



ADMINISTRATIVE LAW

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UNIT-I
ADMINISTRATIVE LAW

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

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

role and function of state. The shifting of gears from *laissez faire state to social welfare state* has resulted in change of role of the state. This trend may be illustrated very forcefully by reference to the position in India. Before 1947, India was a police state. The ruling foreign power was primarily interested in strengthening its own domination; the administrative machinery was used mainly with the object in view and the civil service came to be designated as the “steel frame”. The state did not concern itself much with the welfare of the people. But all this changed with the advent of independence with the philosophy in the Indian constitution the preamble to the constitution enunciates the great objectives and the socioeconomic goals for the achievement of which the Indian constitution has been conceived and drafted in the mid-20th century an era when the concept of social welfare state was predominant. It is thus pervaded with the modern outlook regarding the objectives and functions of the state. it embodies a distinct philosophy which regards the state as an organ to secure good and welfare of the people this concept of state is further strengthened by the Directive Principles of state policy which set out the economic, social and political goals of Indian constitutional system. These directives confer certain non-justiceable rights on the people, and place the government under an obligation to achieve and maximize social welfare and basic social values of life education, employment, health etc. In consonance with the modern beliefs of man, the Indian constitution sets up machinery to achieve the goal of economic democracy along with political democracy, for the latter would be meaningless without former. Therefore, the attainment of socio-economic justice being a conscious goal of state policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with state powerholder. The Administrative law is an important weapon for bringing about harmony between power and justice. The basic law of the land i.e. the constitution governs the administrators.

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

1) Administrative Law-Meaning – Sir Ivor Jonning defines Administrative Law as the Law relating to administration. It determines the organization, powers and duties of administrative authorities.

According to Dr. F.J. Port-“Administrative law is made up of all these legal rules either formally expressed by statute or implied in the prerogative-which have as their ultimate object the fulfillment of public law. It touches first the legislature, in that the formally expressed rules are usually laid down by that body; it touches judiciary, in that (a) there are rules which govern the judicial action that may be brought by or against administrative person, (b) administrative bodies are sometimes permitted to exercise judicial powers: thirdly, it is of course essentially concerned with the practical application of Law.”

The Administrative law deals with composition and powers of different organs of administration, the procedure with the administrative authorities shall adopt in the exercise of their powers and the various modes of control including particularly judicial control over the different kinds of powers exercised by the administrative authorities. In short the administrative law deals with the powers, particularly quasi-judicial and quasi-legislative of administrative authorities along with their executive powers and their control.

Need for the Administrative Law: Its Importance And Functions

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

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

Administration is the all-pervading feature of life today.

The province of administration is wide and embrace following things within its ambit:-

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

The advantage of **the administrative process** is that it could evolve new techniques, processes and instrumentalities, acquire expertise and specialization, to meet and handle new complex problems of modern society. Administration has become a highly complicated job needing a good deal of technical knowledge, expertise and know-how. Continuous experimentation and adjustment of detail has become an essential requisite of modern administration. If a certain rule is found to be unsuitable in practice, a new rule incorporating the lessons learned from experience has to be supplied. The Administration can change an unsuitable rule without much delay. Even if it is dealing with a problem case by case (as does a court), it could change its approach according to the exigency of the situation and the demands of justice. Such a flexibility of approach is not possible in the case of the legislative or the judicial process. Administration has assumed such an extensive, sprawling and varied character, that it is not now easy to define the term “administration” or to evolve a general norm to identify an administrative body. It does not suffice to say that an administrative body is one, which administers, for the administration does not only put the law into effect, but does much more; it legislates and adjudicates. At times, administration is explained in a negative manner by saying that what does not fall within the purview of the legislature or the judiciary is administration.

In such a context, a study of administrative law becomes of great significance.

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

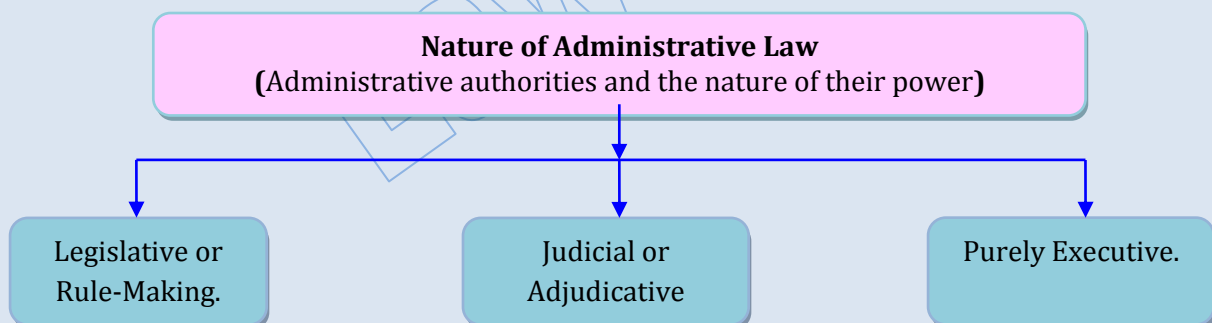
- = Does arming the administration with more and more powers keep in view the interests of the individual?
- = Are adequate precautions being taken to ensure that the administrative agencies follow in discharging their functions such procedures as are reasonable, consistent with the rule of law, democratic values and natural justice?
- = Has adequate control mechanism been developed so as to ensure that the administrative powers are kept within the bounds of law, and that it would not act as a power drunk creature, but would act

only after informing its own mind, weighing carefully the various issues involved and balancing the individual's interest against the needs of social control?

It has increasingly become important to control the administration, consistent with the efficiency, in such a way that it does not interfere with impunity with the rights of the individual. Between individual liberty and government, there is an age-old conflict the need for constantly adjusting the relationship between the government and the governed so that a proper balance may be evolved between private interest and public interest. It is the demand of prudence that when sweeping powers are conferred on administrative organs, effective control- mechanism be also evolved so as ensure that the officers do not use their powers in an undue manner or for an unwarranted purpose. It is the task of administrative law to ensure that the governmental functions are exercised according to law, on proper legal principles and according to rules of reason and justice fairness to the individual concerned is also a value to be achieved along with efficient administration. The goal of administrative law is to redress this inequality to ensure that, so far as possible, the individual and the state are placed on a plane of equality before the bar of justice. In reality there is no antithesis between a strong government and controlling the exercise of administrative powers.

Administrative powers are exercised by thousands of officials and affect millions of people Administrative efficiency cannot be the end-all of administrative powers. There is also the questions of protecting individual's rights against bad administration will lead to good administration. A democracy will be no better than a mere façade if the rights of the people are infringed with impunity without proper redressed mechanism. This makes the study of administrative law important in every country. For India, however, it is of special significance because of the proclaimed objectives of the Indian polity to build up a socialistic pattern of society. This has generated administrative process, and hence administrative law, on a large scale. Administration in India is bound to multiply further and at a quick pace. If exercised properly, the vast powers of the administration may lead to the welfare state; but, if abused, they may lead to administrative despotism and a totalitarian state A careful and systematic study and development of administrative law becomes a desideratum as administrative law is an instrument of control of the exercise of administrative powers.

II) Nature and Scope of Administrative Law- Nature - Administrative law is study of multifarious powers of administrative authorities and the nature of their power can be studies under the following three heads-



Nature and Definition of administrative Law

Administrative Law is, in fact, the body of those which rules regulate and control the administration. Administrative Law is that branch of law that is concerned with the composition of power, duties, rights and liabilities of the various organs of the Government that are engaged in public administration. Under it, we study all those rules laws and procedures that are helpful in properly regulating and controlling the administrative machinery. There is a great divergence of opinion regarding the definition/conception of administrative law. The reason being that there has been

tremendous increase in administrative process and it is impossible to attempt any precise definition of administrative law, which can cover the entire range of administrative process.

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

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

Bernard Schwartz has defined Administrative Law as “the law applicable to those administrative agencies which possess of delegated legislation and ad judicatory authority.”

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

Dicey in 19th century defines it as.

Firstly, portion of a nation’s legal system which determines the legal statutes and liabilities of all State officials.

Secondly, defines the right and liabilities of private individuals in their dealings with public officials.

Thirdly, specifies the procedure by which those rights and liabilities are enforced.

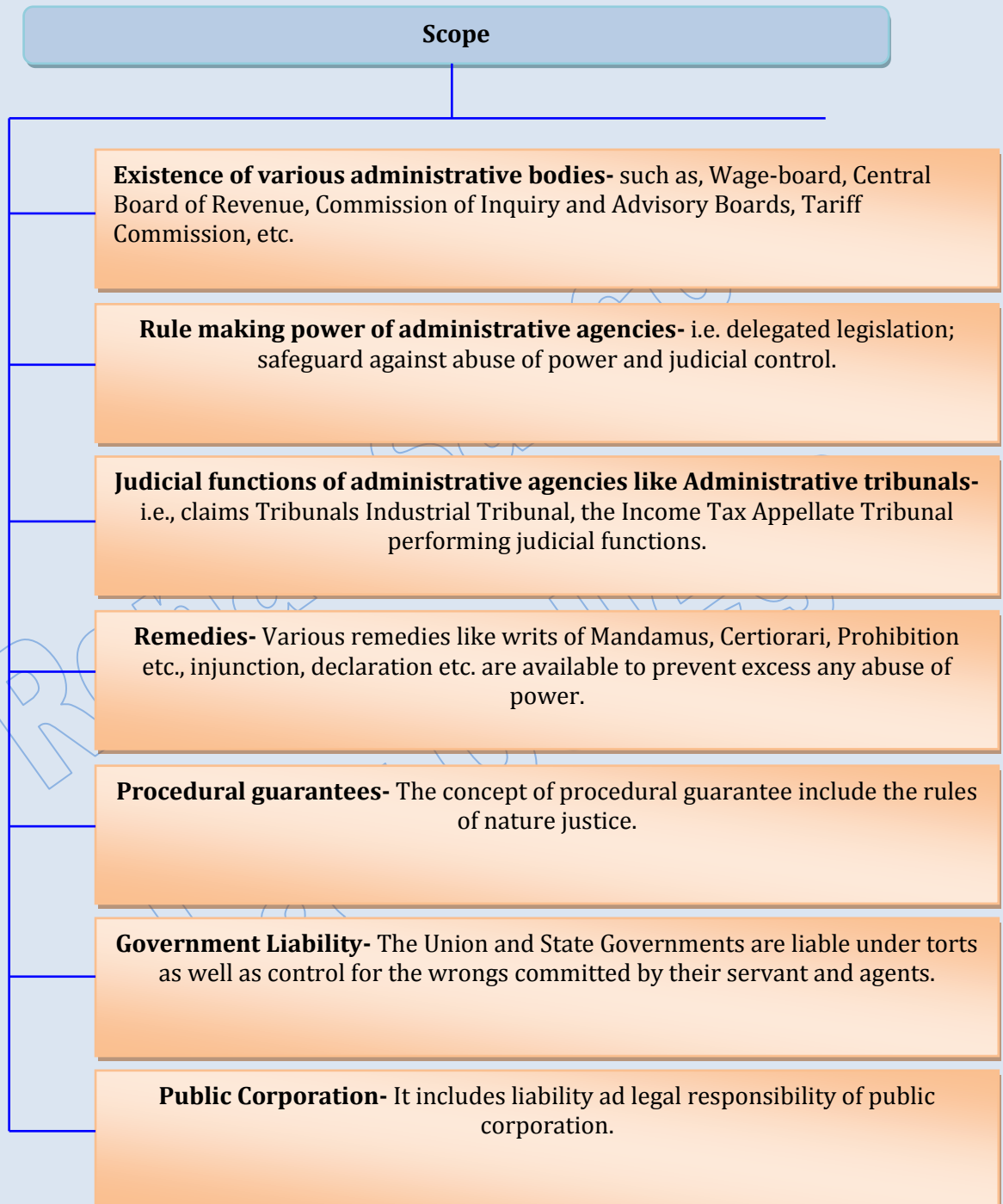
This definition suffers from certain imperfections. It does not cover several aspects of administrative law, e.g. it excludes the study of several administrative authorities such as public corporations which are not included within the expression “State officials,” it excludes the study of various powers and functions of administrative authorities and their control. His definition is mainly concerned with one aspect of administrative. Law, namely, judicial control of public officials.

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

Freiedmann, while dealing with the nature and scope of Administrative law says that Administrative law includes the law relating to-

- (i) The legislative powers of the administration, both at common law and under statute;
- (ii) The administrative powers of the administration, both at common law and under a vast many of statutes;
- (iii) The judicial and quasi-judicial powers of administration, all of them statutory;
- (iv) The legal liability of Public authorities;
- (v) The power of the ordinary courts of supervise the administrative authorities.

III) Scope – The province of Administrative law consists of the following-

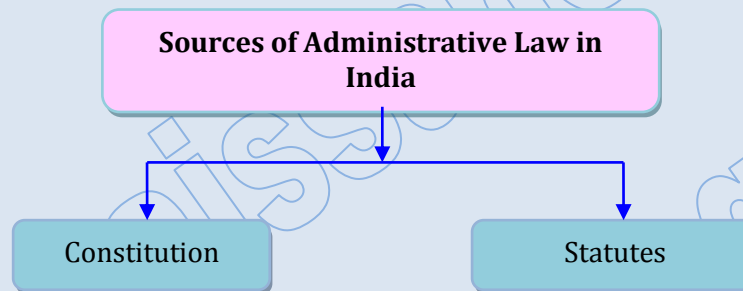


IV) Growth of Administrative law in India- In India a system of both administrative legislation and adjudication were in existence from very early time. But in early British India, executive had the overriding powers in the matter of administration of justice During the British rule in India, the executive was invested with such wide powers to make rules as a modern democratic legislature cannot even imagine. In that period though the court had ample powers to set aside an administrative

action, yet paid great respect and attention to their decisions. Judicial relief was available only when the administrative remedies were exhausted.

The Law Commission in its XI Vth Report has traced the reasons for the growth of administrative law in the following words-
“Society in the 20th century has become exceedingly complex and governmental functions have multiplied. The change in the scope and character of the Government from negative to positive, that is, from the laissez faire to the public service state has resulted in the concentration of considerable power in the hands of the executive branch of Government.

V) Sources of Administrative Law in India



VI) Is Administrative law inconsistent with Rule of Law? - Administrative law is not inconsistent with rules of law. Administrative law checks and controls the discretionary powers of administrative authorities.

The administrative law and rule of law are not opposed to each other but on the other hand go parallel with a common objective of achieving an orderly government.

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

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

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

- A.** Who are administrative authorities?
- B.** What is the nature and powers exercised by administrative authorities?
- C.** What are the limitations, if any, imposed on these powers?
- D.** How the administration is kept restricted to its laminose?
- E.** What is the procedure followed by the administrative authorities?
- F.** What remedies are available to persons adversely affected by administration?

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

Sources of Administrative Law

There are four principal sources of administrative law in India:-

- = **Constitution of India**
- = **Acts and Statutes**
- = **Ordinances, Administrative directions, notifications and Circulars**
- = **Judicial decisions**

RULE OF LAW

1) Rule of Law- The term “The Rule of Law” is derived from the Latin phrase “La legalite”, which refers to a government based on principles of law and not of man. In this sense the concept of ‘la legalite’ was opposed to arbitrary powers. Edward Coke originated this concept when he said that the king must be under the God and Law and thus vindicated the supremacy of law over the pretensions of the executive.

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

Rule of Law is a dynamic concept.

It does not admit of being readily expressed. Hence, it is difficult to define it. Simply speaking, it means supremacy of law or predominance of law and essentially, it consists of values. The concept of the rule of Law is of old origin. Edward Coke is said to be the originator of this concept, when he said that the King must be under God and Law and thus vindicated the supremacy of law over the pretensions of the executives. Prof. A.V. Dicey later developed on this concept in the course of his lectures at the Oxford University. Dicey was an individualist; he wrote about the concept of the Rule of law at the end of the golden Victorian era of laissez-faire in England. That was the reason why Dicey’s concept of the Rule of law contemplated the absence of wide powers in the hands of government officials. According to him, wherever there is discretion there is room for arbitrariness. Further he attributed three meanings to Rule of Law.

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

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

(3) The Third meaning of the rule of law is that the general principle of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the court.

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

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

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

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

According to Dicey the rule of law requires that every person should be subject to the ordinary courts of the country. Dicey has claimed that there is no separate law and separate court for the trial of the Government servants in England. He criticised the system of *droit administratif* prevailing in France. In France there are two types of courts Administrative Court and Ordinary Civil Courts. The disputes between the citizens and the Administration are decided by the Administrative courts while the other cases, (i.e. the disputes between the citizens) are decided by the Civil Court. Dicey was very critical to the separation for deciding the disputes between the administration and the citizens. According to Dicey the Rule of Law requires equal subjection of all persons to the ordinary law of the country and absence of special privileges for person including the administrative authority. This proportion of Dicey does not appear to be correct even in England. Several persons enjoy some privileges and immunities. For example, Judges enjoy immunities from suit in respect of their acts done in discharge of their official function. Besides, Public Authorities Protection Act, 1893, has provided special protection to the official. Foreign diplomats enjoy immunity before the Court. Further, the rules of 'public interest privilege may afford officials some protection against orders for discovery of documents in litigation.' Thus, the meaning of rule of law taken by Dicey cannot be taken to be completely satisfactory. Third meaning given to the rule of law by Dicey that the constitution is the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts is based on the peculiar character of the Constitution of Great Britain. In spite of the above shortcomings in the definition of rule of law by Dicey, he must be praised for drawing the attention of the scholars and authorities towards the need of controlling the discretionary powers of the administration. He developed a philosophy to control the Government and Officers and to keep them within their powers. The rule of law established by him requires that every action of the administration must be backed by law or must have been done in accordance with law. The role of Dicey in the development and establishment of the concept of fair justice cannot be denied.

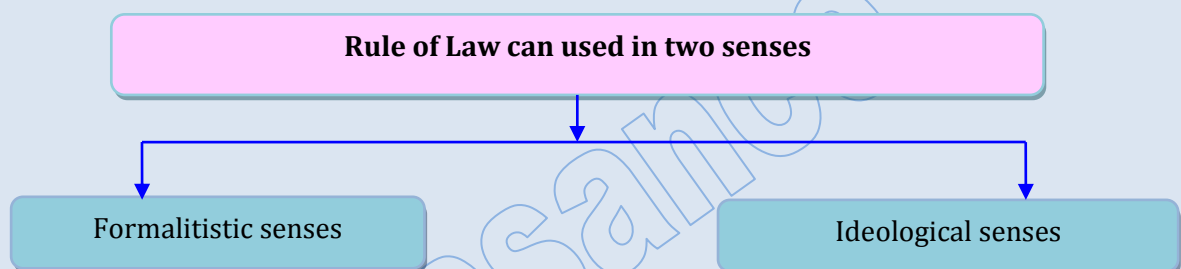
The concept of rule of law, in modern age, does not oppose the practice of conferring discretionary powers upon the government but on the other hand emphasizing on spelling out the manner of their exercise. It also ensures that every man is bound by the ordinary laws of the land whether he be private citizens or a public officer; that private rights are safeguarded by the ordinary laws of the land. Thus the rule of law signifies that nobody is deprived of his rights and liberties by an administrative action; that the administrative authorities perform their functions according to law and not arbitrarily; that the law of the land are not unconstitutional and oppressive; that the supremacy of courts is upheld and judicial control of administrative action is fully secured.

II) Basic Principles of the Rule of Law

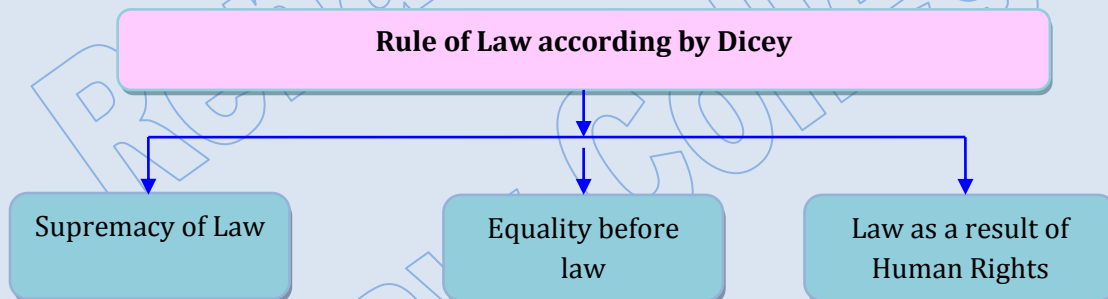
- = Law is Supreme, above everything and every one. No body is the above law.
- = All things should be done according to law and not according to whim
- = No person should be made to suffer except for a distinct breach of law.
- = Absence of arbitrary power being hot and sole of rule of law
- = Equality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

III) Rule of Law and Indian Constitution

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



When the term Rule of Law is used in formalistic sense, it denotes to an organized power as opposed to a rule by one man. When it is used in ideological sense, it denotes to the regulation of the citizens and the government.



IV) Criticism of Dicey's View-

Dicey's views on Rule of Law have been criticized by the modern writers. It is observed that Dicey misconceived the administrative law in France. He ignored the realities in England and misinterpreted the situation in France. He was also not right when he saw that there is no administrative law in England because even during his time Crown and its servants enjoyed special privileges on the parts of the doctrine that "King can do no wrong."

Later on Dicey recognized his mistake by observing that there exists in England a vast body of administrative law.

V) Rule of Law in India-

(1) In Kesavanand Bharati Vs State of Kerala, the view was that the Rule of Law is a basic intent of the 'Constitution apart from democracy.

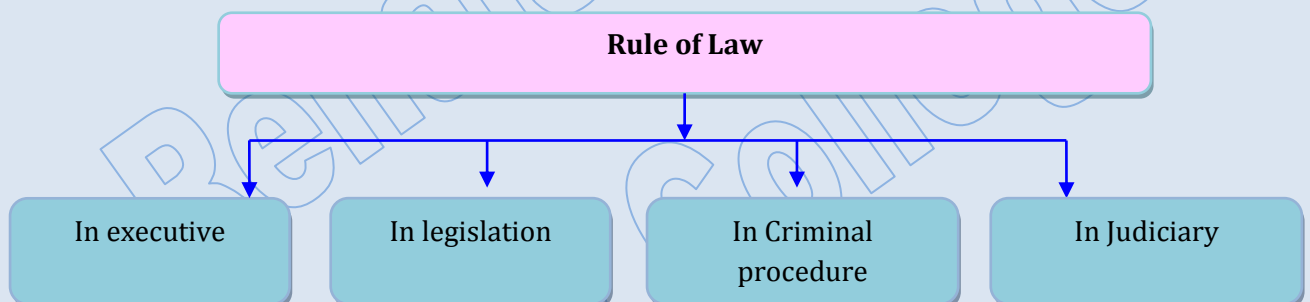
(2) In Indra Gandhi Vs RAJ Narain. Mathew. J. observed: 'The rule of law postulates the pervasiveness of the spirit of law that throughout the whole range of government is the sense of

excluding arbitrary official action in the sphere..... The provisions of the Constitution were enacted with a view to ensure the rule of law.

VI) Modern concept of Rule of Law is formulated by International Commission of Jurists-

The concept of Rule of Law formulated by International Commission of Jurists may be regarded as modern concept because it is in consonance with the need of Rule of Law in a modern welfare society. This concept is also known as Delhi Declaration 1959. It was later on confirmed as Lagos in 1961. The commission divided itself into certain working committees.

VII) Conclusion- The above discussion clearly shows that the recent judgments of the Highest Court of India as well as High Courts exhibit a new approach to the concept of rule of law by emphasizing the fair play and justice in every walk of administrative action and access to judicial remedies for all including socially and economically weaker sections of the society.



DOCTRINE OF SEPARATION OF POWERS

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

Montesquieu's view Montesquieu said that if the Executive and the Legislature are the same person or body of persons, there would be a danger of the Legislature enacting oppressive laws which the executive will administer to attain its own ends, for laws to be enforced by the same body that enacts them result in arbitrary rule and makes the judge a legislator rather than an interpreter of law. If one person or body of persons could exercise both the executive and judicial powers in the same matter, there would be arbitrary powers, which would amount to complete tyranny, if the legislative power would be added to the power of that person. The value of the doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons. The different organs of government should thus be prevented from encroaching on the province of the other organ. This theory has had different application in France, USA and England. In France, it resulted in the rejection of the power of the courts to review acts of the legislature or the executive. The existence of separate administrative courts to adjudicate disputes between the citizen and the administration owes its origin to the theory of separating of powers. The principle was categorically adopted in the making of the Constitution of the United States of America. There, the executive power is vested in the president. Article the legislative power in congress and the judicial power in the Supreme Court and the courts subordinates thereto. The President is not a member of the Congress. He appoints his secretaries on the basis not of their party loyalty but loyalty to himself. His tenure does not depend upon the confidence of the Congress in him. He cannot be removed except by impeachment. However, the United States constitution makes departure from the theory of strict separation of powers in this that there is provision for judicial review and the supremacy of the ordinary courts over the administrative courts or tribunals.

In the **British Constitution** the Parliament is the Supreme legislative authority. At the same time, it has full control over the Executive. The harmony between the Legislator and the (Executive) is secured through the Cabinet. The Cabinet is collectively responsible to the Parliament. The Prime Minister is the head of the party in majority and is the Chief Executive authority. He forms the Cabinet. The Legislature and the Executive are not quite separate and independent in England, so far as the Judiciary is

concerned its independence has been secured by the Act for Settlement of 1701 which provides that the judges hold their office during good behaviour, and are liable to be removed on a presentation of addresses by both the Houses of Parliament. They enjoy complete immunity in regard to judicial acts.

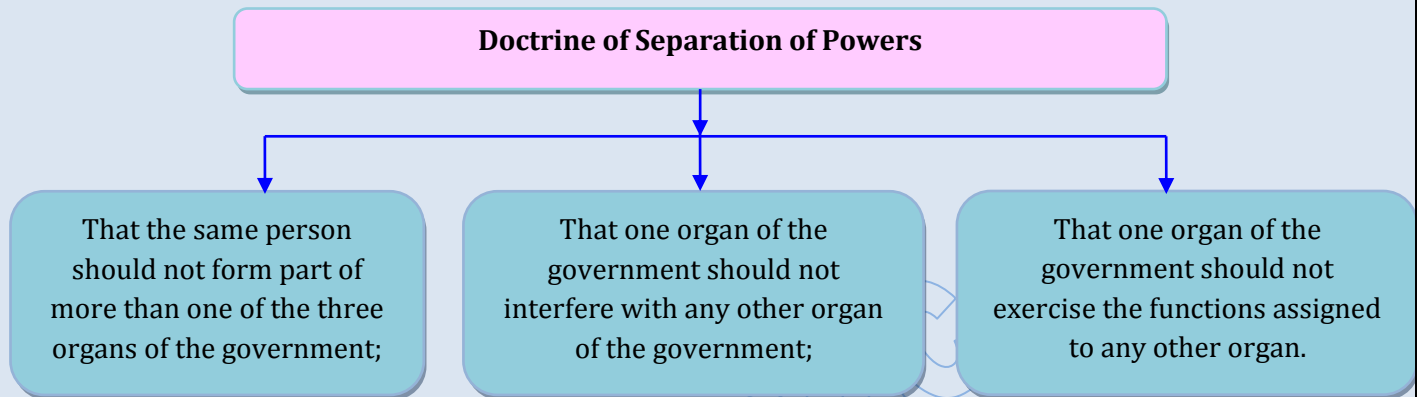
I) Doctrine of Separation of Powers- The doctrine of separation of power can be traced to Aristotle. But it was formulated for the first time by the French jurist, Montesquieu,

In India, we have three organs to function properly as below -

- i) Executive = to implement the law
- ii) Judiciary = to interpret the law
- iii) Legislature = to make the law

Separation of power means all this three organs should not interfere in the working of each other.

According to Wade and Phillips the theory of separation of powers signifies the following three different things;

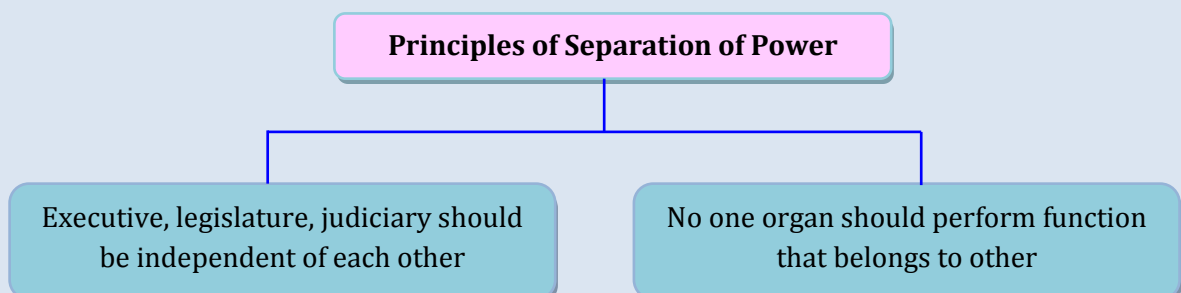


II) Doctrine of Separation in India- In India, the doctrine of separation cannot claim any historical background. The doctrine of separation of powers has also not been accorded a constitutional status. In the constituent Assembly, Prof. K. T. Shah, who was a member of the Constituent Assembly made a proposal to incorporate the doctrine of separation of powers into the constitution, but the Assembly did not accept it.

Though, the doctrine of powers, in its absolute, rigidity, is not inferable from the provisions of the constitution, Article 50 of the constitution provides that the state should take steps to separate judiciary from the executive in all the states of the Union. But even then it cannot be said that Art 50 have incorporated the whole doctrine. Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the differentiated parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our constitution does not contemplate assumption by one organ or part of the state of functions that essentially belongs to another.

III) Modern View- But now the trend of the Supreme Court regarding the doctrine of separation of powers has been change. In the historic case *Kesvanand Bharati Vs. State of Kerala*, 1973 the Court changed its view and held that both the supremacy of the constitution and separation of powers are parts of the basis structure of the Indian Constitution.

IV) Principles of Separation of Power –



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

Functionally, the President's or the Governor's assent is required for all legislations. (Articles 111, 200 and Art 368). The President or the Governor has power of making ordinances when both Houses of the legislature are not in session. (Articles 123 and 212). This is legislative power, and an ordinance has the same status as that of a law of the legislature. (**AK Roy v Union of India AIR 1982 SC 710**) The President or the Governor has the power to grant pardon (Articles 72 and 161) The legislature performs judicial function while committing for contempt those who defy its orders or commit breach of privilege (Articles 105 (3) 194 (3) Thus, the executive is dependent on the Legislature and while it performs some legislative functions such as subordinate it, also performs some executive functions such as those required for maintaining order in the house. There is, however, considerable institutional separation between the judiciary and the other organs of the government. (**See Art 50**)

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

The Judges of the High Court are appointed by the President after consultation with the Chief Justice of India, the Governor of the state, and, in the case of appointment of a judge other than the Chief justice, the Chief Justice of the High Court(Article 217 (1).) It has now been held that in making such appointments, the opinion of the Chief justice of India shall have primacy. (Supreme Court Advocates on Record Association.) The judges of the high Court and the judges of the Supreme Court cannot be removed except for misconduct or incapacity and unless an address supported by two thirds of the members and absolute majority of the total membership of the House is passed in each House of Parliament and presented to the President Article 124 (3) An impeachment motion was brought against a judge of the Supreme court, Justice Ramaswami, but it failed to receive the support of the prescribed number of members of Parliament. The salaries payable to the judges are provided in the Constitution or can be laid down by a law made by Parliament. Article 125 (1) and Art 221 (1). Every judge shall be entitled to such privileges and allowances and to such

rights in respect of absence and pension, as may from time to time be determined by or under any law made by Parliament and until so determined, to such privileges, allowance and rights as are specified in the Second Schedule. Neither the privileges nor the allowance nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment. Appointments of persons to be, and the posting and promotion of, district judges in any state shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such state (Article 233) . The control over the subordinate courts is vested in the acts of the Legislature as well as the executive. The Supreme Court has power to make rules (Article 145) and exercises administrative control over its staff. The judiciary has power to enforce and interpret laws and if they are found in violation of any provision of the Constitution, it can declare them unconstitutional and therefore, void. It can declare the executive action void if it is found against any provisions of the Constitution. Article 50 provides that the State shall take steps to separate the judiciary from the executive. Thus, the three organs of the Government (i.e. the Executive, the Legislature and the Judiciary) are not separate. Actually the complete demarcation of the functions of these organs of the Government is not possible.

V) Case Laws –

For reference –

- i) Delhi Laws Act, 1951
- ii) Rama Javaya Vs. State of Punjab, 1955
- iii) Ramkrishna Dalmiya Vs. Justice Tendulkar, 1959
- iv) Indira Gandhi Vs. Rajnarayan Singh, 1973

Renaissance
Law College

DROIT ADIMINISTRATIF

I) Droit Administratif- Droit Administrative can be defined as a body of rules which determines the organization and the duties of public administration and which regulate the relations of administration with the citizens of the State.

Droit Administratif

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

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

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

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

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

II) Main characteristic features of droit administratif. The following characteristic features are of the *Droit Administratif* in France:-

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

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

- i) The composition and functions of the *Conseil d'Etat* itself;
- ii) The flexibility of its case-law;
- iii) The simplicity of the remedies available before the administrative courts;
- iv) The special procedure evolved by those courts; and
- v) The character of the substantive law, which they apply.

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

III) **THE SYSTEM OF *DROIT ADMINISTRATIF*** according to Dicey, is based on the following two ordinary principles which are alien to English law—

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

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

It was on the basis of these two principles that *Dicey* observed that *Droit Administratif* is opposed to rule of law and, therefore, administrative law is alien to English system. But this conclusion of *Dicey* was misconceived. *Droit Administratif*, that is, administrative law was as much there in England as it was in France but with a difference that the French *Droit Administratif* was based on a system, which was unknown to English law. In his later days after examining the things closely, *Dicey* seems to have perceptibly modified his stand. Despite its overall superiority, the French administrative law cannot be characterized with perfection. Its glories have been marked by the persistent slowness in the judicial reviews at the administrative courts and by the difficulties of ensuring the execution of its last judgment. Moreover, judicial control is the only one method of controlling administrative action in French

Administrative law, whereas, in England, a vigilant public opinion, a watchful Parliament, a self-disciplined civil service and the jurisdiction of administrative process serve as the additional modes of control over administrative action. By contrast, it has to be conceded that the French system still excels its counterpart in the common law countries of the world.

IV) CLASSIFICATION OF ADMINISTRATIVE ACTION

Administrative action is a comprehensive term and defies exact definition. In modern times the administrative process is a by-product of intensive form of government and cuts across the traditional classification of governmental powers and combines into one all the powers, which were traditionally exercised by three different organs of the State. Therefore, there is general agreement among the writers on administrative law that any attempt of classifying administrative functions or any conceptual basis is not only impossible but also futile. Even then a student of administrative law is compelled to delve into field of classification because the present-day law especially relating to judicial review freely employs conceptual classification of administrative action. Thus, speaking generally, an administrative action can be classified into four categories:

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

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

iii) Rule-application action or administrative action.

iv) Ministerial action

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

administration or quasi-legislative action and commonly known as delegated legislation.

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

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

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

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

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

(iii) Rule-application action or administrative action – Though the distinction between quasi-judicial and administrative action has become blurred, yet it does not mean that there is no distinction between the two. If two persons are wearing a similar coat, it does not mean that there is no difference between them. The difference between quasi-judicial and administrative action may not be of much practical consequence today but it may still be relevant in determining the measure of natural justice applicable in a given situation.

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

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

- 1) Making a reference to a tribunal for adjudication under the Industrial Disputes Act.
- 2) Functions of a selection committee.

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

Therefore, at this stage it becomes very important for us to know what exactly is the **difference between Administrative and quasi-judicial Acts.**

Thus broadly speaking, acts, which are required to be done on the subjective satisfaction of the administrative authority, are called 'administrative' acts, while acts, which are required to be done on objective satisfaction of the administrative authority, can be termed as quasi-judicial acts. Administrative decisions, which are founded on pre-determined standards, are called objective decisions whereas decisions which involve a choice as there is no fixed standard to be applied are so called subjective decisions. The former is quasi-judicial decision while the latter is administrative decision. In case of the administrative decision there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh, submissions and arguments or to collate any evidence. The grounds upon which he acts and the means, which he takes to inform himself before acting, are left entirely to his discretion. The Supreme Court observed, "It is well settled that the old distinction between a judicial act and administrative act has withered away and we have been liberated from the pestilent incantation of administrative action."

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

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

UNIT-II 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 require 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.
- iv) 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 profitably 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 device 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.

I) Delegated Legislation- Austin says, “There can be no law without a legislative act.” But when the Legislature, under the pressure of work delegates the legislative power, it results in delegated legislation. 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 in violation of fundamental rights would be void. Besides, there are number of judicial pronouncements by the courts where they have justified delegated legislation.

‘Delegate legislation’ is used in two senses. In one sense delegated legislation means the exercise of the power of rule making, delegated to the executive by the legislature. In the second sense, it means the output of the exercise of that power, viz. rule, regulations, orders, ordinances etc. The expression is used in both senses. Where the emphasis is on the limits of constitutionality of exercise of such power, the term is used in the first sense : where the emphasis is on the output of the concrete rules the term is employed in the second sense.

In simple words, delegated legislation refers to all law making by the authorities other than the legislature i.e., the Central Government, the State Government, Central Board of Revenue and the other administrative bodies and is generally expressed as statutory rules and orders, regulations, by-laws, scheme directions or notifications etc.

II) Nature and Scope of Delegated Legislation-

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 latter. 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 of 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.

Now-a-days, the Parliament passes only a skeleton and the rest of the parts is left on the administrative agencies to provide through the rule making power delegated to them. For example the Import and Export (Control) Act, 1947 contains only eight sections and delegates the whole power to the administrative agency to regulate to the whole mechanism of import and exports.

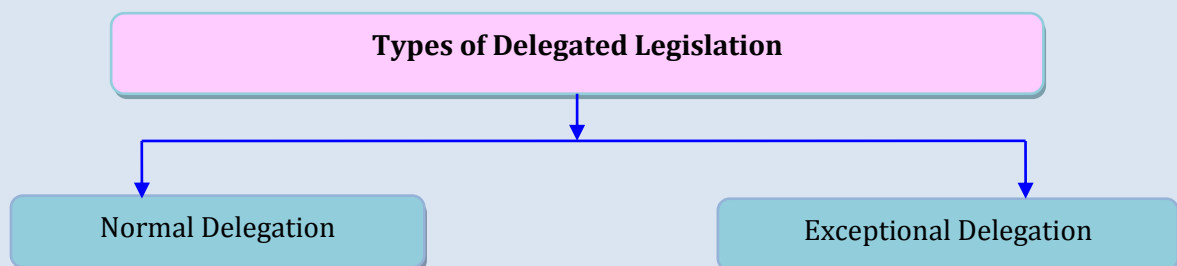
III) Extent of Delegated Legislature Powers- An executive authority can be authorized to modify either existing or future laws but not in any essential feature, while exerting its delegated legislative powers. Exactly, what constitutes an essential feature cannot be enunciated in general terms. But this much is clear that it cannot include a change of policy. When a Legislature is given plenary powers to legislate on a particular subject there must also be an implied power to make law incidental to the exercise of such power. It is a fundamental principle of constitutional law that everything necessary to the exercise of a power is included in the grant of the power. The primary duty of law-making has to be discharged by the legislature itself, but delegation may be resorted to as a subsidiary or an ancillary measure.

IV) Growth History of Delegated Legislation- The Statute of Proclamations, 1539 which was repealed in 1547 was perhaps the most striking piece of legislation effected by a Parliament. Under it Henry VIII was given wide power to legislate by proclamation. The next instance was Statute of Sewers in 1531 where legislative powers were delegated to the Commissioner of Sewers, who was empowered to make drainage schemes and levy rates on land owners. These were outstanding early examples of a technique which the Parliament has always felt able to use.

But it was not the realm of delegation and such were the rare instances and it was not until the eighteenth century that we have significant development in the realm of delegation. As Maitland says, "The period before 16th century was the period of private laws a period when Parliament legislated in such detail that many of its measures would today be matters of administrative instructions."

The growth of modern delegated legislation is usually dated from 1834, when the Poor Law Amendment Act gave to the Poor Law Commissioner, who had no responsibility to Parliament, "power to make rules orders for the management of the Poor." This power which lasted for a century remained a leading example of delegation which put, not merely execution but also the formulation of policy into executive hands. But this was a small instance of experiment in bureaucratic Government. It did not invoke any criticism until later part in the century. The publication of all delegated legislation in uniform series under the title of Statutory Rules and Orders began in 1890 and in 1895 the Rules Publication Act made provisions of systematic printing, publication and public notice. In 1891, for instance, the Statutory Rules and Orders were more than twice as extensive as the statute enacted by the Parliament. The laissez-faire state of 19th century had given place to social welfare state of the First World War Defence of the Realm Act, 1914. Social progress after 1942 complete separation of Powers was not possible, art. 123 Art. 240. Art. 357. Art. 143.

V) Types of Delegated Legislation- On the basis of the nature of Delegated Legislation the Committee on Minister's powers distinguished the following two types of parliamentary delegation:



Types of delegation of legislative power in India There are various types of delegation of legislative power.

1. Skeleton delegation In this type of delegation of legislative power, the enabling statutes set out broad principles and empowers the executive authority to make rules for carrying out the purposes of the Act.

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

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

Government to prescribe –

i) The kind of forms

ii) The method of publication

iii) The manner of making returns, and

v) Such other administrative details

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

i) the powers mentioned above are given , or

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

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

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

An outstanding example of this kind is Section 7 of the Delhi Laws Act of 1912

by which the Provincial Government was authorized to extend, with restrictions and modifications as it thought fit any enactment in force in any part of India to the Province of Delhi. This is the most extreme type of delegation, which was impugned in the Supreme Court in the Delhi Laws Act case. A.I.R. 1951 S.C.332. It was held that the delegation of this type was invalid if the administrative authorities materially interfered with the policy of the Act, by the powers of amendment or restriction but the delegation was valid if it did not effect any essential change in the body or the policy of the Act. That takes us to a term "**bye-law**" whether it can be declared ultra vires ? if so when ? Generally under local laws and regulations the term bye-law is used such as

i) public bodies of municipal kind

ii) public bodies concerned with government, or

iii) corporations, or

iv) societies formed for commercial or other purposes.

The bodies are empowered under the Act to frame bye-laws and regulations for carrying on their administration.

There are five main grounds on which any bye-law may be struck down as ultra vires. They are :

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

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

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

d) That it is uncertain ; and

e) That it is unreasonable.

VI) Subordinate Legislation

Types of Subordinate Legislation

In subordinate legislation the process consists of discretionary elaboration of rules and regulations. In England the power of the Parliament are supreme as such all the legislation other than those made by British Parliament are recognized as subordinate. Subordinate legislation has its origin in the delegation of the power of Parliament to inferior authorities and are subject to control of the sovereign legislation.

- (i) Colonial Legislation
- (ii) Executive
- (iii) Municipal
- (iv) Judicial
- (v) Autonomous

Types of Subordinate Legislation

- (i) Colonial Legislation- The legislation by the self government bodies like colonies and other dependence of the Crown are regarded as colonial legislation. The legislative powers of such bodies are subject to the control of the Imperial Legislation.
- (ii) Executive- Though the main function of the Executive is to administer, but it has been provided with certain subordinate legislative powers which have been expressly delegated to it by Parliament, or pertain to it by the Common Law Statute.
- (iii) Municipal- Municipal authorities are entrusted by the law with limited and subordinate powers of establishing special for the districts under their control. The special laws so-established by the Municipal authorities are known as: Bye-laws", and this type of legislation is known as municipal.
- (iv) Judicial- In England the judicature also possesses the like delegated legislative powers. The higher courts are empowered to make rules for the regulation of their own procedure.
- (v) Autonomous- Though the great bulk of enacted laws is promulgated by the State; the autonomous bodies have been entrusted with a power to make bye-laws for its regulation.

VII) The constitutional limits of Legislative delegation- There are two constitutional limits of legislative delegation-

The constitutional limits of Legislative delegation

(i) The power of delegation is subject to certain limitations the legislature cannot delegate essential legislative functions which consist in determining the legislative policy.

The following non-essential functions may be delegated-

- (a) The power to extent the duration of the statutes, having regard to the local conditions.
 - (b) The power to adopt the existing statutes, with the incidental changes in the name, place etc. and to apply them to a new area, without modifying the underlying policy of the statute.
 - (c) The power to promulgate rules if such rules to be laid before the Parliament before they would come into force.
 - (d) The power to select persons on whom the tax is to be laid, to determine the rates for different classes of goods or to amend the schedule of exemptions.
- (ii) the power conferred on an subordinate authority should not suffer from excessive delegation and whether the power so conferred suffer from excessive delegation should be decided with references to the fact whether the delegation has gone beyond the limits of permissible delegation.

VIII) Conditional Legislation-

When an appropriate legislature enacts a law and authorities an outside authority to bring it into force in such area or at such time as it may decide, that is conditional legislation.

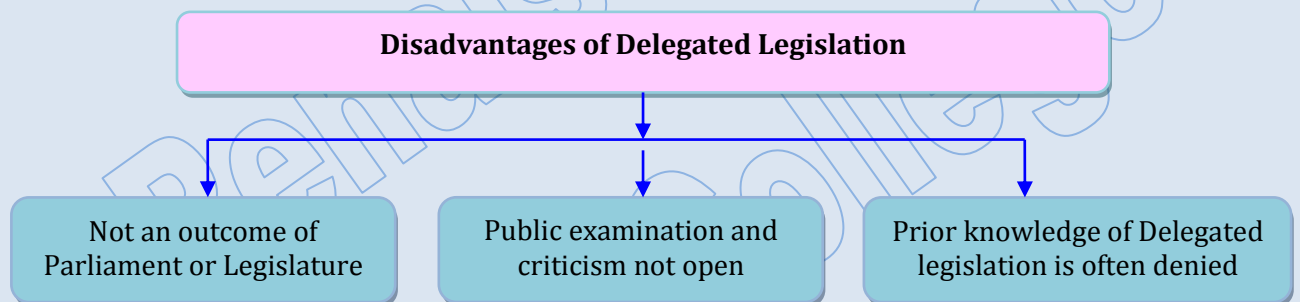
Frequently the legislature enacts a law conditionally leaving it to the Executive to decide as to-

- (i) When will it come into force:
- (ii) The period during which it is to be implemented or suspended : and
- (iii) The place where it should be applied.

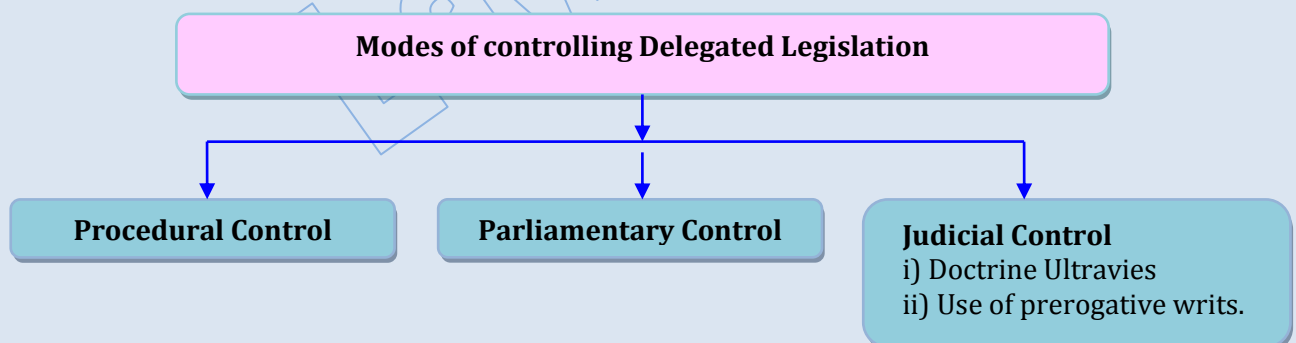
In other words, Conditional Legislation may be defined as a statute that provides control but specifies that they are to go into effect only when a given administrative authority finds the existence of conditions defined in the statute itself. The operation of law follows the fulfillment of the condition. Generally the date of the commencement of an Act may be left entirely to the discretion of the Government and it is laid down that:

“It shall come into force on such date as the Central Government may be notification in the Official Gazette appoint and different dates may be appointed for different provisions of the Act.”

In a conditional legislation the law is complete in itself and certain conditions are laid down as to how when the law would be applied by the delegatee. The delegatee has only to be satisfied if it going to do, is in conformity with the condition laid down in the law. On the other hand, in a delegated legislation only same broad principles and policies are laid down and the details have to be filled up by the delegate, namely, the State Government.



X) MODES OF CONTROLLING DELEGATED LEGISLATION-



Modes of control over delegated legislation The practice of conferring legislative powers upon administrative authorities though beneficial and necessary is also dangerous because of the possibility of abuse of powers and other attendant evils. There is consensus of opinion that proper precautions must be taken for ensuring proper exercise of such powers. Wider discretion is most likely to result in arbitrariness. The exercise of delegated legislative powers must be properly circumscribed and vigilantly scrutinized by the Court and Legislature is not

by itself enough to ensure the advantage of the practice or to avoid the danger of its misuse. For the reason, there are certain other methods of control emerging in this field.

The control of delegated legislation may be one or more of the following types: -

- 1) Procedural;**
- 2) Parliamentary; and**
- 3) Judicial**

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

- i) Doctrine of ultra vires and**
- ii) Use of prerogative writs.**

Control of Delegate Le legislation by means of Procedure- The following requirements are made necessary for the exercise of the delegated authority under different statutes so that procedural safeguards are ensured.

i) The Doctrine of ultra vires---- The chief instrument in the hands of the judiciary to control delegated legislation is the "Doctrine of ultra vires." The doctrine of ultra vires may apply with regard to

i)procedural provision; and

ii) substantive provisions.

The procedural control mechanism operates in following three components:-

- (i) Prior consultation of interests likely to e affected by delegated legislation.
- (ii) Prior publicity of proposed rules and regulations
- (iii) Post-natal publicity of delegated legislation

(a) Parliamentary Control over Delegated Legislation

(i) By laying the rules on the table of Parliament; and

(ii) By a Committee of Parliament acrutinishing the rules so laid.

In U.S.A. the control of Congress over delegated is very limited because neither the technique of 'lying' is extensively used nor there is any Congressional Committee to scrutiny it.

In England, due to concept of supremacy of Parliament, the control exercised by the Parliament over and administrative rule making is very broad and effective. This Parliamentary control operates though 'laying' techniques. Under the provisions of statutory Instruments Act, 1946, all administrative rule making is subject to the control of the Parliament through the Select Committee on statutory Instruments.

In India, the Parliamentary control of delegated legislation follows the same patterns as in England. Like Standing Committee in House of Commons in Britain he further said that such committee would examine delegated legislation and would bring to the notice of Parliament whether delegated legislation has exceeded the original intention of Parliament or has departed from it or has affected any fundamental principle.

- (i) By laying rule on the table of Parliament ; and
- (ii) By a committee of Parliament scrutinizing the rules so made.

(i) By laying rule on the table of Parliament

- (a) Laying with no further direction
- (b) Laying subject to annulment
- (c) Laying, Subject to affirmative resolution
- (d) Laying with deferred operation
- (e) Laying with immediate effect but requiring affirmative resolution as a condition for continuance

(ii) By a committee of Parliament scrutinizing the rules so made

The main function of these committees is to examine the merits of the executive legislation against which petitions are presented.

Main functions of Committees – According to Rule 223, the main functions of the Committee shall be to examine:

- (a) Whether the rules are in accordance with the general objects of the Act;
- (b) Whether the rules contain any matter which could more properly be dealt the Act;
- (c) Whether it contains imposition of tax;
- (d) Whether it directly or bars the jurisdiction of the Court;
- (e) Whether it is retrospective;
- (f) Whether it involves expenditure from the Consolidated Fund;
- (g) Whether there has been unjustified delay in its publication or laying;
- (h) Whether, for any reason, it requires further elucidation.

Parliament, being supreme, can certainly make a law abrogating or repealing by implication provisions of any preexisting law and no exception can be taken on the ground of excessive delegation to the Act of the Parliament itself.

(a) Limits of permissible delegation When a legislature is given plenary power to legislate on a particular subject, there must also be an implied power to make laws incidental to the exercise of such power. It is a fundamental principle of constitutional law that everything necessary to the exercise of a power is included in the grant of the power. A legislature cannot certainly strip itself of its essential functions and vest the same on an extraneous authority.

The primary duty of law making has to be discharged by the legislature itself but delegation may be reported to as a subsidiary or ancillary measure.

(Edward Mills Co. Ltd. v. State of Ajmer, (1955) 1. S.C.R. 735)

Mahajan C.J. in Hari Shankar Bagla v. State of Madhya Pradesh, A.I.R. 1954

S.C. 555 : (1955) 1.S.C.R. 380 at p. 388 observed :

"The Legislature cannot delegate its functions of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The legislature must declare the policy of the law and the legal principles which are to control and given cases and must provide a standard to guide the officials of the body in power to execute the law".

Therefore the extent to which delegation is permissible is well settled. The legislature cannot delegate its essential legislative policy and principle and must afford guidance for carrying out the said policy before it delegates its delegates its subsidiary powers in that behalf. (Vasant lal Maganbhai Sanjanwala v. State of Bombay, A.I.R. 1961 S.C. 4)

The guidance may be sufficient if the nature of things to be done and the purpose for which it is to be done are clearly indicated. The case of Hari Shankar Bagla v. State of Madhya Pradesh, A.I.R. 1954 S.C. 465: (1955) 1 S.C.R. 380 is an instance of such legislation.

The policy and purpose may be pointed out in the section conferring the powers and may even be indicated in the preamble or else where in the Act.

(b) Excessive delegation as a ground for invalidity of statute In dealing with the challenge the vires of any State on the ground of Excessive delegation it is necessary to enquire whether - The impugned delegation involves the delegation of an essential legislative functions or power, and In Vasant lals case (A.I.R. 1961 S.C. 4). Subba Rao, J. observed as follows;

"The constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another.

But, in view of the multifarious activities of a welfare State, it (the legislature) cannot presumably work out all the details to sit the varying aspects of complex situations. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may

- a) not lay down any policy at all;
- b) declare its policy in vague and general terms;
- c) not set down any standard for the guidance of the executive;
- d) confer and arbitrary power to the executive on change or modified the policy laid down by it with out reserving for itself any control over subordinate legislation.

The self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation.

It is for a Court to hold on a fair, generous and liberal construction of on impugned statute whether the legislature exceeded such limits.

PRINCIPLES OF NATURAL JUSTICE

I) Principles Of Natural Justice –

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

Natural Justice used in this way is another name for natural law although devoid of at least some of the theological and philosophical overtones and implications of that concept. This essential similarity is clearly demonstrated by Lord Esher M.R's definition of natural justice as, " the natural sense of what right and wrong." 1 (Voinet v Barrett, (1885) 55, L.J. Q. B, 39, 41). Most of the thinkers of fifteenth to eighteenth century considered natural law and justice as consisting of universal rules based on reason and thus were immutable and inviolable. The history of natural law is a tale of the search of mankind for absolute justice and its failure. Again and again in the course of the last 2500 years the idea of natural law has appeared in some form or the other, as an expression for the search for an ideal higher than positive law. (W.G. Friedman, Legal Theory 95. 5th ed. 1967).

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

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

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

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

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

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

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

CONCEPTUAL FORMULATION

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

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

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

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

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

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

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

Thus the doctrine of natural justice is the result of a natural evolution.

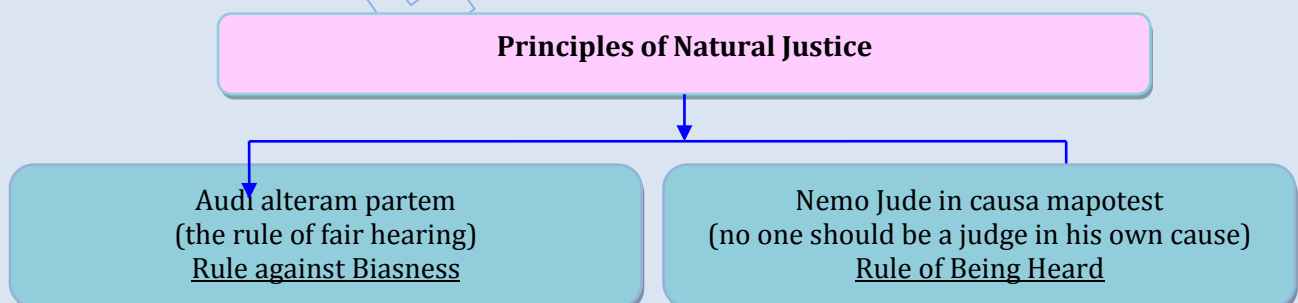
- * Natural Justice is rooted in the natural sense of what is right and wrong. It mandates the Adjudicator or the administrator, as the case may be, to observe procedural fairness and propriety in holding/conducting trial, inquiry or investigation or other types of proceedings or process.

- * The object of Natural Justice is to secure Justice by ensuring procedural fairness. To put it negatively, it is to prevent miscarriage of Justice.
- * The term “Natural Justice” may be equated with “procedural fairness” or “fair play in action”.
- * It is concerned with procedure and it seeks to ensure that the procedure is just, fair and reasonable.
- * It may be regarded as counterpart of the American “Due Process”.

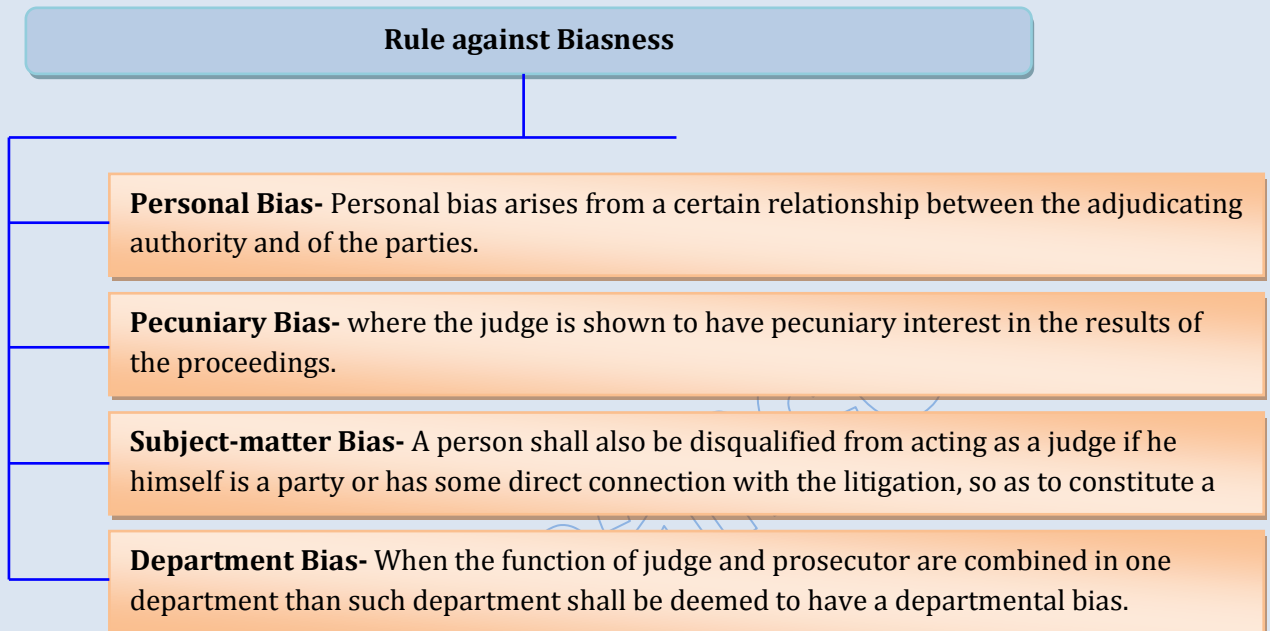
Co-relationship between Law and Natural Justice.

- (a) Law is the means, Justice is the end. Law may be substantive as well as procedural.
- (b) Natural Justice also aims at Justice. It, however, concerns itself only with the procedure. It seeks to secure justice by ensuring procedural fairness. It creates conditions for doing justice.
- (c) Natural justice humanizes the Law and invests the Law with fairness.
- (d) Natural Justice supplements the Law but can supplant the Law.
- (e) Natural Justice operates in areas not specifically covered by the enacted law. An omission in statute, likely to deprive a procedure of fairness, may be supplied by reading into the relevant provision the appropriate principle of Natural Justice.

“Natural Justice” is a concept of common law and signifies certain fundamental rules of judicial procedure. The branch of principles of Natural Justice will prevent justice from being seen to be done.



II) Rule against Biasness- Rule against Biasness denotes than an administrative authority acting in a quasi judicial manner must be impartial, fair and free from biasness.



III) Doctrine of Audi Alteram Partem- Doctrine of Audi Alteram Partem is fundamental rule of natural justice which denotes 'right to be heard'. The doctrine of Audi alteram partem signifies the fact that no man should be condemned unheard. It is said that even Adam and Eve were given the benefit of this by the Almighty before they punish for disobeying His Command. Since the reason of the rule is that party shall have an adequate opportunity of rebutting the case against him it might be that this notice ought to inform the party of the case which has to meet.

Stages of or ingredients of fair hearing are as follows:-

1. Notice: Hearing starts with the notice by the authority concerned to the affected person. Consequently, notice may be taken as the starting point of hearing. Unless a person knows the case against him, he cannot defend himself. Therefore, before the proceedings start, the authority concerned is required to give to the affected person the notice of the case against him. The proceedings started without giving notice to the affected party, would violate the principles of natural justice. The notice is required to be served on the concerned person properly.
2. Hearing: An important concept in Administrative law is that of natural justice or right to fair hearing. A very significant question of modern Administrative law is, where can a right to hearing be claimed by a person against whom administrative action is prepared to be taken?

In **Ridge vs. Baldwin**, the appellant was a chief constable. He was dismissed by the Watch Committee under Section 191 (4) of the Municipal Corporation Act, 1882. This decision of dismissal was taken by the Committee in his absences and even without giving him charge sheet. The action was challenged on the ground that the committee passing the order of dismissal, did not observe the principle of natural and the whole action was taken without given him an opportunity of being heard. The Court of appeal dismissed the action and held that the Watch Committee was not bound to follow the principle of natural justice.

IV) Exception to the Rule of Audi Alteram Partem-

Under the following circumstances the application of the rule of Audi alteram Partem may be excluded wholly or partly-

- (i) Where the functions of an authority concerned have been held not to be Judicial.
- (ii) Where the function of an authority have been held to be policy oriented.
- (iii) Where prompt action, preventive or remedial is needed due to emergency situation.
- (iv) Where the power exercised is disciplinary one, the rule audi alteram Partem does not apply.

Where the process of fair hearing would be prejudicial to public interest the rule alteram partem is excluded. Such situation may cover the cases of Defence or state secrets.

V) Case- In R. Radha Krishna Vs. Osmania University, the university cancelled the whole M. B. A. entrance examination because of mass copying. The decision of the university was challenged on the ground that the candidates were not given a hearing. It was held that notice and hearing to all candidates is not possible in this kind of action which is taken as disciplinary measures to solve a problem which has assumed national social proportion.

Exceptions to Natural Justice

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

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

Emergency: In exceptional cases of urgency or emergency where prompt and preventive action is required the principle of natural justice need not be observed. Thus, the pre-decisional hearing may be excluded where the prompt action is required to be taken in the interest of the public safety or public morality, e.g., where a person who is dangerous to peace in the society is required to be detained or extended or where a building which is dangerous to the human lives is required to be demolished or a trade which is dangerous to the society is required to be prohibited, a prompt action is required to be taken in the interest of public and hearing before the action may delay the administrative action and thereby cause injury to the public interest and public safety. Thus in such situation dire social necessity requires exclusion of the pre-decisional hearing. However, the determination of the situation requiring the exclusion of the rules of natural justice by the administrative authorities is not final and the court may review such determination.

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

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

Renaissance
Law College

CIVIL SERVICES IN INDIA

Administrative capability is a major and crucial factor in the success or failure of development efforts. Administrative modernization has been increasingly recognized as an integral part of the development process. As the ability to assume new tasks, to cope with complexity, to solve novel problems, to modernize resources, etc., depends upon the administrative capacity based on increased professionalization, bureaucratization, modernization and administrative talent. This highlights the role of public and personnel administration.

The quality of the institutions run by Government is dependent to a great extent upon the quality of the employees engaged in their operation. The efficient personnel administration can generate development, dynamism and modernization and ultimately lead to nation building through lubricating and optimizing the capacity and capability of personnel within the Government machinery. The functionaries in public administration can be categorized as “civil services” on the one hand and “public services” on the other. In the current literature on the subject:

- ★ The term “civil service” denotes the entire group of personnel under the employment of governmental system only, mainly the central government and the state governments.
- ★ The term “public service” is used for government employees, quasi-government employees, as well as employees of local bodies.

The Civil Service personnel can be further categorized as follows:

- ★ All operatives who work on the ground level have to directly interact with the common man for rendering a variety of services and performing regulatory functions. They belong mostly to Group ‘D’ and partly to Group ‘C’ services and are known as the “cutting edge” of administration.
- ★ The supervisory level and the middle executive level. They are a whole range of technical and non-technical personnel who belong to the Group ‘B’ services and shade into higher stages of Group ‘c’ at the one end and the lower stages of Group ‘A’ at the other.
- ★ Executive-cum-management levels constitute mostly Group ‘A’ service personnel comprising a whole range of non technical uni- functional services, scientific and technical services and the All India services. The top most layers of these services constitute the potential reservoir of policy makers and top management. Those moving into these policies and to management levels require training in policy analysis, policy formulation, strategic planning, evaluation etc.

Functions of Civil Services

Advice. One of the primary functions of civil service is to offer advice to the political executive. Ministers rely on the advice of their senior officials who are reservoirs of information and organized knowledge concerning the subject matters, which they administer. The political executive necessarily depends upon the civil personnel. For the information that he needs in formulating his own Programme. In the course of administration many problems arise which are usually worked out in the first instance by the civil service and the reported to the political overhead, if at all, for approval or merely for information.

Programme and Operational Planning. In its broad sense planning is a responsibility of the political executive; planning the periodic adjustments of the revenue structure is a responsibility of the Minister for Finance. But there is a field wherein civil servants also perform the function of planning, and this is the field of Programme planning. As we know the legislature passes (to draw a framework for the implementation of policy) an Act in general terms to execute and implement the policy for which certain rules and regulations are required. The civil servants, who put that law into execution, determine the specific steps to be taken in order to bring to fruition a policy or a law already agreed upon. Besides, assisting the ministers in the formulation of policy and drawing a framework of plan,

the civil services are required to participate in the execution of plan. This is termed as operational planning.

Production. Civil Service exists to perform services in the broadest sense of the term. Its primary purpose is production. Every official responsible for running administration needs work standards to enable him to determine whether his organization is reasonably effective, whether his subordinate employees are competent and whether levels of efficiency and output are rising or falling.

Delegated Legislative Powers. Due to the emergence of the welfare state, the activities of the State have got multiplied. The Legislature is neither competent nor has the time to cope with enormous and complex legislation which has consequent grown up. Hence it delegates power of making law to the executive. It passes the bills in skeleton form bearing the details for the executive to fill. The permanent heads of the department evidently performs this job.

Administrative Adjudicatory Power. This is another important power, which has been entrusted to the executive due to rapid technological developments and the emergence of the welfare concept of the State. Administrative adjudication means vesting judicial and quasi-judicial powers with an administrative department or agency. In India this power has been mostly given to the administrative heads. Public administration is the basic infrastructure that sustains a modern society. Therefore, the structure of civil administration and the competence of its higher civil servants have always been critical **determinants in fueling vitality to drive the wheels of progress in any country.**

DISCIPLINARY ACTION AGAINST PUBLIC SERVANTS

A distinction needs to be drawn between disciplinary action of civil or criminal procedure. The former deals with the fault committed in office violating the internal regulations or rules of the administration while the latter is concerned with the violation of law to be dealt with by civil and criminal courts. The following matters are covered in the Conduct Rules. More strictness is observed in those services where

more discretion is involved:

- i) Maintenance of correct behaviour of official superiors,
- ii) Loyalty to the State.
- iii) Regulation of political activities to ensure neutrality of the personnel,
- iv) Enforcement of a certain code of ethics in the official, private and domestic life.
- v) Protection of the integrity of the officials by placing restrictions on investments, borrowings, engaged in trade or business, acquisition or disposal of movable and immovable valuable property, acceptance of gifts and presents, and
- vi) Restriction on more than one marriage.

CAUSES OF DISCIPLINARY PROCEEDINGS

The following are the various causes of disciplinary proceedings.

1) Acts Amounting to Crimes

- a) Embezzlement
- b) Falsification of accounts not amounting to misappropriation of money
- c) Fraudulent claims (e.g. T.A.)
- d) Forgery of documents
- e) Theft of Government property
- f) Defrauding Government
- g) Bribery
- h) Corruption
- i) Possession of disproportionate assets

j) Offences against other laws applicable to Government Servants.

2) Conduct Amounting to Misdemeanor

- a) Disobedience of orders
- b) Insubordination
- c) Misbehaviour
 - i) with superior officers
 - ii) with colleagues
 - iii) with subordinates
- iv) with members of public
- d) Misconduct
 - i) violation of conduct rules
 - ii) violation of standing orders
 - iii) intrigues and conspiracy
 - iv) insolvency

TYPES OF DISCIPLINARY ACTION

Disciplinary action may be informal or formal. Informal disciplinary action may mean assignment to a less desirable work, closer supervision, loss or withholding of privileges, failure of consultations in relevant matters, rejection of proposals or recommendation. It may include curtailing of his/her authority and diminishing his/her responsibility. The reason for taking informal disciplinary action may be that offences are too slight, or too subtle, or too difficult to prove, to warrant direct and formal action.

Formal disciplinary action follows where the offence is serious and can be legally established. In such cases the penalties that are imposed on a member of the service are;

1) Minor Penalties

- a) Censure
- b) Withholding of promotions
- c) Recovery from pay of the whole or part of any loss caused to Government or to a company, association or body of individuals. And
- d) Withholding of increments of pay.

2) Major Penalties

- a) Reduction to a lower stage in the time scale of pay for a specified period.
- b) Reduction to a lower time scale of pay, grade or post, and
- c) Compulsory retirement.

In very serious cases of offence, even judicial proceedings against the offender may also be launched.

MODE OF TAKING DISCIPLINARY ACTION

Usually following provisions are made either in the Constitution or in the statute to check the misuse of power to take disciplinary actions :

- a) No employee shall be demoted or dismissed by an officer below in rank to one who had appointed him/her.
- b) No employee shall be punished except for a cause, specified in some statute or departmental regulation.
- c) No employee shall be punished unless he / she has been given reasonable opportunity to defend his / her case.
- d) The employee shall be informed of the charges laid against him / her.
- e) Where a board of Inquiry is appointed, it shall consist of not less than two senior officers, provided that at least one member of such board shall be an officer of the service to which the employee belongs.

f) After the inquiry against an employee has been completed and after the punishing authority has arrived at any provisional conclusion in regard to the penalty to be imposed, if the penalty proposed is dismissal, removal, reduction in rank or compulsory retirement, the employee charged shall be supplied with a copy of the report of inquiry and be given a further opportunity to show cause why the proposed penalty should not be imposed on him / her.

CONSTITUTION OF INDIA – DEALING WITH DISCIPLINARY MATTERS

Article 309 provides that the Acts of the appropriate legislature may regulate the recruitment and conditions of service of the persons appointed to public services and posts in connection with the affairs of the Union or of any State. It shall be competent for the President or Governor as the case may be, to make rules regulating and recruitment and conditions of service of public service until provisions are made by an Act of the appropriate legislature.

According to Article 310, every person who is a member of a defence service or the civil service of the Union or an All India Service or holds any post connected with defense or any civil post under the union holds office during the pleasure of the president, and every person who is a member of a civil service of a state or holds a civil post under a state holds office during the pleasure of the Governor of the State.

Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or the Governor of the State, any contract under which a person, (not being a member of a defence service or of an All India Service or of a civil service of the Union or a State) is appointed under the Constitution to hold such a post may, if the President or the Governor deems it necessary in order to secure the services of persons having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is required to vacate that post.

Article 311 as amended by Forty-second. Amendment provides that no person who is a member of a civil post under the union or a state, shall be dismissed or removed by an authority subordinate to that by which he / she was appointed. No such person is aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he / she has been informed of the charges against him / her given a reasonable opportunity of being heard in respect of those charges. Where it is proposed after such enquiry to impose upon him / her any such penalty, such penalty may be imposed on the basis of the evidence provided during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed. This clause shall not apply where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his / her conviction on a criminal charge or where the authority empowered to dismiss or remove a person or to reduce him / her in rank is satisfied that for some reason to hold such enquiry. Or where the President or the Governor, as the case may be, is satisfied that in the interests of the security of the State, it is not expedient to hold such enquiry. If in respect of any such person as aforesaid, a question arises, whether it is reasonably practicable to hold the enquiry mentioned above, the decision thereon of the authority empowered to dismiss or remove such person or reduce him / her in rank shall be final.

SUCCESSIVE STEPS INVOLVED IN DISCIPLINARY PROCEEDINGS

The successive steps of the procedure of disciplinary action are:

- i) Calling for an explanation from the employee to be subjected to disciplinary action.
- ii) If the explanation is not forthcoming or is unsatisfactory, framing of charges;
- iii) Suspension of the employee if his / her remaining in the service is likely to prejudice the evidence against him / her.
- iv) Hearing of the charges, and giving opportunity to the employee to defend himself / herself;
- v) Findings and report;

- vi)** Giving another opportunity to the employee to defend himself/herself against the purposed punishment.
- vii)** Punishment order, or exoneration; and
- viii)** Appeal, if any.

ISSUES AND PROBLEMS

There are various problems concerning the disciplinary proceedings. They are as follows:

- i) Lack of knowledge of the Disciplinary Procedure-** It has been seen many a time that the appointing authorities as well as employees are unaware of the details of the disciplinary procedures resulting in many problems.
- ii) Delays-** The time taken to take disciplinary action is very long. When an employee knows of the impending action, he / she becomes more and more irresponsible and problematic. Delays cause hardship to the employees.
- iii) Lack of fair Play-** There is a tendency that the appellate authority generally supports the decision of his / her subordinates. This defeats the purpose of appeal.
- iv) Withholding of Appeal-** Most of the officers do not like appeals against their decisions. There is a tendency to withhold appeals.
- v) Inconsistency-** Disciplinary action should be consistent under the same offence. Otherwise it leads to favoritism, nepotism and corruption.

UNIT-III ADMINISTRATIVE DISCRETION

I) ADMINISTRATIVE DISCRETION- CONCEPT

According to COKE-Discretion is a science of understanding to discern between falsity and truth, between right and wrong, and not to do according to will not private affection. This power should be exercised independently by the authorities concerned according to their own assessment.

It should be noted that a statute conferring discretion usually uses the words 'adequate', 'advisable', 'appropriate', 'beneficial', 'competent', 'convenient', 'expedient', 'equitable', 'far', 'reasonable', 'prejudicial', to safety an 'security', 'detrimental', 'necessary', 'wholesome', 'public purpose', etc. or other opposite. All these words involve matter of degree.

Again an administrative discretion must not be arbitrary or vague but legal and regular. In England even the refusal of exercising discretionary power, where it imposes a duty to exercise it, gives rise a liability to damages. But in India, there is no such law.

But no doubt, an authority may be compelled in India to exercise his discretion where he has been expressly with such power, through courts.

Discretion in layman's language means choosing from amongst the various available alternatives without reference to any predetermined criterion, no matter how fanciful that choice may be. But the term 'Discretion' when qualified by the word 'administrative' has somewhat different overtones. 'Discretion' in this sense means choosing from amongst the various available alternatives but with reference to the rules of reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful, but legal and regular.

The problem of administrative discretion is complex. It is true that in any intensive form of government, the government cannot function without the exercise of some discretion by the officials. But it is equally true that absolute discretion is a ruthless master. Discretionary power by itself is not pure evil but gives much room for misuse. Therefore, remedy lies in tightening the procedure and not in abolishing the power itself.

There is no set pattern of conferring discretion on an administrative officer. Modern drafting technique uses the words 'adequate', 'advisable', 'appropriate', 'beneficial', 'reputable', 'safe', 'sufficient', 'wholesome', 'deem fit', 'prejudicial to safety and security', 'satisfaction', belief, 'efficient', 'public purpose', etc. or their opposites. It is true that with the exercise of discretion on a case-to-case basis, these vague generalizations are reduced into more specific moulds, yet the margin of oscillation is never eliminated. Therefore, the need for judicial correction of unreasonable exercise of administrative discretion cannot be overemphasized.

II) JUDICIAL BEHAVIOR AND ADMINISTRATIVE DISCRETION IN INDIA

Though courts in India have developed a few effective parameters for the proper exercise of discretion, the conspectus of judicial behavior still remains halting, variegated and residual, and lacks the activism of the American courts. Judicial control mechanism of administrative discretion is exercised at two stages:

- I) at the stage of delegation of discretion;
- II) at the stage of the exercise of discretion.

The exercise of discretion must not be arbitrary, fanciful and influenced by extraneous considerations. In matters of discretion the choice must be dictated by public interest and must not be unprincipled or unreasoned. It has been firmly established that the discretionary powers given to the governmental or quasi-government authorities must be hedged by policy, standards, procedural safeguards or guidelines, failing which the exercise of discretion and its delegation may be quashed by the courts. This principle has been reiterated in many cases.

Thus within the area of administrative discretion the courts have tried to fly high the flag of Rule of Law which aims at the progressive diminution of arbitrariness in the exercise of public power.

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 colourable 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 of 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 judgement 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.

III) ADMINISTRATIVE DISCRETION AND FUNDAMENTAL RIGHTS: Articles 13 to 35 of the constitution of India has guaranteed certain fundamental rights to the people. If the law confers and wide discretionary power on an administrative authority which infringes the fundamental rights guaranteed under the Constitution then such law may be declared *ultra vires*. Articles 32, 226 and 227 of the constitution of India contain strong power to control the administrative authority if they exceed the limit or abuse the powers given to them. The courts have used the fundamental rights as a tool to control to some extent either bestowal of discretionary power on the administration or manner of their exercise.

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.

Article 14

Article 14 of Indian Constitution declares that “state shall not deny to any person equality before law and equal protection of the laws throughout the territory of India.” Thus this Article speaks about the “equality before law and equal protection of the laws.” In addition to this provision the right to

equality has been again accepted under Arts 15 and 16. Under Article 15 there is a provision for the prohibition of discrimination on the ground of religion, race, caste, sex or place of birth. Upon these grounds state shall not impose any liability or disability of any kind. Similarly under article 16 equality of opportunity has been granted to all citizens in the matters of public employment. Equality before law English concept. Equality before law simply prohibits class legislation, it does not prohibit classification. Equal protection clause is part of American Constitution also.

Nainsukhds Vs State of U.P., it was held that a law which provided for election on the basis of separate electorates for members of different religions and communities was unconstitutional.

Administrative discretion and Article 19-

There are seven fundamental rights guaranteed to the citizens of India under Article, 19, which are as follows:

- (a) Freedom of speech and Expression
 - (i) Freedom of Assembly
 - (iii) Freedom to form Association
 - (iv) Freedom of Movement
 - (v) Freedom to reside and to settle
 - (vi) Freedom to acquire, hold and dispose of property
(This fundamental right has been omitted by Constitution 44th Amendment Act 1978)
 - (vii) Freedom of profession, occupation, trade or business.

The restriction on art- 19 must be constitutionally valid and must satisfy the following two tests:

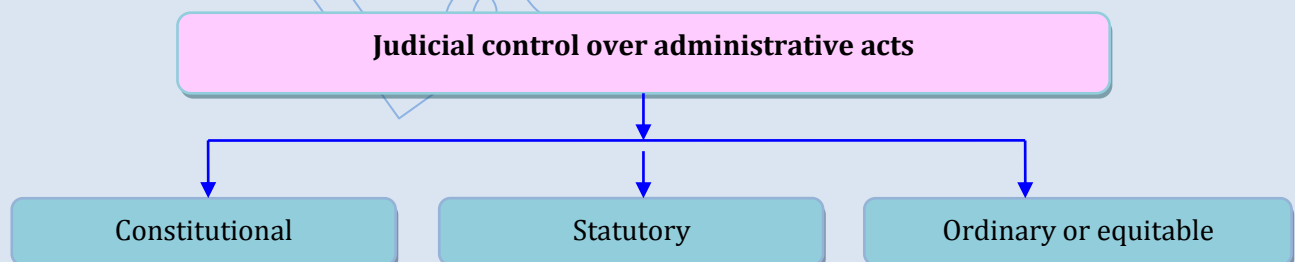
- (i) The restriction must be for the purpose mentioned in clause 2 to 6 of Article 19.
- (ii) The restriction must be reasonable.

The reasonable restrictions are open to judicial review.

IV) PROVISIONS OF JUDICIAL CONTROL OVER ADMINISTRATIVE ACTS- The broad principles on which the exercise of discretionary powers can be controlled, have now been judicially settled. These principles can be examined under two main heads:

- a)** where the exercise of the discretion is in excess of the authority, i.e., ultra vires;
- b)** where there is abuse of the discretion or improper exercise of the discretion.

In India, the provisions of judicial can be grouped into following three heads:



(1) Constitutional- Article 32, 226, 227 of COI.

(2) Statutory Review- There are some acts which provide for an appeal from statutory tribunal to the High-Court on the point of law for example Workmen's Compensation Act 1923.

(3) Ordinary or Equitable- The following are the ordinary or equitable modes to control an administrative discretion.

- (a) Injunction
- (b) Declaration
- (c) Suit for damages.

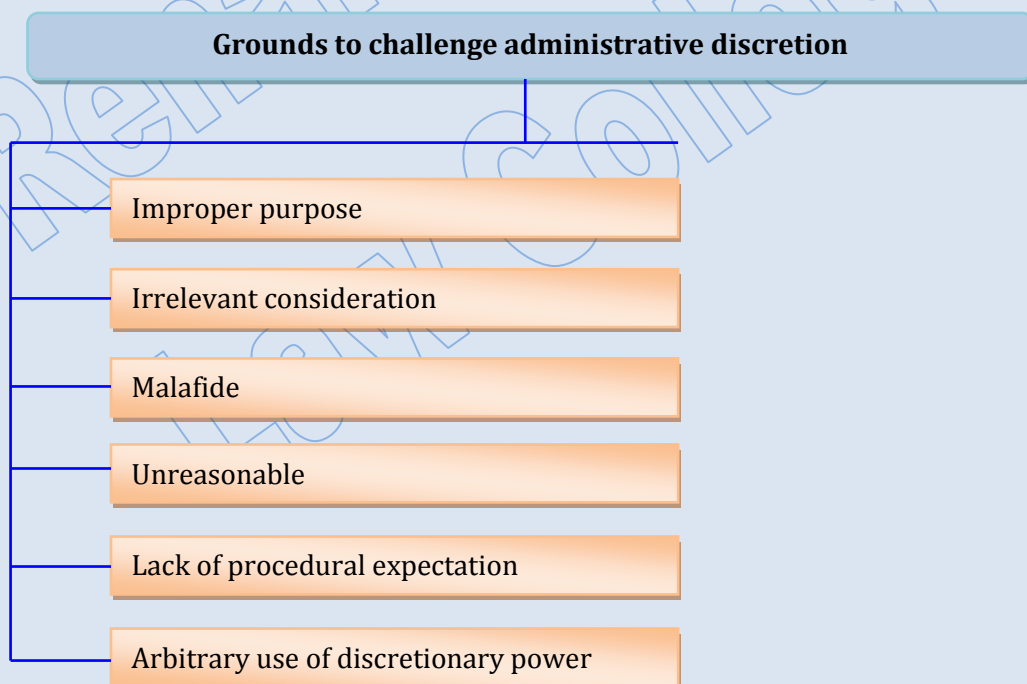
(a) **Injunction**- A Judicial process by which one who has invaded or is threatening to invade the rights legal or equitable of another, is restrained from continuing or committing such wrongful act. Injunction section 36 to 42 of the Specific Relief Act 1963.

Regulate by the Code of Civil Procedure 1908 (Se 37 of the Specific Relief Act.) restrain from doing, a particular thing until the suit is disposed of or until further orders of the Court. An interlocutory application, preserve the status Quo pending trial and judicial discretion of the court.

(b) **Declaration Action** – A declaratory action denotes a judicial remedy, which conclusively determines the rights and obligations of public and private persons and authorities, without the addition of any coercive decree. It is merely a definition of rights and obligations. It does not prescribe any further relief nor any sanction against the defendant. It simply results in the removal of the existing doubts regarding the legal rights of the plaintiff.

(c) **Suit for damages** – Whenever any wrong is done to an individual by some wrongful negligent acts of the public authorities, such individual may file a suit for damages against such authority> The principles determining the quantum of damages are the same that govern the private individuals.

VI) GROUNDS TO CHALLENGE ADMINISTRATIVE DISCRETION - In India, the provisions of judicial can be grouped into following three heads:



VI) Case Laws –

For reference –

- i) RD Shetty Vs. International Airport Authority, 1979
- ii) Himmatlal Vs. Police Commissioner, Ahmadabad, 1973

ACTION OF STATE & ITS LIABILITY

I) ACTION OF STATE AND ITS LIABILITY

Remedies for Actions of the administration is available to the individual against the State. However, they do not provide full redress to the aggrieved individual. Private citizens access to the ordinary courts and the ordinary legal remedies may be qualified by the existence of certain privileges and immunities enjoyed by the state. These privileges immunities though justified in the days in which they originated, are hardly justified in a democratic society. However, the state does enjoy and it may be necessary for it to enjoy certain privileges and immunities.

Administrative law is engaged in the process of redefining such privileges and immunities with a view to reconciling them with the needs of modern times. The Constitution clearly says that the executive power of the Union and of each state extends to 'the carrying on for any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose'. The Constitution therefore, provides that a Government may sue or may be sued by its name. Similar provisions to be found in the Code of Civil Procedure. The above provisions do not, however, enlarge or restrict the extent of State liability; they merely provide the method of redress. The extent of liability will be discussed separately.

II) 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 "the 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.

III) 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-month's 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 provide 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 within 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 from 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.

IV) 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 objection 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.

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 and 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 *nulla tempus occurrit rei*, 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 condonation of delay.

Immunity from Promissory Estoppel

Estoppel 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 "to carry out a representation or promise.

a) which is contrary to law; or

b) which is outside the authority or power of the Officer of the Government or of the public authority to make."

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 (1) 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.

In India the remedy for the breach 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.

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 arises 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 from 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. Section 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 tortious liability, it will be desirable to know the meaning of 'tort'. A tort is a civil wrong arising out of breach of a civil duty or breach of non-contractual obligation. The word 'tort' has been defined in Chambers Dictionary in the following words; ***"Tort is any wrong or injury not arising out of contract 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 breach 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 of the breach of contract 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 in 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 ground that there can be no legal right as against the authority that makes the law on which the right depends.”

Today, hardly, anyone agrees that the stated ground for exempting the sovereign from suit is either logical or practical.

VICARIOUS LIABILITY OF THE STATE

When the responsibility of the act of one person falls on another person, it is called vicarious liability. Such type of liabilities is very common. For example, when the servant of a person harms another person through his act, we held the servant as well as his master liable for the act done by the servant. Here what we mean is essentially the vicarious liability of the State for the torts committed by its servants in the exercise of their duty. The State would of course not be liable if the acts done were necessary for protection life or property. Acts such as judicial or quasi-judicial decisions done in good faith would not invite any liability. There are specific statutory provisions which the administrative authorities from liability. Such protection, however, would not extend malicious act. The burden of proving that an act was malicious would lie on the person who assails the administrative action. The principles of law of torts would apply in the determination of what is a tort and all the defences available to the respondent in a suit for tort would be available to the public servant also.

In India Article 300 declares that the Government of India or a of a State may be sued for the tortious acts of its servants in the same manner as the Dominion of India and the corresponding provinces could have been sued or have been sued before the commencement of the present Constitution. This rule is, however, subject to any such law made by the Parliament or the State Legislature.

Case Law on the tortious liability of the State

=P. and O. Steam Navigation v. Secretary of State for India. (5 Bom HCR App 1.)

=*State of Rajasthan v. Vidyawati*, (AIR 1962 SC 933)

=*Kasturi Lal v. State of U. P.* (AIR 1965 SC 1039)

Damages

It may happen that a public servant may be negligent in the exercise of his duty. It may, however, be difficult to recover compensation from him. From the point of view of the aggrieved person, compensation is more important than punishment. Therefore, like all other employers the State must be made vicariously liable for the wrongful acts of its servants. The Courts in India are now becoming conscious about increasing cases of excesses and negligence on the part of the administration resulting in the negation of the personal liberty. Hence they are coming forward with the pronouncements holding the Government liable for damages even in those cases where the plea of sovereign function could have negative the governmental liability.

Personal liability for abuse of power is a recent phenomenon

“In modern sense the distinction between sovereign and non-sovereign power does not exist. It all depends on the nature of power and manner of its exercise. Legislative supremacy under the Constitution arises out of Constitutional provisions. Similarly the executive is free to implement and administer the law. One of the tests to determine if the legislative or executive functions sovereign in nature is whether the State is answerable for such actions in courts of law, for instance,

acts such as defense of the country, raising armed forces and maintain it, making peace or war, foreign-affairs, power external sovereignty and are political in nature. Therefore, they are not amenable to the jurisdiction of ordinary civil court. The State is immune from being sued as the jurisdiction of the courts in such matters is impliedly barred."

But there the immunity ends. No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner, as it is sovereign. No legal or political system today can place the State above law, as it is unjust and unfair for a citizen to be deprived of his property illegally by the negligent act of officers of State. The modern social thinking and judicial approach is to do away with archaic State protection and place the State or the Government at par with other juristic legal entity. Any watertight compartmentalization of the functions of the State as sovereign or non-sovereign is not sound. It is contrary to modern jurisprudence. But with the conceptual change of statutory power being statutory duty for sake of society and the people, the claim of a common man cannot be thrown out

merely because it was done by an officer of the State official and the rights of the citizen are require to be reconciled so that the rule of law in a welfare State is not shaken. *It is unfortunate that no legislation has been enacted to lay down the law to torts in India. For that law, our courts have to draw from the English common law. Since the law of contract and the law of Sale of Goods and now the law of consumer protection have been enacted, it is high time that our Parliament enacts a law and thereby comes out of the legislative inertia.. The law in India on State liability has developed in the last two decades through judicial process. It has made the State liable for the torts of its servants. The courts have, however, developed such a law without expressly overruling some of the earlier decision, which defined the State liability in very narrow terms.*

SUITS AGAINST GOVERNMENT

I) Contractual Liability of the Government- Articles 294, 298, 299 and 300 of the constitution of India, deal with the contractual liability of the Government. Art 294 provides for succession by the present Governments of the Union and the states the property, aspects rights liabilities and obligations vested in the former Government. Art. 298 authorizes the Government to enter into contracts for the purpose of carrying out of the functions of the State. Article 299 provides essential formalities which a Government contract must fulfill and Article 300 deals with the procedure and the manner in which suits or proceedings against or by the Government may be instituted.

It should be noted here that a Government contract in order to be valid must also fulfill the requirements of section 10 of the Indian Contract Act which deals with the essentials of a valid contract, beside fulfilling the requirements of Art, 299 (1) of the constitution. Similarly sections 73, 74 of the Indian Contract Act which contain the Principles for determining the quantum of damages also apply.

II) Application of the doctrine of waiver to the Government contract-

Since the requirements of Art, 299 are mandatory; these cannot be waived by the Government.

Privileges of the Government under the Civil Procedure Code and Evidence Act-
Under Civil Procedure Code, the privilege available to the Government as compared to an individual is under section 80 of the Civil Procedure Code according to which no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done b such public officer capacity, until the expiration of two months next after notice in writing in the manner provided in the section.

III) Liability of the Government for Tort- English law-The immunity of the Crown from any civil Criminal liability is based upon an ancient and fundamental principle of the English Constitution that “The King can do no wrong”. Earlier an action for a personal wrong will not lie against the sovereign. As such the crown cannot be sued for the tortuous acts of its servant.

Indian Law. In India the liability of the Government for the torts of their servants was accepted quite earlier than in England. In p. & o. Steam Navigation Co. Vs. The Secretary of State for India it was held that the Government is liable for the tortuous act of its servants.

According to Article 300 of the Indian Constitution, the Government of India and a State Government may sue and be sued in relation to their respective affairs in the like cases as Union of India and the corresponding Provinces or Indian Sates might sue or be sued if the constitution had not been passed.

IV) Case Laws –

For reference –

- i) New Marine Coal Co. Vs. Union of India, 1969
- ii) Mahaveer Auto Stores Vs. Indian Oil Corporation, 1980

UNIT-IV
GOVERNMENT PRIVILEGES IN
LEGAL PROCEEDINGS

RIGHT TO KNOW

Government openness is a sure technique to minimize administrative faults. As light is a guarantee against theft, so governmental openness is a guarantee against administrative misconduct. Openness in government is gaining lot of foothold in recent years. It is a topic of growing importance in administrative law. The goal of open government is being pursued by U.S.A, Australia Newzealand and other liberal democracies of the world. Openness in government is bound to act as a powerful check on the abuse of power by the government. The objective of openness in government is ensured by giving access to by the individual to governmental information so that governmental activity is not shrouded in mistery and secrecy. American Constitution, the oldest written constitution of the world, does not contain specific right to information. However, the US Supreme Court has read this right into the First amendment of the Constitution and granted access to information where there is a tradition of openness to information in question and where access contributes to the functioning of the particular process involved.

Administrative Procedure Act, 1946 (APA) was the first enactment, which provided a limited access to executive information. The Act was vague in language and provided many escape clauses. Taking these deficiencies into consideration the Congress in 1966 passed **Freedom of Information Act, 1966**, which gives every citizen a legally enforceable right of access to government files and documents, which the administrators may be tempted to keep confidential. If any person is denied this right, he can seek injunctive relief from the court.

1. Information specifically required by executive order to be kept secret in the interests of national defense or foreign policy.
2. Information related solely to internal personal use of the agency
3. Information specifically exempted from disclosure by statute.
4. Information relating to trade, commercial or financial secrets.
5. Information relating to inter-agency or intra-agency memorandums or letters.
6. Information relating to personal medical files.
7. Information complied for law enforcement agencies except to the extent available by law to a party other than the agency.

After investigating the operation of this Act, Congress in 1974 amended it. Amendments provided:

- (i) For disclosure of “any reasonably segregably portion” of otherwise exempted records;
- (ii) For mandatory time limit of 10 to 30 days for responding to information requests;
- (iii) For rationalized procedure for obtaining information, appeal and cost. Statistics show that maximum (80%) use of this act is being made by business executives their lawyers an editors, authors, reporters and broadcasters whose job is to inform the people have made very little use of this Act.

The judiciary In USA shares the same concern of the Congress, which is reflected in the Freedom of Information Act, 1966. Justice Douglas observed: “Secrecy in government is fundamentally antidemocratic, perpetuating bureaucratic errors. Open discussing based on full information debate on public issues is vital to our national health.” In order to provide access to Federal government meetings, the Congress passed **Sunshine Act, 1977**

In England the thrust of the legislations on ‘information’ but secrecy the present law is contained in the Official secrets acts, 1911, 1920 and 1939. Keeping in view the desirability of openness of governmental affairs in a democratic society, the **Franks Committee** recommended a repeal Section 2 of the 1911 Act and its replacement by the Official information Act. The proposals restricted criminal sanctions to defined areas of major importance: wrongful disclosures of (i) information of major

national importance in the fields of defense security foreign relations, currency and reserves, (ii) cabinet documents, and (iii) information facilitating criminal activity or violating the confidentiality of information supplied to the government by or about individuals, and these of information for private gains.

In 1993, the government in England published a white paper on 'open government' and proposed a voluntary code of practice of providing information. This code is voluntary and thus cannot be equated to statutory law on access to information.

The local government (Access to Information) Act, 1985 is the only statutory law providing legal right to information against local's governors. The Act provides for greater public access to meetings and documents of the major local councils. However, this Act leaves much to the discretion of the councils and mentions at least fifteen categories of exempted information. Individual seeking information has no adequate legal redress. It is certainly strange that a democratic country should be so secretive. It appears that this situation cannot last long because of mounting popular pressure and citizens charter.

The Official Secrets Act, 1923 in India makes all disclosures and use of official information a criminal offence unless expressly authorized.

Courts in India and England have rejected the concept of conclusive right of the government to withhold a document. But still there is too much secrecy, which is the main cause of administrative faults. India Constitution does not specifically provide for the right to information as a fundamental right though the constitutional philosophy amply supports it. In the same manner arts. 19 (a) freedom of thought and expression and 21 right to life and personal liberty would become redundant if information is not freely available Art. 39(a), (b), (c) of the Constitution make provision for adequate means of livelihood, equitable distribution of material resources of the community to check concentration of wealth and means of production. As today information is wealth, hence, need for its equal distribution cannot be over emphasized. Taking a cue from this Constitutional philosophy, the Supreme Court of India found a habitat for freedom of information in Arts. 19(a) and 21 of the Constitution. It is heartening to note that the highest Bench in India while recognizing the efficacy of the 'right to know' which is a sine qua non of a really effective participatory democracy raised the simple 'right to know' to the status of a fundamental right.

In **S. P. Gupta v. Union of India**, the court held that the right to know is implicit in the right of free speech and expression guaranteed under the Constitution in Article 19 (1) (a). The right to know is also implicit in Article 19(1)(a) as a corollary to a free press, which is included in free speech and expression as a fundamental right. The Court decided that the right to free speech and expression includes (i) Right to propagate one's views, ideas and their circulation (ii) Right to seek, receive and impart information and ideas (iii) Right to inform and be informed (iv) Right to know (v) Right to reply and (vi) Right to commercial speech and commercial information.

Furthermore, by narrowly interpreting the privilege of the government to withhold documents under Section 123 of the Evidence Act, the Court has widened the scope for getting information from government file. In the same manner by narrowly interpreting the exclusionary rule of art. 72 (2) of the Constitution, the Court ruled that the Court could examine the material on which cabinet advice to the President is based. However, this judicial creativity is no substitute for a constitutional or a statutory right to information. With the judicial support, the right to information has now become a cause of public action and there is a strong demand for a formal law on freedom of information. States of Goa, Tamil Nadu and Rajasthan have, since 1997,

enacted laws ensuring public access to information, although with various restraints and exemptions. There is a pressure on the Central Governments also to enact law-granting right to information. Various drafts were submitted from consideration by empowered bodies like the Press Council of

India and by independent citizens' groups. but the Freedom of Information Bill, which has finally reached Parliament in 1999, has disappointed almost all who campaigned for its introduction.

This Press Council of India Bill, 1996 had provided three exemptions, which included:

- (1) Information, disclosure of which will have prejudicial effect on sovereignty and integrity of India, security of State and friendly relations with foreign states, public order, investigation of an offence which leads to incitement to an offence;***
- (2) Information which has no relationship to any public activity and would constitute a clear and unwarranted invasion of personal privacy;***
- (3) Trade and commercial secrets protected by law.***

However, the information, which cannot be denied to Parliament or State Legislator, shall not be denied to any citizen. Present government bill tightens all these exemptions while adding several more. One such exemption is in respect of cabinet papers, including records of deliberations of Council of Ministers, Secretaries and other officers. This would make the conduct of all officers of state immune from public scrutiny. Another exemption relates to the legal advice, opinion or recommendations made by an executive decision or policy formulation this confers too far-reaching immunity on officials. However, in one respect the bill marks a definitive advance over the initial draft in doing away with the exemption on information connected to the management of personnel of public authorities. This makes information available relating to recruitment process on public agencies, which is often riddled with corruption and nepotism. The bill is highly inadequate in respect of credible process of appeal and penalties for denial of information. The jurisdiction of the courts has been ruled out since the bill makes provision for an administrative appeal only. The officers who would deal with the requests for information are totally unencumbered by the prospects of any penalty for willful denial of any access. Nevertheless, in spite of these limitations, the proposed Bill is a right step in the right direction.

Right to know also has another dimension. The Bhopal gas tragedy and its disaster syndrome could have been avoided had the people known about the medical repercussions and environmental hazards of the deadly gas leaked from the Union Carbide chemical plant at Bhopal.

In India bureaucrats place serious difficulties in the way of the public's legitimate access to information. The reason for this can be found in colonial heritage.

Today in India secrecy prevails not only in every segment of governmental administration but also in public bodies. Statutory or non-statutory. There is a feeling everywhere that it pays to play safe. Even routine reports on social issues continue to be treated as confidential long after they are submitted. What is given out is dependent on the whims of a minister or a bureaucrat. The result is that there is no debate on important matters and no feedback to the government on the reaction of the people. The stronger the efforts at secrecy, the greater the chance of abuse of authority by functionaries. There is need for administrative secrecy in certain cases. No one wants classified documents concerning national defence and foreign policy to be made public till after the usual period of 35 years is over. Secrecy may also be claimed for other matters enumerated in the Freedom of Information Act, 1966. But the claims of secrecy, generally by the government and public bodies, may play havoc with the survival of democracy in India. Some legislation, therefore, is necessary which recognizes the right to know, makes rules for the proper 'classification of information' and makes the government responsible to justify secrecy. This will not only strengthen the concept of open government, but also introduce accountability in the system of government. Outside the government, there is no justification for secrecy in public undertakings except within a very limited area of economic espionage. Sometime there appears to be a conflict between the right to know and the right to privacy of public figures through whom the machinery of government moves. Our experience in India suggests that a public figure should not be allowed protection against exposure of his private life, which has some relevance to the public duties on the plea that he has a right to privacy. Right to privacy should not be allowed as a pretext to suppress information.

OMBUDSMAN

Ombudsman

After independence setting up of a democratic system of Government raised tremendous hopes and high expectations among people. From a purely regulatory and police administration, the government came to be entrusted with the responsibility of economic and social transformation and that too in a hurry. The state entered economic field in a big way and a number of regulations were brought into play to promote socialistic pattern of the society and to ensure distributive justice.

The Gandhian principle that, "that governments is the best which governs the least" was substituted by a government which was as the American saying goes, a 'big government' affecting the lives of citizens from cradle to grave if not from conception itself. The committee on "Prevention of Corruption" (popularly known as the **Santhanam Committee**) in its report gave special attention to create machinery in the government, which should provide quick and satisfactory redress of public grievances.

I) Ombudsman- the increasing discretionary powers of the administration in the modern welfare State affect the day to-day life of the people. This tremendous increase in the discretionary powers of administration has generated the possibilities of misuse of the powers by administration at the same time. The complaints of mal-administration, corruption, nepotism, administrative inefficiency, negligence, bias etc. have increased. It was felt necessary to evolve an adequate and effective mechanism to keep the administration under control. And this search has produced the idea of "**Ombudsman**" which means a "watch dog of the administration" or "the protector of the little man". This institution of "Ombudsman" was first developed in Sweden in 1809. Later on it was copied by Norway and New Zealand in 1962.

Unique characteristics of Ombudsman-

- (i) The Ombudsman is an independent and non-partisan officer of the legislature who supervises the administration.
- (ii) He deals with specific complaints from the public against Administrative injustice mal-administration, (or may proceed on his own information in similar circumstances).

He has the power to investigate, criticize and report back to the legislature, but not to reserve administrative action.

II) Position of Ombudsman in India- In all India Lawyers Conference held in 1962, Sri M.C. Setalvad gave the idea of establishing an institution similar to that of an Ombudsman. In 1966, the Administrative Reforms Commission recommended the office of Lokpal similar to that of the Ombudsman for the following reasons-

- (i) Since a democratic Government is a Government of the people, by the people and for the people, it has an obligation to satisfy the citizen about its functioning and to offer them adequate means for the ventilation and redress of their grievances.
- (ii) The existing institution of judicial review and Parliamentary control are inadequate in view of ever expanding range of Governmental activities, most of which are discretionary.

On the basis of the recommendation made by the Administrative Reform Commission the Lokpal and Lokayukta Bill was prepared by the Government and placed in the Parliament in 1969 but it lapsed owing to dissolution of Lok Sabha.

The Administrative Reforms Commission, which recommended the Office of Lokpal, formulated the following principle;

- (i) Lokpal should be demonstrably independent and impartial.
- (ii) His investigations and proceedings should be conducted in private and should be informal in character.
- (iii) His appointment should, as far as possible, be non political.
- (iv) His status should be equivalent with the highest judicial functions in India.
- (v) He should deal with the matters involving acts of injustice, corruption and favoritism.

The Bill defined misconduct by providing that a public man will be deemed to have committed misconduct if he directly or indirectly allows his position to be taken advantage of by any of his relatives or associates and by reason thereof such relative or associate secures any undue gain or favor to himself or to another person or cause harm or undue hardship to another person. It further provided that the public man will be liable to be punished if he is motivated by 'motives of personal interest' or if he abuses or attempts to abuse his position to cause harm or undue hardship, to any other person. Even ex-Ministers and ex-M. Ps. are within the ambit of Lokpal if their misconduct is not more than five-years old.

Note: Please refer latest Lokpal Bill/Act.

III) Appointment of Lokpal- According to the Lokpal Bill of 1977, the Lokpal is to be appointed by the President in consultation with the Chief Justice of India and the speaker of Lok Sabha and the leader of opposition in the Lok Sabha. He is appointed for five years. He can not be re-appointed for more than next one term nor any employment under the Government be given to him after his term. He can be removed from his office during his term only on the enquiry which is to be held by a sitting or retired Judge of the Supreme Court in the same manner as there is provision for the removal of a Judge under judges (Enquiry) Act, 1968. The enquiry report is to be placed before both the house of the Parliament and each house has to pass an address for his removal by a majority of its total membership and a majority of not less than two-third of its members present and voting.

IV) Qualifications- The Bills lays down the following negative qualifications:

- (i) He shall not be a member of Parliament or of State Legislature
- (ii) If he is holding office of profit or trust, he shall resign before he takes charge of the office of Lok pal.
- (iii) If he related to any political party he will sever his relations from it.
- (iv) If he attends to a profession he will leave it.
- (v) If he is carrying on any trade or occupation he will break off his relations with its management.

V) Salary- The salary, pension and other perquisites of the Lok pal equal to that of the Chief-Justice-of India.

VI) Functions and Powers of Lok pal- The Lok pal may investigate any action taken by or with the approval of a Minister or secretary, being action taken in the exercise of his administrative functions, if any case where-

- (a) A written complaint in duly made to the Lok pal by a person who claims to have sustained injustice in consequence of maladministration in connection with such action or who affirms that such action has resulted in favor being unduly shown to any person or his accrual of persona benefit or gain to the Minister or to the secretary, as the case may be, or
- (b) Information has come to his knowledge otherwise than on a complaint under clause (a) that such action is of the nature mentioned in the clause.

VII) Matters not with in the jurisdiction of Lok pal- The Lok pal shall not conduct an investigation in respect on any of the following matters-

- (a) Action taken in a matter certified by a Union Minister as affecting the relations with foreign states;
- (b) Action taken under the Extradition act 1963 or the Foreigner's Act, 1946;
- (c) Action taken for the purpose of investigating crime or protecting the security of the state;
- (d) Action taken for the determination whether a matter shall go to court or not;
- (e) Action taken in matters which arise out of the terms of contract governing purely commercial relations of the administration with customers or suppliers, except where the complaint alleges harassment or gross delay in meeting contractual obligations,
- (f) Actions taken in respect of appointment, removal etc. of public servants;
- (g) Grant of honors' and awards.

VIII) Procedure- Investigation shall be conducted in private and the procedure for conducting an investigation shall be such as the Lok Pal considers appropriate in the circumstances of the case.

For the purpose of any such investigation the Lok pal shall have all the powers of a Civil Courts while trying the suit under the Code of Civil Procedure, in respect of the following matters-

- (a) Summoning and enforcing the attendance of any person and examining him on oath;
- (b) Discovery and production of documents;
- (c) Receiving evidence on affidavits;
- (d) Requisitioning any public record or copy thereof from any office.

Contempt- The proceeding before the Lok pal shall be deemed to be judicial proceeding. But he shall have no power to punish for contempt.

IX) Lokayukta in States-

Even before the introduction of Lok pal Bill, several states in India enacted the Lokayukta Statute. For example Bihar, Orissa, Maharashtra, Rajasthan, Tamilnadu and Uttar Pradesh enacted the Lokayukta States. In 1979, the State of Karnataka has also adopted this institution.

In U.P., the U.P. Lokayukta and Up-Lokayukta Act of 1975 was passed. According to this Act, the Lokayukta shall be appointed by the Governor with the consultation of the Chief Justice of the High-Court and leader of the opposition in the Legislative Assembly. The Up-Lokayukta shall be appointed by the Governor in consultation with Lokayukta. The Up-Lokayukta is subject to the administrative control of Lokayukta.

Qualification- The Lokayukta shall be a person who is or has been a judge of the Supreme Court or a High Court. The Lokayukta or Up-Lokayukta should not be a member of any Legislature and also should have no connection with any political party. He shall not any office of profit nor should carry any business or any profession.

Term- He shall hold the office for five years unless he resigns earlier or is removed from the office by the Governor on the ground of misconduct or incapacity.

It should be noted he shall be removed from his office subject to the provisions of Art. 311 of the Constitution. An enquiry is to be conducted by a judge of the Supreme Court or of a High-Court and the enquiry report must be approved by at least two-third majority of each house of state legislature. Lastly the Lokayukta or-Lokayukta may investigate any action taken by-

- (a) Minister or a secretary, or
- (b) Any public servant including a public servant for this purpose by the State Government. The State Government may exclude any complaint involving a grievance or an allegation made against a public servant from the jurisdiction of Lokayukta or Up-Lokayukta.

The Lokayukta and Up-Lokayukta are required to submit annually a consolidated report on the performance of their functions to the Governor.

In 1968, the proposal for creation of the institutions of **Lokpal** and **Lokayukta** was brought forward in the form of a Bill. During this period, the incumbent in the post moved elsewhere and as an interim measure, pending deliberations on the Bill, the Secretary in the Department of Personnel was asked to perform the functions of the Commissioner. No decision was taken thereafter. Arrangements of the Secretary in the Department of Personnel concurrently functioning as a Commissioner fell into disuse. The system introduced as stated above functioned till March 1985 when a separate Department of Administrative Reforms and Public grievances was set up.

The institution of Lokayukta is functioning in 13 States. These States are: Andhra Pradesh, Assam, Bihar, Gujarat, Himachal Pradesh, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan, Uttar Pradesh, Orissa, Punjab and Haryana.

CENTRAL VIGILANCE COMMISSION (CVC)

In any system of government, improvements in the grievance redressal machinery have always engaged the attention of the people. This system no matter, howsoever, ineffective completely fails when inertia and corruption filter from the top. It was against this backdrop that the establishment of the Central vigilance Commission (CVC) was recommended by the Committee on Prevention of Corruption, the Santhanam Committee. The committee now after the name of its Chairman was appointed in 1962. It recommended the establishment of a Central Vigilance Commission as the highest authority at the head of the existing anti-corruption organization consisting of the Directorate of General Complaints and Redress, the Directorate of Vigilance and the Central Police Organization. The jurisdiction of the Commission and its powers are co-extensive with the executive powers of the Center. The government servants employed in the various ministries, and departments of the Government of India and the Union territories, the employees of public sector undertakings, and nationalized banks, have been kept within its purview. The Commission has confined itself to cases pertaining only: (i) to gazetted officers, and (ii) employers of public undertakings and nationalized banks, etc. drawing a basic pay of Rs. 1,000 per month and above.

Service Conditions and Appointment of Vigilance Commissioner : - The Central Vigilance Commissioner is to be appointed by the President of India. He has the same security of tenure as a member of the Union Public Service Commission. Originally he used to hold office for six years but now as a result of the resolution of the Government in 1977, his interest for not more than two years. After the Commissioner has ceased to hold office, he cannot accept any employment in the Union or State Government or any political, public office.

He can be removed or suspended from the office by the President on the ground of misbehavior but only after the Supreme Court has held an inquiry into his case and recommended action against him.

Procedure:

The Commission receives complaints from individual persons. It also gather information about corruption and malpractices or misconduct from various sources, such as, press reports, information given by the members of parliament in their speeches made in parliament, audit objections, information or comments appearing in the reports of parliamentary committees, Audit Reports and information coming to its knowledge through Central Bureau of Investigation. It welcomes the assistance of voluntary organizations like Sadachar Samiti and responsible citizens and the press.

The Commission often receives complaints pertaining to matters falling within the scope of the State Governments. Where considered suitable, such complaints are brought to the notice of state vigilance commissioners concerned for necessary action. Similarly, they forward complaints received by the State Vigilance Commission in regard to matter falling within the jurisdiction of the Central Government, to the Central Vigilance Commission for appropriate action.

The Central vigilance Commission has the following alternatives to deal with these complaints:

a) It may entrust the matter for inquiry to the administrative Ministry/Department concerned.

b) It may ask the Central Bureau of Investigation (C. B. I) to make an enquiry.

c) It may ask the Director of the C. B. I to register a case and investigate it.

It had been given jurisdiction and power to conduct an enquiry into transaction in which public servant are suspected of impropriety and corruption including misconduct, misdemeanor, lack of integrity and malpractices against civil servants. The Central Bureau of Investigation (CBI) in its operations assisted the Commission. The CVC has taken a serious note for the growing preoccupation of the CBI with work other than vigilance. Thus when the CBI is extensively used for non-corruption investigation work such as drugtrafficking, smuggling and murders it hampers the work of the CVC. But how effective this institution has proved in uprooting corruption depends on various factors, the most important being the earnestness on the part of the government, citizens and institutions to clean public life. In its efforts to check corruption in public life and to provide good governance the Apex Court recommended measures of far-reaching consequences while disposing a public interest litigation petition on the *Jain Hawala Case*. Three- Judge Bench separated four major investigating agencies from the control of the executive. These agencies are:

Central Bureau of Investigation;

Enforcement Directorate;

Revenue Intelligence Department and

The Central Vigilance Commission.

The Court has shifted the CBI under the administrative control of the CVC.

The Central Vigilance Commission, until now, was under the Home Ministry entrusted with the task of bringing to book cases of corruption and sundry wrongdoings and suggesting departmental action. Now the CVC is to be the umbrella agency and would coordinate the work of three other investigating arms.

In order to give effect to the view of the Supreme Court, the government issued an ordinance on August 25, 1998. However, this measure had diluted the views of the Supreme Court by pitting one view against the other. Therefore, what ought to have been visualized as a reformative step had begun to seem as a cleaver bureaucratic legalese. It was when the Supreme Court expressed concern over these aspects of the

Ordinance in the hearing relating to its validity that the government decided to amend the Ordinance and thus, on October 27, 1998 **Central Vigilance Commission (Amendment) Ordinance** was issued. The Commission was made a four-member body and its membership was opened to other besides bureaucrats. In the same manner the single directive of prior permission was deleted and the membership of Secretary Personnel, Government of India was deleted. It is too early to comment on the functioning of the reconstituted statutory Central Vigilance Commission but one thing is certain that no commission can root out corruption, which has sunk so deep in the body politic. It can only act as a facilitator and propellant.

COMMISSION OF ENQUIRY

The Commission of Inquiry Act, 1952 is an Act to provide for the appointment of Commissions of Inquiry and for vesting such Commissions with certain powers.

Section 3 of this Act provides for appointment for Commission. It lays down that the appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the House of the People or, as the case may be, the Legislative Assembly of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of-

(i) Making an inquiry into any definite matter of public importance, and (ii) Performing such functions and within such time as may be specified in the notification.

And the commission so appointed shall make the inquiry and perform the functions accordingly.

The Commission consists of one or more members appointed by the appropriate Government and where the Commission consists of more than one member, one of them may be appointed as the Chairman thereof.

“The appropriate Government shall cause to be laid before the House of the People or, as the case may be, the Legislative Assembly of the State, the report, if any, of the Commission on the inquiry made by the Commission under sub-section (1), together with a memorandum of the action taken thereon, within a period of 6 months of the submission of the report by the Commission to the appropriate Government.”

Sec. 3 (4) is conceived as a check upon the Government inaction or deliberate suppression of the report before the Parliament/Legislative Assembly along with the Memorandum of action taken by it thereon.

Section 4 deals with the powers of the Commission. It lays down that the Commission shall have the powers of civil courts while trying a suit under the Code of Civil Procedure in respect of the following matters, namely-

- (a) Summoning and enforcing the attendance of any person, and examining him on oath;
- (b) Requiring the discovery and production of any document;
- (c) Receiving evidence on affidavits;
- (d) Requisitioning any public record or copy thereof from any court of office;
- (e) Issuing commissions for the examination of witnesses or documents; and
- (f) Any other matter which may be prescribed.

Under section 5, where the appropriate Government is of opinion that, having regard to the nature of the inquiry to be made and other circumstances of the case, all or any of the provisions of sub-sections (2) to (5) of section 5 should be made applicable to a Commission, the appropriate Government may, by notification in the Official Gazette, direct that all or such of the provisions as may be specified in the notification shall apply to that Commission, and on the issue of such a notification the said provisions shall apply accordingly.

The Commission shall have power to require any person, subject to any privilege which may be claimed by that person under any law, to furnish on such points or matters, as in the opinion of the Commission, may be useful for, or relevant to the subject matter of the inquiry.

The Commission or any officer, not below the rank of a gazette officer specially authorised in this behalf by the Commission, may enter any building or place where the Commission has reason to believe that any books of account or other documents relating to the subject matter of the inquiry may be found, and may seize any such books of account or document or take extracts or copies there from, subject to the provisions of sections 102 and 103, Cr. P.C. in so far as they may be applicable.

The Commission shall be deemed to be civil court. When any offence as is described in sections 175, 178 to 180 and 228 I.P.C. committed in the view or presence of the Commission, the Commission may, after recording:

- (i) The facts constituting the offence, and
- (ii) The statement of the accused as provided in the Criminal Procedure Code,

Send the case to Magistrate having jurisdiction to try the same, and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case had been forwarded to him under section 482, Cr. P.C. [Sub- section (4)].

Any proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 I.P.C. [Sub-section (5)].

Thus the Commission of Enquiry is an administrative authority which is constituted to make judicial inquiry into any question of public importance.

The President can appoint an inquiring authority so that an inquiry can be held into the charges against any Chief Minister. During the inquiry, the Chief Minister can be asked to resign or not to resign. The inquiry can be held in private or public.

Normally, only charges which have some prima facie substances in them are subjected to a regular inquiry.

The inquiry is held in private because if it is held in public, it is likely to create public excitement which is not desirable and interferes to some extent with the atmosphere in which such an inquiry is conducted in these matters, public interest is the guiding factor.

Regarding procedure to be followed by the commission, the Commission has, subject to any rules that may be made in this behalf, power to regulate its own procedure including-

- (i) The fixing of places and times of its sittings, and
- (ii) Deciding whether to sit in public or private,

And may act, notwithstanding the temporary absence of any member of the existence of a vacancy among its members.

No suit or other legal proceeding shall lie against:

- (i) The appropriate Government,
 - (ii) The Commission,
 - (iii) Any member of the Commission,
 - (iv) Any person acting under the direction either of the appropriate Government or of the Commission,
- In respect of:

- (i) Anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made there under, or
- (ii) The publication by or under the authority of the appropriate Government or the Commission, of report, paper or proceedings.

The appropriate Government may, by notification in the official Gazette, make rules to carry out the purposes of this Act. In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any the following matters, namely,-

- (a) The term of office and the conditions of service of the members of the Commission;
- (b) The manner in which inquiries may be held under this Act and the procedure to be followed by the Commission in respect of the proceedings before it;
- (c) The powers of civil court which may be vested in the Commission;
- (d) Any other matter which has to be, or may be, prescribed.

The Government of India appointed Mr. Sudhi Ranjan Das, former Chief Justice of India, as the one man commission of inquiry to investigate and report on the allegations made by the non-communist opposition members of Punjab against the State Chief Minister, Sardar Pratap Singh Kairon.

The report of the inquiry which was held in camera was to be submitted to the Government by last February, 1964. The scope of the inquiry was restricted to the 21 allegations made in the memorandum submitted to the President of India on 31st July, 1963, by the Punjab opposition leader and others and did not deal with any other allegations or complaints.

Unlike the Lord Denning inquiry into the Perfume scandal in U.K. and the S.K. Das inquiry in respect of Mr. Malviya, this Commission could compel attendance of witnesses, compel production of documents, administer oath to witnesses and allow their cross-examination, and permit counsels to appear on behalf of the parties concerned.

The proceedings before the Commission were treated as judicial proceedings within the meaning of sections 193 and 228, I.P.C. This Commission was set up as the Central Government was of the opinion that it was necessary for the purpose of making an inquiry into a definite matter of public importance.

UNIT-V ADMINISTRATIVE TRIBUNALS

I) ADMINISTRATIVE TRIBUNALS

Administrative Tribunals are agencies created by specific enactments to adjudicate upon controversies that may arise in the course of the implementation of the substantive provisions of the relative enactments. Unlike that of the court which is parts of the traditional judicial system of a country, the jurisdiction of administrative tribunal is not general. But specific, the courts, known to Anglo-saxon jurisprudence would entertain suits, ranging for a simple claim for recovery of debt to complicated issues of law and facts, but excluding the vires of legislation. Administrative Tribunals are solely quasi-judicial functions.

It should be noted that an administrative body will be administrative tribunal only when that body is constituted by the state and is vested with some judicial powers of the state. The tribunals are generally given the power of a civil Court enjoyable under the code of Civil Procedure in the matters of summoning witness, compulsory production and discovery and documents, receiving of evidence on oath and on affidavit, issuing commissions etc.

There are a large number of laws which charge the Executive with adjudicatory functions, and the authorities so charged are, in the strict scene, administrative tribunals. Administrative tribunals are agencies created by specific enactments. Administrative adjudication is term synonymously used with administrative decision making. The decision-making or adjudicatory function is exercised in a variety of ways. However, the most popular mode of adjudication is through tribunals.

II) Characteristics of Administrative tribunals- The following are the characteristics of Administrative tribunals:

Characteristics of Administrative tribunals

- (i) That they are established by the executive under the provisions of statute.
- (ii) That though they are required to act judicially, they perform quasi-judicial functions.
- (i) That they are independent and imperial and work without being influenced by the Government.
- (ii) That they have the powers of Civil Courts in certain matters and their proceeding by the considered to be judicial proceedings.
- (iii) That they are required to follow the principles of natural justice in deceiving the cases.
- (iv) That they are not bound to follow the technical rules of the procedure and evidence prescribed by the civil procedure Code and Evidence-Act.
- (v) That they are not courts in proper sense of terms.

ADMINISTRATIVE TRIBUNALS – EVOLUTION

The growth of Administrative Tribunals both in developed and developing countries has been a significant phenomenon of the twentieth century. In India also, innumerable Tribunals have been set up from time to time both at the center and the states, covering various areas of activities like trade,

industry, banking, taxation etc. The question of establishment of Administrative Tribunals to provide speedy and inexpensive relief to the government employees relating to grievances on recruitment and other conditions of service had been under the consideration of Government of India for a long time. Due to their heavy preoccupation, long pending and backlog of cases, costs involved and time factors, Judicial Courts could not offer the much needed remedy to the government servants, in their disputes with the government. The dissatisfaction among the employees, irrespective of the class, category or group to which they belong, is the direct result of delay in their long pending cases or cases not attended properly. Hence, a need arose to set up an institution, which would, help in dispensing prompt relief to harassed employees who perceive a sense of injustice and lack of fair play in dealing with their service grievances. This would motivate the employees better and raise their morale, which in turn would increase their productivity.

The Administrative Reforms Commission (1966-70) recommended the setting up of Civil Service Tribunals to function as the final appellate authority, in respect of government orders inflicting major penalties of dismissal, removal from service and reduction in rank. As early as 1969, a Committee under the chairmanship of J.C. Shah had recommended that having regard to the very number of pending writ petitions of the employees in regard to the service matters, an independent Tribunal should be set up to exclusively deal with the service matters.

The Supreme Court in 1980, while disposing of a batch of writ petitions observed that the public servants ought not to be driven to or forced to dissipate their time and energy in the courtroom battles. The Civil Service Tribunals should be constituted which should be the final arbiter in resolving the controversies relating to conditions of service. The government also suggested that public servants might approach fact finding

Administrative Tribunals in the first instance in the interest of successful administration.

The matter came up for discussion in other forums also and a consensus emerged that setting up of Civil Service Tribunals would be desirable and necessary, in public interest, to adjudicate the complaints and grievances of the government employees.

The Constitution (through 42nd amendment Article 323-A).

This Act empowered the Parliament to provide for adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and constitutions of service of persons appointed to public service and posts in connection with the affairs of the union or of any state or local or other authority within the territory of India or under the control of the government or any corporation owned or controlled by the government.

In pursuance of the provisions of Article 323-A of the Constitution, the Administrative Tribunals Bill was introduced in Lok Sabha on 29th January 1985 and received the assent of the President of India on 27th February 1985.

STRUCTURE OF THE TRIBUNALS

The Administrative Tribunals Act 1985 provides for the establishment of one Central Administrative Tribunal and a State Administrative Tribunal for each State like Haryana Administrative Tribunal etc; and Joint Administrative Tribunal for two or more states. The Central Administrative Tribunal with its principal bench at Delhi and

other benches at Allahabad, Bombay, Calcutta and Madras was established on 1st November 1985. The Act vested the Central Administrative Tribunal with jurisdiction, powers and authority of the adjudication of disputes and complaints with respect to recruitment and service matters pertaining to the members of the all India Services and also any other civil service of the Union or holding a civil post under the Union or a post connected with defense or in the defense services being a post filled by a civilian. Six more benches of the Tribunal were set up by June, 1986 at Ahmedabad, Hyderabad, Jodhpur, Patna, Cuttack, and Jabalpur. The fifteenth bench was set up in 1988 at Ernakulam.

The Act provides for setting up of State Administrative Tribunals to decide the services cases of state government employees. There is a provision for setting up of Joint Administrative Tribunal for two or more states. On receipt of specific requests from the Government of Orissa, Himachal Pradesh, Karnataka, Madhya Pradesh and Tamil Nadu, Administrative Tribunals have been set up, to look into the service matters of concerned state government employees. A joint Tribunal is also to be set up for the state of Arunachal Pradesh to function jointly with Guwahati bench of the Central Administrative Tribunal.

COMPOSITION OF THE TRIBUNALS

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

QUALIFICATION FOR APPOINTMENT

In order to be appointed as Chairman or Vice-Chairman, one has to be qualified to be (is or has been) a judge of a High Court or has held the post of secretary to the Government of India for at least two years or an equivalent pay-post either under the Central or State Government (vide Sec. 6(i) and (ii) Act No. 13 of 1985). To be a judicial member, one has to be qualified for appointment as an administrative member, one should have held at least for two years the post of Additional Secretary to the Government of India or an equivalent pay-post under Central or State Government or has held for at least three years a post of Joint Secretary to the Govt. Of India or equivalent post under Central or State Government and must possess adequate administrative experience.

APPOINTMENTS

The Chairman, Vice-Chairman and every other members of a Central Administrative Tribunal shall be appointed by the President and, in the case of State or joint Administrative Tribunal(s) by the President after consultation with the Governor(s) of the concerned State(s), (vide Section 6(4), (5) and (6), Act No. 13 of 1985). But no appointment can be made of a Chairman, vice-chairman or a judicial member except after consultation with the Chief Justice of India. If there is a vacancy in the office of the Chairman by reason of his resignation, death or otherwise, or when he is unable to discharge his duties / functions owing to absence, illness or by any other cause, the Vice-Chairman shall act and discharge the functions of the Chairman, until the Chairman enters upon his office or resumes his duties.

TERMS OF OFFICE

The Chairman, Vice-Chairman or other member shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of

- Sixty five, in the case of Chairman or vice-Chairman,
- Sixty-two, in the case of any other member, whichever is earlier.

RESIGNATION OR REMOVAL

The Chairman, Vice-Chairman or any other member of the Administrative Tribunal may, by notice in writing under his hand addressed to the President, resign, his office; but will continue to hold office

until the expiry of three months from the date of receipt of notice or expiry of his terms of office or the date of joining by his successor, whichever is the earliest.

They cannot be removed from office except by an order made by the President on the ground of proven misbehavior or incapacity after an inquiry has been made by a judge of the Supreme Court; after giving them a reasonable opportunity of being heard in respect of those charges (vide Sec. 9(2). Act No. 13 of 1985).

ELIGIBILITY FOR FURTHER EMPLOYMENT

The Chairman of the Central Administrative Tribunal shall be ineligible for further employment under either Central or State government, but Vice-Chairman of the Central Tribunal will be eligible to be the Chairman of that or any other State Tribunal or Vice-Chairman of any State or Joint Tribunal(s). The Chairman of a State or Joint Tribunal(s) will, however, be eligible for appointment as Chairman of any other State or Joint Tribunals. The Vice-Chairman of the State or Joint Tribunal can be the Chairman of the State Tribunal or Chairman, Vice-Chairman of the Central Tribunal or any other State or Joint Tribunal. A member of any Tribunal shall be eligible for appointment as the Chairman or Vice-Chairman of such Tribunal or Chairman, Vice-Chairman or other member of any other Tribunal. Other than the appointments mentioned above the Vice-Chairman or member of a Central or State Tribunal, and also the Chairman of a State Tribunal, cannot be made eligible for any other employment either under the Government of India or under the Government of a State.

JURISDICTION, POWERS AND AUTHORITY

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

PROCEDURE FOR APPLICATION TO THE TRIBUNALS

Chapter IV of the Administrative Tribunals Act prescribes for application to the Tribunal. A person aggrieved by any order pertaining to any matter within the jurisdiction of the Tribunal may make an application to it for redressal of grievance. Such applications should be in the prescribed form and have to be accompanied by relevant documents and evidence and by such fee as may be prescribed by the Central

Government but not exceeding one hundred rupees for filing the application. The Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant has availed of all remedies available to him under the relevant service rules.

This includes the making of any administrative appeal or representation. Since consideration of such appeals and representations involve delay, the applicant can make an application before the Tribunal, if a period of six months has expired after the representation was made no order has been made. But an application to the Tribunal has to be made within one year from the date of final order or rejection of the application or appeal or where no final order of rejection has been made, within one year from the date of expiry of six months period. The Tribunal. May, however admit any application even after one year, if the applicant can satisfy the Tribunal that he/she had sufficient cause for not making the application within the normal stipulated time.

Every application is decided by the Tribunal or examination of documents, written representation and at a times depending on the case, on hearing of oral arguments. The applicant may either appear in person or through a legal practitioner who will present the case before the Tribunal. The orders of the Tribunal are binding on both the parties and should be complied within the time prescribed in the order or within six months of the receipt of the order where no time limit has been indicated in the order. The parties can approach the Supreme Court against the orders of the Tribunal by way of appeal under Article 136 of the Constitution. The Administrative Tribunals are not bound by the procedure laid down in the code of Civil Procedure 1908. They are guided by the principles of natural justice. Since these principles are flexible, adjustable according to the situation, they help the Tribunals in molding their procedure keeping in view the circumstances of a situation.

ADVANTAGES OF THE TRIBUNAL:

- = **Appropriate and effective justice.**
- = **Flexibility**
- = **Speedy**
- = **Less expensive**

LIMITATIONS OF THE TRIBUNALS:

- = **The tribunal consists of members and heads that may not possess any background of law.**
- = **Tribunals do not rely on uniform precedence and hence may lead to arbitrary and inconsistent decision.**

III) Difference between Administrative Tribunal and Court-

- The main distinction between the court and an administrative tribunal lies in the law policy distinction. Because the court first ascertains facts and applies law to these facts as such the function of a judge is like a soft machine- controlled fact finding and controlled application of law. On the other hand, an Administrative Tribunal proceeds with a controlled fact finding and an uncontrolled application policy.
- Secondly, there is no uniform procedure which the administrative tribunals are required to follow exercising adjudicatory powers, whereas the Courts follow a uniform, fixed statutory procedure,
- Thirdly, the Court exercises only judicial functions whereas Administrative Tribunals undertake various other administrative functions.
- Fourthly, tribunal is wider than Court. All Courts are tribunals but all tribunals are not courts.

IV) Reason for development Administrative Tribunal

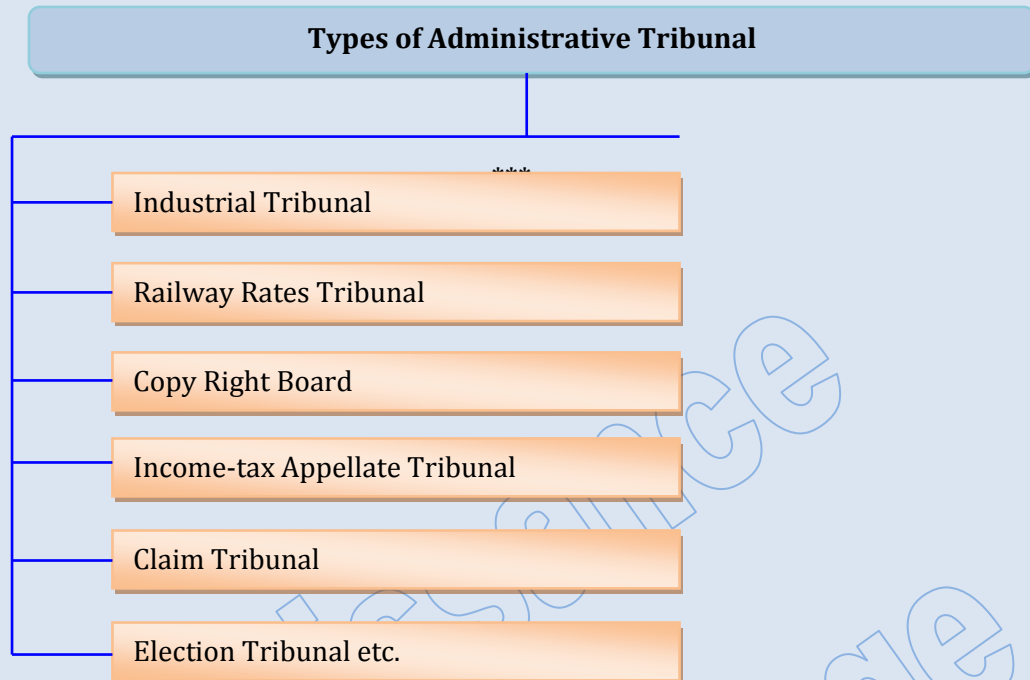
- (1) The procedure adopted by the Court is very much technical and the approaches of the Courts are highly individualistic and ritualistic.
- (2) Secondly, a litigation before a Courts of Law is time consuming & costly.
- (3) Thirdly, the administrative adjudicatory system came into existence with intent to carry out of the modern governmental plans of public health, education, planning, social security, transport, agriculture, industrialization and national assistance and to provide a system of adjudication which was informal, flexible, cheap and rapid.

V) Growth in India-

The necessities of modern collectivist socialist state economic programme of the state covering all the aspects of human life, delay in civil proceedings, in the technicality of disputes and growing demand of justice and economic resulted in
was proliferation of powers of administration, regulating human activities in multifarious way which ultimately resulted in the growth of innumerable quasi-judicial bodies. These tribunals are established the law, although its members are appointed by the Government. It decides the matters while acting judicially, free from the technical rules of procedure and evidence of a court of law keeping fully in view the social needs accepted public policy.
It should be noted that administrative tribunals are constitutionally recognized under Article 32, 136, 226 and 227 of the constitution of India.

VI) Demerits of Tribunals

1. The variety of administrative tribunals has grown like mushrooms in the rainy season.
 2. No uniform system of appeal against the decisions of tribunals. Medical Council of India, Central Government.
 3. The technical rules of Evidence Act do not apply to administrative tribunals.
 4. "A court of no appeal has been put in the hands of men who are generally neither qualified lawyers, magistrates nor judges."
 5. In India, except in the cases of civil servants, in all disciplinary proceedings the functions of prosecutor and the judges are either combined in one person or in the same department which is in violation of the principles of natural justice.
 6. Sometimes, no one knows from where the decision comes. In *G. Nageshwara Rao Vs. A.P.S.R.T.C.* 1956, case was not heard by the authority from whom he received the communications. This divided responsibility, where one hears and another decides is against the concept of fair hearing.
 7. In any disciplinary proceeding the presumption is of guilt rather than innocence.
 8. Official or departmental bias is one of most buffering problems of administrative law.
 9. The administrative tribunals are not required to give reasons for their decisions.
- In India, there is no law to eliminate the dangers inherent in off-the record consultation by an administrative authority.



JUDICIAL REVIEW

I) Judicial Review in England- In England the administrative law is concerned with the actual working of the government machinery and the greater part of it has never come before the courts for interpretation. After the passing of the Administrative of Justice (Miscellaneous Provisions) Act, 1938, does not alter the principles of law upon which prerogative writs were issued.

II) Judicial Review in India-

In India the Courts occupy key position as regards the judicial control of administrative action. Our Constitution guarantees certain fundamental rights enumerated in Articles 13 to 35 of the Constitution. These rights provide a limitation on the legislative and executive powers as well as some effective dimensions of control over administrative discretion.

The Constitution of India contains express provisions for judicial review of legislation as to its conformity with the constitution unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under the widely interpreted “due process” clause in the Fifth and Fourteenth Amendments. If, when the courts in India face up to such important and not too easy task, it is not out of any desire to tilt at legislative authority in a crusader’s spirit but in discharge of a plainly laid upon them by the Constitution.

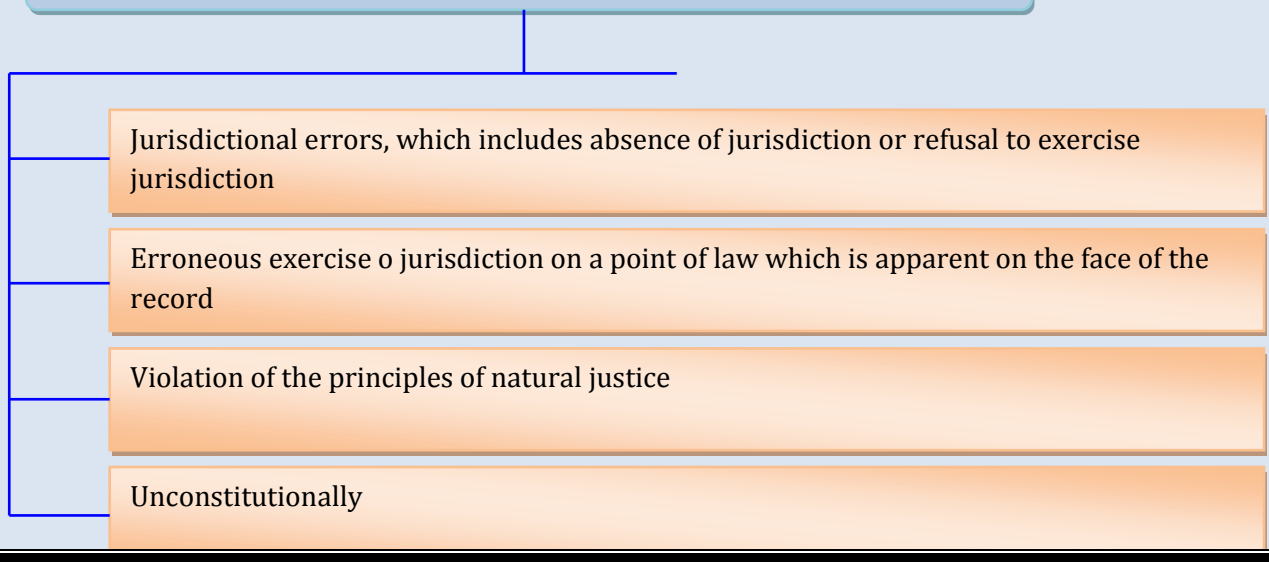
In India the Judicial Review of administrative actions falls into three distinct heads-

- (i) Public law review which is exercised through writs (For Detail please refer last preceding chapter).
- (ii) Statutory review which may be either by way of-
 - (a) Statutory appeals; and
 - (b) Reference to the High-Court or statement of case.
- (i) Private Law review which is exercised through suits for damages, injunctions.

Again where the decisions of administrative bodies are purely of administrative nature, the scope of judicial review is limited but it is not so where the decision is of quasi-judicial nature. Judicial review of quasi-judicial action of administrative authorities has become of greater importance for the reason that there has been a tremendous increase of judicial functions of administrative authorities.

III) Grounds for Review of Quasi-Judicial Order- The quasi-judicial orders of an administrative authority can be reviewed on the following grounds

Grounds for Review of Quasi-Judicial Order



IV) Exclusion of judicial Review- It should be noted that judicial review of an administrative action may be excluded by legislation. An administrative action cannot be reviewed judicially-

- (a) Where the statutes provide such administrative act or decision as final or, conclusive;
- (b) Where the same result is sought to be achieved more directly, by a negative provision barring particular remedies or providing that such administrative action or decision shall not be liable to be questioned in any court or in any legal proceeding.

V) Express Bar or exclusion of Jurisdiction of courts-

- (i) Where the tribunal was not properly constituted;
- (ii) Where the tribunal has abused its power under the state by acting in violation of its provisions
- (iii) Where the statute providing the finality clause is itself unconstitutional-Rayala Sena construction vs. Dy. C. T. O.
- (iv) Where the tribunal has acted in excess of its jurisdiction conferred upon it under the statute or where it was ostensibly failed to exercise a potent jurisdiction.
- (v) Where the tribunal has based its decision partly on conjures, surmises and suspicious-
- (vi) Where the tribunal gave a decision of fact by considering material which is irrelevant to the enquiry or by considering material which is partly relevant and partly irrelevant-Dhirajlal Girdhari Lal vs. Commissioner of Income Tax, Bombay
- (vii) Where the decision is given in violation of the principles of natural justice causing substantial and grave injustice to parties.

VI) Case Laws –

For reference –

In Corporation of Calcutta vs. Calcutta Tramways it has been held that where a statute which contained a finality clause, imposed an unreasonable restriction upon the fundamental right guaranteed under Article 19 (1) (g), then such statute will be struck down.

PUBLIC CORPORATION

I) Public Corporation-

“The public corporation is a hybrid organism, showing some of the features of a Government department and some of the features of a business company, and standing outside the ordinary frame work of Central or Local Government”.

According to GARNER:

“The modern public corporation is a compromise between nationalization and private enterprise; the institution is essentially an instrument devised of administering some particular enterprise in the public interest.

The public corporation are Semi-Government autonomous bodies, primarily concerned with managerial, commercial and industrial enterprises and run various public utilities which the state does not choose to run departmentally as its normal Government function.

II) Essential Features of public Corporation-

Essential Features of public Corporation

- (i) Statutory public corporation is created by a statute which lays down its rights, duties and obligation. Any act of such public corporation outside the authorized area of operation shall be ultravires and cannot bind the corporation. Such ultravires acts cannot be ratified.
- (ii) It is wholly owned by the state
- (iii) It has a separate legal entity and such it can use or be used, enter into contract or acquire property in its own name.
- (iv) Public corporation is largely autonomous in finance and management except for appropriation to provide capital or to cover losses. It has funds of its own and is authorized to use and re-use its revenue.
- (v) A public corporation is generally exempted from most regulatory and prohibiting statutes applicable to expenditure of public funds.
- (vi) It is ordinarily not to the budget, accounting and audit laws and procedures applicable to non-corporate agencies.
- (vii) A Statutory public corporation is a ‘state’ within the definition of the term in Article 12 of the constitution and such, it is subject to the writ jurisdiction of the Supreme Court and High Courts under Articles 32 and 226 of the constitution.
- (viii) In majority of the cases, the employees of public corporations are not civil servants. They are appointed and remunerated under the terms and conditions which the corporation determines itself.
- (ix) A public corporation however, is not a citizen within the meaning of Part II of the constitution and as such cannot claim the fundamental rights given in Article 19 of the constitution – **State Trading Corporation of India Vs. C.T.O.**
Public corporation can not enjoy the privilege of the Government to withhold the document.

III) Common Features of public corporation- The following are the common features of the constitution of public corporations, though every public corporation is different in matters of its constitution.

- (i) The public corporations are identical in their constitution. Each has a governing body, established by a constituent statute, consisting of a chairman and a defined number of members.
- (ii) The public corporations are largely autonomous in finance and management. They have their own separate accounts, which are audited by qualified auditors. The audit reports are published annually together with the general report to the activities of the corporation.
- (iii) Some public corporations are expressly required by their constituent statutes to act for and on behalf of the crown; other can act only on the directions of a specific minister.

In India, the public corporations were set up after independence and have been given constitutional recognition.

IV) Constitutional Position of Public Corporations- The Constitution of India recognizes the public corporations. Article 19 (6) of the constitution. Subclass (2) of Article 19 (6) provides that the state can make law relating to the carrying on the state or by corporation, owned or controlled by the state, of any Trade, business, industry of service, whether to the exclusion, complete or partial, of citizens or otherwise.

V) Classification of Public Corporation- Though, no exact classification is provided, the statutory public corporations may be classified as under:

Classification of Public Corporation



VI) Parliament Control –

The Parliamentary Control is implied in statutory corporation as they owe their origin and continued existence to a statute passed by the Parliament. The initial control is exercised at the time when the bill proposing the creation of a statutory corporation is introduced for discussion in the House. The following process has been adopted for controlling the corporation:

(i) Legislation- The Parliamentary control begins with the very Act of Legislation which brings the corporation into existence.

(ii) Laying of rules and regulation- The parliament supervises the statutory corporations through the process of laying of rules and regulations on the Table of Houses as some of the Acts bringing up the public corporations provide that the rules made under these Acts are to be laid before the Parliament.

(iii) Question- Under rule 32 of the rules procedure of the Lok Sabha the first hour of every sitting shall be available for the question-answer, unless the speaker directs otherwise. In this period the Member of the Parliament may question regarding the state of affairs of any statutory corporation.

(iv) Resolution- Discussion of the matters relating to public corporation may occur through the medium of resolutions in the Parliament.

(v) Motions- Motions provide the general form of discussion of matters related to a public corporation.

(vi) Parliamentary Committee- The Parliament constituted the committee on public undertaking in 1964. Prior to the establishment of Parliamentary Committee, the Estimates Committee and the Public Accounts Committee were looking after the public undertaking's affairs. It should be noted that a Minister cannot be a member of this Parliamentary committee.

VII) Government Control-

The general Government control over the working of the public Corporation is highly desirable to ensure the affairs of the statutory corporations are being conducted in the best interest of the society. The Government control over a public undertaking may be conducted through any or combination of the following devices:

(i) By appointing the Governing Board and Managers of a public undertaking;

(ii) By issuing general policy directions

(iii) By issuing specific direction to the public undertaking.

(iv) By participating in management as member of the Governing Board.

By instituting inquiries into the working of the corporation under certain circumstances.

VIII) Judicial Control-

As stated above, a statutory corporation is a 'State' within the meaning of Article 12 of the constitution of India and such it is subject to writ jurisdiction of the Supreme Court under 32 and of the High-Court article under Article 226 of the Constitution.

CONSTITUTIONAL REMEDIES

I) Constitutional Remedies available against an Administrative action- Article 32, 136, 226 and 227 of Indian constitution provide strong powers to the Courts to control the administrative authorities if they exceed their limit to do what they should do, omit or abuse the powers given to them.

Art, 32 and 226 of the constitution provide remedies by way of writs. Under Article 32 (2) the Supreme Court of India is empowered to issue appropriate directions or orders or writs, including writs in the nature of habeas corpus, certiorari, mandamus, prohibition and quo-warranto which may be appropriate. The five writs specifically mentioned in Article 32 (2) are known as prerogative writs in English law.

Article 32- Article 32 provides a “guaranteed” remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. Where there is no question of the enforcement of a fundamental right, Article 32 has no application.

Article 136- Under Article 136 of the constitution, the Supreme Court is empowered to grant special leave to appeal against an order or determination of not only court of law but also of tribunal.

Article 226- Under Article 226, the High-Court are empowered to issue directions, orders or writs including writs in the nature of habeas Corpus, mandamus, prohibition certiorari and quowarrato for the enforcement of any of the rights conferred by Part III of the constitution or for any other purpose.

Article 227- Article 227 gives powers of superintendence over all courts and tribunal by the High-Court thought the territories in relation to which they exercise jurisdiction

II) Difference between Article 226 and Article 32

Article 226	Article 32
<ol style="list-style-type: none"> Under this Article Court may issue writs. Article 226 is not fundamental right. During emergency the President of India cannot suspend this Article. No doubt under Article 226 High Court may issue writs. But this jurisdiction is discretionary in nature therefore reedy may be refused also. High Courts no doubt grant or issue writs even for the enforcement of fundamental right yet it is not obligatory for them. High Courts may take into consideration of the existence of other adequate legal remedy and decline to issue a writ if there exist other adequate legal remedy. 	<ol style="list-style-type: none"> Under Article 32 Supreme Court may issue writs. Article 32 is itself a fundamental right. Since Article 32 itself is a fundamental right therefore President of India ay Suspend it. Article 32 itself is a fundamental right and constitution has granted a fundamental right to move to Supreme Court in case of breach of fundamental right. In case of breach of fundamental right a person may invoke jurisdiction of Supreme Court as a matter of right. The Supreme Court can not, on the ground of the existence of an adequate legal remedy, decline to entertain a petition under Article 32 for the right to move the Supreme Court for the enforcement of the rights conferred by Part III of the Courts is itself a guaranteed right.

III) Types of writs

i) Habeas corpus

Habeas corpus is a latin term and it develop out of the prerogative writ of absubjiciendum which literally means to have the body” and by which the people could secure their release from illegal.

The writ can be issued on the application either-

- (a) Of the prisoner himself, or
- (b) Of any person on his behalf, or
- (c) Where the prisoner cannot act, then on the application of any person who believes him to be unlawfully imprisoned.

Who can apply for the writ of Habeas Corpus- The writ of habeas corpus can be made either by the person detained or any other person provided that he is not an utter stranger, but is at least a friend or relative of the imprisoned person.

Grounds of the writ of Habeas Corpus-As stated above, the writ of habeas corpus is a process by which a person who is confined without established procedure of law may secure a release from his confinement. The following grounds to seek a remedy by way of habeas corpus-

- (i) The person must be confined;
- (ii) petition for writ of habeas corpus may be filed either by the detainee or any person who is not a stranger but is a friend or relative of the person detained
- (iii) That the detention was malafide or for collateral purpose.
- (iv) That the order is defective e.g. misdescription of detainee failure to mention place of detention etc.
- (v) That the detainer has not applied his mind in passing the order of detention.
- (vi) That the ground supplied to the detainee was vague and indefinite.
- (vii) That the detention is illegal.
- (viii) That there was delay in furnishing ground.
- (ix) That there was delay in considering the Representation.
- (x) That orders of Detention is irregular.

Refusal of the writ of Habeas Corpus

- (i) Where the prisoner is detained outside the jurisdiction of the High-Court to which the application is made, the court will refuse the writ of habeas corpus.
- (ii) Where the effect of granting the writ would be to review the judgment of a Court which is open or which shows jurisdiction on its face.
- (iii) When the detention is found legal on the relevant date, the court refused to issue the writ of habeas corpus. Jagannath Hisra and other Vs. State of Orissa.
- (iv) Where the Court is of the opinion that the order of issuing writ defeat the ends of justice.

Circumstance in which the writ of habeas does not lie- The writ of habeas corpus will not lie in the following circumstances:

- (i) The writ of habeas corpus does lie where arrest and detention not giving grounds, is confirmed by remand order of the Magistrate in case falling under section 9 of the Punjab Security of State act.
- (ii) When a person is committed to jail custody by a competent court by an order which *pria facie* not appear to be without jurisdiction or wholly illegal.

- (iii) When all the issue of the fact can be tricks in other proceedings, the writ of habeas corpus will not lie.
- (iv) Where a person has been convicted by a duly constitute tribunal, a writ of habeas corpus will not lie for questioning the validity of such conviction.
- (v) Where a person convicted or in execution under legal process including person in execution of a legal sentence after conviction on indictment in the usual course.
- (vi) Where a person undergoing a sentence of imprisoned imposed on him by a competent court, the writ of habeas corpus will not lie.
- (vii) Where the physical restraint is put upon a person under law, no habeas corpus will lie.
- (viii) Where the petithen has been filed is seeking others available remedy.

Statutory bar to writ of habeas corpus- Article 21 is the sole repository of rights to life and personal liberty against the state. And Art 22 provides a right of protection against illegal arrest and detention. But the President of India can issue a proclamation of emergency under Article 359 of the constitution and suspend of the fundamental rights. And when fundamental rights have been suspended, the writ of habeas corpus for the enforcement of such right is also not maintainable. When the fundamental rights were suspended under the Presidential order, no writ habeas corpus will lie.

Limitations on the issue of habeas Corpus- The following are the limitations on the issue o habeas corpus-

- (i) The habeas corpus cannot be use as a device to evade the ordinary law for the review revision or appeal of a judgment under which a person is imprisoned.
- (ii) That the application should be in a proper manner.
- (iii) That generally whenever there is an adequate alternative restraint remedy, habeas corpus should not be given.
- (iv) That for the issue o habeas corpus, the wrongful restraint must exist at the when the court has to make the rule absolute for its issue.

(ii) Writ of Mandamus-

Mandamus is an order issued by the king's Bench Division of compel the performance of a public duty.

Against whom the writ of mandamus can issue- Writ of Mandamus can be issue to or against any person holding a public office, a corporation on or an interior.

Who can apply for writ of Mandamus- No one can ask for a mandamus without a legal right. The legal right must be one which is judicially enforceable and legally protected. And a person can be said to be aggrieved only when a person is denied a legal right by someone who has a legal duty to do something or to abstain from a dong something –**Mani Subrat Jain Vs. State of Haryana 1977.**

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

- (i) That the petitioner must have a legal right.
- (ii) That such right must exist on the date of the petition.
- (iii) That such a legal right of the petitioner has been infringed.
- (iv) That the infringement of such legal right has been owing to non- performance of the corresponding duty by the public authority.
- (v) That the petitioner has demanded the performance of the legal duty by the public authority and the authority has refused to act.

- (vi) That there has been no effective alternative legal remedy. And the alternative remedy need not be a statutory remedy.
- (vii) The duty imposed on the public authority must be mandatory and not discretionary.
- (viii) Where there has been abuse of power.
- (ix) Violation of statutory provisions.
- (x) Malafide exercise of power.

Grounds on which Mandamus may be refuse-

- (a) That the act against which mandamus is sought has been completed and the writ, if issued, will be infractions.
- (b) That the petition is premature-**E.I. Commercial Co. Vs. Collector 1957.**
- (c) When it appears that it would be futile in its result. The court will refuse the writ were no benefit could arise from granting it.
- (d) Where there is suppression or misstatement of material facts in the petition. **Ibrahim vs. High-Court Commissioner 1951.**
- (e) Where there is an alternative remedy which is adequate to meet the needs of the case.
- (f) Where there is a long delay on the part of the petitioner in applying for mandamus.
- (g) Where the petition is filed to get the contract enforced by a public servant independently of any statutory duty or obligation to the petition.
- (h) Where the petition is filed to seek directions for the Tribunal to decide in first instance a mixed question of law and fact.
- (i) Writ of mandamus is refused in respect of exercise of administrative functions.
- (j) Mandamus would not issue for correcting mere errors of law.
- (k) Writ of Mandamus will not issue to compel a person to institute legal proceedings- **Nagpur Glass Works Vs. State of M.P. 1955.**

Mandamus will also not lie against the Governor of a State directing him to recall nomination to the Legislative Council, and forbear from giving to the nominations.

Against whom a writ of Mandamus cannot lie-Normally a writ of mandamus cannot issue against a private individual.

Secondly, it will lie for the interference in the internal administration of the authority.

Thirdly, against the educational body, for the decision taken by the unfair means committee of the University after giving opportunity of hearing the examinee, the writ of mandamus will not issue.

(iii) Writ of Certiorari

Definition and Nature of the writ of Certiorari-Certiorari is an order or command issued by the High-Court to an inferior court or body exercising judicial or quasi-judicial functions to transmit the records of a cause or matter pending before them the High-Court in order that its legality may be investigated and if the order of an inferior court is found to be without jurisdiction or against the principle of natural justice, it is quashed.

It enables a Superior Court, a court of record, to correct the orders and the decisions of inferior courts and inferior Tribunals discharging judicial functions.

Against whom the writ of certiorari be issued-It is well settled that writ of certiorari be issued against-

- (i) Any judicial or quasi-judicial authority acting in judicial manner;
- (ii) Any other authority which performs judicial functions and acts in a judicial manner.

The person who can apply for the writ of certiorari- In *Charanjit Lal Vs. Union of India*, it has been that an application for the issue of writ Article 32 or 226 can only be made by the aggrieved party and not by a stranger.

Necessary conditions for the issue of the writ of certiorari- Writ of certiorari is issued when anybody or person-

- (a) Having legal authority,
- (b) To determine questions affecting rights or subjects,
- (c) Having duty to act judicially, either
 - (i) Acts in excess of its legal jurisdiction; or
 - (ii) Commits an error apparent on the face of the record or
 - (iii) Acts in violation of the principles of natural justice.

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

- (a) That the impugned order is vitiated by error of want of jurisdiction, which includes-
 - (i) Excess of jurisdiction
 - (ii) Abuse of jurisdiction
 - (iii) Absence of jurisdiction.
- (b) That there was an error of law apparent on the face of the record and
- (c) That there had been a violation of principles of natural justice.

Grounds of refusal of the writ of certiorari- The writ of certiorari may be refused on the following grounds:

- (i) Where alternative remedy not availed.
- (ii) Futile writ-Where the writ is futile, it will be refused.

(iv) The writ of Prohibition

In the words of Prof. A.T. Markos:

“Prohibition is a judicial writ issued from a superior jurisdiction to an ecclesiastical or similar tribunal or an inferior temporal court including under the latter description, administrative authorities having a duty imposed on them to proceed judicially to prevent those tribunal from continuing their proceeding in excess of or abuse of their jurisdiction in violation of the rule of natural justice or in contravention of the laws of the land.

The writ of prohibition lies only when the inferior court or tribunal has not made a decision where as the writ of certiorari lies when the court or tribunal has made a decision.

Grounds for the writ of Prohibition

- (i) Absence of jurisdiction or excess of jurisdiction
- (ii) Violation of the Principles of Natural justice.
- (iii) Infringement of the Fundamental Rights.
- (iv) Contravention of the law of the land
- (v) Fraud.

Against whom the right of Prohibition lies- The writ of Prohibition, like certiorari lies only against the judicial and quasi judicial authorities. A writ of Prohibition can issue only in a case in which certiorari can be issued. In other words the writ of Prohibition lies against-

- (i) Judicial authorities; or
- (ii) Quasi-judicial; or
- (iii) Statutory body having judicial powers.

(v) The writ of Quo-warranto

The quo-warranto proceedings affords judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty. If the inquiry leads to the finding that the holder of the office has not valid title to it, the issue of the writ of quo-warranto ousts him from the office.

Who can apply for the writ of quo-warranto – information in the nature of quo-warranto would lie even at the instance of a relation who is not personally interested in the matter nor affected by the illegal assumption of the office by the opposite party.

Condition when the writ of quo-warranto will not lie – As state above, the writ of quo-warranto is discretionary in nature, the petitioner is not necessarily entitled to the issue of a writ. The writ of quo-warranto will not lie in the following cases;

- (i) The writ of quo-warranto will not lie in respect of an office of a private nature.
- (ii) Where there is acquiescence on the part of the petitioner, the writ of quo-warranto will not lie.
- (iii) When the office is abolished, no information in the nature of quo-warranto will lie.
- (iv) Where it will be vexatious, the High-Court shall in 'its' discretion refuse to issue a writ of quo-warranto – **Bari Nath Vs. State of U.P. 1965.**
- (v) When the application for quo-warranto is a belated one 1964.
- (vi) The writ of quo-warranto may also be refused if there is an adequate alternative remedy.
- (vii) Where it will be futile.
- (viii) The writ of quo-warranto will not lie in case of mere irregularity.
