to the extent of such inconsistency, be void. Article 13(2) provides that the State should 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. The Constitution guarantees equality before law and equal protection of laws. Article 21 guarantees right to life and personal liberty. It provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 19 (1) (a) guarantees the third principle of rule of law (freedom of such and expression).

Article 19 guarantees six Fundamental Freedoms to the citizens of India -- freedom of speech and expression, freedom of assembly, freedom to form associations or unions, freedom to live in any part of the territory of India and freedom of profession, occupation, trade or business. The right to these freedoms is not absolute, but subject to the reasonable restrictions which may be imposed by the State.

Article 20(1) provides that no person shall he convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence not be subject to a penalty greater than that which might have been inflicted tinder the law in for cc at the time of the commission of the offence. According to Article 20(2), no person shall be prosecuted and punished for the same offence more than once. Article 20(3) makes it clear that no person accused of the offence shall be compelled to be witness against himself. In India, Constitution is supreme and the three organs of the Government viz. Legislature, Executive and judiciary are subordinate to it. The Constitution provided for encroachment of one organ (E.g.: Judiciary) upon another (E.g.: Legislature) if its action is mala fide, as the citizen (individual) can challenge under Article 32 of the Constitution.

In India, the meaning of rule of law has been much expanded. It is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by Parliament. It is also regarded as a part of natural justice.

In KesavandaBharti vs. State of Kerala (1973) - The Supreme Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure.

In Menaka Gandhi vs. Union of India, AIR 1978 SC 597 - The Supreme Court declared that Article 14 strikes against arbitrariness.

In Indira Gandhi Nehru vs. Raj Narahr, Alit 1975 SC 2299 - Article 329-A was inserted in the Constitution under 39th amendment, which provided certain immunities to the election of office of Prime Minister from judicial review. The Supreme Court declared Article 329-A as invalid since it abridges the basic structure of the Constitution.

In A.D.M Jabalpur vs.,ShivakantShukla (1976) 2 SCC 521 AIR 1976 SC 1207 - This case is popularly known as Habeas Corpus Case.

On 25th June, emergency was proclaimed under Article 359. Large number of persons was arrested under N11SA (Maintenance of Internal Security Act. 1971) without informing the grounds for arrest. Some of their filed petition in various high Courts for writ of Heabeas Corpus. The petitioners contend that their detention is violation of Article 21. It was argued on the other side that the protection tinder Article 21 is not available (suspended) during emergency. The preliminary objection (not to file writ petitions during emergency). The Preliminary objection (not to file writ petitions during emergence) was rejected by various High Courts. The Madhya Pradesh Government through Additional District Magistrate. Jabalpur and Government of India filed appeals before Supreme Court. The question before Supreme Court was, whether there was any rule of law in India apart front Article 21 of the Constitution. The Supreme Court by majority held that there is no rule of law other than the constitutional rule of law. Article 21 is our rule of law. If it is suspended, there is not rule of law.

Rule of law and Administrative law

Introduction: Rule of law is classical principle of administrative law. As a matter of fact this principle was one of the principles that acted as impediment development of Administrative Law principles. The irony further is that the rule of law is now an important part of modern Administrative Law. Whereas the rule of law is still the one of the very important principles regulating in common law countries and common law derived countries modern laws has denied some of the important parts of rule of law as proposed by Dicey at the start of 19th Century. Dicey Rule of Law: The concept of rule of law backs to the time of Aristotle. Aristotle ruled out the concept of rule under discretion by all means and tried to convey his followers that given the choice it is always rule of law that scores over rule of discretion. In Modern times the rule of law was propounded by the Albert Dicey, a British jurist and Philosopher. He gave following three postulates of rule of law: 1. Everyone is equal before the law. 2. Sanctions have to be backed by law. 3. Courts are the ultimate body and supremacy of court is ambivalent in civilized society. He was firm proponent of the concept and very influential thinker of his times. Though the first two principles are still in almost every legal system of

world, the third principle was protested many of jurists of that time. The Dicey in particular opposed the principle of French system of DroitAdministratif. England at that time was in fact propounding some quasi legislative and quasi judicial processes which were taken cognizance of English thinkers of that time; still the whole common law system of country was blindfolded with the Dicey's philosophy of "rule of law."

Dicey's Rule of Law and Modern Administrative Law: Dicey's view and proposition of rule of law has succeeded in part and wasn't sustainable on other. Most of the modern legal system implements the principles of judicial review and similar principles of proportionality and legitimate expectations. Dicey's views on written and unwritten constitutions are subject to much debate and discussion.
What can be said is that some written constitutions (e.g. the U.S. Constitution) have been quite successful at providing a framework within which individual rights are protected while others (e.g. some of the Soviet blocks constitutions) have been near total failures.
The modern administrative law is fine mixture of DroitAdministratif, the French law system and Dicey rule of law. The sophisticated combination of the two principles has given rise to powerful and vast body of executive. In fact the development of modern Administrative law is consequence of development of administration and its side effects.
Objective of Paper: In this paper I am going to critically examine the pros and cons of modern administrative law in terms of balance of efficiency and bureaucracy. This paper shall also discuss the constitutional provisions all over the world and compare the implementation part of it in governance.

c. Separation of powers and its relevance

1. INTRODUCTION

1.1. Concept of Separations of Powers In the context of separation of powers, judicial review is crucial and important. We have three wings of the state, judiciary, Legislature and Executive with their function clearly chalked out in our Constitutions. Article 13 of the constitution mandates that the "state shall make no law, which violates, abridges or takes away rights conferred under part III". This implies that both the Legislature and

judiciary in the spirit of the words can make a law, but under the theory of checks and balances, the judiciary is also vested with the power to keep a check on the laws made by the Legislature. Montesquieu: The foundations of theory of separation of powers were laid by the French Jurist Baron De Montesquieu (1689-1755) in his great work Espirt De Lois (the spirit of Laws) published in 1748. The conclusions of Montesquieu are summarized in the following quoted passage."When the legislative and executive powers are united in the same persons or body there can be no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to enforce them in a tyrannical manner...were the powers of judging joined with the legislature the life and liberty of the subject would be exposed to arbitrary control. For the judge would then be the legislator. Were it joined to the executive power, the judge might be have with all the violence of an oppressors" To obviate the danger of arbitrary government and tyranny Montesquieu advocated a separation of governmental functions. The decline of separation of powers requires that the functions of legislations, administration and adjudications should not be placed in the hand of one body of persons but should be distributed among the district or separate bodies of persons.

2. PRINCIPLES OF CHECKS AND BALANCES The doctrine of separations of powers may be traced back to an earlier theory known as the theory of mixed government from which it has been evolved. That theory is of great antiquity and was adurnbrated in the writings of Polybius, a great historian who was captured by the Romans in 167 BC and kept in Rome as a Political hostage for 17 years in his history of Rome Polybius explained the reasons for the exceptional stability of Roman Government which enabled Rome to establish a worldwide empire. He advanced the theory that the powers of Rome stemmed from her mixed government. Unmixed systems of government that is the three primary forms of government namely, Monarchy, Aristocracy and Democracy – were considered by Polybius as inherently unstable and liable to rapid degeneration. The Roman constitutions counteracted that instability and tendency to degeneration by a happy mixture of principles drawn from all the three primary forms of government. The consuls, the senate and the popular Assemblies exemplified the monarchical, the aristocratic and the democratic principles respectively. The powers of Government were distributed between them in such a way that each checked and was checked by the others so that an equipoise or equilibrium was achieved which imparted a remarkable stability to the constitutional structure. It is from the wok of Polybius that political

theorist in the 17th Century evolved that theory of separation of powers and the closely related theory of checks and Balances.

3. SEPARATION OF POWERS- INDIAN CONSTITUTIONS Indian constitution is a very well built document. It assigns different roles to all the three wings of government the Legislature, Executive and the Judiciary. There is no ambiguity about each wings power, privilege and duties. Parliament has to enact law, Executive has to enforce them and the judiciary has to interpret them. There is supposed to be no overlapping or overstepping. The judiciary versus the Executive or Legislative is a battle which is not new but in recent times, the confrontation is unprecedented with both the sides taking the demarcation of powers to a flash point. Justice Mukherjee observed, "it does not admit of any serious dispute that the doctrine of separation of powers has, strictly speaking no place in the system of Government that Indian has at the present day". The theory of checks and balance has been observed in the Indian constitutions. There is no rigorous separation of powers. For instance, parliament has the judicial power of impeachment and punishing for contempt. The president has the legislative powers of ordinance making. Thus the Indian constitution has not applied the doctrine of separation of powers in its strictest form.

4. JUDICIARY –IMPORTANCE AND ITS NEED Judiciary – It's Importance: An endeavor is being made to highlights the judicial functioning in India, in the context of increasing cases of judicial corruptions and delays in administration of justice. The Indian judiciary has so far, gained the public confidence in discharging its constitutional functions. As an institution, the judiciary has always commanded considerable respect from the people of country. The roots of this high regard lie in the impartiality, independence and integrity of the members of the judiciary. The judiciary in a democratic polity governed by the rule of law stands as a bull work against abuse or misuse of excess use of powers on the part of the executive and protects the citizens against the government lawlessness. Judiciary – It Need: Expressing the needs for and importance of judiciary a learned jurist aptly remarks: "middle class people are combating with the government powers through media of the courts". The Indian judiciary is considered as Guardian of the Rights of the citizens of India, explained, argued and emphasized in several contexts.

5. INDEPENDENCE OF JUDICIARY "Judiciary is unlimited"- an unelected judiciary which is not accountable to anyone except its own temperament has taken over

significant powers of Indian Governance. The courts have gone well beyond ensuring that laws are implemented. Now, the Supreme court has invented its own laws and methods of implementation, gained control of bureaucracy and threatened officers with contempt of court if its instructions are not complied with. The question is not whether some good has come out of the all this. The issue is whether the courts have arrogated vase and uncontrolled powers of themselves which undermine both Democracy and Rule of law, including the question is no undermine both Democracy and Rule of Law including the powers exercised under the doctrine of separation of powers.

6. CONCLUSION Administration of justice is a divine function. In fact a nation's rank in the civilization is generally determined according to the degree in which s justice is actually administrated. This sacred functions to be an institutions manned by men of high efficiency, honesty and integrity. As the old adages goes, "Justice delayed is Justice denied". This phrase seems to be tune in so far as the administration of justice in India is concerned. While the people have reasons to feel disappointed with functioning of the legislatures and the executive, they have over the years clung to the belief that they can go to the courts for help. But unfortunately, the judiciary is fast losing its credibility in the eyes of the people for one of the main reasons that justice delivery systems have become costlier and highly time consuming. It is needless to say that the ultimate success of a democratic system is measured in terms of the effectiveness and efficiency of its administration of justice system. More rightly observed by Lord Bryce, "There is no better test of the excellence of a Government than the efficiency of its judicial system".

d. **The Relationship of Administrative Law to Constitutional Law and Other Concepts**

CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW Administrative law is categorized as public law since it governs the relationship between the government and the individual. The same can be said of constitutional law. Hence, it is undeniable that these two areas of law, subject to their differences, also share some common features. With the exception of the English experience, it has never been difficult to make a clear distinction between administrative law and constitutional law. However, so many administrative lawyers agree that administrative law cannot be fully comprehended without a basic knowledge of constitutional law. As Justice Gummov has made it clear —The subject of administrative law cannot be understood or taught without attention to its constitutional foundation. This is true because of the close relationship between these two laws. To the early English writers there was no difference between administrative

and constitutional law. Therefore, Keitch observed that it is logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial. However, in countries that have a written constitution, their difference is not so blurred as it is in England. One typical difference is related to their scope. While constitutional law deals, in general, with the power and structures of government, i.e. the legislative, the executive and the judiciary, administrative law in its scope of study is limited to the exercise of power by the executive branch of government. The legislative and the judicial branches are relevant for the study of administrative law only when they exercise their controlling function on administrative power. Constitutional law, being the supreme law of the land, formulates fundamental rights which are inviolable and inalienable. Hence, it supersedes all other laws including administrative law. Administrative law does not provide rights. Its purpose is providing principles, rules and procedures and remedies to protect and safeguard fundamental rights. This point, although relevant to their differences, can also be taken as a common ground shared by constitutional and administrative law. To put it in simple terms, administrative law is a tool for implementing the constitution. Constitutional law lays down principles like separation of power and the rule of law. An effective system of administrative law actually implements and gives life to these principles. By providing rules as to the manner of exercising power by the executive, and simultaneously effective controlling mechanisms and remedies, administrative law becomes a pragmatic tool in ensuring the protection of fundamental rights. In the absence of an effective system of administrative law, it is inconceivable to have a constitution which actually exists in practical terms. Similarly, the interdependence between these two subjects can be analyzed in light of the role of administrative law to implement basic principles of good administration enshrined in the F.D.R.E. constitution. The constitution in Articles 8(3), 12(1) and 12(2), respectively provides the principles of public participation, transparency and accountability in government administration. As explained above, the presence of a developed system of administrative law is sine qua non for the practical realization of these principles. Administrative law is also instrumental in enhancing the development of constitutional values such as rule of law and democracy. The rules, procedures and principles of administrative law, by making public officials, comply with the limit of the power as provided in law, and checking the validity and legality of their actions, subjects the administration to the rule of law. This in turn sustains democracy. Only, in a government firmly rooted in the principle of rule of law, can true democracy be planted

and flourished. Judicial review, which is the primary mechanism of ensuring the observance of rule of law, although mostly an issue within the domain of administrative law, should look in the constitutional structure for its justification and scope. In most countries, the judicial power of the ordinary courts to review the legality of the actions of the executive and administrative agencies emanates from the constitution. The constitution is the supreme document, which confers the mandate on the ordinary courts. Most written constitutions contain specific provisions allocating judicial review power to the high courts, or the Supreme Court, including the grounds of review and the nature and type of remedies, which could be granted to the aggrieved parties by the respective courts. A basic issue commonly for administrative law and constitutional law is the scope of judicial review. The debate over scope is still continuing and is showing a dynamic fluctuation, greatly influenced by the ever changing and ever expanding features of the form and structure of government and public administration. The ultimate mission of the role of the courts as custodians of liberty', unless counter balanced against the need for power and discretion of the executive, may ultimately result in unwarranted encroachment, which may have the effect of paralyzing the administration and endangering the basic constitutional principle of separation of powers. This is to mean that the administrative law debate over the scope of judicial review is simultaneously a constitutional debate.

d. Administrative law vis-à-vis Privatization

INTRODUCTION

Privatization policies have become dominant in a manner that cuts through borders and cultures motivated by complex factors, partially ideological and partially economic. In many countries all over the world privatization leads to the creation of new forms of government action. As a result, it should serve as a major focus of interest for public law - including both constitutional and administrative law. With this consciousness in mind, the current article discusses the challenges posed by privatization initiatives to public law.1 Privatization is indeed a matter of public policy, but it is important to unfold the relevance of law to its discussion as well. Interestingly, the opposite phenomenon – of nationalization – has always been discussed not only as a matter of public policy but also as a matter of law (due to its clear impact on property rights). This understanding should serve as a catalyst for a further study of what has been so far neglected. It is worth adding that the focus on privatization is still important despite the tendency to adopt certain

nationalization initiatives against the background of the economic crisis which started in 2008. Nationalization is still perceived as an exception and such initiatives are considered provisional steps, with the long term intent to return to privatization when the time is ripe. Moreover, this crisis is yet another illuminating example of the necessity for regulation of private activities; one of the focuses of the proposed analysis of the implications of privatization for public law. Indeed, legal scholarship has already started to discuss the implications of privatization for public law. However, so far, the discussion did not profess to offer a general framework for addressing privatization as a central component for the understanding of public law. In contrast, the view offered here is that privatization is not only a phenomenon that merits some doctrinal adjustments, but rather a central process that calls for a re-evaluation of area of public law, which would lead to the development of a new sub-area focusing on the public law of privatization. Accordingly, the article offers an initial outline for the development of the public law of privatization. More concretely, the article offers a model for analyzing questions of privatization from a public law perspective. This model is intended to reflect the complexity of the social and economic challenges posed by privatization policies. It is aimed at dealing with the various implications of privatization decisions which have to be considered not only with regard to their managerial utilitarian aspects, but also with regard to their social and distributive implications, as well as their potential effect on human rights. The approach suggested is based on distinguishing between three different questions raised by privatization decisions. The first question considers the boundaries of privatization: are there any limitations on the types of actions or types of powers that can be privatized? The second question relates to the administrative process of privatization: what are the constraints that should apply to the implementation of a privatization decision (for example, is there a duty to set a privatization policy before proceeding with a concrete privatization initiative, or is there a duty to disclose information regarding privatization initiatives)? The third question refers to the outcomes of privatization and its regulation: which legal regime should apply to privatized activities, and will they be subject to special regulation or special duties? The article does not present a normative viewpoint on the proper scope of the privatization phenomenon. As explained later, this is usually determined by ideology and political philosophy. Accordingly, the decisions on the scope of privatization will usually be left to the public arena. In other words, it is important to maintain the distinguishing line between presenting a policy view on operations that should not be privatized and a legal view on this matter. However, as

explained below, this deferral to the political arena may also have its limits. Following this introduction, Part I of the article will present the different patterns of privatization. Part II will present the traditional approach of the public law to privatization. This approach has indeed recognized that privatization might raise specific legal questions, but mainly sided with limited judicial intervention in decisions in the area, while focusing principally on the aspect of equality in competition for business opportunities created by privatization. Part III points out the 'blind spot' of the traditional discussion in this subject, while referring to additional juridical questions that need to be examined regarding privatization initiatives. The article will conclude by offering directions for developing the public law of privatization.

e. Classification of Administrative Law

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 – 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.

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.

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 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.

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.

UNIT-II: Legislative Functions of Administration

A. Meaning and concept of Delegated legislation

One of the most significant developments of the present century is the growth in the legislative powers of the executives. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law. We know that there is no such general power granted to the executive to make law it only supplements the law under the authority of legislature. This type of activity namely, the power to supplement legislation been described as delegated legislation or subordinate legislation.

However the attitude of the jurists towards delegated legislation has not been unanimous. The practice of delegated legislation was considered a factor, which

promoted centralization. Delegated Legislation was considered a danger to the liberties of the people and a devise to place despotic powers in few hands. It was said that delegated legislation preserved the outward show of representative institutions while placing arbitrary and irresponsible power in new hands. But the tide of delegated legislation was high and these protests remained futile. A very strong case was made out against the practice of Delegated Legislation by Lord Hewart who considered increased governmental interference in individual activity and considered this practice as usurpation of legislative power of the executive. He showed the dangers inherent in the practice and argued that wide powers of legislation entrusted to the executive lead to tyranny and absolute despotism.

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.

B. Constitutionality of delegated Legislation

The powers of the legislature, however, depend upon the nature and character of the law-making bodies. In the presidential form of government, the legislature has an effective control over the executive but the latter is not accountable to it. The legislature in parliamentary system of government has full control over almost all the spheres of government.1 activity. The legislature in a unitary government has both legislative and constituent functions. The position, scope of authority and functions of the legislature, therefore, depend upon the form of government. With the growth of democracy the legislature is assuming more and more importance.

Functions

The various functions performed by the legislature in general may be discussed as follows:

1. Law-Making: The real and legitimate function of the legislature is to make, amend and repeal laws. It makes new laws to meet the changed needs of society. Old laws which are not suitable to the new conditions are amended. Laws which have become obsolete in character are re-pealed. Modern state is a positive or welfare state. Consequently the work of the legislature has increased enormously. Its legislative activities have now been expanded to various fields like education, social welfare and economic regulation and planning. It may delegate subordinate legisla-tive powers to the executive authorities.
2. Control over Finances: All the legislatures of the world have got an undisputed control over the national purse. It is the crux of democracy that parliament controls the finance. No money could be spent or raised by the executive without the previous consent and approval of the parliament. In fact no money can be withdrawn from the Consolidated Fund of the state without authorization of parliament. Every year budget containing the estimated expenditure and income of the ensuing year is placed before it. It passes the budget in two parts—the Appropriation Act and the Finance Act. It exercises supervision over the financial admini-stration through its two important committees—the Public Accounts Committee and the Estimates Committee.

3. Executive Functions of the Legislature: Although the legisla-ture is a law making body yet it performs certain other functions as well. It is so because the government possesses an organic unity and the functions of one organ must overlap the others. The legislature under the parliamentary system of government controls the executive through the vote of no-confidence, interpolation (asking questions) and adjournment motions. Under this system of government, the executive is responsible to the legislature. It continues in office so long as it enjoys the confidence of the majority in the legislature. The moment a Cabinet loses the confidence of the majority, it is thrown out of office by a vote of no- confidence. Although in theory the legislature controls the executive in a parliamentary system of government yet in practice the position is reverse. The executive has complete control over the legislature so long as it enjoys the support of a safe majority in the legislature.

C. **Control Mechanism**

i. **Legislative control in India over delegation:** In India, the question of control on rule-making power engaged the attention of the Parliament. Under the Rule of Procedure and Conduct of Business of the House of the People provision has been made for a Committee which is called 'Committee on Subordinate Legislation'.

The First Committee was constituted on Ist December, 1953 for

i. Examining the delegated legislation, and ii. Pointing out whether it has

a) Exceeded or departed from the original intentions of the Parliament, or

b) Effected any basic changes.

Originally, the committee consisted to 10 members of the House and its strength was later raise to 13 members. It is usually presided over by a member of the Opposition.

The Committee

i. scrutinizes the statutory rules, orders. Bye-laws, etc. made by any-making authority, and

ii. report to the House whether the delegated power is being properly exercised within the limits of the delegated authority, whether under the Constitution or an Act of Parliament. It further examines whether

iii. The Subordinate legislation is in accord with the general objects of the Constitution or the Act pursuant to which it is made;

iv. it contains matter which should more properly be dealt with in an Act of Parliament;

v. it contains imposition of any tax;

vi. it, directly or indirectly, ousts the jurisdiction of the courts of law;

vii. it gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly confer any such power;

viii. It is constitutional and valid;

The following are the modified recommendations

1. That, in future, the Acts containing provisions for making rules, etc., shall lay down that such rules shall be laid on the Table as soon as possible.

2. That all these rules shall be laid on the Table for a uniform and total period of 30 days before the date of their final publication. But it is not deemed expedient to lay any rule on the Table before the date of publication; such rule may be laid as soon as possible after publication. An Explanatory Note should, however, accompany such rules at the time they are so laid, explaining why it was not deemed expedient to lay these rules on the Table of the House before they were published.

3. On the recommendation of the Committee, the bills are generally accompanied with Memoranda of Delegated Legislation in which; -. i) full purpose and effect of the delegation of power to the subordinate authorities, ii) the points which may be covered by the rules, iii) the particulars of the subordinate authorities or the persons who are to exercise the delegated power, and iv) the manner in which such power has to be exercised, are mentioned. They point out if the delegation is of normal type or unusual. The usefulness of the Committee lies more in ensuring that the standards of legislative rule-making are observed that in merely formulating such standards. It should effectively point out the cases of any unusual or unexpected use of legislative power by the Executive.

C. Judicial

Judicial control can be divided into the following two classes: -

i. Doctrine of ultra vires and
ii. Use of prerogative writs.
iii. Procedural

Procedural Control Over Delegated Legislation (A Prior consultation of interests likely to be affected by proposed delegated Legislation:- From the citizen's post of view the most beneficial safeguard against the dangers of the misuse of delegated Legislation is the development of a procedure to be followed by the delegates while formulating rules and regulations. In England as in America the Legislature while delegating powers abstains from laying down elaborate procedure to be followed by the delegates. But certain acts do however provide for the consultation of interested bodies and sometimes of certain Advisory Committees which must be consulted before the formulation and application of rules and regulations. This method has largely been developed by the administration independent of statute or requirements. The object is to ensure the participation of affected interests so as to avoid various possible hardships. The method of consultation has the dual merits of providing as opportunity to the affected interests to present their own case and to enable the administration to have a first-hand idea of the problems and conditions of the field in which delegated legislation is being contemplated. Prior publicity of proposed rules and regulations:- Another method is antecedent publicity of statutory rules to inform those likely to be affected by the proposed rules and regulations so as to enable them to make representation for consideration of the rule-making authority. The rules of Publication Act, 1893, sec.1.Provided for the use of this method. The Act provided that notice of proposed 'statutory rules' is given and the representations of suggestions by interested bodies be considered and acted upon if proper. But the Statutory Instruments Act, 1946 omitted this practice in spite of the omission, the Committee on Ministers Powers 1932, emphasized the advantages of such a practice.

D. Sub-Delegation

DELEGATED LEGISLATION

One of the most significant developments of the present century is the growth in the legislative powers of the executives. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law. We know that there is no such general power granted to the executive to make law it only supplements the law under the authority of

legislature. This type of activity namely, the power to supplement legislation been described as delegated legislation or subordinate legislation.

Why delegated legislation becomes inevitable: The reasons as to why the Parliament alone cannot perform the jobs of legislation in this changed context are not far to seek. Apart from other considerations the inability of the Parliament to supply the necessary quantity and quality legislation to the society may be attributed to the following reasons:

i.Certain emergency situations may arise which necessitate special measures. In such cases speedy and appropriate action is required. The Parliament cannot act quickly because of its political nature and because of the time required by the Parliament to enact the law.

ii. The bulk of the business of the Parliament has increased and it has no time for the consideration of complicated and technical matters. The Parliament cannot provide the society with the requisite quality and quantity of legislation because of lack of time. Most of the time of the Parliament is devoted to political matters, matters of policy and particularly foreign affairs.

iii. Certain matters covered by delegated legislation are of a technical nature which requires handling by experts. In such cases it is inevitable that powers to deal with such matters is given to the appropriate administrative agencies to be exercised according to the requirements of the subject matter. "Parliaments" cannot obviously provide for such matters as the members are at best politicians and not experts in various spheres of life.

iv. Parliament while deciding upon a certain course of action cannot foresee the difficulties, which may be encountered in its execution. Accordingly various statutes contain a 'removal of difficulty clause' empowering the administration to remove such difficulties by exercising the powers of making rules and regulations. These clauses are always so worded that very wide powers are given to the administration. v. The practice of delegated legislation introduces flexibility in the law. The rules and regulations, if found to be defective, can be modified quickly. Experiments can be made and experience can be profitability utilized. However the attitude of the jurists towards delegated legislation has not been unanimous. The practice of delegated legislation was considered a factor, which promoted centralization. Delegated Legislation was considered a danger to the liberties of the people and a devise to place despotic powers in few hands. It was said that delegated legislation preserved the outward show of representative institutions while placing arbitrary and irresponsible power

in new hands. But the tide of delegated legislation was high and these protests remained futile.

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.

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 empower the executive authority to make rules for carrying out the purposes of the Act.

2. A typical example of this kind is the Mines and Minerals (Regulation and Development) Act, 1948.

3. 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.

UNIT-III: Judicial Functions of Administration

a. Need for devolution of adjudicatory authority on administration

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

b. Nature of tribunals-constitution, powers, procedures, rules of evidence

The Administrative Tribunals Act, 1985 An Act to provide for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation 1[or society] owned or controlled by the Government 1[in pursuance of Article 323-A of the Constitution] and for matters connected therewith or incidental thereto. Published in the

Gazette of India Extraordinary, dated the 27th February, 1985Provisions relating to Central Administrative Tribunal come into force with effect from the 1st July, 1985 vide GSR No. 527 (E), dated the 1st July, 1985. 1. Inserted vide The Administrative Tribunals (Amendment) Act, 1986 (No. 19 of 1986). Takes effect from the 22nd January 1986.

b. Nature of Administrative Tribunals

Among the many innovative provisions adopted by the Forty-second Amendment of the Constitution (1976) a measure of far-reaching importance was the provision for the setting up of Administrative Tribunals. Part XIV-A which consists of two Articles 323A and 323B deals with these Tribunals.

Section (1) of Article 323-A provides for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India. The power to constitute such Tribunals is vested exclusively in Parliament.

Section (2) of the same Article provides that a law made by Parliament under section (1) may:

(i) Provide for the establishment of an Administrative Tribunal for the Union and a separate Administrative Tribunal for each State or for two or more States;
(ii) Specify the jurisdiction, powers and authority which may be exercised by such tribunals;
(iii) Provide for the procedure to be followed by these tribunals; and
(iv) Exclude the jurisdiction of all courts except the special jurisdiction of the Supreme Court under Article 136. Article 323-B empowers Parliament or State Legislatures to set up tribunals for matters other than those covered by clause (2) of Article 323-A. The matters to be covered by such tribunals are as follows:
    (i) Levy, assessment, collection and enforcement of any tax;
    (ii) Foreign exchange, import and export across customs frontiers;
    (iii) Industrial and labor disputes;
    (iv) Matters connected with land reforms covered by Article 31-A;
    (v) Ceiling on urban property;
    (vi) Elections to either House of Parliament or Legislatures of the States and

(vii) Production, procurement, supply and distribution of food-stuffs or other essential goods. A law made under the above provisions may provide for the establishment of a hierarchy of tribunals and specify the jurisdiction, powers and authority which may be exercised by each of them. Such law may also provide for the procedure to be followed by these tribunals and exclude the jurisdiction of all courts except the Supreme Court of India. The Scheme of Administrative Tribunals envisaged by Part XIV-A of the Constitution as several other provisions of the Forty-second Amendment of the Constitution was looked upon with suspicion and misgivings by certain sections of political and public opinion in the country and that was reflected in the attempt of the Janata Government (1977-79) to abolish these provisions.

The Forty-fourth Amendment (1978) among other things sought to abolish Part XIV-An altogether. However, this attempt of the Janata Government was unsuccessful as it could not muster adequate support in Parliament. The basic objective of administrative tribunals is to take out of the purview of the regular courts of law certain matters of dispute between the citizen and government agencies and make the judicial process quick and less expensive. The fact that there has been a phenomenal increase in the number of disputes in which administrative authorities are involved has to be recognized. If all these disputes go to the ordinary judicial system where there is provision for appeals to successive higher courts one after another, there will be no speedy settlement of such disputes and they might linger for years or decades. Inordinate delay and enormous cost are the two distinguishing features of the ordinary judicial system. The number of cases that are pending before the High Courts and the Supreme Court today is legion. No one can normally expect any speedy disposal of most of them. At the same time, there are matters of social concern which require reasonably quick disposal. Administrative tribunals facilitate this and that is the strongest argument in their favor. Administrative tribunals are not an original invention of the Indian political system. Such tribunals are now well established in all democratic countries of Europe as well as the United States of America. Britain which until a few decades ago looked upon administrative tribunals with suspicion has, in recent times, recognized their beneficial role and therefore has set up many of them. The experience of India during the past two decades and more has demonstrated that administrative tribunals have an effective role to play in a country which has embarked upon a programme of rapid socioeconomic change.

Constitution: Each Tribunal shall consist of Chairman, such number of Vice-Chairman and judicial and administrative members as the appropriate Government (either the Central Government or any particular State Government singly or jointly) may deem fit (vide Sec. 5.(1) Act No. 13 of 1985). A bench shall consist of one judicial member and one administrative member. The bench at New Delhi was designated the Principal Bench of the Central Administrative Tribunal and for the State Administrative Tribunals. The places where their principal and other benches would sit specified by the State Government by Notification (vide Section 5(7) and 5(8) of the Act).

Procedure: Chapter III of the Administrative Tribunal Act deals with the jurisdiction, powers and authority of the tribunals. Section 14(1) of the Act vests the Central Administrative Tribunal to exercise all the jurisdiction, powers and authority exercisable by all the courts except the Supreme Court of India under Article 136 of the Constitution. One of the main features of the Indian Constitution is judicial review. There is a hierarchy of courts for the enforcement of legal and constitutional rights. One can appeal against the decision of one court to another, like from District Court to the High Court and then finally to the Supreme Court, But there is no such hierarchy of Administrative Tribunals and regarding adjudication of service matters, one would have a remedy only before one of the Tribunals. This is in contrast to the French system of administrative courts, where there is a hierarchy of administrative courts and one can appeal from one administrative court to another. But in India, with regard to decisions of the Tribunals, one cannot appeal to an Appellate Tribunal. Though Supreme Court under Article 136, has jurisdiction over the decisions of the Tribunals, as a matter of right, no person can appeal to the Supreme Court. It is discretionary with the Supreme Court to grant or not to grant special leave to appeal. The Administrative Tribunals have the authority to issue writs. In disposing of the cases, the Tribunal observes the canons, principles and norms of 'natural justice'. The Act provides that "a Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure 1908, but shall be guided by the principles of natural justice. The Tribunal shall have power to regulate its own procedure including the fixing of the place and times of its enquiry and deciding whether to sit in public of private". A Tribunal has the same jurisdiction, powers and authority, as those exercised by the High Court, in respect of "Contempt of itself" that is, punish for contempt, and for the purpose, the provisions of the contempt of Courts Act 1971 have been made

applicable. This helps the Tribunals in ensuring that they are taken seriously and their orders are not ignored.

Powers:Chapter IV of the Administrative Tribunals Act prescribes for application to the Tribunal. A person aggrieved by any order pertaining to any matter within the jurisdiction of the Tribunal may make an application to it for redressal of grievance. Such applications should be in the prescribed form and have to be accompanied by relevant documents and evidence and by such fee as may be prescribed by the Central Government but not exceeding one hundred rupees for filing the application. The Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant has availed of all remedies available to him under the relevant service rules. This includes the making of any administrative appeal or representation. Since consideration of such appeals and representations involve delay, the applicant can make an application before the Tribunal, if a period of six months has expired afterthe representation was made no order has been made. But an application to the Tribunal has to be made within one year from the date of final order or rejection of the application or appeal or where no final order of rejection has been made, within one year from the date of expiry of six months period. The Tribunal. May, however admit any application even after one year, if the applicant can satisfy the Tribunal that he/she had sufficient cause for not making the application within the normal stipulated time. Every application is decided by the Tribunal or examination of documents, written representation and at a times depending on the case, on hearing of oral arguments. The applicant may either appear in person or through a legal practitioner who will present the case before the Tribunal. The orders of the Tribunal are binding on both the parties and should be complied within the time prescribed in the order or within six months of the receipt of the order where no time limit has been indicated in the order. The parties can approach the Supreme Court against the orders of the Tribunal by way of appeal under Article 136 of the Constitution. The Administrative Tribunals are not bound by the procedure laid down in the code of Civil Procedure 1908. They are guided by the principles of natural justice. Since these principles are flexible, adjustable according to the situation, they help the Tribunals in molding their procedure keeping in view the circumstances of a situation.

Rules of evidence- no evidence, some evidence and substantial evidence. Criminal Justice reflects the responses of the society to crimes and criminals. The key components

engaged in this role are the courts, police, prosecution, and defence. Administering criminal justice satisfactorily in a democratic society governed by rule of law and guaranteed fundamental rights is a challenging task. It is in this context that the subordinate judiciary assumes great importance. The role of magistrate is effectively summed up in the words of Former Chief Justice Ranganath Mishra in a writ petition relating to conditions of subordinate judiciary in the case of All India Judges' Association vs. Union of India (1992) 1 SCC 119 Where he observes: "The Trial judge is the kingpin in the hierarchical system of administration of justice. He directly comes in contact with the litigant during the proceedings in court. On him lies the responsibility of building up of the case appropriately and on his understanding of the matter the cause of justice is first answered. The personalities, knowledge, judicial restraint, capacity to maintain dignity are the additional aspects which go into making the Court's functioning successful". Mentioning the high expectations of society from the judges, he further advices: "A judge ought to be wise enough to know that he is fallible and therefore, ever ready to learn and be courageous enough to acknowledge his errors". Right to speedy trial is implicit in the right to life and liberty guaranteed by Article 21 of the Constitution of India. However, there is a huge pendency of criminal cases and inordinate delay in the disposal of the same on the one hand and very low rate of conviction in cases involving serious crime. As per the latest amendment, Section 309 of the Cr.P.C. has been inserted with an explanation to its subclause. With an aim to speed-up trials, the amendment states that no adjournment should be granted at the party's request, nor can the party's lawyer being engaged in another court be ground for adjournment. Section 309 contains a mandatory provision that in every inquiry or trial the proceedings shall be held as expeditiously as possible and in particular when the examination of witnesses has once begun the same shall be continued from day to day until all witnesses in attendance have been examined unless the court finds the adjournment of the case beyond the following day to be necessary for reasons to be recorded. When the enquiry or trial relates to an offence under Section 376 to 376D IPC, the same shall be completed within a period of two months from the date of commencement of the examination of witnesses. The introduction of Plea Bargaining included under sections 265A to 265L of the Code of Criminal Procedure has also been noticed very effectively. Judicial Officers must be aware of "offences affecting the socioeconomic condition of the country" for the purpose of Section 265A. A judge should be well versed with the latest amendments and further developments which take place in law and put them into practice to give effect to the intent of the legislature which is to speed up the process of delivering justice. Section 165 of the Indian Evidence Act grants sweeping

powers to the Judge to put questions. The rationale for giving such sweeping powers is to discover the truth and indicative evidence. Counsel seeks only client's success; but the Judge must watch justice triumphs. If criminal court is to be an effective instrument in dispensing justice, Presiding Officer must cease to be a spectator and mere a recording machine. He must become an active participant in the trial evincing intelligence and active interest by putting questions to witness in order to ascertain the truth. The Code of Criminal Procedure delineates the powers and functions of judicial magistrates at every stage both pre-trial, during trial and post trial and the same require no repetition. However, I wish to remind you that these powers and functions bestowed upon you are to be exercised as public trust in full compliance with the Constitutional mandates of fair and speedy trial for both the accused and the complainant. Criminal system to be truly just must be free of bias. There should be judicial fairness otherwise the public faith in rule of law would be broken.

d. PRINCIPLES OF NATURAL JUSTICE

In India there is no statute laying down the minimum procedure which administrative agencies must follow while exercising decision-making powers. This minimum fair procedure refers to the principles of natural justice Natural justice is a concept of common law and represents higher procedural principles developed by the courts, which every judicial, quasi-judicial and administrative agency must follow while taking any decision adversely affecting the rights of a private individual. Natural justice implies fairness, equity and equality. In a welfare state like India, the role and jurisdiction of administrative agencies is increasing at a rapid pace. The concept of Rule of Law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging these functions in a fair and just manner. In India, the principles of natural justice are firmly grounded in Article 14 & 21 of the Constitution. With the introduction of concept of substantive and procedural due process in Article 21, all that fairness which is included in the principles of natural justice can be read into Art. 21. The violation of principles of natural justice results in arbitrariness; therefore, violation of natural justice is a violation of Equality clause of Art. 14.

The principle of natural justice encompasses following two rules: -

1. Nemojudex in causasua - No one should be made a judge in his own cause or the rule against bias.

2. Audi alterampartem - Hear the other party or the rule of fair hearing or the rule that no one should be condemned unheard.
3. Reasoned decisions.

i.RULE AGAINST BIAS (NEMO JUDEX CAUSA SUA) Bias means an operative prejudice, whether conscious or unconscious in relation to a party or issue. The rule against bias flows from following two principles: - a) No one should be a judge in his own cause b) Justice should not only be done but manifestly and undoubtedly be seen to be done. Thus a judge should not only be impartial but should be in a position to apply his mind objectively to the dispute before him. The rule against bias thus has two main aspects: - 1. The administrator exercising adjudicatory powers must not have any personal or proprietary interest in the outcome of the proceedings. 2. There must be real likelihood of bias. Real likelihood of bias is a subjective term, which means either actual bias or a reasonable suspicion of bias. It is difficult to prove the state of mind of a person. Therefore, what the courts see is whether there is reasonable ground for believing that the deciding factor was likely to Have been biased. Bias can take many forms: - · Personal Bias · Pecuniary Bias · Subject-matter bias · Departmental bias · Pre-conceived notion bias

A.K.Kraipak vs. UOI

In this case, Naquishband, who was the acting Chief Conservator of Forests, was a member of the Selection Board and was also a candidate for selection to All India cadre of the Forest Service. Though he did not take part in the deliberations of the Board when his name was considered and approved, the SC held that `there was a real likelihood of a bias for the mere presence of the candidate on the Selection Board may adversely influence the judgment of the other members' SC also made the following observations: - 1. The dividing line between an administrative power and quasi-judicial power quite thin and is being gradually obliterated. Whether a power is Administrative or quasi-judicial, one has to look into - a) the nature of power conferred b) the person on whom it is conferred c) the framework of the law conferring that power d) the manner in which that power is expected to be exercised. 2. The principles of natural justice also apply to administrative proceedings, 3. The concept of natural justice is to prevent

miscarriage of justice and it entails - (i) No one shall be a judge of his own cause. (ii) No decision shall be given against a party without affording him a reasonable hearing. (iii) The quasi-judicial enquiries should be held in good faith and not arbitrarily or unreasonably.

ii. **AUDI ALTERAM PARTEM OR RULE OF FAIR HEARING**

The principle of audialterampartem is the basic concept of principle of natural justice. The expression audialterampartem implies that a person must be given opportunity to defend himself. This principle is sine qua non of every civilized society. This rule covers various stages through which administrative adjudication pass starting from notice to final determination. Right to fair hearing thus includes:- 1. Right to notice 2.Right to present case and evidence 3.Right to rebut adverse evidence (i) Right to cross examination (ii) Right to legal representation 4.Disclosure of evidence to party 5.Report of enquiry to be shown to the other party 6. Reasoned decisions or speaking orders

iii. **Reasoned decisions** Post decisional hearing means hearing after the decision is reached. The idea of post decisional hearing has been developed by the SC in Maneka Gandhi vs. UOI to maintain the balance between administrative efficiency and fairness to the individual. Mankea Gandhi vs. UOI

Facts In this case the passport dated 01.06.1976 of the petitioner, a journalist, was impounded `in the public interest' by an order dated 02.07.1977. The Govt. declined to furnish her the reasons for its decision. She filed a petition before the SC under article 32 challenging the validity of the impoundment order. She was also not given any pre-decisional notice and hearing.

Argument by the Government. The Govt. argued that the rule of audialterampartem must be held to be excluded because otherwise it would have frustrated the very purpose of impounding the passport.

Held The SC held that though the impoundment of the passport was an administrative action yet the rule of fair hearing is attracted by the necessary implication and it would not be fair to exclude the application of this cardinal rule on the ground of administrative convenience. The court did not outright quash the order and allowed the return of the passport because of the special socio-political factors attending the case.

REQUIREMENT OF CROSS EXAMINATION

Cross-examination is used to rebut evidence or elicit and establish truth. In administrative adjudication, as a general rule, the courts do not insist on cross-examination unless the circumstances are such that in the absence of it, an effective defence cannot be put up. The SC disallowed cross-examination in State of J&K vs. BakshiGulam Mohammed on the ground that the evidence of witness was in the form of affidavits and the copies had been made available to the party. In Town Area Committee vs. Jagdish Prasad, the department submitted the charge, got an explanation and thereafter straightaway passed the dismissal order. The court quashed the order holding that the rule of fair hearing includes an opportunity to cross-examine the witness and to lead evidence. In HiraNathMisra vs. Principal, Rajendra Medical College the court disallowed the opportunity of cross-examination on the grounds of practicability. The SC rejected the contention of the appellants that they were not allowed to cross-examine the girl students on the ground that if it was allowed no girl would come forward to give evidence, and further that it would not be possible for the college authorities to protect the girl students outside the college precincts. Where, however, witnesses depose orally before the authority, the refusal to allow cross examination would certainly amount to violation of principles of natural justice. It can thus be concluded that right to cross-examine is an important part of the principle of fair hearing but whether the same should be allowed in administrative matters mainly depends on the facts and circumstances of the case.

RIGHT OF LEGAL REPRESENTATION

Legal representation is not considered as an indispensable part of the rule of fair hearing in administrative proceedings. This denial of legal representation is justified on the ground that –

a) the lawyers tend to complicate matters, prolong hearings and destroy the essential informality of the hearings.

b) it gives and edge to the rich over the poor who cannot afford a good lawyer. Whether legal representation is allowed in administrative proceedings depends on the provisions of the statute. Factory laws do not permit legal representation, Industrial Disputes Act allows it with the permission of the tribunal and some

statutes like Income Tax permit representation as a matter of right. The courts in India have held that in following situations, some professional assistance must be given to the party to make his right to defend himself meaningful: -

a) Illiterate

b) Matter is technical or complicated

c) Expert evidence is on record

d) Question of law is involved

e) Person is facing trained prosecutor

REQUIREMENT OF PASSING A SPEAKING OR REASONED ORDER

In India, unless there is specific requirement of giving reasons under the statute, it is not mandatory for the administrative agencies to give reasons for their decisions. Reasons are the link between the order and mind of the maker. Any decision of the administrative authority affecting the rights of the people without assigning any reason tantamount to violation of principles of natural justice. The requirement of stating the reasons cannot be under emphasized as its serves the following purpose: -

1.It ensures that the administrative authority will apply its mind and objectively look at the facts and evidence of the case.

2. It ensures that all the relevant factors have been considered and that the irrelevant factors have been left out.

3. It satisfies the aggrieved party in the sense that his view point have been examined and considered prior to reaching a conclusion.

4. The appellate authorities and courts are in a better position to consider the appeals on the question of law.

In short, reasons reveal the rational nexus between the facts considered and the conclusions reached. However, mere recording of reasons serves no purpose unless the same are communicated either orally or in writing to the parties. In fact mere communication of reasons has no meaning unless the corrective machinery is in place. Whether the reasons should be recorded or not depends on the facts of the case. In Tarachand vs. Municipal Corporation, an assistant teacher was dismissed on the ground of moral turpitude. The Enquiry fully established the charge. The Asst. Education Commissioner confirmed the report w/o giving

reasons. The SC held that where the disciplinary authority disagrees with the report of the enquiry officer, it must state the reasons. In other words, the sighting of reasons is not mandatory where the disciplinary authority merely agrees with the report of enquiry officer.

REPORT OF ENQUIRY REPORT TO BE SHOWN TO THE OTHER PARTY

Whether a copy of enquiry report must be submitted to the delinquent employee before passing the order? Until 1987, there was no precedent or law which made it obligatory, in all cases, for the disciplinary authority to serve a copy of the enquiry report on the delinquent before reaching a final decision. For the first time in 1987, full bench of CAT held that failure to supply a copy of the enquiry report to the delinquent before recording a finding against him is obligatory and failure to do so would vitiate the enquiry. (P,K,Sharmavs, UOI) The SC in 1973 considered this question in Keshav Mills Co. Ltd. vs. UOI. Facts Appellant Co. after doing business for 30 years closed down. 1200 persons unemployed - On the basis of commission to enquire into the affairs of the co. u/s 15 of IDRA, GOI passed an order u/s 18-A to take over the mill. Challenged before SC on the ground that enquiry report not submitted Held · Not possible to lay down general principle on this Q. · Answer depends on facts and circumstances of each case · If the non-disclosure of the report causes any prejudice in any manner to the party, it must be disclosed, otherwise non-disclosure would not amount to violation of principles of natural justice.

FAIR TRIAL TO ACCUSED: CO-RELATIVE DUTIES OF MAGISTRATE

It is well settled today that the accused has fundamental right to know the grounds of his arrest, right to legal aid in case he is indigent, right to consult his lawyer and such other rights guaranteed by Constitution and equivalent safeguards incorporated in CrPC. Let's pause here and dwell more on the corresponding duties of a magistrate in ensuring fair trial to the accused. Article 22(2) provides that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest and no one shall be detained in custody beyond the said period without the authority of a magistrate. The magistrate can pass order of remand to authorise the detention of the accused in such custody as such

magistrate thinks fit, for a term not exceeding 15 days in the whole. Justice Bhagwati summed up the purpose of these safeguards in Khatri II vs State of Bihar (1981) 1 SCC 627 "This healthy provision enables the magistrates to keep check over the police investigation and it is necessary that the magistrates should try enforcing this requirement and where it is found disobeyed, come down heavily upon the police... There is however, no obligation on the part of the magistrate to grant remand as a matter of course. The police have to make out a case for that. It can't be a mechanical order". Right to know the ground of arrest is conferred the status of fundamental right under article 22(1). It is reasonable to expect that grounds of arrest communicated in language understood by the accused. Further, the accused has right to inform his friend or relative of his arrest. Arrest of a person is a denial of an individual's liberty which is fundamental to one's existence. The fundamental rights will remain mere promise if Magistrates do not ensure compliance of the same. Hence, magistrates have been given the fundamental duty under amended section 50A of the Criminal Procedure to satisfy that the police has informed the arrested person of his rights and made an entry of the fact in book to be maintained in the police station. There have been frequent complaints about the police's noncompliance of the above mentioned requirements. The magistrates are empowered under section 97 to issue search warrant which is in the nature of a writ of habeas corpus for rescue of a wrongfully confined person by intervention of police directed by a magisterial order. If magistrate has reason to believe that any person is confined under circumstances that amounts to an offence, he may issue a search warrant and person if found shall be immediately taken before a magistrate. The accused has a right to be medically examined and if such a request is made, the Magistrate shall direct examination of the body unless he considers it is made for purpose of delay or defeating the ends of justice. In SheelaBarsevs State of Maharashtra (1983) 2 SCC 96, it was held by the Hon'ble Supreme Court that the arrested accused person must be informed by the magistrate about his right to be medically examined in terms of section section 54. In this case, High court directed magistrates to ask the arrested person as to whether he has any complaint of torture or maltreatment in police custody. The state under constitutional mandate is required to provide free legal aid to an indigent accused person and this arises not only when the trial commences but when the accused is for the first time produced before the magistrate, as also when he is remanded from time to time. In Anil Yadav v State of Bihar 1982 (2) SCC 195

commonly referred to as Bhagalpur Blinding case, the judicial magistrates failed in their duties to inform blinded prisoners of their rights. As a result, the Supreme Court had to cast a duty on all magistrates and courts to promptly and duly inform the indigent accused about his right to get free legal aid as without this the right may prove to be illusory. The right to legal aid today is enshrined in Article 39A and further institutionalized with the coming into force of the Legal Services Authorities Act, 1986. This assumes more significance as denial of the same may even vitiate the trial at later stage. Further, in HussainaraKhatoon V Case (1980) 1 SCC 108 it was held that it is the duty of the magistrate to inform the accused that he has a right to be released on bail on expiry of statutory period of 90 or 60 days as the case may be. Suffice is to say that magistrates are the best persons to oversee that the accused is not denied his rights. We must not forget that ensuring criminal justice requires cooperation of the two arms of the state directly involved i.e. the judiciary and the police machinery. While direct interference is not desirable in investigation process, the magistrate is kept in the picture at all the stages of the police investigation. On a conjoint reading of section 57 and 167 of the Code, it is clear that the legislative intention was to ensure speedy investigation after a person has been taken in custody. It is expected that investigation is completed within 24 hours and if not possible within 15 days. The role of magistrate is to oversee the course of investigation and prevent abuse of law by investigating agency. However, you must understand that your role is complementary to that of police. In doing so, you must preside without fear or favour.

RECORDING CONFESSIONS & DYING DECLARATION

Confessions and dying declarations recorded by magistrate constitute valuable evidence as they may form the basis of conviction of the accused. Although there is no hard and fast rule as to proper manner of recording the same, the Magistrate must follow certain broad guidelines to ensure that the document inspires confidence of the court assessing it. Just as the FIR recorded is of great importance because it is the earliest information given soon after the commission of a cognisable offence before there is time to forget, fabricate or embellish. Similarly the confession made to magistrate is highly valuable evidence. Section 164 empowers magistrate to record even when he has no jurisdiction in the case. Before recording any such confession, the magistrate is required to explain to the person making confession that

a) He is not bound to make such a confession
b) If he does so it may be used as evidence against him

These provisions must be administered in their proper spirit lest they become mere formalities. The magistrate must have reason to believe that it is being made voluntarily. You must exercise your judicial knowledge and wisdom to find out whether it is voluntary confession or not. The magistrate must see that the warning is brought home to the mind of the person making the confession. If the recording continues on another day, a fresh warning is necessary before a confession is recorded on the other day. After giving warnings, the magistrate should give him adequate time to think and reflect. There is no hard and fast rule but the person must be completely free from possible police influence. Normally such a person is sent to jail custody at least for a day before his confession is recorded. How much time for reflection should be allowed depends on circumstances in each case. The act of recording confession is a solemn act and in discharging such duties the magistrate must take care to see that the requirements of law are fully satisfied. The magistrate recording the confession must appreciate his function as one of a judicial officer and he must apply his judicial mind to the task of ascertaining that the statement the accused is going to make is of his own accord and not on account of any influence on him. A dying declaration is an admissible piece of evidence under section 32 of Indian Evidence Act as it is the first hand knowledge of facts of a case by the victim himself. I myself have held in Surinder Kumar vs. State of Haryana (2011) 10 SCC 173, a case relating to wife burning, that if the dying declaration is true and voluntary, it can be basis of conviction without corroboration. Thus, proper recording of the dying declaration by the magistrates assumes significance. There is no exhaustive list of procedures to be followed rather depends on case to case basis. It may be recorded in the form of question and answers in the language of the deceased as far as practicable. Before proceeding to record the dying declaration, the magistrate shall satisfy himself that the declarant is in a fit condition to make a statement and if medical officer is present, a fitness certificate should be obtained. It is the duty of the magistrate to ensure the making of a free and spontaneous statement by the declarant without any prompting, suggestion or aid from any other justice. If possible, at the conclusion of recording, the declaration must be read out to the declarant and signature must be obtained symbolic of correctness of the same.

LAW ON ELECTRONIC EVIDENCE

The proliferation of computers, the social influence of information technology and the ability to store information in digital form have all required Indian law to be amended to include provisions on the appreciation of digital evidence. In the year 2000 Parliament enacted the Information Technology (IT) Act 2000, which amended the existing Indian statutes to allow for the admissibility of digital evidence. The IT Act is based on the United Nations Commission on International Trade Law which adopted the Model Law on Electronic Commerce together with providing amendments to the Indian Evidence Act 1872, the Indian Penal Code 1860 and the Banker's Book Evidence Act 1891, recognizing transactions that are carried out through electronic data interchange and other means of electronic communication. Digital knowledge has become prerequisite for effective judgeship.

SUMMARY TRIALS: ROLE OF MAGISTRATES IN DELIVERING SWIFT JUSTICE

The magistrates are empowered to deal with summons cases and few specific warrant cases in a summary way with the clear intention of ensuring speedy justice. They can give an abridge version of regular trial in offences like petty thefts, house trespass, cattle trespass, insult to provoke breach of peace and other such offences punishable with imprisonment not exceeding 2 years. The inclusion of additional forms of crime, for example, section 138 cases under the Negotiable Instruments Act or section 498A cases under the Indian Penal Code have contributed a large number of cases in the criminal courts. Over 38 lakh cheque bouncing cases are pending in various courts in the country. Huge backlog of cheque bouncing or dishonoured cheque cases need to be speedily disposed, lest the litigants lose faith in the judicial system and the purpose of the Act be defeated. In this context, the Law Commission in its 213th Report has recommended setting up of fast track magisterial courts to for fast disposal of cheque. However, I strongly believe that if magistrates fulfill the mandate lay down in section 143 of the Act, separate courts may not be required. The provisions of section 143, as inserted in the Act in 2002, state that offences under section 138 of the Act shall be tried in a summary manner. It empowers the Magistrate to pass a sentence of imprisonment for a term up to one year and an amount of fine exceeding five thousand rupees. It also provides that if it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may

have to be passed, he can do so after hearing the parties and recalling any witness who may have been examined. Under this provision, so far as practicable, the Magistrate is expected to conduct the trial on a day-to day basis until its conclusion and conclude the trial within six months from the date of filing of the complaint. Further, section 147 makes the offence punishable under section 138 of the Act compoundable i.e. it can be settled between the parties. The court can note the same and record the settlement reached. In Damodar S PrabhuvsSayedBabalal (2010) 5 SCC 663, the Court laid down certain broad guidelines to ensure that application for compounding is made at an early stage of trial. The guideline empowers the magistrate to (a) Give directions making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused. (b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit. The court further observed that: "Complaints are being increasingly filed in multiple jurisdictions in a vexatious manner which causes tremendous harassment and prejudice to the drawers of the cheque. We direct that it should be mandatory for the complainant to disclose that no other complaint has been filed in any other court in respect of the same transaction. Such a disclosure should be made on a sworn affidavit which should accompany the complaint filed under Section 200 of the CrPC" section 143 of the Act and above-mentioned guidelines so that you comprehend the significance of summary trial procedure as a tool in your hands, which you must utilize to deliver swift justice. The responsibility is cast on you to act in a fair, judicious and yet balanced way to ensure that the accused also gets a fair opportunity of defending the case and, at the same time, also to ensure that this provision is not misused by the accused only for the purpose of protracting the trial or to defeat the ends of justice.

Institutional Decision Based on a preponderance of the evidence, the institution's deciding official usually makes the final determination whether to accept the investigation report, its findings, and the recommended institutional actions. If this

determination varies from that of the investigation committee, the deciding official needs to explain in detail the basis for rendering a decision different from that of the investigation committee in the institution's letter transmitting the report to ORI. The explanation should be consistent with the PHS definition of research misconduct, the institution's policies and procedures, and the evidence reviewed and analyzed by the investigation committee. The deciding official may also return the report to the investigation committee with a request for further fact-finding or analysis. The deciding official's determination, together with the investigation committee's report, constitutes the final investigation report for purposes of ORI review. When a final decision on the case has been reached, the institution needs to notify both the respondent and the whistleblower in writing. In addition, the deciding official will determine whether law enforcement agencies, professional societies, professional licensing boards, editors of journals in which falsified reports may have been published, collaborators of the respondent in the work, or other relevant parties should be notified of the outcome of the case. The institution is also responsible for ensuring compliance with all notification requirements of funding or sponsoring agencies. In addition, the institutional policy may permit an appeal. If so, the policy should specify the grounds for an appeal and the procedures for filing an appeal.

UNIT-IV: Administrative Discretion and Judicial Control of Administrative Action

a. Need and its relationship with rule of law

Introduction:

Rule of law is classical principle of administrative law. As a matter of fact this principle was one of the principles that acted as impediment development of Administrative Law principles. The irony further is that the rule of law is now an important part of modern Administrative Law. Whereas the rule of law is still the one of the very important principles regulating in common law countries and common law derived countries modern laws has denied some of the important parts of rule of law as proposed by Dicey at the start of 19th Century. Dicey Rule of Law: The concept of rule of law backs to the time of Aristotle. Aristotle ruled out the concept of rule under discretion by all means and tried to convey his followers that given the choice it is always rule of law that scores over rule of discretion. In Modern times the

rule of law was propounded by the Albert Dicey, a British jurist and Philosopher. He gave following three postulates of rule of law: 1. Everyone is equal before the law. 2. Sanctions have to be backed by law. 3. Courts are the ultimate body and supremacy of court is ambivalent in civilized society. He was firm proponent of the concept and very influential thinker of his times. Though the first two principles are still in almost every legal system of world, the third principle was protested many of jurists of that time. The Dicey in particular opposed the principle of French system of DroitAdministratif. England at that time was in fact propounding some quasi legislative and quasi judicial processes which were taken cognizance of English thinkers of that time; still the whole common law system of country was blindfolded with the Dicey's philosophy of "rule of law." Dicey's Rule of Law and Modern Administrative Law: Dicey's view and proposition of rule of law has succeeded in part and wasn't sustainable on other. Most of the modern legal system implements the principles of judicial review and similar principles of proportionality and legitimate expectations. Dicey's views on written and unwritten constitutions are subject to much debate and discussion. What can be said is that some written constitutions (e.g. the U.S. Constitution) have been quite successful at providing a framework within which individual rights are protected while others (e.g. some of the Soviet blocks constitutions) have been near total failures. The modern administrative law is fine mixture of DroitAdministratif, the French law system and Dicey rule of law. The sophisticated combination of the two principles has given rise to powerful and vast body of executive. In fact the development of modern Administrative law is consequence of development of administration and its side effects. Objective of Paper: In this paper I am going to critically examine the pros and cons of modern administrative law in terms of balance of efficiency and bureaucracy. This paper shall also discuss the constitutional provisions all over the world and compare the implementation part of it in governance.

b. **Constitutional imperative and exercise of discretion Administrative action:**

No law can clothe administrative discretion with a complete finality, for the courts always examine the ambit and even the mode of its exercise for the angle of its conformity with fundamental rights. The fundamental rights thus provide a basis to the judiciary in India to control administrative discretion to a large extent. There have been a number of cases in which a law, conferring discretionary powers, has

been held violative of a fundamental right. The following discussion will illustrate the cases of judicial restraints on the exercise of discretion in India. Administrative Discretion and Article 14: Article14 prevents arbitrary discretion being vested in the executive. Equality is antithetic to arbitrariness. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. Right to equality affords protection not only against discretionary laws passed by legislature but also prevents arbitrary discretion being vested in the executive. Often executive or administrative officer or Government is given wide discretionary power. In a number of cases, the Statute has been challenged on the ground that it conferred on an administrative authority wide discretionary powers of selecting persons or objects discriminately and therefore, it violated Article 14. The Court in determining the question of validity of such statute will examine whether the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of selection or classification. The Court will not tolerate the delegation of uncontrolled power in the hands of the Executive to such an extent as to enable it to discriminate. In State of West Bengal v. Anwar Ali, AIR 1952 SC 75. It was held that in so far as the Act empowered the Government to have cases or class of offences tried by special courts, it violated Article 14 of the Constitution. The court further held the Act invalid as it laid down "no yardstick or measure for the grouping either of persons or of cases or of offences" so as to distinguish them from others outside the purview of the Act. Moreover, the necessity of "speedier trial" was held to be too vague, uncertain and indefinite criterion to form the basis of a valid and reasonable classification. Under Article 19: Article 19 guarantees certain freedoms to the citizens of India, but they are not absolute. Reasonable restrictions can be imposed on these freedoms under the authority of law. They cannot be contended merely on executive action. The reasonableness of the restrictions is open to judicial review. These freedoms can also be afflicted by administrative discretion. Such cases can be examined below. A number of cases have come up involving the question of validity of law conferring discretion on the Executive to restrict the right under Article 19(1) (b) and (e). The State has conferred powers on the Executive to extern a person from a particular area in the interest of peace and safety in a number of statutes. In Dr. Ram Manohar v. State of Delhi, AIR 1950 SC 211, where the D.M. was empowered under East Punjab Safety Act, 1949, to make an order of internment from an area in case he was satisfied that such an order was necessary to prevent a person from acting in any

way prejudicial to public peace and order, the Supreme Court upheld the law conferring such discretion on the execution on the grounds, inter alia, that the law in the instant case was of temporary nature and it gave a right to the externee to receive the grounds of his internment from the Executive. In Hari v. Deputy Commissioner of Police, AIR 1956 SC 559, the Supreme Court upheld the validity of section 57 of the Bombay Police Act authorizing any of the officers specified therein to extern convicted persons from the area of his jurisdiction if he had reasons to believe that they are likely to commit any offence similar to that of which they were convicted. This provision of law, which apparently appears to be a violation of the residence, was upheld by court mainly on the considerations that certain safeguards are available to the externee, i.e., the right of hearing and the right to file an appeal to the State Government against the order. In a large number of cases, the question as to how much discretion can be conferred on the Executive to control and regulate trade and business has been raised. The general principle laid down in that the power conferred on the Executive should not be arbitrary, and that it should not be left entirely to the discretion of any authority to do anything it likes without any check or control by any higher authority." "Any law or order which confers arbitrary and uncontrolled power upon the Executive in the matter of the regulating trade or business is normally available in commodities control cannot but be held to be unreasonable." and no provisions to ensure a proper execution of the power and to operate as a check against injustice resulting from its improper exercise. The Supreme Court in H.R. Banthis v. Union of India (1979 1 SCC 166) declared a licensing provision invalid as it conferred an uncontrolled and unguided power on the Executive. The Gold (Control) Act, 1968, provided for licensing of dealers in gold ornaments. The Administrator was empowered under the Act to grant or renew licenses having regard to the matters, inter alia, the number of dealers existing in a region, anticipated demand, suitability of the applicant and public interest. The Supreme Court held that all these factors were vague and unintelligible. The term 'region' was nowhere defined in the Act. The expression 'anticipated demand was vague one. The expression 'suitability of the applicant and 'public interest' did not contain any objective standards or norms. Where the Act provides some general principles to guide the exercise of the discretion and thus saves it from being arbitrary and unbridled, the court will uphold it, but where the Executive has been granted 'unfettered power to interfere with the freedom of property or trade and business, the court will strike down such provision

of law. Under Article 31(2): Article 31(2) of the Constitution provided for acquisition of private property by the Government under the authority of law. It laid down two conditions, subject to which the property could be requisitioned _1) that the law provided for an amount (after 25th Amendment) to be given to the persons affected, which was non-justifiable; and (2) that the property was to be acquired for a public purpose. In an early case, where the law vested the administrative officer with the power to acquire estates of food grains at any price, it was held to be void on the grounds, inter alia, that it failed to fix the amount of compensation or specify the principles, on which it could be determined. Since the matter was entirely left to the discretion of the officer concerned to fix any compensation it liked, it violated Article 31(2). The property under Article 31(2) could be acquisitioned for a public purpose only. The Executive could be made the sole judge to decide a public purpose. No doubt, the Government is in best position to judge as to whether a public purpose could be achieved by issuing an acquisition order, but it is a justifiable issue and the final decision is with the courts in this matter. In West Bengal Settlement Kanungo Co-operative Credit Society Ltd. V. BelaBannerjee,(AIR 1954 SC 170) the provision that a Government's declaration as to its necessity to acquire certain land for public purpose shall be conclusive evidence thereof was held to be void. The Supreme Court observed that as Article 31(2) made the existence of a public purpose a necessary condition of acquisition, it is, therefore, necessary that the existence of such a purpose as a fact must be established objectively and the provision relating to the conclusiveness of the declaration of then Government as to the nature of the purpose of the acquisition must be held unconstitutional. The Courts have, however, attempted to construe the term public purpose rather broadly; the judicial test adopted for the purpose being that whatever furthers the general interests of the community as opposed to the particular interests of the individual is a public purpose. The general tendency of the Legislature is to confer the power of acquisition on the Executive in an undefined way by using vague expressions such as "purposes of the State" or "purposes of the Union", so as to give wider latitude to the courts to uphold it. Thus, we have seen in the above illustrations how the courts have used the mechanism of fundamental rights to control the administrative discretion. In fact fundamental rights are very potential instruments by which the Judiciary in India can go a long way in warding off the dangers of administrative discretion.

b. **Grounds of judicial review**

In India the administrative discretion, thus, may be reviewed by the court on the following grounds.

I. Abuse of Discretion

Now a day, the administrative authorities are conferred wide discretionary powers. There is a great need of their control so that they may not be misused. The discretionary power is required to be exercised according to law. When the mode of exercising a valid power is improper or unreasonable there is an abuse of power. In the following conditions the abuse of the discretionary power is inferred: -

i) Use for improper purpose: - The discretionary power is required to be used for the purpose for which it has been given. If it is given for one purpose and used for another purpose. It will amount to abuse of power.

ii) Malafide or Bad faith: - If the discretionary power is exercised by the authority with bad faith or dishonest intention, the action is quashed by the court. Malafide exercise of discretionary power is always bad and taken as abuse of discretion. Malafide (bad faith) may be taken to mean dishonest intention or corrupt motive. In relation to the exercise of statutory powers 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.

iii) Irrelevant consideration: - The decision of the administrative authority is declared void if it is not based on relevant and germane considerations. The considerations will be irrelevant if there is no reasonable connection between the facts and the grounds.

iv) Leaving out relevant considerations:- The administrative authority exercising the discretionary power is required to take into account all the relevant facts. If it leaves out relevant consideration, its action will be invalid.

v) Mixed consideration: - Sometimes the discretionary power is exercised by the authority on both relevant and irrelevant grounds. In such condition the court will examine whether or not the exclusion of the irrelevant or non-existent considerations would have affected the ultimate decision. If the court is satisfied that the exclusion of the irrelevant considerations would have affected the decision, the order passed by the authority in the exercise of the discretionary power will be declared invalid but if

the court is satisfied that the exclusion of the irrelevant considerations would not be declared invalid.

vi) Unreasonableness: - The Discretionary power is required to be exercised by the authority reasonably. If it is exercised unreasonably it will be declared invalid by the court. Every authority is required to exercise its powers reasonably. In a case Lord Wrenbury has observed that a person in whom invested a discretion must exercise his discretion upon reasonable grounds. Where a person is conferred discretionary power it should not be taken to mean that he has been empowered to do what he likes merely because he is minded to do so. He is required to do what he ought and the discretion does not empower him to do what he likes. He is required, by use of his reason, to ascertain and follow the course which reason directs. He is required to act reasonably.

vii) Colourable Exercise of Power: - Where the discretionary power is exercised by the authority on which it has been conferred ostensibly for the purpose for which it has been given but in reality for some other purpose, it is taken as colorable exercise of the discretionary power and it is declared invalid.

viii) Non-compliance with procedural requirements and principles of natural justice: - If the procedural requirement laid down in the statute is mandatory and it is not complied, the exercise of power will be bad. Whether the procedural requirement is mandatory or directory is decided by the court. Principles of natural justice are also required to be observed.

ix) Exceeding jurisdiction: - The authority is required to exercise the power within the limits or the statute. Consequently, if the authority exceeds this limit, its action will be held to be ultra vires and, therefore, void.

II. Failure to exercise Discretion

In the following condition the authority is taken to have failed to exercise its discretion and its decision or action will be bad.

i) Non-application of mind: - Where an authority is given discretionary powers it is required to exercise it by applying its mind to the facts and circumstances of the case in hand. If he does not do so it will be deemed to have failed to exercise its discretion and its action or decision will be bad.

ii) Acting under Dictation: - Where the authority exercises its discretionary power under the instructions or dictation from superior authority. It is taken, as non-

exercise of power by the authority and its decision or action is bad. In such condition the authority purports to act on its own but in substance the power is not exercised by it but by the other authority. The authority entrusted with the powers does not take action on its own judgment and does not apply its mind. For example in Commissioner of Police v. Gordhandas the Police Commissioner empowered to grant license for construction of cinema theatres granted the license but later cancelled it on the discretion of the Government. The cancellation order was declared bad as the Police Commissioner did not apply his mind and acted under the dictation of the Government.

III) Imposing fetters on the exercise of discretionary powers: - If the authority imposes fetters on its discretion by announcing rules of policy to be applied by it rigidly to all cases coming before it for decision, its action or decision will be bad. The authority entrusted with the discretionary power is required to exercise it after considering the individual cases and if the authority imposes fetters on its discretion by adopting fixed rule of policy to be applied rigidly to all cases coming before it, it will be taken as failure to exercise discretion and its action or decision or order will be bad.

Illegality, irrationality and procedure impropriety:

Illegality: In Lord Diplock's words, this ground means that the decision maker "must understand correctly the law that regulates his decision-making power and must give effect to it."

A decision may be illegal for many different reasons. There are no hard and fast rules for their classification, but the most common examples of cases where the courts hold administrative decisions to be unlawful are the following:

The decision is made by the wrong person (unlawful sub-delegation): If the law empowers a particular authority, e.g. a minister, to make certain decisions, the Minister cannot subdelegate this power to another authority, e.g. an executive officer or a committee. This differs from a routine job not involving much discretion being done by civil servants in the Minister's name, which is not considered delegation. An example of when this happened was in Allingham v Minister of Agriculture and Fisheries where a notice preventing farmers from growing sugar beet was unlawful because the power to put up the sign was delegated by the original committee. Where a decision is made by a properly empowered department within a local council, s.101 of the Local Government Act allows for delegation.

Irrationality: Under Lord Diplock's classification, a decision is irrational if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it." This standard is also known as Wednesbury unreasonableness, after the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, where it was first imposed.

Unlike illegality and procedural impropriety, the courts under this head look at the merits of the decision, rather than at the procedure by which it was arrived at or the legal basis on which it was founded. The question to ask is whether the decision "makes sense". In many circumstances listed under "illegality", the decision may also be considered irrational.

Proportionality: Proportionality is a requirement that a decision is proportionate to the aim that it seeks to achieve. E.g. an order to forbid a protest march on the grounds of public safety should not be made if there is an alternative way of protecting public safety, e.g. by assigning an alternative route for the march. Proportionality exists as a ground for setting aside administrative decisions in most continental legal systems and is recognised in England in cases where issues of EC law and ECHR rights are involved. However, it is not as yet a separate ground of judicial review, although Lord Diplock has alluded to the possibility of it being recognised as such in the future. At present, lack of proportionality may be used as an argument for a decision being irrational

Procedural impropriety: A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute have not been followed or if the 'rules of natural justice have not been adhered to.

Statutory procedures: An Act of Parliament may subject the making of a certain decision to a procedure, such as the holding of a public hearing or inquiry, or a consultation with an external adviser. Some decisions may be subject to approval by a higher body. Courts distinguish between "mandatory" requirements and "directory" requirements. A breach of mandatory procedural requirements will lead to a decision being set aside for procedural impropriety.

c. **Doctrine of legitimate expectation**

Legitimate expectation is the ground of judicial review. Besides the above grounds on which the exercise of discretionary powers can be examined, a third major basis of

judicial review of administrative action is legitimate expectation, which is developing sharply in recent times. The concept of legitimate expectation in administrative law has now, undoubtedly, gained sufficient importance. It is stated that the legitimate expectation is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action and this creation takes its place besides such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and in future, perhaps, the unreasonableness, the proportionality. In Union of India v. Hindustan Development Corporations, (1993 3SCC 499) the court held that it only operates in public law field and provides locus standi for judicial review. Its denial is a ground for challenging the decision but denial can be justified by showing some overriding public interest. In the instant case, question arose regarding the validity of the dual policy of the government in the matter of contracts with private parties for supply of goods. There was no fixed procedure for fixation of price and allotment of quality to be supplied by the big and small suppliers. The government adopted a dual price policy, lower price for big suppliers and higher price for small suppliers in public interest and allotment of quantity by suitably adjusting the same so as to break the cartel. The court held that this does not involve denial of any legitimate expectation. The court observed: legitimate expectations may come in various forms and owe their existence to different kind of circumstances and it is not possible to give an exhaustive list in the context of vast and fast expansion of governmental activities. By and large they arise in cases of promotions, which are in normal course expected, though not guaranteed by way of statutory right, in cases of contracts, distribution of largess by the Government and in somewhat similar situations. Legitimate expectation gives the applicant sufficient locus standi for judicial review. The doctrine of legitimate expectation is to be confined mostly to right of fair hearing before a decision, which results in negative a promise, or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate does not require the fulfillment of the expectation where an overriding public interest requires otherwise. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation, which it would be within its powers to fulfill. The protection is limited to that extent and a judicial review can be within those limits. A person, who bases his claim on the doctrine of legitimate expectation, in the first instance, must

satisfy that there is foundation and thus he has locus standi to make such a claim. There are stronger reasons as to why the legitimate expectation should not be substantively protected than the reason as to why it should be protected. If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or arbitrary, discriminatory unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is " not the key which unlocks the treasury of natural justice and it ought not to unlock the gate which shuts, the court out of review on the merits", particularly when the element of speculation and uncertainly is inherent in that very concept. The courts should restrain themselves and restrict such claims duly to the legal limitations. Further in Food Corporation of India v. M/s. Kamdhenu Cattle Seed Industries AIR 1993 SC 1601. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and this extent. The Court observed: "The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process." In LalaSachinder Kumar v. Patna Regional Development Authority, (AIR 1994 PATNA 128) the court again applied the doctrine of legitimate expectation and held the order of allotment of residential plots issued by the Patna Regional Development Authority as bad. In the instant case Regional Development Authority issued an advertisement inviting applications for the allotment of residential plots. In this process preference was given to the employees of the Patna Regional Development Authority without considering the

case of applicant petitioner, whereas Rules did not provide for any such preferential allotment. The court held that allotment in favor of employees is arbitrary. The applicant petitioner has legitimate expectations to be considered for allotment.

d. **Evolution of concept of Ombudsmen**

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 A Module – 1 138 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. 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.

e. **Lokpal and Lokayukta Act:**

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 Module – 1 139 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. The system introduced as stated above functioned till March 1985 when a separate Department of Administrative Reforms and Public grievances was set up.

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.

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.

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.

Anti corruption bodies and and their administrative procedures:

A anti-corruption is an institution that is granted a charter recognizing it as a separate legal entity having its own privileges and liabilities distinct from those of its members. A corporation means a legal entity.

There are two types of corporations.

1. Corporation sole constituted of one person who has been incorporated by law such as the Administrator General, the AG, the Registrar of Tittles, the IGG etc.,

2. A corporation aggregate is constituted of a group of individuals such that they can act, control or hold property in the name of that group.

In Uganda, legal entities which are incorporated under the Companies Act, Cap 110 are known as companies.

A public corporation is a corporate body established by law to carry out certain specified functions for one reason or another that cannot be appropriately done by the government, a government ministry or department. See S. 170 Companies Act. They are a means of

implementing certain aspects of socio-economic policies of government. Examples, Uganda Investment Authority

An important feature of a Corporation is limited liability. If a corporation fails, shareholders normally only stand to lose their investments and employees will lose their jobs, but neither will they be further liable for debts that remain owing to the corporations creditors.

TRAITS OF PUBLIC CORPORATIONS

a) Corporate status as a legal entity,

b) Created by Specific statutes passed by the legislature, which spell out the functions, sources of funds, management of the relevant corporations.

c) Largely independent of the central government. They are not government they are managed by a board of directors. However, they are always under the general control of the Line ministers and are subject to ministerial control.

d) They have perpetual succession and a common seal.

CLASSIFICATIONS OF PUBLIC CORPORATIONS

Public corporations may be classified according to the functions for which they are created, namely.

a) Development corporations.

i. Some development corporations are set up to promote development of a sector of the economy. I.e. Wildlife Authority, Uganda Tourist Board for the tourism sector.

ii. Some development corporations are set up to provide public utilities, e.g. Uganda national Water and Sewage Corporation.

NOTE: Many Utility Corporation have since been privatised, i.e. UMEME. In the past, it was argued that public corporations could generate capital for reinvesting in the economy that it could attract foreign investment developing infrastructure that was not attractive to private investors etc. but these conceptions have since been departed from. It is now argued that these functions can be performed better by private enterprises.

b) Regulatory Corporations. E.g.

i. Uganda land Commission is set up for the purpose of granting alienating and controlling public land on behalf of the government.

ii. National Drug authority to regulate the manufacture, importation and sale of pharmaceuticals ion the country.

c) Finance Corporations. Bank of Uganda, Uganda Development Bank

d) Marketing boards. In as much as these have been phased out, they include the Coffee Marketing Board, Lint Marketing Board.

e) Educational, cultural and public amenities Corporations, e.g. LDC, Makerere University and UMI (Uganda Management Institute).

f) Cultural. Trustees of Nakivuubo War Memorial Stadium Trust, etc.

PURPOSES OF PUBLIC CORPORATIONS

a) Regulatory purposes, for controlling a particular sector, e.g. Uganda Communication Commission regulates, issues of License, radio stations and TVs

b) For service delivery i.e. to deliver specialized service.

c) For purposes of handling technical/ scientific matters which cannot be conveniently carried out within government.

d) For commercial purposes, i.e. to make profits for example Uganda Development Corporation, in 1950's

CONCLUSION

In the light of the above discussion I have come to the conclusion that the doctrine of res judicata will not apply unless all four conditions have been proved. The provisions of section 11 of CPC are not directory but mandatory. The Section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue. The doctrine of res judicata is ultimately based on considerations of public policy. One important public consideration of public policy is that the decisions pronounced by Courts of competent jurisdiction should be final unless they are modified or reversed by appellate authorities and the other principle is that no one should be made to face

the same kind of litigation twice over because such a process would be contrary to considerations of fair play and justice. The Doctrine of res Judicata is not only confined to decisions in a suit and that the doctrine applies even to decisions rendered in proceedings which are not suits but how far the decision which is rendered in original proceedings will bind the parties depends upon the considerations. A decision given in proceedings other than a suit may still operate as res Judicata if substantial rights of the parties are determined. But if the decision is given in a summary proceeding it does not operate as res Judicata. The principle of res Judicata does not apply strictly to public interest litigations. The primary object of res Judicata is to bring an end to litigation, so there is no reason not to extend the doctrine of res judicata.

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BA LLB 4TH SEM

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Administrative Law

Unit – I: Evolution and Scope of Administrative Law

a. Nature, Scope of development administrative law

Definition:

Definition by Ivor Jennings Ivor Jennings in his "The law and the constitution, 1959" provided the following definition of the term "administrative law". According to him, "administrative law is the law relating to the administrative authorities".

This is the most widely accepted definition, but there are two difficulties in this definition.

(1) It is very wide definition, for the law which determines the power and functions of administrative authorities may also deal with the substantive aspects of such powers. For example:- Legislation relation to public health services, houses, town and country planning etc.. But these are not included within the scope and ambit of administrative law, and

(2) It does not distinguish administrative law from constitution law.

According to K. C. Davis, "Administrative law as the law concerns the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action".

Definition by Prof. Wade According to Wade (Administrative Law, 1967) any attempt to define administrative law will create a number of difficulties. But if the powers and authorities of the state are classified as legislative, administrative and judicial, then administrative law might be said "the law which concerns administrative authorities as opposed to the others".

Scope of administrative law

I- Public Law/Private Law Divide The boundaries of administrative law extend only when administrative agencies and public officials exercise statutory or public powers, or when performing public duties. In both civil and common-law countries, these types of functions are sometimes called —public law functions to distinguish them from —private law functions. The former govern the relationship between the state and the individual, whereas the later governs the relationship between individual citizens and some forms of relationships with the state, like relationship based on government contract. For example, if a citizen works in a state owned factory and is dismissed, he or she would sue as a —private law function. However, if he is a civil servant, he or she would sue as a —public law function. Similarly, if residents of the surrounding community were concerned about a decision to enlarge the state- owned factory because of environmental pollution, the legality of the decision could be reviewed by the courts as a —public law function. It is also to be noted that a contract between an individual or business organization with a certain administrative agency is a private law function governed by rules of contract applicable to any individual – individual relationship. However, if it is an administrative contract it is subject to different rules. The point here is that the rules and principles of administrative law are applicable in a relationship between citizens and the state; they do not extend to cases where the nature of the relationship is characterized by a private law function.

B) Substance vs. Procedure

Many of the definition and approaches to administrative law are limited to procedural aspects of the subject. The focus of administrative law is mainly on the manner and procedure of exercising power granted to administrative agencies by the legislature. Fox describes the trend and interaction between substance and procedure as. It is the unifying force of the administrative process – in dramatic contrast to the wide variety of substantive problems with which agencies deal- that has persuaded most administrative law professors to concentrate on agency procedure rather than agency substance. Hence, to a wider extent, the study of administrative law has been limited to analyzing the manner in which matters move through an agency, rather than the wisdom of the matters themselves. With respect to judicial review, the basic question asked is not whether a particular

decision is —right, or whether the judge, or a Minister, or officials have come to a different decision. The questions are what is the legal limit of power or reasonable limit of discretion the law has conferred on the official? That power been exceeded, or otherwise unlawfully exercised? Therefore, administrative law is not concerned with the merits of the decision, but with the decision making process.

Development of Administrative Law

Administrative law was existent in India even in ancient times. Under the Mauryas and Guptas, several centuries before christ, there was well organised and centralise Administration in India. The rule of "Dharma" was observed by kings and Administrators and nobody claimed any exemption from it. The basic principle of natural justice and fair play were followed by the kings and officers as the administration could be run only on those principles accepted by Dharma, which was even a wider word than "Rule of Law" or "Due process of Law", Yet, there was no Administrative law is existence in the sense in which we study it today. With the establishment of East India company (EIC) and event of the British Rule in India. The powers of the government had increased. Many Acts, statutes and Legislation were passed by the British government regulating public safety, health, morality transport and labour relations. Practice of granting Administrative licence began with the State Carriage Act 1861. The first public corporation was established under the Bombay Port Trust Act 1879. Delegated legislation was accepted by the Northrn India Canal and Drainage Act, 1873 and Opium Act 1878 proper and effective steps were taken to regulate the trade and traffic in explosives by the Indian Explosives by the Indian Explosives Act 1884.

In many, statutes, provisions were made with regard to holding of permits and licences and for the settlement of disputes by the Administrative authorities and Tribunals. During the Second World War, the executive powers tremendously increased Defence of India Act, 1939 and the rules made there under conferred ample powers on the property of an individual with little or no judicial control over them, In addition to this, the government issued many orders and ordinances, covering several matters by way of Administrative instructions.

The philosophy of a welfare state has been specifically embodied in the constitution of India. In the constitution itself, the provisions are made to secure to all citizens social, economic and political justice, equality of status and opportunity. The ownership and control of material resources of the society should be so distributed as best to sub serve the common good. The operation of the economic system should not result in the concentration of all these objects.

In Fact, to secure those objects, several steps have been taken by the parliament by passing many Acts, e.g. the Industrial (Development and Regulation) Act 1951, the Requisitioning and Acquisition of Immovable Property Act 1952, the Essential Commodities Act, 1955. The Companies Act 1956, the Banking Companies (Acquisition and Transfer of undertakings) Act, 1969. The Maternity Benefits Act, 1961, The Payment of Bonus Act 1965, The Equal Remuneration Act 1976, The Urban Land (ceiling and Regulation) Act 1976, The Beedi Worker's Welfare Fund Act, 1976 etc.

Even, while interpreting all these Acts and the provisions of the constitution, the judiciary started taking into consideration the objects and ideals social welfare. Thus, in Vellunkunnel Vs. Reserve Bank of India AIR) 1962 SC137), the Supreme Court held that under the Banking Companies Act, 1949 the Reserve Bank was the sole judge to decide whether the affairs of a Banking company where being conducted in a manner prejudicial to the depositors, interest and the court had no option but to pass an order of winding up as prayed for by the Reserve Bank.
In state of Andhra Pradesh Vs. C. V. Rao, (1975) 2 SCC 557 dealing with departmental inquiry, the Supreme Court held that the jurisdiction to issue a writ of certiorari under Article 226 is supervisory in nature. In is not an appellate court and if there is some evidence or record on which the tribunal had passed the order, the said findings cannot be challenged on the ground the evidence for the same is insufficient or inadequate. The adequacy or sufficiency of evidence is within the exclusive jurisdiction of the tribunal.

b. Rule of law and Administrative law

The expression 'Rule of Law' has been derived from the French phrase 'la principle de legalite', i.e. a Government based on the principles of law. It is implied by the state in the administration of justice. The Rule of law, according to Gamer, is of en used simply to describe the state le words, the term 'rule of law' indicates the state of affairs in a country where, in main, the law mules. 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 aloof affairs in a country where, in main, the law is observed and order is kept. It is an expression synonymous with law and order.

The basis of Administrative Law is the 'Doctrine of the Rule of Law'. It was expounded for the first time by Sri Edward Coke, and was developed by Prof. A.V. Dicey in his book 'The law of the Constitution' published in 1885. According Coke, in a battle against King, he should be under God and the Lank thereby the Supremacy of Law is established.

Dicey regarded rule of law as the bedrock of the British Legal System:. 'Fins doctrine is accepted in the constitutions of U.S.A. and India.

According to Prof. Diccy, rules of law contain three principles or it has three meanings as stated below:

1. Supremacy of I.aw or the Firs (meaning of the Rule of Law.
2. Equality before Law or the Second meaning of the Rule of Law: and
3. Predominance of Legal Spirit or the Third meaning of the Rule of Lim.

1. Supremacy of Law: 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. It implies that a man may be punished for a breach of law but cannot be punished for anything else. No man can be punished except for a breach of law. An alleged offence is required to be proved before the ordinary courts in accordance with the ordinary procedure.
2. Equality before Law: - The Second meaning of the Rule of Law is that no man is above law. Every man whatever is his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. Prof. Dicey states that, there must be equality before the law or equal subjection of all classes to the ordinary law of the land. He criticized the French legal system of

droit Administrative in which there were separate administrative tribunals for deciding the cases of State Officials and citizens separately. He criticizes such system as negation of law

3. Predominance of Legal Spirit: - The Third meaning of the rule of law is that the general principles of the constitution are the result of juridical decisions determining file rights of private persons in particular cases brought before the Court. Dicey states that many constitutions of the states (countries) guarantee their citizens certain rights (fundamental or human or basic rights) such as right to personal liberty, freedom from arrest etc. According to him documentary guarantee of such rights is not enough. Such rights can be made available to the citizens only when they are properly enforceable in the Courts of law, For Instance, in England there is no written constitution and such rights are the result judicial decision.

Rule of Law under the Constitution of India: - The doctrine of Rule of Law has been adopted in Indian Constitution. The ideals of the Constitution, justice, liberty and equality are enshrined (embodied) in the preamble. The Constitution of India has been made the supreme law of the country and other laws arc required to be in conformity with the Constitution. Any law which is found in violation of any provision of the Constitution is declared invalid. Part III of the Constitution of India guarantees the Fundamental Rights. Article 13(l) of the Constitution makes it clear that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provision of Part ill dealing with the Fundamental Rights, shall, to the extent of such inconsistency, be void. Article 13(2) provides that the State should 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. The Constitution guarantees equality before law and equal protection of laws. Article 21 guarantees right to life and personal liberty. It provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 19 (1) (a) guarantees the third principle of rule of law (freedom of such and expression).

Article 19 guarantees six Fundamental Freedoms to the citizens of India -- freedom of speech and expression, freedom of assembly, freedom to form associations or unions, freedom to live in any part of the territory of India and freedom of profession, occupation, trade or business. The right to these freedoms is not absolute, but subject to the reasonable restrictions which may be imposed by the State.

Article 20(1) provides that no person shall he convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence not be subject to a penalty greater than that which might have been inflicted tinder the law in for cc at the time of the commission of the offence. According to Article 20(2), no person shall be prosecuted and punished for the same offence more than once. Article 20(3) makes it clear that no person accused of the offence shall be compelled to be witness against himself. In India, Constitution is supreme and the three organs of the Government viz. Legislature, Executive and judiciary are subordinate to it. The Constitution provided for encroachment of one organ (E.g.: Judiciary) upon another (E.g.: Legislature) if its action is mala fide, as the citizen (individual) can challenge under Article 32 of the Constitution.

In India, the meaning of rule of law has been much expanded. It is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by Parliament. It is also regarded as a part of natural justice.

In KesavandaBharti vs. State of Kerala (1973) - The Supreme Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure.

In Menaka Gandhi vs. Union of India, AIR 1978 SC 597 - The Supreme Court declared that Article 14 strikes against arbitrariness.

In Indira Gandhi Nehru vs. Raj Narahr, Alit 1975 SC 2299 - Article 329-A was inserted in the Constitution under 39th amendment, which provided certain immunities to the election of office of Prime Minister from judicial review. The Supreme Court declared Article 329-A as invalid since it abridges the basic structure of the Constitution.

In A.D.M Jabalpur vs.,ShivakantShukla (1976) 2 SCC 521 AIR 1976 SC 1207 - This case is popularly known as Habeas Corpus Case.

On 25th June, emergency was proclaimed under Article 359. Large number of persons was arrested under N11SA (Maintenance of Internal Security Act. 1971) without informing the grounds for arrest. Some of their filed petition in various high Courts for writ of Heabeas Corpus. The petitioners contend that their detention is violation of Article 21. It was argued on the other side that the protection tinder Article 21 is not available (suspended) during emergency. The preliminary objection (not to file writ petitions during emergency). The Preliminary objection (not to file writ petitions during emergence) was rejected by various High Courts. The Madhya Pradesh Government through Additional District Magistrate. Jabalpur and Government of India filed appeals before Supreme Court. The question before Supreme Court was, whether there was any rule of law in India apart front Article 21 of the Constitution. The Supreme Court by majority held that there is no rule of law other than the constitutional rule of law. Article 21 is our rule of law. If it is suspended, there is not rule of law.

Rule of law and Administrative law

Introduction: Rule of law is classical principle of administrative law. As a matter of fact this principle was one of the principles that acted as impediment development of Administrative Law principles. The irony further is that the rule of law is now an important part of modern Administrative Law. Whereas the rule of law is still the one of the very important principles regulating in common law countries and common law derived countries modern laws has denied some of the important parts of rule of law as proposed by Dicey at the start of 19th Century. Dicey Rule of Law: The concept of rule of law backs to the time of Aristotle. Aristotle ruled out the concept of rule under discretion by all means and tried to convey his followers that given the choice it is always rule of law that scores over rule of discretion. In Modern times the rule of law was propounded by the Albert Dicey, a British jurist and Philosopher. He gave following three postulates of rule of law: 1. Everyone is equal before the law. 2. Sanctions have to be backed by law. 3. Courts are the ultimate body and supremacy of court is ambivalent in civilized society. He was firm proponent of the concept and very influential thinker of his times. Though the first two principles are still in almost every legal system of

world, the third principle was protested many of jurists of that time. The Dicey in particular opposed the principle of French system of DroitAdministratif. England at that time was in fact propounding some quasi legislative and quasi judicial processes which were taken cognizance of English thinkers of that time; still the whole common law system of country was blindfolded with the Dicey's philosophy of "rule of law."

Dicey's Rule of Law and Modern Administrative Law: Dicey's view and proposition of rule of law has succeeded in part and wasn't sustainable on other. Most of the modern legal system implements the principles of judicial review and similar principles of proportionality and legitimate expectations. Dicey's views on written and unwritten constitutions are subject to much debate and discussion.
What can be said is that some written constitutions (e.g. the U.S. Constitution) have been quite successful at providing a framework within which individual rights are protected while others (e.g. some of the Soviet blocks constitutions) have been near total failures.
The modern administrative law is fine mixture of DroitAdministratif, the French law system and Dicey rule of law. The sophisticated combination of the two principles has given rise to powerful and vast body of executive. In fact the development of modern Administrative law is consequence of development of administration and its side effects.
Objective of Paper: In this paper I am going to critically examine the pros and cons of modern administrative law in terms of balance of efficiency and bureaucracy. This paper shall also discuss the constitutional provisions all over the world and compare the implementation part of it in governance.

c. Separation of powers and its relevance

1. INTRODUCTION

1.1. Concept of Separations of Powers In the context of separation of powers, judicial review is crucial and important. We have three wings of the state, judiciary, Legislature and Executive with their function clearly chalked out in our Constitutions. Article 13 of the constitution mandates that the "state shall make no law, which violates, abridges or takes away rights conferred under part III". This implies that both the Legislature and

judiciary in the spirit of the words can make a law, but under the theory of checks and balances, the judiciary is also vested with the power to keep a check on the laws made by the Legislature. Montesquieu: The foundations of theory of separation of powers were laid by the French Jurist Baron De Montesquieu (1689-1755) in his great work Espirt De Lois (the spirit of Laws) published in 1748. The conclusions of Montesquieu are summarized in the following quoted passage."When the legislative and executive powers are united in the same persons or body there can be no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to enforce them in a tyrannical manner...were the powers of judging joined with the legislature the life and liberty of the subject would be exposed to arbitrary control. For the judge would then be the legislator. Were it joined to the executive power, the judge might be have with all the violence of an oppressors" To obviate the danger of arbitrary government and tyranny Montesquieu advocated a separation of governmental functions. The decline of separation of powers requires that the functions of legislations, administration and adjudications should not be placed in the hand of one body of persons but should be distributed among the district or separate bodies of persons.

2. PRINCIPLES OF CHECKS AND BALANCES The doctrine of separations of powers may be traced back to an earlier theory known as the theory of mixed government from which it has been evolved. That theory is of great antiquity and was adurnbrated in the writings of Polybius, a great historian who was captured by the Romans in 167 BC and kept in Rome as a Political hostage for 17 years in his history of Rome Polybius explained the reasons for the exceptional stability of Roman Government which enabled Rome to establish a worldwide empire. He advanced the theory that the powers of Rome stemmed from her mixed government. Unmixed systems of government that is the three primary forms of government namely, Monarchy, Aristocracy and Democracy – were considered by Polybius as inherently unstable and liable to rapid degeneration. The Roman constitutions counteracted that instability and tendency to degeneration by a happy mixture of principles drawn from all the three primary forms of government. The consuls, the senate and the popular Assemblies exemplified the monarchical, the aristocratic and the democratic principles respectively. The powers of Government were distributed between them in such a way that each checked and was checked by the others so that an equipoise or equilibrium was achieved which imparted a remarkable stability to the constitutional structure. It is from the wok of Polybius that political

theorist in the 17th Century evolved that theory of separation of powers and the closely related theory of checks and Balances.

3. SEPARATION OF POWERS- INDIAN CONSTITUTIONS Indian constitution is a very well built document. It assigns different roles to all the three wings of government the Legislature, Executive and the Judiciary. There is no ambiguity about each wings power, privilege and duties. Parliament has to enact law, Executive has to enforce them and the judiciary has to interpret them. There is supposed to be no overlapping or overstepping. The judiciary versus the Executive or Legislative is a battle which is not new but in recent times, the confrontation is unprecedented with both the sides taking the demarcation of powers to a flash point. Justice Mukherjee observed, "it does not admit of any serious dispute that the doctrine of separation of powers has, strictly speaking no place in the system of Government that Indian has at the present day". The theory of checks and balance has been observed in the Indian constitutions. There is no rigorous separation of powers. For instance, parliament has the judicial power of impeachment and punishing for contempt. The president has the legislative powers of ordinance making. Thus the Indian constitution has not applied the doctrine of separation of powers in its strictest form.

4. JUDICIARY –IMPORTANCE AND ITS NEED Judiciary – It's Importance: An endeavor is being made to highlights the judicial functioning in India, in the context of increasing cases of judicial corruptions and delays in administration of justice. The Indian judiciary has so far, gained the public confidence in discharging its constitutional functions. As an institution, the judiciary has always commanded considerable respect from the people of country. The roots of this high regard lie in the impartiality, independence and integrity of the members of the judiciary. The judiciary in a democratic polity governed by the rule of law stands as a bull work against abuse or misuse of excess use of powers on the part of the executive and protects the citizens against the government lawlessness. Judiciary – It Need: Expressing the needs for and importance of judiciary a learned jurist aptly remarks: "middle class people are combating with the government powers through media of the courts". The Indian judiciary is considered as Guardian of the Rights of the citizens of India, explained, argued and emphasized in several contexts.

5. INDEPENDENCE OF JUDICIARY "Judiciary is unlimited"- an unelected judiciary which is not accountable to anyone except its own temperament has taken over

significant powers of Indian Governance. The courts have gone well beyond ensuring that laws are implemented. Now, the Supreme court has invented its own laws and methods of implementation, gained control of bureaucracy and threatened officers with contempt of court if its instructions are not complied with. The question is not whether some good has come out of the all this. The issue is whether the courts have arrogated vase and uncontrolled powers of themselves which undermine both Democracy and Rule of law, including the question is no undermine both Democracy and Rule of Law including the powers exercised under the doctrine of separation of powers.

6. CONCLUSION Administration of justice is a divine function. In fact a nation's rank in the civilization is generally determined according to the degree in which s justice is actually administrated. This sacred functions to be an institutions manned by men of high efficiency, honesty and integrity. As the old adages goes, "Justice delayed is Justice denied". This phrase seems to be tune in so far as the administration of justice in India is concerned. While the people have reasons to feel disappointed with functioning of the legislatures and the executive, they have over the years clung to the belief that they can go to the courts for help. But unfortunately, the judiciary is fast losing its credibility in the eyes of the people for one of the main reasons that justice delivery systems have become costlier and highly time consuming. It is needless to say that the ultimate success of a democratic system is measured in terms of the effectiveness and efficiency of its administration of justice system. More rightly observed by Lord Bryce, "There is no better test of the excellence of a Government than the efficiency of its judicial system".

d. **The Relationship of Administrative Law to Constitutional Law and Other Concepts**

CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW Administrative law is categorized as public law since it governs the relationship between the government and the individual. The same can be said of constitutional law. Hence, it is undeniable that these two areas of law, subject to their differences, also share some common features. With the exception of the English experience, it has never been difficult to make a clear distinction between administrative law and constitutional law. However, so many administrative lawyers agree that administrative law cannot be fully comprehended without a basic knowledge of constitutional law. As Justice Gummov has made it clear —The subject of administrative law cannot be understood or taught without attention to its constitutional foundation. This is true because of the close relationship between these two laws. To the early English writers there was no difference between administrative

and constitutional law. Therefore, Keitch observed that it is logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial. However, in countries that have a written constitution, their difference is not so blurred as it is in England. One typical difference is related to their scope. While constitutional law deals, in general, with the power and structures of government, i.e. the legislative, the executive and the judiciary, administrative law in its scope of study is limited to the exercise of power by the executive branch of government. The legislative and the judicial branches are relevant for the study of administrative law only when they exercise their controlling function on administrative power. Constitutional law, being the supreme law of the land, formulates fundamental rights which are inviolable and inalienable. Hence, it supersedes all other laws including administrative law. Administrative law does not provide rights. Its purpose is providing principles, rules and procedures and remedies to protect and safeguard fundamental rights. This point, although relevant to their differences, can also be taken as a common ground shared by constitutional and administrative law. To put it in simple terms, administrative law is a tool for implementing the constitution. Constitutional law lays down principles like separation of power and the rule of law. An effective system of administrative law actually implements and gives life to these principles. By providing rules as to the manner of exercising power by the executive, and simultaneously effective controlling mechanisms and remedies, administrative law becomes a pragmatic tool in ensuring the protection of fundamental rights. In the absence of an effective system of administrative law, it is inconceivable to have a constitution which actually exists in practical terms. Similarly, the interdependence between these two subjects can be analyzed in light of the role of administrative law to implement basic principles of good administration enshrined in the F.D.R.E. constitution. The constitution in Articles 8(3), 12(1) and 12(2), respectively provides the principles of public participation, transparency and accountability in government administration. As explained above, the presence of a developed system of administrative law is sine qua non for the practical realization of these principles. Administrative law is also instrumental in enhancing the development of constitutional values such as rule of law and democracy. The rules, procedures and principles of administrative law, by making public officials, comply with the limit of the power as provided in law, and checking the validity and legality of their actions, subjects the administration to the rule of law. This in turn sustains democracy. Only, in a government firmly rooted in the principle of rule of law, can true democracy be planted

and flourished. Judicial review, which is the primary mechanism of ensuring the observance of rule of law, although mostly an issue within the domain of administrative law, should look in the constitutional structure for its justification and scope. In most countries, the judicial power of the ordinary courts to review the legality of the actions of the executive and administrative agencies emanates from the constitution. The constitution is the supreme document, which confers the mandate on the ordinary courts. Most written constitutions contain specific provisions allocating judicial review power to the high courts, or the Supreme Court, including the grounds of review and the nature and type of remedies, which could be granted to the aggrieved parties by the respective courts. A basic issue commonly for administrative law and constitutional law is the scope of judicial review. The debate over scope is still continuing and is showing a dynamic fluctuation, greatly influenced by the ever changing and ever expanding features of the form and structure of government and public administration. The ultimate mission of the role of the courts as custodians of liberty', unless counter balanced against the need for power and discretion of the executive, may ultimately result in unwarranted encroachment, which may have the effect of paralyzing the administration and endangering the basic constitutional principle of separation of powers. This is to mean that the administrative law debate over the scope of judicial review is simultaneously a constitutional debate.

d. Administrative law vis-à-vis Privatization

INTRODUCTION

Privatization policies have become dominant in a manner that cuts through borders and cultures motivated by complex factors, partially ideological and partially economic. In many countries all over the world privatization leads to the creation of new forms of government action. As a result, it should serve as a major focus of interest for public law - including both constitutional and administrative law. With this consciousness in mind, the current article discusses the challenges posed by privatization initiatives to public law.1 Privatization is indeed a matter of public policy, but it is important to unfold the relevance of law to its discussion as well. Interestingly, the opposite phenomenon – of nationalization – has always been discussed not only as a matter of public policy but also as a matter of law (due to its clear impact on property rights). This understanding should serve as a catalyst for a further study of what has been so far neglected. It is worth adding that the focus on privatization is still important despite the tendency to adopt certain

nationalization initiatives against the background of the economic crisis which started in 2008. Nationalization is still perceived as an exception and such initiatives are considered provisional steps, with the long term intent to return to privatization when the time is ripe. Moreover, this crisis is yet another illuminating example of the necessity for regulation of private activities; one of the focuses of the proposed analysis of the implications of privatization for public law. Indeed, legal scholarship has already started to discuss the implications of privatization for public law. However, so far, the discussion did not profess to offer a general framework for addressing privatization as a central component for the understanding of public law. In contrast, the view offered here is that privatization is not only a phenomenon that merits some doctrinal adjustments, but rather a central process that calls for a re-evaluation of area of public law, which would lead to the development of a new sub-area focusing on the public law of privatization. Accordingly, the article offers an initial outline for the development of the public law of privatization. More concretely, the article offers a model for analyzing questions of privatization from a public law perspective. This model is intended to reflect the complexity of the social and economic challenges posed by privatization policies. It is aimed at dealing with the various implications of privatization decisions which have to be considered not only with regard to their managerial utilitarian aspects, but also with regard to their social and distributive implications, as well as their potential effect on human rights. The approach suggested is based on distinguishing between three different questions raised by privatization decisions. The first question considers the boundaries of privatization: are there any limitations on the types of actions or types of powers that can be privatized? The second question relates to the administrative process of privatization: what are the constraints that should apply to the implementation of a privatization decision (for example, is there a duty to set a privatization policy before proceeding with a concrete privatization initiative, or is there a duty to disclose information regarding privatization initiatives)? The third question refers to the outcomes of privatization and its regulation: which legal regime should apply to privatized activities, and will they be subject to special regulation or special duties? The article does not present a normative viewpoint on the proper scope of the privatization phenomenon. As explained later, this is usually determined by ideology and political philosophy. Accordingly, the decisions on the scope of privatization will usually be left to the public arena. In other words, it is important to maintain the distinguishing line between presenting a policy view on operations that should not be privatized and a legal view on this matter. However, as

explained below, this deferral to the political arena may also have its limits. Following this introduction, Part I of the article will present the different patterns of privatization. Part II will present the traditional approach of the public law to privatization. This approach has indeed recognized that privatization might raise specific legal questions, but mainly sided with limited judicial intervention in decisions in the area, while focusing principally on the aspect of equality in competition for business opportunities created by privatization. Part III points out the 'blind spot' of the traditional discussion in this subject, while referring to additional juridical questions that need to be examined regarding privatization initiatives. The article will conclude by offering directions for developing the public law of privatization.

e. Classification of Administrative Law

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 – 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.

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.

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 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.

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.

UNIT-II: Legislative Functions of Administration

A. Meaning and concept of Delegated legislation

One of the most significant developments of the present century is the growth in the legislative powers of the executives. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law. We know that there is no such general power granted to the executive to make law it only supplements the law under the authority of legislature. This type of activity namely, the power to supplement legislation been described as delegated legislation or subordinate legislation.

However the attitude of the jurists towards delegated legislation has not been unanimous. The practice of delegated legislation was considered a factor, which

promoted centralization. Delegated Legislation was considered a danger to the liberties of the people and a devise to place despotic powers in few hands. It was said that delegated legislation preserved the outward show of representative institutions while placing arbitrary and irresponsible power in new hands. But the tide of delegated legislation was high and these protests remained futile. A very strong case was made out against the practice of Delegated Legislation by Lord Hewart who considered increased governmental interference in individual activity and considered this practice as usurpation of legislative power of the executive. He showed the dangers inherent in the practice and argued that wide powers of legislation entrusted to the executive lead to tyranny and absolute despotism.

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.

B. Constitutionality of delegated Legislation

The powers of the legislature, however, depend upon the nature and character of the law-making bodies. In the presidential form of government, the legislature has an effective control over the executive but the latter is not accountable to it. The legislature in parliamentary system of government has full control over almost all the spheres of government.1 activity. The legislature in a unitary government has both legislative and constituent functions. The position, scope of authority and functions of the legislature, therefore, depend upon the form of government. With the growth of democracy the legislature is assuming more and more importance.

Functions

The various functions performed by the legislature in general may be discussed as follows:

1. Law-Making: The real and legitimate function of the legislature is to make, amend and repeal laws. It makes new laws to meet the changed needs of society. Old laws which are not suitable to the new conditions are amended. Laws which have become obsolete in character are re-pealed. Modern state is a positive or welfare state. Consequently the work of the legislature has increased enormously. Its legislative activities have now been expanded to various fields like education, social welfare and economic regulation and planning. It may delegate subordinate legisla-tive powers to the executive authorities.
2. Control over Finances: All the legislatures of the world have got an undisputed control over the national purse. It is the crux of democracy that parliament controls the finance. No money could be spent or raised by the executive without the previous consent and approval of the parliament. In fact no money can be withdrawn from the Consolidated Fund of the state without authorization of parliament. Every year budget containing the estimated expenditure and income of the ensuing year is placed before it. It passes the budget in two parts—the Appropriation Act and the Finance Act. It exercises supervision over the financial admini-stration through its two important committees—the Public Accounts Committee and the Estimates Committee.

3. Executive Functions of the Legislature: Although the legisla-ture is a law making body yet it performs certain other functions as well. It is so because the government possesses an organic unity and the functions of one organ must overlap the others. The legislature under the parliamentary system of government controls the executive through the vote of no-confidence, interpolation (asking questions) and adjournment motions. Under this system of government, the executive is responsible to the legislature. It continues in office so long as it enjoys the confidence of the majority in the legislature. The moment a Cabinet loses the confidence of the majority, it is thrown out of office by a vote of no- confidence. Although in theory the legislature controls the executive in a parliamentary system of government yet in practice the position is reverse. The executive has complete control over the legislature so long as it enjoys the support of a safe majority in the legislature.

C. **Control Mechanism**

i. **Legislative control in India over delegation:** In India, the question of control on rule-making power engaged the attention of the Parliament. Under the Rule of Procedure and Conduct of Business of the House of the People provision has been made for a Committee which is called 'Committee on Subordinate Legislation'.

The First Committee was constituted on Ist December, 1953 for

i. Examining the delegated legislation, and ii. Pointing out whether it has

a) Exceeded or departed from the original intentions of the Parliament, or

b) Effected any basic changes.

Originally, the committee consisted to 10 members of the House and its strength was later raise to 13 members. It is usually presided over by a member of the Opposition.

The Committee

i. scrutinizes the statutory rules, orders. Bye-laws, etc. made by any-making authority, and

ii. report to the House whether the delegated power is being properly exercised within the limits of the delegated authority, whether under the Constitution or an Act of Parliament. It further examines whether

iii. The Subordinate legislation is in accord with the general objects of the Constitution or the Act pursuant to which it is made;

iv. it contains matter which should more properly be dealt with in an Act of Parliament;

v. it contains imposition of any tax;

vi. it, directly or indirectly, ousts the jurisdiction of the courts of law;

vii. it gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly confer any such power;

viii. It is constitutional and valid;

The following are the modified recommendations

1. That, in future, the Acts containing provisions for making rules, etc., shall lay down that such rules shall be laid on the Table as soon as possible.

2. That all these rules shall be laid on the Table for a uniform and total period of 30 days before the date of their final publication. But it is not deemed expedient to lay any rule on the Table before the date of publication; such rule may be laid as soon as possible after publication. An Explanatory Note should, however, accompany such rules at the time they are so laid, explaining why it was not deemed expedient to lay these rules on the Table of the House before they were published.

3. On the recommendation of the Committee, the bills are generally accompanied with Memoranda of Delegated Legislation in which; -. i) full purpose and effect of the delegation of power to the subordinate authorities, ii) the points which may be covered by the rules, iii) the particulars of the subordinate authorities or the persons who are to exercise the delegated power, and iv) the manner in which such power has to be exercised, are mentioned. They point out if the delegation is of normal type or unusual. The usefulness of the Committee lies more in ensuring that the standards of legislative rule-making are observed that in merely formulating such standards. It should effectively point out the cases of any unusual or unexpected use of legislative power by the Executive.

C. Judicial

Judicial control can be divided into the following two classes: -

i. Doctrine of ultra vires and
ii. Use of prerogative writs.
iii. Procedural

Procedural Control Over Delegated Legislation (A Prior consultation of interests likely to be affected by proposed delegated Legislation:- From the citizen's post of view the most beneficial safeguard against the dangers of the misuse of delegated Legislation is the development of a procedure to be followed by the delegates while formulating rules and regulations. In England as in America the Legislature while delegating powers abstains from laying down elaborate procedure to be followed by the delegates. But certain acts do however provide for the consultation of interested bodies and sometimes of certain Advisory Committees which must be consulted before the formulation and application of rules and regulations. This method has largely been developed by the administration independent of statute or requirements. The object is to ensure the participation of affected interests so as to avoid various possible hardships. The method of consultation has the dual merits of providing as opportunity to the affected interests to present their own case and to enable the administration to have a first-hand idea of the problems and conditions of the field in which delegated legislation is being contemplated. Prior publicity of proposed rules and regulations:- Another method is antecedent publicity of statutory rules to inform those likely to be affected by the proposed rules and regulations so as to enable them to make representation for consideration of the rule-making authority. The rules of Publication Act, 1893, sec.1.Provided for the use of this method. The Act provided that notice of proposed 'statutory rules' is given and the representations of suggestions by interested bodies be considered and acted upon if proper. But the Statutory Instruments Act, 1946 omitted this practice in spite of the omission, the Committee on Ministers Powers 1932, emphasized the advantages of such a practice.

D. Sub-Delegation

DELEGATED LEGISLATION

One of the most significant developments of the present century is the growth in the legislative powers of the executives. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law. We know that there is no such general power granted to the executive to make law it only supplements the law under the authority of

legislature. This type of activity namely, the power to supplement legislation been described as delegated legislation or subordinate legislation.

Why delegated legislation becomes inevitable: The reasons as to why the Parliament alone cannot perform the jobs of legislation in this changed context are not far to seek. Apart from other considerations the inability of the Parliament to supply the necessary quantity and quality legislation to the society may be attributed to the following reasons:

i.Certain emergency situations may arise which necessitate special measures. In such cases speedy and appropriate action is required. The Parliament cannot act quickly because of its political nature and because of the time required by the Parliament to enact the law.

ii. The bulk of the business of the Parliament has increased and it has no time for the consideration of complicated and technical matters. The Parliament cannot provide the society with the requisite quality and quantity of legislation because of lack of time. Most of the time of the Parliament is devoted to political matters, matters of policy and particularly foreign affairs.

iii. Certain matters covered by delegated legislation are of a technical nature which requires handling by experts. In such cases it is inevitable that powers to deal with such matters is given to the appropriate administrative agencies to be exercised according to the requirements of the subject matter. "Parliaments" cannot obviously provide for such matters as the members are at best politicians and not experts in various spheres of life.

iv. Parliament while deciding upon a certain course of action cannot foresee the difficulties, which may be encountered in its execution. Accordingly various statutes contain a 'removal of difficulty clause' empowering the administration to remove such difficulties by exercising the powers of making rules and regulations. These clauses are always so worded that very wide powers are given to the administration. v. The practice of delegated legislation introduces flexibility in the law. The rules and regulations, if found to be defective, can be modified quickly. Experiments can be made and experience can be profitability utilized. However the attitude of the jurists towards delegated legislation has not been unanimous. The practice of delegated legislation was considered a factor, which promoted centralization. Delegated Legislation was considered a danger to the liberties of the people and a devise to place despotic powers in few hands. It was said that delegated legislation preserved the outward show of representative institutions while placing arbitrary and irresponsible power

in new hands. But the tide of delegated legislation was high and these protests remained futile.

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.

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 empower the executive authority to make rules for carrying out the purposes of the Act.

2. A typical example of this kind is the Mines and Minerals (Regulation and Development) Act, 1948.

3. 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.

UNIT-III: Judicial Functions of Administration

a. Need for devolution of adjudicatory authority on administration

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

b. Nature of tribunals-constitution, powers, procedures, rules of evidence

The Administrative Tribunals Act, 1985 An Act to provide for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation 1[or society] owned or controlled by the Government 1[in pursuance of Article 323-A of the Constitution] and for matters connected therewith or incidental thereto. Published in the

Gazette of India Extraordinary, dated the 27th February, 1985Provisions relating to Central Administrative Tribunal come into force with effect from the 1st July, 1985 vide GSR No. 527 (E), dated the 1st July, 1985. 1. Inserted vide The Administrative Tribunals (Amendment) Act, 1986 (No. 19 of 1986). Takes effect from the 22nd January 1986.

b. Nature of Administrative Tribunals

Among the many innovative provisions adopted by the Forty-second Amendment of the Constitution (1976) a measure of far-reaching importance was the provision for the setting up of Administrative Tribunals. Part XIV-A which consists of two Articles 323A and 323B deals with these Tribunals.

Section (1) of Article 323-A provides for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India. The power to constitute such Tribunals is vested exclusively in Parliament.

Section (2) of the same Article provides that a law made by Parliament under section (1) may:

(i) Provide for the establishment of an Administrative Tribunal for the Union and a separate Administrative Tribunal for each State or for two or more States;
(ii) Specify the jurisdiction, powers and authority which may be exercised by such tribunals;
(iii) Provide for the procedure to be followed by these tribunals; and
(iv) Exclude the jurisdiction of all courts except the special jurisdiction of the Supreme Court under Article 136. Article 323-B empowers Parliament or State Legislatures to set up tribunals for matters other than those covered by clause (2) of Article 323-A. The matters to be covered by such tribunals are as follows:
    (i) Levy, assessment, collection and enforcement of any tax;
    (ii) Foreign exchange, import and export across customs frontiers;
    (iii) Industrial and labor disputes;
    (iv) Matters connected with land reforms covered by Article 31-A;
    (v) Ceiling on urban property;
    (vi) Elections to either House of Parliament or Legislatures of the States and

(vii) Production, procurement, supply and distribution of food-stuffs or other essential goods. A law made under the above provisions may provide for the establishment of a hierarchy of tribunals and specify the jurisdiction, powers and authority which may be exercised by each of them. Such law may also provide for the procedure to be followed by these tribunals and exclude the jurisdiction of all courts except the Supreme Court of India. The Scheme of Administrative Tribunals envisaged by Part XIV-A of the Constitution as several other provisions of the Forty-second Amendment of the Constitution was looked upon with suspicion and misgivings by certain sections of political and public opinion in the country and that was reflected in the attempt of the Janata Government (1977-79) to abolish these provisions.

The Forty-fourth Amendment (1978) among other things sought to abolish Part XIV-An altogether. However, this attempt of the Janata Government was unsuccessful as it could not muster adequate support in Parliament. The basic objective of administrative tribunals is to take out of the purview of the regular courts of law certain matters of dispute between the citizen and government agencies and make the judicial process quick and less expensive. The fact that there has been a phenomenal increase in the number of disputes in which administrative authorities are involved has to be recognized. If all these disputes go to the ordinary judicial system where there is provision for appeals to successive higher courts one after another, there will be no speedy settlement of such disputes and they might linger for years or decades. Inordinate delay and enormous cost are the two distinguishing features of the ordinary judicial system. The number of cases that are pending before the High Courts and the Supreme Court today is legion. No one can normally expect any speedy disposal of most of them. At the same time, there are matters of social concern which require reasonably quick disposal. Administrative tribunals facilitate this and that is the strongest argument in their favor. Administrative tribunals are not an original invention of the Indian political system. Such tribunals are now well established in all democratic countries of Europe as well as the United States of America. Britain which until a few decades ago looked upon administrative tribunals with suspicion has, in recent times, recognized their beneficial role and therefore has set up many of them. The experience of India during the past two decades and more has demonstrated that administrative tribunals have an effective role to play in a country which has embarked upon a programme of rapid socioeconomic change.

Constitution: Each Tribunal shall consist of Chairman, such number of Vice-Chairman and judicial and administrative members as the appropriate Government (either the Central Government or any particular State Government singly or jointly) may deem fit (vide Sec. 5.(1) Act No. 13 of 1985). A bench shall consist of one judicial member and one administrative member. The bench at New Delhi was designated the Principal Bench of the Central Administrative Tribunal and for the State Administrative Tribunals. The places where their principal and other benches would sit specified by the State Government by Notification (vide Section 5(7) and 5(8) of the Act).

Procedure: Chapter III of the Administrative Tribunal Act deals with the jurisdiction, powers and authority of the tribunals. Section 14(1) of the Act vests the Central Administrative Tribunal to exercise all the jurisdiction, powers and authority exercisable by all the courts except the Supreme Court of India under Article 136 of the Constitution. One of the main features of the Indian Constitution is judicial review. There is a hierarchy of courts for the enforcement of legal and constitutional rights. One can appeal against the decision of one court to another, like from District Court to the High Court and then finally to the Supreme Court, But there is no such hierarchy of Administrative Tribunals and regarding adjudication of service matters, one would have a remedy only before one of the Tribunals. This is in contrast to the French system of administrative courts, where there is a hierarchy of administrative courts and one can appeal from one administrative court to another. But in India, with regard to decisions of the Tribunals, one cannot appeal to an Appellate Tribunal. Though Supreme Court under Article 136, has jurisdiction over the decisions of the Tribunals, as a matter of right, no person can appeal to the Supreme Court. It is discretionary with the Supreme Court to grant or not to grant special leave to appeal. The Administrative Tribunals have the authority to issue writs. In disposing of the cases, the Tribunal observes the canons, principles and norms of 'natural justice'. The Act provides that "a Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure 1908, but shall be guided by the principles of natural justice. The Tribunal shall have power to regulate its own procedure including the fixing of the place and times of its enquiry and deciding whether to sit in public of private". A Tribunal has the same jurisdiction, powers and authority, as those exercised by the High Court, in respect of "Contempt of itself" that is, punish for contempt, and for the purpose, the provisions of the contempt of Courts Act 1971 have been made

applicable. This helps the Tribunals in ensuring that they are taken seriously and their orders are not ignored.

Powers:Chapter IV of the Administrative Tribunals Act prescribes for application to the Tribunal. A person aggrieved by any order pertaining to any matter within the jurisdiction of the Tribunal may make an application to it for redressal of grievance. Such applications should be in the prescribed form and have to be accompanied by relevant documents and evidence and by such fee as may be prescribed by the Central Government but not exceeding one hundred rupees for filing the application. The Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant has availed of all remedies available to him under the relevant service rules. This includes the making of any administrative appeal or representation. Since consideration of such appeals and representations involve delay, the applicant can make an application before the Tribunal, if a period of six months has expired afterthe representation was made no order has been made. But an application to the Tribunal has to be made within one year from the date of final order or rejection of the application or appeal or where no final order of rejection has been made, within one year from the date of expiry of six months period. The Tribunal. May, however admit any application even after one year, if the applicant can satisfy the Tribunal that he/she had sufficient cause for not making the application within the normal stipulated time. Every application is decided by the Tribunal or examination of documents, written representation and at a times depending on the case, on hearing of oral arguments. The applicant may either appear in person or through a legal practitioner who will present the case before the Tribunal. The orders of the Tribunal are binding on both the parties and should be complied within the time prescribed in the order or within six months of the receipt of the order where no time limit has been indicated in the order. The parties can approach the Supreme Court against the orders of the Tribunal by way of appeal under Article 136 of the Constitution. The Administrative Tribunals are not bound by the procedure laid down in the code of Civil Procedure 1908. They are guided by the principles of natural justice. Since these principles are flexible, adjustable according to the situation, they help the Tribunals in molding their procedure keeping in view the circumstances of a situation.

Rules of evidence- no evidence, some evidence and substantial evidence. Criminal Justice reflects the responses of the society to crimes and criminals. The key components

engaged in this role are the courts, police, prosecution, and defence. Administering criminal justice satisfactorily in a democratic society governed by rule of law and guaranteed fundamental rights is a challenging task. It is in this context that the subordinate judiciary assumes great importance. The role of magistrate is effectively summed up in the words of Former Chief Justice Ranganath Mishra in a writ petition relating to conditions of subordinate judiciary in the case of All India Judges' Association vs. Union of India (1992) 1 SCC 119 Where he observes: "The Trial judge is the kingpin in the hierarchical system of administration of justice. He directly comes in contact with the litigant during the proceedings in court. On him lies the responsibility of building up of the case appropriately and on his understanding of the matter the cause of justice is first answered. The personalities, knowledge, judicial restraint, capacity to maintain dignity are the additional aspects which go into making the Court's functioning successful". Mentioning the high expectations of society from the judges, he further advices: "A judge ought to be wise enough to know that he is fallible and therefore, ever ready to learn and be courageous enough to acknowledge his errors". Right to speedy trial is implicit in the right to life and liberty guaranteed by Article 21 of the Constitution of India. However, there is a huge pendency of criminal cases and inordinate delay in the disposal of the same on the one hand and very low rate of conviction in cases involving serious crime. As per the latest amendment, Section 309 of the Cr.P.C. has been inserted with an explanation to its subclause. With an aim to speed-up trials, the amendment states that no adjournment should be granted at the party's request, nor can the party's lawyer being engaged in another court be ground for adjournment. Section 309 contains a mandatory provision that in every inquiry or trial the proceedings shall be held as expeditiously as possible and in particular when the examination of witnesses has once begun the same shall be continued from day to day until all witnesses in attendance have been examined unless the court finds the adjournment of the case beyond the following day to be necessary for reasons to be recorded. When the enquiry or trial relates to an offence under Section 376 to 376D IPC, the same shall be completed within a period of two months from the date of commencement of the examination of witnesses. The introduction of Plea Bargaining included under sections 265A to 265L of the Code of Criminal Procedure has also been noticed very effectively. Judicial Officers must be aware of "offences affecting the socioeconomic condition of the country" for the purpose of Section 265A. A judge should be well versed with the latest amendments and further developments which take place in law and put them into practice to give effect to the intent of the legislature which is to speed up the process of delivering justice. Section 165 of the Indian Evidence Act grants sweeping

powers to the Judge to put questions. The rationale for giving such sweeping powers is to discover the truth and indicative evidence. Counsel seeks only client's success; but the Judge must watch justice triumphs. If criminal court is to be an effective instrument in dispensing justice, Presiding Officer must cease to be a spectator and mere a recording machine. He must become an active participant in the trial evincing intelligence and active interest by putting questions to witness in order to ascertain the truth. The Code of Criminal Procedure delineates the powers and functions of judicial magistrates at every stage both pre-trial, during trial and post trial and the same require no repetition. However, I wish to remind you that these powers and functions bestowed upon you are to be exercised as public trust in full compliance with the Constitutional mandates of fair and speedy trial for both the accused and the complainant. Criminal system to be truly just must be free of bias. There should be judicial fairness otherwise the public faith in rule of law would be broken.

d. PRINCIPLES OF NATURAL JUSTICE

In India there is no statute laying down the minimum procedure which administrative agencies must follow while exercising decision-making powers. This minimum fair procedure refers to the principles of natural justice Natural justice is a concept of common law and represents higher procedural principles developed by the courts, which every judicial, quasi-judicial and administrative agency must follow while taking any decision adversely affecting the rights of a private individual. Natural justice implies fairness, equity and equality. In a welfare state like India, the role and jurisdiction of administrative agencies is increasing at a rapid pace. The concept of Rule of Law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging these functions in a fair and just manner. In India, the principles of natural justice are firmly grounded in Article 14 & 21 of the Constitution. With the introduction of concept of substantive and procedural due process in Article 21, all that fairness which is included in the principles of natural justice can be read into Art. 21. The violation of principles of natural justice results in arbitrariness; therefore, violation of natural justice is a violation of Equality clause of Art. 14.

The principle of natural justice encompasses following two rules: -

1. Nemojudex in causasua - No one should be made a judge in his own cause or the rule against bias.

2. Audi alterampartem - Hear the other party or the rule of fair hearing or the rule that no one should be condemned unheard.
3. Reasoned decisions.

i.RULE AGAINST BIAS (NEMO JUDEX CAUSA SUA) Bias means an operative prejudice, whether conscious or unconscious in relation to a party or issue. The rule against bias flows from following two principles: - a) No one should be a judge in his own cause b) Justice should not only be done but manifestly and undoubtedly be seen to be done. Thus a judge should not only be impartial but should be in a position to apply his mind objectively to the dispute before him. The rule against bias thus has two main aspects: - 1. The administrator exercising adjudicatory powers must not have any personal or proprietary interest in the outcome of the proceedings. 2. There must be real likelihood of bias. Real likelihood of bias is a subjective term, which means either actual bias or a reasonable suspicion of bias. It is difficult to prove the state of mind of a person. Therefore, what the courts see is whether there is reasonable ground for believing that the deciding factor was likely to Have been biased. Bias can take many forms: - · Personal Bias · Pecuniary Bias · Subject-matter bias · Departmental bias · Pre-conceived notion bias

A.K.Kraipak vs. UOI

In this case, Naquishband, who was the acting Chief Conservator of Forests, was a member of the Selection Board and was also a candidate for selection to All India cadre of the Forest Service. Though he did not take part in the deliberations of the Board when his name was considered and approved, the SC held that `there was a real likelihood of a bias for the mere presence of the candidate on the Selection Board may adversely influence the judgment of the other members' SC also made the following observations: - 1. The dividing line between an administrative power and quasi-judicial power quite thin and is being gradually obliterated. Whether a power is Administrative or quasi-judicial, one has to look into - a) the nature of power conferred b) the person on whom it is conferred c) the framework of the law conferring that power d) the manner in which that power is expected to be exercised. 2. The principles of natural justice also apply to administrative proceedings, 3. The concept of natural justice is to prevent

miscarriage of justice and it entails - (i) No one shall be a judge of his own cause. (ii) No decision shall be given against a party without affording him a reasonable hearing. (iii) The quasi-judicial enquiries should be held in good faith and not arbitrarily or unreasonably.

ii. **AUDI ALTERAM PARTEM OR RULE OF FAIR HEARING**

The principle of audialterampartem is the basic concept of principle of natural justice. The expression audialterampartem implies that a person must be given opportunity to defend himself. This principle is sine qua non of every civilized society. This rule covers various stages through which administrative adjudication pass starting from notice to final determination. Right to fair hearing thus includes:- 1. Right to notice 2.Right to present case and evidence 3.Right to rebut adverse evidence (i) Right to cross examination (ii) Right to legal representation 4.Disclosure of evidence to party 5.Report of enquiry to be shown to the other party 6. Reasoned decisions or speaking orders

iii. **Reasoned decisions** Post decisional hearing means hearing after the decision is reached. The idea of post decisional hearing has been developed by the SC in Maneka Gandhi vs. UOI to maintain the balance between administrative efficiency and fairness to the individual. Mankea Gandhi vs. UOI

Facts In this case the passport dated 01.06.1976 of the petitioner, a journalist, was impounded `in the public interest' by an order dated 02.07.1977. The Govt. declined to furnish her the reasons for its decision. She filed a petition before the SC under article 32 challenging the validity of the impoundment order. She was also not given any pre-decisional notice and hearing.

Argument by the Government. The Govt. argued that the rule of audialterampartem must be held to be excluded because otherwise it would have frustrated the very purpose of impounding the passport.

Held The SC held that though the impoundment of the passport was an administrative action yet the rule of fair hearing is attracted by the necessary implication and it would not be fair to exclude the application of this cardinal rule on the ground of administrative convenience. The court did not outright quash the order and allowed the return of the passport because of the special socio-political factors attending the case.

REQUIREMENT OF CROSS EXAMINATION

Cross-examination is used to rebut evidence or elicit and establish truth. In administrative adjudication, as a general rule, the courts do not insist on cross-examination unless the circumstances are such that in the absence of it, an effective defence cannot be put up. The SC disallowed cross-examination in State of J&K vs. BakshiGulam Mohammed on the ground that the evidence of witness was in the form of affidavits and the copies had been made available to the party. In Town Area Committee vs. Jagdish Prasad, the department submitted the charge, got an explanation and thereafter straightaway passed the dismissal order. The court quashed the order holding that the rule of fair hearing includes an opportunity to cross-examine the witness and to lead evidence. In HiraNathMisra vs. Principal, Rajendra Medical College the court disallowed the opportunity of cross-examination on the grounds of practicability. The SC rejected the contention of the appellants that they were not allowed to cross-examine the girl students on the ground that if it was allowed no girl would come forward to give evidence, and further that it would not be possible for the college authorities to protect the girl students outside the college precincts. Where, however, witnesses depose orally before the authority, the refusal to allow cross examination would certainly amount to violation of principles of natural justice. It can thus be concluded that right to cross-examine is an important part of the principle of fair hearing but whether the same should be allowed in administrative matters mainly depends on the facts and circumstances of the case.

RIGHT OF LEGAL REPRESENTATION

Legal representation is not considered as an indispensable part of the rule of fair hearing in administrative proceedings. This denial of legal representation is justified on the ground that –

a) the lawyers tend to complicate matters, prolong hearings and destroy the essential informality of the hearings.

b) it gives and edge to the rich over the poor who cannot afford a good lawyer. Whether legal representation is allowed in administrative proceedings depends on the provisions of the statute. Factory laws do not permit legal representation, Industrial Disputes Act allows it with the permission of the tribunal and some

statutes like Income Tax permit representation as a matter of right. The courts in India have held that in following situations, some professional assistance must be given to the party to make his right to defend himself meaningful: -

a) Illiterate

b) Matter is technical or complicated

c) Expert evidence is on record

d) Question of law is involved

e) Person is facing trained prosecutor

REQUIREMENT OF PASSING A SPEAKING OR REASONED ORDER

In India, unless there is specific requirement of giving reasons under the statute, it is not mandatory for the administrative agencies to give reasons for their decisions. Reasons are the link between the order and mind of the maker. Any decision of the administrative authority affecting the rights of the people without assigning any reason tantamount to violation of principles of natural justice. The requirement of stating the reasons cannot be under emphasized as its serves the following purpose: -

1.It ensures that the administrative authority will apply its mind and objectively look at the facts and evidence of the case.

2. It ensures that all the relevant factors have been considered and that the irrelevant factors have been left out.

3. It satisfies the aggrieved party in the sense that his view point have been examined and considered prior to reaching a conclusion.

4. The appellate authorities and courts are in a better position to consider the appeals on the question of law.

In short, reasons reveal the rational nexus between the facts considered and the conclusions reached. However, mere recording of reasons serves no purpose unless the same are communicated either orally or in writing to the parties. In fact mere communication of reasons has no meaning unless the corrective machinery is in place. Whether the reasons should be recorded or not depends on the facts of the case. In Tarachand vs. Municipal Corporation, an assistant teacher was dismissed on the ground of moral turpitude. The Enquiry fully established the charge. The Asst. Education Commissioner confirmed the report w/o giving

reasons. The SC held that where the disciplinary authority disagrees with the report of the enquiry officer, it must state the reasons. In other words, the sighting of reasons is not mandatory where the disciplinary authority merely agrees with the report of enquiry officer.

REPORT OF ENQUIRY REPORT TO BE SHOWN TO THE OTHER PARTY

Whether a copy of enquiry report must be submitted to the delinquent employee before passing the order? Until 1987, there was no precedent or law which made it obligatory, in all cases, for the disciplinary authority to serve a copy of the enquiry report on the delinquent before reaching a final decision. For the first time in 1987, full bench of CAT held that failure to supply a copy of the enquiry report to the delinquent before recording a finding against him is obligatory and failure to do so would vitiate the enquiry. (P,K,Sharmavs, UOI) The SC in 1973 considered this question in Keshav Mills Co. Ltd. vs. UOI. Facts Appellant Co. after doing business for 30 years closed down. 1200 persons unemployed - On the basis of commission to enquire into the affairs of the co. u/s 15 of IDRA, GOI passed an order u/s 18-A to take over the mill. Challenged before SC on the ground that enquiry report not submitted Held · Not possible to lay down general principle on this Q. · Answer depends on facts and circumstances of each case · If the non-disclosure of the report causes any prejudice in any manner to the party, it must be disclosed, otherwise non-disclosure would not amount to violation of principles of natural justice.

FAIR TRIAL TO ACCUSED: CO-RELATIVE DUTIES OF MAGISTRATE

It is well settled today that the accused has fundamental right to know the grounds of his arrest, right to legal aid in case he is indigent, right to consult his lawyer and such other rights guaranteed by Constitution and equivalent safeguards incorporated in CrPC. Let's pause here and dwell more on the corresponding duties of a magistrate in ensuring fair trial to the accused. Article 22(2) provides that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest and no one shall be detained in custody beyond the said period without the authority of a magistrate. The magistrate can pass order of remand to authorise the detention of the accused in such custody as such

magistrate thinks fit, for a term not exceeding 15 days in the whole. Justice Bhagwati summed up the purpose of these safeguards in Khatri II vs State of Bihar (1981) 1 SCC 627 "This healthy provision enables the magistrates to keep check over the police investigation and it is necessary that the magistrates should try enforcing this requirement and where it is found disobeyed, come down heavily upon the police... There is however, no obligation on the part of the magistrate to grant remand as a matter of course. The police have to make out a case for that. It can't be a mechanical order". Right to know the ground of arrest is conferred the status of fundamental right under article 22(1). It is reasonable to expect that grounds of arrest communicated in language understood by the accused. Further, the accused has right to inform his friend or relative of his arrest. Arrest of a person is a denial of an individual's liberty which is fundamental to one's existence. The fundamental rights will remain mere promise if Magistrates do not ensure compliance of the same. Hence, magistrates have been given the fundamental duty under amended section 50A of the Criminal Procedure to satisfy that the police has informed the arrested person of his rights and made an entry of the fact in book to be maintained in the police station. There have been frequent complaints about the police's noncompliance of the above mentioned requirements. The magistrates are empowered under section 97 to issue search warrant which is in the nature of a writ of habeas corpus for rescue of a wrongfully confined person by intervention of police directed by a magisterial order. If magistrate has reason to believe that any person is confined under circumstances that amounts to an offence, he may issue a search warrant and person if found shall be immediately taken before a magistrate. The accused has a right to be medically examined and if such a request is made, the Magistrate shall direct examination of the body unless he considers it is made for purpose of delay or defeating the ends of justice. In SheelaBarsevs State of Maharashtra (1983) 2 SCC 96, it was held by the Hon'ble Supreme Court that the arrested accused person must be informed by the magistrate about his right to be medically examined in terms of section section 54. In this case, High court directed magistrates to ask the arrested person as to whether he has any complaint of torture or maltreatment in police custody. The state under constitutional mandate is required to provide free legal aid to an indigent accused person and this arises not only when the trial commences but when the accused is for the first time produced before the magistrate, as also when he is remanded from time to time. In Anil Yadav v State of Bihar 1982 (2) SCC 195

commonly referred to as Bhagalpur Blinding case, the judicial magistrates failed in their duties to inform blinded prisoners of their rights. As a result, the Supreme Court had to cast a duty on all magistrates and courts to promptly and duly inform the indigent accused about his right to get free legal aid as without this the right may prove to be illusory. The right to legal aid today is enshrined in Article 39A and further institutionalized with the coming into force of the Legal Services Authorities Act, 1986. This assumes more significance as denial of the same may even vitiate the trial at later stage. Further, in HussainaraKhatoon V Case (1980) 1 SCC 108 it was held that it is the duty of the magistrate to inform the accused that he has a right to be released on bail on expiry of statutory period of 90 or 60 days as the case may be. Suffice is to say that magistrates are the best persons to oversee that the accused is not denied his rights. We must not forget that ensuring criminal justice requires cooperation of the two arms of the state directly involved i.e. the judiciary and the police machinery. While direct interference is not desirable in investigation process, the magistrate is kept in the picture at all the stages of the police investigation. On a conjoint reading of section 57 and 167 of the Code, it is clear that the legislative intention was to ensure speedy investigation after a person has been taken in custody. It is expected that investigation is completed within 24 hours and if not possible within 15 days. The role of magistrate is to oversee the course of investigation and prevent abuse of law by investigating agency. However, you must understand that your role is complementary to that of police. In doing so, you must preside without fear or favour.

RECORDING CONFESSIONS & DYING DECLARATION

Confessions and dying declarations recorded by magistrate constitute valuable evidence as they may form the basis of conviction of the accused. Although there is no hard and fast rule as to proper manner of recording the same, the Magistrate must follow certain broad guidelines to ensure that the document inspires confidence of the court assessing it. Just as the FIR recorded is of great importance because it is the earliest information given soon after the commission of a cognisable offence before there is time to forget, fabricate or embellish. Similarly the confession made to magistrate is highly valuable evidence. Section 164 empowers magistrate to record even when he has no jurisdiction in the case. Before recording any such confession, the magistrate is required to explain to the person making confession that

a) He is not bound to make such a confession
b) If he does so it may be used as evidence against him

These provisions must be administered in their proper spirit lest they become mere formalities. The magistrate must have reason to believe that it is being made voluntarily. You must exercise your judicial knowledge and wisdom to find out whether it is voluntary confession or not. The magistrate must see that the warning is brought home to the mind of the person making the confession. If the recording continues on another day, a fresh warning is necessary before a confession is recorded on the other day. After giving warnings, the magistrate should give him adequate time to think and reflect. There is no hard and fast rule but the person must be completely free from possible police influence. Normally such a person is sent to jail custody at least for a day before his confession is recorded. How much time for reflection should be allowed depends on circumstances in each case. The act of recording confession is a solemn act and in discharging such duties the magistrate must take care to see that the requirements of law are fully satisfied. The magistrate recording the confession must appreciate his function as one of a judicial officer and he must apply his judicial mind to the task of ascertaining that the statement the accused is going to make is of his own accord and not on account of any influence on him. A dying declaration is an admissible piece of evidence under section 32 of Indian Evidence Act as it is the first hand knowledge of facts of a case by the victim himself. I myself have held in Surinder Kumar vs. State of Haryana (2011) 10 SCC 173, a case relating to wife burning, that if the dying declaration is true and voluntary, it can be basis of conviction without corroboration. Thus, proper recording of the dying declaration by the magistrates assumes significance. There is no exhaustive list of procedures to be followed rather depends on case to case basis. It may be recorded in the form of question and answers in the language of the deceased as far as practicable. Before proceeding to record the dying declaration, the magistrate shall satisfy himself that the declarant is in a fit condition to make a statement and if medical officer is present, a fitness certificate should be obtained. It is the duty of the magistrate to ensure the making of a free and spontaneous statement by the declarant without any prompting, suggestion or aid from any other justice. If possible, at the conclusion of recording, the declaration must be read out to the declarant and signature must be obtained symbolic of correctness of the same.

LAW ON ELECTRONIC EVIDENCE

The proliferation of computers, the social influence of information technology and the ability to store information in digital form have all required Indian law to be amended to include provisions on the appreciation of digital evidence. In the year 2000 Parliament enacted the Information Technology (IT) Act 2000, which amended the existing Indian statutes to allow for the admissibility of digital evidence. The IT Act is based on the United Nations Commission on International Trade Law which adopted the Model Law on Electronic Commerce together with providing amendments to the Indian Evidence Act 1872, the Indian Penal Code 1860 and the Banker's Book Evidence Act 1891, recognizing transactions that are carried out through electronic data interchange and other means of electronic communication. Digital knowledge has become prerequisite for effective judgeship.

SUMMARY TRIALS: ROLE OF MAGISTRATES IN DELIVERING SWIFT JUSTICE

The magistrates are empowered to deal with summons cases and few specific warrant cases in a summary way with the clear intention of ensuring speedy justice. They can give an abridge version of regular trial in offences like petty thefts, house trespass, cattle trespass, insult to provoke breach of peace and other such offences punishable with imprisonment not exceeding 2 years. The inclusion of additional forms of crime, for example, section 138 cases under the Negotiable Instruments Act or section 498A cases under the Indian Penal Code have contributed a large number of cases in the criminal courts. Over 38 lakh cheque bouncing cases are pending in various courts in the country. Huge backlog of cheque bouncing or dishonoured cheque cases need to be speedily disposed, lest the litigants lose faith in the judicial system and the purpose of the Act be defeated. In this context, the Law Commission in its 213th Report has recommended setting up of fast track magisterial courts to for fast disposal of cheque. However, I strongly believe that if magistrates fulfill the mandate lay down in section 143 of the Act, separate courts may not be required. The provisions of section 143, as inserted in the Act in 2002, state that offences under section 138 of the Act shall be tried in a summary manner. It empowers the Magistrate to pass a sentence of imprisonment for a term up to one year and an amount of fine exceeding five thousand rupees. It also provides that if it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may

have to be passed, he can do so after hearing the parties and recalling any witness who may have been examined. Under this provision, so far as practicable, the Magistrate is expected to conduct the trial on a day-to day basis until its conclusion and conclude the trial within six months from the date of filing of the complaint. Further, section 147 makes the offence punishable under section 138 of the Act compoundable i.e. it can be settled between the parties. The court can note the same and record the settlement reached. In Damodar S PrabhuvsSayedBabalal (2010) 5 SCC 663, the Court laid down certain broad guidelines to ensure that application for compounding is made at an early stage of trial. The guideline empowers the magistrate to (a) Give directions making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused. (b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit. The court further observed that: "Complaints are being increasingly filed in multiple jurisdictions in a vexatious manner which causes tremendous harassment and prejudice to the drawers of the cheque. We direct that it should be mandatory for the complainant to disclose that no other complaint has been filed in any other court in respect of the same transaction. Such a disclosure should be made on a sworn affidavit which should accompany the complaint filed under Section 200 of the CrPC" section 143 of the Act and above-mentioned guidelines so that you comprehend the significance of summary trial procedure as a tool in your hands, which you must utilize to deliver swift justice. The responsibility is cast on you to act in a fair, judicious and yet balanced way to ensure that the accused also gets a fair opportunity of defending the case and, at the same time, also to ensure that this provision is not misused by the accused only for the purpose of protracting the trial or to defeat the ends of justice.

Institutional Decision Based on a preponderance of the evidence, the institution's deciding official usually makes the final determination whether to accept the investigation report, its findings, and the recommended institutional actions. If this

determination varies from that of the investigation committee, the deciding official needs to explain in detail the basis for rendering a decision different from that of the investigation committee in the institution's letter transmitting the report to ORI. The explanation should be consistent with the PHS definition of research misconduct, the institution's policies and procedures, and the evidence reviewed and analyzed by the investigation committee. The deciding official may also return the report to the investigation committee with a request for further fact-finding or analysis. The deciding official's determination, together with the investigation committee's report, constitutes the final investigation report for purposes of ORI review. When a final decision on the case has been reached, the institution needs to notify both the respondent and the whistleblower in writing. In addition, the deciding official will determine whether law enforcement agencies, professional societies, professional licensing boards, editors of journals in which falsified reports may have been published, collaborators of the respondent in the work, or other relevant parties should be notified of the outcome of the case. The institution is also responsible for ensuring compliance with all notification requirements of funding or sponsoring agencies. In addition, the institutional policy may permit an appeal. If so, the policy should specify the grounds for an appeal and the procedures for filing an appeal.

UNIT-IV: Administrative Discretion and Judicial Control of Administrative Action

a. Need and its relationship with rule of law

Introduction:

Rule of law is classical principle of administrative law. As a matter of fact this principle was one of the principles that acted as impediment development of Administrative Law principles. The irony further is that the rule of law is now an important part of modern Administrative Law. Whereas the rule of law is still the one of the very important principles regulating in common law countries and common law derived countries modern laws has denied some of the important parts of rule of law as proposed by Dicey at the start of 19th Century. Dicey Rule of Law: The concept of rule of law backs to the time of Aristotle. Aristotle ruled out the concept of rule under discretion by all means and tried to convey his followers that given the choice it is always rule of law that scores over rule of discretion. In Modern times the

rule of law was propounded by the Albert Dicey, a British jurist and Philosopher. He gave following three postulates of rule of law: 1. Everyone is equal before the law. 2. Sanctions have to be backed by law. 3. Courts are the ultimate body and supremacy of court is ambivalent in civilized society. He was firm proponent of the concept and very influential thinker of his times. Though the first two principles are still in almost every legal system of world, the third principle was protested many of jurists of that time. The Dicey in particular opposed the principle of French system of DroitAdministratif. England at that time was in fact propounding some quasi legislative and quasi judicial processes which were taken cognizance of English thinkers of that time; still the whole common law system of country was blindfolded with the Dicey's philosophy of "rule of law." Dicey's Rule of Law and Modern Administrative Law: Dicey's view and proposition of rule of law has succeeded in part and wasn't sustainable on other. Most of the modern legal system implements the principles of judicial review and similar principles of proportionality and legitimate expectations. Dicey's views on written and unwritten constitutions are subject to much debate and discussion. What can be said is that some written constitutions (e.g. the U.S. Constitution) have been quite successful at providing a framework within which individual rights are protected while others (e.g. some of the Soviet blocks constitutions) have been near total failures. The modern administrative law is fine mixture of DroitAdministratif, the French law system and Dicey rule of law. The sophisticated combination of the two principles has given rise to powerful and vast body of executive. In fact the development of modern Administrative law is consequence of development of administration and its side effects. Objective of Paper: In this paper I am going to critically examine the pros and cons of modern administrative law in terms of balance of efficiency and bureaucracy. This paper shall also discuss the constitutional provisions all over the world and compare the implementation part of it in governance.

b. **Constitutional imperative and exercise of discretion Administrative action:**

No law can clothe administrative discretion with a complete finality, for the courts always examine the ambit and even the mode of its exercise for the angle of its conformity with fundamental rights. The fundamental rights thus provide a basis to the judiciary in India to control administrative discretion to a large extent. There have been a number of cases in which a law, conferring discretionary powers, has

been held violative of a fundamental right. The following discussion will illustrate the cases of judicial restraints on the exercise of discretion in India. Administrative Discretion and Article 14: Article14 prevents arbitrary discretion being vested in the executive. Equality is antithetic to arbitrariness. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. Right to equality affords protection not only against discretionary laws passed by legislature but also prevents arbitrary discretion being vested in the executive. Often executive or administrative officer or Government is given wide discretionary power. In a number of cases, the Statute has been challenged on the ground that it conferred on an administrative authority wide discretionary powers of selecting persons or objects discriminately and therefore, it violated Article 14. The Court in determining the question of validity of such statute will examine whether the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of selection or classification. The Court will not tolerate the delegation of uncontrolled power in the hands of the Executive to such an extent as to enable it to discriminate. In State of West Bengal v. Anwar Ali, AIR 1952 SC 75. It was held that in so far as the Act empowered the Government to have cases or class of offences tried by special courts, it violated Article 14 of the Constitution. The court further held the Act invalid as it laid down "no yardstick or measure for the grouping either of persons or of cases or of offences" so as to distinguish them from others outside the purview of the Act. Moreover, the necessity of "speedier trial" was held to be too vague, uncertain and indefinite criterion to form the basis of a valid and reasonable classification. Under Article 19: Article 19 guarantees certain freedoms to the citizens of India, but they are not absolute. Reasonable restrictions can be imposed on these freedoms under the authority of law. They cannot be contended merely on executive action. The reasonableness of the restrictions is open to judicial review. These freedoms can also be afflicted by administrative discretion. Such cases can be examined below. A number of cases have come up involving the question of validity of law conferring discretion on the Executive to restrict the right under Article 19(1) (b) and (e). The State has conferred powers on the Executive to extern a person from a particular area in the interest of peace and safety in a number of statutes. In Dr. Ram Manohar v. State of Delhi, AIR 1950 SC 211, where the D.M. was empowered under East Punjab Safety Act, 1949, to make an order of internment from an area in case he was satisfied that such an order was necessary to prevent a person from acting in any

way prejudicial to public peace and order, the Supreme Court upheld the law conferring such discretion on the execution on the grounds, inter alia, that the law in the instant case was of temporary nature and it gave a right to the externee to receive the grounds of his internment from the Executive. In Hari v. Deputy Commissioner of Police, AIR 1956 SC 559, the Supreme Court upheld the validity of section 57 of the Bombay Police Act authorizing any of the officers specified therein to extern convicted persons from the area of his jurisdiction if he had reasons to believe that they are likely to commit any offence similar to that of which they were convicted. This provision of law, which apparently appears to be a violation of the residence, was upheld by court mainly on the considerations that certain safeguards are available to the externee, i.e., the right of hearing and the right to file an appeal to the State Government against the order. In a large number of cases, the question as to how much discretion can be conferred on the Executive to control and regulate trade and business has been raised. The general principle laid down in that the power conferred on the Executive should not be arbitrary, and that it should not be left entirely to the discretion of any authority to do anything it likes without any check or control by any higher authority." "Any law or order which confers arbitrary and uncontrolled power upon the Executive in the matter of the regulating trade or business is normally available in commodities control cannot but be held to be unreasonable." and no provisions to ensure a proper execution of the power and to operate as a check against injustice resulting from its improper exercise. The Supreme Court in H.R. Banthis v. Union of India (1979 1 SCC 166) declared a licensing provision invalid as it conferred an uncontrolled and unguided power on the Executive. The Gold (Control) Act, 1968, provided for licensing of dealers in gold ornaments. The Administrator was empowered under the Act to grant or renew licenses having regard to the matters, inter alia, the number of dealers existing in a region, anticipated demand, suitability of the applicant and public interest. The Supreme Court held that all these factors were vague and unintelligible. The term 'region' was nowhere defined in the Act. The expression 'anticipated demand was vague one. The expression 'suitability of the applicant and 'public interest' did not contain any objective standards or norms. Where the Act provides some general principles to guide the exercise of the discretion and thus saves it from being arbitrary and unbridled, the court will uphold it, but where the Executive has been granted 'unfettered power to interfere with the freedom of property or trade and business, the court will strike down such provision

of law. Under Article 31(2): Article 31(2) of the Constitution provided for acquisition of private property by the Government under the authority of law. It laid down two conditions, subject to which the property could be requisitioned _1) that the law provided for an amount (after 25th Amendment) to be given to the persons affected, which was non-justifiable; and (2) that the property was to be acquired for a public purpose. In an early case, where the law vested the administrative officer with the power to acquire estates of food grains at any price, it was held to be void on the grounds, inter alia, that it failed to fix the amount of compensation or specify the principles, on which it could be determined. Since the matter was entirely left to the discretion of the officer concerned to fix any compensation it liked, it violated Article 31(2). The property under Article 31(2) could be acquisitioned for a public purpose only. The Executive could be made the sole judge to decide a public purpose. No doubt, the Government is in best position to judge as to whether a public purpose could be achieved by issuing an acquisition order, but it is a justifiable issue and the final decision is with the courts in this matter. In West Bengal Settlement Kanungo Co-operative Credit Society Ltd. V. BelaBannerjee,(AIR 1954 SC 170) the provision that a Government's declaration as to its necessity to acquire certain land for public purpose shall be conclusive evidence thereof was held to be void. The Supreme Court observed that as Article 31(2) made the existence of a public purpose a necessary condition of acquisition, it is, therefore, necessary that the existence of such a purpose as a fact must be established objectively and the provision relating to the conclusiveness of the declaration of then Government as to the nature of the purpose of the acquisition must be held unconstitutional. The Courts have, however, attempted to construe the term public purpose rather broadly; the judicial test adopted for the purpose being that whatever furthers the general interests of the community as opposed to the particular interests of the individual is a public purpose. The general tendency of the Legislature is to confer the power of acquisition on the Executive in an undefined way by using vague expressions such as "purposes of the State" or "purposes of the Union", so as to give wider latitude to the courts to uphold it. Thus, we have seen in the above illustrations how the courts have used the mechanism of fundamental rights to control the administrative discretion. In fact fundamental rights are very potential instruments by which the Judiciary in India can go a long way in warding off the dangers of administrative discretion.

b. **Grounds of judicial review**

In India the administrative discretion, thus, may be reviewed by the court on the following grounds.

I. Abuse of Discretion

Now a day, the administrative authorities are conferred wide discretionary powers. There is a great need of their control so that they may not be misused. The discretionary power is required to be exercised according to law. When the mode of exercising a valid power is improper or unreasonable there is an abuse of power. In the following conditions the abuse of the discretionary power is inferred: -

i) Use for improper purpose: - The discretionary power is required to be used for the purpose for which it has been given. If it is given for one purpose and used for another purpose. It will amount to abuse of power.

ii) Malafide or Bad faith: - If the discretionary power is exercised by the authority with bad faith or dishonest intention, the action is quashed by the court. Malafide exercise of discretionary power is always bad and taken as abuse of discretion. Malafide (bad faith) may be taken to mean dishonest intention or corrupt motive. In relation to the exercise of statutory powers 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.

iii) Irrelevant consideration: - The decision of the administrative authority is declared void if it is not based on relevant and germane considerations. The considerations will be irrelevant if there is no reasonable connection between the facts and the grounds.

iv) Leaving out relevant considerations:- The administrative authority exercising the discretionary power is required to take into account all the relevant facts. If it leaves out relevant consideration, its action will be invalid.

v) Mixed consideration: - Sometimes the discretionary power is exercised by the authority on both relevant and irrelevant grounds. In such condition the court will examine whether or not the exclusion of the irrelevant or non-existent considerations would have affected the ultimate decision. If the court is satisfied that the exclusion of the irrelevant considerations would have affected the decision, the order passed by the authority in the exercise of the discretionary power will be declared invalid but if

the court is satisfied that the exclusion of the irrelevant considerations would not be declared invalid.

vi) Unreasonableness: - The Discretionary power is required to be exercised by the authority reasonably. If it is exercised unreasonably it will be declared invalid by the court. Every authority is required to exercise its powers reasonably. In a case Lord Wrenbury has observed that a person in whom invested a discretion must exercise his discretion upon reasonable grounds. Where a person is conferred discretionary power it should not be taken to mean that he has been empowered to do what he likes merely because he is minded to do so. He is required to do what he ought and the discretion does not empower him to do what he likes. He is required, by use of his reason, to ascertain and follow the course which reason directs. He is required to act reasonably.

vii) Colourable Exercise of Power: - Where the discretionary power is exercised by the authority on which it has been conferred ostensibly for the purpose for which it has been given but in reality for some other purpose, it is taken as colorable exercise of the discretionary power and it is declared invalid.

viii) Non-compliance with procedural requirements and principles of natural justice: - If the procedural requirement laid down in the statute is mandatory and it is not complied, the exercise of power will be bad. Whether the procedural requirement is mandatory or directory is decided by the court. Principles of natural justice are also required to be observed.

ix) Exceeding jurisdiction: - The authority is required to exercise the power within the limits or the statute. Consequently, if the authority exceeds this limit, its action will be held to be ultra vires and, therefore, void.

II. Failure to exercise Discretion

In the following condition the authority is taken to have failed to exercise its discretion and its decision or action will be bad.

i) Non-application of mind: - Where an authority is given discretionary powers it is required to exercise it by applying its mind to the facts and circumstances of the case in hand. If he does not do so it will be deemed to have failed to exercise its discretion and its action or decision will be bad.

ii) Acting under Dictation: - Where the authority exercises its discretionary power under the instructions or dictation from superior authority. It is taken, as non-

exercise of power by the authority and its decision or action is bad. In such condition the authority purports to act on its own but in substance the power is not exercised by it but by the other authority. The authority entrusted with the powers does not take action on its own judgment and does not apply its mind. For example in Commissioner of Police v. Gordhandas the Police Commissioner empowered to grant license for construction of cinema theatres granted the license but later cancelled it on the discretion of the Government. The cancellation order was declared bad as the Police Commissioner did not apply his mind and acted under the dictation of the Government.

III) Imposing fetters on the exercise of discretionary powers: - If the authority imposes fetters on its discretion by announcing rules of policy to be applied by it rigidly to all cases coming before it for decision, its action or decision will be bad. The authority entrusted with the discretionary power is required to exercise it after considering the individual cases and if the authority imposes fetters on its discretion by adopting fixed rule of policy to be applied rigidly to all cases coming before it, it will be taken as failure to exercise discretion and its action or decision or order will be bad.

Illegality, irrationality and procedure impropriety:

Illegality: In Lord Diplock's words, this ground means that the decision maker "must understand correctly the law that regulates his decision-making power and must give effect to it."

A decision may be illegal for many different reasons. There are no hard and fast rules for their classification, but the most common examples of cases where the courts hold administrative decisions to be unlawful are the following:

The decision is made by the wrong person (unlawful sub-delegation): If the law empowers a particular authority, e.g. a minister, to make certain decisions, the Minister cannot subdelegate this power to another authority, e.g. an executive officer or a committee. This differs from a routine job not involving much discretion being done by civil servants in the Minister's name, which is not considered delegation. An example of when this happened was in Allingham v Minister of Agriculture and Fisheries where a notice preventing farmers from growing sugar beet was unlawful because the power to put up the sign was delegated by the original committee. Where a decision is made by a properly empowered department within a local council, s.101 of the Local Government Act allows for delegation.

Irrationality: Under Lord Diplock's classification, a decision is irrational if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it." This standard is also known as Wednesbury unreasonableness, after the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, where it was first imposed.

Unlike illegality and procedural impropriety, the courts under this head look at the merits of the decision, rather than at the procedure by which it was arrived at or the legal basis on which it was founded. The question to ask is whether the decision "makes sense". In many circumstances listed under "illegality", the decision may also be considered irrational.

Proportionality: Proportionality is a requirement that a decision is proportionate to the aim that it seeks to achieve. E.g. an order to forbid a protest march on the grounds of public safety should not be made if there is an alternative way of protecting public safety, e.g. by assigning an alternative route for the march. Proportionality exists as a ground for setting aside administrative decisions in most continental legal systems and is recognised in England in cases where issues of EC law and ECHR rights are involved. However, it is not as yet a separate ground of judicial review, although Lord Diplock has alluded to the possibility of it being recognised as such in the future. At present, lack of proportionality may be used as an argument for a decision being irrational

Procedural impropriety: A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute have not been followed or if the 'rules of natural justice have not been adhered to.

Statutory procedures: An Act of Parliament may subject the making of a certain decision to a procedure, such as the holding of a public hearing or inquiry, or a consultation with an external adviser. Some decisions may be subject to approval by a higher body. Courts distinguish between "mandatory" requirements and "directory" requirements. A breach of mandatory procedural requirements will lead to a decision being set aside for procedural impropriety.

c. **Doctrine of legitimate expectation**

Legitimate expectation is the ground of judicial review. Besides the above grounds on which the exercise of discretionary powers can be examined, a third major basis of

judicial review of administrative action is legitimate expectation, which is developing sharply in recent times. The concept of legitimate expectation in administrative law has now, undoubtedly, gained sufficient importance. It is stated that the legitimate expectation is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action and this creation takes its place besides such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and in future, perhaps, the unreasonableness, the proportionality. In Union of India v. Hindustan Development Corporations, (1993 3SCC 499) the court held that it only operates in public law field and provides locus standi for judicial review. Its denial is a ground for challenging the decision but denial can be justified by showing some overriding public interest. In the instant case, question arose regarding the validity of the dual policy of the government in the matter of contracts with private parties for supply of goods. There was no fixed procedure for fixation of price and allotment of quality to be supplied by the big and small suppliers. The government adopted a dual price policy, lower price for big suppliers and higher price for small suppliers in public interest and allotment of quantity by suitably adjusting the same so as to break the cartel. The court held that this does not involve denial of any legitimate expectation. The court observed: legitimate expectations may come in various forms and owe their existence to different kind of circumstances and it is not possible to give an exhaustive list in the context of vast and fast expansion of governmental activities. By and large they arise in cases of promotions, which are in normal course expected, though not guaranteed by way of statutory right, in cases of contracts, distribution of largess by the Government and in somewhat similar situations. Legitimate expectation gives the applicant sufficient locus standi for judicial review. The doctrine of legitimate expectation is to be confined mostly to right of fair hearing before a decision, which results in negative a promise, or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate does not require the fulfillment of the expectation where an overriding public interest requires otherwise. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation, which it would be within its powers to fulfill. The protection is limited to that extent and a judicial review can be within those limits. A person, who bases his claim on the doctrine of legitimate expectation, in the first instance, must

satisfy that there is foundation and thus he has locus standi to make such a claim. There are stronger reasons as to why the legitimate expectation should not be substantively protected than the reason as to why it should be protected. If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or arbitrary, discriminatory unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is " not the key which unlocks the treasury of natural justice and it ought not to unlock the gate which shuts, the court out of review on the merits", particularly when the element of speculation and uncertainly is inherent in that very concept. The courts should restrain themselves and restrict such claims duly to the legal limitations. Further in Food Corporation of India v. M/s. Kamdhenu Cattle Seed Industries AIR 1993 SC 1601. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and this extent. The Court observed: "The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process." In LalaSachinder Kumar v. Patna Regional Development Authority, (AIR 1994 PATNA 128) the court again applied the doctrine of legitimate expectation and held the order of allotment of residential plots issued by the Patna Regional Development Authority as bad. In the instant case Regional Development Authority issued an advertisement inviting applications for the allotment of residential plots. In this process preference was given to the employees of the Patna Regional Development Authority without considering the

case of applicant petitioner, whereas Rules did not provide for any such preferential allotment. The court held that allotment in favor of employees is arbitrary. The applicant petitioner has legitimate expectations to be considered for allotment.

d. **Evolution of concept of Ombudsmen**

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 A Module – 1 138 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. 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.

e. **Lokpal and Lokayukta Act:**

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 Module – 1 139 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. The system introduced as stated above functioned till March 1985 when a separate Department of Administrative Reforms and Public grievances was set up.

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.

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.

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.

Anti corruption bodies and and their administrative procedures:

A anti-corruption is an institution that is granted a charter recognizing it as a separate legal entity having its own privileges and liabilities distinct from those of its members. A corporation means a legal entity.

There are two types of corporations.

1. Corporation sole constituted of one person who has been incorporated by law such as the Administrator General, the AG, the Registrar of Tittles, the IGG etc.,

2. A corporation aggregate is constituted of a group of individuals such that they can act, control or hold property in the name of that group.

In Uganda, legal entities which are incorporated under the Companies Act, Cap 110 are known as companies.

A public corporation is a corporate body established by law to carry out certain specified functions for one reason or another that cannot be appropriately done by the government, a government ministry or department. See S. 170 Companies Act. They are a means of

implementing certain aspects of socio-economic policies of government. Examples, Uganda Investment Authority

An important feature of a Corporation is limited liability. If a corporation fails, shareholders normally only stand to lose their investments and employees will lose their jobs, but neither will they be further liable for debts that remain owing to the corporations creditors.

TRAITS OF PUBLIC CORPORATIONS

a) Corporate status as a legal entity,

b) Created by Specific statutes passed by the legislature, which spell out the functions, sources of funds, management of the relevant corporations.

c) Largely independent of the central government. They are not government they are managed by a board of directors. However, they are always under the general control of the Line ministers and are subject to ministerial control.

d) They have perpetual succession and a common seal.

CLASSIFICATIONS OF PUBLIC CORPORATIONS

Public corporations may be classified according to the functions for which they are created, namely.

a) Development corporations.

i. Some development corporations are set up to promote development of a sector of the economy. I.e. Wildlife Authority, Uganda Tourist Board for the tourism sector.

ii. Some development corporations are set up to provide public utilities, e.g. Uganda national Water and Sewage Corporation.

NOTE: Many Utility Corporation have since been privatised, i.e. UMEME. In the past, it was argued that public corporations could generate capital for reinvesting in the economy that it could attract foreign investment developing infrastructure that was not attractive to private investors etc. but these conceptions have since been departed from. It is now argued that these functions can be performed better by private enterprises.

b) Regulatory Corporations. E.g.

i. Uganda land Commission is set up for the purpose of granting alienating and controlling public land on behalf of the government.

ii. National Drug authority to regulate the manufacture, importation and sale of pharmaceuticals ion the country.

c) Finance Corporations. Bank of Uganda, Uganda Development Bank

d) Marketing boards. In as much as these have been phased out, they include the Coffee Marketing Board, Lint Marketing Board.

e) Educational, cultural and public amenities Corporations, e.g. LDC, Makerere University and UMI (Uganda Management Institute).

f) Cultural. Trustees of Nakivuubo War Memorial Stadium Trust, etc.

PURPOSES OF PUBLIC CORPORATIONS

a) Regulatory purposes, for controlling a particular sector, e.g. Uganda Communication Commission regulates, issues of License, radio stations and TVs

b) For service delivery i.e. to deliver specialized service.

c) For purposes of handling technical/ scientific matters which cannot be conveniently carried out within government.

d) For commercial purposes, i.e. to make profits for example Uganda Development Corporation, in 1950's

CONCLUSION

In the light of the above discussion I have come to the conclusion that the doctrine of res judicata will not apply unless all four conditions have been proved. The provisions of section 11 of CPC are not directory but mandatory. The Section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue. The doctrine of res judicata is ultimately based on considerations of public policy. One important public consideration of public policy is that the decisions pronounced by Courts of competent jurisdiction should be final unless they are modified or reversed by appellate authorities and the other principle is that no one should be made to face

the same kind of litigation twice over because such a process would be contrary to considerations of fair play and justice. The Doctrine of res Judicata is not only confined to decisions in a suit and that the doctrine applies even to decisions rendered in proceedings which are not suits but how far the decision which is rendered in original proceedings will bind the parties depends upon the considerations. A decision given in proceedings other than a suit may still operate as res Judicata if substantial rights of the parties are determined. But if the decision is given in a summary proceeding it does not operate as res Judicata. The principle of res Judicata does not apply strictly to public interest litigations. The primary object of res Judicata is to bring an end to litigation, so there is no reason not to extend the doctrine of res judicata.

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