LLB
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Administrative Law

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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.

Definition by K. C. Davis

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".

Again, there are some difficulties with this definition also. It falls to distinguish administrative law from constitutional law Like Jennings definition mentioned above; this is also very wide definition. It includes the entire legal field except the legislature and the Judiciary. It also includes the law of local government. It is also said that it is not possible to divide completely and definitely the functions of legislative, executive and judiciary.

It is very difficult to say precisely where legislation ends and administrative begins. Though enacting a law is functioning of the legislature the administrative authorities, legislate under the powers delegated to them by the legislature and this delegated legislation is certainly a part of administrative law.

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 ï 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 ï 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.

Since independence, the activities and the functions of the government have further increased. Under the Industrial Disputes Act 1947, the Minimum Wages Act 1948 important social security measures have been taken for those employed in Industries.

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.

The state is given power to impose reasonable restrictions even on the Fundamental Rights guaranteed by the constitution.

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.

Again, 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.

Similar view was taken in K. L. Shinde Vs State of Mysore, (AIR 1976 SC 1080) In Shrivastava Vs Suresh Singh (AIR 1976 SC 1904), The Supreme Court observed that in matters relating to questions regarding adequacy or sufficiently of training the expert opinion of public service commission would be generally accepted by the court.

Very Recently, in State of Gujrat Vs. M. I. Haider Bux (AIR 1977 SC 594), The Supreme Court held that under the provisions of the Land Acquisition Act, 1994, Ordinarily, government is the best authority to decide whether a particular purpose is a public purpose and whether the land can be acquired for the purpose or not.

Thus, on the one hand, the activities and powers of the government and administrative authorities have increased and on the other hand, there is great need for the enforcement of the rule of law and judicial review over these powers, so that the citizens should be free to enjoy the liberty guaranteed to them by the constitution. For that purpose, provisions are made in the statutes giving right of appeal, revision etc. and at the same time extra-ordinary remedies are available to them under Article 32, 226 and 227 of the constitution of India. The Principle of judicial review is also accepted in our constitution, and the order passed by the administrative authorities can be quashed and set aside if they are malafied or ultravires the Act or the provisions of the constitution.

And if the rules, regulations or orders passed by these authorities are not within their powers, they can be declared ultravires, unconstitutional, illegal or void.

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.Diccy 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.

Application of the Doctrine in England: Though, there is no written constitution, the rule of law is applied in concrete cases. In England, the Courts are the guarantors of the individual rights. Rule of law establishes an effective control over the executive and administrative power.

However, Dicey's rule of law was not accepted in full in England. In those days, many statutes allowed priority of administrative power in many cases, and the same was not challenged better c the Courts. Further sovereign immunity existed on the ground of King can do no wrong'. The sovereign immunity was abolished by the 'Crown Proceedings Act, 1947. Prof. Dicey could not distinguish arbitrary power from discretionary power, and failed to understand the merits of French legal system.

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 Kesavanda Bharti 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.,Shivakant Shukla (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 Droit Administratif. 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 ñrule of law.ò

Dicey's Rule of Law and Modern Administrative Law: Dicey's view and proposition of rule of law has succeeded in part and wasnôt 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 Droit Administratif, 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 ñstate shall make no law, which violates, abridges or takes away rights conferred under part IIIò. 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.ñWhen 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 oppressorsò 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 ï 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, ñit 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 dayò. 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 ï Itôs 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 ï It Need: Expressing the needs for and importance of judiciary a learned jurist aptly remarks: ñmiddle class people are combating with the government powers through media of the courtsò. 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

ñJudiciary is unlimitedò- 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 nationôs 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, ñJustice delayed is Justice deniedò. 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, ñThere is no better test of the excellence of a Government than the efficiency of its judicial systemò.

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 libertyó, 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.

Lastly, administrative and constitutional law shares a common ground, and supplements each other in their mission to bring about administrative justice. Concern for the rights of the individual has been identified as a fundamental concern of administrative law. It ultimately tries to attain administrative justice. Sometimes, the constitution may clearly provide right to administrative justice. Recognition of the principles of administrative justice is given in few bills of rights or constitutional documents. Australia and South Africa may be mentioned in this respect.

Constitutional law needs to be understood to include more than the jurisprudence surrounding the express and implied provisions of any constitution. In its broader sense, constitutional law connotes the laws and legal principles that determine the allocation of decision-making functions amongst the legislative, executive and judicial branches of government, and that define the essential elements of the relationship between the individual and agencies of the state. Wade has observed that administrative law is a branch of constitutional law and that the connecting thread is the quest for administrative justice.

e. 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 ï of nationalization ï 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 ôblind spotô 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.

f. Classification of function administrative

Pure administrative function can be divided into three categories:

(a) Administrative discretion

(b) Ministerial action

(c) Administrative instruction

ADMINISTRATIVE DISCRETION:

In Laymanôs language, discretion means choosing from amongst the various available alternatives without reference to nay predetermined criterion, no matter how fanciful that choice may be. A person in his will has discretion to dispose his property in any manner, no matter how arbitrary and fanciful that may be. But when the word discretion is qualified by the word óadministrativeô has somewhat different overtones. óDiscretionô in this sense means choosing from amongst the various available alternatives but with reference to the rules or reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful but legal and regular. (Lord Halsbury).

CJ. Coke says- Discretion is a science or understanding to discern between falsity and truth, between right and wrong and not to do according to will and private affection.

The problem of administrative discretion is complex. It is true that in any intensive form of government cannot function without the exercise of some discretion by the officials. It is necessary not only for individualization of the administrative power but also because it is humanly impossible to lay down a rule for every conceivable eventuality in the complex art of modern government. But it is equally true that absolute discretion is a ruthless master. It is more destructive of freedom than any of manôs other inventions (Justice Doglus). There for, there has been a constant conflict between the claims of administration to an absolute discretion and the claims of subjects to a reasonable exercise of it.

MINISTERIAL ACTION:

Ministerial function is that function of agency which is taken as a matter of duty imposed upon it by the law devoid of any discretion or judgment. Therefore, a ministerial action involves the performance of a definite duty I respect of which there is no choice, no wish and no freedom. Here, the high authority dictates and lower authority carries out. Collection of revenue may be one such ministerial action. Furthermore, if the statute requires that the agency shall open a bank account in a particular bank or shall prepare the annual report to be placed on the table of the minister, such action of opening the bank account and the preparation of the annual report shall be classified as ministerial.

When an administrative agency is acting ministerial it has no power to consult its own wishes but when it is acting administratively its standards are subjective and it follows its own wishes.

ADMINISTRATIVE INSTRUCTION:

Administrative instruction means power to issue instruction flow from the general executive power of the administration. In any intensive form of government the desirability and efficacy of administrative instruction issued by the superior administrative authorities to their subordinates cannot be over emphasized. óAdministrative instructionô is a most efficacious technique for achieving some kind of uniformity in administrative discretion and to manipulate in an area which is new and dynamic. These instructions also give a desired flexibility to the administration devoid of technicalities of the rule-making process.

Administrative instruction may be specific or general and directory or mandatory. Its type depends largely on the provisions of the statute which authorizes the administrative agencies to issue instructions. The instructions which are generally issued not under any statutory authority but under the general power of administration are considered as directory and hence are unenforceable not having the force of law.

If administrative instructions have no force of law but if these are consistently followed for a long time government cannot depart from it at its own sweet will without rational justification.

UNIT-II: Legislative Functions of Administrative

a. Necessity and Constitutionality

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 govern-ment 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 partsð the Appropriation Act and the Finance Act.

It exercises supervision over the financial admini-stration through its two important committeesð 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.

b. Forms and requirements

The legislature also approves or disapproves proclamations and or-dinances issued by the executive.

Certain legislatures perform some direct executive functions as well, e.g., the Senate of America shares with the Parliament the power of making appointments and concluding treaties.

Control over Public Administration:

The Parliament deter-mines the structure and organization of the public administration and provides funds to maintain it.

It creates different state services, lays down rules and regulations of service, determines the distribution of powers between various agencies of administration and provides institu-tional devices for recruitment, and training of personnel of administration.

It asks for appointment of the Commissions like Gorewala Committee and Administrative Reforms Commission to enquire into the ad-ministrative structure and make recommendations for improvement and re-organization.

judicial controls

Judicial duties of the Legislature:

Certain legislatures perform some judicial functions. The House of Lords, for example, is the highest court of appeal in the U.K. The Senate of America is the highest court of impeachment for high public officials.

In India, impeachment of the President is to be conducted by the Parliament. It determines the judicial structure in the country and may affect changes whenever it deems fit.

In India, legislature might confer judicial or semi-judicial functions on the executive. The legislatures try their own members and decide contested elections.

Judicial Controls

ÅAdministrative agencies are subject to the judicial review of the courts. However, such review is not automatic. Parties seeking review must show:

ÅThe action is reviewable (the APA presumes this).

ï The party must have standing to sue.

ï The party must have exhausted all possible administrative remedies.

ï Article lll, Section 2 of the Constitution requires that an actual controversy be at issue.

ÅA court may review whether:

ï An agency has exceeded the scope of its enabling legislation.

ï An agency has properly interpreted the laws.

ï An agency has violated the U.S. Constitution.

ï An agency has complied with all applicable procedural requirements.

ï An agencyôs actions are arbitrary or capricious, or an abuse of discretion.

ï An agencyôs conclusions are not supported by substantial evidence.

Ventilation of grievances:

A legislature acts as an agency for ventilation of the grievances of the people. A legislature is a place where every interest and shade of opinion can have its case presented. Parlia-mentary debates and discussions throw a flood of light over different issues of public importance.

The proceedings of a legislature are flashed in the newspapers. Thus a legislature on the one hand, acts as a vehicle for the expression of public opinion, and on the other, acts as an organ for the formation of public opinion. It secures redress of grievances of the people against the executive.

It secures modification in government policies in accordance with the interests of the common people. People can make petitions to the Parliament. Every Parliament has a Committee on Petitions of its own to deal with such petitions from the people.

As Laski says "The opportunity to utter complaint is one of the occasions where the legislature has a special value."

Electoral Functions:

Many legislatures perform certain elec-toral functions. The Parliament of India, for example elects the Vice- President of the Indian Republic.

It also takes share in the election of the President. In Switzerland, members of the legislature elect the Federal Council, the Judges, Chancellor and even the General of the Army.

It makes election laws, determines dates of general elections and mid-term elections.

Constitutional Functions:

Legislatures in different countries of the world have some share in effecting constitutional amendments. The Parliament of India, for example, has a dominant share in making constitutional amendments.The U.S. Congress can propose amendments to the Constitution. The British Parliament can singly amend the consti-tution. It is at once a law making body and a Constituent Assembly.

Planning:

In every Welfare state, legislature adopts plans for economic development. They not only regulate economy by way of fiscal, financial, banking and tariff policies, but allow the government agencies to enter into the industrial field.

The Parliaments pass legisla-tion establishing Public Corporations to undertake industrial and com-mercial activities on behalf of the State. Though these corporations are autonomous, the Parliament exercises regular control over their working apart from determining their constitution, structure, powers and function-ing through law.

It is also responsible for providing social utility services to the community. These may be organized departmentally or through au-tonomous or statutory bodies.

Appointment of Commissions:

Parliament may appoint from time to time commissions and committees of enquiry and investigations. It may establish research institutes, etc.

Thus the Parliament today performs all those functions which are essential to organize common welfare. These functions are so numerous and defy enumeration.

c. Control

i. Legislative

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;

ix. it involves expenditure from the Consolidated Fund of India or the Public Revenues;
x. its form or purpose requires any elucidation for any reason;
xi. it appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; and
xii. there appears to have been unjustifiable delay in its publication on its laying before the Parliament. The Committee of the first House of the People submitted a number of reports and continues to do useful work. The Committee considered the question of bringing about uniformity in the provisions of the Acts delegating legislative powers. It made certain recommendations in its First report (March, 1954) which it later modified in its Third Report (May, 1955) after noting the existing divergent legislation in India.

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.

ii. 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.

Publication of Delegated Legislation: - Adequate publicity of delegated legislation is absolutely necessary to ensure that law may be ascertained with reasonable certainty by the affected persons. Further the rules and regulations should not come as a surprise and should not consequently bring hardships which would naturally result from such practice. If the law is not known a person cannot regulate his affairs to avoid a conflict with them and to avoid losses. The importance of these laws is realized in all countries and legislative enactments provide for adequate publicity.

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.

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. The criticism was so strong and the picture painted was so shocking that a high power committee to inquire into matter was appointed by the Lord Chancellor. This committee thoroughly inquired into the problem and to the conclusion that delegated legislation was valuable and indeed inevitable. The committee observed that with reasonable vigilance and proper precautions there was nothing to be feared from this practice.

Nature and Scope of delegated legislation: Delegated legislation means legislation by authorities other than the Legislature, the former acting on express delegated authority and power from the later. Delegation is considered to be a sound basis for administrative efficiency and it does not by itself amount to abdication of power if restored to within proper limits. The delegation should not, in any case, be unguided and uncontrolled. Parliament and State Legislatures cannot abdicate the legislative power in its essential aspects which is to be exercised by them. It is only

a nonessential legislative function that can be delegated and the moot point always lies in the line of demarcation between the essential and nonessential legislative functions.
The essential legislative functions consist in making a law. It is to the legislature to formulate the legislative policy and delegate the formulation of details in implementing that policy. Discretion as to the formulation of the legislative policy is prerogative and function the legislature and it cannot be delegated to the executive. Discretion to make notifications and alterations in an Act while extending it and to effect amendments or repeals in the existing laws is subject to the condition precedent that essential legislative functions cannot be delegated authority cannot be precisely defined and each case has to be considered in its setting. In order to avoid the dangers, the scope of delegation is strictly circumscribed by the Legislature by providing for adequate safeguards, controls and appeals against the executive orders and decisions.
The power delegated to the Executive to modify any provisions of an Act by an order must be within the framework of the Act giving such power. The power to make such a modification no doubt, implies certain amount of discretion but it is a power to be exercised in aid of the legislative policy of the Act and cannot

i. travel beyond it, or
ii. run counter to it, or
iii. Certainly change the essential features, the identity, structure or the policy of the Act.

Under the constitution of India, articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The delegation of legislative power was conceived to be inevitable and therefore it was not prohibited in the constitution. Further, Articles 13(3) (a) of the Constitution of India lays down that law includes any ordinances, order bylaw, rule regulation, notification, etc. Which if found inviolation of fundamental rights would be void. Besides, there are number of judicial pronouncements by the courts where they have justified delegated legislation. For e.g. While commenting on indispensability of delegated legislation JusticeKrishna Iyer has rightly observed in the case of *Arvinder Singh v. State of Punjab, AIR A1979 SC 321*, that the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility that our massive legislature may not get off to a start if they must directly and comprehensively handle legislative business in their plentitude, proliferation and particularization Delegation of some part of legislative power becomes a compulsive necessity for viability. A provision in a statute which gives an express power to the Executive to amend or repeal any existing law is described in England as Henry viii Clause because the King came to exercise power to repeal Parliamentary laws. The said clause has fallen into disuse in England, but in India some traces of it are found here and there, for example, Article 372 of the Constitution authorizes the president of India to adopt pro Constitutional laws, and if necessary, to make such adaptations and modifications, (whether by way of repeal or amendment) so as to bring them in accord with the provisions of the Constitution. The State Reorganization Act, 1956 and some other Acts similar thereto also contain such a provision. So long as the modification of a provision of statute by the Executive is innocuous and immaterial and does not affect any essential change in the matter.

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 ï

i. The kind of forms
ii. The method of publication
iii. The manner of making returns, and
iv. Such other administrative details

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

1. the powers mentioned above are given , or
2. the power given is so vast that its limits are almost impossible of definition, or
3. while limits are imposed, the control of the courts is ousted.

Such type of delegation is commonly known as the Henry VIII Clause. An outstanding example of this kind is Section 7 of the Delhi Laws Act of 1912 by which the Provincial Government was authorized to extend, with restrictions and modifications as it thought fit any enactment in force in any part of India to the Province of Delhi. This is the most extreme type of delegation, which was impugned in the Supreme Court in the Delhi Laws Act case. It was held that the delegation of this type was invalid if the administrative authorities materially interfered with the policy of the Act, by the powers of amendment or restriction but the delegation was valid if it did not affect any essential change in the body or the policy of the Act. That takes us to a term "bye-law" whether it can be declared ultra vires? If so when? Generally under local laws and regulations the term bye-law is used such as

I. public bodies of municipal kind
II. public bodies concerned with government, or
III. corporations, or
IV. societies formed for commercial or other purposes.

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

1. That is not made and published in the manner specified by the Act, which authorizes the making thereof;
2. That is repugnant of the laws of the land;
3. That is repugnant to the Act under which it is framed;
4. That it is uncertain; and

5. That it is unreasonable.

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

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

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

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

(ii) Rule-decision action or quasi-judicial action ï Today the bulk of the decisions which affect a private individual come not from courts but from administrative agencies exercising ad judicatory powers. The reason seems to be that since administrative decision-making is also a by-product of the intensive form of government; the traditional judicial system cannot give to the people that quantity of justice, which is required in a welfare State. Administrative decision-making may be defined, as a power to perform acts administrative in character, but requiring incidentally some characteristics of judicial traditions. On the basis of this definition, the following functions of the administration have been held to be quasi-judicial functions:

1. Disciplinary proceedings against students.

2. Disciplinary proceedings against an employee for misconduct.

3. Confiscation of goods under the sea Customs Act, 1878.

4. Cancellation, suspension, revocation or refusal to renew license or permit by licensing authority.

5. Determination of citizenship.

6. Determination of statutory disputes.

7. Power to continue the detention or seizure of goods beyond a particular period.

8. Refusal to grant óno objection certificateô under the Bombay Cinemas (Regulations) Act, 1953.

9. Forfeiture of pensions and gratuity.

10. Authority granting or refusing permission for retrenchment.

11. Grant of permit by Regional Transport Authority. Attributes of administrative decision-making action or quasi-judicial action and the distinction between judicial, quasi-judicial and administrative action.

(iii) Rule-application action or administrative action ï 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. In *A.K. Kraipak v. Union of India*, the Court was of the view that in order to determine whether the action of the administrative authority is quasi-judicial or administrative, one has to see the nature of power conferred, to whom power is given, the framework within which power is conferred and the consequences. Therefore, administrative action is the residuary action which is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. It does not decide a right though it may affect a right. However, it does not mean that the principles of natural justice can be ignored completely when the authority is exercising ñadministrative powersò. Unless the statute provides otherwise, a minimum of the principles of natural justice must always be observed depending on the fact situation of each case. No exhaustive list of such actions may be drawn; however, a few may be noted for the sake of clarity:

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

2) Functions of a selection committee.

Administrative action may be statutory, having the force of law, or non statutory, devoid of such legal force. The bulk of the administrative action is statutory because a statute or the Constitution gives it a legal force but in some cases it may be non-statutory, such as issuing directions to subordinates not having the force of law, but its violation may be visited with disciplinary action. Though by and large administrative action is discretionary and is based on subjective satisfaction, however, the administrative authority must act fairly, impartially and reasonable. Therefore, at this stage it becomes very important for us to know what exactly is the difference between Administrative and quasi-judicial Acts. Thus broadly speaking, acts, which are required to be done on the subjective satisfaction of the administrative authority, are called óadministrativeô acts, while acts, which are required to be done on objective satisfaction of the administrative authority, can be termed as quasi-judicial acts. Administrative decisions, which are founded on pre-determined standards, are called objective decisions whereas decisions which involve a choice as there is no fixed standard to be applied are so called subjective decisions. The former is quasi-judicial decision while the latter is administrative decision. In case of the administrative decision there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments or to collate any evidence.The grounds upon which he acts and the means, which he takes to inform himself

before acting, are left entirely to his discretion. The Supreme Court observed, ñIt is well settled that the old distinction between a judicial act and administrative act has withered away and we have been liberated from the pestilent incantation of administrative action.

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

1. Notes and administrative instruction issued in the absence of any

2. If administrative instructions are not referable to any statutory authority they cannot have the effect of taking away rights vested in the person governed by the Act.

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.

CHAPTER I

1. Short title, extent and commencement. ï

(1) This Act may be called the Administrative Tribunals Act, 1985.

(2) It extends, -

(a) In so far as it relates to the Central Administrative Tribunal, to the whole of India;

(b) In so far as it relates to Administrative Tribunals for States, to the whole of India, except the State of Jammu and Kashmir.

(3) The provisions of this Act, in so far as they relate to the Central Administrative Tribunal, shall come into force on such date as the Central Government may, by notification, appoint.

(4) The provisions of this Act, in so far as they relate to an Administrative Tribunal for a State, shall come into force in a State on such date as the Central Government may, by notification, appoint.

2. Act not to apply to certain persons. -The provisions of this Act shall not apply to-

(a) Any member of the naval, military or air forces or of any other armed forces of the Union;

(c) Any officer or servant of the Supreme Court or of any High Court 2[or courts subordinate thereto];

(d) Any person appointed to the secretarial staff of either House of Parliament or to the secretarial staff of any State Legislature or a House thereof or, in the case of a Union Territory having a Legislature, of that Legislature.

1. Deleted vide The Administrative Tribunals (Amendment) Act, 1986 (No. 19 of 1986). Deemed to have been deleted with effect from the Ist of November, 1985.

2. Inserted vide The Administrative Tribunal (Amendment) Act, 1987 (No. 51 of 1987). Takes effect from the 22nd December, 1987.

3. Definitions. -In this Act, unless the context otherwise requires,

1(a) ñAdministrative Memberò means a Member of a Tribunal who is not a judicial member within the meaning of Clause (i);

2(aa) ñAdministrative Tribunalò, in relation to a State, means the Administrative Tribunal for the State or, as the case may be, the Joint Administrative Tribunal for that State and any other State or States;

(b) ñApplicationò means an application made under Section 19;

(c) ñAppointed dayò, in relation to a Tribunal, means the date with effect from which it is established, by notification, under Section 4;

(d) ñAppropriate Governmentò means, -

(i) In relation to the Central Administrative Tribunal or a Joint Administrative Tribunal, the Central Government;

(ii) In relation to a State Administrative Tribunal, the State Government;

(e) ñBenchò means a Bench of a Tribunal;

(f) ñCentral Administrative Tribunalò means the Administrative Tribunal established under sub-section (1) of Section 4;

(g) ñChairmanò means the Chairman of a Tribunal;

(h) ñJoint Administrative Tribunalò means an Administrative Tribunal for two or more States established under sub-section (3) of Section 4;

1(j) ñJudicial Memberò means a Member of a Tribunal appointed as such under this Act, and includes the Chairman or a Vice-Chairman who possesses any of the qualifications specified in sub-section (3) of Section 6;

3(ia) ñMemberò means a Member (whether Judicial or Administrative) of a Tribunal and includes the Chairman and a Vice-Chairman;

(j) ñNotificationò means a notification published in the Official Gazette;

(k) ñPostò means a post within or outside India;

(l) ñPrescribedò means prescribed by rules made under this Act;

(m) ñPresidentò means the President of India;

4(n) Deleted;

(o) ñRulesò means rules made under this Act;

(p) ñServiceò means service within or outside India;

(q) ñService mattersò, in relation to a person, means all matters relating to the conditions of his service 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 as the case may be, of any corporation 5[or society] owned or controlled by the Government, as respects-

(i) Remuneration (including allowances), pension and other retirement benefits;

(ii) Tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation;

(iii) Leave of any kind;

(iv) Disciplinary matters; or

(v) Any other matter whatsoever;

(r) ñService rules as to redressed of grievancesò, in relation to any matter, means the rules, regulations, orders or other instruments or arrangements as in force for the time being with respect to redressed otherwise than under this Act, or any grievances in relation to such matters;

3(rr) ñSocietyò means a society registered under the Societies Registration Act, 1860 (21 of 1960), or under any corresponding law for the time being in force in a State];

(s) ñSupreme Courtò means the Supreme Court of India;

(t) ñTribunalò means the Central Administrative Tribunal or a State administrative Tribunal or a Joint Administrative Tribunal;

(u) ñVice-Chairmanò means the Vice-Chairman of a Tribunal.

EXPLANATION.-In the case of a Tribunal having two or more Vice-Chairmen, references to the Vice-Chairman in this Act shall be construed as a reference to each of those Vice-Chairmen.

1. Inserted vide The Administrative Tribunals (Amendment) Act, 1986

2. Renumbered (No. 19 of 1986). Takes effect from the 22nd January, 1986.

3. Substituted vide The Administrative Tribunals (Amendment) Act, 1986 (No. 19

4. Deleted of 1986) and takes effect from the 22nd January, 1986.

GOVERNMENT OF INDIA'S NOTIFICATIONS

(1) óAppointed dayô under Sec. 3 (c), 1-11-1985.-In exercise of the powers conferred by sub-section (1) of Section 4 of the Administrative Tribunals Act, 1985 (13 of 1985) and in supersession of the Notification No. GSR 667 (E), dated the 20th August, 1985, the Central Government hereby establishes the Central Administrative Tribunal with effect from the 1st day of November, 1985, which shall be the óappointed dayô within the meaning of clause (c) of Section 3 of the Act.

(2) Delhi, Allahabad, Bombay, Calcutta and Madras Benches.-In exercise of the powers conferred by sub-section (7) of Section 5 of the Administrative Tribunals Act, 1985 (13 of 1985) and in supersession of the Notification of the Government of India in the Ministry of Personnel and Training, Administrative Reforms and Public Grievances and Pension f Department of Personnel and Training, Notification No. GSR 609 (E), dated the 26th July, 1985], Central Government hereby specifies-

(1) Delhi as the place at which the Principal Bench and the Additional Bench I and Additional Bench 11 of the Central Administrative Tribunal shall ordinarily sit; and

(2) Allahabad, Bombay, Calcutta and Madras as the places at which the other Additional Benches of the Central Administrative Tribunal shall ordinarily sit.

(3) Bangalore, Chandigarh and Guwahati Benches.-In exercise of the powers conferred by sub-section (7) of Section 5 of the Administrative Tribunal Act, 1985 (13 of 1985) and in continuation of the

Notification of the Government of India in the Ministry of Personnel and Training, Administrative Reforms and Public Grievances and Pension (Department of Personnel and Training), GSR No. 823 (E), dated the 31st October, 1985, the Central Government hereby specifies Bangalore, Chandigarh and Guwahati as the places at which the Benches of the Central Administrative Tribunal shall ordinarily sit with effect from the 3rd March, 1986.

(4) Cuttack, Jabalpur, Jodhpur and Patna Benches.-In exercise of the powers conferred by sub-section (7) of Section 5 of the Administrative Tribunals Act, 1985 (13 of 1985) and in continuation of the notification of the Government of India in the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), GSR No. 309 (E), dated the 20th February, 1986, the Central Government hereby specifies Cuttack, Jabalpur, Jodhpur and Patna as the places at which the Benches of the Central Administrative Tribunal shall ordinarily sit with effect from the 30th June, 1986.

(5) Ahmedabad and Hyderabad Benches.-In exercise of the powers conferred by sub-section (7) of Section 5 of the Administrative Tribunals Act, 1985 (13 of 1985) and in continuation of the notification of the Government of India in the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), GSR No. 908 (E), dated the 25th June, 1986, the Central Government hereby specifies Ahmedabad and Hyderabad as the places at which the Benches of the Central Administrative Tribunal shall ordinarily sit with effect from the 30th June, 1986.

(6) Ernakulam Bench.-In exercise of the powers conferred by sub section (7) of Section 5 of the Administrative Tribunals Act, 1985 (13 o 1985) and in continuation of the notification of the Government of India in the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), GSR No. 920 (E), dated the 27th June 1986, the Central Government hereby specifies Ernakulam as the place at which the Bench of the Central Administrative Tribunal shall ordinary sit with effect from the 1st September, 1988.

(7) Lucknow and Jaipur Benches. -In exercise of the powers conferred by sub-section (7) of Section 5 of the Administrative Tribunals Ac 1985 (13 of 1985) and in continuation of the notification of the Government of India in the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), No. 11019/31 (i)/85-A dated the Ist September, 1988, the Central Government hereby specifies Lucknow and Jaipur as the places at which the Bench of the Central Administrative Tribunal shall ordinarily sit.

CHAPTER II: Establishment of Tribunals and Benches thereof

4. Establishment of Administrative Tribunals. ï

(1) The Central Government shall, by notification, establish an Administrative Tribune to be known as the Central Administrative Tribunal, to exercise jurisdiction, powers and authority conferred on the Central Administrative Tribune by or under this Act.

(2) The Central Government may, on receipt of a request in this behalf from any State Government, establish, by notification, an Administrative Tribunal for the State to be known as the (Name of the State) Administrative Tribunal to exercise the jurisdiction, powers and authority conferred on the Administrative Tribunal for the State by or under this Act.

(3) Two or more States may, notwithstanding anything contained in sub-section (2) and notwithstanding that any or all of those States has or have Tribunals established under that sub-section, enter into an agreement that the same Administrative Tribunal shall be the Administrative Tribunal for each of the States participating in the agreement, and if the agreement is approved by the Central Government and published in the Gazette of India and the Official Gazette of each of those States, the Central Government may, by notification, establish a Joint Administrative Tribunal to exercise the jurisdiction, powers and authority conferred on the Administrative Tribunals for those States by or under this Act.

(4) An agreement under sub-section (3) shall contain provisions as to the name of the Joint Administrative Tribunal, the manner in which the participating States may be associated in the selection of the Chairman, Vice-Chairman and other Members of the Joint Administrative Tribunal, the places at which the Bench or Benches of the Tribunal shall sit, the apportionment among the participating States of the expenditure in connection with the Joint Administrative Tribunal and may also contain such other supplemental, incidental and consequential provisions not inconsistent with this Act as may be deemed necessary or expedient for giving effect to the agreement.

1[(5) notwithstanding anything contained in the foregoing provisions of this section, or sub-section (1) of Section 5, the Central Government may, -

(a) With the concurrence of any State Government, designate, by notification, all or any of the Members of the Bench or Benches of the State Administrative Tribunal established for that State under sub-section (2) as members of the Bench or Benches of the Central Administrative Tribunal in respect of that State and the same shall exercise the jurisdiction, powers and authority conferred on the Central Administrative Tribunal by or under this Act;

(b) On receipt of a request in this behalf from any State Government, designate, by notification, all or any of the Members of the Bench or Benches of the Central Administrative Tribunal functioning in that State as the Members of the Bench or Benches of the State Administrative Tribunal for that State and the same shall exercise the jurisdiction, powers and authority conferred on the Administrative Tribunal for that State by or under this Act.

And upon such designation, the Bench or Benches of the State Administrative Tribunal or, as the case may be, the Bench or Benches of the Central Administrative Tribunal shall be deemed, in all respects, to be the Central Administrative Tribunal, or the State Administrative Tribunal for that State established under the provisions of Article 323-A of the Constitution and this Act.

(6) Every notification under sub-section (5) shall also provide for the apportionment between the State concerned and the Central Government of the expenditure in connection with the Members common

to the Central Administrative Tribunal and State Administrative Tribunal and such other incidental and consequential provisions not inconsistent with this Act as may be deemed necessary or expedient.]

1. Inserted vide The Administrative Tribunals (Amendment) Act, 1986 (No. 19 of 1986) and takes effect from the 22nd January, 1986.

5. Composition of Tribunals and Benches thereof. ï

(1) Each Tribunal shall consist of a Chairman and such number of Vice-Chairmen 1[and Judicial and Administrative Members] as the appropriate Government may deem fit and, subject to the other provisions of this Act, the jurisdiction, powers and authority of the Tribunal may be exercised by Benches thereof.

1(2) Subject to the other provisions of this Act, a Bench shall consist of one Judicial Member and one Administrative Member.

(4) Notwithstanding anything contained in sub-section (1) 2the Chairman-

1[(a) May, in addition to discharging the functions of the Judicial Member or the Administrative Member of the Bench to which he is appointed, discharge the functions of the Judicial Member or, as the case may be, the Administrative Member, of any other Bench];

(b) May transfer the Vice-Chairman or other Member from one Bench to another Bench;

1[(c) May authorize the Vice-Chairman or the Judicial Member or the Administrative Member appointed to one Bench to discharge also the functions of the Vice-Chairman, or as the case may be, the Judicial Member or the Administrative Member of another Bench]; and

(d) May, for the purpose of securing that any case or cases which, having regard to the nature of the questions involved, requires or require, in his opinion or under the rules made by the Central Government in this behalf, to be decided by a Bench composed of more than 1[two members] issue such general or special orders, as he may deem fit:

3[Provided that every Bench constituted in pursuance of this clause shall include at least one Judicial Member and one Administrative Member.]

(6) Notwithstanding anything contained in the foregoing provisions of this section, it shall be competent for the Chairman or any other Member authorized by the Chairman in this behalf to function as 3[a Bench] consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such classes of cases or such matters pertaining to such classes of cases as the Chairman may by general or special order specify:

Provided that if at any stage of the hearing of any such case or matter it appears to the Chairman or such Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of 3[two Members] the case or matter may be transferred by the Chairman or, as the case may be, referred to him for transfer to, such Bench as the Chairman may deem fit.

5[(7) Subject to the other provisions of this Act, the Benches of the Central Administrative Tribunal shall ordinarily sit at New Delhi (which shall be known as the Principal Bench), Allahabad, Calcutta, Madras, New Bombay and at such other places as the Central Government may, by notification, specify.

(8) Subject to the other provisions of this Act, the places at which the Principal Bench and other Benches of a State Administrative Tribunal shall ordinarily sit shall be such as the State Government may, by notification, specify.]

1. Substituted vide The Administrative Tribunals (Amendment) Act, 1986 (No. 19 of 1986). Takes effect from the 1st November, 1985.

GOVERNMENT OF INDIA'S ORDER

onstitution of Single Member Bench of the Tribunal to dispose of specified cases.-In exercise of the powers conferred by sub-section (6) of Section 5 of the Administrative Tribunals Act, 1985, I, K. Madhava Reddy, Chairman, Central Administrative Tribunal, hereby authorise all the members of the Central Administrative Tribunal, to function as a Bench consisting of Single Member and to exercise the jurisdiction, powers and authority of the Tribunal in respect of such cases or class of cases as are specified below with effect from Ist May, 1988-

Cases relating to-(a) Change of date of birth while in service;

(b) Posting/transfers;

(c) Entry(s) in character rolls made otherwise than as a measure of penalty under Central Civil Services (Classification, Control and Appeal) Rules, 1965;

(d) Allotment of and eviction from Government accommodation;

(e) Fixation of pay;

(f) Claims of medical reimbursement, leave, Joining Time, Leave Travel Concession and Overtime;

(g) Crossing of Efficiency Bar;

(h) Grant of Family Pension;

Grant or refusal to grant of advances/loans;

(j) Stagnation increment(s);

(k) Grant of passes to Railway employees;

Grant or refusal to grant or recovery of allowances;

(m) Payment of interest on pensioner benefits.

2. All cases specified in para.1 above shall be posted for admission before a Single Member Bench. If the Single Member Bench is of the view that any such case is not fit for admission, it shall order such a case to be posted before a Bench of two Members.

3. All urgent matters for admission and interim orders which are moved for hearing during vacation shall be heard by a Vacation Bench which shall ordinarily consist of a Single Member. The Chairman may constitute a Bench of two Members also as a Vacation Bench. However, if the Single Member sitting as a Vacation Bench is of the view that any case is not fit for admission, he shall order such a matter to be posted before a Bench of two Members, immediately after the vacation.

4. Where for any reason, a Bench of more than two Members cannot be constituted all urgent matters for admission and interim orders which are moved for hearing shall be heard by a Bench consisting of a Single Member. If the Single Member is of the view that any case is not fit for admission he shall make such interim orders, as he may deem fit and post, as soon as may be, the case before a Bench of two Members.

5. Notwithstanding anything contained in paras.1 to 4 above, if at any stage of hearing of any such case or matter, it appears to the Chairman or such Single Member that the case or matter is of such nature that it ought to be heard by a Bench consisting of two Members, they may refer the case or the matter to a Bench consisting of two Members subject to the proviso to sub-section (6) of Section 5 of the Administrative Tribunals Act, 1985.

6. Bench of a Single Member or a Bench of more than one Member, as the case may be, shall be constituted in the case of Principal Bench by the Chairman and in his absence by the Vice-Chairman of the Principal Bench and in case of other Benches by the Vice-Chairman of the respective Benches and in their absence by the Chairman.

6. Qualifications for appointment as Chairman, Vice-Chairman or other Members. -

(1) A person shall not be qualified for appointment as the Chairman unless he-

(a) Is, or has been, a Judge of a High Court; or

(b) Has, for at least two years, held the office of Vice-Chairman 1

(2) A person shall not be qualified for appointment as the Vice-Chairman unless he-

(a) Is, or has been, 2[or is qualified to be, j a Judge of a High Court; or

(b) Has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India; or

3[(bb) Has, for at least five years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or]

(c) Has, for a period of not less than three years, held office as 3[a Judicial Member or an Administrative Member].

4[(3) A person shall not be qualified for appointment as a Judicial Member unless he-

(a) Is, or has been, or is qualified to be, a Judge of a High Court; or

(b) Has been a member of the Indian Legal Service and has held a post in Grade I of that Service for at least three years.

(3-A) A person shall not be qualified for appointment as an Administrative Member unless he-

(a) Has, for at least two years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or

(b) Has, for at least three years, held the post of a Joint Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India,

And shall, in either case, have adequate administrative experience.]

(4) 5[Subject to the provisions of sub-section (7), the Chairman, Vice-Chairman and every other Member of the Central Administrative Tribunal shall be appointed by the President.

(5) 5[Subject to the provisions of sub-section (7), the Chairman, Vice-Chairman and every other Member of an Administrative Tribunal for a State shall be appointed by the President after consultation with the Governor of the concerned State.

(6) The Chairman, Vice-Chairman and every other Member of a Joint Administrative Tribunal shall, subject to the terms of the agreement between the participating State Governments published under sub-section (3) of Section 4, 6[and subject to the provisions of sub-section (7)] be appointed by the President after consultation with the Governors of the concerned States.7[(7) No appointment of a person possessing the qualifications specified in this section as the Chairman, a Vice-Chairman or a Member shall be made except after consultation with the Chief Justice of India.]

EXPLANATION -In computing for the purposes of this section, the period during which a person has held any post under the Central or a State Government, there shall be included the period during which he has held any other post under the Central or a State Government (including an office under this Act) carrying the same scale of pay as that of the first mentioned post or a higher scale of pay.

1. Omitted vide The Administrative Tribunals (Amendment) Act, 1987 (No. 51 of 1987). Takes effect from the 22nd December, 1987.

2. Inserted

3. Inserted vide The Administrative Tribunals (Amendment) Act, 1986 (No. 19 of 1986). Takes effect from the 22nd January, 1986.

4. Substituted

5. Substituted vide The Administrative Tribunals (Amendment) Act, 1986 (No. 19 of 1986). Takes effect from the 22nd January, 1986.

6. Inserted

7. Substituted vide The Administrative Tribunals (Amendment) Act, 1987 (No. 51 of 1987). Takes effect from the 22nd December, 1987.

7. Vice-Chairman to act as Chairman or to discharge his functions in certain circumstances. ï

(1) In the event of the occurrence of any vacancy in the office of the Chairman by reason of his death, resignation or otherwise, the Vice-Chairman or, as the case may be, such one of the Vice-Chairmen as the appropriate Government may, by notification, authorize in this behalf, shall act as the Chairman until the date on which a new Chairman, appointed in accordance with the provisions of this Act to fill such vacancy enters upon his office.

(2) When the Chairman is unable to discharge his functions owing to absence, illness or any other cause, the Vice-Chairman, or, as the case may be, such one of the Vice-Chairmen as the appropriate Government may, by notification, authorize in this behalf, shall discharge the functions of the Chairman until the date on which the Chairman resumes his duties.

8. Term of office. -1[The Chairman, Vice-Chairman or other Member shall hold office as such for a term of five years from the date on which he enters upon his office, but shall be eligible for re-appointment for another term of five years:

Provided that no Chairman, Vice-Chairman or other Member shall hold office as such after he has attained, -

(a) In the case of the Chairman or Vice-Chairman, the age of sixty five years, and

(b) In the case of any other Member, the age of sixty-two years.

c. 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.

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: -

- *Nemo judex in causa sua* - No one should be made a judge in his own cause or the *rule against bias.*
- *Audi alteram partem* - Hear the other party or the rule of fair hearing or the rule that no one should be condemned unheard.
- 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.

J.Mohopatra & Co. Vs, State of Orissa

SC quashed the decision of the Textbooks' selection committee because some of its members were also the authors of the books, which were considered for selection. The Court concluded that withdrawal of person at the time of consideration of his books is not sufficient as the element of quid pro quo with other members cannot be eliminated.

Ashok Kumar Yadav vs. State of Haryana

Issue

Whether the selection of candidate would vitiate for bias if close relative of members of the Public Service Commission is appearing for selection?

Held

The SC laid down the following propositions: -

1. Such member must withdraw altogether from the entire selection process otherwise all selection would be vitiated on account of reasonable likelihood of bias affecting the process of selection
2. This is not applicable in case of Constitutional Authority like PSC whether central or State. This is so because if a member was to withdraw altogether from the selection process, no other person save a member can be substituted in his place and it may sometimes happen that no other member is available to take the place of such a member and the functioning of PSC may be affected.
3. In such a case, it is desirable that the member must withdraw from participation in interview of such a candidate and he should also not take part in the discussions. The SC conceptualized the doctrine of necessity in this case.

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

The principle of *audi alteram partem* is the basic concept of principle of natural justice. The expression *audi alteram partem* 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 *audi alteram partem* 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.

The technique of post decisional hearing was developed in order to balance these factors against the requirements of law, justice and fairness. The court stressed that a fair opportunity of being heard following immediately the order impounding the passport would satisfy the mandate of natural justice. The same technique of validating void administrative decision by post decisional hearing was adopted in *Swadeshi Cotton Mills Vs. UOI* . Under section 15 of IDRA, an undertaking can be taken over after making an investigation into its affairs. But u/s 18-AA, a takeover w/o an investigation is permitted where `immediate' action is required.

The court validated the order of the govt. which had been passed in violation of the rule of *audi alteram partem* because the govt. had agreed to give post-decisional hearing. The ratio of the majority decision was as follows: -

1. Pre-decisional hearing may be dispensed with in an emergent situation where immediate action is required to prevent some imminent danger or injury or hazard to paramount public interest.
2. Mere urgency is, however, no reason for exclusion of *audi alteram partem* rule.The decision to exclude pre-decisional hearing would be justiciable.
3. Where pre-decisional hearing is dispensed with, there must be a provision for post-decisional remedial hearing.

In *K.I.Shephard vs. UOI* certain employees of the amalgamated banks were excluded from employment. The Court allowing the writs held that post-decisional hearing in this case would not do justice. The court pointed out that there is no justification to throw a person out of employment and then give him an opportunity of representation when the requirement is that he should be given an opportunity as a condition precedent to action. In *H.L.Trehan Vs. UOI*, a circular was issued by the Govt. on taking over the company prejudicially altering the terms and conditions of its employees w/o affording an opportunity of hearing to them. The SC observed

that "In our opinion, the post decisional opportunity of hearing does not subserve the rules of natural justice. The authority that embarks upon a post-decisional hearing will normally proceed with a closed mind and there is hardly any chance of getting proper consideration of the representation at such a post decisional hearing." Thus in every case where pre-decisional hearing is warranted, post-decisional hearing will not validate the action except in very exceptional circumstances.

Conclusion

It can be concluded that pre-decisional hearing is the standard norm of rule of *audi alteram partem*. But post-decisional hearing at least affords an opportunity to the aggrieved person and is better than no hearing at all. However, post-decisional hearing should be an exception rather than rule. It is acceptable in the following situations:_

1. where the original decision does not cause any prejudice or detriment to the person affected;
2. where there is urgent need for prompt action;
3. where it is impracticable to afford pre-decisional hearing.

The decision of excluding pre-decisional hearing is justifiable.

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. Bakshi Gulam 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 *Hira Nath Misra 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

The courts have observed in few cases that it would be improper to disallow legal representation to the aggrieved person where the State is allowed to be represented through a lawyer. In *Nandlal Bajaj vs. State of Punjab*, the court allowed legal representation to the detainee through a lawyer despite Section 8(e) of COFEPOSA specifically denied legal representation in express terms because the State had been represented through a lawyer. In *Board of Trustees, Port of Bombay vs. Dilip Kumar*, a request of delinquent employee for legal representation was turned down as there was no provision in the regulations. During the course of enquiry, the regulation was amended giving powers to Enquiry Officer to allow legal representation. The court held that this question whether legal representation should be allowed to the delinquent employee would depend on the fact whether the delinquent employee is pitted against legally trained mind. In such a case, denial of request to engage a lawyer would result in violation of essential principles of natural justice. Following this case, the SC in *J.K.Aggarwal vs. Haryan Seeds Development Corporation Limited* held that refusal to sanction the service of a lawyer in the enquiry was not a proper exercise of the discretion under the rule resulting in failure of natural justice; particularly in view of the fact that the Presenting Officer was a person with legal attainments and experience.

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.

S.N.Mukherjee vs. UOI

Issue

Whether it was incumbent upon the Chief of Army Staff to record the reasons of the orders passed by him while confirming the findings and the sentence of the CG Observed SC observed that

- The requirement to record reasons could be regarded as one of the principles of natural justice.
- An administrative authority must record the reasons in support of their decisions, unless the requirement is expressly or by necessary implication excluded.
- The reasons cited would enable the court to effectively exercise the appellate or supervisory powers.
- The giving of reasons would guarantee consideration of the matter by the authority.
- The reasons would produce clarity in the decisions and reduce arbitrariness.

Held

U/s 162 of the Army Act, the reasons have to be reached only in cases where the proceedings of a summary court martial are set aside or the sentence is reduced and not when the findings and sentence are confirmed. Thus requirement of recording reasons cannot be insisted upon at the stage of consideration of post-confirmation petition by the CG.

Mahindra & Mahindra vs. UOI

Order passed by MRTPC, a quasi judicial body - Clauses in agreement with the dealers are found to be offensive and resulting in RTP - No reasons were cited - Co. filed appeal before SC - SC held that the order suffers from an error of law apparent from the face of it as no reasons have been given.

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,Sharma vs, 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.

e. 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 Judgesô Association vs. Union of India (1992) 1 SCC 119 Where he observes: ñThe 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 Courtôs functioning successfulò. Mentioning the high expectations of society from the judges, he further advices: ñA 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 errorsò. 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 sub-clause. With an aim to speed-up trials, the amendment states that no adjournment should be granted at the partyôs request, nor can the partyôs 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 ñoffences affecting the socioeconomic condition of the countryò 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 clientôs 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.

One of the cardinal principles of criminal law is that everyone is presumed to be innocent unless his guilt is proved beyond reasonable doubt in a trial before an impartial and competent court. Justice requires that no one be punished without a fair trial and judicial officers play their part in ensuring the same.

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. Letôs 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 ñThis 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 canôt be a mechanical orderò. 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 individualôs liberty which is fundamental to oneôs 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 policeôs 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 *Sheela Barse vs 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 *Hussainara Khatoon 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 favor.

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 Bankerôs 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 Prabhu vs Sayed Babalal (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: ñComplaints 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 CrPCò 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.

CROSS CASE

In a recent case Dr. Mohammad Khalil Chisti vs. State of Rajasthan involving free fight where there was cross case, I myself observed with regret the duplication of proceedings in the same case which should have been ideally heard and disposed of together at both trial and appellate stage. You may come across similar circumstances where there are allegations and counter allegation. Where there are two different versions of same incident resulting into two criminal cases are described as ñcase and counter caseò In such a scenario, you must try the two cases together. Trial of cross cases presents a variety of ticklish practical issues and challenges. Under section 319 of the Code, if a magistrate upon hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in connected offence he should hold trial together. In State Of M.P vs Mishrilal (2003) 9 SCC 426, both the parties lodged an FIR against each other in respect of the same incident. The Supreme Court while giving guidance as to the procedure to be adopted in such cases has observed as follows: - ñThe cross- cases should be tried together by the same court irrespective of the nature of the offence involved. The rationale behind this is to avoid the conflicting judgments over the same incident because if cross cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments.ò

f. Institutional Decision

Based on a preponderance of the evidence, the institutionôs 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. Administrative Discretion

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 Droit Administratif. 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 ñrule of law.ò

Dicey's Rule of Law and Modern Administrative Law: Dicey's view and proposition of rule of law has succeeded in part and wasnôt 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 Droit Administratif, 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 Discretion and fundamental rights: 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 ñno yardstick or measure for the grouping either of persons or of cases or of offencesò so as to distinguish them from others outside the purview of the Act. Moreover, the necessity of ñspeedier trialò 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.ò ñAny 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.ò 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 óregionô was nowhere defined in the Act. The expression óanticipated demand was vague one. The expression ósuitability of the applicant and ópublic interestô 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 óunfettered 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. Bela Bannerjee,(AIR 1954 SC 170)* the provision that a Governmentôs 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 ñpurposes of the Stateò or ñpurposes of the Unionò, 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.

c. 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.

d. Doctrine of legitimate expectation

Legitimate expectation as 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 ñ 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 meritsò, 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**:** ñThe 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.ò In *Lala Sachinder 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.

B. Judicial control of Administrative Action

i. Introduction

There has been tremendous expansion in the administrative process. This is natural in a welfare state as a welfare state is basically an administrative state. So expansion in the administrative power is a consequence of the concept of welfare state. All legal power, according to H.W.R. Wade, 'as opposed to duty, is inevitably discretionary to a greater or lesser extenté ' Therefore, in order to maintain rule of law it is absolutely necessary to control this discretionary element in the administrative power. Justice Douglas of the U.S. Supreme Court has rightly remarked that it is the majesty of the administrative law that it has been able to control absolute discretion on the part of the government or any ruler or official because absolute discretion is a ruthless master. It is more destructive of freedom than any of man's inventions.

Therefore, the judicial control over the administrative action becomes imperative. There are two types of remedies against the administrative wrongs ï private law remedy of suit and judicial review through writs. Civil law remedy could be effective if the procedure is simple cheap and expeditious, which is not so in India. Therefore, this remedy is not effective against the administration. There is tremendous scope for this remedy in administrative matters since it lies at the door-step of a litigant. It is the public law remedy of judicial review through writs which is very effective and expeditious, though it is costly as only High Courts and the Supreme Court have the power to issue these writs. The power of judicial review is a supervisory power and not a normal appellate power against the decisions of administrative authorities. The recurring theme of the apex court's decision relating to nature and scope of judicial review is that it is limited to consideration of legality of decision making process and not legality of order per se. That mere possibility of another view cannot be a ground of interference.

ii. Court as the final authority to determine the legality of administrative action

POWERS OF THE SUPREME COURT

The Power of judicial review is a constitutional power since it is the Constitution which invests these powers in the Supreme Court and the High Courts in the States. So far the Supreme Court is concerned the relevant Articles are 32 with Articles 12 and 13 and Article 136. Article 32 empowers the Supreme Court to issue directions, orders or writs (which are specifically mentioned therein) for the enforcement of fundamental rights. What is unique about Article 32 is that the right to move the Supreme Court under this Article is itself a Fundamental Right. Thus the Supreme Court is made guarantor or protector of the fundamental rights. Dr. Ambedkar called it the soul of the Constitution. The Supreme Court has further expanded the scope of this Article even in cases where no fundamental right is involved. In *Jhumman Singh v. CBI* (1995 (3) SCC 420. Also see M.C.Mehta v. Union of India, A.I.R 1987, SC 965), it was held that where a person manipulated facts in order to get a decree by a court to defeat the ends of justice, in such a situation petition was held to be maintainable under Article 32. Though Article 32 is called

cornerstone of the democratic edifice, it becomes inconvenient for the Supreme Court to entertain petitions under original jurisdiction since it could overload the court. Therefore, sometimes the Supreme Court suggests that the petitioner should first approach the High Court under Article 226 before coming to the Supreme Court under Article 32.

ARTICLE 136-A SPECIAL POWER OF JUDICIAL REVIEW

Under Article 136, the Supreme Court may grant special leave to appeal against any decision of a Tribunal. What is a Tribunal is not defined, but the Supreme Court has interpreted it in a liberal way. A tribunal is a body or authority which is vested, with judicial power to adjudicate on question' of law or fact, affecting the rights of citizens in a judicial manner. Such authorities or bodies must have been constituted by the state and vested with judicial as distinguished from administrative or executive functions.

Article 136 does not confer a right of appeal as such but a discretionary power on the Supreme Court to grant special leave to appeal. The Supreme Court has held that even in cases where special leave is granted, the discretionary power continues to remain with the court even at the stage when the appeal comes up for hearing. Generally, the court does not, grant special leave to appeal, unless it is shown that exceptional and special circumstance exist, that substantial and grave injustice has been done and the case in question presents sufficient gravity to warrant a review of the decision appealed against. It confers a very wide discretion on the Supreme Court to be exercised for satisfying the demands of justice.

In *Bharat Coking Coal Co. v. Karam Chand Thapar* (2003(1)SCC 6.), the Supreme Court held, Article 136 ñhas been engrafted by the founding fathers of the Constitution for the purpose of avoiding mischief of injustice on the wrong assumption of law. The justice delivery system of the country prompts this court to interfere under Article 136 of the Constitution when the need of the society stands established and the judgment, if left outstanding, would not only create prejudice but would have otherwise adverse effect upon the society.ò

POWERS OF THE HIGH COURTS

Article 226 clause (1) empowers the High Courts in the States or Union Territories to issue to any person or authority including any Government within their territories, directions, orders or writs for the enforcement of the fundamental rights or for any other purpose.

The power of judicial review of the High Court under Article 226 is wider than that of the Supreme Court under Article 32 of the Constitution. The expression 'for any other purpose' enables the High Court to exercise their power of judicial review for the enforcement of ordinary legal rights which are not fundamental rights. High Court can issue a writ to a person or authority not only when it is within the territorial jurisdiction of the court but also when it is outside its jurisdiction provided the cause of action wholly or partly arises within its territorial jurisdiction. This power of the High Court under Article 226 is concurrent with the power of the Supreme Court under Article 32 of the Constitution.

Article 227 clause (1) confers the power of 'superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. However, this power does not extend, like Article 136, over any court or tribunal constituted under any law relating to the Armed Forces.

This power is in addition to the power conferred upon the High Court under Article 226 which is of a judicial nature. Is this power of superintendence, administrative or judicial? Under the Government of India Act, 1935 this power extended only to the courts and was of administrative nature only. Under the Constitution it is extended to the tribunals and section 224 clause (2) of the Government Of India Act, 1935, which made it of administrative nature, was not retained in Article 227. Therefore, the power of superintendence under Article 227 is of an administrative as well as judicial nature. The parameters of this power are well settled and it is exercised on the same grounds as the power of judicial review. They are:

(i) It can be exercised even in those cases where no appeal or revision lies to the High Court;

(ii) The power should not ordinarily be exercised if any other remedy is available even if it involved inconvenience or delay.

(iii) The power is available where there is want or excess of jurisdiction, failure to exercise jurisdiction violation of principles of natural justice and error of law apparent on the face of the record;

(iv) In the exercise of this power the High Court does not act as appellate tribunal.

(v) It does not invest the High Court with an unlimited prerogative to interfere in cases where wrong decisions have been arrived at by judicial or quasi-judicial tribunals on questions of law or fact. There has to be grave miscarriage of justice or flagrant violation of law calling for interference.

Tribunal under Article 227 has the same meaning as under Article 136 for the Supreme Court. In *Surya Dev Rai v. Ram Chander Rai* (A.I.R 2003 SC 3044; Also see Shiv Shakti Cooperative Housing Society, Nagpur v. M.S Swaraj Developers A.I.R 2003 SC 2434.), the Supreme Court held that the purpose underlying vesting of this jurisdiction under Article 227 is ñpaving the path of justice and removing its obstacles therein.òThus a very wide discretionary power is provided to the High Courts under articles 226 and 227. However, it must be exercised according to the principles of judicial review.

iii.Exhaustion of Administrative remedies

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

(a) Under article 32, the Supreme Court has been empowered to enforce fundamental rights guaranteed under Chapter III of the Constitution. Article 32 of the Constitution provides remedies by way of writs in this country. The Supreme Court has, under Article 32(2) power to issue appropriate directions, or orders or writs, including writs in the nature of *habeas corpus, certiorari, mandamus, prohibition and quo- warranto* The court can issue not only a writ but can also make any order or give any direction, which it may consider appropriate in the circumstances. It cannot turn down the petition simply on the ground that the proper writ or direction has not been prayed for.

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

(c) Under Article 136 the Supreme Court has been further empowered, in its discretion, to grant special leave to appeal from any judgment, decree, determination, sentence or order by any Court or tribunal in India. Article 136 conferred extraordinary powers on the Supreme Court to review all such administrative decisions, which are taken by the administrative authority in quasi-judicial capacity. The right to move the Supreme Court in itself is a guaranteed right, and Gajendragadkar, J., has assessed the significance of this in the following manner: ñThe fundamental right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should in the words of *Patanjali Sastri, J.,* regard itself as the protector and guarantor of fundamental rights and should declare that it cannot consistently with the responsibility laid upon it, refuse to entertain

applications seeking protection against infringement of such rights. Since Article 32 is itself fundamental right, it cannot be whittled down by a legislation. It can be invoked even where an administrative action has been declared as final by the statute. An order made by a quasi-judicial authority having jurisdiction under an Act which is intra virus is not liable to be questioned on the sole ground that the provisions of the Act on the terms of the notification issued there under have been misinterpreted.

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

First, if the statute for a provision thereof *ultra vires* any action taken there under by a quasi-judicial authority which infringes or threatens to infringe a fundamental right, will give rise to the question of enforcement of that right and petition under Article 32 will lie.
Second, if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing error as to a right, the question of enforcement of that arises and a petition under Article 32 will lie even if the statute is *intra vires*.
Third, if the action taken by a quasi-judicial authority is procedurally *ultra virus*, a petition under Article 32 would be competent.

iv. Locus Standi

In law, standing or locus standi is the term for the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Standing exists from one of three causes:

1. The party is directly subject to an adverse effect by the statute or action in question, and the harm suffered will continue unless the court grants relief in the form of damages or a finding that the law either does not apply to the party or that the law is void or can be nullified. This is called the "something to lose" doctrine, in which the party has standing because they directly will be harmed by the conditions for which they are asking the court for relief.

2. The party is not directly harmed by the conditions by which they are petitioning the court for relief but asks for it because the harm involved has some reasonable relation to their situation, and the continued existence of the harm may affect others who might not be able to ask a court for relief. In the United States, this is the grounds for asking for a law to be struck down as violating the First Amendment, because while the plaintiff might not be directly affected, the law might so adversely affect others that one might never know what was not done or created by those who fear they would become subject to the law ï the so-called "chilling effects" doctrine.

3. The party is granted automatic standing by act of law. Under some environmental laws in the United States, a party may sue someone causing pollution to certain waterways without a federal permit, even if the party suing is not harmed by the pollution being generated. The law allows them to receive a portion of any fines collected by the government from their violation of law. In some U.S. states, a person who believes a book, film or other work of art is obscene may sue in their own name to have the work banned directly without having to ask a District Attorney to do so.

In the United States, the current doctrine is that a person cannot bring a suit challenging the constitutionality of a law unless the plaintiff can demonstrate that he/she/it is or will "imminently" be harmed by the law. Otherwise, the court will rule that the plaintiff "lacks standing" to bring the suit, and will dismiss the case without considering the merits of the claim of unconstitutionality. To have a court declare a law unconstitutional, there must be a valid reason for the lawsuit. The party suing must have something to lose in order to sue unless it has automatic standing by action of law.

v. Laches

Laches or *Unreasonable Delay* is defined as:

Failure to do something at the proper time, especially such delay as will bar a party from bringing a legal proceeding.

It is principally a question of inequity of permitting claim to be enforced.

Lache as a self-defense: Laches acts as a defense to an equitable action, that bars recovery by the plaintiff because of the plaintiff's undue delay in seeking relief.

Laches and Statute of Limitation: Laches is the equitable equivalent of statutes of limitations. However, unlike statutes of limitations, laches leaves it up to the court to determine, based on the unique facts of the case, whether a plaintiff has waited too long to seek relief.

Elements of Laches: Unreasonable lapse of timeThe concept of Laches is based on the legal maxim "Equity aids the vigilant, not those who slumber on their rights." Laches recognizes that a party to an action can lose evidence, witnesses, and a fair chance to defend himself or herself after the passage of time from the date the wrong was committed. If the defendant can show disadvantages because for a long time he or she relied on the fact that no lawsuit would be started, then the case should be dismissed in the interests of justice.

- It is a form of delay for such time as to constitute acquiescence.
- Delay such as to preclude court from arriving at a safe conclusion as to truth.
- Delay that makes it inequitable to accord relief sought.

- Delay that warrants presumption that party has waived his right.
- Delay that works or results in disadvantage, injury, injustice, detriment or prejudice.
- Failure to prosecute claim within reasonable and proper period.
- It is implied waiver from knowledge of existing conditions and acquiescence in them.
- Inexcusable delay in assertion of rights.
- It is lack of diligence on part of plaintiff to injury, prejudice, or disadvantage of defendant.
- Lapse of time and acquiescence in alleged wrong.
- Lapse of time together with change in condition or relation of parties.
- Lapse of time together with prejudice or lapse such that prejudice will be presumed.
- Neglect to asset a right or claim. A neglect to assert a right or claim may operate as a right to waiver. A waiter is the voluntary relinquishment or surrender of come known right or privilege.
- Laches implies a neglect to do that which the party ought to do for his own benefit or protection. Hence laches may be evidence of acquiescence.
- To the detriment of another. In the happening of an event when the disadvantage of the party allows the other party to not to assert the right or the claim within the reasonable time happens to be an element of laches.
- It is an inequity founded on some change in the condition or relations of the property or parties.
- Laches is, or is based on, delay attended by or inducing change of condition or relation.
- It is a neglect for unreasonable and unexplained length of time under circumstances permitting diligence to do what could have or should have been done
- It is neglect for unreasonable length of time to do what should have been done
- Neglect or omission for unexplained and unreasonable length of time
- Neglect or omission to assert right as, taken in conjunction with lapse of time and other circumstances, causes prejudice to adverse party

Example: In the event of causing loss of marriage of the defendant the petitioner may not present the original photographs of the marriage so that the marriage is held null and void. And if the petitioner comes to know about the same after the lapse of reasonable time it might be the case of laches and the court may presume the same.

vi. Res judicata

INTRODUCTION

'*Res*' in Latin means *thing* a '*Judicata*' means *already decided*. This rule operates as a bar to the trial of a subsequent suit on the same cause of action between the same parties. Its basic purpose is - "One suit and one decision is enough for any single dispute". The rule of *'res judicata'* does not depend upon the correctness or the incorrectness of the former decision. It is a principle of law by which a matter which has been litigated cannot be relitigated between the same parties. This is known as the rule of "*res judicata*" (thing decided). The aim of this rule is to end

litigation once a matter has been adjudicated. It aims to save the court time and prevent harassment to parties.

"*Res judicata pro veritate accipitur*" is the full maxim which has, over the years, shrunk to mere "*res judicata*". Section 11 contains the rule of conclusiveness of the judgment, which is based partly on the maxim of Roman Jurisprudence ñ*interest reipublicae ut sit finis litium*" (it concerns the State that there be an end to law suits) and partly on the maxim "*Nemo debet bis vexari pro una at eadem causa*" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised. The principle of *res judicata* is based on the need to give finality and certainty to judicial decisions. The principle of *res judicata* includes *constructive res judicata* also. The term *res judicata* in common parlance refers to the various ways in a judgment in which one action will have a binding effect in another. In modern terminology, these binding effects are called ñclaim preclusionò. It must be distinguished from the second effect which is called ñcollateral estoppelò or ñissue preclusionò. *Res judicata* is a broad term ñwhich encompasses both issue preclusion or claim preclusionò. The effect of issue preclusion is that an issue determined in a first action may not be re-agitated when the same issue arises in a later action based on a different claim or demand.

Essentials for res judicata.ð The general principle of *res judicata* is embodied in its different forms in three different Indian major statutesð Section 11 of the Code of Civil Procedure, *Section 300 of the Code of Criminal Procedure, 1973 and Sections 40 to 43 of the Indian Evidence Act*, yet it is not exhaustive. Here, we are concerned only with Section 11 of the Code of Civil Procedure. Following conditions must be proved for giving effect to the principles of *res judicata* under Section 11ð

i. that the parties are same or litigating under same title,
ii. that the matter directly and substantially in issue in the subsequent suit must be same which was directly and substantially in issue in the former suit,
iii. that the matter in issue has been finally decided earlier, and
iv. that the matter in issue was decided by a Court of competent jurisdiction.

If any one or more conditions are not proved, the principle of *res judicata* would not apply. Where all the four conditions are proved, the Court has no jurisdiction to try the suit thereafter as it becomes not maintainable and liable to be dismissed. For application of principle of *res judicata*, existence of decision finally deciding a right or a claim between parties is necessary.

RES JUDICATA IN PUBLIC INTEREST LITIGATION

Public Interest Litigation is not defined in any statute or in any act. It has been interpreted by judges to consider the intent of public at large. Although, the main and only focus of such litigation is only "Public Interest". Public interest litigation or social action litigation is fought with the objective to make good the grievances of public at large. In *Forward Construction Co.*

v. Prabhat Mandal(AIR 1986 SC 39) , the Supreme Court was directly called upon to decide the question. The apex court held that the principle would apply to public interest litigation provided it was a bona fide litigation. In another case of *Ramdas Nayak v. Union of India (AIR 1995 Bom 235)*, the court observed: It is a repetitive litigation on the very same issue coming up before the courts again and again in the grab of public interest litigation. It is high time to put an end to the same. In *State of Karnataka & Anr v. All India Organizations & Ors(AIR 2006 SC 1846)*, the Court has stated that in a public interest litigation the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is bonafide the judgment in previous public interest litigation would be a *judgment in rem*. It binds the public at large and bars any member of the public from coming to the Court and raising any connected issue which has been raised or should have been raised on an earlier occasion by way of public interest litigation, if the issue were directly and substantially in issue in the previous proceedings. Hence principle of *res judicata* and constructive res judicata are applicable to public interest litigation also.

RES JUDICATA IN TAXATION MATTERS

When does the principle of *res judicata* apply in tax matters? The common understanding is that, notwithstanding the public policy behind the rule, it has no relevance to tax disputes. It is said that a finding or an opinion recorded by an authority or even by a court of law for one assessment year has no binding effect on the issues in subsequent assessment years. Strictly speaking *res judicata* does not apply to income-tax proceedings. But each assessment being a suit, what is decided in one year may not apply in the following years but where a fundamental aspect permeating through the different assessment year has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be all appropriate to allow the position to be changed in a subsequent year11.

In *Amalgamated Coalfields Ltd. Janapadha sabha(AIR 1968 SC 1013)*, the apex Court has said that each assessment year, being an independent unit, a decision for one year may not operate as *res judicata* in another year. But if a pure question of law, e.g. constitutional validity of a statute is decided, ñit may not be easy to hold that the decision on this basic and material issue would not operate as *res judicata* against the assessee for a subsequent year.ò

In *Bharat Sanchar Nigam Ltd. V. Union of India (AIR 2006 SC 1383),* the apex Court has held that in a tax matter decision given for one assessment year does not operate as *res judicata* for the subsequent years on the premise that *res judicata* applies to debar Courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The Court made it clear that a Court of superior jurisdiction overruling a decision of a lower authority cited before it, would not operate to upset the binding nature of that decision on the parties to the case and to whom the principle of *res judicata* would continue to operate.

RES JUDICATA IN EXECUTION PROCEEDINGS

Explanation VII14 added in the section 11 has made it clear that not only general principle of *res judicata* but also constructive *res judicata* apply to execution proceedings. The provisions of the section are now applicable to a proceeding for the execution of a decree, and references in the section to a suit, issue or former suit shall be construed as references respectively to a proceeding

for the execution of a decree, question arising in such proceeding and a former proceeding for the execution of that decree. However, an application by decree-holder to transfer certain papers to another Court for further execution is not an execution application and its dismissal does not bar a fresh application.

The Law Commission recommended that the principle of *res judicata* should be applied to the situations of proceedings in execution and independent proceedings and suggested insertion of Section 11A. Instead of inserting Section 11A the Joint Committee of Parliament suggested insertion of Explanation to Section 11 and on the basis of that report; Explanations VII and VIII have been inserted by C.P.C. (Amendment) Act, 1976. Section 11 of the present Code excluding Explanation VIII envisages that judgment in a former suit would operate as *res judicata* if the Court which decided the suit was competent to try the same by virtue of its pecuniary jurisdiction and the subject-matter to try the subsequent suit as such it is not necessary that the said Court should have had territorial jurisdiction to decide the subsequent suit.

The provisions of this Section were not expressly made applicable to execution proceedings. But the principle of *res judicata* has been extended to execution proceedings because the doctrine is based on the general principle of law, for it were not binding; there would be no end to litigation. In *Mahijibhai v. Manibhai(AIR 1965 SC 1477.)*, the Supreme Court by a majority held that an application for restitution under Section 144 of the Code of Civil procedure is an application for restitution under Section 144 of the Code of Civil procedure is an application for execution of a decree. The principle of *res judicata* applies to execution proceedings. In *Harnath Rai v. Hirdai Narain(AIR 1953 Pat. 242)* and *Venkappa v. Lakshmikant Rao(AIR 1956 Hyd. 7.),* It is held that the principle of Constructive *res judicata* applies not only to different execution applications but also to different stages of the same execution petition.

RES JUDICATA IN WRIT PETITION

It has been settled since long that the Section 11 of the Code is not applicable, the general principle of *res judicata* may be made applicable in the judicial proceedings. It is settled principle of law that general principle of *res judicata* applies to writ petitions. However, a writ petition dismissed under Article 226 of the Constitution of India would not ordinarily bar filing of writ petition under Article 32 or a special leave petition under

Art. 136. In the leading case of *Darayao v. State of UP(AIR 1961 SC 1457),* the Supreme Court has exhaustively dealt with the question of applicability of the principle of res judicata in writ proceedings and laid down certain principles which may be summarized thus:

- If a petition under Article 226 is considered on merits as a contested matter and is dismissed, the decision would continue to bind the parties unless it is otherwise modified or reversed in appeal or other appropriate proceedings permissible under the Constitution.
- It would not be open to a party to ignore the said judgment and move the Supreme Court under Article 32 by an original petition made on the same facts a for obtaining the same or similar orders or writs.
- If the petition under Article 226 in a High Court is dismissed not on merits but because of laches of the party applying for the writ or because it is held the party had an alternative remedy available to it the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32.

- Such a dismissal may, however, constitute a bar to a subsequent application under Article 32 where and if the facts thus found by the High Court be themselves relevant even under Article 32.
- If a writ petition is dismissed *in limine* and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend on the nature of the order. If the order is on merits, it would be a bar.
- If a petition is dismissed *in limine* without a speaking order, such dismissal cannot be treated as creating a bar of *res judicata.*
- If a petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under Article 32 because in such a case, there had been no decision on merits bythe court.
- The doctrine of constructive *res judicata* applies to writ proceedings and when any point which might and ought to have been taken but was not taken in earlier proceedings cannot be taken in a subsequent proceeding.
- The rule of *constructive res judicata* however does not apply to a writ of *habeas corpus.* Therefore, even after the dismissal of one petition of habeas corpus, a second petition is maintainable if fresh, new or additional grounds are available.
- The general principles of *res judicata* apply to different stages of the same suit or proceedings.
- If a petitioner withdraws the petition without the leave of court to institute a fresh petition on the same subject-matter, the fresh petition is not maintainable.

CONSTRUCTIVE *RES JUDICATA*:

A question sometimes arises as to whether the rue of constructive can be applied to writ petitions. This question arose for the first time before the Supreme Court in the case of *Amalgamated Coalfields Ltd v. Janapada Sabha(AIR 1964 SC 1013)*. In that case, the earlier notices issued by the respondent against the companies calling upon them to pay tax were challenged on certain grounds. At the time of hearing of the petitions, an additional ground was also taken and the authority of the Sabha to increase the rate of tax was challenged. However, since there was no pleading, the sand point was not allowed to be argued and the petitions were dismissed. The said decision was upheld even by the Supreme Court. Thereafter, once again when the notices were issued in respect of the different period, they were challenged on that additional ground, which was not permitted to be argued in the previous litigation. The High Court dismissed the petitions holding that they were barred by *res judicata.*

HABEAS CORPUS PETITION:

English as well as American Courts have taken the view that the principle of *res judicata* is not applicable to a writ of *habeas corpus.* In India also, the doctrine of *res judicata* is not made applicable to cases of *habeas corpus* petitions. In *Ghulam Sarwar v. Union of India (AIR 1967 SC 1335)*, rejecting the plea of application of constructive *res judicata,* the Supreme Court observed: ñIf the doctrine of constructive *res judicata* be applied, this Court, though is enjoined by the Constitution to protect the right of a person illegally detained, will become powerless to do so. *That would be whittling down the wide sweep of the constitutional protection***."** In *Lallubhai Jogibhai patel v. Union of India (AIR 1981 SC 728)*, the petitioner was detained and

the petition filed against the said order was dismissed by the Supreme Court by an order dated May 9, 1980, but the reasons were given on the August 4, 1980, he was informed that he may, if so advised, file a fresh petition on those additional grounds, which he did. The question which arose before the Supreme Court was whether the principle of constructive *res judicata* could apply to a writ of habeas corpus. Sarkaria J. made the following remarkable observations, which, it is submitted lay down correct law: ñThe application of constructive res judicata is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief.ò

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*.

vii.Judicial review and extent

The judicial review available under article 32, 136 226 and 227 is taken as Constitutional mode of judicial review, 1.e. the judicial review available under Articles 32, 136, 226, 227 cannot be excluded by the finality clause contained in the statute and expressed in any languages. Any statute or ordinary laws cannot take the jurisdiction of the Court under article 32, 136, 226 and 227 as the Constitution of India provides them. Thus, any ordinary law cannot bar the jurisdiction of the Supreme Court under Article 32 and 136 and of the High Court under Articles 226 and 227. In *Keshava Nanda Bharti v. State of Kerala, (A.I.R. 1973 S.C. 1461)* the Supreme Court has held the Parliament has power to amend the Constitution but it cannot destroy or abrogate the basic structure or framework of the Constitution. Article 368 does not enable Parliament of abrogate or take away Fundamental right or to completely alter the fundamental features of the Constitution so as to destroy its identity. Judicial review therefore it cannot be taken away.

In *Indra Nehru Gandhi v. Raj Narain*, the validity of Clause (4) of Article 329 ï A inserted by the Constitution (39 the Amendment) Act, 1975 was challenged on the ground that it destroyed the basic structure of the Constitution. The said Clause (4) provided that notwithstanding any Court order declaring the election of the Prime Minister or the Speaker of Parliament to be void, it would continue to be void in all respects and any such order and any finding on which such order was based would be deemed always to have been void and of no effect. This clause empowered Parliament to establish by law some authority or body for deciding the dispute relating to the election of the Prime Minister or Speaker. It provides that the decision of such authority or body could not be challenged before the Court. This clause was declared unconstitutional and void as being violation of free and fair election, democracy and rule of law, which are parts of the basic structure of the Constitution. In case judicial review, democracy, free and fair election and rule of law were included in the list of the basic features of the Constitution. Consequently any Constitutional amendment, which takes away, any of them will be unconstitutional and therefore void. The non-constitutional mode of judicial review is conferred on the civil Courts by statute and therefore it may be barred or excluded by the statute. S. 9 of the Civil Procedure Code, 1908 confers a general jurisdiction to Civil Courts to entertain suits except where its jurisdiction is expressly or impliedly excluded. Implied exclusion of the jurisdiction of the Civil Courts is usually given effect where the statute containing the exclusion clause is a self contained Code and provides remedy for the aggrieved person or for the settlement of the disputes.

When not excluded.

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

1. Unconstitutionality of the statute: Exclusion clause does not bar the jurisdiction of the Court to try a suit questioning the constitutionality of an action taken there under. If the statute, which contains the exclusion clause, is itself unconstitutional, the bar will not operate. The finality should not be taken to mean that unconstitutional or void laws be enforced without remedy.
2. Ultra vires Administrative action: The exclusion clause does not bar the jurisdiction of the Court in case where the action of the authority is ultra vires. If action is ultra vires the powers of the administrative authority; the exclusion clause does not bar the jurisdiction of the Courts. The rule is applied not only in the case of substantive ultra vires but also in the case of procedural ultra vires. If the authority acts beyond its power or jurisdiction or violates the mandatory procedure prescribed by the statute, the exclusion or finality clause will not be taken as final and such a clause does not bar the jurisdiction of the Court.
3. Jurisdictional error: The exclusion or ouster or finality clause does not bar the jurisdiction of the Court in case the administrative action is challenged on the ground of the jurisdictional error or lack of jurisdiction. The lack of jurisdiction or jurisdictional error may arise where the authority assumes jurisdiction, which never belongs to it or has exceeded its jurisdiction indicating the matter or has misused or abused its jurisdiction. The lack of jurisdiction also arises where the authority exercising the jurisdiction is not properly constituted.

4. Non compliance with the provisions of the statute: the exclusion clause will not bar the jurisdiction of the Court if the statutory provisions are not complied with. Thus if the provisions of the statute are not complied with, the Court will have jurisdiction inspite of the exclusion or finality clause.
5. Violation of the Principles of natural Justice: If the order passed by the authority is challenged on the ground of violation of the principles of natural justice; the ouster clause or exclusion clause in the statute cannot prevent the Court from reviewing the order.
6. When finality clause relates to the question of fact and not of law: Where the finality clause makes the finding of a Tribunal final on question of facts, the decision of the Tribunal may be reviewed by the Court on the question of law.

C. Methods of judicial review

i. Statutory appeals

Statutory Review

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

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

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

ii. Writs

The Constitution of India provides various Fundamental rights to all its citizens. The provisions for proper enforcement of these Fundamental rights are also given in the Constitution. In simple terms, enforcement of the Fundamental rights is safeguarded with the help of 5 prerogative Writs. Writs are nothing but written orders of the court ordering a party to whom it is addressed to perform or cease from performing a specified act. So Article 32 empowers the Supreme Court while Article 226 empowers the High Courts to issue writs against any authority of the State in order to enforce the Fundamental rights.

The ñStateò is defined under Article 12 of the Constitution and includes the Government and the Parliament of India, Government and the Legislatures of the States and all other authorities within the

Indian Territory or under the control of Government of India. ñOther authoritiesò is an expression that includes business organizations and citizens.

Let us now understand the five types of Writs:

1. WRIT OF HABEAS CORPUS: One of the valuable writs for personal liberty is ñHabeas Corpusò which means ñYou may have the bodyò. If any person is detained in prison or a private custody without legal justification; this writ is issued to the authority confining such person, to produce him/her before the Court. The Court intervenes here and asks the authority to provide the reasons for such detention and if there is no justification, the person detained is set free. The applicant for this writ can either be the person in detention or any person acting on his/her behalf to protect his/her liberty. This writ provides for immediate relief in case of unlawful detention.

For instance : the first Habeas Corpus casein India was filed in Kerala where P. Rajan, a college student was arrested by the Kerala police and he died in custody unable to bear the torture. His father Mr T.V. Eachara Warrier filed a Habeas Corpus writ and it was proved that Rajan died in police custody.

2. WRIT OF CERTIORARI: The meaning of Certiorari is to be certified. This writ is issued when any lower court or a tribunal exercises a wrongful jurisdiction and decides the case. The party affected can move this writ to higher courts like the High Court or the Supreme Court. Writ of Certiorari can be issued to the quasi judicial or subordinate courts when they act:

- In excess or without any jurisdiction
- In contravention to the principles of Natural justice
- In violation of the prescribed procedure as established by law
- Resulting in an error of judgment apparent on the face of it. The writ of Prohibition and Writ of Certiorari are similar except for the time of their issuance. The former is issued before the passing of the order by the lower court while the latter is issued after passing of the order.

3. WRIT OF MANDAMUS: The term ñMandamusò in Latin means ñWe commandò. This writ is issued to a public official who refrains from performing his public duties which he is obliged to do. This writ can also be issued to any public authority (including the government, corporation and Court) commits an act which is detrimental to the welfare of the general public. This writ however cannot be issued against the President and the Governor.

4. WRIT OF QUO-WARRANTO: ñBy what warrants?ò is the literal meaning of the term Quo-Warranto. The issuance of this writ takes place to restrain a person from acting in public office to which he is not entitled. In simple words, if a person occupies a public office without being qualified for the office, then this writ is issued to restrain the concerned authority from discharging his duties. The High Court of that particular state has the authority to issue this writ and direct the person to vacate the office in question. The writ of Quo-Warranto is issued in 3 instances when

- The office in question is a public office and is substantive in nature
- The State or the Constitution has created the office
- The public servant (respondent) should have asserted a claim on the office.

5. WRIT OF PROHIBITION: Writ of Prohibition is issued to a subordinate to cease doing something which it is not supposed to do as per law. Normally, this writ is issued by the superior courts to the lower courts when the lower court tries to exceed the limit of jurisdiction vested in it. Likewise, if the court acts in absence of jurisdiction, this writ can be issued. Once this writ is issued the lower court is under an obligation to stop its proceedings. One cannot issue this writ against a public official who does not have judicial or quasi judicial powers. This writ is issued before the lower court passes an order.

iii. Declaratory judgments and injunctions

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

i) Injunction
ii) Declaratory Action
iii) Action for damages.

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

Meaning of Equity

Before we discuss equitable remedies, it is necessary for us to know something about equity. Since the administration of justice has begun on the basis of law in the world, a class of society has always been against the rigidity of law. This class of society is of the opinion that howsoever mature and legally skilled men may make the laws, yet they cannot experience the circumstances which the judges may have to face in future. The circumstances in which the provisions of law may prove to be unjust for the people if is necessary to make the provisions of law flexible, and injustice caused by such rigidity of law should be stopped. Equity is based on this consideration. Equity is a voice against injustice caused by rigidity of low. Equity, which is not a synonym of natural justice, demands that justice should be made in accordance with the circumstances. Equities a new and independent system of law which developed in England. It has its own history and origin. It made an important contribution in the English system of law as a supplementary of main legal system till 1873, when it was merged in the common law According to Ashburner. ñEquity is a word which has been borrowed by law from morality and which was acquired in law a strictly technical meaning.ò

Equitable Remedies may be discussed under following headings:

(1) Injunction

An injunction is a preventive remedy. It is a judicial process by which one who has invaded or is threatening to invade the rights of another is restrained from continuing or commencing such wrongful Act. In India, the law with regard to injunctions has been laid down in the specific Relief Act, 1963. Injunction may be prohibitory or mandatory.

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

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

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

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

Declaration (Declaratory Action)

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

Action for Damages
If any injury is caused to an individual by wrongful or negligent acts of the Government servant the aggrieved person can file suit for the recovery of damages from the Government concerned.

A declaratory judgment, also called a declaration, is the legal determination of a court that resolves legal uncertainty for the litigants. It is a form of legally binding preventive adjudication by which a party involved in an actual or possible legal matter can ask a court to conclusively rule on and affirm the rights, duties, or obligations of one or more parties in a civil dispute (subject to any appeal). The declaratory judgment is generally considered a statutory remedy and not an equitable remedy in the United States, and is thus not subject to equitable requirements, though there are analogies that can be found in the remedies granted by courts of equity. A declaratory judgment does not by itself order any action by a party, or imply damages or an injunction, although it may be accompanied by one or more other remedies.

The declaratory judgment is distinguished from another important non-monetary remedy, the injunction, in two main ways. First, the injunction has, and the declaratory judgment lacks, a number of devices for managing the parties. Second, the declaratory judgment is sometimes available at an earlier point in a dispute, because it is not subject to the equitable ripeness requirement.

A declaratory judgment is generally distinguished from an advisory opinion because the latter does not resolve an actual case or controversy. Declaratory judgments can provide legal certainty to each party in a matter when this could resolve or assist in a disagreement. Often an early resolution of legal rights will resolve some or all of the other issues in a matter.

A declaratory judgment is typically requested when a party is threatened with a lawsuit but the lawsuit has not yet been filed; or when a party or parties believe that their rights under law and/or contract might conflict; or as part of a counterclaim to prevent further lawsuits from the same plaintiff (for example, when only a contract claim is filed, but a copyright claim might also be applicable). In some instances, a declaratory judgment is filed because the statute of limitations against a potential defendant may pass before the plaintiff incurs damage (for example, a malpractice statute applicable to a certified public accountant may be shorter than the time period the IRS has to assess a taxpayer for additional tax due to bad advice given by the C.P.A.).

Declaratory judgments are authorized by statute in most common-law jurisdictions. In the United States, the federal government and most states enacted statutes in the 1920s and 1930s authorizing their courts to issue declaratory judgments

iv. Civil Suits for Compensation

Privileges and Immunities of the Administration in Suits
The various privileges available to the Government under various statutes are as follows: -

I. Immunities from the operation of the statute.
In England the rule is that its own laws do not bind the Crown unless by express provision or by necessary implication they are made binding on it. Thus in England the statutes are not binding on the crown unless by express provision or by necessary implication, they are made binding thereon. Its basis is the maxim ñthe King can do no wrong. This rule was followed even in India till 1967.
In India the present position is that the statute binds the State or Government unless expressly or by necessary implication it has exempted or excluded from its operation. In case the State has been exempted from the operation of the statute expressly, there is no difficulty in ascertaining whether the statute is binding on the State or not but it becomes a difficult issue in case where the State is exempted from the operation of the statute by necessary implication. However, where the statute provides for criminal prosecution involving imprisonment, the statute is deemed to be excluded from the operation of the statute necessary implication.

II. Privileges and Immunities under the Civil Procedure Code, 1908.

Section 80 (1) provides that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered in the manner provided in the section. The section is mandatory and admits of no exception. Thus, the requirement of notice is mandatory.

However, it is to be noted that if a public officer acts without jurisdiction, the requirement of notice is not mandatory. Its object appears to provide the Government or the public officer an opportunity to consider the legal position thereon and settle the claim without litigation. The Government may waive the requirement of notice; the waiver may be express or implied. The requirement of notice causes much inconvenience to the litigants especially when they seek immediate relief against the Government. To minimize the hardships to the litigants a new Clause (20 was inserted in S.80 of the C.P.C by the Civil Procedure Code Amendment Act, 1970. The clause provides that the Court may grant leave to a person to file a suit against the Government or a public officer without serving the two-monthôs notice in case where relief claimed is immediate and urgent. Before granting this exemption the Court is required to satisfy itself about the immediate and urgent need. It is to be noted that S.80 of the C.P.C does not apply to a suit against a statutory Corporation. Consequently in case the suit is filed against the statutory Corporation. Consequently, such notice is not required to be given in cases the suit is filed against statutory Corporation. S.80 does not apply with respect to a claim against the Government before the claim Tribunal under the Motor Vehicle Act. S.80 of the C.P.C. does not apply to a writ petition against the Government or a public officer, the requirement of notice as provided under S.80 of the C.P.C is not required to be complied with. S.82 of the C.P.C. also provides privilege to the Government. According to this section where in a suit by or against the Government or the public officer, a time shall be specified in the decreed within which shall be satisfied and if the decree is not satisfied writhing the time so specified and within three months from the date of the decree. Where no time is so specified, the Court shall report the case for the orders of the Government. Thus a decree against the Government or a public officer is not executable immediately. The Court is required to specify the time within which the decree has to be satisfied and where no such time has been specified, three months from the date of the decree will be taken to be the time within which is to be satisfied. If the decree is not satisfied within such time limit the Court shall report the case for the orders of the Government.

III. Privileges under the Evidence Act (Privileges to withhold documents)

In England the Crown enjoys the privilege to withhold from producing a document before the Court in case the disclosure thereof is likely to jeopardize the public interest. In *Duncon v. Cammel Laird Co. Ltd. (1942 AC 624)* The Court held that the Crown is the sole judge to decide whether a document is a privileged one and the court cannot review the decision of the Crown. However, this decision has been overruled in the case of *Conway v. Rimmer. (1968 AC 910)* In this case the Court has held that it is not an absolute privilege of the Crown to decide whether a document is a privileged one. The court can see it and decide whether it is a privileged one or not.

In India S. 123 provides that no one shall be permitted to give any evidence derived from unpublished official records relating to any affair of State except with the permission of the officer at the Head thinks fit. Only those records relating to the affairs of the State are privileged,

the disclosure of which would cause injury to the public interest. To claim this immunity the document must relate to affairs of state and disclosure thereof must be against interest of the State or public service and interest.

The section is based on the principle that the disclosure of the document in question would cause injury to the public interest and that in case of conflict between the public interest and the private interest, the private interest must yield to the public interest.

The Court has power to decide as to whether such communication has been made to the officer in official confidence. For the application of S.124 the communication is required to have made to a public officer in official confidence and the public officer must consider that the disclosure of the communication will cause injury to the public interest. According to S.162 a witness summoned to provide a document shall, if it is in his possession or power, bring it to the Court, not with outstanding any objective which there may be to its production or to its admissibility. The Court shall decide on the validity of any such objection. The court, if it sees fit, may inspect the document, unless it refers to the matters of State or take other evidence to enable it to determine on its admissibility. If for such purpose it is necessary to cause any document to be translated the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the direction, he shall be held to have committed an offence under S.166 of the Indian Penal Code. S. 162 apply not only to the official documents but also to the private documents. It is for the Court to decide as to whether a document is or is not a record relating to the affairs of the State. For this purpose the Court can take evidence and may inspect the document itself. In *State of Punjab v. Sodhi Sukdev Singh (AIR 1961 SC 493)* the court had the opportunity of discussing the extent of government privilege to withhold documents where twin claims of governmental confidentiality and individual justice compete for recognition. The court was very alive to the constraints of this privilege on private defense, therefore Gajendragadkar, J. delivering the majority judgment autioned that care has to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provision of Section 123. In order to guard against the possible misuse of the privilege, the court also developed certain norms. First, the claim of privilege should be in the form of an affidavit, which must be signed by the Minister concerned, or the Secretary of the Department. Second, the affidavit must indicate within permissible limits the reasons why the disclosure would result in public injury and that the document in question has been carefully read and considered and the authority is fully convinced that its disclosure would injure public interest. Third, the if the affidavit is found unsatisfactory, the court may summon the authority for cross-examination.

Working the formulations still further, the court in *Amar Chand v. Union of India (AIR 1964 SC 1658)* disallowed the privilege where there was evidence to show that the authority did not apply its mind to the question of injury to the public interest which would be caused by the disclosure of the document. In *Indira Nehru Gandh v. Raj Narain .(1975 Supp SCC 1: AIR 1975 SC 2299)* the Court compelled the production of Blue Books of the polic and disallowed the claims of privilege. In State of *Orissa v. Jagannath Jena, ((1972) 2 SCC 165)* the Supreme Court again disallowed the privilege on the ground that the public interest aspect had not been clearly brought out in the affidavit. In this case, the plaintiff wanted to see endorsement on a file by the Deputy Chief Minister and the I. G. of Police. The law on Government privileges took a new turn in *S.P. Gupta v. Union of India (AIR 1982 SC 149)* The question in the present case was whether the correspondence between the Law Minister and these Chief Justices ought to be

produced in the Supreme Court, so, as to enable the court to judge the question of validity of the non-continuance of an Additional Judge in the Delhi High Court. The government opposed the production of these reports on the ground that their disclosure would injure public interest under Section 123 of the Indian Evidence act. But the Supreme Court ruled otherwise. The case is a definite evidence of courtôs attempt to promote the ideal of open Government in India. Justice Bhagwati took some such view in the above case when he expressed his faith in the ideal of an open Government. Merely secrecy of the Government is not a vital public interest so as to prevail over the most imperative demands of justice. In giving a new orientation to the statutory provision in question, Bhagwati, J. emphasized, ñWhere a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their Government is doing.ò He observed: ñThe citizenôs right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic state. And this is why the demand for openness in the Government is increasingly growing in different parts of the world He further pointed out that if the process and functioning of
Government are kept shrouded in secrecy and hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority.
The decision has opened a new dimension of judicial control over the exercise of privileges under Sections 123 by the executive. The Court now has assumed the power of inspection of documents in camera and if it finds that its disclosure would harm the public interest, the claim for non-disclosure might be upheld. If the disclosure, to the mind of the Court, does not harm the public interest, its disclosure would be ordered.
Period of Limitation for Suit against Government Art 149 of the First Schedule of the Limitation Act of 1890 prescribed a longer period of limitation for suits by or on behalf of the State. The Act of 1963 contains a similar provision under Art 112. The Article applies to the Central Government an all the State Governments including the Government of the State of Jammu and Kashmir. This longer limitation period was based on the common law maxim null a tempus occur it rein, that is, no time affects the Crown. The longer period of limitation, however, does not apply to appeals and applications by Government. Under s 5 of the Limitation Act, it is provided that an appeal or application may be admitted after the expiry of the period of limitation if the court is satisfied that there was sufficient cause for the delay. It was held that the government was not entitled to any special consideration in the matter of condo nation of delay.

Immunity from Promissory Estoppels
Estoppels is a rule whereby a party is precluded from denying the existence of some state of facts, which he had previously asserted and on which the other party has relied or is entitled to rely on. Courts, on the principle of equity, to avoid injustice, have evolved the doctrine of promissory estoppels. The doctrine of promissory estoppel or equitable estoppel is firmly established in administrative law. The doctrine represents a principle evolved by equity to avoid injustice. Application of the doctrine against government is well established particularly where it is necessary to prevent manifest injustice to any individual. The doctrine of promissory estoppel against the Government also in exercise of its Government, public or executive functions, where it is necessary to prevent fraud or manifest injustice. The doctrine within the aforesaid limitations cannot be defeated on the plea of the executive necessity or freedom of future executive action.

The doctrine cannot, however, be pressed into aid to compel the Government or the public authority ñto carry out a representation or promise.

a) Which is contrary of law; or
b) Which is outside the authority or power of the Officer of the Government or of the public authority to make.ò

It is to be noted that Estoppel cannot be pleaded against a minor or against statute. Estoppel does not lie against the Government on the representation or Statement of facts under S. 115 if it is against the statute or Act of the Legislature but it may be applied in irregular act. The liability of the Government has been extended by the doctrine of Promissory Estoppel.
Doctrine of Promissory Estoppel is often applied to make the Government liable for its promises and stopped from going back from the promise made by it. According to this doctrine where a person by words or conduct and the other person acts on such promise or assurance and changes his positive to his detriment, the person who gives such promise or assurance cannot be allowed to revert or deviate from the promise.

Case law
In India, the courts are invoking this doctrine, In *Union of India v. Anglo (Indo) – Afghan Agencies Ltd.(AIR 1968 SC 718)*The doctrine of Promissory Estoppel was applied against the Government. This case developed a new judicial trend. The Court upheld the application of Promissory Estoppel to the executive acts of the State. The Court negated the plea of executive necessity. Under the scheme an exporter was entitled to import raw materials equal to the amount, which was exported. Five lakhs rupees worth goods were exported by the petitioner but he was given import license for an amount below two lakh rupees. The Court held that the Government was bound to keep its promise. The scheme was held to be binding on the
Government and the petitioner were entitled to get the benefit of the scheme. The Supreme Court in Century Spinning and Manufacturing Co. Ltd. V. Ulhasnagar Municipal Council, (AIR 1971 SC 1021)again extended the doctrine of Promissory Estoppel. In this case this doctrine was applied against public authorities. The Court has made it clear that this Court will not make a distinction between a private individual and a public body so far as the doctrine of Promissory Estoppel is concerned. In short, if the Government makes a promise and promisee acts upon it and changes his position, then the Government will be held bound by the promise and cannot change its position against the promisee and it is not necessary for the promisee to further show that he has acted to his detriment. For the application of the doctrine of Promissory Estoppel it is not necessary that there should be some pre-existing contractual relationship between the parties.
In Delhi Cloth and General Mills v. Union of India, (1988 1 S.C.C. 86) the Supreme Court has held that for the application of the principle of Promissory Estoppel change in position by acting on the assurance to the promise is not required to be proved. However, the judicial opinion is that it cannot be invoked against a statutory provision or to support an ultra vires act or to compel the Government or a public authority to carry out a promise, which are contrary to law or ultra vires its powers. The doctrine of Promissory Estoppel is not applied in the following conditions:

1. Public Interest: The doctrine of Promissory Estoppel is an equitable doctrine and therefore it must yield place to the equity if larger public interest requires. It would not be enough to say that the public interest requires that the Government would suffer if the Government were required to honor it. In order to resist its liability the Government would disclose to the Court the various events insisting its claim to be exempt from liability and it would be for the Court to decide whether those events are such as to render it equitable and to enforce the liability against the Government.
2. Representation against law: The doctrine of Promissory Estoppel cannot be applied so as compel the Government or the public authority to carry out a promise, which does law prohibit.
3. Ultra vires promise or representation: If the promise or representation made by the officer is beyond his power, the State cannot be held liable for it on the basis of the Principle of Promissory Estoppel.
4. Fraud: the doctrine of Promissory Estoppel is not applied in cases where the promise from the Government is obtained by fraud.
5. Fraud on the Constitution: The doctrine of Promissory Estoppel is not applied in cases when the promise or representation is obtained to play fraud on the Constitution and enforcement would defeat or tend to defeat the Constitutional goal.
6.

Liability of State or Government in Contract

Article 298 provides that the executive power of the Union and of each
State shall extend to the carrying on of any trade or business and to the acquisition holding and disposal property and the making of contracts for any purpose. Article 299 (I) lays down the manner of formulation of such contract. Article 299 provides that all contracts in the exercise of the executive power of the union or of a State shall be expressed to be made by the President or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize. Article 299 (2) makes it clear that neither the President nor the Governor Shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution or for the purposes of any enactment relating or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof. Subject to the provisions of Article 299 (1), the other provisions of the general law of contract apply even to the Government contract. A contract with the Government of the Union or State will be valid and binding only if the following conditions are followed: -

1. The contract with the Government will not be binding if it is not expressed to be made in the name of the President or the Governor, as the case may be.
2. The contract must be executed on behalf of the President or the Governor of the State as the case may be. The word executed indicates that a contract with the Government will be valid only when it is in writing.

3. A person duly authorized by the President or the Governor of the State, as the case may be, must execute the contract. The above provisions of Article 299 are mandatory and the contract made in contravention thereof is void and unenforceable.

The Supreme Court has made it clear that in the case grant of Government contract the Court should not interfere unless substantial public interest is involved or grant is mala fide when a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition.

Effect of a valid contract with Government

However, as Article 299 (2) provides neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution or for the purposes of any enactment relating to the Government of India. As soon as a contract is executed with the Government in accordance with
Article 299, the whole law of contract as contained in the Indian Contract
Act comes into operations. Thus the applications of the private law of contract in the area of public contracts may result in the cases of injustice. A contract of service with the Governments not covered by Article 299 of the Constitution. After a person is taken in a service under the Government, his rights and obligations are governed by the statutory rules framed by the Government and not by the contract of the parties. Service contracts with the Government do not come within the scope of Article 299. They are subject to ñpleasureò. They are not contracts in usual sense of the term as they can be determined at will despite an express condition to the contrary. *(Parshottam Lal Dhingra v. Union of India, AIR*
1958 SC 36) In India the remedy for the branch of a contract with Government is simply a suit for damages. The writ of mandamus could not be issued for the enforcement of contractual obligations. But the Supreme Court in its pronouncement in Gujarat State Financial Corporation v. Lotus Hotels, ((1983) 3 SCC 379) has taken a new stand and held that the writ of mandamus can be issued against the Government or its instrumentality for the enforcement of contractual obligations. The Court ruled that it is too late to contend today the Government can commit branch of a solemn undertaking on which other side has acted and then contend that the party suffering by the branch of contract may sue for damages and cannot compel specific performance of the contract through mandamus.

The doctrine of judicial review has extended to the contracts entered into by the State of its instrumentality with any person. Before the case of *Ramana Dayaram Shetty v. International Airport Authority. (AIR 1979 SC 1628)* The attitude of the Court was in favour of the view that the Government has freedom to deal with anyone it chooses and if one person is chosen rather than another, the aggrieved party cannot claim the protection of article 14 because the choice of the person to fulfill a particular contract must be left to the Government, However, there has been significant change in the Courtôs attitude after the case of Ramana Dayaram Shetty. The attitude for the Court appears to be in favour of the view that the Government does not enjoy absolute discretion to enter into contract with any one it likes. They are bound to act reasonably fairly and in non-discriminatory manner.

In the case of *Kasturi Lal v. State of J&K (AIR 1980 SC 1992)*, in this case

Justice Bhagwati has said ñEvery activity of the Government has a public element in it and it must, therefore, be informed with reason and guided by public interest. Every government cannot act arbitrarily without reason and if it does, its action would be liable to be invalidated.ò Non arbitrariness, fairness in action and due consideration of legitimate expectation of affected party is essential requisites for a valid state action. *(Food Corporation of India v. Kamadhenu Cattle Feed Industries, (1993) 1 SCC 71)* In a recent case *(Tata Cellular v. Union of India, AIR 1996 SC 11)* the Supreme Court has held that the right to refuse the lowest or any other tender is always available to the Government but the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

Ratification: -The present position is that the contract made in contravention of the provisions of Article 299 (1) shall be void and therefore cannot be ratified.
The Supreme Court has made it clear that the provisions of Article 299 (1) are mandatory and therefore the contract made in contravention thereof is void and therefore cannot be ratified and cannot be enforced even by invoking the doctrine of Estoppel. In such condition the question of estoppel does not arise. The part to such contract cannot be estoppels from questioning the validity of the contract because there cannot be estoppel against the mandatory requirement of Article 299.
The Government cannot exercise its power arbitrarily or capriciously or in an unprincipled manner. In this case Justice Bhagwati has said ñ Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest: Government cannot act arbitrarily and without reason and if it does, its action due consideration of legitimate expectation of affected party are Court has held that the right to refuse the lowest or any other tender is always available to the Government but the principles laid down in article 14 of the Constitution have to be kept in view while accepting or refusing a tender. The right to choose cannot be considered to be an arbitrary power. Of Course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. In the case of *Shrilekha Vidyarathi v. State of U.P (1991 S.C .C 212)* the Supreme Court has made it clear that the State has to act justly, fairly and reasonably even in contractual field. In the case of contractual actions of the State the public element is always present so as to attract article 14. State acts for public good and in public interest and its public character do not change merely because the statutory or contractual rights are also available to the other party. The court has held that the state action is public in nature and therefore it is open to the judicial review even if it pertains to the contractual field. Thus the contractual action of the state may be questioned as arbitrary in proceedings under Article 32 or 226 of the Constitution. It is to be noted that the provisions of Sections 73, 74 and 75 of the Indian Contract Act dealing with the determination of the quantum of damages in the case of breach of contract also applies in the case of Government contract.

Quasi-Contractual Liability
According to section 70 where a person lawfully does anything for another person or delivers anything to him such other person enjoys the benefit thereof, the latter is bound to make

compensation to the former in respect of or to restore, the thing so done or delivered. If the requirements of Section 70 of the Indian Contract act are fulfilled, even the Government will be liable to pay compensation for the work actually done or services rendered by the State. Section 70 is not based on any subsisting contract between the parties but is based on quasi-contract or restitution. Section 70 enables a person who actually supplies goods or renders some services not intending to do gratuitously, to claim compensation from the person who enjoys the benefit of the supply made or services rendered. It is a liability, which arise on equitable grounds even though express agreement or contract may not be proved.

Section 65 of the Indian Contract Act

If the agreement with the Government is void as the requirement of Article 299 (1) have not been complied, the party receiving the advantage under such agreement is bound to restore it or to make compensation for it to the person form whom he has received it. Thus if a contractor enters into agreement with the Government for the construction of go down and received payment therefore and the agreement is found to be void as the requirements of Article 299 (1) have not been complied with, the Government can recover the amount advanced to the contractor under Section 65 of the Indian Contract act. Action 65 provides that when an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it to make compensation for it to the person from whom he received it.

Suit against State in torts: Before discussing tortuous liability, it will be desirable to know the meaning of ótortô A tort is a civil wrong arising out of breach of a civil duty or breach of non-contractual obligation. The word ótortôhas been defined in Chambers

Dictionary in the following words; *"Tort is any wrong or injury not arising out of contact for which there is remedy by compensation or damages."* Thus, tort is a civil wrong, which arises either out of breach of no contractual obligation or out of a breach of civil duty. In other words, tort is a civil wrong the only remedy for which is damages. The essential requirement for the arising of the tort is the beach of duty towards people in general. Although tort is a civil wrong, yet it would be wrong to think that all civil wrongs are torts. A civil wrong which arises out for the breach of contact cannot be put in the category of tort as it is different from a civil wrong arising out of the breach of duty towards public in general.

Liability for Torts

In India immunity of the Government for the tortious acts of its servants, based on the remnants of old feudalistic notion that the king cannot be sued I his own courts without his consent ever existed. The doctrine of sovereign immunity, a common law rule, which existed in England, also found place in the United States before 1946 Mr. Justice Holmes in 1907 declared for a unanimous Supreme Court: *"A sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical round that there can be no legal right as against the authority that makes the law on which the right depends."*

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