THE TAMIL NADU
Dr. AMBEDKAR LAW UNIVERSITY
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ADMINISTRATIVE LAW

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Preface

Administrative law is the body of law that governs the activities of administrative agencies of the government which comprise of rulemaking power when delegated to them by the Legislature as and when the need, power of adjudication to pronounce decisions while giving judgements on certain matters, implementation/enforcement of public policy. Thus, Administrative law determines the organization, powers and duties of administrative authorities. The concept of Administrative Law is founded on the following principles: Power is conferred on the administration by law; No power is absolute or uncontrolled howsoever broad the nature of the same might be; there should be reasonable restrictions on exercise of such powers depending on the situation. It provides accountability and responsibility in the administrative functioning. Though administrative law is as old as administration itself since they cannot exist separately, in India the early signs of existence of administrative law could be found in the treatises written during the reign of the Mauryas, Guptas Mughals as well as East India Company which introduced the modern administrative law in Indian legal system. There are several reasons and factors responsible for the rapid growth of Administrative law in 20th century such as changed relations of Authorities and Citizens; Origin of Welfare State Concept; Inadequacy of the Legislations; Inadequacy of Courts; Technical Experts are with Administrative Organs; Union of both Administrative & Judicial Function; The Judicial System Proved Inadequate In simple words. Thus, the reason behind the growing importance of Administrative law is the assumption by the Administrative authorities of very wide powers including legislative and judicial which was the result of the social welfare state. Since Administrative law is primarily concerned with the control over the exercise of their powers, i.e. to prevent Administrative authorities from abuse and misuse of powers, it has become a subject of growing interest.The study of administrative laws is very significant because the very concept of having a democracy and a government to work for the people would be self-defeating as there would be no responsibility or accountability of the public officials to anybody and the administration would run arbitrarily.

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SUBJECT : ADMINISTRATIVE LAW

Objectives :

Today we are living in a 'administrative age' where there is rising tendency to transfer more and more powers to executive which include quasi judicial as well as quasi-legislative which has become inevitable in modern democratic state. Therefore, there has been a tremendous increase in powers and functions of the administrative authorities and the obvious result is full of danger of its degeneration and unwanted encroachment on human rights and liberties. Hence, there requires adequate control, safeguard through procedural fairness, judicial review and remedies to those affected by the administration. This syllabus has been prescribed with these objectives.

UNIT – I : Introduction to Administrative Law

1. Definition, Nature, Scope - Origin and Development in U.K., U.S.A., France and India -Sources -Administrative Law and Constitutional Law

2. Rule of Law Concept, Evaluation of Dicey's concept of Rule of Law, Modern conception of Rule of Law, Rule of Law in U.K., U.S.A. and India, Rule of Law vis-à-vis Administrative Law

3. Doctrine of Separation of Powers – Meaning, Origin, Montesquieu's Doctrine of Separation of Powers, System of checks and balances, position in U.K., U.S.A., and India-

4. Parliamentary Sovereignty in U.K., Limited Legislative Powers in U.S.A. and India

5. Classification of Administrative Action

a. Nature of Powers–Executive, Legislative and Judicial

b. Legislative function–Quasi Legislative functions – Administrative Directions.

c. Judicial function – Quasi Judicial functions – Tribunals and Administrative Justice

d. Executive function – Ministerial functions and discretionary functions.

UNIT – II : Delegated Legislation

Meaning, Nature, Origin, Development and causes of growth of delegated legislation, Types of Delegated Legislation and Constitutionality of Delegated Legislation-Delegated Legislation and Conditional Legislation, Sub-Delegation-Restraints on Delegation of Legislative Power, Doctrine of Excessive Delegation- Control over Delegated Legislation – Judicial, Procedural and Legislative Control-Administrative directions and Delegated Legislation

UNIT – III : Procedural Fairness and Judicial Review

A. Principles of Natural Justice

Concept, Parameters and application of the Principles of Natural Justice-Rule against Bias-Audi Alteram Partem or the Rule of Fair Hearing – Meaning, Object, Ambit and Ingredients of Fair Hearing, Institutional Decision, Post-Decision Hearing-Reasoned Decisions-Exceptions to the Rule of Natural Justice-Effects of Breach of Natural Justice

B. Administrative Process and Judicial Review

1) Meaning and need for Judicial Review

2) Scope of Judicial Review

Jurisdiction of the Supreme Court -Writ Jurisdiction-Appeal by Special Leave (Art. 136)-Scope and Object of Article 136-Jurisdiction of the High Court

3) Judicial Review of Administrative Action through Writs-

Scope of the Writ Jurisdiction -Against whom the Writ lies-Territorial extent of Writ Jurisdiction -Relief against an Interim Order – Interim Relief [Art. 226(3)]-*Locus-standi*-Kinds of Writ -Grounds for issue of Writs

4) Principles for the Exercise of Writ Jurisdiction

Alternative Remedy-Laches or Dela-*Res Judicata*

5) Public Interest Litigation and *Locus-Standi*

6) Doctrine of Legitimate Expectation and Doctrine of Proportionality

C. Statutory Remedies

a) Injunction- Declaration against the Government - Exclusion of Civil Suits

D. Privileges and Immunities of Government in Legal Proceedings

Privilege to withhold documents - Miscellaneous Privileges of the Government-Notice, Limitation, Enforcement of Court Order- Binding nature of Statutes over the States action-Promissory Estoppel- Right to Information

E. Judicial Control of Administrative Discretion

Meaning, Nature and need of Administrative discretion -Ground and Extent of Judicial Review -Fundamental Rights and Discretionary Powers

F. Liability of the State

Liability of the State in Torts and Contracts

UNIT – IV : Ombudsman, Lokpal, Lokayukta and Central Vigilance Commission

Meaning, Object, Main characteristics, Need and Utility-Origin and development of the Institution -Ombudsman in New Zealand-Ombudsman in England (Parliamentary Commissioner)-Ombudsman in India –Lokpal-Lokayukta in States-Central Vigilance Commission

UNIT – V : Administrative Tribunals and Public Undertaking

(A) Administrative Tribunals

Meaning, Nature, Main characteristics, Origin and development (U.S.A., U.K. and India)-Franks Committee-Tribunal and Court,Similarity and Difference-Reason for growth of Administrative Tribunals-Merits and Demerits of Administrative Tribunal-Procedure and powers of Administrative Tribunal (U.K., U.S.A. and India)-Tribunal under Constitution -High Court's Superintendence over Tribunals-Appeal to Supreme Court by Special Leave-Working of the Administrative Tribunal

Administrative Tribunals under Administrative Tribunals Act, 1985-

Administrative Procedure Act in U.S.A.-Domestic Tribunal

(B) Public Undertaking

Object, Importance, Characteristics, Classification, Reason for the growth - working of Public Corporations-Rights, Duties and Liabilities of Public Corporations-Controls over Public Corporations, Government Control, Parliamentary Control, Judicial Control, Public Control-Role of Ombudsman in Public Undertaking

Books Prescribed :

1. M.P. Jain and S.N. Jain – Principles of Administrative Law
2. S.P. Sathe – Administrative Law
3. I.P. Massey – Administrative Law
4. C.K. Takwani – Administrative Law
5. Kailash Rai - Administrative Law

Reference Books :

1. Wade – Administrative Law
2. De Smith – Administrative Law
3. Foulkes – Administrative Law
4. Indian Law Institute – Cases and Material of Administrative Law
5. Markose – Judicial Control of Administrative action
6. Griffith and Street – Administrative Law
7. Report of the Law Commission – First Report Second Report – Fourteenth Report
8. Report on the Committee of Minister's power Franks Committee report.

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UNIT :I

INTRODUCTION TO ADMINISTRATIVE LAW

Administrative Law

The expression "Administrative Law" may mean two different things, namely, (a) law relating to administration, and (b) law made by the administration. The latter would itself be of two kinds. Firstly, it may be rules, regulations, orders, schemes, bye-laws, *etc.,* made by the administrative authorities on whom power to make such subordinate legislation is conferred by a statute. This may be called rule-making. Secondly, certain administrative authorities have power to decide questions of law and/ or fact affecting particular person or persons generally, *i.e.,* adjudication. Most of such powers are exercised quasi-judicially. Such decisions apply a statute or administrative policy and instructions to specific cases, in doing so they create a body of administrative law. Administrative law relating to administration engages the attention of lawyers. Administration is government or a department or an agency of the government. Under the Constitution of India the powers of the state are divided between the Union (including the Union Territories) on the one hand and the states on the other hand. Both the Union and the states are divided into three great departments, namely, (1) the executive, (2) the legislature, and (3) the judiciary. Administrative powers are exercised by the executive in either of two ways. It may act in exercise of the executive power of the Union or of a state or it may act under the authority of a specific statute or subordinate legislation. The exercise of all administrative powers is subject to the rule of law. The legal control may be exercised by three authorities, namely, (1) the legislature, (2) the higher executive, and (3) the judiciary. Administrative law concerns itself mainly with the legal control of the government or of administrative authorities by the courts.

It is impossible to attempt any precise definition of administrative law which can cover the entire range of administrative process. The American approach to administrative law is denoted by the definition propounded by ***Davis***. According to him, administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action. It does not include the enormous mass of substantive law produced by the agencies. An administrative agency, according to him, is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rule-making. The emphasis in the definition is on judicial control of administrative agencies. But other control mechanisms, like the parliamentary control of delegated legislation, control through administrative appeals , and through the ombudsman type institution, are quite important and significant and need to be studied for a fuller comprehension of administrative law.

Dicey has defined administrative law as denoting that portion of a nation's legal system

which determines the legal status and liabilities of all State officials, which defines the rights and liabilities of private individuals in their dealings with public officials, and which specifies the procedure by which those rights and liabilities are enforced. The definition is narrow and restrictive in so far as it leaves out of consideration many aspects of administrative law, e.g., it excludes many administrative authorities, which strictly speaking, are not officials of the States such as public corporations; it also excludes procedures of administrative authorities or their various powers and functions, or their control by Parliament or in other ways, Dicey's formulation refers primarily to one aspect of administrative law, i.e. control of public officials. Dicey formulated his definition with the ***droit administratif*** in view.

Sir Ivor Jennigs defines administrative law as the law relating to administration. It determines the organization, powers and the duties of administrative authorities. This formulation does not differentiate between administrative and Constitutional law. It lays entire emphasis on the organization, power and duties to the exclusion of the manner of their exercise. Jennings' formulation leaves many aspects of administrative law untouched, especially the control mechanism. The English administrative law does not lay so much emphasis on procedures of administrative bodies as does the American administrative law. Jennings; definition does not attempt to distinguish Constitutional law from administrative law, and the former "in its usual meaning has a great deal to say concerning the organization of administrative authorities.

A satisfactory and a proper formulation to define the scope, content and ambit of administrative law can be: Administrative law deals with the structure, powers and functions of the organs of administration; the limits of their powers; the methods and procedures followed by them in exercising their powers and functions; the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation.

Origin and Development of Administrative Law

Administrative law is the bye-product of the growing socio-economic functions of the State and the increased powers of the government. Administrative law has become very necessary in the developed society, the relationship of the administrative authorities and the people have become very complex. In order to regulate these complex, relations, some law is necessary, which may bring about regularity certainty and may check at the same time the misuse of powers vested in the administration. With the growth of the society, its complexity increased and thereby presenting new challenges to the administration we can have the appraisal of the same only when we make a comparative study of the duties of the administration in the ancient times with that of the modern times. In the ancient society the functions of the State

were very few the prominent amongthem being protection from foreign invasion, levying of Taxes andmaintenance of internal peace & order. It does not mean, however that there was no administrative law before 20th century. In fact administrative law itself is endemic of organized Administration.

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 Conseild'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 suomotu 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 Conseild'Etatis 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 de tournament de pouvior (misapplication of power). It has exercised its jurisdiction liberally.

Main characteristic features of droit administratif.

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

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

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

i) The composition and functions of the Conseild'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. 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.

India: In India, 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

modern administrative system. But in 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 favored State intervention in and social control and regulation of individual enterprise. The State started to act in the interest 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.

Administrative Law and Constitutional Law

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 socio-economic goals for the achievement of which the Indian Constitution has been conceived and drafted in the mid-20th century an era when the concept of social welfare State was predominant. It is thus pervaded with the modern outlook regarding the objectives and functions of the State. It embodies a distinct philosophy which regards the State as on organ to secure good andwelfare 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 power holder.

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.

The Indian Constitution has been conceived and drafted in the mid-twentieth century-an era when the concept of social welfare State is predominant. It is thus pervaded with the modern outlook regarding the objectives and functions of the State. It embodies adistinct philosophy of government, and, explicitly declares that India will be organized as a social welfare State, i.e., a State that renders social services to the people and promotes their general welfare. This concept of a welfare State is further strengthened by the Directive Principles of State Policy, which set out the economic, social and political goals of the Indian Constitutional system. These directives confer certain non-justiceable rights on the people, and place the governments under an obligation toachieve and maximize social welfare and basic social values like education, employment, health etc. In consonance with the modern beliefs of man, the Indian Constitution sets up machinery to achieve the goal of economic democracy along with political democracy. Thus the **Constitution of India** is having significant effect on laws including **administrative law**. It is under this fundamental laws are made and executed, all governmental authorities and the validity of their functioning adjudged. No legislature can make a law and no governmental agency can act, contrary to the

Constitution no act, executive, legislative, judicial or quasi-judicial, of any administrative agency can stand if contrary to the Constitution.

The Constitution thus conditions the whole government process in the country.The judiciary is obligated to see any governmental organ does not violate the provisions of the Constitution. This function of the judiciary entitles it to be called as guardian of the Constitution. The Administrative process has grown so much that it will not be out of place to say that today we are not governed but administered. It may be pointed out that the Constitutional law deals with fundamentals while administrative with details. Thus whatever may be the arguments and counter arguments, the fact remains that the administrative law is recognized as separate, independent branch of legal discipline, though at times the disciplines of Constitutional law and administrative law may overlap. Further clarifying the point he said the correct position seems to be that if one draws two circles of administrative law and Constitutional law at a certain place they may over lap and this area may termed as water shed in administrative law .In India, in the Watershed one can include the whole control mechanism provided in the Constitution for the control of the administrative authorities that is Article 32, 226,136,300 and 311.

Sources of Administrative Law

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

a. Constitution of India
b. Acts and Statutes
c. Ordinances, Administrative directions, notifications and Circulars
d. Judicial decisions

Rule of Law Concept

The term **'Rule of Law'** refers to a government based on principles of law and not of men. In a democracy, the concept has assumed different dimension and means that the holders of public powers must be able to justify publically that the exercise of power is legally valid and socially just. Dicey developed this concept of 'Rule of Law'. Dicey said 'Rule of Law' means, "the absolute supremacy of predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, or prerogative, or even wide discretionary authority on the part of the government." According to him, wherever there is discretion there is room for arbitrariness. The term Rule of Law is used in contradiction to 'rule of man' and 'rule according to law'. It is modern name for natural law.

The term Rule of Law can be used in two senses: (i) formalistic sense: and (ii) ideological sense. If used in the formalistic sense it refers to organized power as opposed to a rule by one man and if used in an ideological sense it refers to the regulation of the relationship of the

citizen and the government and in this sense it becomes a concept of varied interest and contents.

In its ideological sense, the concept of Rule of Law represents an ethical code for the exercise of public power in any country. Strategies of this code may differ from society to society depending on the societal needs at any given time, but its basis postulates are universal covering all space and time. These postulates include equality, freedom and accountability.

Evaluation of Dicey's concept of Rule of Law

Dicey's formulation of the concept of 'Rule of Law', which according to him forms the basis of the English Constitutional Law, contains three principles:

(i) Absence of discretionary power in the hands of the government officials.

(ii) No person should be made to suffer in body or deprived of his property except for a breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the Rule of Law implies:

(a) Absence of special privileges for a government official or any other person;

(b) All the persons irrespective of status must be subjected to the ordinary courts of the land;

(c) Everyone should be governed by the law passed by the ordinary legislative organs of the State.

(iii) The rights of the people must flow from the customs and traditions of the people recognized by the courts in the administration of justice.

Dicey claimed that the Englishmen were ruled by law and law alone; he denied that in England the government was based on exercise by persons in authority of wide, arbitrary or discretionary powers. While in many countries the executive exercised wide discretionary power and authority, it was not so in England. Dicey asserted that wherever there was discretion there was room for arbitrariness which led to insecurity of legal freedom of the citizens.

Another significance which Dicey attributed to the concept of Rule of Law was "equality before the law or the equal subjection of all classes of the ordinary law of the land administered by the ordinary law courts". In England, he maintained, every person was subject to one and the same body of law. He criticized the system of droit administratif prevailing in France where there were separate administrative tribunals for deciding cases between the government and the citizens. He went on to assert that in England there was no administrative law. The idea of having separate bodies to deal with disputes in which

government is concerned, and keeping such matters out of the purview of the common courts, asserted Dicey, was unknown to the law of England, and indeed was fundamentally inconsistent with the English traditions and customs.

Dicey was factually wrong in his analysis as he ignored the privileges and immunities enjoyed by the Crown (and thus the whole government) under the cover of the constitutional maxim that the king can do no wrong and also ignored the many statutes which conferred discretionary powers on the executive which could not be called into question in ordinary courts. He also ignore the growth of administrative tribunals. He misunderstood and miscomprehended the real nature of the French droit administratif . He thought that this system designed to protect officials from liability for their acts, and as such, was inferior to the British system of ordinary courts deciding disputes between the citizen and the state. But, as later studies have revealed, droit administratif is in certain respects more effective in controlling the administration than the common law system. Dicey was denying the existence of administrative law in England.

Dicey asserted, that so long as the courts dealt with a breach of law by an official, there could be no droit administratif in England and the rule of law would be preserved. Dicey thus reluctantly recognized the beginning of administrative law in England under the force of circumstances. However, since then, things have changed rather demonstrably.

Dicey's concept of Rule of Law has had its advantages and disadvantages. Although, complete absence of discretionary powers, or absence of inequality, are not possible in this administrative age, yet the concept of the rule of law has been used to spell out many propositions and deductions to restrain an undue increase in administrative powers and to create controls over it. The rule of law has given to the countries following the common law system, a philosophy to curb the government's power and to keep it within bounds; it has provided a sort of touchstone or standard to judge and test administrative law in the country at a given time. Similarly, rule of law is also associated with the supremacy of courts. Therefore, in the ultimate analysis, courts should have the power to control administrative action and any overt diminution of that power is to be criticized. It also serves as the basis of judicial review of administrative action for the judiciary sees to it that the executive keeps itself within the limits of law and does not overstep the same.

But there has been a negative side of the concept of rule of law as well. A grave defect in Dicey's analysis is his insistence on the absence not only of "arbitrary" but even of "wide discretionary" powers. The needs of the modern government make wide discretionary power inescapable. Perhaps the greatest defect of the concept has been its misplaced trust in the efficacy of judicial control as a panacea for all evils, and somewhat irrational attitude generated towards the French system.

3. Doctrine of Separation of Powers

If the "rule of law" hampered the recognition of administrative law in England, the doctrine of "separation of powers" had an intimate impact on the growth of administrative process and administrative law in the United States. It has been characterized as the "principal doctrinal barrier" to the development of administrative law in the U.S.A. The doctrine of separation of powers is implict in the American Constitution. It emphasizes the mutual exclusiveness of the three organs of the government. The form of government in the U.S.A., characterised as the presidential, is based on the theory that there should be separation between the executive and legislature.

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 17thCenturies, French philosopher John Boding and British Politician Locke respectively had expounded the doctrine of separation of powers. But it was Montesquieu, French jurist, who for the first time gave it a systematic and scientific formulation in his book 'Esprit des Lois' (The spirit of the laws).

Montesquieu's Doctrine of Separation of Powers

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.

The doctrine of separation of power does not apply rigorously even in the United States and some exceptions to it are recognized in the Constitution itself. For instance, a bill passed by the Congress may be vetoed by the President, and to this extent, the President may be said to be exercising legislative functions. Again, certain appointments of high officials are to be approved by the Senate, and also the treaties made by the president do not take effect until they are approved by the Senate; to the extent, the Senate may be said to be exercising executive functions. This exercise of some functions of one organ by the other is justified on the basis of checks and balances, i.e. the functioning of one organ is to be checked in some measures by the other. In India, the doctrine of separation of power has not been accorded as constitutional status. Apart from the directive principle laid down in Article 50 which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.

In India, in Ram Jawaya Kapur v. State of Punjab, in pursuance of the policy of nationalizing text books used in schools in State, Punjab Government issued an executive order acquiring the copyright in selected books from authors and undertaking itself printing, publishing and sale of books. Private publishing houses thus ousted from text-book business. This order was challenged on the ground that executive power of State did not extend to undertaking trading activities without a legislative sanction. The Supreme Court observed, "ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away." It is neither necessary nor possible to give an exhaustive enumeration of kinds and categories of executive functions. Article 73 of Constitution provides that the executive power of Union shall extend to the matters with respect to which parliament has power to make laws. Similarly Article 62 provides for in case of a State Government. Neither of these articles contain any definition as to what the executive function is and what activities would come within its scope.

Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the function of different parts of 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 belong to another.

In Asif Hameed V. State of J&K, the selection to the MBBS course in the two Governmental colleges of J&K has been set aside by High court on the ground that the selection was not held in accordance with the direction of the said court given in an earlier case Jyotshana Sharma V. State of J&K. In that case the High Court directed the State government to entrust the selection process of two medical colleges to a statutory independent body which was to be free from executive influence. No such body was constituted. The primary issue, in this case, is whether the High court has the competence to issue directions to the State Government to constitute "Statutory Body" for selection and whether selection made by any other authority is invalid on the ground alone.

The Supreme Court observed that although the doctrine of separation of powers hasn't been recognized under the Constitution, the Constitution-makers have carefully defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own where demarcated under the Constitution. No organ can usurp the functions assigned to another. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive have all the powers including that of finance. Judiciary has power to ensure that the aforesaid two main organs of State function within the constitutional limits. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by legislature and executive. The only check on court's own exercise is power is the self-imposed discipline of judicial restraint.

While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers. It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation. Of course, any member of the legislature can also introduce legislation but the court certainly cannot mandate the executive or any member of legislature to initiate legislation, however necessary or desirable the court may consider it to be. That is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution.

When the Constitution gives power to the executive government to lay-down policy and procedure for admission to medical colleges in the State then the High Court has no authority

to divest the executive of that power. The State Government in its executive power, in the absence of any law on the subject, is the competent authority to prescribe method and procedure for admission to medical colleges by executive instructions, but the High Court transgressed its self imposed limits in issuing the directions for constituting statutory authority. However, the selection procedure is always open to judicial review on the grounds of unreasonableness, etc.

The "Doctrine of separation of Powers" in today's context of Liberalization, privatization and globalization cannot be interpreted to mean either 'separation of powers' or 'check and balance' or principle of restraint' but 'community powers' exercised in the spirit of cooperation by various organs of the State in the best interest of the people.

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 par takes 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: Disciplinary proceedings against students, Disciplinary proceedings against an employee for misconduct, Cancellation, suspension, revocation or refusal to renew license or permit by licensing authority, Determination of citizenship, Power to continue the detention or seizure of goods beyond a particular period, Forfeiture of pensions and gratuity.

(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: such as making a reference to a tribunal for adjudication under the Industrial Disputes Act and 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.

(iv) Ministerial or Discretionary action – Functions dischargeable by the administration may either be ministerial or discretionary. 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. A ministerial function is one where the relevant law prescribes the duty to be performed by the concerned authority in certain and specific terms leaving nothing to the discretion or judgment of the authority. Discretion implies power to make a choice between alternative courses of action.

In any intensive form of government, the government cannot function without the exercise of some discretion by the officials. It is necessary not only for the individualization of the

administrative power but also because it is humanly impossible to lay down a rule for every conceivable eventuality in the complex art of modern government. But it is equally true that absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. Therefore, there has been a constant conflict between the claims of the administration to an absolute discretion and the claims of subjects to a reasonable exercise of it. Discretionary power by itself is not pure evil but gives much room for misuse.

UNIT:II

DELEGATED LEGISLATION

Delegated Legislation

Delegated legislation refers to all law making which takes place outside the legislature and is generally expressed as rules, regulations, bye-laws, orders, schemes, directions or notifications, etc. In other words when an instrument of a legislative nature is made by an authority in exercise of power delegated or conferred by the legislature it is called subordinate legislation or delegated legislation. Parliament is obliged to delegate very extensive law-making power over matters of detail and to content itself with providing a framework of more or less permanent statutes. Salmond defines delegated legislation as "that which proceeds from any authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority.

Scope of Delegated Legislation

1. Wide general powers: A standard argument for delegated legislation is that it is necessary for cases where Parliament cannot attend to small matters of detail.
2. Taxation: Even the tender subject of taxation has been invaded to a considerable extent.
3. Power to vary Acts of Parliament: It is a quite possible for Parliament to delegate a power to amend statutes. This used to be regarded as incongruous, and the clause by which it was done was nicknamed 'the Henry VIII clause'.
4. Technicality: The legislators are often ignorant of legal and technical points and leaves the law making power to the administrative agencies.
5. Emergency Powers: A modern society is many times faced with occasion when there is sudden need of legislature action. The legislature can't meet at short notice, thus executive need to have standby power.

Types of Delegated Legislation and Constitutionality of Delegated Legislation,

Administrative rule-making or delegated legislation in India is commonly expressed by the term 'statutory rules and orders'. Parliament follows no particular policy in choosing the forms of delegated legislation, and there is a wide range of varieties and nomenclature. The Delegated legislation can be classified under various classes depending on the purpose to be achieved:

1. Title based classification: An Act may empower an authority to make regulations, rules or bye-laws, to make orders, or to give directions. There is scarcely a limit to the varieties of legislative provisions which may exist under different names.
2. Discretion-based classification (Conditional Legislation): Another classification of administrative rule-making may be based on discretion vested in rule-making authority. On the basis of 'discretion' administrative rule-making may be classified into subordinate and contingent or conditional legislation.

3. Purpose-based classification: Another classification of administrative rule-making would involve the consideration of delegated legislation in accordance with the different purposes which it is made to serve. On this basis the classification may be as: Enabling Act, Alteration Act, Taxing Act, Supplementary Act, Classifying and Fixing Standard Acts, Penalty For Violation Acts, etc.

4. Authority-based classification (Sub-Delegation): Another classification of administrative rule-making is based on the position of the authority making the rules. Sometimes the rule-making authority delegates to itself or to some other subordinate authority a further power to issue rules; such exercise of rule-making power is known as sub-delegated legislation. Rule-making authority cannot delegate its power unless the power of delegation is contained in the enabling Act.

5. Nature-based classification (Exceptional Delegation): Classification of administrative rule-making may also be based on the nature and extent of delegation. The committee on Ministers Powers distinguished two types of parliamentary delegation:

a. Normal Delegation:

(i) Positive: Where the limits of delegation are clearly defined in the enabling Act.

(ii) Negative: Where the power delegated does not include power to do certain things.

b. Exceptional Delegation: Instances of exceptional delegation may be:

(i) Power to legislate on matters of principle.

(ii) Power to amend Acts of Parliament.

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

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

Such exceptional delegation is also known as Henry VIII clause to indicate executive autocracy.

The term 'constitutionality of administrative 'rule-making' means the permissible limits of the Constitution of any country within which the legislature, which as the sole repository of law-making power, can validly delegate rule-making power to other administrative agencies. Today the necessity to aid the transition from laissez-faire to a welfare and service State has led to the tremendous expansion of government authority. The new role of the State can be fulfilled only through the use of greater power in the hands of the government which is most suited to carry out the social and economic tasks before the country. The task of enhancing the power of the government to enable it to deal with the problem of social and economic reconstruction has been accomplished through the technique of delegation of legislative power to it. This delegation of legislative power raises a natural question of its constitutionality.

In England, Parliament is supreme and, therefore, unhampered by any constitutional limitations, Parliament has been able to confer wide legislative powers on the executive.

In the USA, the rule against delegation of legislative power is basically based on the doctrine of separation of powers. In America the doctrine of separation of powers has been raised to a constitutional status. The U.S. Supreme Court has observed that the doctrine of separation of powers has been considered to be an essential principle underlying the Constitution and that the powers entrusted to one department should be exercised exclusively by that department without encroaching upon the powers of another. It is accepted that a rigid application of the doctrine of separation of powers in neither desirable nor feasible in view of the new demands on the executive. Therefore, in the USA, courts have made a distinction between what may be termed as "legislative powers" and the power to "fill in the details". If the delegation is of a regulatory nature, the court has upheld constitutionality of the delegation of legislative power even in the absence of any specified standard.

The question of permissible limits of the Constitution in India, within which law-making power may be delegated can be studied in three different periods:

1. When the Privy Council was the highest court of appeal: The Privy Council was the highest court for appeal from Indian in constitutional matters till 1949. During the period the Privy Council was the highest court of appeal, the question of permissible limits of delegation remained uncertain.

2. When Federal Court became the highest court of appeal: In a decision given by Federal Court it was held that in India legislative powers cannot be delegated.

3. When Supreme Court became the highest court of appeal: Here In re Delhi Laws Act is said to be the Bible of delegated legislation. Seven Judges heard the case and produced seven separate judgments. The case was argued from two extreme positions. It was argued that the power of legislation carries with it the power to delegate and unless the legislature has completely abdicated or effaced itself, there is no restriction on delegation of legislative powers. The learned Counsel built his arguments on the theory of separation of powers and tried to prove before the court that there is an implied prohibition against delegation of legislative powers. The Supreme Court took the via media and held:

(1) Doctrine of separation of powers is not a part of the Indian Constitution.

(2) Indian Parliament was never considered an agent of anybody, and therefore the doctrine of delegates non potest delegare has no application.

(3) Parliament cannot abdicate or efface itself by creating a parallel legislative body.

(4) Power of delegation is ancillary to the power of legislation.

(5) The limitation upon delegation of power is that the legislature cannot part with its essential legislative power that has been expressly vested in it by the Constitution. Essential legislative power means laying down the policy of the law and enacting that policy into a binding rule of conduct.

Even though seven judges gave seven separate judgments but it was not be correct to hold that no principle was clearly laid down by the majority of judges. Anyone who surveys the

whole case comes to an inescapable conclusion that there is a similarity in the view of the judges at least on three points: (i) that the legislature cannot give that quantity and quality of law which is required for the functioning of a modern State, hence delegation is necessity; (ii) that in view of a written Constitution the power of delegation cannot be unlimited; and (iii) that the power to repeal a law or to modify legislative policy cannot be delegated because these are essential legislative functions which cannot be delegated. The Supreme Court has now made it abundantly clear that the power of delegation is a constituent element of legislative power as a whole under Article 245 of the Constitution and other relative Articles.

It is now firmly established that excessive delegation of legislative power is unconstitutional. The legislature must first discharge its essential legislative functions (laying down the policy of the law and enacting that policy into a binding rule of conduct) and then can delegate ancillary or subordinate legislative functions which are generally termed as power "to fill up details".

Whether a particular legislation suffers from 'excessive delegation' is a question to be decided with reference to certain factors which may include, (i) subject matter of the law, (ii) provisions of the statute including its preamble, (iii) scheme of the law, (iv) factual and circumstantial background in which law is enacted.

The opinion of the Supreme Court is to be analysed in order to determine the extent of permissible delegation. In Rajnarain Singh V. Chairman, Patna Administration Committee, Section 3(1)(f) of the impugned Act empowered the Patna local administration to select any provision of the Bengal Municipality Act and apply it to Patna area with such restrictions and modifications as the government may think fit. The government picked up Section 104 and after modification applied it to the town of Patna. The Supreme Court declared the delegation ultra vires on the ground that the power to pick out a section for application to another area amounts to delegating the power to change the policy of the Act which is an essential legislative power, and hence cannot be delegated.

During the colonial days in India, modest delegation of legislative power was upheld by the courts under the rubric of "conditional legislation". The idea behind this term is that the legislature makes the law which is full and complete in all respects, but it is not brought into operation immediately. The enforcement of the law is made dependent upon the fulfillment of a condition, and what is delegated to the outside agency is the authority to determine, by exercising its own judgment, whether or not the condition has been fulfilled. Thus in conditional legislation, the law is there but its taking effect is made to depend upon determination of some fact or condition by an outside agency.

In Lachmi Narain V. India, the Supreme Court has itself stated that no useful purpose is served by calling a power conferred by a statute as conditional legislation instead of delegated legislation. There is no difference between them in principle, for "conditional" legislation like delegated legislation has "a content, howsoever small and restricted, of the

law-making power itself," and in neither case can the person be entrusted with the power act beyond the limits which circumscribe the power.

In course of time, through a series of decisions, the Supreme Court has confirmed the principle that the legislature can delegate its legislative power subject to its laying down legal principles and provide standards for the guidance of the delegate to promulgate delegated legislation, otherwise the law will be bad on account of "excessive delegation".

Whatever may be the test to determine the constitutionality of delegated legislation, the fact remains that due to the compulsions of modern administration courts have allowed extensive delegation of legislative powers, especially in the area of tax and welfare legislation. Validation of extensive delegated legislation thus continues unabated in India on ground of administrative necessity. Delegated legislation becomes inevitable with the following reasons is to supply the necessary quantity and quality legislation to the society:

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 isgiven 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 profitability utilized.

However the attitude of the jurists towards delegated legislation has not been unanimous. The practice of delegated legislation was considered a factor,which promoted centralization. Delegated Legislation was considered a danger to the liberties of the people and a devise to place despotic powers in few hands. It was said that delegated legislation preserved the

outward show of representative institutions while placing arbitrary and irresponsible power in new hands. But the tide of delegated legislation was high and these protests remained futile.

A very strong case was made out against the practice of Delegated Legislation by Lord Hewart who considered increased governmental interference in individual activity and considered this practice as usurpation of legislative power of the executive. He showed the dangers inherent in the practice and argued that wide powers of legislation entrusted to the executive lead to tyranny and absolute despotism. The criticism was so strong and the picture painted was so shocking that a high power committee to inquire into matter was appointed by the Lord Chancellor. This committee thoroughly inquired into the problem and to the conclusion that delegated legislation was valuable and indeed inevitable. The committee observed that with reasonable vigilance and proper precautions there was nothing to be feared from this practice.

Nature and Scope of delegated legislation:

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

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

i) travel beyond it, or

ii) run counter to it, or

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

Under the Constitution of India, articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The delegation of legislative power was conceived to be inevitable and therefore it was not prohibited in the constitution. Further, Articles 13(3)(a) of the Constitution of India lays down that law includes any ordinances, order bylaw, rule regulation, notification, etc. Which if found in violation of fundamental rights would be void. Besides, there are number of judicial pronouncements by the courts where they have justified delegated legislation. For e.g. *In re Delhi Laws Act case, AIR 1961 Supreme Court 332; VasantlalMaganBhaiv.State of Bombay, air 1961 SC 4; S. Avtar Singh v. State of Jammu and Kashmir, AIR1977 J&K 4.*While commenting on indispensability of delegated legislation JusticeKrishnaIyer has rightly observed in the case of Arvinder Singh v. State of Punjab, **AIR1979 SC 321**, that the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility that our massive legislature may not get off to a start if they must directly and comprehensively handle legislative business in their plentitude, proliferation and particularization Delegation of some part of legislative power becomes a compulsive necessity for viability. A provision in a statute which gives an express power to the Executive to amend or repeal any existing law is described in England as **Henry viii Clause** because the King came to exercise power to repeal Parliamentary laws. The said clause has fallen into disuse in England, but in India some traces of it are found here and there, for example, Article 372 of the Constitution authorizes the president of India to adopt pro Constitutional laws, and if necessary, to make such adaptations and modifications, (whether by way of repeal or amendment) so as to bring them in accord with the provisions of the Constitution. The State Reorganization Act, 1956 and some other Acts similar thereto also contain such a provision. So long as the modification of a provision of statute by the Executive is innocuous and immaterial and does not affect any essential change in the matter.

Administrative Direction: Nowadays, apart from rules and delegated legislations, issuance of directions or instructions by the administration is a common trend. Directions may be issued for different purposes and in various forms, namely, letters, circulars, orders, memoranda, pamphlets, public notices, press notes, a publication in the Official Gazette, etc. The administrative authorities issue such directions while exercising either its general administrative powers or even statutory powers. There is a difference between administrative direction and delegated legislation. The delegated legislation is binding on both the administration and the individual and is enforceable through a court of law and a direction is not so binding and enforceable. To regulate service matters of its employees, the Central Government can issue directions under Article 73 and the State Governments under Article 162 of the Constitution. Regarding the enforceability of an administrative direction, the Supreme Court of India has held that a direction may be binding on the administration to the extent it confers a benefit on an individual.

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

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

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

i) The kind of forms

ii) The method of publication

iii) The manner of making returns, and

iv) Such other administrative details

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

i) the powers mentioned above are given , or

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

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

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

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

i) public bodies of municipal kind

ii) public bodies concerned with government, or

iii) corporations, or

iv) societies formed for commercial or other purposes.

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

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

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

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

d) That it is uncertain ; and

e) That it is unreasonable.

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 otherattendant 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.

Procedural Control over Delegated Legislation:

(a) Prior consultation of interests likely to be affected by proposed delegated Legislation

From the citizen's post of view the must beneficial safeguardagainst the dangers of the misuse of delegated Legislation is the development of a procedure to be followed by the delegates while formulating rules and regulations. In England as in America the Legislature while delegating powers abstains from laying down elaborate procedure to be followed by the delegates. But certain acts do however provide for the consultation ofinterested bodies. and sometimes of certain Advisory Committees which must be consulted before the formulation and application of rules and regulations. This method has largely been developed by the administration independent of statute or requirements. The object is to ensure the participation of affected interests so as to avoid various possible hardships. The method of consultation has the dual merits of providing as opportunity to the affected interests to present

their own case and to enable the administration to have a first-hand idea of the problems and conditions of the field in which delegated legislation is being contemplated.

(b) Prior publicity of proposed rules and regulations Another method is antecedent publicity of statutory rules to inform those likely to be affected by the proposed rules and regulations so as to enable them to make representation for consideration of the rule-making authority. The rules of Publication Act, 1893, S.I. provided for the use of this method. The Act provided that notice of proposed 'statutory rules' is given and the representations of suggestions by interested bodies be considered and acted upon if proper. But the Statutory Instruments Act, 1946 omitted this practice in spite of the omission, the Committee on Ministers Powers 1932, emphasized the advantages of such a practice.

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

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

The First Committee was constituted on Ist December, 1953 for

i) Examining the delegated legislation, and

ii) Pointing out whether it has

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

b) Effected any basic changes.

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

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

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

It further examines whether

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

ii) it contains matter which should more properly be dealt within an Act of Parliament;

iii) it contains imposition of any tax;

iv) it, directly or indirectly, ousts the jurisdiction of the courts of law;

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

vi) It is constitutional and valid;

vii) it involves expenditure from the Consolidated Fund of India or the Public Revenues;

viii) its form or purpose requires any elucidation for nay reason;

ix) it appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; and

x) there appears to have been unjustifiable delay in its publication on its laying before the Parliament.

The Committee of the first House of the People submitted a number of reports and continues to do useful work. The Committee considered the question of bringing about uniformity in the provisions of the Acts delegating legislative powers. It made certain recommendations in its First report (March, 1954) which it later modified in its Third Report (May, 1955) after noting the existing divergent legislation in India. The following are the modified recommendations

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

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

3. On the recommendation of the Committee, the bills are generally accompanied with Memoranda of Delegated Legislation in which; -.

i) full purpose and effect of the delegation of power to the subordinate authorities,

ii) the points which may be covered by the rules,

iii) the particulars of the subordinate authorities or the persons who are to exercise the delegated power, and

iv) the manner in which such power has to be exercised, are mentioned.

They point out if the delegation is of normal type or unusual. The usefulness of the Committee lies more in ensuring that the standards of legislative rule-making are observed that in merely formulating such standards. It should effectively point out the cases of any unusual or unexpected use of legislative power by the Executive.

Parliamentary control of delegated legislation is exercised by:

i) taking the opportunity of examining the provisions providing for delegation in a Bill, and

ii) getting them scrutinized by parliamentary committee of the Rules, Regulations, Bye-laws and orders,

When the Bill is debated,

i) the issue of necessity of delegation, and

ii) the contents of the provisions providing for delegation, can be taken up.

After delegation is sanctioned in an Act, the exercise of this power by the authority concerned should receive the attention of the House of the Parliament. Indeed, it is this later stage of parliamentary scrutiny of thedelegated authority and the rules as framed in its exercise that is more important. In a formal sense, this is sought to be provided by making it necessary that the rules, etc., shall be laid on the Table of the House. The members are informed of such laying in the daily agenda of the House. The advantage of this procedure is that members of both the Houses have such chances as parliamentary procedure –

i) the modification or the repeal of the enactment under which obnoxious rules and orders are made, or

ii) revoking rules and orders themselves.

The matter may be discussed in the House during the debates or on special motions. The provisions for laying the rule, etc., are being made now practically in every Act which contains a rule making provision. Such provisions are enacted in the following form: -

(1) The Government may by notification in the official Gazette, make rules for carrying out all or any of the purposes of this Act.

(2) Every rule made under this section shall be laid, as soon as may be, after it is made, before each House of Parliament while it is in session for a total period of fourteen days which may be comprised in one session or in the successive session immediately following, both Houses agree in making any modification in the Rule or in the annulment of the rule. The rule thereafter have effect only in such modified form or shall stand annulled, as the case may be, so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

If the Parliamentary control is not effective it becomes necessary to provide for certain procedural safeguards, which go to make the delegated legislation ascertainable and accessible.

Procedural Control

The following requirements are made necessary for the exercise of the delegated authority under different statutes so that procedural safeguards are ensured.

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.

i) **Procedural defects** The Acts of Parliament delegating legislative powers to other bodies or authorities often provide certain procedural requirements to be complied with by such

authorities while making rules and regulations, etc. These formalities may consist of consultation with interested bodies, publication of draft rules and regulations, hearing of objections, considerations of representations etc. If these formal requirements are mandatory in nature and are disregarded by the said authorities then the rules etc. so made by these authorities would be invalidated by the Judiciary. In short subordinate legislation in contravention of mandatory procedural requirements would be invalidated by the court as being ultra vires the parent statute. Provision in the parent Statute for consulting the interested parties likely to be affected, may, in such cases, avoid all these inconveniences and the Railway authorities may not enact such rule after they consult these interests. A simple provision regarding consultation thus assumes importance.

On the other hand, if the procedural requirements were merely of directory nature, then a disregard thereof would not affect the validity of subordinate legislation. The fact that procedural requirements have far reaching effects , may be made clear by just one example. Suppose the Railway authorities want to relieve pressure of work of unloading goods during daytime at a station amidst a big and brisk business center. The public wants a reduction in the traffic jams due to heavy traffic because of unloading. The traffic authorities and Railway authorities decide to tackle the problem effectively by making the rule that the unloading is done during late hours of night. The railway authorities make an order to this effect, without consulting interested bodies. Such rule might cause many hardships e.g. –

i) The conditions of labour are such that unloading of goods during the night would adversely affect the profit margin as the workers would charge more if they work in night shifts.

ii) It may not be without risk to carry money from one place to another during late hours of night. If safety measures are employed, that in addition to the element of a greater risk, expenses would increase, adversely affecting the margin of profits.

iii) The banking facilities may not be available freely during night.

iv) Additional staff may be necessary in various concerns for night duty.

v) This business are loading and unloading during night may cause inconvenience and disturbance in the locality.

Now infect of these difficulties another alternative which appears to be desirable is better supervision of unloading and better regulation of traffic by posting more police officers and stricter enforcement of traffic laws. Provisions in the parent statute for consulting the interested parties likely to be affected may, in such cases, avoid all these inconveniences, and the Railway authorities may not act such a rule after they consult these interests. A simple provision regarding consultation thus assumes importance.

The question of the effectiveness of the application of the doctrine of ultra vires, so far as procedure is concerned, would largely depend upon the words used in the particular statue. If the words are specific and clearly indicate the bodies to be consulted, then it would be possible to show noncompliance. But in case where the minister is vested with the discretion

to consult these bodies which he considers to be representative of the interests likely to be affected or where he is to consult such bodies, if any, it is very difficult to prove noncompliance with the procedural requirements.

(ii) Substantive Defects: In case of delegated legislation, unlike and Act of the Parliament, the court can inquire into whether it is within the limits laid down by the present statute. If a piece of delegated legislation were found to be beyond such limits, court would declare it to be ultra vires and hence invalid. (R.V.Minister of Health, (1943), 2 ALL ER591).The administrative authorities exercising legislative power under the authority of an Act of the Parliament must do so in accordance with the terms and objects of such statute. To find out whether administrative authorities have properly exercised the powers, the court have to construe the parent statute so as to find out the intention of the legislature. The existence and extent of the powers of administrative authorities is to be affixed in the light of the provisions of the parent Act.

Mandatory or directory procedural provision: The question whether particular procedural requirements are mandatory or directory must be examined with care. In case the statute provided for the effect of noncompliance of such requirements, then it is to be followed by the courts without difficulty. But uncertainty creeps in where the statute is silent on the point and decision is to be made by the judiciary. The courts is determining whether the provisions to this effect in a particular Statute are mandatory or directory are guided by various factors. They must take into consideration the whole scheme of legislation and particularly evaluate the position of such provisions in their relation with the object of legislation. The nature of the subject matter to be regulated, the object of legislation, and the provisions as placed in the body of the Act must all be considered carefully, so as to find out as to what was the intention of the legislature. Much would depend upon the terms and scheme of a particular legislation, and hence broad generalizations in this matter are out of place.

Judicial control over delegated legislature

Judicial control over delegated legislature can be exercised at the following two levels :-

1) Delegation may be challenged as unconstitutional; or

2) That the Statutory power has been improperly exercised.

The delegation can be challenged in the courts of law as being unconstitutional, excessive or arbitrary. The scope of permissible delegation is fairly wide.Within the wide limits. Delegation is sustained it does not otherwise, infringe the provisions of the Constitution. The limitations imposed by the application of the rule of ultra vires are quite clear. If the Act of the Legislature under which power is delegated, is ultra vires, the power of the legislature in the delegation can never be good. No delegated legislation can be inconsistent with the provisions of the Fundamental Rights. If the Act violates any Fundamental Rights the rules, regulations and bye-laws framed there under cannot be better. Where the Act is good, still the

rules and regulations may contravene any Fundamental Right and have to be struck down. The validity of the rules may be assailed as the stage in two ways :-

i) That they run counter to the provisions of the Act; and

ii) That they have been made in excess of the authority delegated by the Legislature.

The method under these sub-heads for the application of the rule of ultra viresis described as the method of substantive ultra vires. Here the substance of rules and regulations is gone into and not the procedural requirements of the rule making that may be prescribed in the statute. The latter is looked into under the procedural ultra vires rule. **Power of Parliament to repeal law** Under the provision to clause (2) of Article 254, Parliament can enact at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State, Ordinarily, the Parliament would not have the power to repeal a law passed by the State Legislature even though it is a law with respect to one of the matters enumerated in the Concurrent List. Section 107 of the Government of India Act, 1935 did not contain any such power. Art. 254 (2) of the Constitution of India is in substance a reproduction of section 107 of the 1935 Act, the concluding portion whereof being incorporated in a proviso with further additions. The proviso to Art. 254 (2), the Indian Constitution has enlarged the powers of Parliament and, under that proviso, Parliament can dowhat the Central Legislature could not do under section 107 of the Government of India Act, and can enact a law adding to, amending, varying or repealing a law of the State when it relates to a matter mentioned in the concurrent List. Therefore the Parliament can, acting under the proviso to Art. 254 (2) repeal a State Law.

While the proviso does confer on Parliament a power to repeal a law passed by the State Legislature, this power is subject to certain limitations. It is limited to enacting a law with respect to the same matter adding to, amending, varying or repealing a law so made by the State Legislature. The law referred to here is the law mentioned in the body of Art. 254 (2), It is a law made by the State Legislature with reference to a matter in the Concurrent List containing provisions repugnant to an earlier law made by Parliament and with the consent to an earlier law made by Parliament and with the consent of the President. It is only such a law that can be altered, amended, repealed under the proviso.

The power of repeal conferred by the proviso can be exercised by Parliament alone and cannot be delegated to an executive authority. The repeal of a statute means that the repealed statute must be regarded as if it had never been on the statute book. It is wiped out from the statute book. In the case of Delhi Laws Act, 1951 S.C.R. 747, it was held that to repeal or abrogate an existing law is the exercise of an essential legislative power. 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 Madya 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 theofficials 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. (Vasantlal 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 HariShankar 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 elsewhere 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 Vasantlals case (A.I.R. 1961 S.C. 4). SubbaRao, 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, 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 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 without 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.

UNIT – III

PROCEDURAL FAIRNESS AND JUDICIAL REVIEW

A. PRINCIPLES OF NATURAL JUSTICE

The concept of natural justice is the backbone of law and justice. 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. 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. A comprehensive definition of natural justice is yet to be evolved. 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 trail, inquiry or investigation or other types of proceedings or process. The object of Natural Justice is to secure Justice by ensuring procedural fairness. To put it negatively, it is to prevent miscarriage of Justice. The term "Natural Justice" may be equated with "procedural fairness" or "fair play in action". It is concerned with procedure and it seeks to ensure that the procedure is just, fair and reasonable. It may be regarded as counterpart of the American "Due Process". Fairness is a component of rule of law, which pervades the constitution. The dispensation of natural justice by statute will render any decision without observance of natural justice as unjust and hence is not acceptable. These two are the basic pillars of the Principles of Natural Justice. No system of law can survive without these two basic pillars.

(A) Nemo Judex in Causa Sua: No one should be made a judge in his own case, or the rule against bias.

(a) Rule against bias

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

(B) Audi Alteram Partem: Hear the other party, or the rule of fair hearing, or the rule that no one should be condemned unheard.

(a) Hear the other side.

(b) Hear both sides.

(c) No person should be condemned unheard.

Rule against Bias:

A. Nemo Judex in Causa Sua: Doctrine of Bias:

One of the essential elements of judicial process is that administrative authority acting in a quasi- judicial manner should be impartial, fair and free from bias. No tribunal can be Judge in his own cause and any person, who sits in judgment over the rights of others, should be

free from any kind of bias and must be able to bear an impartial and objective mind to the question in controversy.

Bias and Mala fide Intention: In case of mala fide, Courts insist on proof of mala fide while as in case of bias, proof of actual bias is not necessary. What is necessary is that there was "real likelihood" of bias and the test is that of a reasonable man. "The reason underlying this rule", according to prof. M.P. Jain, is that bias being a mental condition there are serious difficulties in the path of proving on a balance of probabilities that a person required to act judicially was in fact biased. Bias is the result of an attitude of mind leading to a predisposition towards an issue. Bias may arise unconsciously. It is not necessary to prove existence of bias in fact. Further, justice should not only be done but seem to be done. Therefore, the existence of actual bias is irrelevant. What is relevant is the impression which a reasonable man has of the administration of justice. Rule of bias is only a principle of judicial conduct and is imposed strictly on the exercise of the judicial or quasi- judicial authorities. In the matters of sole discretion of the authority or in the matters depending upon the subjective satisfaction of the authority concerned, the Court will not issue any order on the ground of bias for quashing it.

Bias and Prejudice: Of a slightly lesser type of evil is prejudice. It is nearer to bias and sometimes it is likely to be misunderstood for bias. Judicial pronouncements on this aspect have made the distinction clear. Prejudice is defined by Webster as to prepossess unexamined opinion or opinions formed without due knowledge of the facts and circumstances attending to the question, to bias, the mind by hasty and incorrect notion, and to give it an unreasonable bent to one side or other of a cause. Bias is the leaning of the mind, inclination, prepossession, and propensity towards some persons or objects and not leaving the mind indifferent. Bias is a particular influential power, which is ways the judgment, the inclination of mind towards a particular object and is not synonymous with prejudice. A man may not be prejudiced without being biased about another, but he may be biased without being prejudiced. The bias is generally of three types:

(1) Pecuniary bias;

(2) Personal bias; and

(3) Bias as to subject matters.

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

appellant that Lord Chancellor had a share in the respondent company. In appeal, their Lordships of House of Lords held that through Lord Chancellor forgot to mention about the interest in the company by mere inadvertence, yet the interest was sufficient to invalidate the decision given by the Lord Chancellor.

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

(2)**Personal Bias:** Personal bias has always been matter of judicial interpretation. It can be claimed that no other type of bias came for judicial scrutiny as much as this type. With the growing inter-dependability of human relations, cases of personal bias favouring one or the other party, have grown tremendously. Personal bias can be of two types viz.

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

(b) Where he is interested in one of the parties either directly as a party or indirectly as being related to one of the parties. In fact, there are number of situations which may create a personal bias in the Judge's mind against one party in dispute before him. He may be friend of the party, or hostility against one of the parties to a case. All these situations create bias either in favour of or against the party and will operate as a disqualification for a person to act as a Judge. The leading case on the point is Mineral Development Ltd. V. State of Bihar,(AIR 1960 SC 468) in this case, the petitioner company was owned by Raja Kamkshya Narain Singh, who was a lessee for 99 years of 3026 villagers, situated in Bihar, for purposes of exploiting mica from them. The Minister of Revenue acting under Bihar Mica Act cancelled his license. The owner of the company raja Kamalkshya Narain singh, had opposed the Minister in general election of 1952 and the Minister had filed a criminal case under section 500, Indian Penal Code, against him and the case was transferred to a Magistrate in Delhi. The act of cancellation by the Minister was held to be a quasi- judicial act. Since the personal rivalry between the owner of the petitioner's company and the minister concerned was established, the cancellation order became vitiated in law.

The other case on the point is Manek Lal v. Prem Chand (AIR 1957 S.C. 425) Here the respondent had filed a complaint of professional misconduct against Manek Lal who was an advocate of Rajasthan High Court. The chief Justice of the High Court appointed bar council tribunal to enquire into the alleged misconduct of the petitioner. The tribunal consisted of the Chairman who had earlier represented the respondent in a case. He was a senior advocate and was once the advocate-General of the State. The Supreme Court held the view that even though Chairman had no personal contact with his client and did not remember that he had appeared on his behalf in certain proceedings, and there was no real likelihood of bias, yet he was disqualified to conduct the inquiry. He was disqualified on the ground that justice not only be done but must appear to be done to the litigating public. Actual proof of prejudice

was not necessary; reasonable ground for assuming the possibility of bias is sufficient. A Judge should be able to act judicially, objectively and without any bias. In such cases what the court should see is not whether bias has in fact affected the judgment, but whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal.

(3) **Bias as to the Subject-matter.** A judge may have a bias in the subject matter, which means that he is himself a party, or has some direct connection with the litigation, so as to, constitute a legal interest. "A legal interest means that the Judge is in such a position that bias must be assumed." The smallest legal interest will disqualify the Judge. Thus for example, members of a legal or other body, who had taken part in promulgating an order or regulation cannot afterwards sit for adjudication of a matter arising out of such order because they become disqualified on the ground of bias. Subject to statutory exceptions persons who once decided a question should not take part in reviewing their own decision on appeal. To disqualify on the ground of bias there must be intimate and direct connection between adjudicator and the issues in dispute. To vitiate the decision on the ground of bias as for the subject matter there must be real likelihood of bias such bias has been classified by Jain and Jain into four categories:-

(a) Partiality of connection with the issues;

(b) Departmental or official bias;

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

(d) Acting under dictation.

B. Audi Alteram Partem or Rule of Fair Hearing:

The second principle of natural justice is audi alteram partem (hear the other side) i.e. no one should condemned unheard. It requires that both sides should be heard before passing the order. This rule insists that before passing the order against any person the reasonable opportunity must be given to him. This rule implies that a person against whom an order to his prejudice is passed should be given information as to the charges against him and should be given opportunity to submit his explanation thereto. In **Ridge v Baldwin [1964] AC 40 case heard by the House of Lords.** The judges hearing the case extended the doctrine of natural justice (procedural fairness in judicial hearings) into the realm of administrative decision making. The Brighton police authority dismissed its Chief Constable (Charles Ridge) without offering him an opportunity to defend his actions. The Chief Constable appealed, arguing that the Brighton Watch Committee (headed by George Baldwin) had acted unlawfully (ultra vires) in terminating his appointment in 1958 following criminal proceedings against him. Ridge also sought financial reparation from the police authority; having declined to seek reappointment, he sought a reinstatement of his pension, to which he would have been entitled with effect from 1960 had he not been dismissed, plus damages, or

salary backdated to his dismissal. The House of Lords held that Baldwin's committee had violated the doctrine of natural justice, overturning the principle outlined by the Donoughmore Committee thirty years before that the doctrine of natural justice could not be applied to administrative decisions.

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

1. **Notice**: Hearing starts with the notice by the authority concerned to the affected person. Consequently, notice may be taken as the starting point of hearing. Unless a person knows the case against him, he cannot defend himself. Therefore, before the proceedings start, the authority concerned is required to give to the affected person the notice of the case against him. The proceedings started without giving notice to the affected party, would violate the principles of natural justice. The notice is required to be served on the concerned person properly. However, the omission to serve notice would not be fatal if the notice has not been served on the concerned person on account of his own, fault. The notice must give sufficient time to the person concerned to prepare his case. Whether the person concerned has been allowed sufficient time or not depends upon the facts of each case. The notice must be adequate and reasonable. The notice is required to be clear and unambiguous. If it is ambiguous or vague, it will not be treated as reasonable or proper notice. If the notice does not specify the action proposed to be taken, it is taken as vague and therefore, not proper.

However, the requirement of notice will not be insisted upon as a mere technical formality, when the concerned party clearly knows the case against him, and is not thereby prejudiced in any manner in putting up an effective defence. Therefore in Keshav Mills Co. V Union of India, the court did not quash the order of the government taking over the mill for a period of 5 years on the technical ground that the appellants were not issued notice before this action was taken, because, at an earlier stage, a full-scale hearing had already been given and there was nothing more which the appellant wanted to know. Similarly, in Maharashtra State Financial Corpn. V Suvarna Board Mill, the court held that a notice calling upon the party to repay dues within 15 days failing which factory would be taken over is sufficient for taking over the factory and no fresh notice is required for pulling down an unauthorised structure when notice for removing such structure has already been given. Where a statute expressly provides that a notice must be given, failure to give notice makes the act void. Article 22 of Constitution requires that detenu must be furnished with the grounds of detention and if the grounds are vague, the detention order may be quashed by the court. The grounds given in notice on which the action is proposed to be taken must be clear, specific and unambiguous. A notice is vague if it merely mentions the charges without mentioning the action proposed to be taken.

2. **Hearing:** An important concept in Administrative law is that of natural justice or right to fair hearing. The right to hearing becomes an important safeguard against any abuse, or

arbitrary or wrong use, of its powers by the administration in several ways. The right to hearing can be claimed by the individual affected by the administrative action from 3 sources. Firstly, the requirement of hearing may be spelt out of certain fundamental rights granted by constitution. Secondly, the statute under which an administrative action is being taken may itself expressly impose the requirements of hearing. Thus Article 311 of Constitution lays down that no civil servant shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action. Thirdly it has been reiterated over and over again that a quasi judicial body must follow principles of natural justice.

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

Right To Know The Evidence Against Him: Adjudicating authority receives all the relevant material produced by the individual: A hearing to be treated a fair hearing the adjudicating authority should provide the person-affected opportunity to produce all the relevant materials, which he wishes to produce. It is the general principle that all the evidence which the authority wishes to use against the party should be placed before the party for his comment and rebuttal. If the evidence is used without disclosing it to the affected party, it will be against the rule of fair hearing.

The extent and context and content of the information to be disclosed depend upon the facts of each case. Ordinarily the evidence is required to be taken in the presence of the party concerned. However, in some situations this rule is relaxed. For example, where it is found that it would be embarrassing to the witness to testify in the presence of the party concerned, the evidence of the witness may be taken in the absence of the party. The hearing to be fair the adjudicating authority is not required only to disclose the person concerned the evidence or material to be taken against him but also to provide an opportunity to rebut the evidence or material. This principle was firmly established in Dhakeshwari Cotton Mills Ltd V. Commissioner of Income Tax. In this case the appellate income tax tribunal did not disclose the information supplied to it by the department. The SC held that the assessee was not given fair hearing. However, the supply of adverse material, unless the law otherwise provides, in original form is not necessary. It is sufficient if the summary of the contents of the material is supplied provides it is not misleading. A person may be allowed to inspect a file and take notes. Whatever mode is used, the fundamental remains the same that nothing should be used against the person which has not been brought to his notice.

Right to Present Case and Evidence:

This can be done through writing or orally. The courts are unanimous on the point that oral or a personal hearing is not an integral part of fair hearing unless circumstances so exceptional that without oral hearing a person cannot put up an effective defense. Therefore, where complex legal and technical questions are involved or where the stakes are very high, oral

hearing shall become a part of fair hearing. Thus, in the absence of a statutory requirement for oral hearing courts will decide the matter taking into consideration the facts and circumstances of every case. In Union of India V. J. P. Mitter the court refused to quash the order of the President of India in a dispute relating to the age of high Court judge on the ground that the President did not grant oral hearing even on request. The court was of the view that when the person has been given an opportunity to submit his case in writing, there is no violation of the principles of natural justice if oral hearing is not granted. The administrative authority must further provide full opportunity to present evidence – testimonial or documentary. In Dwarkeshwari Cotton Mills Ltd. V. Commissioner of Income Tax., the SC quashed the decision of the administrative authority on the ground that not allowing the assessee to produce material evidence violates the rule of fair hearing. However, the supply of adverse material, unless the law otherwise provides, in original form is not necessary. It is sufficient if the summary of the contents of the material is supplied provides it is not misleading. A person may be allowed to inspect a file and take notes. Whatever mode is used, the fundamental remains the same that nothing should be used against the person which has not been brought to his notice.

The Right to Rebut Adverse Evidence:

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

The Supreme Court in Town Area Committee V. Jagdish Prasad, the department submitted the charge-sheet, got an explanation and thereafter straightaway passed the dismissal order. The court quashed the order holding that the rule of fair hearing includes an opportunity to cross-examine the witnesses and to lead evidences. However, in externment proceedings and proceedings before customs authorities to determine whether goods are smuggled or not the right of cross-examination was held not to be a part of natural justice. On the grounds of practicability also opportunity of cross-examination may be disallowed. In Hira Nath Mishra V. Principal, Rajendra Medical College, the SC rejected the contention of the appellants that they were not allowed to cross-examine the girl students on the ground that if it was allowed no girl would come forward to give evidence, and further that it would not be possible for the college authorities to protect girl students outside the college premises.

Legal Representation:

Ordinarily the representation through a lawyer in the administrative adjudication is not considered as an indispensable part of the fair hearing. However in certain situations, denial of the right to legal representation amounts to violation of natural justice. Thus where the

case involves a question of law or matter which is complicated and technical or where the person is illiterate or expert evidence is on record or the prosecution is conducted by legally trained persons, the denial of legal representation will amount to violation of natural justice. In such conditions the party may not be able to meet the case effectively and therefore he must be given some protectional assistance to make his right to be heard meaningful.

It is relevant to note at this stage that the SC in M.H. Hoskot V. State of Maharashtra, while importing the concept of 'fair procedure' in Article 21 of the Constitution held that the right to personal liberty implies provision by the State of free legal service to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service. In Khatri V. State of Bihar, the Supreme Court of India further ruled that the State is constitutionally bound to provide legal aid to the poor or indigent accused not only at the stage of trial but at the time of remand also. Such right cannot be denied on the ground of financial constraints or administrative inability or that the accused did not ask for it. The SUPREME COURT OF INDIA emphasized that it is the duty of the presiding officer to inform the accused of such right. In the same manner in Nalini Satpathy V. P.L.Dani, the court held that the accused must be allowed legal representation during custodial interrogation and the police must wait for a reasonable time for the arrival of a lawyer. However, the Court which took the right step, did not take a long stride in holding that the State must provide a lawyer if the accused is indigent. The observation of the Court could well be inducted in the administration. In the area of criminal justice the CPC now provides for legal aid to the accused.

Institutional Decision (One who decides must hear):

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

In Gullupalli Nageshwara Rao V. A. P. State Road Transport Corporation is a case where an administrative action was challenged on the ground that the one who decides did not hear. In this case, the petitioners challenged the order of the government confirming the scheme of road nationalisation. The Secretary of the Transport Department gave the hearing but the final decision came from the Chief Minister. The Supreme Court of India held that this divided responsibility was against the concept of fair hearing because if one who decides does not hear the party, he gets no opportunity of clearing doubts in his mind by reasoned arguments.

Rule against Dictation:

Any administrative authority invested with the power of decision making must exercise this power to exercise of its own judgment. The decision must be actually his, who decides. Therefore, if a decision is taken at the direction of any outside agency, there is a violation of fair hearing. In Mahadayal V. Commercial Tax Officer, the Supreme Court of India quashed the decision of the CTO imposing tax on the petitioner on directions from his superior officer even when he himself was of the opinion that the petitioner was liable to tax.

Fundamentals of 'fair hearing' require that the administrative authority must not haste in making decisions. In S.P. Kapoor V. State of H.P, the Supreme Court of India quashed the action of the government taken in haste. In this case the Departmental Promotional Committee was constituted the very next day of the finalisation of the seniority list of the candidates who were continuing on ad hoc promotion for about six years. At the time of the constitution of the committee, one of the members was on the leave for a short time and therefore, the person officiating was included in his place as a committee member. Selections were made and the orders of appointment were also issued on the very date of the constitution of the committee. The Supreme Court of India held that the way whole thing was completed in haste gives rise to the suspicion that some high-up was interested in pushing through the matter hastily and hence the matter requires to be considered afresh.

Post Decisional Hearing:

Post decisional hearing may be taken to mean hearing after the decision sometimes public interest demands immediate action and it is not found practicable to afford hearing before the decision or order. In such situation the Supreme Court insists on the hearing after the decision or order. In short, in situations where prior hearing is dispensed with on the ground of public interest or expediency or emergency the Supreme Court insists on the post decisional hearing. In Charan Lal Sadu V. Union of India the Supreme Court has held that where a statute does not in terms exclude the rule of predecisional hearing but contemplates a post decisional hearing amounting to a full review of the original order on merits it would be construed as excluding the rule of *audi alteram partem* at the pre-decisional stage. If the statute is silent with regard of the giving of a pre-decisional hearing, then the administrative action after the post decisional hearing will be valid.

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

of the power would be vitiated. (Management of M/S M.S. NallyBharat Engineering Co. Ltd. v. State of Bihar 1990 S.C.C. 48)

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

Reasoned decision (Speaking Order):

Reasoned decision may be taken to mean a decision which contains reason in its support. When the adjudicators bodies give reasons in support of their decisions, the decisions are treated as reasoned decision. A decision, thus supported by reasons is called reasoned decision. It is also called speaking order. In such condition the order speaks for itself or it tells its own story. The reasoned decision introduces fairness in the administrative powers. It excludes or at least minimizes arbitrariness. The right to reasons is an indispensable part of sound judicial review. The giving of reasons is one of the fundamental of good administration. It has been asserted that a part of the principle of natural justice is that a party is entitled to know the reason for the decision apart from the decision itself. In another words, a party is entitled to know the reason, for the decision, be it judicial or quasi-judicial.

This requirement to give reasons, however, is an approach quite new to administrative law, as the prevailing law is that the quasi-judicial bodies need not give reasons in support of their decisions, although in some cases, the court did insist upon making ' speaking orders'. But a change in the approach is being noticed since last few years and a growing emphasis is being laid on these bodies to give reasons for their decisions. In India, in the absence of any particular statutory requirement, there is no general requirement for administrative agencies to give reasons for their decisions. However, if the statute under which the agency is functioning requires reasoned decisions, courts consider it mandatory for the administrative agency to give reasons which should not be merely 'rubber-stamp' reasons but a brief, clear statement providing the link between the material on which certain conclusions are based and the actual conclusions. In M.J.Sivani V. State of Karnataka the Court reiterated that when the rules direct recording of reasons it is a sine qua non and a condition precedent for a valid order. Appropriate brief reasons, though not like a judgment, are necessary for a valid order. Normally they must be communicated to the affected party so that he may have an opportunity to have them tested in the appropriate forum. An administrative order itself may contain reasons or the file may disclose reasons to arrive at the decision showing application of mind to the facts in issue.

The reasoned decision gives satisfaction to the person against whom the decision has been given. It will convince the person against whom the decision has been given that the decision is not arbitrary but genuine. It will enable the person against whom the decision has been given to examine his right of appeal. If reasons are not stated, the affected party may not be

able to exercise his right of appeal effectively. Thus, the giving of reasons in support of the decision is now considered one of the fundamentals of good administration.

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

Exceptions to the Rule of Natural Justice:

The word exception in the context of natural justice is really a misnomer, because in these exclusionary cases the rule of audi alteram partem is held inapplicable not by way of an exception to 'fair play in action', but because nothing unfair can be inferred by not affording an opportunity to present or meet a case. Such situations where nothing unfair can be inferred by not affording fair hearing must be few and exceptional in every civilized society. Application of the principles of natural justice can be excluded either expressly or by necessary implication, subject to the provisions of Articles 14 and 21 of the constitution.

1) Exclusion Emergency: In such exceptional cases of emergency where prompt action, preventive or remedial, is needed, the requirement of notice and hearing may be obviated. Therefore, if the right to be heard will paralyse the process, law will exclude it. Even in a situation of emergency where precious rights of people are involved, post-decisional hearing has relevance to administrative and judicial gentlemanliness. Otherwise some pre-decisional hearing, no matter in a rudimentary form must be given depending on the fact situation of every case. However, the administrative determination of an emergency situation calling for the exclusion of rules of natural justice is not final. Courts may review the determination of such a situation. In Swadeshi Cotton Mills V. Union of India the court held that the word "immediate" in section 18-A of the Industries (Development and Regulation) Act cannot stand in the way of the application of the rules of natural justice.

2) Exclusion in Cases Of Confidentiality:

In Malak Singh V. State Of Punjab And Haryana the Supreme Court held that the maintenance of surveillance register by the police is a confidential document. Neither the person whose name is entered in the register nor any other member of the public can have access to it. Furthermore, the court observed that the observance of the principles of natural justice in such a situation may defeat the very purpose of surveillance and there is every possibility of the ends of justice being defeated instead of being served.

3) Exclusion In Case Of Purely Administrative Matters: A student of the university was removed from the rolls for unsatisfactory academic performance without being given any pre-decisional hearing. The Supreme Court in Jawahar Lal Nehru University V. B.S. Narwal held

that the very nature of academic adjudication appears to negative any right of an opportunity to be heard. Therefore if the competent academic authorities examine and assess the work of a student over a period of time and declare his work unsatisfactory, the rules of natural justice may be excluded. However, this exclusion would not apply in case o disciplinary matters or where the academic body performs non-academic functions.

4) Exclusion Based On Impracticability: In R. Radhakrishnan V. Osmania University, where the entire MBA entrance examination was cancelled by the university because of mass coping, the court held that notice and hearing to all candidates is not possible in such a situation, which had assumed national proportions. Thus the court sanctified the exclusion of the rules of natural justice on the ground of administrative impracticability.

5) Exclusion In Cases Of Interim Preventive Action: If the action of the administrative authority is a suspension order in the nature of a preventive action and not a final order, the application of the principles of natural justice may be excluded. In Abhay Kumar V.K. Srinivasan, the institution passed an order debarring the student from entering the premises of the institution and attending classes till the pendency of a criminal case against him for stabbing a co-student. This order was challenged on the ground of denial of natural justice. The Delhi High Court rejecting the contention held that such an order could be compared with an order of suspension pending enquiry which is preventive in nature in order to maintain campus peace and hence the principles of natural justice shall not apply.

6) Exclusion In Cases of Legislative Action: Legislative action, plenary or subordinate, is not subject to the rules of natural justice because these rules lay down a policy without reference to a particular individual. On the same logic principles of natural justice can also be excluded by a provision of the Constitution also. The Constitution of India excludes the principles of natural justice in Articles 22, 31(A), (B), (C) and 311(2) as a matter of policy. Nevertheless if the legislative exclusion is arbitrary, unreasonable and unfair courts may quash such a provision under Articles 14 and 21 of the Constitution. Union of India V. Cynamide India Ltd. when the Supreme Court that no principles of natural justice had been violated when the government issued a notification fixing the prices of certain drugs. The Court reasoned that since the notification flowed from a legislative act and not an administrative one so the principles of natural justice would not apply.

7) Where No Right Of The Person Is Infringed: Where no right has been conferred on a person by any statute nor any such right arises from common law the principles of natural justice are not applicable. In Andhra Steel Corpn. V. A.P. State Electricity Board held that a concession can be withdrawn at any time without affording any opportunity of hearing to affected persons except when the law requires otherwise or the authority is bound by promissory estoppels. In this case the Electricity Board had withdrawn the concession in electricity rate without any notice and hearing to the appellant. Therefore, where an order of extension was cancelled before it became operational or the order of stepping up salary was

withdrawn before the person was actually paid or the services of the probationer terminated without charge the principles of natural justice are not attracted.

8) Exclusion In Case of Statutory Exception Or Necessity: Disqualification on the ground of bias against a person will not be applicable if he is the only person competent or authorised to decide that matter or take that action. If this exception is not allowed there would be no other means for deciding that matter and the whole administration would come to a grinding halt. But the necessity must be genuine and real. Charan Lal Sahu V. Union of India (Bhopal Gas disaster case) is a classical example of the application of this exception. In this case the constitutional validity of the Bhopal Gas disaster (Processing of Claims) Act, 1985, which had authorized the Central government to represent all the victims in matters of compensation award, had been challenged on the ground that because the Central government owned 22 per cent share in the Union Carbide Company and as such it was a joint tortfeasor and thus there was a conflict between the interests of the government and the victims. Negativating the contention the court observed that even if the argument was correct the doctrine of necessity would be applicable to the situation because if the government did not represent the whole class of gas victims no other sovereign body could so represent and thus the principles of natural justice were not attracted.

9) Exclusion In Case Of Contractual Arrangement: In State of Gujarat V. M.P. Shah Charitable Trust, the Supreme Court held the principles of natural justice are not attracted in case of termination of an arrangement in any contractual field. Termination of an arrangement/agreement is neither a quasi-judicial nor an administrative act so that the duty to act judicially is not attracted.

10) Exclusion In Case of Government Policy Decision: In Balco Employees Union V. Union of India, the Apex Court was of the view that in taking of a policy decision in economic matters at length, the principles of natural justice have no role to play. In this case employees had challenged the government's policy decision regarding disinvestment in Public sector undertakings. The Court held that even though workers may have interest in the decision, but unless the policy decision to disinvest is capricious, arbitrary, illegal or uninformed , and is not contrary to law, the decision cannot be challenged on the grounds of violation of the principles of natural justice. Therefore, if in exercise of executive powers the government takes any policy decision, principles of natural justice can be excluded because it will be against public interest to do so.

11) 'Useless Formality' Theory: 'Useless formality' is yet another exception to the application of the principles of natural justice. Where on the admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not insist on the observance of the principles of natural justice because it would be futile to order its observance. Therefore, where the result would not be different, and it is

demonstrable beyond doubt, order of compliance with the principles of natural justice will not be justified.

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

Effect of Breach of Natural Justice

In India, by and large, the Indian case law has been free from the void or voidable controversy and the judicial thinking has been that a quasi-judicial order made without following natural justice is void and nullity. The most significant case in the series is Nawabkhan v. Gujarat S. 56 of the Bombay Police Act, 1951 empowers the Police Commissioner to extern any undesirable person on certain grounds set out therein. An order passed by the commissioner on the petitioner was disobeyed by him and he was prosecuted for this in a criminal court. During the pendency of his case, on a writ petition filed by the petitioner, the High Court quashed the internment order on the ground of failure of natural justice. The trial court then acquitted the appellant. The government appealed against the acquittal and the High Court convicted him for disobeying the order. The High Court took the position that the order in question was not void *ab initio*; the appellant had disobeyed the order much earlier than date it was infringed by him; the High Courts own decision invalidating the order in question was not retroactive and did not render it a nullity from its inception but it was invalidate only from the date the court declared it to be so by its judgment. Thus, the arguments adopted by the High Court were consistent with the view that the order in question was voidable and not void. However, the matter came in appeal before the Supreme Court, which approached the matter from a different angle. The order of internment affected a Fundamental Right (Art. 19) of the appellant in a manner which was not reasonable. The order was thus illegal and unconstitutional and hence void. The court ruled definitively that an order infringing a constitutionally guaranteed right made without hearing the party affected, where hearing was required, would be void *ab initio* and ineffectual to bind the parties from the very beginning and a person cannot be convicted non observance of such an order. "Where hearing is obligated by statute which affects the fundamental right of a citizen, the duty to give the hearing sound in constitutional requirement and failure to comply with such a duty is fatal. The appellant could not be convicted for flouting the police commissioners order which encroached upon his Fundamental Right and had been made without due hearing and was thus void *ab initio* and so was never really in existence.

Much for the confusion in Administrative Law India can be avoided if the rule is accepted that an order made ought to have been observed, is void *ab intio*. A person disobeys an administrative order at his own risk, for if he disobeys an order, and the court later holds it as not void, then he suffers the consequence, for whether an order is void or not can only be settled conclusively by a court order Accepting the voidness rule will make authorities take care in passing orders after fulfilling all the necessary formalities. It will also denude the courts of discretion whether to set aside an order or not in case of violation of natural justice. However, there may be some situations when illation of a void order may not be excusable, e.g. when a prisoner escapes from thereon thinning that the administrative order under which he has been detained is void. It is an area where no general principle can be held applicable to all the varying situations because what has to be reconciled here is public interest with private rights. In most of the cases i.e. staying the implementation of the order challenged until the Court is able to decide the question on merits.

B. ADMINISTRATIVE PROCESS AND JUDICIAL REVIEW

Judicial review, in short, is the authority of the Courts to declare void the acts of the legislature and executive, if they are found in the violation of the provisions of the Constitution. Judicial Review is the power of the highest Court of a jurisdiction to invalidate on Constitutional grounds, the acts of other Government agency within that jurisdiction. The doctrine of judicial review has been originated and developed by the American Supreme Court, although there is no express provision in the American Constitution for the judicial review. In Marbury v. Madison the Supreme Court made it clear that it had the power of judicial review. In England there is supremacy of Parliament and therefore, the Act passed or the law made by Parliament cannot be declared to be void by the Court. The function of the judiciary is to ensure that the administration or executive function conforms to the law. The Constitution of India expressly provides for judicial review. Like U.S.A., there is supremacy of the Constitution of India. Consequently, an Act passed by the legislature is required to be in conformity with the requirements of the Constitution and it is for the judiciary to decide whether or not the Act is in conformity with the Constitutional requirements and if it is found in violation of the Constitutional provisions the Court has to declare it unconstitutional and therefore, void because the Court is bound by its oath to uphold the Constitution. The Constitution of India, unlike the American Constitution expressly provides for the judicial review. The limits laid down by the Constitution may be express or implied. Articles 13, 245 and 246, etc. provide the express limits of the Constitution.

The provisions of Article 13 are:

Article 13 (1) provides that all laws in force in the territory of India immediately before the commencement of the Constitution of India, in so far as they are inconsistent with the provision of Part III dealing with the fundamental rights shall, to the extent of such

inconsistency, be void. No law made by Parliament shall be deemed to be invalid on the ground that it would have been extra-territorial operation. The State Legislature can make law only for the State concerned and, therefore, the law made by the state Legislature having operation outside the State would be beyond its competence and, therefore ultravires and void.

The ***doctrine of ultravires*** has been proved very effective in controlling the delegation of legislative function by the legislature and for making it more effective it is required to be applied more rigorously. Delegation without laying down the legislative policy or standard for the guidance of the delegate will amount to abdication of essential legislative function by the Legislature. The delegation of essential legislative function falls in the category of excessive delegation and such delegation is not permissible. The power of judicial review controls not only the legislative but also the executive or administrative act. Where the act of the executive or administration is found ultra virus the Constitution or the relevant Act, it is declared ultra virus and, therefore, void. The Court interferes when the uncontrolled and unguided discretion is vested in the executive or administrative authorities or the repository of the power abuses its discretionary power. The judicial review is not an appeal from a decision but a review of the manner in which the decision has been made. ***The judicial review is concerned not with the decision but with the decision making process.*** The Supreme Court has expressed the view that in the exercise of the power of judicial review the Court should observe the self-restraint and confine itself the question of legality:

1. Whether a decision making authority exceeding its power?

2. Committed an error of law.

3. Committed a breach of the rules of natural justice.

4. Reached a decision which no reasonable tribunal would have reached, or

5. Abused its power.

The Court is only concerned with the manner in which those decisions have been taken. The extents of the duty to act fairly vary from case to case. The aforesaid grounds may be classified as under:

(i) Illegality,

(ii) Irrationality and

(iii) Procedural impropriety.

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

The judicial review is the supervisory jurisdiction.

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

The administrative action is subject to judicial review on the ground of **procedural impropriety** also. If the procedural requirement laid down in the statute is mandatory and it is not complied, the exercise of power will be bad. The procedural requirement is mandatory or the Court decides directory. In case of violation of the principles of natural justice, the order will be held to be void. The principles of natural justice are treated as part of the constitutional guarantee contained by Article 14 and their violation is taken as the violation of Article 14. The judicial review is the basic feature of the Constitution, which has been entrusted to the Constitutional Courts, namely, the Supreme Court of India and High Courts under Article 32 and Articles 226 and 227 respectively. Any statute cannot exclude the jurisdiction under these Articles. The Court either would enforce valid Acts/actions or refuse to enforce them when found unconstitutional. Judicial review does not concern itself with the merits of the Act or action but of the manner in which it has been done and its effect on constitutionalism. In Indira Nehru Gandhi v. Raj Narain, **(A.I.R. 1975 S.C. 2299)** the Supreme Court has held that even where the Constitution itself provides that the action of the administrative authority shall be final. The judicial review provided under Articles 32, 136, 226 and 227 is not barred. Judicial review is the part of the basic structure of the Constitution.

Exclusion of Judicial Review (Ouster clause or finality clause): Finality clause may be taken to mean a section in the statute, which bars the jurisdiction of the ordinary Courts. The modern legislative tendency is to insert such clause to preclude the Courts from reviewing the law. The jurisdiction of the Courts is excluded in several ways. Exclusive may be express or implied. For example S.2 of the Foreigners act, 1946 may be mentioned as an example of express exclusion. It provides that the action taken under the act shall not be called in question in any legal proceeding before any Court of law. In India the position on the **finality clause** is not well settled. It is extremely complex issue. For this purpose the judicial review may be divided into two categories-

Constitutional modes of judicial review and Non-Constitutional modes of judicial review: The judicial review available under article 32, 136 226 and 227 is taken as Constitutional mode of judicial review. Any statute or ordinary laws cannot take the jurisdiction of the Court under article 32, 136, 226 and 227 as the Constitution of India provides them. In Keshava Nanda Bharti v. State of Kerala, **(A.I.R. 1973 S.C. 1461)** the

Supreme Court has held the Parliament has power to amend the Constitution but it cannot destroy or abrogate the basic structure or framework of the Constitution. Article 368 does not enable Parliament of abrogate or take away Fundamental right or to completely alter the fundamental features of the Constitution so as to destroy its identity. Judicial review therefore it cannot be taken away.

In Indra Nehru Gandhi v. Raj Narain, the validity of Clause (4) of Article 329 A inserted by the Constitution 39th Amendment Act, 1975 that notwithstanding any Court order declaring the election of the Prime Minister or the Speaker of Parliament to be void, it would continue to be void in all respects and any such order and any finding on which such order was based would be deemed always to have been void and of no effect. This clause was declared unconstitutional and void as being violation of free and fair election, democracy and rule of law, which are parts of the basic structure of the Constitution. The non-constitutional mode of judicial review is conferred on the Civil Courts by statute and therefore it may be barred or excluded by the statute. S. 9 of the Civil Procedure Code, 1908 confers a general jurisdiction to Civil Courts to entertain suits except where its jurisdiction is expressly or impliedly excluded. Implied exclusion of the jurisdiction of the Civil Courts is usually given effect where the statute containing the exclusion clause is a self-contained Code and provides remedy for the aggrieved person or for the settlement of the disputes.

When not excluded:

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

a. **Unconstitutionality of the statute:** Exclusion clause does not bar the jurisdiction of the Court to try a suit questioning the constitutionality of an action taken there under. If the statute, which contains the exclusion clause, is itself unconstitutional, the bar will not operate. The finality should not be taken to mean that unconstitutional or void laws be enforced without remedy.

b. **Ultra vires Administrative action:** The exclusion clause does not bar the jurisdiction of the Court in case where the action of the authority is ultra vires. If action is ultra vires the powers of the administrative authority; the exclusion clause does not bar the jurisdiction of the Courts. The rule is applied not only in the case of substantive ultra vires but also in the case of procedural ultra vires. If the authority acts beyond its power or jurisdiction or violates the mandatory procedure prescribed by the statute, the exclusion or finality clause will not be taken as final and such a clause does not bar the jurisdiction of the Court.

c. **Jurisdictional error:** The exclusion or ouster or finality clause does not bar the jurisdiction of the Court in case the administrative action is challenged on the ground of the jurisdictional error or lack of jurisdiction. The lack of jurisdiction or jurisdictional error may arise where the authority assumes jurisdiction, which never belongs to it or has exceeded its jurisdiction indicating the matter or has misused or abused its jurisdiction. The lack of

jurisdiction also arises where the authority exercising the jurisdiction is not properly constituted.

d. **Non compliance with the provisions of the statute:** the exclusion clause will not bar the jurisdiction of the Court if the statutory provisions are not complied with. Thus if the provisions of the statute are not complied with, the Court will have jurisdiction inspite of the exclusion or finality clause.

e. **Violation of the Principles of natural Justice:** If the order passed by the authority is challenged on the ground of violation of the principles of natural justice; the ouster clause or exclusion clause in the statute cannot prevent the Court from reviewing the order

f. **When finality clause relates to the question of fact and not of law:** Where the finality clause makes the finding of a Tribunal final on question of facts, the decision of the Tribunal may be reviewed by the Court on the question of law.

C. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

(a) Constitutional Remedies

The judicial control of administrative action provides a fundamental safeguard against the abuse of power.

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

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

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

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

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

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

Under Article 32 of the Constitution the following person may complain of the infraction of any fundamental rights guaranteed by the Constitution: Any person including corporate bodies who complains of the infraction of any of the fundamental rights guaranteed by the Constitution is at liberty to move the Supreme Court except where the languages of the provision or the nature of the right implies the inference that they are applicable only to natural person. The right that could be enforced under article 32 must ordinarily be the rights of the petitioner himself who complains of the infraction of such rights and approaches the Court for relief. An exception is as held in the Calcutta Gas Case,(**AIR 1962 SC 1044)** that in case of habeas corpus not only the man who is or detained in confinement but any person provided he is not an absolute stranger, can institute proceeding to obtain a writ of habeas corpus for the purpose of liberation.

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

A petition under Art 32 may be rejected on the ground of inordinate delay It was held by Supreme Court in **Employees Welfare Association Vs. union of India (A.I.R 1990 334)** that a petition under Art 32 would be barred by res judicata if a petition on the same cause of action filed before the High Court was earlier rejected. The Court went further and said that the principle of **res judicata** did not apply to successive writ petitions in the Supreme Court and the High Court under Arts 32 and 226 respectively. The Court observed that a petition based on fresh or additional grounds would not be barred by res judicata. A petition under

Artic 32, however, will not lie against the final order of the Supreme Court under art 32 of the constitution. It was held that a petition would not lie under Art 32 challenging the correctness of an order of the Supreme Court passed on a special leave petition under Art 136 of the Constitution setting aside the award the award of enhanced solarium and interest under the land acquisition Act, 1894.

Existence of alternative remedies

When statutory remedies are available for determining the disputed questions of fact or law, such questions cannot be raised through a petition under Art 32. If the facts are disputed, they must be sorted out at the appropriate forum. In *Ujjam Bai v. State of UP* (**AIR 1962 SC 1621)** the Supreme Court held that a petition under Art 32 could not impugned error of law or fact committed in the exercise of the jurisdiction conferred on an authority by law. The Court here made a distinction between acts, which were ultra vires, or in violation of the principles of natural justice and those, which were erroneous though within jurisdiction. While the former could be impugned, the latter could not be impugned in a writ petition under art 32. This dictum was, however, narrowed down by subsequent decisions. It was held that where an error of law or fact committed by a tribunal resulted in violation of a fundamental right; a petition under Art 32 would be maintainable. The fact that the right to move the Supreme Court for the enforcement of fundamental rights under Art 32 is a fundamental right should not bind us to the reality that such a right in order to be meaningful must be used economically for the protection of the fundamental rights. The Court has given such expansive interpretation of Art 21 of the Constitution that the question, which seemed to be alien to Art 32, became integral part of it. **Principles Regarding Writ Jurisdiction under Article 226**

Article 226 empowers the High Courts to issue writs in the nature of habeas corpus, mandamus, prohibition, certiorari and quo warranto or any of them for the enforcement of any of the fundamental rights or for any other purpose. It has been held that the words 'for any other purpose' mean for the enforcement of any statutory or common law rights. The jurisdiction of the High Courts under Art 226 is wider than that of the Supreme Court under Art32. The jurisdictions under Art 32 and 226 are concurrent and independent of each other so far as the fundamental rights are concerned. A person has a choice of remedies. He may move either the Supreme Court under Art 32 or an appropriate High Court under Art 226. If his grievance is that a right other than a fundamental right is violated, he will have to move the High Court having jurisdiction. He may appeal to the Supreme Court against the decision of the High Court. After being unsuccessful in the High Court, he cannot approach the Supreme Court under Art 32 for the same cause of action because as said earlier, such a petition would be barred by **resjudicata.**

Similarly, having failed in the Supreme Court in a petition filed under Art 32,he cannot take another chance by filing a petition under Art 226 in the High Court having jurisdiction over

his matter because such a petition would also be barred by res judicata. The High Court's jurisdiction in respect of 'other purposes' is however, discretionary. The courts have laid down rules in accordance with which such discretion is to be exercised. The jurisdiction of the High Court under Art 226cannot be invoked if: The petition is barred by res jusicata; If there is an alternative and equally efficacious remedy available and which has not been exhausted; If the petition raised questions of facts which are disputed; and If the petition has been made after an inordinate delay.

Withdrawal or abandonment of a petition under Art 226 and 227 without the permission of the court to file a fresh petition there under would bar such a fresh petition in the High Court involving the same subject matter, though other remedies such as suit or writ petition under Art 32 would be open. The principle underlying Rule 1 of Order 23 of the CPC was held to be applicable on the ground of public policy. It is a general rule of the exercise of judicial discretion under Art 226 that the High Court will not entertain a petition if there is an alternative remedy available. The alternative remedy however, must be equally efficacious. Where an alternative and efficacious remedy is provided, the Court should not entertain a writ petition under Art 226.

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

Scope of the High court's Jurisdiction under Article 226

The jurisdiction of the High Court under Art 226 is very vast and almost without any substantive limits barring those such as territorial limitations. There are three types of limitations: Those arising from judicial policy; those which are procedural and those because of the petitioner's conduct. The Supreme Court has held that the extra ordinary jurisdiction should be exercised only in exceptional circumstances. It was held that the jurisdiction under Art 226 should be used most sparingly for quashing criminal proceedings. It was held that the High Court had power to review its own judgments given under Art 226. This power, however, must be exercised sparingly and incases, which fell within the guidelines provided by the Supreme Court.

Constitutional Remedy:

Writ of Habeas Corpus

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

literally mean 'to have the body' The writ provides remedy for a person wrongfully detained or restrained. By this a command is issued to a person or to jailor who detains another person in custody to the effect that the person imprisoned or the detenu should be produced before the Court and submit the day and cause of his imprisonment or detention. The detaining authority or person is required to justify the cause of detention. If there is no valid reason for detention, the Court will immediately order the release of the detained person.

The personal liberty will have no meaning in a constitutional set up if the writ of habeas corpus is not provided therein. The writ is available to all the aggrieved persons alike. It is the most effective means to check the arbitrary arrest by any executive authority. It is available only in those cases where the restraint is put on the person of a man without any legal justification. When a person has been subjected to confinement by an order of the Court, which passed the order after going through the merits of the case the writ of habeas corpus cannot be invoked, however erroneous the order may be. Moreover, the writ is not of punitive or of corrective nature. It is not designed to punish the official guilty for illegal confinement of the detenu. Nor can it be used for devising a means to secure damages. An application for habeas corpus can be made by any person on behalf of the prisoner as well as by the prisoner himself, subject to the rules and conditions framed by various High Courts.

Thus the writ can be issued for various purposes such as:

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

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

(c) securing the custody of minor;

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

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

When the Writ does not lie.

The writ will not lie in the following circumstances:-

1. If it appears on the face of the record that the detention of the person concerned is in execution of a sentence on indictment of a criminal charges. Even if in such cases it were open to investigate the jurisdiction of the court, which convicted the petitioner, but the mere jurisdiction would not justify interference by habeas corpus.

2. In habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of institution of the proceedings. It was, thus, held in Gopalan v. State,**(AIR 1950 SC.27)** that if a fresh and valid order justifying the detention is made by the time to the return to the writ, the court couldn't release the detenu whatever might have been the defect of the order in pursuance of which he was arrested or initially detained.

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

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

Grounds of Habeas Corpus:

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

(1) The applicant must be in custody;

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

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

(4) A person has no right to present successive applications for habeas corpus to different Judges of the same court.

As regards the applicability of res judicata to the writ of habeas corpus the Supreme Court has engrafted an exception to the effect that where the petition had been rejected by the High Court, a fresh petition can be filed to Supreme Court under Article 32.

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

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

(7) It must be established that the detaining authority was not satisfied that the detenu was committing prejudicial acts, etc. It may be noted in this connection that the sufficiency of the material on which the satisfaction is based cannot be subject of scrutiny by the Court. Where the detaining authority did not apply his mind in passing the order of detention, the court will intervene and issue the order of release of the detenu. Vague and indefinite grounds of detention.__ where the detaining authority furnishes vague and indefinite grounds, it entitles the petitioner to release.

Delay in furnishing ground may entitle detenu to be released.

The Court has consistently shown great anxiety for personal liberty and refused to dismiss a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. It has adopted the liberal attitude in view of the peculiar socio-economic conditions prevailing in the country. People in general are poor, illiterate and lack financial resources. It would therefore be not desirable to insist that the petitioner should set out clearly and specifically the ground on which he challenges the order of detention. The scope of writ of habeas corpus has considerably increased by virtue of the decision of the Supreme Court in *Maneka Gandhi v. Union of India,* and also by the adoption of forty-fourth amendment to the Constitution. Hence the writ of habeas corpus will be available to the people against any wrongful detention.

Writ of Mandamus

A writ of mandamus is in the form of command directed to the inferior Court, tribunal, a board, corporation or any administrative authority, or a person requiring the performance of a specific duty fixed by law or associated with the office occupied by the person. Mandamus in England is "neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of public duty and specially affects the right of an individual provided there is no other appropriate remedy. The writ is issued to compel an authority to do his duties or exercise his powers, in accordance with the mandate of law. The authority may also be prevented from doing an act, which he is not entitled to do. The authority, against which the writ is issued, may be governmental or semi-governmental, or judicial bodies. Its function in Indian Administrative Law is as general writ of justice, whenever justice is denied or delayed and the aggrieved person has no other suitable the defects of justice. An order in the nature of mandamus is not made against a private individual. The rule is now well established that a writ of mandamus cannot be issued to a private individual, unless he acts under some public authority. A writ can be issued to enforce a public duty whether it is imposed on private individual or on a public body. The Court laid down that public law remedy mandamus can be availed of against a person when he is acting in a public capacity as a holder of public office and in the performance of a public duty. It is not necessary that the person or authority against which mandamus can be claimed should be created by a statute. Mandamus can be issued against a natural person if he is exercising a public or a statutory power of doing a public or a statutory duty.

Grounds of the Writ of Mandamus

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

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

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

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

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

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

The applicant must show that the duty, which is sought to be enforced, is owed to him and the applicant must be able to establish an interest the invasion of which has been given rise to the action. The writ of mandamus is available against all kinds of administrative action, if it is affected with illegality. When the action is mandatory the authority has a legal duty to perform it. Where the action is discretionary, the discretion has to be exercised on certain principles; the authority exercising the discretion has mandatory duty to decide in each case whether it is proper to exercise its discretion.

In the exercise of its mandatory powers as well as discretionary powers it should be guided by honest and legitimate considerations and the exercise its discretion should be for the fulfillment of those purposes, which are contemplated by the law. Where the duty is not mandatory but it is only discretionary, the writ of mandamus will not be issued. The principles are illustrated in Vijaya Mehta v. State**(AIR 1980 Raj.207)** There a petition was moved in the high Court for directing the state Government to appoint a Commission to inquire into change in climate cycle, flood in the State etc. Refusing to issue the writ, the Court pointed out that under Section 3 of the Commission of Inquiry Act, the Government is obligated to appoint a commission if the Legislature passes a resolution to that effect.

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

Mandamus was issued to compel the government to fill the vacant seats in a Medical College as Article 41 of the Constitution, which is a directive principle of State policy, includes the right to medical education. In Bhopal sugar Industries Ltd. V. income Tax Officer, Bhopal, **(AIR 1961 SC 182)** it was held by the Supreme Court that, where the Income Tax Officer had virtually refused to carry out the clear and unambiguous directions which a superior tribunal like the Income tax appellate Tribunal had given to him by its final order in exercise of its appellate power in respect of an order of assessment made by him, such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based on as it is the hierarchy of Courts. In such a case a writ of mandamus should issue ex-debits justifiable to compel the Income-tax Officer to carry out the directions given to him by the Income-tax Appellate Tribunal. A writ of mandamus will not be issued unless an accusation of noncompliance with a legal duty or a public duty is leveled. It must be shown by concrete evidence that there was a distinct and

specific demand for performance of any legal or public duty cast upon the said party declined to comply with the demand.

When an original legislation by the Union or State exceeds its legislative orbit and injuries private interests, the owner of such interests can have a mandamus directing the States not to enforce the impugned law "against the petitioners in any manner whatsoever." The duty of this writ becomes more onerous as it attempts to face different phases and types of ultra vires administrative action, whether with regard to internment or election, taxation or license fees, evacuee property or dismissal of public officers.

Grounds on which writ of mandamus may be refused.

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

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

Who may apply for mandamus? __It is only a person whose rights have been infringed who may apply for mandamus. It is interesting to note that the rule of locus stand has been liberalized by the Supreme Court so much as to enable any public-spirited man to move the court for the issue of the writ on behalf of others. General principles relating to mandamus to enforce public duties In considering general principles the following points have to be considered:

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

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

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

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

(iii) An applicant for mandamus must take the position that the person against whom an order is sought is holding a public office under some law, and his grievance is that he is acting

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

Against whom a Writ of Mandamus cannot be issued?

Writ of mandamus is issued generally for the enforcement of a right of the petitioner. Where the applicant has no right the writ cannot be issued. It cannot lie to regulate or control the discretion of the public authorities. The writ of mandamus will not be issued if there is mere omission or irregularity committed by the authority. It will not lie for the interference in theinternal administration of the authority. In the matters of official judgment, the High Court cannot interfere with the writ of mandamus.

Writ of Certiorari:

Certiorari is a command or order to an inferior Court or tribunal to transmit the records of a cause or matter pending before them to the superior Court to be dealt with there and if the order of inferior Court is found to be without jurisdiction or against the principles of natural justice, it is quashed. Certiorari is historically an extraordinary legal remedy and is corrective in nature. It is issued in the form of an order by a superior Court to an inferior civil tribunal which deals with the civil rights of persons and which is public authority to certify the records of any proceeding of the latter to review the same for defects of jurisdiction, fundamental irregularities of procedure and for errors of law apparent on the proceedings. The jurisdiction to issue a writ of certiorari is a supervisory one and in exercising it, the Court is not entitled to act as a Court of appeal. That necessarily means that the findings of fact arrived at by the inferior Court or tribunal are binding. An error of law apparent on the face of the record could be corrected by a writ of certiorari, but not an error of fact; however grave it may appear to be.

Certiorari is a proceeding in personam: Unlike the writ of habeas corpus the petition for certiorari should be by the person aggrieved, not by any other person. The effect of the rule of personam is that if the person against whom the writ of certiorari is issued does not obey it, he would be committed forthwith for contempt of court. Certiorari is an original proceeding in the superior Court. It has its origin in the court of issue and therefore the petition in India is to be filed in the High Court under Article 226 or before the Supreme Court under Article 32 of the Constitution.

Against whom it can be issued: As regards the question against whom the writ can be issued, it is well settled that the writ is available against nay judicial or quasi-judicial authority, acting in a judicial manner. It is also available to any other authority, which performs judicial function and acts in a judicial manner. Any other authority may be Government itself. But the conditions allied with it are that Government acts in a judicial manner and the issue is regarding the determination of rights or title of a person. Previously the question was in doubt whether it was available against Central and Local Governments.

The majority of judgment is there, when the grant of certiorari against the Government has been denied. The Madras High Court in 1929 and again in 1940 in Chettiar v. Secretary to the Government of Madras **(ILR1940 Mad.205.)**held that a writ of certiorari would not lie against Madras Government. The Assam High Court has held that the writ of certiorari will be issued to an authority or body of persons who are under a duty to act judicially. It will not be available against the administrative order or against orders of non-statutory bodies.

Necessary conditions for the issue of the Writ : When anybody

(a) Having legal authority.

(b) To determine questions affecting rights of subjects,

(c) Having duty to act judicially,

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

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

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

(a) Excess of jurisdiction.

(b) Abuse of jurisdiction.

(c) Absence of jurisdiction.

(2) Violation of Natural justice.

(3) Fraud.

(4) Error on the face of records.

The Supreme Court has stated in Ebrahim Abu Bakar v. Custodian- General of Evacuee Property(**111952 SCJ 488),** that want of jurisdiction may arise from, the nature of subject matter, from the abuse of some essential preliminary, or Upon the existence of some facts collateral to the actual matter, which the Court has to try, and which is the conditions precedent to the assumption of jurisdiction by it. The Court does not interfere in the cases where there is a pure exercise of discretion, and which is not arbitrary if it is done in good faith.

The issue of writ of certiorari is the violation of natural justice and has a recognized place in Indian legal system . The superior Courts have an inherent jurisdiction to set aside orders of convictions made by inferior tribunals if they have been procured by fraud or collusion . Court will decline to quash unless it is satisfied that the fraud was clear and manifest and was instrumental in procuring the order impugned. It is a patent error, which can be corrected by certiorari but not a mere wrong decision. **(T. C. Basappa v. T. Nagappa AIR1954 SC 440).** It was for the first time when the Supreme Court issued the writ of certiorari on the only ground that the decision of the election tribunal clearly presented a case of error of law,

which was apparent on the face of the record. The error must be apparent on the face of the records.

Writ of Quo Warranto

The term quo warranto means "by what authority." Whenever any private person wrongfully usurps an office, he is prevented by the writ of quo warranto from continuing in that office. The basic conditions for the issue of the writ are that the office must be public, it must have been created by statute or Constitution itself, it must be of a substantive character and the holder of the office must not be legally qualified to hold the office or to remain in the office or he has been appointed in accordance with law.

A writ of quo warranto is never issued as a matter of course and it is always within the discretion of the Court to decide. The Court may refuse to grant a writ of quo warranto if it is vexatious or where the petitioner is guilty of larches, or where he has acquiesced or concurred in the very act against which he complains or where the motive of the relater is suspicious.

As to the question that can apply for writ to quo warranto, it can be stated that any private person can file a petition for this writ, although he is not personally aggrieved in or interested in the matter. Ordinarily, delay and lashes would be no ground for a writ of quo warranto unless the delay in question is inordinate. An unauthorized person issues the writ in case of an illegal usurpation of public office. The public office must be of a substantive nature. The remedy under this petition will go only to public office private bodies the nature of quo warranto will lie in respect of any particular office when the office satisfies the following conditions:

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

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

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

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

Another instance of granting the writ of quo warranto is where a candidate becomes subject to a disqualification after election or where there is a continuing disqualification. In cases of office of private nature the writ will not lie. In Jamalpur Arya Samaj Sabha v. Dr. D. Rama, **(AIR 1954 Pat 297)** the High Court of Patna refuse to issue the writ of quo warranto against the members of the Working Committee of Bihar Raj Arya Samaj Pratinidhi Sabha- a private religious association.

In Niranjan Kumar Goenka v. **(AIR 1973 Pat 85)** The University of Bihar, Muzzafarpur the Patna High Court held that writ in the nature of quo warranto cannot be issued against a person not holding a public office. Acquiescence is no ground for refusing quo warranto in case of appointment to public office of a disqualified person, though it may be a relevant

consideration in the case of election When the office is abolished no information in the nature of quo warranto will lie.

Public Interest Litigation (P I L):

An individual who does it out of concern for public interest initiates it. But after having initiated it, once the Court admits a matter, it no longer remains the concern only of the person who has initiated it. The constraints of feasibility restrain the courts from over admitting matters, and not undertaking issues, which are better, dealt with by the other co-ordinate organs of the government such as the legislature or the executive. PIL area of operation, is that if certain infringement of law, injury to public interest, public loss due to official apathy, inaction or manipulation or dereliction of duty as ordained by the authoritative rules or statutes which are corelatable to public interest, being offensive to or destructive of it, will all fall within the PIL jurisdiction and judgment given in such cases, in view of their impact and end-result or even visibility in forms of reduction or elimination of the "original sin" are often categorized as pronouncements belonging to the area of the " judicial activism". Supreme Court made a relaxation of the principle of locus standi and started accepting genuine and appropriate cases even through complainant was someone different from the person affected. Of course, the admissions done only after a very strict scrutiny of the points involved the motive or motivation of the complainant and the purpose, which the case, if decided, would serve. It is only after a full satisfaction of the court that such a case is accepted as a PIL. The public-spirited men can take up cudgels on their behalf and bring up before law courts cases of law infringement or non-implementation on statutory provisions affecting adversely people or public. The alternative is that the courts suo moto take up some such cases either on the basis of reports, communications or other verifiable evidences. As of now, the courts are well disposed towards this form or course of litigation. They do not or would not reject such a course outright but would take cognizance, even if ultimately they way as well dispose of them or discuss them on good and sufficient grounds.

In the Fertilizer Corporation Manager Union v. Union of India case, the eminent jurist V.R. Krishna Iyer, the initiator of this innovative process of PIL, described law as " a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction of the Court". The former Chief Justice P.N Bhagwati, picking up the thread from where Iyer left it, propounded in S.P. Gupta's case, "the court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights, the only way in which this can be done is by entertaining writ petitions and even letters from public spirited citizens seeking judicial redress on behalf of those who have suffered a legal wrong or an injury".

Suspension of Judicial Review during Emergency

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

The jurisdiction under Art 227 is narrower than that under Art 226 because while under art 226, the High Court can quash any administrative action, under Art 227, it can act only in respect of judicial or at the most quasi- judicial actions. A petition under Art 227 is not maintainable if there is an adequate alternative remedy. Remedy through Special Leave to appeal under article 136. Article 136 deals with a very special appellate jurisdiction conferred on the Supreme Court. Under this provision the Supreme Court has power to grant in the discretion, special leave to appeal from

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

(b) In any cause or matter;

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

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

Remedy against the administrative tribunal under Article 227 : Forty-fourth Amendment Act of the Constitution the jurisdiction of the High Court over administrative tribunals has been restored and accordingly the power of superintendence and supervision of the High Courts over them exists as before. The power extended not only to administrative but also even to judicial superintendence over judicial or quasi judicial bodies. The power of the High Court under Article 226 differed from power of superintendence exercised by it under Article 227 Firstly, where it could quash orders of inferior court or tribunal, but the court under Article 226 may quash the order as well as issue further directions in the matter. Secondly, Under Article 227 the power of interference was limited to seeing that the tribunals function within the limits of its authority .Thirdly, the power under Article 227 will only be exercised where the party affected moves the court, while the superintending power under Article 227

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

B) Statutory Remedies

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

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

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

iii) Equitable Remedies

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

i) Injunction

ii) Declaratory Action

iii) Action for damages.

(i) Injunction

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

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

Interlocutory or temporary injunction: Temporary injunctions are such as to continue until a specified time or until the further order of the court. **(S. 37 for The Specific Relief Act).** It is granted as an interim measure to preserve status quo until the case is heard and decided. Temporary injunction may be granted at any stage of a suit. Temporary injunctions are regulated by the Civil Procedure Code.

Temporary injunction is provisional in nature. It does not conclude or determine a right. Besides, a temporary injunction is a mere order. The granting of temporary injunction is a matter of discretion of the court.

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

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

(ii)Declaration (Declaratory Action):

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

(iii) Action for Damages

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

D. PRIVILEGES AND IMMUNITIES OF GOVERNMENT IN LEGAL PROCEEDINGS

The various privileges available to the Government under various statutes are as follows: -

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 on 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.

Privileges and Immunities under the Civil Procedure Code, 1908.

Section 80 (1) Civil Procedure Code, 1908 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. 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 provides privilege to the Government. According to this section where in a suit by or against the Government or the public officer, a time shall be specified in the decreed within which shall be satisfied and if

the decree is not satisfied writhing the time so specified and within three months from the date of the decree. Where no time is so specified, the Court shall report the case for the orders of the Government. Thus a decree against the Government or a public officer is not executable immediately. The Court is required to specify the time within which the decree has to be satisfied and where no such time has been specified, three months from the date of the decree will be taken to be the time within which is to be satisfied. If the decree is not satisfied within such time limit the Court shall report the case for the orders of the Government.

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

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

In India S. 123 provides that no one shall be permitted to give any evidence derived from unpublished official records relating to any affair of State except with the permission of the officer at the Head thinks fit. Only those records relating to the affairs of the State are privileged, the disclosure of which would cause injury to the public interest. To claim this immunity the document must relate to affairs of state and disclosure thereof must be against interest of the State or public service and interest.

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

The Court has power to decide as to whether such communication has been made to the officer in official confidence. For the application of S.124 the communication is required to have made to a public officer in official confidence and the public officer must consider that the disclosure of the communication will cause injury to the public interest.

According to S.162 a witness summoned to provide a document shall, if it is in his possession or power, bring it to the Court, not with outstanding any objective which there may be to its production or to its admissibility. The Court shall decide on the validity of any such objection. The court, if it sees fit, may inspect the document, unless it refers to the matters of State or take other evidence to enable it to determine on its admissibility. If for such purpose it is necessary to cause any document to be translated the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the direction, he shall be held to have committed an offence under S.166 of the Indian Penal Code.

S. 162 apply not only to the official documents but also to the private documents. It is for the Court to decide as to whether a document is or is not a record relating to the affairs of the State. For this purpose the Court can take evidence and may inspect the document itself.

In State of Punjab v. Sodhi Sukdev Singh (**AIR 1961 SC 493)** the court had the opportunity of discussing the extent of government privilege to withhold documents where twin claims of governmental confidentiality and individual justice compete for recognition. The court was very alive to the constraints of this privilege on private defense, therefore Gajendragadkar, J. delivering the majority judgment cautioned that care has to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provision of Section 123. In order to guard against the possible misuse of the privilege, the court also developed certain norms. First, the claim of privilege should be in the form of an affidavit, which must be signed by the Minister concerned, or the Secretary of the Department. Second, the affidavit must indicate within permissible limits the reasons why the disclosure would result in public injury and that the document in question has been carefully read and considered and the authority is fully convinced that its disclosure would injure public interest. Third, if the affidavit is found unsatisfactory, the court may summon the authority for cross-examination. Working the formulations still further, the court in Amar Chand v. Union of India **(AIR 1964 SC 1658)** disallowed the privilege where there was evidence to show that the authority did not apply its mind to the question of injury to the public interest which would be caused by the disclosure of the document. In Indira Nehru Gandh v. Raj Narain .**(1975 Supp SCC 1: AIR 1975 SC 2299)** the Court compelled the production of BlueBooks of the polic and disallowed the claims of privilege. In State of Orissa v. Jagannath Jena, **((1972) 2 SCC 165)** the Supreme Court again disallowed the privilege on the ground that the public interest aspect had not been clearly brought out in the affidavit. In this case, the plaintiff wanted to see endorsement on a file by the Deputy Chief Minister and the I. G. of Police.

The law on Government privileges took a new turn in S.P. Gupta v. Union of India (**AIR 1982 SC 149)** The question in the present case was whether the correspondence between the Law Minister and these Chief Justices ought to be produced in the Supreme Court, so, as to enable the court to judge the question of validity of the non-continuance of an Additional Judge in the Delhi High Court. The government opposed the production of these reports on the ground that their disclosure would injure public interest under Section 123 of the Indian Evidence act. But the Supreme Court ruled otherwise. The case is a definite evidence of court's attempt to promote the ideal of open Government in India. If process and functioning of Government are kept shrouded in secrecy and hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority. The decision has opened a new dimension of judicial control over the exercise of privileges under Sections 123 by the executive. The Court now has assumed the power of inspection of documents in

camera and if it finds that its disclosure would harm the public interest, the claim for non-disclosure might be upheld. If the disclosure, to the mind of the Court, does not harm the public interest, its disclosure would be ordered. Period of Limitation for Suit Against Government Art 149 of the First Schedule of the Limitation Act of 1890 prescribed a longer period of limitation for suits by or on behalf of the State. The Act of 1963 contains a similar provision under Art 112. The Article applies to the Central Government an all the State Governments including the Government of the State of Jammu land Kashmir. This longer limitation period was based on the common law maxim nulla tempus occur it rein, that is, no time affects the Crown. The longer period of limitation, however, does not apply to appeals and applications by Government.

Under s 5 of the Limitation Act, it is provided that an appeal or application may be admitted after the expiry of the period of limitation if the court is satisfied that there was sufficient cause for the delay. It was held that the government was not entitled to any special consideration in the matter of condo nation of delay.

Right to Information Act 2005:

Right to Information Act 2005 mandates timely response to citizen requests for government information. It is an initiative taken by Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions to provide a– RTI Portal Gateway to the citizens for quick search of information on the details of first Appellate Authorities, PIOs etc. amongst others, besides access to RTI related information / disclosures published on the web by various Public Authorities under the government of India as well as the State Governments. The basic object of the Right to Information Act is to empower the citizens, promote transparency and accountability in the working of the Government, contain corruption, and make our democracy work for the people in real sense. It goes without saying that an informed citizen is better equipped to keep necessary vigil on the instruments of governance. and make the government more accountable to the governed. The Act is a big step towards making the citizens informed about the activities of the Government.

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 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 of law; or

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

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

In India, the courts are invoking this doctrine, In Union of India v. Anglo (Indo) – Afghan Agencies Ltd.,(AIR 1968 SC718)The doctrine of Promissory Estoppel was applied against the Government. The Court negated the plea of executive necessity. Under the scheme an exporter was entitled to import raw materials equal to the amount, which was exported. Five lakhs rupees worth goods were exported by the petitioner but he was given import license for an amount below two lakh rupees. The Court held that the Government was bound to keep its promise. The scheme was held to be binding on the Government and the petitioner was entitled to get the benefit of the scheme.

The Supreme Court in Century Spinning and Manufacturing Co. Ltd. V. Ulhasnagar Municipal Council,(AIR 1971 SC 1021)again extended the doctrine of Promissory Estoppel. If the Government makes a promise and promisee acts upon it and changes his position, then the Government will be held bound by the promise and cannot change its position against the promisee and it is not necessary for the promisee to further show that he has acted to his detriment. For the application of the doctrine of Promissory Estoppel it is not necessary that there should be some pre-existing contractual relationship between the parties.

In Delhi Cloth and General Mills v. Union of India, (1988 1 S.C.C. 86) the Supreme Court has held that for the application of the principle of Promissory Estoppel change in position by acting on the assurance to the promise is not required to be proved. The doctrine of Promissory Estoppel is not applied in the following conditions:

a. **Public Interest:** The doctrine of Promissory Estoppel is an equitable doctrine and therefore it must yield place to the equity if larger public interest requires. It would not be enough to say that the public interest requires that the Government would suffer if the Government were required to honor it. In order to resist its liability the Government would disclose to the Court the various event insisting its claim to be exempt from liability and it would be for the Court to decide whether those events are such as to render it equitable and to enforce the liability against the Government.

b. **Representation against law:** The doctrine of Promissory Estoppel cannot be applied so as compel the Government or the public authority to carry out a promise, which does law prohibit.

c. **Ultra vires promise or representation:** If the promise or representation made by the officer is beyond his power, the State cannot be held liable for it one the basis of the Principle of Promissory Estoppel.

d. Fraud : the doctrine of Promissory Estoppel is not applied in cases where the promise from the Government is obtained by fraud.

e. **Fraud on the Constitution:** The doctrine of Promissory Estoppel is not applied in cases when the promise or representation is obtained to play fraud on the Constitution and enforcement would defeat or tend to defeat the Constitutional goal.

E. ADMINISTRATIVE DISCRETION:

Administrative discretion means choosing from amongst the various available alternatives without reference to any pre determined criterion. '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. 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.

Judicial Behavior and Administrative Discretion in India

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.

Control at stage of delegation of discretion The court exercise control over delegation of discretionary powers to the administration by adjudicating upon the constitutionality of the law under which such powers are delegated with reference to the fundamental rights enunciated in Part III of the Indian Constitution. Therefore, if the law confers vague and wide discretionary power on any administrative authority, it may be declared ultra vires Article 14, Article 19 and other provisions of the Constitution.

In certain situations, the statute though it does not give discretionary power to the administrative authority to take action, may give discretionary power to frame rules and

regulations affecting the rights of citizens. The court can control the bestowal of such discretion on the ground of excessive delegation.

Control at the stage of the exercise of discretion

In India, unlike the USA, there is no Administrative Procedure Act providing for judicial review on the exercise of administrative discretion. Therefore, the power of judicial review arises from the constitutional configuration of courts.

i) That the authority is deemed not to have exercised its discretion at all.

ii) That the authority has not exercised its discretion properly.

i) That the authority is deemed not to have exercised its discretion at all : Under this categorization, courts exercise judicial control over administrative discretion if the authority has either abdicated its power or has put fetters on its exercise or the jurisdictional facts are either non-existent or have been wrongly determined. **Purtabpore Company Ltd. V. Cane Commissioner of Bihar, (AIR 1970 SC1896)** is a notable case in point. In this case the Cane Commissioner who had the power to reserve sugarcane areas for the respective sugar factories, at the dictation of the Chief Minister excluded 99 villages from the area reserved by him in favor of the appellant-company. The court quashed the exercise of discretion by the Cane Commissioner on the ground that the abdicated his power by exercising it at the dictation of some other authority; therefore, it was deemed that the authority had not exercised its discretion at all. Thus the exercise of discretion with instructions of some other person amounts to failure to exercise the discretion. It is immaterial that the authority invested with the discretion itself sought the instructions.

ii) That the authority has not exercised its discretion properly: Improper exercise of discretion includes such things as 'taking irrelevant considerations into account', 'acting for improper purpose', 'asking wrong questions', 'acting in bad faith', 'neglecting to take into consideration relevant factors' or 'acting unreasonable'. **S.R. Venkataraman v. Union of India,(1979 2SCC 491)** the appellant, a Central Government officer, was prematurely retired from service in 'public interest' under Rule 56(j)(i) on attaining the age of 50 years. Her contention was that the government did not apply its mind to her service record and that in the facts and circumstances of the case the discretion vested under Rule 56(j)(I) was not exercised for furtherance of public interest and that the order was based on extraneous circumstances. The government conceded that there was nothing on record to justify the order. The Supreme Court, quashing the order of the government, held that if a discretionary power has been exercised for an unauthorized purpose, it is generally immaterial whether its repository was acting in good faith or bad faith. An administrative order based on a reason or facts that do not exist must be held to be infected with an abuse of power. **R.D. Shetty v. International Airport Authority (1979 3SCC 459)**: It is heartening to see the law catching up with the vagaries of the State's dealings in the exercise of its discretion. In this case the issue was the awarding of a contract for running a second-class hotelier's and it was clearly

stipulated that the acceptance of the tender would rest with the Airport Director who would not bind himself to accept any tender and reserved to himself the right to reject all or any of the tenders received without assigning any reason. A writ petition was filed by a person who was himself neither a tenderer nor an hotelier. His grievance was that he was in the same position as the successful tenderer because if an essential condition could be ignored in the tenderer's case why not in the petitioner's? The Supreme Court accepted the plea of locus stand in challenging the administrative action. Justice P.N.Bhagwati, who delivered the judgment of the Court, held:

1) Exercise of discretion is an inseparable part of sound administration and, therefore, the State which is itself a creature of the Constitution, cannot shed its limitation at any time in any sphere of State activity.

2) It is a well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them.

3) It is indeed unthinkable that in a democracy governed by the rule of law the executive government or any of its officers should possess arbitrary powers over the interests of an individual. Every action of the executive government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement.

4) The government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licenses only in favor of those having gray hair or belonging to a particular political party or professing a particular religious faith. The government is still the government when it acts in the matter of granting largesse and it cannot act arbitrarily. It does not stand in the same position as a private individual. 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. In India the administrative discretion, thus, may be reveiwed by the court on the following grounds.

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

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

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

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 won 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.

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.

Administrative Discretion and fundamental rights

No law can clothe administrative discretion with a complete finality, for the courts always examine the ambit and even the mode of its exercise for the angle of its conformity with fundamental rights. The fundamental rights thus provide a basis to the judiciary in India to control administrative discretion to a large extent.

Administrative Discretion and Article 14.

Article14 prevents arbitrary discretion being vested in the executive. Right to equality affords protection not only against discretionary laws passed by legislature but also prevents arbitrary discretion being vested in the executive. In **State of West Bengal v. Anwar Ali, AIR 1952 SC 75.** It was held that in so far as the Act empowered the Government to have cases or class of offences tried by special courts, it violated Article 14 of the Constitution. The court further held the Act invalid as it laid down "no yardstick or measure for the grouping either of persons or of cases or of offences" so as to distinguish them from others outside the purview of the Act. Moreover, the necessity of "speedier trial" was held to be too vague, uncertain and indefinite criterion to form the basis of a valid and reasonable classification.

Under Article 19

Article 19 guarantees certain freedoms to the citizens of India, but they are not absolute. Reasonable restrictions can be imposed on these freedoms under the authority of law. The reasonableness of the restrictions is open to judicial review.

The State has conferred powers on the Executive to extern a person from a particular area in the interest of peace and safety in a number of statutes. **In Dr. Ram Manohar v. State of Delhi, AIR 1950 SC 211.**, where the D.M. was empowered under East Punjab Safety Act, 1949, to make an order of externment from an area in case he was satisfied that such an order was necessary to prsevent a person from acting in any way prejudicial to public peace and order, the Supreme Court upheld the law conferring such discretion on the execution on the grounds, inter alia, that the law in the instant case was of temporary nature and it gave a right to the externee to receive the grounds of his externment from the Executive.

In Hari v. Deputy Commissioner of Police, AIR 1956 SC 559, the Supreme Court upheld the validity of section 57 of the Bombay Police Act authorizing any of the officers specified therein to extern convicted persons from the area of his jurisdiction if he had reasons to believe that they are likely to commit any offence similar to that of which they were convicted. This provision of law, which apparently appears to be a violation of the residence was upheld by court mainly on the considerations that certain safeguards are available to the externee, i.e., the right of hearing and the right to file an appeal to the State Government against the order.

The Supreme Court in **H.R. Banthis v. Union of India (1979 1 SCC 166)** declared a licensing provision invalid as it conferred an uncontrolled and unguided power on the Executive. The Gold (Control) Act, 1968, provided for licensing of dealers in gold ornaments. The Administrator was empowered under the Act to grant or renew licenses having regard to the matters, inter alia, the number of dealers existing in a region, anticipated demand, suitability of the applicant and public interest. The Supreme Court held that all these factors were vague and unintelligible. The term 'region' was nowhere defined in the Act. The expression 'anticipated demand was vague one. The expression 'suitability of the applicant

and 'public interest' did not contain any objective standards or norms. The Executive has been granted 'unfettered power to interfere with the freedom of property or trade and business, the court will strike down such provision of law.

Under Article 31(2):

Article 31(2) of the Constitution provided for acquisition of private property by the Government under the authority of law. It laid down two conditions, subject to which the property could be requisitioned

(1) that the law provided for an amount (after 25th Amendment) to be given to the persons affected, which was non-justiciable; and

(2) that the property was to be acquired for a public purpose. No doubt, the Government is in best position to judge as to whether a public purpose could be achieved by issuing an acquisition order, but it is a justiciable issue and the final decision is with the courts in this matter. **In West Bengal Settlement Kanungo Co-operative Credit Society Ltd. V.Bela Bannerjee, (AIR 1954 SC 170)** the provision that a Government's declaration as to its necessity to acquire certain land for public purpose shall be conclusive evidence thereof was held to be void. The Supreme Court observed that as Article 31(2) made the existence of a public purpose a necessary condition of acquisition, it is, therefore, necessary that the existence of such a purpose as a fact must be established objectively and the provision relating to the conclusiveness of the declaration of then Government as to the nature of the purpose of the acquisition must be held unconstitutional.

Judicial Control of Administrative discretion: 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.

These two categories, however, are not mutually exclusive. In one sense the exercise of the discretion may be ultra vires, in other sense the same might have been exercised on irrelevant considerations. As regards the ultra vires exercise of administrative discretion, the following incidents are pre-eminent:

1) where an authority to whom discretion is committed does not exercise that discretion himself;

2) where the authority concerned acts under the dictation of another body and disables itself from exercising a discretion in each individual case;

3) where the authority concerned in exercise of the discretion, does something which it has been forbidden to do, or does an act which it has been authorized to do;

4) where the condition precedent to the exercise of its discretion is nonexistent, in which case the authority lacks the jurisdiction to act as all.

Under the abuse of discretionary power, the following instances may be considered:

1) where the discretionary power has been exercised arbitrarily or capriciously;
2) where the discretionary power is exercised for an improper purpose, i.e., for a purpose other than the purpose of carrying into effect in the best way the provisions of the Act;
3) where the discretionary power is exercised inconsistent with the spirit and purpose of the statute;
4) where the authority exercising the discretion acts on extraneous considerations, that is to say, takes into account any matters which should not have been taken into account;
5) where the authority concerned refuses or neglects to take into account relevant matter or material considerations;
6) where the authority imposes a condition patently unrelated to or inconsistent with the purpose or policy of the **expectation** statute;
7) where in the exercise of the discretionary power, it acts mala fide;
8) where the authority concerned acts unreasonably.

Legitimate expectation as ground of judicial review:

The concept of legitimate expectation in administrative law is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action and this creation takes its place besides such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and in future, perhaps, the unreasonableness, the proportionality. In **Union of India v. Hindustan Development Corporations, (1993 3SCC 499)** the court held that it only operates in public law field and provides locus standi for judicial review. Its denial is a ground for challenging the decision but denial can be justified by showing some overriding public interest. The doctrine of legitimate expectation is to be confined mostly to right of fair hearing before a decision, which results in negativing a promise, or withdrawing an undertaking is taken. A person, who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is foundation and thus he has locus standi to make such a claim. The court must lift the veil and see whether the decision is violative of these principles warranting interference. The courts should restrain themselves and restrict such claims duly to the legal limitations.

Further in **Food Corporation of India v. M/s. Kamdhenu Cattle Seed Industries AIR 1993 SC 1601**. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and this extent. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process.

In **Lala Sachinder Kumar v. Patna Regional Development Authority, (AIR 1994 PATNA 128)** In the instant case Regional Development Authority issued an advertisement inviting applications for the allotment of residential plots. In this process preference was given to the employees of the Patna Regional Development Authority without considering the case of applicant petitioner, whereas Rules did not provide for any such preferential

allotment. The court held that allotment in favour of employees is arbitrary. The applicant petitioner has legitimate expectations to be considered for allotment.

F. LIABILITY OF THE STATE

Liability of State or Government in Contract: Article 298 provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition holding and disposal property and the making of contracts for any purpose. Article 299 (I) lays down the manner of formulation of such contract. Article 299 provides that all contracts in the exercise of the executive power of the union or of a State shall be expressed to be made by the President or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize.

Article 299 (2) makes it clear that neither the President nor the Governor Shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution or for the purposes of any enactment relating or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof. Subject to the provisions of Article 299 (1), the other provisions of the general law of contract apply even to the Government contract.

A contract with the Government of the Union or State will be valid and binding only if the following conditions are followed: -

S1. The contract with the Government will not be binding if it is not expressed to be made in the name of the President or the Governor, as the case may be.

2. The contract must be executed on behalf of the President or the Governor of the State as the case may be. The word executed indicates that a contract with the Government will be valid only when it is in writing.

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

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

Effect of a valid contract with Government: However, as Article 299 (2) provides neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution or for the purposes of any enactment relating to the Government of India. As soon as a contract is executed with the

Government in accordance with Article 299, the whole law of contract as contained in the Indian Contract Act comes into operations. Thus the applications of the private law of contract in the area of public contracts may result in the cases of injustice.

A contract of service with the Governments not covered by Article 299 of the Constitution: After a person is taken in a service under the Government, his rights and obligations are governed by the statutory rules framed by the Government and not by the contract of the parties. Service contracts with the Government do not come within the scope of Article 299. They are subject to "pleasure". They are not contracts in usual sense of the term as they can be determined at will despite an express condition to the contrary. (Parshottam Lal Dhingra v. Union of India, AIR 1958 SC 36)

In India the remedy for the branch of a contract with Government is simply a suit for damages. The writ of mandamus could not be issued for the enforcement of contractual obligations. But the Supreme Court in its pronouncement in Gujarat State Financial Corporation v. Lotus Hotels,(1983) 3 SCC 379) has taken a new stand and held that the writ of mandamus can be issued against the Government or its instrumentality for the enforcement of contractual obligations. The Court ruled that it is too late to contend today the Government can commit branch of a solemn undertaking on which other side has acted and then contend that the party suffering by the branch of contract may sue for damages and cannot compel specific performance of the contract through mandamus.

The doctrine of judicial review has extended to the contracts entered into by the State of its instrumentality with any person. Before the case of Ramana Dayaram Shetty v. International Airport Authority. (AIR 1979 SC1628) The attitude of the Court was in favour of the view that the Government has freedom to deal with anyone it chooses and if one person is chosen rather than another, the aggrieved party cannot claim the protection of article 14 because the choice of the person to fulfill a particular contract must be left to the Government, However, there has been significant change in the Court's attitude after the case of Ramana Dayaram Shetty. The attitude for the Court appears to be in favour of the view that the Government does not enjoy absolute discretion to enter into contract with anyone it likes. They are bound to act reasonably fairly and in non-discriminatory manner.

In the case of Kasturi Lal v. State of J&K (AIR 1980 SC 1992), in this case Justice Bhagwati has said "Every activity of the Government has a public element in it and it must, therefore, be informed with reason and guided by public interest. Every government cannot act arbitrarily without reason and if it does, its action would be liable to be invalidated." Non arbitrariness, fairness in action and due consideration of legitimate expectation of affected party are essential requisites for a valid state action. (Food Corporation of India v. Kamadhenu Cattle Feed Industries, (1993) 1 SCC 71) In a recent case (Tata Cellular v. Union of India, AIR 1996 SC 11) the Supreme Court has held that the right to refuse the lowest or any other tender is always available to the Government but the principles laid down in Article

14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

Ratification:

The present position is that the contract made in contravention of the provisions of Article 299 (1) shall be void and therefore cannot be ratified. The Supreme Court has made it clear that the provisions of Article 299 (1) are mandatory and therefore the contract made in contravention thereof is void and therefore cannot be ratified and cannot be enforced even by invoking the doctrine of Estoppel. In such condition the question of estoppel does not arise. The part to such contract cannot be estoppel from questioning the validity of the contract because there cannot be estoppel against the mandatory requirement of Article 299.

Government cannot act arbitrarily and without reason and if it does, its action due consideration of legitimate expectation of affected party are Court has held that the right to refuse the lowest or any other tender is always available to the Government but the principles laid down in article 14 of the Constitution have to be kept in view while accepting or refusing a tender. The right to choose cannot be considered to be an arbitrary power. Of Course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

In the case of Shrilekha Vidyarathi v. State of U.P (1991 S.C .C 212) the Supreme Court has made it clear that the State has to act justly, fairly and reasonably even in contractual field. In the case of contractual actions of the State the public element is always present so as to attract article 14. State acts for public good, in public interest and its public character does not change merely because the statutory or contractual rights are also available to the other party. The court has held that the state action is public in nature and therefore it is open to the judicial review even if it pertains to the contractual field. Thus the contractual action of the state may be questioned as arbitrary in proceedings under Article 32 or 226 of the Constitution. It is to be noted that the provisions of Sections 73, 74 and 75 of the Indian Contract Act dealing with the determination of the quantum of damages in the case of breach of contract also applies in the case of Government contract.

Quasi-Contractual Liability

According to section 70 where a person lawfully does anything for another person or delivers anything to him such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered. If the requirements of Section 70 of the Indian Contract act are fulfilled, even the Government will be liable to pay compensation for the work actually done or services rendered by the State.

Section 70 is not based on any subsisting contract between the parties but is based on quasi-contract or restitution. Section 70 enables a person who actually supplies goods or renders some services not intending to do gratuitously, to claim compensation from the person who enjoys the benefit of the supply made or services rendered. It is a liability, which arise on equitable grounds even though express agreement or contract may not be proved. As per Section 65 of the Indian Contract Act ,if the agreement with the Government is void as the requirement of Article 299 (1) have not been complied, the party receiving the advantage under such agreement is bound to restore it or to make compensation for it to the person form whom he has received it. Action 65 provides that when an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it to make compensation for it to the person from whom he received it.

Liability of State or Government in Torts:

Before discussing tortuous 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 contact for which there is remedy by compensation or damages."*** The essential requirement for the arising of the tort is the beach of duty towards people in general. Although tort is a civil wrong, yet it would be wrong to think that all civil wrongs are torts. A civil wrong which arises out for the breach of contact cannot be put in the category of tort as it is different from a civil wrong arising out of the breach of duty towards public in general.

Vicarious Liability of the State:

When the responsibility of the act of one person falls on another person, it is called vicarious liability. Here it means that 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. Such protection, however, would not extent malicious act. The burden of proving that an act was malicious would lie on the person who assails the administrative action. 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.

The first important case involving the tortious liability of the Secretary of State for India-in – Council was raised in P.and O. Steam Navigation v. Secretary of State for India. (5 Bom HCR App 1.)The question referred to the Supreme Court was whether the Secretary of State for India is liable for the damages caused by the negligence of the servants in the service of

the Government. The Court pointed out the principle of law that the Secretary of State for India in Council is liable for the damages occasioned by the negligence of Government servants, if the negligence is such as would render an ordinary employer liable. According to the principle laid down in this case the Secretary of State can be liable only for acts of non-sovereign nature, liability will not accrue for sovereign acts Chief Justice peacock admitted the distinction between the sovereign and non sovereign functions of the government. But the judgment of P. and O. Steam Navigation case, was differently interpreted in Secretary of State v. Hari Bhanji, (5 Mad 273) In this case it was held that if claims do not arise out of acts of State, the Civil Courts could entertain them. The conflicting position before the commencement of the Constitution has been set at rest in the well known judgment of the Supreme Court in State of Rajasthan v. Vidyawati, (AIR 1962 SC 933) where the driver of a jeep, owned and maintained by the State of Rajasthan for the official use of the Collector of the district, drove it rashly and negligently while taking it back from the workshop to the residence of the Collector after repairs, and knocked down a pedestrian and fatally injured him. The State was sued for damages. The Supreme Court held that the State was vicariously liable for damages caused by the negligence of the driver. in fact, the decision of the Supreme Court in State of Rajasthan v. Vidyawati, (Kesoram Poddar v. Secretary of State for India, 54 Cal 969) introduces an important qualification on the State immunity in tort based on the doctrines of sovereign and non-sovereign functions. It decided that the immunity for State action can only be claimed if the act in question was done in the course of the exercise of sovereign functions.

Then came the important case of Kasturi Lal v. State of U. P. (AIR 1965 SC 1039) where the Government was not held liable for the tort committed by its servant because the tort was said to have been committed by him in the course of the discharge of statutory duties. The statutory functions imposed on the employee were referable to and ultimately based on the delegation of the sovereign powers of the State. The Supreme Court's judgment unambiguously indicates that the Court itself on the question of justice felt strongly that Kashturilal should be compensated yet, as a matter of law they held that he could not be. Consequently there has been an expansion in the area of governmental liability in torts.

Sovereign and non-sovereign dichotomy Changed judicial attitude: It is redeeming to note that the sovereign and non-sovereign dichotomy in the State functions which the Supreme Court has followed so far, is not being narrowed down by a new gloss over the sovereign functions of the State.The courts started holding most of the governmental functions as non-sovereign with a result that the area of tortious liability of the government expanded considerably. The Madhya Pradesh High Court (Associated Pool v. Radhabai, AIR 1976 MP 164.) The making of law, the administration of justice, the maintenance of order, the repression of crime, carrying on for war, the making of treaties of peace and other consequential functions, Whether this list be exhaustive or not, it is at least clear that the

socio-economic and welfare activities undertaken by a modern state are not included in the traditional sovereign function.

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

In the case of Rudal Shah v. State of Bihar. (AIR 1983 SC 1036) Here the petitioner was detained illegally in the prison for over fourteen years after his acquittal in a full dressed trail. The court awarded Rs. 30,000 as damages so the petitioner.

In Bhim Singh v. State of J&K (AIR 1986 SC 494) where the petitioner, a member of legislative Assembly was arrested while he was on his way to Srinagar to attend Legislative Assembly in gross violation of his constitutional rights under Articles 21 and 22 (2) of the Constitution, the court awarded monetary compensation of Rs.50,000 by way of exemplary costs to the petitioner. Another landmark case namely, C.Ramkonda Reddy v. State, (AIR 1989) AP 235)has been decided by the Andhra Pradesh, in which State plea of sovereign function was turned down and damages were awarded despite its being a cases of exercise of sovereign function.

In Saheli a Women's Resource Center v. Commissioner of Police, Delhi, (AIR 1990 SC 513) where the death of nine years old boy took place on account of unwarranted atrocious beating and assault by a Police officer in New Delhi, the State Government was directed by the court to pay Rs. 75000 as compensation to the mother of victim.

In Lucknow Development Authority v. M.K. Gupta, (1994 1 SCC 245) the Supreme Court has observed that where public servant by mal fide, oppressive and capricious acts in discharging official duty causes in justice, harassment and agony to common man and renders the State or its instrumentality liable to pay damages to the person aggrieved from public fund, the State or its instrumentality is duly bound to recover the amount of compensation so paid from the public servant concerned.

Liability of the Public Servant

Liability of the State must be distinguished from the liability of the individual officers of the State. So far as the liability of the individual officers is concerned, if they have acted outside the scope of their powers or have acted illegally, they are liable to the same extent as any other private citizen would be. The ordinary law of contact or torts or criminal law governs that liability. An officer acting in discharge of his duty without bias or mal fides could not be held personally liable for the loss caused to the other person. However such acts have to be done in pursuance of his official duty and they must not be ultra vires his powers. If an official acts outside the scope of his powers, he should be liable in civil law to the same extent as a private individual would be. Where a public servant is required to be protected for

acts done in the course of his duty, special statutory provisions are made for protecting them from liability.

Public Accountability

Major developments in the area of public accountability have taken place. In the absence of public accountability today, corruption is a low-risk and high profit business. In order to strengthen the concept of public accountability the court in Common Cause., A Registered Society (Petrol Pumps Matter) v. Union of India ((1996) 6 SCC 530) held that it is high time that public servants should be held personally liable for their functions as public servants. Thus, for abusing the process of court public servant was held responsible and liable to pay the cost out of his own pocket. Shori Lal v. DDA 1995 Supp (2) SCC119. The principle thus developed is that a public servant dealing with public property in oppressive, arbitrary or unconstitutional manner would be liable to pay exemplary damages as compensation to the government, which is 'by the people'

In Lucknow Development Authority v M. K. Gupta, (1994 1 SCC 243) For acts and omissions causing loss or injury to the subject, the public authority must compensate. Where, however, the suffering was due to mal fide or capricious act of public servant, such a public servant would be made to pay for it. Although the Court spoke in connection with the Consumer Protection Act, if this principle is to be extended to liability for wrongful acts in general, it would doubtless provide an effective deterrent against mal fide and capricious acts of public servants.

Such compensation would of course be paid from the public treasury, which would burden the taxpayer. He, therefore further ordered that when a complaint was entitled to compensation, because of the suffering caused by a mal fide or oppressive or capricious act of a public servant, the Commission under the Consumer Protection Act should direct the department concerned to pay such compensation from the public fund immediately but to recover the same from those who are responsible for such unpardonable behavior by dividing it proportionately among them when they were more than one.

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.

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.

In recent years, the courts have awarded compensation in a number of situations. Compensation was awarded for police brutalities committed on policemen People Union for Democratic Rights v. Police Commissioner((1989) 4 SCC 730) to victims of negligence by medical personnel in an eye camp resulting in irreversible damage to the eyes of patients, A.S Mittal v. State of U. P (AIR 1989 SC 1570) and to victims of road accidental President Union of India v. Sadashiv (AIR 1985 Bom 345) and to victims of environmental pollution (AIR 1987 Sc 1792) The plea of sovereign immunity has been rejected by courts time an again. Pushpinder Kaur v. Corporal Sharma (AIR 1985 P & H81) Besides these, the courts have awarded excreta payment (Kali Dass v. State of J&K(1987) 1 SCC 430) and costs of public interest litigating to those who spearheaded it (DC Wadhwa v. State of Bihar) The Supreme Court has held that where essential governmental functions were concerned, loss or injury occurring to any person due to failure of the government to discharge them would make it liable for compensation. Such compensation would be paid even if the plaintiff does not prove negligence on the part of an authority.

In Nilbati Behera v. State of Orissa (AIR 1993 SC 1960) the Supreme Court held that the awards of compensation in the public law proceedings were different from the awards in the tort cases. In a civil suit for tortuous liability, whether the State was liable was an issue to be decided by taking evidence. The petitioner had to prove that the respondent was guilty of negligence and he suffered as a result of that. In a writ petition, the fact that a fundamental right had been violated was enough to entitle a person to compensation. Further, compensation in writ proceedings is symbolic and is not based on the quantification of the actual loss suffered by the petitioner.

UNIT – IV

Ombudsman, Lokpal, Lokayukta and Central Vigilance Commission

Introduction

Administrative law is an ever growing subject which cannot be confined to one single terrain. For a nation to prosper and develop holistically it needs to have an organised system of administration. Maladministration leads to various obstacles in the progress of a nation and is like a termite which slowly erodes the very foundation of a nation and prevents the very structure of administration from accomplishing its task. The root cause of this problem of maladministration is corruption. It does not confine itself to any one branch of law and is eventually bound to be present at every instance where there is an abuse of power. For an administrative system to be good it must not abstain from being answerable to the people. But, as has been said, absolute power corrupts absolutely which implies that if there is power then its abuse is bound to be there.

It eventually leads to the need for an appropriate mechanism which can secure the rights of a person from being infringed by administrative wrongs. For this reason, the institution of "ombudsman" came to the rescue and proved to be of immense importance and has been and is still being adopted by various nations to protect the rights of the individual against the administrative practices of the State and also to avoid inefficiency in the administrative set up of the State.

Historical Background

In 1713 the king of Sweden, King Charles XII was in a situation of war with Russia and during this point of time the King in order to keep a check on the working of the public servants came up with an office named *"Hogsta Ombudsmannen"*. However in the year 1719 the name of this office was changed to *"Justitiekansler"* which meant Chancellor of Justice. Officially the institution of ombudsman was inaugurated in the year 1809 in Sweden. This institution did not become very famous till it was adopted by Denmark. The administrative policies of Sweden were followed by Finland also, but it is very surprising that it was after a huge gap of 110 years that Finland finally adopted the institution of ombudsman. Denmark and Finland had their own problem in adopting the institution of ombudsman. Since Finland was under the control of Russia till the year 1919 it did not adopt this institution and for Denmark the problem was actually the language barrier which prevented it from adopting it. However, there was a huge impact in a positive sense on the institution of ombudsman when it was adopted by New Zealand and Norway in the year 1962 and it proved to be of great significance in spreading of the concept of ombudsman. The reason why this system of ombudsman was so easily adopted by various countries having different political and historical backgrounds was the degree of flexibility of the institution of ombudsman and hence its easy adaptation to this concept was readily adopted by various nations, the Scandinavian countries being the best suited example of it.

The institution of ombudsman is not only confined to the developing nations, it equally extends itself to the various developed nations as well. In the year 1967 the Great Britain

became the first large nation in the democratic world to adopt the ombudsman institution and it was largely based on the recommendations of the Whyaat Report of 1961. The developing countries also began to look into the concept of ombudsman and it was because of this that Guyana became the first developing nation to have adopted the concept of ombudsman and it was adopted in the year 1966 and subsequently it was further adopted by Mauritius, Singapore, Malaysia and India as well. All these systems of ombudsman are in essence based on the same structure and idea but deviate only in very fine aspects relating to the changes in the different political and historical systems of the respective nations, whether already developed or in the phase of development.

The institution of Ombudsman in the Indian scenario

In the year 1966 a commission was set up named the Administrative Reforms Commission and this commission recommended that an institution based on the lines of an ombudsman is necessary in India and in pursuance of this a bill was forwarded in the Lok Sabha in the year 1968 which was eventually passed in the year 1969. Since the governments have yielded so much power that can lead to its abuse, it eventually leads to the advent of the ombudsman in India.

Once India attained freedom from the shackles of the British Empire, India had a humungous task to deal with, coping with problems such as the Second World War, economic crises and famines to name a few. And in order to tackle all these problems, India required a competent administrative set up and huge amount of power was given to the administrators and therefore a proper mechanism was required to protect the individuals from the faults of the administration. As was the case in Denmark, India also had to suffer a lot of administrative crises after the Second World War and there were numerous cases of maladministration and corruption surfacing during this period and such problems had to be tackled immediately.

It has been found that the existing democratic processes under the law are inadequate to deal with the complaints of citizens against the Government. The present scope for judicial review of administrative action is also very meager. There are no proper means of correcting an erroneous decision of facts or investigating into complaints of misconduct, inefficiency, delay or negligence.

The only remedy in such cases is to approach the Minister, or to draw the attention by putting questions in the Parliament. It is difficult for an ordinary citizen to do that much. Moreover, in cases of perversity and misconduct of a Minister, the remedy is not clear. Out of two alternatives, namely, to have the 'Counseil-d-Etat' under French system of 'droit administratiff' or the Ombudsman in the Scandinavian system, most of the modern countries of the world have preferred the latter one as a suitable means for redressing innumerable wrongs of the Government officials. The problems of citizen's grievance that have been germinated by a welfare State have caught the attention of the world for establishing an institution like Ombudsman. Ombudsman originated in Sweden in 1809 was adopted in Finland in 1919 and Denmark in 1955. It was set up in New Zealand, a commonwealth country with parliamentary form of government in 1962. The 'Justice', a British wing of the

international Commission of Jurists recommended that it be set up in England and the Parliamentary Commissioner's Act, 1967 was passed. Ombudsman has come to stay in England. The Ombudsman type of machinery has been found to be useful for redressing the grievances of citizens, which fall in the above description. It contains some of the qualities of droit administratif.

Central Vigilance Comission:

The committee on "Prevention of Corruption" (popularly known as the Santhanam Committee) in its report gave special attention to create machinery in the government, which should provide quick and satisfactory redress of public grievances. Accordingly, the Government on June 29, 1964 providing, inter alia, issued detailed instructions:

1. It is the basic proposition that the prime responsibility for dealing with a complaint from the public lies with the government organization whose activity or lack of activity gives rise to the complaint. Thus; the higher levels of the hierarchical structure of an organization are expected to look into the complaints against lower levels. If the internal arrangements within each organization are effective enough, there should be no need for a special 'outside' machinery to deal with complaints.

2. For dealing with grievances involving corruption and lack of integrity on the part of government servants; special machinery was brought into existence in the form of the Central Vigilance Commission.

3. For dealing with grievances, while outside machinery was not considered necessary of feasible for the present, the organizations and the departments should provide for quickest redressal of such grievances.

4. The internal arrangement for handling complaints and grievance should be quickly reviewed by each ministry, special care being bestowed on the task by those ministries whose work brings them in touch with the public. Every complaint should receive quick and sympathetic attention leaving in the outcome, as far as possible, no ground in the mind of the complaint for a continued feeling of grievance.

5. For big organizations having substantial contact with the public, there should be distinct cells under a specially designated senior officer which should function as a sort of outside complaint agency within the organization and, thus, act as a second check on the adequacy of disposal of complaints.

Simultaneously, a demand articulated in many, from time to time, for setting up an independent authority with power and responsibility of dealing with major grievances affecting large sections of the people. It was averred that the hierarchical type of remedy for grievances of citizens should be improved by tightening up the existing arrangements and by providing an internal 'outside' check to keep things up to the mark. Since the main limitation of the hierarchical remedy is that the various authorities act too departmental check system. A proposal was placed before the Cabinet to the effect that the "extra-departmental check" should operate through a commissioner for redress of Citizens' grievances, whose main

functions should be to ensure that arrangements are made in each ministry/department/office. For receiving and dealing with the citizens' grievances and that they work efficiently. In exercise of this function, the Commissioner should inspect these units, advise those who hold charge of these units and communicate his observations to the Head of Department or to the Secretary as may be necessary. He should also keep the minister informed of how the arrangements in the department under the minister are working. The proposal in essence was that the Commissioner would be an inspector and supervisor under each ministerial though located outside. The location for the Commissioner was suggested to be in the Home Ministry from where he would provide a common service. The proposal made it clear that the proposed Commissioner would not be anything like an Ombudsman.

Firstly, he would be appointed by the government and not elected by Parliament.

Secondly, he would only be an inspector and supervisor of the existing hierarchical arrangements and not an independent investigating authority, like an Ombudsman.

Thirdly, the Commissioner would be very much a part of the Government machinery and not an outside agency although he would e outside the individual ministries/departments. The Cabinet approved creation of a Commissioner for Public grievances and an officer of the rank of Additional Secretary was appointed against the post in March, 1966. This arrangement continued for about a year –and –a-half.

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

Need of the Institution:

The reasons due to which grievances normally arise, can be due to the delay in disposal of various matters; dilatory procedures which do not discriminate between routine and urgent; observance of rules for the sake of their observance without appreciating their effect on the end results; Administrative orders in exercise of discretion by executive which may be open to question either on the ground of misuse or abuse of power resulting in injustice; Prevalence of corruption and outside influence; Arbitrariness in executor of authority; and Misconduct and misbehaviour.

Any good system of administration, in the ultimate analysis, has to be responsible and responsive to the people. Because, the chances of administrative faults affecting the rights of the persons, personal or property have tremendously increased and the chances of friction between government and the Private citizen have multiplied manifold therefore, the importance institution like Ombudsman to protect the people against administrative fault

cannot be over emphasized. In the mid–nineties the main thrust of the court was public accountability to tackle the problem of corruption high places which was eating into the vitals of the polity. However, in late nineties the emphasis shifted to keeping balance between the needs of public accountability and the demands of individual rights. The canvas grievance redress strategies must be spread wide to include 'right to know' and 'discretion to disobey' besides other judicial and administrative techniques if the rampant corruption and the abuse of power is to be checked effectively before the people lose complete faith in democracy in India.

As mentioned earlier, the institution of commissioner for Public Grievances fell into disuse and there was no central agency to oversee and monitor the working of internal machinery in different organizations. The Administrative Reforms Commission submitted its report on Machinery floor Redress of .Public grievances in August 1966. The central theme of this report was to create the twin institutions of Lokpal and Lokayukta with authority to investigate both complaints against corruption and grievances. Any progressive system of administration presupposes the existence a mechanism for handling grievances against administrative faults, and the recognition of a right of every member of the public to know what passes in government files.

Ombudsman:

The Ombudsman is an officer of Parliament who investigates complaints from citizens, against government departments, that they have been unfairly dealt with and if he finds that the complaint is justified, helps to obtain a remedy. He has usually a high status- that of a judge of the highest court and can investigate act involving corruption and maladministration by government officials, sometimes including ministers.

The Ombudsman system is highly flexible. This is demonstrated by its successful adaptation in four Scandinavian countries, which have significant governmental and legal difference, and in New Zealand and the United Kingdom, which have an entirely different constitutional system. The Ombudsman of each country has been designed to suit the local needs and conditions. Hence there are differences in them with respect to jurisdiction as well as functions. For example, the Swedish and Finnish Ombudsmen have jurisdiction over the judiciary. The Ombudsman in New Zealand, Denmark and Norway has no authority over the judiciary. The Swedish Ombudsman has no jurisdiction over the ministers. His function is generally to supervise how judges, government officials and other civil servants observe the laws and to prosecute those who have acted illegally or neglected their duties. The Danish Ombudsman has authority over the ministers as well as the judges. The Norwegian Ombudsman has authority to scrutinize the acts of ministers, which they perform as heads of a Ministry. The Finnish Ombudsman not only has jurisdiction over the Cabinet Ministers but also has authority to prosecute them.

OMBUDSMAN IN INDIA

Thus we have seen that the establishment of the institution of Ombudsman is the demand of time. It will be much useful in redressing the grievances of the citizens against the administration. Attempts have been made to establish the institution like Ombudsman (called

Lokpal) but unfortunately it has not been established so far. However the institution of Lokayukta is functioning in some Indian States.

The system of Ombudsman enables Parliament and Ministers both to correct the faults in the administration. The ministerial responsibility appears to have resulted in sheltering the mistakes in the administration. Often they make defensive answer in Parliament and found reluctant in admitting mistakes. In such a situation the system of Ombudsman is of much use. The existence of Ombudsman will encourage the administration to be sensitive to the public opinion and the demands of fairness. It will help in controlling the administration. The Administrative Reform commission has recommended for the establishment of Ombudsman type of institution in India. A Draft Bill was appended to the Interim Report of the administrative Law Commission. In1968 a Bill called the Lokpal and Lokayuktas Bill was introduced in the LokSabha but before it could be passed, the Lok Sabha was dissolved and therefore the Bill lapsed. In 1971 and another Bill was introduced in the Lok Sabha but again the Bill lapsed on account of the dissolution of the LokSabha. In 1977 a new Bill called Lokpal Bill, 1977 was introduced in the LokSabha. The Bill was referred to the Joint Select Committee of the two House of Parliament but the Bill again lapsed on account of the dissolution of the Lok Sabha. Again Lok Pal Bill, 1985 was introduced in the Lok Sabha and it also lapsed because before its passage the term of the Lok Sabha ended. Again features of the Lokpal Bill, 1989 are as follows:

This Bill seeks to establish the institution of Lokpal. The institution of Lokpal shall consist of a Chairman and two members who may be either sitting or retired Judges of the Supreme Court. Where all or any of the allegation have been substantiated against a Minister, the Prime Minister will decide the action to be taken on the recommendation of the Lokpal and in the case of Prime Minister the Lok sabha will decide the action to be taken thereon. In case the allegation is not substantiated wholly or partly, the Lokpal will close the case. The Lokpal has not been given jurisdiction to enquire into theallegation against the President, the Vice President, the Speaker of LokSabha, the Chief Justice or any Judge of the Supreme Court, the Comptroller and auditor General, the Chief Election Commissioner or Election Commissioner, the Chairman or any Member of the Union Public Service Commission. The Institution cannot enquire into any matter concerning anyperson if the Lokpal or any member thereof has any bias in respect of theperson or matter. Lokpal cannot enquire into any matter referred for enquiry under the Commission of Enquiries Act. Besides, Lokpal cannot enquire into any complaint made five years after the date of offence stated in the complaint.

The salary, service conditions and removal from the office in the case of the Chairman will be the same as those of the Chief Justice of India and in the case of other member will be as those of the Judges of the Supreme Court. These provisions have been made to ensure the independence of the institution of Ombudsman. The Bill also provides that a member of the Lokpal cannot be a Member of Parliament or State legislature or a political party. It also provides that a member thereof should not hold any office of trust or profit or he should not carry on any business or practice any profession. The Bill also makes provision for the appointment of staff to assist the Lokpal.

The Lokpal can entertain a complaint from any person other than a public servant. The Bill has empowered the Lokpal to require a public servant or any other person to give such information as may be desired or to produce such documents, which are relevant for the purposes of investigation. He will have the powers of a Civil Court under the Civil Procedure Code, 1908 with respect:

i) to summon a person and examine him on oath;

ii) to require a person to disclose and produce a document;

iii) to take evidence on oath;

iv) to require any public document or recorded to be placed beforehim;

v) to issue commission for the examination of evidence anddocuments;

vi) any other matters as may be provided.

In August 1998 the Prime Minister Atal Bihari Bajpae presented the LokPal Bill in the Lok Sabha. The Prime Minister has also been broughtwithin the jurisdiction or power of LokPal. Under the Bill the LokPal wasempowered to make enquiries in the charges of completion broughtbefore, it against any Minister or Prime Minister or Member or eitherHouse of Parliament. However, he was not empower thereon the Bill tomake enquires in the charges of corruption against the President, Vice-President, Speaker of Lok Sabha, Comptroller and Auditor general, Chief Election Commissioner and other Election Commissioner, Judges of the Supreme Court and Members of the Union Public Service Commission.

Under this Bill the institution of Lok Pal was to consist of three members including its Chairman. Only the sitting or retired Chief Justice of India or any Judge of the Supreme Court could be appointed its Chairman while any sitting or retired Judge of the Supreme Court of Chief Justice of any High Court could be appointed its members. The appointment was to be made by President on the recommendation of the selection committee consisting of seven members. The Vice-President would be the Chairman of this selection committee.

The origin of Lokpal and Lokayukta in India

The issue concerning the ombudsman was for the first time raised in the Parliament in the year 1963. The idea of ombudsman came to India in the year 1959. Mr C.D. Deshmukh was the Chairman of the University Grants Commission and he made possible the establishment of a tribunal which would be completely impartial and would look into the matters and make proper reports on the complaints filed by the public in general. From this incident there have been continuous demands for the establishment of such a mechanism like an ombudsman in all the strata of the Indian society.

A Lokpal is a proposed ombudsman in India. The word is derived from the Sanskrit word "lok" (people) and "pala" (protector/caretaker), or "caretaker of people."The concept of a constitutional ombudsman was first proposed in parliament by Law Minister Ashoke Kumar Sen in the early 1960s. The first Jan Lokpal Bill was proposed by Shanti Bhushan in 1968 and passed in the 4th LokSabha in 1969, but did not pass through the RajyaSabha. Subsequently, 'lokpal bills' were introduced in 1971, 1977, 1985, again by Ashoke Kumar

Sen, while serving as Law Minister in the Rajiv Gandhi cabinet, and again in 1989, 1996, 1998, 2001, 2005 and in 2008. A crucial change with reference to the Lokpal Bill came in the year 2011 and it was in this year that the Lokpal Bill was passed and it eventually led to the establishment of the institution of Lokpal at the Centre and Lokayukta at State level. Another important feature of this Bill is that the form of the current Bill has been arrived at after it went through numerous recurring rounds of consultations and discussions with all the interested parties which also included the society at large. And it was only after such numerous deliberations and proper consultations that this Act eventually came into force on the 1st January 2014.

Lokayukta:

Though the birth of an Ombudsman in the Centre is still doubtful, but for the States it has become a cherished institution. The institution of Lokayukta is functioning in 13 States. These States are: Andhra Pradesh, Assam, Bihar, Gujrat, Himachal Pradesh, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan, Uttar Pradesh, Orissa, Punjab and Haryana. In Tamil Nadu and Jammu & Kashmir different investigating agencies are functioning [see the Tamil Nadu Public Men (Criminal Misconduct) Act, 1973 and the Jammu & Kashmir Government Servants (Prevention of Corruption) Act, 1975]. A similar proposal is pending in the State of Kerala [See Public Men (InvestigationAbout Misconduct) Bill, 1977]. Delhi has also established the institution of Ombudsman.

Working of Lokayuktas in the State:

The fact of the establishment of the institution of Ombudsman in States proves beyond doubt that the assumption of accepting the "system of responsible government" and the consequential "ministerial responsibility" as a means of providing continuous oversight over the administration is not wholly correct. A Lokayukta can be much more effective than a member of Parliament or State Legislature because of his freedom from political affiliation land because of access to departmental documental. The following tables would show the working of the Lokayuktas in various states.

Much information is not available about the types of complaints received by the Lokayuktas in various States but whatever information is available clearly indicates that the main areas of grievance include police action or inertia, prison torture, mala fide exercise of power and demand or acceptance of illegal gratification.

A survey of state enactments relating to Lokayukta indicates that there is no uniformity in the provisions of these enactments. In some states, grievances against administration are within the jurisdiction of Lokayukta, while in other states such grievances are kept out of its jurisdiction. In some enactments jurisdiction of Lokayukta extends to only a limited number of public functionaries while in others even vice-chancellors and Registrars of the Universities have been brought under its jurisdiction. In some states the Chief Minister has been brought within the purview of the Act, while in some cases he is not. Similar is the cases with the members of the legislatures. There is no uniformity in the qualification, emoluments. allowance, status and powers of Lokayukta. Only in some enactments power of search and seizure and power to take action *suo motu* have been given to Lokayukta. in some states budget of the Lokayukta office is charged on the consolidated funds of the state but in others

it id not done. Power to punish for its contempt is conferred upon the institution of Lokayukta in some states only. In the same manner only a few states have put independent investigative machinery at the disposal of Lokayukta. in some states Lokayukta has been given some other additional functions to perform also in order to make the institution cost effective. Besides these, there are various other matters where there is no uniformity in state enactments.

Institution of Lokayukta has not been given any constitutional status, hence,its existence and survival completely depends at the sweet-will of the state government. For political reasons State of Orissa issued an ordinance in 1992 for the abolition of Lokayukta institution. It for same reason Haryana repealed Lokayukta Act in 1999. It is tragic that in some states this institution was established not for prevention of corruption but for harassing and intimidating political opponents and for protecting the ruling elite. it is for this reason that the government are keen that the lokayukta should be their own nominee. Supreme Court had to quash the appointment of Lokayukta of Punjab, Justice H. S. Rai, because the Chief Justice of the High Court had not been consulted. In the same manner Justice vanish was removed from the office of Lokayukta of Haryana by repealing the Act because the Act had made removal of Lokayukta cumbersome by the outgoing government. This is a dangerous sign when a good institution is being allowed to be destroyed in party politics.

Whether the recommendations of the Lokayuta or Upa-Lokayukta are mere recommendations or have a binding effect is a question, which deserves serious consideration. The Apex Court in Lokayukta/Upa-Lokayukta v. T. R. S. Reddy32 (1997) 9 SCC 42.) opined that since the Lokayuktas/Upa-Lokayuktas are high judicial dignitaries it would be obvious that they should be armed with appropriate powers and sanctions so that their opinions do not become mere paper directions. Proper teeth and claws so that the efforts put in by them are not wasted and their reports are not shelved.

A Critical Analysis of the Lokpal and the Lokayukta Act

Section 4(1) of the Act reads as, "the Chairperson and members of Lokpal shall be appointed by the President and this appointment shall be compulsorily made in accordance with the recommendations which are based on the report given by the Selection Committee." This Selection Committee which will be giving its recommendation will be comprised of the Prime Minister, the Speaker of the House of People, Leader of the Opposition in the House of People, the Chief Justice of India or a Judge of the Supreme Court nominated by the Chief Justice and one eminent Jurist.

This specific provision has been heavily criticised. A Chief Justice, because of his credentials should never be subordinate to the Prime Minister and with respect to the appointment of the Jurist it is very crucial that it be done with extreme caution as it will definitely be a very important factor to prevent the Lokpal from becoming a mere toothless law; rather, it would become a rubber stamp of the party which is in power at that point of time. Section 4 (2) clearly states, that mere vacancy in the Selection Committee will not annul the appointment of a Chairperson or a member of Lokpal. It becomes very difficult to ascertain the real intent behind this provision. It is almost impossible to have a situation when the post of the Prime Minister, Lok Sabha Speaker, and Leader of Opposition in the Lok Sabha or the Chief Justice of India are vacant. Section 5 makes it very clear that the selection process must compulsorily

start before a minimum of three months from expiry of the term of the Chairperson or a Member of the Lokpal in order to make sure that there is no vacancy in the Selection Committee. It is the vacancy of the eminent jurist which has a proper legal backing. The appointment or vacancy of the eminent jurist is actually an important tool which the government possesses and it is with the help of this tool that the government is able to take control of the majority of the members who are in the executive, specifically in matters of a dissenting judicial member, the Lok Sabha Speaker and the Prime Minister being at one end. Such sections can be used to mould the circumstances accordingly and hence it is very ambiguous and should have been avoided.

Section 14 (1) (a) deals with the procedural aspect of the Act and it states that if there is any allegation of corruption which is made in the complaint filed by the aggrieved party with respect to any person who is or has been a Prime Minister, it can be taken into consideration and an enquiry can be made into by the Lokpal. However there is an exception to this provision and it excludes certain matters such as public order, international relations, atomic energy and space from the purview of this provision and given the important character of such matters it is fair to exclude these matters.

It is very astonishing to see that the procedure which is actually prescribed in the case of preliminary inquiry and the procedure which entails the issue of investigation provided under Section 20 are in complete contrast with one another and it will not be wrong to say that they are self-contradictory. Once there is a complaint which is received by the Lokpal, it has the authority to order a preliminary enquiry to look into the matter to see whether there exists any prima facie case or not or it may order the investigation to be carried on by any other agency, but it can only be done if it has been established that there is a prima facie case.

However the issue is that the proviso given in this section clearly states that before giving orders for any kind of investigation stated under Clause (b), it is the duty of the Lokpal to call for an explanation which is to be given by the public servant which is done with a view to ascertain whether there is a prima facie case or not. Therefore, it is compulsory for the Lokpal to seek the explanation of the public servant before ordering any sort of investigation.

The provision also states that "the seeking of explanation from the public servant before an investigation shall not interfere, with the search and seizure, if any, required to be undertaken by any agency" which is totally toothless as it is very clear from the section that unless the Lokpal himself has authorised the investigation by a particular agency, it is not legal for the agency to go for search and seizure under the law, and unless a proper explanation has been sought by the Lokpal from the public servant the Lokpal is not allowed to proceed with investigation and hence the Lokpal is bound to seek an explanation from the public servant. As it is clear from the section, there is a clear contrast between these provisions and it is very difficult to reconcile the two sections.

In the month of December 2013, the Lokpal and Lokayukta Act 2014 was finally passed by the Parliament. The main objective of this particular act was to put a strict control on the acts of corruption with the establishment of independent machinery in the Centre, which would be called Lokpal and it will be receiving complaints in connection with the corrupt activities by public servants and it will be the duty of the Lokpal only to ensure that proper investigation is

conducted into the matters and also in addition to this, wherever it is needed there must be effective prosecution.

Special courts have been established to ensure that all these processes are completed within a stipulated time period. It has also been made compulsory by the Act for every State to pass a law within a given time period of one year to establish a body of Lokayukta at the level of the State. However there is one problem with this provision and that problem is that the specific details in relation to the Act have been left completely on the State. To tackle the problems of corruption at the Central level this Act provides for the establishment of a body called the Lokpal which would be responsible to look into the matters of investigation, prosecution against the public officials.

The Act empowers the Lokpal to receive complaints regarding corruption against the Prime Minister, Ministers, Members of Parliament (MPs), and officers of the central government, and against functionaries of any entity that is completely or partially financed by the government with an annual income which is beyond a specified limit.

It is clearly mentioned in the Act that on receiving a complaint against any public official, officers from groups A, B, C or D being the sole exceptions, the Lokpal will be mandatorily bound to order an inquiry concerning the matter. The Lokpal has an option with respect to the execution of the enquiry, as in, whether the enquiry should be done by the Lokpal's own enquiry system and at the same time the Lokpal also has the option of directing the Central Bureau of Investigation or any other agency to do the inquiry. This inquiry is generally to be finished within sixty to ninety days and then a proper report needs to be submitted to the Lokpal.

When there are complaints which are specifically targeted towards the public servants of group A,B,C or D, then under such circumstances the matter will be referred to the Central Vigilance Commission for an initial inquiry and once the inquiry is done the report is to be submitted to the Lokpal if the matter is in reference to public servants belonging to group A and B but the CVC is authorised to continue with the CVC Act, 2003 if the matter is in connection with the public servants who are in group C and D.

Once the report which is submitted after the inquiry is received by the Lokpal, the Lokpal should make sure that the public servant is given a fair opportunity to present his side of the case and he must be given the right to be heard and after hearing the public servant if the Lokpal comes to the conclusion that on the face of it there is a case then the Lokpal can give orders for the investigation to be carried out by the CBI or can also order for some departmental inquiry into the same matter.

Usually the time period for the investigation to be finished is six months but under certain circumstances this time period of six months can be extended to one year also and once the investigation is complete, a proper report is to be submitted to the appropriate court and also a copy of the same report must be sent to the lokpal.

Selection Procedure for the members of Lokpal

The Lokpal consists of one Chairperson and eight members and these members are selected through the screening of two committees and these committees are, Selection Committee and Search Committee.

The Selection Committee has the core function of selection and final say in the matter and it comprises of five prestigious office-bearers as members, viz, the Prime Minister, the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Chief Justice of India (CJI) or a judge of the Supreme Court nominated by the CJI, and one eminent jurist, as recommended by the other four members of the committee. Before selection by the committee above, another group of seven members is constituted, called the Search Committee. An essential function of this committee is to shortlist a panel of eligible candidates for the post of Chairperson and members of the Lokpal, which is then put before the Selection Committee. The Selection Committee then decides upon this proposed panel by the Search Committee. A peculiar feature of the Search Committee and that of the Lokpal is that, half of the total members of each should be persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, minorities and women.

Superintendence of the functioning of the CBI

The Lokpal & Lokayukta Act provides that the Lokpal will have powers of "superintendence" over the CBI besides envisaging that the Lokpal has powers to enquire or investigate complaints under its jurisdiction, against any committee. But the real picture showcases otiose nature of such provisions of the said Act due to lack of instrumentalities that would affect the change proposed.

To some extent, the need for functional independence of the CBI has been catered to by a change brought forth in the selection process of its Director, by this Act. Earlier, the CBI Director was directly appointed by a committee, usually dominated by the ideologies and emissaries of the ruling government; but now he is to be selected through a four member Selection Committee comprising of the Prime Minister, the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Chief Justice of India (CJI) or a judge of the Supreme Court nominated by the CJI. Also, the Act provides that the transfer of CBI officers investigating cases referred by the Lokpal can be done only with the approval of the Lokpal.

However, such procedure only provides for a ten-per centre supervision of Lokpal over the CBI; as the Central Government still controls the budget, appointment of other officials of the CBI, and the receiving authority for the annual confidential reports of senior CBI officials, making them vulnerable to governmental pressure.

A plethora of suggestions were made by civil society groups and awareness NGOs to enhance the independence of CBI and efficiency of its investigation, all of which were discarded by the government to be included in the Lokpal & Lokayukta Act. Proposals like budget to be chargeable to the consolidated fund of India, appointment and removal of senior CBI officers to require Lokpal approval and make Lokpal the receiving authority of for annual confidential reports of officers working on cases referred by the Lokpal; so as to provide complete financial as well as administrative supervision of Lokpal over the CBI.

Limitations:

Power and Jurisdiction of the Lokayuktas in States

The controversial backlog of the Act involving State legislatures was the one that led to the rejection of a previous Bill which in turn brought a revised Bill providing an option of Article 252 to be invoked and option was given to the States to have their own Lokpal Act.

The present Act mandates the setting up of Lokayuktas in each state within one year along with the provision that State legislatures shall have the authority to determine the powers and jurisdiction of the Lokayukta. This makes the situation crystal clear and the gives rise to the apprehension of inefficient Lokayuktas with restricted jurisdiction in the fetters of the state government's stewards adversely affecting the poor and marginalized through raging corruption.

Laches or restrictions

Another limitation of the Act is envisaged in the following words that the Lokpal "shall not inquire or investigate into any complaint, if the complaint is made after the expiry of a period of seven years from the date on which the offence mentioned in such complaint is alleged to have been committed."

Though unreasonable delay by the plaintiff in instituting a suit or filing a complaint is a ground for dismissal but the gist of the matter is that cases concerned with lokpal are usually high-profile scams of the government bringing under its garb the highest office bearers which are discovered with proper evidence only after one regime ends (five years or even seven years) and a proposal is made that in the presence of concrete and corroborative evidence, complaints should be entertained and worked upon by the Lokpal to ensure justice and so that the purpose of the Act is served.

Supreme Court has pronounced several decisions regarding the institution of Ombudsman. This heading analyses various case laws related to the institution.

1. Common Cause, A Registered Society v. Union of India & Ors.

This case is a review petition to provide relief to pass an appropriate writ, order or orders to direct the Parliament to draft a Bill for the enactment of a legislation to establish the institution of Lokpal, or an alternative system similar to Ombudsman for checking and controlling corruption at public, political and bureaucratic levels. The Solicitor General brings to notice that efforts were made with no consensus on the proposed bill. It is a matter which concerns the Parliament and the Court cannot do anything substantial in this matter.

2. Justice K. P. Mohapatra v. Sri Ram Chandra Nayak and Ors.

Retired Judge of the High Court of Orissa was appointed as the Lokpal by the Governor of Orissa by issuing a notification. By a notification dated 26.11.1996, the Government of Orissa appointed the appellant as the Lokpal with effect from the date on which he was sworn in as such. After hearing the parties, the PIL was allowed and it was held that there was no effective consultation with the Leader of the Opposition and that the consultation under Section 3(1) of the Orissa Lokpal and Lokayukta Act was effective on reference to the Governor, Chief Justice and Leader of the Opposition. The Court observed that there was no

consultation with the Chief Justice with regard to the name suggested by the Leader of the Opposition. Therefore, appointment of the appellant as the Lokpal was void. That order is under challenge in this appeal.

In the context of the aforesaid functions of the Lokpal and the required qualification of a person who is to be appointed to hold such office, the word 'consultation' used in Section 3 is required to be interpreted. As

"(i) Consultation is a process which requires the meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.

(ii) When the offending action affects fundamental rights or is to effectuate built-in insulation as fair procedure, consultation is mandatory and non-consultation renders the action ultra vires or invalid or void.

(iii) When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action or order illegal.

(iv) When the opinion or advice or view does not bind the person or the authority, any action or decision taken contrary to the advice is not illegal, nor does it become void.

(v) When the object of consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken be put to the notice of the authority or the persons to be consulted; have the views or objections, take them into consideration, and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decisions thereon. In such circumstances it amounts to an action 'after consultation'."

Applying the principle enunciated in the aforesaid judgment, it is apparent that the consultation with the Chief Justice is mandatory and his opinion would have primacy. The nature of the consultation with the Leader of the Opposition is to apprise him about the proposal of selecting a person for the post and also to take his views on the said proposal. However, the opinion rendered by the Leader of the Opposition is not binding on the State Government and the Leader of the Opposition would have no power to recommend someone else for the said post.

3. Sri Justice S. K. Ray v. State of Orissa and Ors.

The appellant was the Chief Justice of the Orissa High Court and retired on 5.11.1980. He was appointed as the Lokpal on 17.8.1989 under Section 3 of the Orissa Lokpal and Lokayukta Act, 1970. Prior to his appointment as Lokpal, he had also functioned as the Chairman of the Commission of Enquiry into certain disputes involving the States of Tamil

Nadu, Kerala and some of their Ministers. Pursuant to the repeal of the Act by the Orissa Lokpal and Lokayuktas [Repeal] Ordinance, 1992, which came into effect on 16.7.1992, he ceased to hold the office of Lokpal. The said Ordinance was subsequently replaced by the Orissa Lokpal and Lokayuktas [Repeal] Act, 1995. The appellant filed a writ petition before the High Court contending that he had incurred certain liabilities in ceasing to hold the office being ineligible for further employment under the State Government or for any other employment under an office in any such local authority, corporation, Government Company or society registered under the Societies Registration Act, 1860, which is subject to the control of the State Government and which is notified by the Government in that behalf. He claimed-

- Compensation for loss of salary for the remainder period of his tenure as Lokpal.
- Pension with effect from 16.7.1992 as per Rule 7 of the Orissa Lokpal (Conditions of Service) Rules, 1984.
- Refund of the amount of pension deducted from his salary during the period 17.8.1989 to 16.7.1992, and
- Payment of encashment value of unutilised leave which accrued to him during the period 17.8.1989 to 16.7.1992.

Of the four claims made by the appellant, the High Court held that the appellant was not entitled to compensation for loss of salary for the remainder period of his tenure as Lokpal as well as for payment of pension with effect from 16.7.1992. However, insofar as the encashment of value of unutilised leave and the deduction of amount of pension during the period from 17.8.1989 to 16.7.1992 were concerned, appropriate reliefs were given.

4. In Re: Under Article 317 (1) of the Constitution of India for enquiry and report on the allegations against Dr. H.B. Mirdha, Chairman, Orissa Public Service Commission.

Reference was made by the State Government to the Lokpal, Orissa. The Lokpal in his order observed that in view of the provisions of Section 21 of the Orissa Lokpal and Lokayuktas Act, 1985, the Lokpal was not authorised to investigate into the actions taken by the Chairman or a member of the OPSC.

5. State of Gujarat and Anr. v. Hon'ble Mr. Justice R .A. Mehta (Retd.) and Ors.

Writ Petition was referred by two Judges challenging appointment of Respondent No. 1 to the post of Lokayukta. Contention rose whether appointment of Respondent No. 1 could be held to be illegal. In the State of Gujarat, post of Lokayukta had been lying vacant for a period of more than nine years. The Governor had misjudged her role and had insisted that under Gujarat Lokayukta Act, 1986, Council of Ministers had no role to play in the appointment of Lokayukta and that she could so fill it up in consultation with the Chief Justice of Gujarat High Court and the Leader of Opposition. Appointment of Lokayukta could be made by Governor as Head of State only with the aid and advice of the Council of Ministers and not independently as a statutory authority.

The recommendation of the Chief Justice suggested only one name in place of the panel of names and was in consonance with the law laid down by the Court and there was no cogent

reason to not give effect to said recommendation. Objections raised by the Chief Minister have been duly considered by the Chief Justice as well as by the Court and none of them were tenable to the extent that any of them might be labelled as cogent reasons for the purpose of discarding the recommendation of a name for appointment to the post of Lokayukta. Thus, the process of consultation stood complete and in such a situation, the appointment could not be held to be illegal and the appointment of the candidate was held to be legal, so that the process of consultation for appointment was completed.

6. Justice Chandrashekaraiah (Retd.) v. Janekere C. Krishna and Ors. etc.

The matter in dispute was the appointment of Upa-Lokayukta. In the matter of appointment of Upa-Lokayukta the advice tendered by the Chief Minister will have primacy and not that of the Chief Justice of High Court and others. Under Karnataka Lokayukta Act, 1984 consultation is mandatory, Section 3(2)(a) and (b) when read literally and contextually admits no doubt that the Governor of the State can appoint Lokayukta or Upa-Lokayukta only on the advice tendered by the Chief Minister and that the Chief Justice of the High Court is only one of the consultees and his views have no primacy. The Chief Minister is legally obliged to consult the Chief Justice of the High Court and other four consultees, which is a mandatory requirement. The various directions given by the High Court, is beyond the scope of the Act and the High Court has indulged in a legislative exercise which is impermissible in law. The Chief Minister committed an error in not consulting the Chief Justice of the High Court in the matter of the appointment of Upa-Lokayukta. The appointment of Upa-Lokayukta is in violation of Section 3(2)(b) of the Act since the Chief Justice of the High Court was not consulted nor was the name deliberated upon before advising or appointing him as a Upa-Lokayukta, consequently, the appointment as Upa-Lokayukta cannot stand in the eye of law and he has no authority to continue to hold the post of Upa-Lokayukta of the State. Appointment was declared invalid as the authority did not follow mandatory provisions.

Countries with the Presence of the Ombudsman

The International Ombudsman Institute (IOI), established in 1978, is the only global organisation for the cooperation of more than 150 Ombudsman institutions. In addition to its periodic conferences the IOI fosters regional and international information exchange. The International Ombudsman Institute is organised in regional chapters in Africa, Asia, Australasia & Pacific, Europe, the Caribbean and Latin America, and North America. The organisation has three working languages, English, French and Spanish.

When we look throughout the world institution of ombudsman exist in countries which are thrown light on few developed and developing countries where the institution is in existence and is flourishing.

- Sweden: It comprises 4 member offices comprising 1 chief and 3 members appointed by the Swedish Parliament for 4 years. It can take suo motu action with jurisdiction extending to all state authorities and institutions. It has no jurisdiction over any member of Parliament. Recommendations made by it are not binding.

- New Zealand: This is a post appointed by the Governor-General. He oversees the action of the Centre and local government agencies and ministries can initiate action based on

oral complaint. He has the power to investigate independently and submit his recommendation to the concerned department head. If no action is taken, the complaint is forwarded to the House of Representatives.

- UK: Here the ombudsman is called Parliamentary Commissioner. It is a position appointed by the Prime Minister for a period of seven years. No suo motu action can be initiated. Action can only be taken on complaints received on approval by a member of parliament with jurisdiction extending to ministers and bureaucrats. There is no specific eligibility for selection.
- Finland: He is a legal expert appointed for a term of 4 years. Legality of the government, ministries, and the President along with courts and employees of public bodies are looked into by the Ombudsman. It has the power to prosecute, reprimand, guide and rebuke officials. Legislative and private company's affairs are outside its jurisdiction.
- Hong Kong: Sends recommendation to the head of the department concerned and then to legislative council in case of non- redressed. Opinion prevalent in the public that more powers should be enshrined on the ombudsman.
- Indonesia: It is elected by the House of Representative based on nominations by the President of the Country. Its jurisdiction includes both public offices and private sector involved in administering public service.

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 maters falling within the scope of the State Governments. Where considered suitable, such complaints are brought to the notice of state vigilance commissioners concerned for necessary action. Similarly, they forward complaints received by the State Vigilance Commission in regard to matter falling within the jurisdiction of the Central Government, to the Central Vigilance Commission for appropriate action. The Central vigilance Commission has the following alternatives to deal with these complaints:

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

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

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

It had been given jurisdiction and power to conduct an enquiry into transaction in which publics servant are suspected of impropriety and corruption including misconduct, misdemeanor, lack of integrity and malpractices against civil servants. The Central Bureau of Investigation (CBI) in its operations assisted the Commission. The CVC has taken a serious note for the growing preoccupation of the CBI with work other than vigilance. Thus when the CBI is extensively used for non-corruption investigation work such as drug trafficking, 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 governancethe Apex Court recommended measures of far-arching 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 movement issued an ordinance on August 25, 1998. However, this measure had diluted the views of the Supreme Court by pitting one view against the other. Therefore, what ought to have been visualized as a reformative step had begun to seen as a cleaver bureaucratic legalese. It was when the Supreme Court expressed concern over these aspects of the Ordinance in the hearing relating to its validity that the government decided to amend the Ordinance and thus, on October27, 1998 **Central Vigilance Commission (Amendment) Ordinance** was issued. The Commission was made a four-member body and its membership was opened to other besides bureaucrats. In the same manner the single directive of prior permission was deleted and the membership of Secretary Personnel, Government of India was deleted.

It is too early to comment on the functioning of the reconstituted statutory Central Vigilance Commission but one thing is certain that no commission can root out corruption, which has sunk so deep in the body politic. It can only act as a facilitator and propellant.

Central Bureau of Investigation

Apart from vigilance organization in every ministry and department, the centralized agency for anti-corruption work viz. the Central Bureau of Investigation, which functions administratively under the Department of Personnel and administrative Reforms. The latter formulates all policy matters pertaining to vigilance and discipline among public servants. It also coordinates the activities of various heads of departments and functions as the nodal authority in the matter of administrative vigilance. It also deals with

(i) vigilance cases against the officers belonging to the Indian Administrative Service and the Central Secretariat Service (Grade-I) and above of the service); and administrative matters connected with the Central Bureau of Investigation and the Central Vigilance Commission as also with the policy matters relating to powers and functions of the Commission. The role of the Central Bureau of Investigation may be shortly described as follows:

1) It can take up investigations against the higher levels and in complex cases.

2) I t is resourceful and can get material from various sources which may not be available to normal departmental machinery.

3) Even if its cases in the early year proved to be weak, it is now encouraging to see that the Central Bureau of Investigation takes up only those cases for prosecution which are sound and strong. The most important need in the interest of efficiency and progress is to fix a time schedule for a case to demarcate clear fields of responsibility between the Central Bureau of Investigation and the Central Vigilance commission.

UNIT – V

ADMINISTRATIVE TRIBUNALS AND PUBLIC UNDERTAKING

Administrative Tribunals

Administrative Adjudication and Administrative Tribunals:

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.

The main characteristics of Administrative Tribunals are as follows:

- Administrative Tribunals is the creation of a statute.
- An Administrative Tribunals is vested in the judicial power of the State and thereby performance quasi-judicial functions as distinguished form pure administrative functions.
- Administrative Tribunals is bound to act judicially and follow the principles of natural justice.
- It has some of the trapping of a court and are required to act openly, fairly and impartially.
- An administrative Tribunal is not bound by the strict rules of procedure and evidence prescribed by the civil procedure court.

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 Ist 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, Madhaya Pradesh and Tamil Naidu, 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, deat 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

a) Sixty five, in the case of Chairman or vice-Chairman,
b) 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 ofthe 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 ofAdministrative Tribunals and regarding adjudication of service matters, one would have a remedy only before one of the Tribunals. This is in contrast to the French system of administrative courts, where there is a hierarchy of administrative courts and one can appeal from one administrative court to another. But in India, with regard to decisions of the Tribunals, one cannot appeal to an Appellate Tribunal. Though Supreme Court under Article 136, has jurisdiction over the decisions of the Tribunals, as a matter of right, no person can appeal to the Supreme Court. It is discretionary with the Supreme Court to grant or not to grant special leave to appeal.

The Administrative Tribunals have the authority to issue writs. In disposing of the cases, the Tribunal observes the canons, principles and norms of 'natural justice'. The Act provides that "a Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure 1908, but shall be guided by the principles of natural justice.

The Tribunal shall have power to regulate its own procedure including the fixing of the place and times of its enquiry and deciding whether to sit in public of private". A Tribunal has the same jurisdiction, powers and authority, as those exercised by the High Court, in respect of "Contempt of itself" that is, punish for contempt, and for the purpose, the provisions of the contempt of Courts Act 1971 have been made applicable. This helps the Tribunals in ensuring that they are taken seriously and their orders are not ignored.

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.

B. Public Undertaking

Object, Importance, Characteristics, Classification, Reason for the growth - working of Public Corporations-Rights, Duties and Liabilities of Public Corporations-Controls over Public Corporations, Government Control, Parliamentary Control, Judicial Control, Public Control-Role of Ombudsman in Public Undertaking.

Public Undertaking:

With the steady increase in state functions corresponding to the change in the philosophy of state activity from *laissez faire* to social welfare, it is generally an accepted notion in modern states, especially the developing, that ownership of most of the natural resources and capital heavy industries should increasingly rest in the state. In developing countries, state intervention in economic and industrial enterprises has become almost compulsory for various reasons. The major reasons for state intervention in economic activity are:

- to build up an industrial infrastructure and raise productivity;
- increase employment and general standard of living by accelerating national growth and

  development;
- to render needed services and cater to public utilities like power, transportation and
- communication which are capital heavy investments and strictly unprofitable under private enterprises;
- to provide sources of credit to finance agricultural and industrial product ional and trade; and
- to reduce dependence on foreign capital and aid in the long run.

Most developing countries suffer from acute lack of capital, entrepreneurial skills and regional imbalances. The two main aims of all developing societies are to raise levels of productivity and strive towards creation of an equalitarian and just social order. The immensity of the socio-economic problems of these countries makes state intervention inevitable and in fact desirable. The state becomes a vital partner in industrial development and promotion of industrial enterprises both as a matter of national policy and to ensure public control over certain sectors of the economy.

In India, the Industrial Policy Resolution of 1956 has laid down the basic principle that will govern the state's approach towards industrial development. The approach derives its base from the Directive Principles of State Policy contained in the Constitution and from the adoption by Parliament in December 1954 of the socialist pattern of society as the objective o

four social and economic goals and laws. The Industrial Policy Resolution of 1956 stated that the need for rapid planned development required that all industries of basic and strategic importance, or in the nature of public utility services, should be in the public sector.
Consequently, their number has steadily increased with every plan, and by the end of Third Plan period, various State governments owned or held majority shares in about 175 Public Undertakings, with an estimated total investment of nearly Rs. 2,000 crores. Public enterprises in our country cover a range of activities that is at once vast and varied. They are engaged: directly or indirectly in advancing loans; regulating trade; organizing promotional land development activities; manufacturing heavy machinery, machine tool; instruments, electrical equipment, chemicals, drugs and fertilizers; prospecting and drilling for oil laden refining crude oil; operating air, sea land road transport; mining of coal and mineral ores; smelting and casing of steel and other metals; production and distribution of mills, trading, markets, hotels, etc.

A public undertaking, for purposes of examination by the Estimates Committee, was defined by the Speaker of the Lok Sabha as follows, "Public Undertaking means an organization endowed with a legal personality and set up by or under the provisions of a statute for undertaking on behalf of the government of India an enterprise of industrial, commercial nature or special services in the public interest and possessing a large measures of administrative andfinancial autonomy."

This definition obviously is concerned only with the public undertakings under the union Government and leaves out of account public undertakings in the States. A more comprehensive definition has been given by S. S. Khera, "By State economic activity carried on by the central government or by a state government or jointly by the central government and state government, and a in each either solely or in association with private enterprise so long as it is managed by a self-contained management."S. S. Khera gives six good reasons to justify the Government's playing an active role in economic development:

i) Modern economy has to be a planned economy, and it has come to be widely recognized and the prejudice against it is fast dying out even in the socalled capitalist or free-economy countries. Planning is of particular significance to an under-developed country like India, where a lot has to be achieved with limited resources and within a limited time. Modern planned economy has, thus, become inevitable; and in a planned economy, the national responsibility of planning is something that cannot be assumed or discharged by any authority other than the Government, which the people have elected to office to look after the affairs of the country.

ii) In a country like India where the industrial base has not been built up sufficiently, and the capital investment funds still need a great deal of building up and garnering, state intervention becomes imperative.

iii) Government, such as, the present Government in India, which is committed to the objective of a socialist society, is increasingly compelled to enter directly into industrial and commercial activity.

iv) A Government politically committed to certain-social objective, may well decide that in order to achieve certain minimum per capita income it may be necessary to set up, to evolve and to operate a pattern of prices, subsidies, incentives or disincentives of different kinds in order to influence the consumption pattern

v) By active participation in business; the Government has sought to tap gold mines of industry and commerce for the funds needed to discharge the new and heavier burdens it now shoulders.

vi) Large-scale participation by government in industrial and commercial activity is bound to augment the national dividend.

Organization of Public Undertakings: There is no one ideal form of organizing public enterprises In general, three main forms of organization, each with significant variations, are now utilized for the administration of public enterprises, namely Departmental Concerns, Government Companies and Public Corporations.

1. Departmental Concerns. Initially, no distinction was drawn between public enterprises and traditional government functions. Thus, the oldest state enterprises, such as the postal, telegraph and telephone service, and railways were organized financed and controlled as any other government department. This form of organization is still commonly employed when the main purpose of the enterprise is to provide revenue.

2. Government companies. The Joint-Stock Company form has been used extensively in recent years in respect of manufacturing activities in the public sector. Both, the Central and the State Governments seem to favor it. This type is also known as mixed ownership companies. It should be remembered that the form does not describe a legal or organizational pattern but an economic concept. It includes various forms of joint enterprises shared between the State and private enterprises. The latter may be national or foreign. They may represent the shares of individual firms participating in the venture or the subscription of members of the public at large.

According to the Report of the Study Team on Public Sector Undertakings (of the Administrative Reforms Commission) central and provincial characteristics of this form are as follows;

a) It has most of the features of a private limited company;

b) The whole of the capital stock or 51 per cent or above of it, is owned by the Government;

c) All the directors, or a majority of them, are appointed by the Government depending upon the extent to which private capital is participating in the enterprise;

d) It is a body corporate, created under a general law, viz., the Companies Act;

e) It can sue and be sued, enter into contract, and acquire property in its own name;

f) Unlike the public corporation, it is created by an executive decision of the Government without Parliament's specific approval having been obtained, and its Articles of association, though conforming to an Act are drawn up and are revisable by the government;

g) Its funds are obtained from the Government and, in some cases, from private shareholders, and through revenues derived from sale of its goods and services;

h) It is generally exempt from the personnel, budget, accounting and audit laws and procedures applicable to Government departments; and

i) Its employees, excluding the deputations, are not civil servants.

3. **Public Corporations**. During the last 40 years or so, a new form of organization for managing public enterprises has been evolved in the shape of public corporation, which has been described by W. A. Robson as "The most important constitutional innovation of this century." The principal characteristics of the Public Corporation, according to the Rangoon Seminar Report, are as follows;

i) It is wholly owned by the State.

ii) It is generally created by, or pursuant to, a special law defining its powers, duties and immunities and prescribing the form of management and its relation to established departments and ministries.

iii) As a body corporate, it is a separate entity for legal purposes and can sue and be sued, enter into contracts and acquire property its own name. Corporations conducting business in their own names have been generally given greater freedom in making contracts and acquiring and disposing of property in its own name. Corporations conducting business in their own names have been generally given greater freedom in making contracts and acquiring and disposing of property than ordinary government departments.

iv) Except for government appropriations to provide capital or a to cover losses, a public its funds from borrowing either from the Treasury or the public, or from revenues derived from the sale of goods and services. It is authorized to use and re-use its revenues.

v) It is generally exempted from most regulatory and prohibitory statues applicable to expenditure of public funds.

vi) It is ordinarily not subject to the budget, accounting and audit laws, and procedures applicable to non-corporate agencies.

vii) In the majority of cases, employees of Public Corporations are not civil servants, and are recruited and remunerated under terms and conditions which the Corporation itself determines.

In view of the above discussion it becomes clear that these public corporations are treated both as public authorities and as commercial concerns. The principal benefits of the Public Corporation as an organizational device are its freedom from unsuitable government regulations and controls and its high degree of operating and financial flexibility. In this form, one discerns a balance between the auto my and flexibility enjoyed by private enterprise and the responsibility of the public as represented by elected members and legislators. In the famous word so president Franklin D. Roosevelt, the Public Corporation "Is clothed with the power of government but possessed of the flexibility and initiative of a private enterprise."

However, this form, in its turn, has given rise to other problems, namely the difficulty of reconciling autonomy of the corporation with public accountability. That the Public Corporations cannot be made immune from ministerial control land direction is universally conceded. But how to do it without infringing their corporate autonomy has come into direct conflict with the urgent need for bringing the operations of this Corporation into harmony with related actions of the government. Vacuum Removal from the so-called political pressures may mean, in fact, that the significant political power is being placed in the hands of a small unrepresentative, and in extreme cases, possibly even a self-perpetuating group controlling the Public Corporations.

To sum up, each of these three types of organization has its own strong and weak points. Thus, A. D. Gorwala has held the views that the departmental management was in many ways a direct negation of the requirements of autonomy and militated against flexibility and initiative, that is sound "State enterprise tradition" It must, therefore, be a rare exception to be resorted to when dictated by the need of secrecy, strategic importance, etc. He, generally, favored the Company form for substantially commercial functions because of great flexibility. According to him, Corporation form should be used when the undertaking was to discharge what in effect were the extensions of government functions, for example, broadcasting, irrigation, etc.

According to the administrative Reforms Commission's Study Team Report, among all the three forms in which public undertakings have been organized, the Departmental form is one that is generally regarded suitable only for undertakings that provide services affecting the totality of the community or the security of the country. A Departmental form cannot provide the flexibility and autonomy that are needed for commercial and industrial enterprise. Such undertakings require a high degree of freedom, boldness and enterprise in management and must be free from the circumspection and cumbersome, time consuming and vexatious procedures of departmental administration.

Both the Company form and the Public Corporation form can provide for this flexibility and autonomy. It is not, therefore, all types of understandings and under all circumstances. The choice will have to depend on the nature of the undertakings, its importance, its magnitude and investment, and the role that it is expected to play in economic development, capital formation and provision of goods and services. What is crucial is the vigilance and responsibility with which autonomy is exercised and the meticulousness and spirit of co-operation with which autonomy is respected.

Some Problems for Public Corporation: Public Corporation has succeeded in solving a number of problems. At the same time, however, it has created some others. Some of the more pressing problems confronting the Public Corporations are:

(a) How should we reconcile autonomy of the Public Corporations with public accountability, i.e., accountability to Parliament?

(b) What should be the extent and nature of ministerial control?

(c) Should there are a Standing Parliamentary Committee on public Corporations?

The supreme considerations underlying the choice of Public Corporations in preference to other forms of state enterprises are autonomy of the Corporations must be scrupulously honored; the latter cannot be made wholly free from responsibility to Parliament or from ministerial control. They are accountable to Parliament at least on those matters, which lie under the control, direct or indirect, of the Minister. Parliaments certainly entitled to discuss the general policies of the Public Corporations, and the economy and efficiency of their administration. It should not, however, discuss day-to-day matters and details of administration. The need for reconciling autonomy of the Corporations with the accountability to Parliament has been repeatedly emphasized . These public corporation are treated both a public authorities and as commercial concerns. As public authorities they are subject to the normal controls of constitution and administrative laws to supervision by the minister, who in turn is answerable to Parliament, and by Courts through the control, which they exercise over administrative authorities.

The test for determining the constitutional position of a Public Corporation as either a Department of Government or as a servant of the State may be summarized as below:

i) If the statute in terms answers the question (as it did in the case of the Central Land Board under the Company & Town Planning Act, 1917), the need for any further enquiry s obviated.

ii) In the absence of such statutory declaration or provision, the intention of Parliament as to be gathered from the provisions of the statute constituting the Corporation. Some Attributes of Public Corporation

Vicarious Liability: On principles of vicarious liability, corporation is liable to pay damages for wrongs done by their officers or servants. They are liable even for tort requiring a mental element as an ingredient, e.g. malicious prosecution. In India, local authorities like Municipalities and District Boards have been held responsible for the tort committed by their servants or officers.

Grant of exemption to government companies from the application of a statutory provision does not fall foul of Art. 14 and is not discriminatory as government companies stand in a different class altogether and the classification made between government companies and others is a valid one. The Supreme Court has advanced the following justification for this view. ***"As far as Government undertakings and companies are concerned, it has to be held that they form a class by themselves since any profit that they may make would in the end result to the benefit to the members of the general public... The role of industries in the public sector is very sensitive and critical from the point of view of national economy..."***

The public corporation (statutory corporation) is a body having an entity separate and independent from the Government. It is not a department or organ of the Government. Consequently, its employees are not regarded as Government servants and therefore they are not entitled to the protection of Article 311.

A public corporation is a person but not citizen. And therefore it can claim the benefit of the Fundamental Rights.

It is to be also noted that a public corporation is included within the meaning of State under Article12. and therefore the Fundamental right can be enforced against it
The public corporation or statutory corporations are included with the meaning of other authorities and therefore it is subject to the writ jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226.

For the validity of the corporation contract, the requirements of a valid contract laid down in Article 299 are not required to be complied with.

The employees of a public corporation are subject to the labour laws.

The Government control over the financial matters relating to the public corporation provides teeth to the governmental control of the public corporations. Generally the Government is vested with the powers of controlling the borrowing expenditure and capital formation. For example, the Oil and Natural Gas Commission Act, 1956 provides that the Commission can borrow money with the prior approval of the Central Government. Similarly, the Damodar Valley Corporation Act provides that the Corporation can borrow money with the prior approval of the Central Government. The statute creating the corporation may require the corporation to submit to the Government its budget and programme for the next year.

To sum up we can say that public enterprise in the near future will be subjected to the scrutiny of the consumers and Courts. Because the quality of services rendered by these enterprises to the public is a matter, which concerns consumers in many ways. It is but natural, therefore, that disputes arises between the enterprises and their employees, or between the enterprises and the public also, the courts are not averse to extending their supervisory role over these enterprises in some respects.

The Supreme Court has recently underlined the principle of public accountability of these enterprises (with reference to the life Insurance Corporation) in the following words:" Corporation which carries on the business of life insurance in the shape of a statutory monopoly is answerable to the people of India with whose funds it deals and to whose welfare it clams to cater.

Control over public Undertakings:

Public Sector and Accountability Public sector enterprises are created and owned by the State and therefore they are subject to parliamentary supervision and control. PSUs have an obligation towards the people via parliament to report on the management resources entrusted to them. This obligation of PSUs towards the public is known as public accountability. With a massive investment of public funds in public enterprises, whether controlled by the centre or the state, the principle of public accountability acquires special significance. This fact was well-recognized by the legislature of our country when in the Companies Act, 1956, they provided for a well-thought out framework of control and audit of public enterprises under the Companies Act as a scheme of dual audit and also made the enterprises accountable to the parliament or the state legislature as may be appropriate. The dual scheme of audit envisaged in the Companies Act for public sector enterprise covers the audit requirements form two angles. As the enterprises would, to a large extent, be operating with normal commercial objectives, the normal statutory audit by professionally qualified chartered

accountants was made essential along with the audit by the Comptroller and Auditor General of India to look into propriety, regularity, economy, efficiency and effectiveness of transactions of the enterprise.

Government is one of the important agencies that exercise control over the managers of public enterprises. It possesses sufficient power and control over the PSUs. In the case of department undertakings the government has got direct control over every activity of them. In the case of statutory corporations, the statutes, and in the case of government companies the articles of association provide adequate powers to the government to have necessary control over them. The **minister** of respective ministry exercises control over the PSUs through the issue of general policy decisions and specific directives, through participating in the management, appointing the board, etc. In India, the ministerial control is both formal and informal. They interfere not only in policy matters but also in the day-to-day affairs of the organization. The degree of ministerial control over the PSUs depends on many factors such as the government attitude towards economic planning, the nature of the political system, personality of the minister, mode of financing, etc.

Parliament, which represents the public in a democracy, has the ultimate control over the PSUs in India as they are sanctioned by the parliament. But the degree of control over PSUs by the parliament varies in different form of organizations. In the case of departmental forms of undertakings the parliament has full control over them. But in the case of public corporations the degree of control is less, as the parliament has to act with certain restraints within the statute. In the case of government companies the degree of parliamentary control is lesser. Usually government companies are created by an executive action rather than with the parliament sanction. The parliament gets an opportunity only at the time of demands for grants or when the balance sheet and annual reports are placed before the House.

Parliamentary Control:

Accountability also means the responsibility of the administration to parliament for public expenditure. The parliament adopts two methods for controlling expenditure – control before the money is appropriated and the control after the money is appropriated. In the case of the PSUs the first method that is before appropriating money is not possible and so for this reason the accountability of the PSUs to the parliament has assumed special significance. According to Articles 112 to 117 of the Indian Constitution, there is a 4-stage review and approval of financial proposals in the parliament. They are: - (i) a general discussion on the budget (ii) discussion and voting of demands for grants (iii) consideration and passing of the appropriation bill and (iv) consideration and passing of the finance bill.

The Committee on Public Undertaking:

Due to the large number of PSUs we have in India, the Ministers and the Members of the Parliament do not have an opportunity to discuss the affairs of the PSUs in the Parliament. The demand for setting up a separate committee on public undertakings came in the parliament in 1953. The Committee on Public Undertakings (COPU) came into existence on 1st May 1964 by combining the functions of Public Accounts Committee and Estimate Committee. The Committee has to examine and the reports and accounts of the PSUs

including the reports of the C & AG. It has also to see that the affairs of the undertakings are being managed in accordance with sound business and commercial principles. But they do not examine matters of government policy or day-to-day affairs of the concern. Since it combines the advantages of Estimate and Public Accounts Committee, the Committee has been found to be providing a lot of valuable and useful material on PSU's operation. However, the Committee has been able to examine only a portion of the reports and accounts submitted to it till now. But the committee was able to present the problems and facts about PSUs before the parliament in a frank and forthright manner. It is true, the committee suffers from several handicaps but this is largely due to our parliamentary system, which is based on the Westminster Model.

There are a number of agencies of control over public enterprises in India such as (1) government (2) ministry (3) parliament (4) statutes, articles and rules (5) Comptroller and Auditor General of India, and (6) some special agencies.

Statutes, articles and rules are the basic instruments of control over PSUs in the case of departmental undertakings. The government has direct, automatic and continuous control over them. The enabling statutes, in the case of public corporations, lays down the guiding principles and limits within which decisions are to be taken.

Comptroller and Auditor General (C&AG) is the supreme authority in India for applying audit control. The powers vested in him are different with regard to different forms of organization. In the case of departmental undertakings he is vested with the constitutional powers of audit and is the exclusive authority in this regard. In the case of statutory corporations it is the enabling legislation which provides the agency responsible for the audit.

There is not much uniformity in respect of various Acts related to different statutory corporations with respect to audit control. There are also some special agencies, which are also responsible for controlling the activities of PSUs directly as well as indirectly. The prominent ones are the Consumers Council, Advisory Committee, Public Relations and the Press. These special agencies are a force that should be respected and heard by the PSUs in their functioning. They can interfere and even control the activities of the PSUs where the Acts and Statutes are silent. Another device of control may be expert reviews, management audits, investigations, and studies of the performance of individual enterprises. They may bring to light various discrepancies and put forward suggestions in the light of studies or investigations carried out. After every five or six years there could be such studies sponsored by the Management Boards. Their objective would be find out whether the overall performance has been satisfactory; whether the enterprise is in a sound state of health; whether its capital structure is satisfactory; whether its products are acceptable and have a bright future; and whether its personnel have job satisfaction and are adequately motivated within the organization.

MODEL ANSWER -ADMINISTRATIVE LAW

DURATION:- 2 1/2 hours **MAX MARKS:70**

Part A answer any 2 **(2x12=24)**

Q.No.1.Define Administrative law. Explain the nature and scope of administrative law.

INTRODUCTION

Administrative law is the most outstanding legal development arising from confrontation with the complex problems of socio-economic justice in the welfare state. The most significant and outstanding phenomenon of the 20th century has been the establishment of welfare state in democratic countries.

It does not however mean that there was no administrative law before the emergence of welfare state. The truth is that administrative law is based on the assumption that there is a politically organized society and from that assumption certain rules relating to the control of administration emerge, which are called administrative law.

DEFINITION:-

IVOR JENNINGS:-

Administrative law is the law relating to the administration. It determines the organisation, powers and duties of the administrative authorities.

This is most widely accepted definition.

- It does not distinguish administrative law from constitutional law; and
- It is a very wide definition.
- It does not include the remedies available for the aggrieved person.

WADE:-

Administrative law is the law relating to the control of governmental power' according to him the primary object of administrative law is to keep powers of the government within their legal bounds so as to protect the citizens against their abuse. The powerful engines of authority must be prevented from running amok.

K.C.DAVIS

Administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action.

NATURE AND SCOPE OF ADMINISTRATIVE.

Administrative law deals with the powers of the administrative authorities, the manner in which the powers are exercised and the remedies which are available to the aggrieved persons, when those powers are abused by these authorities.

The main object of the study of administrative law is to unravel the way in which these administrative authorities could be kept within their limits so that the discretionary powers may not be turned into arbitrary powers.

Administrative law is concerned with the operation and control of administration, with emphasis on function rather than on structure. It deals with administrative process and its control.

Schwartz divides Administrative Law in three parts.

1. The powers vested in administrative agencies;
2. The requirements imposed by law upon the exercise of those powers and
3. Remedies available against unlawful administrative actions.

Now the state is not merely a police state, exercising sovereign functions, but as a progressive democratic state, it seeks to ensure social security and social welfare for the common man, regulates private enterprise, exercises control over the production, manufacture and distribution of essential commodities, starts many enterprises, seeks to achieve equality for all and ensure equal pay for equal work.

It improves slums and looks after health and morals of people.

It takes all the steps which socio-economic justice demands. All these developments have led to administrative explosion which has widened the scope and ambit of administrative law.

The concept of administrative law has assumed great importance.

It is a branch of law which has witnessed remarkable advances in the welfare state as it being increasingly developed to control abuse or misuse of governmental power and keep the executives and its various instrumentalities and agencies within the limits within the limits of their power.

CONCLUSION

Welfare state is an administrative state which exercises public power for achievement of socio-economic purposes and performs numerous functions.

Hence it can be stated that the various functions of the states has given the scope for the evolution of administrative law.

Q.No.2. Explain the concept of "Rule of Law" according to A.V.Dicey.

RULE OF LAW:-

The entire basis of Administrative Law is the doctrine of the rule of Law. Sir Edward Coke, Chief Justice was the originator of this concept.

He stated that 'In a battle against the King, he maintained successfully that the king should be under God and the Law, and he established the Supremacy of the Law against the Executive.

Dicey developed this theory of Coke in his classic work "The Law and the Constitution' published in the year 1885.

Meaning :- The term 'rule of Law' means the principles of legality which refers to a government based on principles of law and not of men.

According to Dicey:- the rule of law is one of the cardinal principles of the English system. He gave three meanings to the doctrine.

1. Supremacy of law;
2. Equality before law and
3. Predominance of legal spirit.

1. **Supremacy of Law:-**

- Dicey states that rule of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power or wide discretionary power.
- It excluded the existence of arbitrariness, of prerogative power or even wide discretionary authority on the part of government.
- According to him the English men were ruled by law and law alone.

2. **Equality before law:-**

- Dicey says that there must be equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.
- In England, he maintained, all persons were subject to one and the same law, and there were no extraordinary tribunals or special courts for officers of the government and other authorities.
- He criticized the French legal system of 'droitadministratiff'.
- According to Dicey, exemption of civil servants from the jurisdiction of the ordinary courts of law and providing them with the special tribunals was the negation of equality.

3. **Predominance of legal spirit:-**
    - The general principles of the constitution are the result of judicial decisions of the courts in England.

- In many countries rights are guaranteed by a written constitution;
- In England it is not so.
- Those rights are the result of judicial decisions in concrete cases which have actually arisen between the parties.
- The constitution is not the source but consequence of the rights of the individuals.
- The rights in a written constitution can be abrogated at any time by amending the constitution.

MERITS:-

DICEY'S THEORY:- has its own advantage and merits.

The doctrine of Rule of Law proved to be an effective and powerful weapon in keeping administrative authorities within their limits.

It a test to all administrative actions.

This doctrine is almost accepted by all legal system as a constitutional safeguard.

- The first principle (supremacy of law)- recognizes a cardinal rule of democracy that every government must be subject to law and not law subject to the government.
- The second principle (equality before law) it is also important in a democratic polity.
- The third principle puts emphasis on the role of judiciary in enforcing individual rights and personal freedoms irrespective of their inclusion in a written constitution.

DEMIRITS:-

- The first rule was criticized on the ground that Dicey equated supremacy of Rule of Law with absence of not only arbitrary powers but even of discretionary powers.
  - According to him 'wherever there is discretion, there is room for arbitrariness' and he failed to distinguish between arbitrary power from discretionary power.
  - The second principle of Dicey was equally fallacious. He had criticized the legal system of France- droitadministratif.
  - He stated that the administrative courts of France conferred on government officials special rights, privileges and prerogatives as against private citizens.
  - But it was not so, the French system in many respects proved to be more effective in controlling abuse of administrative powers than the common law system.
  - During Dicey's time, several administrative tribunals had come into existence which adjudicated upon the rights of subjects not according to common law and procedure of Crown's courts but according to special laws applied to specified groups.

- The crown enjoyed immunity under the well-known maxim 'the king can do no wrong'.
- It was therefore not correct to say that there was 'equality before law' in strict sense.

Q.No.3. What is delegated legislation? What are the different controls over delegated legislation?

DEFINITION:-

Delegated legislation is a legislation made by a body or person other than the sovereign in parliament by virtue of powers conferred by such sovereign under the statute.

"when the function of legislation is entrusted to organs other than the legislature by the legislature itself, the legislation made by such organs is called delegated legislation."

According to Jain and Jain, the term 'delegated legislation' is used in two senses:

1. Exercise by a subordinate agency of the legislative power delegated to it by the legislature.
2. Subsidiary rules themselves which are made by the subordinate authority in pursuance of the power conferred on it by the legislature.

1. According to the first point, it means that the authority making the legislation is subordinate to the legislature.

   The legislative powers are exercised by an authority other than the legislature in exercise of the powers delegated or conferred on them by the legislature itself. This is also known as subordinate legislation', because the powers of the authority which makes it are limited by the statute which conferred the power and consequently, it is valid only insofar as it keeps within those limits.
2. Delegated legislation according to second point means all rules, regulation, bye-laws, orders etc.

   Ex:- the essential commodities Act, 1955 enumerates certain commodities as essential commodities under the Act. But the list given in the statute is not exhaustive and the central government is empowered to declare any other commodity as essential commodity and to apply the provisions of the Act to it.

   Ex. Minimum wages Act 1948:- to provide for fixing minimum wages in certain employment. The Act applies to employments mentioned in the schedule.

   But the central government is empowered to add other employment to the schedule if, in the opinion of the government the Act should apply.

   REASONS FOR GROWTH OF DELEGATED LEGISLATION

1. Pressure upon parliamentary time.
2. Technicality:-

3. Flexibility:-
4. Experimentation:-
5. Emergency:-
6. Confidential matters:-
7. Complexity of modern administration:-

CLASSIFICATION OF DELEGATION LEGISLATION

1. TITLE BASED CLASSIFICATION :-
2. Nature based classification.

CONTROL OVER DELEGATED LEGISLATION

Due to the complexities and exigencies of intensive form of government, the institution of delegated legislation has come to stay. Delegation of legislative powers to the executive has to be conceded within the permissible limits.

However, there is inherent danger of abuse of the legislative power by the executive authorities. The need, therefore, is that of controlling the delegate in exercising his legislative powers.

Therefore, 'today the question is not whether delegated legislation is desirable or not but it is what controls and safeguards can be introduced so that the power conferred is not misused or misapplied.

The control which are exercised over delegated legislation may be divided into three categories.

1. Judicial control
2. Legislative control
3. Procedural control.

1. Judicial control:- judicial control over delegated legislation is exercised by applying two tests,

a. Substantive ultra vires and
b. Procedural ultra vires.

Ultra vires:- means beyond powers. An act which is done in excess of power is ultra vires.

When a subordinate legislation goes beyond the scope of authority conferred on the delegate to enact, it is known as substantive ultra vires.

It is a fundamental principle of law that a public authority cannot act outside, the powers and if the authority acts, such act becomes ultra vires and accordingly void.

When a subordinate legislation is enacted without complying with the procedural requirements prescribed by the parent Act or by the general law, it is known as procedural ultra vires.

In case of procedural ultra vires, the court may or may not quash delegated legislation as it depends upon the circumstances whether the procedure is held to be mandatory or directory.

Judicial control over delegated legislation is exercised by applying the doctrine of ultra vires in a number of circumstances.

1. **Where Parent Act is Ultra vires to the constitution.**
   The constitution prescribes the boundaries within which the legislature can act. If the parent Act or enabling Act is ultra vires to the constitution the rules and regulations made thereunder would also be null and void.
   The parent act is declared ultra vires to the constitution. If it violates:-
   i. Express constitutional limits.
   ii. Implied constitutional limits.
   iii. Constitutional rights.

i. **Express constitutional limits:-**
   Invalidity of the rules and regulations arises if the parent Act is violative of express limits prescribed by the constitution.
   The legislative powers of the union and the states are distributed in Article 246 of the constitution.
   It either legislature encroaches upon the exclusive sphere of the other as demarcated in three limits.
   a. Union list
   b. State list and
   c. Concurrent list, its legislation will be ultra vires.

ii. **Implied constitutional limits.**
   Implied constitutional limits are those which were enunciated in Delhi law Act case.

Legislature cannot delegate essential legislative function to any other agency and if it so delegates the parent Act will be ultra vires the constitution.

CASE LAW.

HAMDARD DAWAKHANA V. UNION OF INDIA [AIR 1960 SC 554]

The court held section 3 of the Drugs and Magic Remedies (objectionable advertisement) Act Ultra vires the constitution because the legislature had not laid down sufficient guidelines for the exercise of administrative discretion in selecting a disease to be included in this list.

ST. JOHNS TEACHERS TRAINING INSTITUTE V. REGIONAL DIRECTOR, NATIONAL COUNCIL FOR TEACHERS EDUCATION (AIR 2003 SC 8014)

The supreme court has laid down that delegated legislation is based on the assumption that legislative cannot possibly forsee every administrative difficulty that may arise in operation of statute.

Delegated legislation is designed to fill those needs and is meant to supplement and not supplant the enabling statute.

iii. Constitutional rights.

No legislature has competence to pass a law violative of the provisions of commerce clause, right to property under Article 300-A or right to life and personal liberty under Article 21.

The parent Act may be challenged although the statute is well within the legislative compliance yet violates the provisions of Part III of the constitution by imposing what may be called an unreasonable restrictions on the enjoyment of fundamental rights.

Case Law.

Chintaman Rao V. State of Madhya Pradesh [AIR 1951 SC 118].

The parent Act conferred power on the Deputy commissioner to prohibit the manufacture of bidis notified areas during the agricultural season as fixed by him.

The Deputy commissioner imposed a total ban on the manufacture of bidis.

The order passed by the Deputy commissioner was held ultra vires in as much as the Act under which it was made violated the fundamental right to carry on trade, business, profession and occupation guaranteed under Article 19(1)(g) of the constitution of India.

In the opinion of the court the order imposed unreasonable restriction on the exercise of fundamental right.

II. where delegated legislation is ultra vires the constitution

Sometimes it may happen that the parent Act may not be ultra vires the constitution and delegated legislation may be consistent with parent Act, yet the delegated legislation may be held invalid on the ground that it is ultra vires the constitution.

Narendra Kumar V union of India [AIR 1954 SC 224]

There was an Act by named the Essential supplies (temporary powers) Act, 1946.

The parent Act was constitutionally valid but clause 3(2) (b) of the act was held ultra vires by the supreme court as it violated Article 19(1) (g) of the constitution of India by imposing unreasonable restrictions on the right to carry on trade and business.

The clause 3(1) of the Act provided that no one can carry on business in coal except under a licence.

Clause 3(2)(b) was ultra vires Articles 19(1) (g) as it confers arbitrary powers on the executive in granting exemptions.

iv. Arbitrary power is ultra vires the constitution.

In HIMMAT V. COMMISSIONER OF POLICE [AIR 1973 SC 87]

Under the Bombay Police Act 1951 : section 33(1) had authorized the commissioner of police to make rules for regulation of conduct and behavior of Assemblies and Processions on or along the streets.

Rule 7:- made that no public meeting will be held without previous permission of the commissioner.

The rule was held ultra vires on the ground that it conferred arbitrary powers on the commissioners in granting or refusing permission and as such it imposed unreasonable restriction on the exercise of freedom of speech and expression guaranteed under Article 19(1)(b) of the constitution.

iii) Theory of Derivative immunity.

The parent Act cannot be challenged before the court because it is protected under Article 31-B of the constitution on account of its placement in the 9th Schedule, the question is whether the delegated legislation made there under can be challenged.

VASANLAL MAGANBHAI V. STATE OF BOMBAY [AIR 1961 SC 4]

It was held that if the parent Act is saved under Article 31-B and cannot be challenged, the delegated legislation also cannot be challenged as being violative of any fundamental rights on the ground of derivative protection.

PRAG ICE AND OIL MILLS V. UNION OF INDIA [AIR 1978 SC 1296]

In this case the constitutional validity of the Mustard oil(price control) order, 1977 was challenged.

The parent Act (Essential commodities Act, 1955) was placed in the 9th schedule and, therefore was protected under Article 31-B.

The question before the supreme court was whether the orders and notification (child legislation) issued under the Essential commodities Act, 1955 can be still be challenged as violative of fundamental rights.

The supreme court held that even a case where a parent Act cannot be challenged before the court because of protection of Article 31-B of the constitution on account of its placement in the 9th schedule, the delegated legislation promulgated there under can still be challenged if it violates any provision of the constitution.

In this way the child legislation does not come under the protective umbrella of the 9th schedule

III. WHERE THE DELEGATED LEGISLATION IS ULTRA VIRES THE PARENT ACT.

Delegated legislation can be challenged on the ground that it is ultra vires the parent Act or enabling statute or any general law.

It is accepted principle that the authority of delegated legislation must be exercised within the authority.

The delegate cannot make a rule which is not authorized by the parent statute or delegating statute.

Delegated legislation or subordinate legislation can be declared valid only if it conforms exactly to the power conferred.

Rule is always open to challenge on the ground that it is unauthorized.

Case law

ADDITIONAL DISTRICT MAGISTRATE [REV] V. SRI RAM (2000) 4 scc 452.

In this case the Delhi Land Revenue Act and Delhi Reforms Act did not empower rule-making authority to classify land or to exclude any area from preparation of record of right and annual register.

However, rules made under Act in 1962 classified land into six categories and provided that the name of tenure holder or sub-tenure holder occupying land in 'extended abadi' and in prescribed six categories of land will not be reflected in the record of right and annual register. The court held that the rules are ultra vires the parent act.

i. Delegated legislation in excess of the power conferred by the parent Act.

If the subordinate authority keeps within the powers delegated, the delegated legislation is upheld valid; but if it does not, the court will certainly quash it.

IN DWARKA NATH V. MUNICIPAL CORPORATION. [AIR 1971 SC 1844]

Under section 23(1) of the Food Adulteration Act, 1954, the Central Government was empowered to make rules for restricting the packing and labeling of any article of food with the end in view to prevent the public from being deceived or misled as to quality and quantity of the article.

Rule 32 made thereunder by the government stated that there shall be specified on every label name and business address of the manufacturer, batch number or code number either in Hindi or English.

Proceedings was started against the one company i.e., "Mohan Ghee company for violation of Rule 32 as on Ghee tins only "Mohan Ghee Laboratories, Delhi-5 was written.

It was pleaded on behalf of the Mohan Ghee Company that the requirement of address under Rule 32 is in excess of the power of the Parent Act which is restricted to quantity and quality only.

Accepting the contention, the Supreme Court held Rule 32 as ultra vires of the Act as it was beyond the power conferred on the government.

v. **Delegated legislation in conflict with the parent Act.**

Sometimes it happens that the parent Act lays down procedure which must be followed by the administrative body which exercising law-making power under it.

If the procedure is not followed, the delegated legislation may declared has bad/void.

BANWARI LAL AGARWALLA V. STATE OF BIHAR

Under section 12 of the Mines Act 1952, the central government was required to consult the mining Board constituted under the Act before framing rules.

The central government made rules without consulting the Mining Board.

The Supreme Court held that the rules so framed in violation of the statutory provision were invalid being ultra vires the procedure established by the parent Act.

IV. MALAFIDE :- BAD FAITH.

Delegated legislation may be challenged on the ground of mala fide or improper motive of the rule-making authority. Whenever legislature confers any legislative power on any administrative authority, the said power must be exercised in good faith by the latter and on proof of bad faith the court can hold the exercise of power ultra vires.

NAGARAJ . V. STATE OF ANDRA PRADESH [AIR 1985 SC 551]

The Andra Pradesh Government issued an ordinance reducing the age of superannuation of all Government employees from 58 years to 55 years.

The ordinance was challenged on the ground that it was mala fide exercise of power.

The supreme court held that the ordinance making power was a legislative power and the argument of mala fides was misconceived.

IV. UNREASONABLENESS.

Delegated legislation can be challenged as unreasonable under the due process clause of the constitution.

The validity of regulation can be sustained only if it is reasonably related to the purposes of enabling legislation.

Even a rule that deals with the subject matter within agency's delegated authority may be invalid if it is arbitrary or unreasonable .

A regulation to be valid, must be consistent with the statute, but it must be reasonable also.

DWARKA PRASAD V. STATE OF U.P. [AIR 1954 SC 224]

The validity of clause 4(3) of the U.P.Coal control order was challenged. Under this clause, the licensing authority was given power to grant, refuse to grant, renew or refuse to renew a licence and to suspend, cancel, revoke or modify any licence granted by him under the order for reasons to be recorded.

Holding the provision as arbitrary and unreasonable, the court observed that 'the licensing authority has been given absolute power' in the granting, cancelling etc of licence.

LEGISLATIVE CONTROL

As usual, law-making power is vested in the legislature. If the legislature delegates legislative powers to the executive, it must also see that powers are properly exercised by the administration.

Since, it is legislature which delegates legislative power to the administration, it is primarily for it to supervise and control the actual exercise of this power, and ensure against the danger of its objectionable, abusive and unwarranted use by the administration.

The underlying object of legislative control is to keep watch over the rule-making authorities and also to provide an opportunity to criticize them if there is abuse of power on their part.

There are three control exercised by the legislature over delegated legislation as follows,

a. Proceedings in parliament;
b. Laying on the Table; and
c. Scrutiny committees.

a. Proceedings in parliament:-

- There are two houses of parliament.
- Each house has its own rules of procedure and conduct of business.
- A rule of each house requires that a bill involving proposal for delegation of legislative power "shall be accompanied by a memorandum explaining such proposals and drawing attention to their scope,
- Stating also whether they are of exceptional or normal character.
- A number of proceedings are involved in exercise of control over delegation of legislative power by the legislature-

i. Debate on delegating bill:- when involving delegation of legislative power is under consideration before parliament, members may discuss all matters about delegation including necessity, extent, type of delegation and the authority to whom power is proposed to be given.

ii. Asking questions and giving notices:- any member of the House may ask questions on any matter concerning delegation of legislative power and, if not satisfied, can give notice for debate as laid down under Rule 59 of the procedure and conduct of Business in LokSabha.

iii. Resolution on motion:- any member of the house may move a resolution on motion, if the matter relating to delegation of legislative power is of urgent and immediate nature, and the reply given by the government is not satisfactory.

iv. Demand for vote on grant:- members can discuss any thing about delegated legislation when budget demands are presented by a Ministry. Any member may propose to reduce grant

Through this proposal, he may bring the matter of exercise of rule-making power under discussion.

v. Directions by speaker:- the speaker may refer bills containing provisions for delegation of legislative powers to the committee to examine the extent of such powers sought to be delegated.

b. Laying on the table.

One of the devices of control over the exercise of power of delegated legislation is legislative overseeing of delegated legislation.

Laying serves two purposes,

Firstly, it informs the legislature as to what rules have been framed by the administrative authorities in exercise of law-making power, and

Secondly, it provides an opportunity to the legislatures to question or challenge the rules already made or proposed to be made.

In almost all the common wealth countries the procedure of 'laying on the table' of the legislature is required to be followed.

There are several type of laying.

The degree of control necessarily differs in these forms. The select committee on delegated Legislation summarized these forms under seven heads.

i. Laying without further provision for control.

The parent Act under this form simply provides that the rules shall be laid before the houses. This procedure serves the purpose of only informing the parliament as to what rules and regulations were made by the administrative authorities.

ii. Laying with deferred operation.

In this case the requirement of laying is linked with postponement of rules and in this way parliament gets greater degree of control than in the preceding form of laying.

iii. Laying with immediate effect but subject to annulment.

Under this type of laying, the rules come into force when laid before parliament, but cease to be in operation if disapproved by it within a specified period.

iv. Laying in draft but subject to resolution that no further proceedings be taken.

Under this, draft of statutory rules are required to be laid before parliament but the parent Act provides that the rules should not be made effective until a particular period has expired.

v. Laying in draft and requiring affirmative resolution.

This method provides a stringent parliamentary supervision over delegated legislation.

The draft rules do not become effective until an affirmative resolution has been passed by parliament.

Members get the opportunity to discuss and react to the rules before they can finally be given effect by the executive authority.

vi. Laying with operation deferred until approval given by affirmative resolution.

In this case, rules are actually, made but they do not come into operation until approved by the parliament.

vii. Laying with immediate effect but requiring affirmative resolution as condition for continuance.

This method of laying is used where prompt operation of delegated legislation is required but at the same time strict parliamentary supervision is also necessary.

The confirmatory resolution keeps the delegated legislation alive, which would otherwise die.

It is often applied in cases of taxation or to rules made during emergency.

In India, there is no statutory provision requiring laying of all delegated legislations. There is no general obligation on the administration to lay the rules before parliament.

Whether the rules made under a statute are to be laid before the houses of parliament or not depends upon the terms of each enabling statute.

Generally, a provision of laying is found in a number of statutes, in the following form;

Every rule made under this Act shall be laid, as soon as may be, after it is made before each houses of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if before the expiry of the session both houses agree in making any modification in the rule or both houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

There was no uniform practice in the laying procedure, the scrutiny committee made the following suggestions:-

i. All Acts of parliament should uniformly require that the rules shall be laid on the Table of the House "as soon as possible".
ii. This period should be uniform and should be a total period of 30 days from the date of their final publication and
iii. The rules shall be subject to such modification as the Houses may like to make.

The laying procedure has not been formalized and systematized by any statute.

There are a number of statutes where provisions have been made for laying of delegated legislation.

Such statutes are,

- Immigration Act, 1922.
- Insurance act 1938.
- Agricultural products Act 1938.
- Motor vehicles Act, 1939.

There are other Acts, namely

- The Representation of the people Act, 1951,
- Indian services Act 1951.
- The Indian development and regulation Act 1952,

Which contain only the right of modification of the rules and not annulment.

The procedure of laying has been streamlined in India by certain legislative measures.

Our parliament has amended,

- 50 Indian Statutes by the Delegated legislation (Amendment) Act 1983 and
- 91 statutes by the Delegated Legislation provisions (Amendment) Act 1985 and
- 47 statutes by the Delegated legislation (Amendment) Act 1986.

It has inserted provisions for laying before the state legislature and parliament where there were no such provisions and in other instances provided for annulment or modification within a specified period.

It provides a typical clause.

"Every rule prescribed or sanctioned by the Central government under this Act shall be laid, as soon as may be after it is prescribed or sanctioned, before each house of Parliament, while

it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session, or the successive sessions aforesaid, both houses agree in making any modification in the rule or both houses agree that the rule should not have effect, as the case may be, so, however, that such modification or annulment shall be without prejudice to the validity of anything previously done under that rule".

EFFECTS OF FAILURE TO LAY.

In India the consequences of non-compliance with laying provisions depend on whether the provisions in the delegating statute are mandatory or directory.

NARENDRA KUMAR V. UNION OF INDIA [AIR 1960 SC 430]

The Supreme Court held that the provision regarding laying was mandatory.

In this case section 3(5) of the Essential Commodities Act, 1955 provided that the rules framed thereunder must be laid before both houses of parliament.

On this ground clause 4 of the Non-Ferrous control order, 1958 was declared to be of no effect unless laid before the houses of Parliament.

HUKUM CHAND V. UNION OF INDIA [AIR 1972 SC 2427]

In this case the Court held that, the laying provision is mandatory. The rules which were made without laying before the parliament were struck down as being ultra vires the powers of the administrative agency.

C. SCRUTINY COMMITTEES

Significant control over delegate legislation is exercised by the legislature through its committees.

The reason for this is that legislative control over delegated legislation would not be of much use, unless the rules were properly studied and scrutinized.

Therefore with a view to strengthen parliamentary control over delegated legislation, Scrutiny committees were sought to be established.

The parliament succeeded to form a select committee on statutory rules and orders in 1944 which is now known as the committees on statutory instrument.

Two scrutiny committees have been established under the INDIAN CONSTITUTION.

1. The LokSabha committee on subordinate legislation - 1953
2. The RajyaSabha committee on subordinate legislation – 1964

The functions of the committees are identical in both the Houses of parliament.

The Lok Sabha committee on subordinate legislation – 1953

- This committee consists of 15 members nominated by the speaker for one year.
- It represents all the political parties in the House in proportion to their respective strength.
- A minister cannot be a member of the committee.
- Any member on his appointment as a minister ceases to be a member of the committee.
- The chairman of the committee is also nominated by the speaker from among the members of the committee.
- The chairman is usually a member of the opposition.
- All this has made the committee a true replica of the LokSabha.
- The quorum is one third of the total membership.
- In absence of quorum, no business can be transacted.

THE RAJYA SABHA COMMITTEE.

- It consists of 15 members
- Who are nominated by the chairman of the Rajyasabha.
- A minister can also become the member of this committee.

MAIN FUNCTIONS OF THE COMMITTEE.

1. Whether the order is in accord with the general object of the constitution or the Act pursuant to which it is made.
2. Whether it contains matter which in the opinion of the committee should more properly be dealt with in an Act of parliament.
3. Whether it contains imposition of tax.
4. Whether it is directly or indirectly bars the jurisdiction of the courts
5. Whether is gives retrospective effect to any of the provisions in respect of which the constitution or the Act does not expressly give any such power.
6. Whether it involves expenditure from the consolidated fund of India.
7. Whether is appears to make some unusual or unexpected use of the powers conferred by the constitution or the Act pursuant to which it is made.
8. Whether there appears to have been unjustifiable delay in the publication or the laying of it before parliament and
9. Whether for any reason its form or purport calls for any elucidation.

PROCEDURAL CONTROL.

- Procedural control mechanism has the potential to meet the aforesaid requirements.

- It has 3 components:
- 1. antecedent publicity.
- 2. publication.
- 3. consultation of interests.

1. Antecedent publicity.

- A means of obtaining participation in the rule making process by un- organized interests is through the device of antecedent publicity.
- In India there is no separate law relating to the system of antecedent publicity.
- In certain statutes have provided for antecedent publicity.
- Co-operative societies Act, 1912- section 43.
- The chartered Accountants Act 1949 section 30(3)
- The central Tea board Act, 1949 section 15,
- Provides an examples where it is required that the rules must be first published in draft form to give an opportunity to the people to have their say in the rule-making.

Antecedent publicity required by Parent Act attracts the application of section 23 of the General Clauses Act, 1897 which provides.

i. That the authority shall publish a draft of the proposed rules in the Gazette.
ii. That the authority shall invite objections and suggestions by a specific date.
iii. That the authority shall take into consideration any objections or suggestions which may be received by it while finalizing the rules.

2. PUBLICATION:-

There is a principle of law is that "ignorance of law is no excuse". There is also another equally established principle of law that the public must have access to the law and should be given an opportunity to know the law.

The practice of publication of delegated legislation differs from statute to statute. In certain cases the statute provides that the rules must be published in the official gazette.

The administrative authority can choose its mode of publication.

i. MODE OF PUBLICATION.
In STATE OD MAHARASHTRA V. M.H. GEORGE [A.I.R 1965 SC 722]

In this case guidelines formulated regarding the mode of publication of delegated legislation thus-

i. Where there is statutory requirement as to the mode or form of publication and they are such that in the circumstances, the court holds to be mandatory, a failure

to comply with those requirements might result in their being no effective order the contravention of which could be the subject of prosecution.

ii. Where there is no statutory requirement, it is necessary that it should be published in the usual form i.e. by publication within the country as generally adopted to notify all the persons the making of rules, and

iii. In India, publication in the official Gazette, the Gazette of India is the ordinary method of bringing a rule or subordinate legislation to the notice of persons concerned.

ii. PUBLICATION AS A COROLLARY OF NATURAL JUSTICE.

Publication of delegate legislation has been taken by the courts as a corollary of natural justice.

In HARLA V. STATE OF RAJASTHAN [AIR 1951 SC 467]

The Supreme court has held that delegated legislation cannot take effect unless published.

iii. EFFECT OF DELEGATED LEGISLATION FROM THE DATE OF PUBLICATION.

Unless the rule-making authority specifies the date on which the rules shall come into force, the rules generally take effect on the date of publication.

3. CONSULTATION OF INTERESTS.

An important measure to check and control the exercise of the power of delegated legislation is the technique of consultation through which affected interests may participate in the rule-making process.

Public participation in rule-making process is regarded as a valuable safe guard, for it enables the interests affected to make their views known to the rule-making authority.

Consultation as required under the Indian statutes fall under the following categories.

1. Official consultation.
2. Consultation with statutory boards.
3. Consultation with advisory boards.
4. Making of Draft rules of affected interests

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Part B Answer any 2 **(2 x7=14)**

Q.No.4.Explain the various grounds for exercising judicial control over "administrative discretion" in India with help of decided cases.

ADMINISTRATIVE DISCRETION:

Meaning: Discretion implies power to make a choice between an alternative course of action or inaction. The term itself implies vigilance, care, caution and circumspection.

Coke proclaimed Discretion as a science or understanding to discern between falsity and truth, between right and wrong, between shadows sand substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.

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

In Secy. Of State for Education and Science Vs. Metropolitian Borough Council Tameside. Lord Diplock said " the very concept of administrative discretion involves a right to choose between more than one possible cause of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred.

There are different types of discretionary powers conferred on the administration. They range from simple ministerial functions like maintenance of birth and death register regulation of business activity, acquiring property for the public purpose, investigations, seizure, confiscation and destruction of property, experiment or detention of a person or subjective satisfaction of the administrative authority and the like.

The need for administrative discretion arises to meet variability of situations in the interests of public. But an administration unrestrained in its power to pursue its socialistic objectives by any and all means considered expedient by the officials of government is anti-thesis of law and is nothing but administrative lawlessness. Administrators who do as they like and who are not bound by considerations capable of rational formulation cannot be said to act within the framework of law.

When discretionary power is conferred on an administrative authority, it must be exercised according to law. When the mode of exercising a valid power is improper or unreasonable, there is an abuse of the power.

There are several forms of abuse of discretion. The excess or abuse of discretion may be inferred from the following circumstances:

a. Acting without jurisdiction
b. Exceeding jurisdiction
c. Arbitrary action.
d. Irrelevant considerations.

e. Leaving out irrelevant consideration
f. Mixed considerations
g. Mala fide
h. Collateral purpose: improper object;
i. Colourable exercise of power;
j. Colourable legislation; fraud on Constitution
k. Non-observance of natural justice;
l. Unreasonableness.

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Q.NO.5. EXPLAIN 'PUBLIC CORPORATIONS'. WHAT ARE THEIR FUNCTIONS? EXPLAIN WITH HELP OF ILLUSTRATIONS.

SYNOPSIS:

Introduction
Definition
Characteristics
Functions along with illustrations
Conclusion

Introduction:

The modern world aims at welfare state. it seeks to ensure social security and social welfare for the common mass. Now the states also participates in trade, commerce and business in order to achieve the object of socialist, democratic, republic, constitutional protection is afforded to State monopoly and hence necessary provisions are incorporated in the Constitution itself by laying down the Directive Principles of State policy.

Article 39(b) states ownership and control of material resources of the community should be so distributed to subserve the common good.

Article 39(c) states that operation of economic system should not result in concentration of wealth and means of production to the common deteriment.

The political philosophy of the 20th and 21st centuries has therefore impelled the government to enter into trade and commerce with a view to making such enterprises pursue public interest and making them answerable to the society at large.

Definition:

No statute or court has ever attempted ***inDhanoa Vs. Municipal Corp. Delhi a corporation is defined thus:***

"A corporation is an artificial being created by law having legal entity entirely separate and distinct from the individuals who compose it with the capacity of continuous existence and succession, notwithstanding changes in its membership. In addition, it possesses the capacity as such legal entity of taking, holding and conveying property, entering into contracts, suing and being sued, and exercising such other powers and privileges as may be conferred on it by the law of its creation just as a natural person may."

Object:

Under our Constitution, public sector plays key role in the economic development of the country. It has been said that certain functions are so vital to the nation that it is proper not to leave them to private enterprises. They should be run and managed by the state, either through its own department or by government companies or by creating public sector undertakings.

Characteristics:

1. A corporation is established by or under a statute. It possesses a separate legal entity with perpetual succession and a common seal.
2. There may be several members or shareholders of a corporation.
3. A corporation does not neither soul nor body, it acts through natural persons.
4. A corporation can possess, hold and dispose of property.
5. An appropriate government may issue directives relating to policy matters. The corporations are bound by them.

Functions of public corporations:

The constitution of the corporations and their functions, powers and duties may be understood by a study of the actual working of a few public corporations:

Reserve Bank of India: (RBI)

It was constituted under the RBI Act 1934, and it was nationalized in the year 1948. It is a separate legal entity and hence can sue and be sued. It was primarily established to regulate the credit structure, to carry on banking business and to secure monetary stability in the country. It is managed by the Board o Directors, consisting of Governor and the Deputy Governors and number of directors. The salaries of the governor and Deputy Governors are fixed by the board with the approval of the Central government. They are eligible for a term of five years and can be re-employed. The RBI has extensive powers over the Banking business in India. It grants licences without which no company can carry on banking business. It grants licences without which no company can carry on banking business. Before granting of such licence it can inquire into the affairs of the company to satisfy itself. It can cancel a licence on the ground that the conditions specified therein have not been complied

with. It has to send reports to the Government. The RBI has very wide discretionary powers. It determines the policy relating to bank advances, frames proposals for amalgamation of two or more Banks.

Life Insurance Corporation of India (LIC):

It was established under the Life Insurance Corporation of India Act, 1956. It shares certain characteristics with the other corporations. It is a body corporate with perpetual succession and a common seal. It has power to acquire, hold and dispose of property. It can sue and be sued. The corporation was established to carry on life insurance business and given the privilege of carrying on this business to the exclusion of all other persons and institutions. The Central Government may give directions in writing in the matters of policy involving public interest. 95% of the profits are to be reserved for the policy holders and the balance is to be utilised as the Central Government may decide.

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Q.No.6. EXPLAIN THE CONCEPT OF OMBUDSMAN. TRACE THE DEVELOPMENT IN INDIA.

SYNOPSIS:

Meaning
Importance
Historical growth
Powers and duties
Merits and demerits
Position in India

Meaning:

Ombudsman means 'a delegate, agent, officer or commissioner.

Garner: describes him as an officer of parliament, having his primary function, the duty of acting as an agent for parliament, for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executive.

Importance:

The administrator is not a super-administrator to whom the individual can appeal when he is dissatisfied with the discretionary decisions of a public official in the hope that he may obtain a more favourable decision. Hence ombudsman is a suitable person to appeal for his dissatisfaction.

Historical growth:

The institution of Ombudsman originated in Sweden in 1809 it has been accepted in other countries including Denmark, Finland, New Zealand, England, Australia and India. In India, the institution of ombudsman is called as Lokpal or Lokayukta.

Powers and duties:

- The Ombudsman inquires and investigates into complaints made by citizens against abuse of discretionary power, maladministration or administrative inefficiency and takes appropriate actions.
    - They have very wide powers they have access to departmental files.
    - The complainant is not required to lead any evidence before the ombudsman to prove his case. It is the duty of the ombudsman to satisfy himself whether or not the complainant was justified.
    - The ombudsman can act suomotu.
    - The ombudsman can grant relief to the aggrieved person as unlike the powers of a civil court, his powers are limited.

Merits and demerits:

- Ombudsman institution is successful in those countries which have a comparatively small population.
- But this institution is not useful in populous countries, like U.S.A or India.
- It is easy for a single man to dispose of complainants in small countries.
- It is not easy for a single man to dispose of complainants in populous countries.
- It is more suitable for small countries as the prestige and personal contact would be more easier.
- The prestige and personal contact would be lost if there are a number of officers who has always to depend upon a large staff and subordinate officers.
- This institution is suitable for non-democratic countries.
- This institution is not suitable for democratic countries as this institution is accusatorial and inquisitorial institution and it does not fit into the Indian Constitution because we have an independent judiciary.

Conclusion: Indian parliament so far has not enacted any Act though a proposal to constitute an institution of Ombudsman (lokpal) was made by the Administrative Reforms Commission as early as 1967. But some States, however, have enacted statutes and appointed Lokayukta.

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Q.No.8. Answer any 5 of the following short notes **5X4=20**

Droit Administraiff.

Meaning:-

The French legal system is known as Droit administrative, there are two types of laws and two sets of courts independent of each other. Whereas ordinary courts administer ordinary civil law between subjects and subjects, administrative courts administer the law between the subject and the state.

An administrative authority or official is not subject to the jurisdiction of ordinary court exercising powers under the civil law in disputes between private individuals.

All claims and disputes in which these authorities or officials are parties fall outside the scope of the jurisdiction of ordinary courts and they are dealt with and decided by special tribunals.

This system was able to provide expeditious and inexpensive relief and better protection to citizens against administrative acts or omissions than the common Law system.

Concrete cases to illustrate.

1. If an employee in a Government factory is injured by an explosion, according to the administrative courts in France, the risk should fall on the State, but the English courts will not hold the state liable unless the injured proves negligence of some servant of the crown.

Thus, English courts still apply the conservative and traditional approach that there should be no liability without fault;

French administrative courts adopt pragmatic approach that 'justice requires that the state should be responsible to the workman for the risk which he runs by reason of his part in the public service.

2. A, a private gas company entered into an agreement with the town planning council to supply gas at a particular rate for a period of 30 years. The agreement was made on the basis of the rates of coal in the year 1904.

But after the First World War, the rates shot up. An application was filed by the gas company before Conseil d' Etat for revision of rates.

A common law would have rejected this application and would not have granted the relief prayed for, but the conseil accepted it and revised the rates.

According to the Conseil, it was in the interest of the public at large that the company should continue to work rather than be wound up and insistence of providing gas at the fixed rates would result into liquidation of the company.

a. HABEAS CORPUS.

The Latin phrase 'Habeas corpus' means 'have the body'. This is a writ in the nature of an order calling upon the person who has detained or arrested another to produce the latter before the court, in order to let the court know on what ground he has been confined and to set him free if there is no legal justification for the imprisonment.

In other words, by this writ, the court directs the person or authority who has detained another person to bring the body of the prisoner before the court so that the court may decide the validity, jurisdiction or justification for such detention.

Object:-

The writ of Habeas Corpus provides a prompt and effective remedy against illegal restraints.

The principal aim is to provide for a swift judicial review of alleged unlawful detention.

If the court comes to the conclusion that there is no legal justification for the imprisonment of the person concerned, the court will pass an order to set him at liberty forthwith.

A.D.M. JABALPUR V. SHIVAKANT SHUKLA [AIR 1976 SC 1207]

Justice Khanna. Stated that "The writ of habeas corpus is a process for securing the liberty of the subject by affording an effective means of immediate relief from unlawful or unjustifiable detention, whether in prison or private custody.

By it the High court and the Judges of that court, at the instance of a subject aggrieved, command the production of that subject and inquire into the cause of his imprisonment.

If there is not legal justification for that detention, the party is ordered to be released.

c. DISTINGUISH BETWEEN COURT AND TRIBUNAL.

In today's trend the executive performs ministerial functions and along with this it also performs many quasi-legislative and quasi-judicial functions also.

As the governmental functions have increased the function of adjudication of disputes is the exclusive jurisdiction of the ordinary courts of law, in reality. Now, many judicial functions have come to be performed by the executive.

It also seeks to ensure social security and social welfare for the common masses. Therefore administrative tribunals are, therefore, established to decide various quasi-judicial issues in place of ordinary courts of law.

According to supreme court the expression Tribunal as used in Article 136 does not mean the same thing as court but includes, with its ambit, all adjudicating bodies, provided they are constituted by the state and are invested with judicial as distinguished from administrative or executive functions.

Distinction between Tribunal and court:

An administrative tribunal is similar to a court in certain aspects. Both of them are constituted by the state, invested with judicial powers and have a permanent existence.

But at the same time, it must not be forgotten that an administrative tribunal is not a court. The line of distinction between a court and tribunal in some cases is indeed fine through real.

- A court of law is a part of the traditional judicial system.
- On the other hand, an administrative tribunal is an agency created by a statute and invested with judicial powers.
- The court derives its powers from judiciary.
- Whereas an administrative tribunal derives its powers from executive as well as judiciary.
- Ordinary civil courts have judicial powers to try all suits of a civil nature.
- Whereas an administrative tribunal have powers to try cases in special matters statutorily conferred.
- Judges of ordinary courts of law are independent of the executive in respect of their tenure, terms and conditions of service, etc.
- Whereas an administrative tribunal are entirely in the hands of the Government in respect of those matters.
- In a court of law it is generally presided over by an officer trained in law.
- But members of administrative tribunals may not be trained as well in law.
- The court of law is bound by all the rules of evidence and procedure .
- But the administrative tribunal is not bound by those rules unless the relevant statue imposes such an obligation.
- The court must decide all the questions objectively on the basis of the evidence and materials produced before it.
- But an administrative tribunal may decide questions taking into account the departmental policy or expediency, hence the decisions may be subjective.

- The court of law is bound by precedents, principles of re judicata and estoppels.
- Administrative tribunal is not strictly bound by them.

d). NATURAL JUSTICE:-

Natural justice is an important concept in administrative law. The principles of Natural Justice or fundamental rules of procedure for administrative action are neither fixed nor prescribed in any code.

Natural Justice has meant many thing to many writers lawyers and system of law.

DEFINITION:-

Natural Justice is an ethico-legal concept which is based on natural feeling of human being. It is known as natural law, universal law, divine justice or fair play in action.

Though highly attractive and potential, natural justice is a vague and ambiguous concept and therefore it is not possible to define it.

In the words of Megarry :- "it is justice that is simple and elementary as distinct from justice that is complex, sophisticated and technical.

According to De Smith:- Natural Justice expresses the close relationship between the common law and moral principles and it has an impressive ancestry.

SWADESHI COTTON MILLS V INDIA [1981] 1 SCC 664.

Justice Chinappa Reddy J :- Natural Justice, like ultra vires and public policy, is a branch of the public law and is a formidable weapon, which can be wielded to secure justice to the citizen.... While it may be used to protect certain fundamental liberties-civil and political rights- it may be used, as indeed it is used more often than not, to protect vested interests and to obstruct the path of progressive change.

PRINCIPLES OF NATURAL JUSTICE:

English law recognizes two principles of natural justice.

NEMO DEBET ESSE JUDEX IN PROPRIA CAUSA:-

No man shall be a judge in his own cause, or no man can act as both at the one and the same time- a party or a suitor and also as a judge, or the deciding authority must be impartial and without bias; and

AUDI ALTERAM PARTEM :-hear the other side or both sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority.

NEMO DEBET ESSE JUDEX IN PROPRIA CAUSA:- ABSENCE OF BIAS, INTEREST OR PREJUDICE.

The first principle of natural justice consists of the rule against bias or interest and is based on three maxims,

1. No man shall be a judge in his own cause
2. Justice should not only be done, but manifestly and undoubtedly be seen to be done
3. Judges, like ceaser's wife should be above suspicion.

AUDI ALTERAM PARTEM [HEAR THE OTHER SIDE]

Meaning:-

Audi Alterman Partem means "hear the other side" or 'no man should be condemned unheard' or 'both the sides must be heard before passing any order'.

Explanation:-

The second fundamental principle of natural justice is audialtermanpartem, i.e. no man should be condemned unheard, or both the sides must be heard before passing any order.

It has been described as 'foundational and fundamental concept. It lays down a norm which should be implemented by all courts and tribunals at national as also at international level.

Before an order is passed against any person, reasonable opportunity of being must be given to him.

This maximum included 2 elements,

1. Notice
2. Hearing

e) TYPES OF BIAS:-

Bias is of four types,

i. Pecuniary bias,
ii. Personal bias,
iii. Official bias or bias as to subject-matter and
iv. Judicial obstinacy.

i. **PECUNIARY BIAS:-**

It is well-settled that as regards pecuniary interest 'the least pecuniary interest in the subject-matter of the litigation will disqualify any person form action as a judge.

DR. BONHAM CASE

Dr. Bonham, a doctor of Cambridge University was fined by the college of Physicians for practicing in the city of London without the licence of the college.

The statue under which the college acted provided that the fines should go half to the king and half to the colleges.

The claim was disallowed by Coke, C.J as the college had a financial interest in its own judgment and was a judge in its own cause.

DIMES V. GRANT JUNCTION CANAL

In this case, the suits were decreed by the Vice-Chancellor and the appeals against those decrees were filed in the court of Lord Chancellor, Cottenham.

The appeals were dismissed by him and decrees were confirmed in favour of a canal company in which he was a substantial shareholder.

The House of Lords agreed with the Vice-chancellor and affirmed the decree on merits.

But the house of Lords quashed the decision of Lord Cottenham.

MANAK LAL V. DR. PREM CHAND [AIR 1957 SC 425]

In this court held that "it is obvious that pecuniary interest, however

small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a judge.

VISHAKAPATANAM CORP MOTOR TRANSPORT CO. LTD. V. G.BANGARURAJU [A.I.R 1953 MAD 709]

A cooperative society had asked for a permit. The collector was the president of that society and he was also a chairman of the Regionally Transport authority, who had granted the permit in favour of the society,

The court set aside the decision as being against the principles of natural justice.

J.MOHAPATRA & CO. V. STATE OF ORISSA [AIR 1984 SC 1572]

In this case some of the members of the committee set up for selecting books for educational institutions were themselves authors whose books were to be considered for selection.

It was held by the Supreme Court that the possibility of bias could not be ruled out.

It is not the actual bias in favour of the author-member that is material, but the possibility of such bias".

II. PERSONAL BIAS:-

The second type of bias is a personal one. A number of circumstances may give rise to personal bias.

Here a judge may be a relative, friend or business associate of a party.

He may have some personal grudge, enmity or grievance or professional rivalry against such party.

In view of these factors, there is every likelihood that the judge may be biased towards one party or prejudiced towards the other.

STATE OF U.P V. MOHD. NOOH [AIR 1958 SC 86]

A departmental inquiry was held against A by B. As one of the witnesses against 'A' turned hostile, B left the inquiry, gave evidence against A, resumed to complete the inquiry and passed an order of dismissal.

The Supreme Court held that 'the rules of natural justice were completely discarded and all canons of fair play were grievously violated" by B.

A.K.KRAIPAK V. UNION OF INDIA [AIR 1970 SC 150]

In this case one Mr. N was a candidate for selection Board. N did not sit on the Board when his own name was considered.

Name of N was recommended by the Board and he was selected by the Public Service Commission.

The candidates who were not selected filed a writ petition for quashing the selection of N on the ground that the principle of natural justice were violated.

Quashing the selection, the court observed:- "it is against all canons of justice to make a man judge in his cause.

It is true that he did not participate in the deliberations of the committee when his name was considered.

But the very fact that he was a member of the selection board must have had its own in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered.

III. OFFICIAL BIAS.

The third type of bias is official bias or bias as to the subject-matter.

This may arise when the judge has a general interest in the subject-matter.

GULLAPALLI NAGESWARA RAO .V. A.P.S.R.T.C [AIR 1959 SC 308]

The petitioners were carrying on motor transport business. The Andra State Transport undertaking published a scheme for nationalization of motor transport in the state and invited objections.

The objections filed by the petitioners were received and heard by the secretary and thereafter the scheme was approved by the chief minister.

The Supreme Court upheld the contention of the petitioners that the official who heard the objections was 'in substance' one of the parties to the dispute and hence the principles of natural justice were violated.

But in GullapalliII:- The Supreme court qualified the application of the doctrine of official bias. Here the hearing was given by the Minister and not by the Secretary.

The Court held that the proceedings were not vitiated as the secretary was a part of the departmental but the Minister was only primarily responsible for the disposal of the business pertaining to that department.

IV. JUDICIAL BIAS :-

STATE OF W.B .V. SHIVANANDA PATHAK [AIR 1995 SC 2050]

A writ of Mandamus was sought by the petitioner directing the government to promote him.

A single judge allowed the petition ordering the authorities to promote the petitioner forthwith.

But the order was set aside by the division bench.

After two years, a fresh petition was filed for payment of salary and other benefits in the terms of the Judgement of the single judge.

It was dismissed by the single judge.

The order was challenged in appeal which was heard by a Division Bench to which one Member was a judge who had allowed the earlier petition.

The appeal was allowed and certain reliefs were granted.

The state approached Supreme Court

The Supreme Court allowing the appeal and set aside the order.

It said that if a judgment of a judge is set aside by a superior court, the Judge must submit to that Judgement.

He cannot rewrite overruled Judgement in the same or in collateral proceedings.

The Judgement of the higher court binds not only to the parties to the proceedings but also the judge who had rendered it.

Q.No.9. Solve any two of the given problem. **2x6=12**

a. **A contract was entered between 'A' and Government of India through correspondence of letters. However, there was no formal contract deed entered between them. Whether this contract is valid.**

Answer:-

No, the contract between 'A' and Government is not a valid contract for the following reasons.

Article 299(1) of the Indian constitution prescribes the mode or manner of execution of such contracts:-

"All contracts made 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".

Requirements of the contract.

1.Every contract must be expressed to be made by the President or the Governor.

2. Every contract must be executed by a person authorized by the President or the Governor and

3. Every contract must be expressed in the name of the President or the Governor.

So, in the above mentioned problem the essentials required under Article 299(1) is not completed hence the contract is not a valid contract.

b. **Whether BDA has statutory powers to demolish any building without any notice if it was constructed without prior permission. X's house is constructed without permission. The authority demolished the house of 'x'. Advice 'x'.**

Natural justice is an important concept in Administrative law. Natural justice has meant many things to many writers, layers, jurists and systems of law. It has many colours, shades, shapes and forms.

The English law recognises two principles of natural justice:

1. No man shall be a judge in his own cause.
2. Hear the other side, or both the sides must be heard.

In this case, the second requirement i,eaudialterampartem has to be observed and accordingly every person must be given an opportunity of being heard before any adverse action if taken against him.

In the historic case of ***Copper Vs. Wandsworth Board of works*** it is quite similar to the facts as mentioned above. In this case the defendant Board had power to demolish any building without giving any opportunity of hearing if it was erected without prior permission. The Board demolished the house of the plaintiff under this provision. The action of the Board demolished the house of the house of the plaintiff under this provision. The court held that the Board's power was subject to the qualification that no man can be deprived of his property without having an opportunity o9f being heard.

My advice to X, to is file a case against the BDA authorities as they have violated the principles of Natural justice.