# CHAPTER 4

# JUDICIAL REVIEW OF ADMINTRATIVE ACTION IS AN INTEGRAL PART OF CONSTITUTIONAL SCHEME OF INDIA

## 4.1 An Overview

Judicial review of administrative action is perhaps the most important development in the field of public law in the second half of this century. In India, the doctrine of judicial review is the basic feature of Indian Constitution. Judicial review is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law. Judicial review is the touchstone of the Constitution. The Supreme Court and High Courts are the ultimate interpreters of the Constitution. It is, therefore, their duty to find out the extent and limits of the power of coordinate branches, viz. executive and legislature and to see that they do not transgress their limits. This is indeed a delicate task assigned to the judiciary by the Constitution. Judicial review is thus the touchstone and essence of the rule of law.

The power of judicial review is an integral part of Indian Constitutional system and without it, there will be no government laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. In judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or order is made. A court of law is not exercising appellate power and it cannot substitute its opinion for the opinion of the authority deciding the matter.

It is a cardinal principle of Indian Constitution that no one howsoever highly placed and no authority lofty can claim to be the sole judge of its power under the Constitution. The rule of law requires that the exercise power by the legislature or buy the judiciary or by the government or by any other authority must be conditioned by the Constitution. Judicial review is thus the touchstone and repository of the supreme law of the land. In recent times, judicial review of

administrative action has become extensive and expansive. The traditional limitations have vanished and the sphere of judicial scrutiny is being expanded. Under the old theory, the courts used to exercise power only in cases of absence or excess or abuse of power. As the State activities have become pervasive and giant public corporations have come in existence, the stake of public exchequer justifies larger public audit and judicial control.

The scope of judicial review in India is not a wide as in USA. The American Supreme Court can declare any law unconstitutional on the ground of its not being in "due process of law", but the Indian Supreme Court has no such power. In India, outside the limitation imposed on the legislative powers, Parliament and State legislature are supreme in their respective legislative fields and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate legislature. Another reason is because the Indian Supreme Court has consistently refused to declare legislative enactments invalid on the ground that they violate the natural, social or political rights of citizens, unless it could be shown that such injustice was expressly prohibited by the Constitution.

Judicial Review, a concept of Rule of Law, is the check and balance mechanism to maintain the separation of powers. Separation of power has rooted the scope of Judicial Review. It is a great weapon in the hands of the courts to hold unconstitutional and unenforceable any law and order which is inconsistent or in conflict with the basic law of the land. The two principal basis of judicial review of administrative actions are "Theory of Limited Government" and "Supremacy of constitution" with the requirement that ordinary law must confirm to the Constitutional law.

### 4.2 Rule of Law: Basis of Judicial Review of Administrative Actions

It is the duty of the judiciary to keep different organs of the state within the limits power conferred upon them by the constitution. The legitimacy of judicial review is based in the Rule of Law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. Judicial Review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked.

Dicey has given three meanings of the rule of law. According to him, "It means in the first place, the absolute supremacy or predominance of regular laws as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogatives or even of wide discretionary authority on the part of the Government. Englishmen are ruled by the law and by the law alone a man may be punished for a breach of law but he can be punished for nothing else… no man's punishable or can be lawfully made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."[1] Further Dicey writes, "It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. Dicey continues that, "Not only that with us no man is above the law but (what is a different thing) that here everyman. Whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[2] Prof. Dicey while elaborating the equality of all before law. Say, "With us every official, from the Prime Minister to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen".

Thirdly, according to Dicey, the Rule of Law may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries, naturally form part of the constitutional code, are not the sources but the consequences of the rights of individuals as defined and enforced by the courts…. It means that the main principle of the constitution, such as the right to personal or of public meeting, has been set up on the foundation of the old common law and not as things derived from any general Constitution Theory. Rights in brief, do not flow from the constitution but from judicial decisions as in the famous Wilkes, case[3].

The Doctrine of Judicial Review is embodied in the Constitution and the subject can approach High Court and Supreme Court for the enforcement of fundamental

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E.C.S. Wade, *Dicey: Introduction to the Study of the Constitution*, 10th edition, London, Macmillan,1959,p.188.

[2]*Ibid.*

[3].N.R.Madhava Menon, *Constitutional Institutions and the maintenance of Rule of Law; Rule of Law in a Free Society*,(ed.) N.R.Madhava Menon,Oxford University Press,2008,p.41-42.

right guaranteed under the Constitution. If the executive or the Government abuses the power vested in it or if the action id mala fide, the same can be quashed by the ordinary courts of law ..All the rule, regulations, ordinances, bye-laws, notifications, customs and usages are "laws" within the meaning of Article13[4] of the Constitution and if they are inconsistent with or contrary to any of the provisions thereof, they can be declared ultra vires by the Supreme Court and by the High Courts . Judicial review of administrative action aims to protect citizens from abuse of power by any branch of State.

All administrative authorities are subject to the rule of law. Normally, their decisions are subject to statutory and departmental appeals, revisions or review. These authorities form a large part of our legal system directly administering law to persons with whom they are dealing. However, other defects occur in the exercise of their powers which are incapable of remedy by the statutory and departmental appeals. A supervisory power to correct such defects has, therefore, been vested in the High Courts. The power of the judicial and administrative superintendence of the High Courts over such authorities was first conferred on the High Courts by section 107 of the Government of India Act, 1919. When this Act was repealed by the Government of India Act, 1935, section 224 of the latter Act continued the administrative superintendence but expressly took away the power of judicial superintendence of the High Courts. The reason, perhaps, was that the power of judicial superintendence had not been expressly conferred on the High Courts by section107 of the former Act but was implied in the High Courts by judicial construction of section 107. The effect of these judicial decisions was negative by section 224(2) of the latter Act. However, the judicial superintendence in addition to the administrative one of the High Courts over all the courts and tribunals in their respective territorial jurisdiction was re-established by article 227 of the Constitution of India.[5]

The immediate reason for the enactment of article 226 was the need for a machinery to enforce fundamental rights. The infringement of the fundamental rights may be caused not only by executive action but by the exercise of

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Article 13 (2) of the Constitution of India.

*See Municipal Corporation of Delhi v. M/S Tyagi Anand and Company (P) Ltd.,* I.L.R. (1972) 1 Delhi 804.

legislative power. Article 227 could not be invoked to correct the latter. But the scope of article 226 was broadened to include not only the enforcement of fundamental rights but also the upholding of other rights and correction of other wrongs. Articles 226 and 227, therefore, form a harmonious system together forming the power of judicial review of the High Courts.

Rule of Law has been held to be a basic feature of the Indian Constitution. In the Indian Constitution, Article 14 combines the English doctrine of the Rule of Law and the equal protection clause of the Fourteenth Amendment. Rule of law postulates the preservation of the spirit of law through the whole range of government. Because of its amorphous nature Sir Ivor Jennings called it an unruly horse[6].

Soon after the Constitution came into force in 1950 in *A.K.Gopalan's case*[7] the Supreme Court placed rather a narrow and restrictive interpretation upon article 21 of the Constitution. By a majority, it was held in this case that "… the procedure established by law' means procedure established by a law made by the State" and the court refused to infuse in that procedure the principles of natural justice. The court also arrived at the conclusion that article 21 excluded enjoyment of the freedoms guaranteed under Article 19.

*Gopalan's case* [8] was decided soon after, the Constitution came into force, more than 49 years ago. The judgement was mainly based on the language of the Constitution and the requirements of the particular case before the court. The law has not remained static. The doctrine of exclusivity of fundamental rights as evolved in *Gopalan's case*[9] was thrown overboard by the same Supreme Court, about two decades later in *Bank Nationalization case*[10] , and four years later in 1974, in *Hardhan Saha's case*[11], the supreme court judged the constitutionality of preventive detention with reference to article 19 also. Twenty eight years after the judgement in *Gopalan's case*[12], in 1978 the Supreme Court in *Maneka*

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[6] M.N.Venkatachaliah, *Rule of Law and Judiciary ;Rule of Law in a Free Society*,(ed.) N.R.Madhava Menon, Oxford University Press,2008, p.123.
[7] .*Supra* n.6.
[8] *Id.*
*Id.*
*R.C.Cooper v. U.O.I.*,AIR 1970 SC 565
AIR 1974 SC 2154
[12] *Supra* n 6.

*Gandhi's case*[13], pronounced that the procedure contemplated by article 21 must be 'right, just and fair' and not arbitrary; it must pass the test of reasonableness and the procedure should be in conformity with the principles of natural justice and unless it was so, it would be no procedure at all and the requirement of article 21 would not be satisfied. The courts have, thus, been making judicial intervention in cases concerning violation of human rights as an ongoing judicial process.

In the case of *Nilabati Behera v. State*[14]the court crystallized the judicial right to compensation, which was further reiterated in *D. K. Basu v. State of W.B*[15]. In this the court went to the extent of saying that since compensation was being directed by the courts to be paid by the State, which has been held vicariously liable for the illegal acts of its officials , the reservation to clause 9(5) of ICCPR by the Government of India had lost its relevance. In fact, the sentencing policy of the judiciary in torture related cases, against erring officials in India, has become very strict.

### 4.3 Delegated Legislation: Inevitable for Welfare State

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

#### 4.3.1 Need to have Delegated Legislation in Welfare State

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

[13]AIR 1978 SC 597
[14]AIR 1993 SC 1960
[15](1997) 1 SCC 416

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.

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.

Certain matters covered by delegated legislation are of a technical nature which require handling by experts. In such cases it is inevitable that powers to deal with such matters is given to the appropriate administrative agencies to be exercised according to the requirements of the subject matter.

"Parliaments" cannot obviously provide for such matters as the members are at best politicians and not experts in various spheres of life.

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.

### 4.3.2 Nature and Scope of Delegated Legislation in India

Delegated legislation means legislation by authorities other than the Legislature, the former acting on express delegated authority and power from the later. Delegation is considered to be a sound basis for administrative efficiency and it does not by itself amount to abdication of power if restored to within proper limits. The delegation should not, in any case, be unguided and uncontrolled.

Parliament and State Legislatures cannot abdicate the legislative power in its essential aspects which is to be exercised by them. It is only a nonessential legislative function that can be delegated and the moot point always lies in the line of demarcation between the essential and nonessential legislative functions.

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

In order to avoid the dangers, the scope of delegation is strictly circumscribed by the Legislature by providing for adequate safeguards, controls and appeals against the executive orders and decisions. The power delegated to the Executive to modify any provisions of an Act by an order must be within the framework of the Act giving such power.

Under the constitution of India, articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The delegation of legislative power was conceived to be inevitable and therefore it was not prohibited in the constitution. Further, Articles 13(3)(a) of the Constitution of India lays down that law includes any ordinances, order bylaw, rule regulation, notification, etc. Which if found inviolation of fundamental rights

would be void. Besides, there are number of judicial pronouncements by the courts where they have justified delegated legislation[16].

While commenting on indispensability of delegated legislation Justice Krishna Iyer, has rightly observed in the case of *Arvinder Singh v. State of Punjab*[17], 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 plenitude, proliferation and articularisation. Delegation of some part of legislative power becomes a compulsive necessity for viability.

### 4.3.3Modes of Control over Delegated Legislation

The practice of conferring legislative powers upon administrative authorities though beneficial and necessary is also dangerous because of the possibility of abuse of powers and other attendant evils. There is consensus of opinion that proper precautions must be taken for ensuring proper exercise of such powers. Wider discretion is most likely to result in arbitrariness. The exercise of delegated legislative powers must be properly circumscribed and vigilantly scrutinized by the Court and Legislature is not by itself enough to ensure the advantage of the practice or to avoid the danger of its misuse. For the reason, there are certain other methods of control emerging in this field.

The control of delegated legislation in India is mainly of three of the following types: -

Procedural

Parliamentary;

Judicial

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

Doctrine of ultra vires

Use of prerogative writs.

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[16]*In re Delhi Laws Act case,* AIR 1961 SC 332*; Vasantlal Magan Bhai v.State of Bombay,* AIR 1961 SC 4*; S. Avtar Singh v. State of Jammu and Kashmir,* AIR 1977 J&K 4

[17]AIR 1979 SC 321

### 4.4 Doctrine of Ultra-Vires: Jurisdictional Principle

The jurisdictional principle which determines the reviewability of an administrative action is often expressed as 'want or excess of jurisdiction; the underlying doctrine is known as 'ultra-vires'. Historically, the basis of judicial review in England is the doctrine of ultra-vires or excess of jurisdiction. The attempts by the courts to extend this narrow concept to the modern problems of the administrative process has introduced certain technicalities and artificialities in the law relating to judicial review. The courts take the position that writ jurisdiction is of a supervisory nature and cannot be equated with an appeal to the court from the body in question[18].

Thus, the doctrine of ultra vires provides a half way basis of judicial review between review on appeal and no review at all. In an appeal the appellate authority not only quash the administrative decision, but can go into the merits of the decision of the authority appealed against and may substitute its own judgement in its place, while in the case of ultra vires the powers of the courts are limited only to quash the administrative decision if it is in excess of power of the authority, or directing to act according to law and courts keep away from examining the merits of the pase. Thus, an appeal on a point of law or fact is wider in scope and court has a wider jurisdiction. Thus, the half way review, extent of which is not always clear, creates uncertainty about judicial intervention in administrative action[19].

Sometimes, the courts may feel like intervening because they feel strongly about the injustice of the case before them, sometimes they are not sure of injustice and uphold the decision of the administration. Courts lack frankness to admit this clearly which leads them to state their conclusion in terms of artificial conceptualism and vague formulae. The result often manifests itself inconsistent decisions and judicial uncertainty.

On the whole, the judicial review of administrative action is undertaken with a view to ensuring that administrative agencies act according to their allocated jurisdiction and according to the principles of natural justice. The main ground for invalidating an administrative action is ultra vires. However, over the years, the courts have developed various grounds on which they could intervene, yet the

[18]Wade, *Administrative Law* , Oxford University Press , 1977, p. 40.
[19]*Ibid.*

law regarding judicial review of administrative action through writs is complicated, involved and deficient.

### 4.4.1Doctrine of Ultra-Vires: Limited Application in India

The law, regarding the judicial review of administrative action in India was derived historically from the common law, the dominant feature of which was the enforcement of controls over the powers of public authorities through the ordinary court of law. Thus, from the earliest times, the proceedings instituted before borough courts were removable into the king's court at Westminster[20]. The superior courts used to maintain a very tight control over the justices of the peace, who exercised a wide range of duties, including repairs of highways, bridges and other administrative matters. When most of the administrative powers of the justices of the peace were transferred to the local authorities in 1888, the courts maintained similar control over the latter. While exercising their control over the lower courts and tribunals, the courts claimed a right to determine the proper jurisdiction of the former and to keep them within their jurisdiction. In this process of review, there emerged the principle of jurisdiction, otherwise known as 'ultra-vires' which marked off an area in which the lower tribunals are absolute judges, but are not allowed to cross the wall.

The doctrine of ultra-vires, as explained by Lord Sel borne L.C. in one case, ought to be reasonably, and not unreasonably understood and applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised ought not (unless expressly prohibited) to be held ultra vires[21].

As in England, so in India, the doctrine of ultra-vires has attained a high level of sophistication, so that the courts are enabled not merely to control actions which are obviously outside jurisdiction, but to examine the reasonableness, motives and relevancy of considerations. Courts have also exercised controls on various aspects of discretionary powers. Procedural errors are also held jurisdictional if the procedural requirement is mandatory as distinguished from directory.

[20]Holdsworth, A History of English Law, Vol. 2(1936) pp. 395-405.

[21]*Attorney-General v. Great Eastern Railway Co.* (1880)5 AC 473 at 478

Administrative actions in India are subject to judicial review in cases of llegality, irrationality or procedural impropriety[22]. In state of *A.P. v. Me Dowell & Co*[23].the Apex Court while dealing with the administrative actions and judicial review, laid down that the scope of judicial review in case of administrative action is limited to three grounds: (i) unreasonableness which more appropriately be called irrationality; (ii) illegality; (iii) procedural impropriety.

The doctrine of ultra-vires is the principal instrument for judicial control of administrative authorities. It embraces all kinds of administrative acts done' in excess of powers.' Otherwise known as 'jurisdictional principle'. However, in judicial review court does not sit as a court of appeal but merely review the manner in which the decision was made.

The Supreme Court in *Tata Cellular v. Union of India*[24], laid down that judicial review is concerned with reviewing not the merits of the decision but the decision making process itself. If a review of administrative decision is permitted, it will be substituting its own decision which itself may be fallible. The duty of the court is to confine itself to the question of legality. Its concern should be[25]

Whether the decision-making authority exceeds its power;

committed an error of law;

committed a breach of the rules of natural justice;

reached a decision which no reasonable tribunal would have reached;

Abuse of its power.

The doctrine of ultra-vires is consistent with to some extent the concept of rule of law, therefore, the concept of ultra-vires is nowadays regarded by many as an inadequate rationale for judicial review. Thus, the preferred view is that the courts need not resort to fiction such as the intention of the parliament or the technicalities of 'jurisdictional facts' and 'error of law' but that rather the courts will intervene whenever there has been an unlawful exercise of power.

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[22]*Tata Cellular v. Union of India (1994)6 SCC 651;* AIR 1994 SCW 3344*; Pragoty Supply Co. & Co.-op. Society Ltd. v. State,* AIR 1996 Gau 17

[23]AIR 1996 SC 1627

[24]*Supra* n.22.

[25]*Mansukhlal v. State* (1997)7 SCC 622

### 4.5. Use of Writs for Review of Administrative Action

In modern democratic countries, the administrative authorities are vested with vast discretionary powers. The exercise of those powers often becomes subjective in the absence of specific guidelines etc. Hence the need for a control of the discretionary powers is essential to ensure that 'Rule of Law' exist in all governmental actions. The judicial review of administrative actions in the form of writ jurisdiction is to ensure that the decisions taken by the authorities are legal, rational, proper, just, fair and reasonable. Safeguard of fundamental rights and assurance of natural justice are the most important components of writ jurisdictions.

Article 32 and 226 of the constitution of India has designed for the enforcement of fundamental rights and for a judicial review of administrative actions, in the form of writs. It is a constitutional remedy available to a person to bring his complaint or grievance against any administrative action to the notice of the court. Safeguard of fundamental rights and assurance of natural justice are the most important components of writ jurisdictions.

#### 4.5.1 Origin of Writs in India

The origin of writs in India goes back to the Regulating Act, 1773 under which Supreme Court was established at Calcutta. The charter also established other High Courts and also gave them power to issue writs as successor to Supreme Court. The writ jurisdiction of these courts was limited to their original civil jurisdiction which they enjoyed under Section 45 of the Specific Relief Act, 1877.

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Writ jurisdiction is exercised by the Supreme Court and the High Courts. This power is conferred to Supreme Court by article 32 and to high courts by article 226.Article 32(1) guarantee a person the right to move the Supreme Court for the

enforcement of fundamental rights guaranteed by part III of the constitution. Article 32(2) empowers the Supreme Court to issue direction or orders or writs in the nature of Habeas Corpus, Certiorari, Prohibition, mandamus and Quo-warranto for the enforcement of fundamental rights. Article 226 empowers the state high courts to issue directions, orders or writs as mentioned above for the enforcement of fundamental rights and for 'any other purpose'. i.e., High courts can exercise the power of writs not only for the enforcement of fundamental rights but also for other legal rights.

Thus the constitution provides the discretionary remedies on the High Court and the Supreme Court. In the absence of the provisions of such remedies no one can enforce its rights given. Thus wherever there is a right there must be a remedy for it. Thus it should satisfy the maxim, 'ubi jus ibi remedium.' One of the principle makers of the constitution, Dr. Ambedkar has given the prime importance to Article 32 among all other articles from the Indian Constitution. He has referred that, "It is the very soul of the Constitution and the very heart of it, "It is the very soul of the Constitution and the very heart of it".

In *Devilal v. STO*[26], it has been marked that, "There can be no doubt that the Fundamental Rights, guaranteed to the citizens are a significant feature of our Constitution and the High Courts under Article 226 are bound to protect these Fundamental Rights." In *Daryao v. State of U.P.*[27] it was held that the right to obtain a writ must equally be a fundamental right when a petitioner presents the case. Thus, it cannot merely be considered as an individual's right to move the Supreme Court but it is also the duty and responsibility of the Supreme Court to protect the fundamental rights.

### 4.5.2 Principles of Exercise of Writs Jurisdiction in India

Writs are meant as prerogative remedies. The writ jurisdictions exercised by the Supreme Court under article 32 and by the high courts under article 226, for the enforcement of fundamental rights are mandatory and not discretionary. But the writ jurisdiction of high courts for 'any other purpose' is discretionary. In that sense the writ jurisdiction of high courts are of a very intrinsic nature. Hence high courts have the great responsibility of exercising this jurisdiction strictly in

[26]AIR 1965 SC 1150

[27]AIR 1961 SC 1457

accordance with judicial considerations and well established principles. When ordinary legal remedies seem inadequate, in exceptional cases, writs are applied. Following writs are used by our judiciary to review the administrative action:

#### 4.5.2.1 Writ of Habeas Corpus

The meaning of the Latin phrase Habeas Corpus is 'have the body'. According to Article 21, "no person shall be deprived of his life or personal liberty except according to the procedure established by law". The writ of Habeas corpus is in the nature of an order directing a person who has detained another, to produce the latter before the court in order to examine the legality of the detention and to set him free if there is no legal justification for the detention. It is a process by which an individual who has been deprived of his personal liberty can test the validity of the act before a higher court. The objective of the writ of habeas corpus is to provide for a speedy judicial review of alleged unlawful restraint on liberty. It aims not at the punishment of the wrongdoer but to resume the release of the retinue. The writ of habeas corpus enables the immediate determination of the right of the appellant's freedom. In the writs of habeas corpus, the merits of the case or the moral justification for the imprisonment or detention are irrelevant. In *A.D.M. Jabalpur v. Shivakant Shukla*[28], it was observed 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. If there is no legal justification for that detention, then the party is ordered to be released."

#### 4.5.2.2 Writ of Certiorari

The writ of Certiorari is generally issued against authorities exercising quasi-judicial functions. The Latin word Certiorari means 'to certify'. Certiorari can be defined as a judicial order of the supreme court or by the high courts to an inferior court or to any other authority that exercise judicial, quasi-judicial or administrative functions, to transmit to the court the records of proceedings pending with them for scrutiny and to decide the legality and validity of the order passed by them. Through this writ, the court quashes or declares invalid a decision taken by the concerned authority. Though it was meant as a supervisory

[28]AIR 1976 SC 1207

jurisdiction over inferior courts originally, these remedy is extended to all authorities who issue similar functions.

The concept of natural justice and the requirement of fairness in actions, the scope of certiorari have been extended even to administrative decisions. An instance showing the certiorari powers was exercised by the Hon'ble Supreme court in *A. K. Kraipak v. Union of India*[29], where the selection was challenged on the ground of bias. The Supreme Court delineated the distinction between quasi judicial and administrative authority. The Supreme Court exercising the powers issued the writ of Certiorari for quashing the action. Certiorari is corrective in nature. This writ can be issued to any constitutional, statutory or non statutory body or any person who exercise powers affecting the rights of citizens.

#### 4.5.2.3 Writ of Prohibition

The grounds for issuing the writs of certiorari and prohibition are generally the same. They have many common features too. The writ of prohibition is a judicial order issued to a constitutional, statutory or non statutory body or person if it exceeds its jurisdiction or it tries to exercise a jurisdiction not vested upon them. It is a general remedy for the control of judicial, quasi judicial and administrative decisions affecting the rights of persons.

The writ of Prohibition is issued by the court exercising the power and authorities from continuing the proceedings as basically such authority has no power or jurisdiction to decide the case. Prohibition is an extra ordinary prerogative writ of a preventive nature. The underlying principle is that 'prevention is better than cure.' In *East India Commercial Co. Ltd v. Collector of Customs*[30], a writ of prohibition is an order directed to an inferior Tribunal forbidding it from continuing with a proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise.

[29] AIR 1970 SC 170
[30] AIR 1963 SC 1124

#### 4.5.2.4 Writ of Mandamus

The writ of mandamus is a judicial remedy in the form of an order from the supreme court or high courts to any inferior court, government or any other public authority to carry out a 'public duty' entrusted upon them either by statute or by common law or to refrain from doing a specific act which that authority is bound to refrain from doing under the law. For the grant of the writ of mandamus there must be a public duty. The superior courts command an authority to perform a public duty or to non-perform an act which is against the law. The word meaning in Latin is 'we command'. The writ of mandamus is issued to any authority which enjoys judicial, quasi-judicial or administrative power. The main objective of this writ is to keep the public authorities within the purview of their jurisdiction while performing public duties. The writ of mandamus can be issued if the public authority vested with power abuses the power or acts mala fide to it.

#### 4.5.2.5 Writ of Quo Warranto

The word meaning of 'Quo warranto' is 'by what authority'. It is a judicial order against a person who occupies a substantive public office without any legal authority. The person is asked to show by what authority he occupies the position or office. This writ is meant to oust persons, who are not legally qualified, from substantive public posts. The writ of Quo warranto is to confirm the right of citizens to hold public offices. In this writ the court or the judiciary reviews the action of the executive with regard to appointments made against statutory provisions, to public offices .It also aims to protect those persons who are deprived of their right to hold a public office.

In *University of Mysore v. Govinda Rao*[31],the Supreme Court observed that the procedure of quo Warranto confers the jurisdiction and authority on the judiciary to control executive action in making the appointments to public offices against the relevant statutory provisions; it also protects a citizen being deprived of public office to which he may have a right.

[31]AIR 1965 SC497

### 4.6 Grounds of Judicial Review of Administrative Action in India

Outsourcing of legislative and adjudicatory powers to the administrative authorities as an imperative of modern system of governance has brought the law of judicial review of administrative action in prime focus. Law dealing with judicial review of administrative action is largely judge-induced and judge-led; consequently thickets of technicalities and inconsistencies surround it. Anyone who surveys the spectrum of judicial review finds that the fundamentals on which courts base their decisions include Rule of law, administrative efficiency, fairness and accountability. These fundamentals are necessary for making administrative action 'people-centric'. Courts have generally exhibited a sense of self-restraint where judicially manageable standards do not exist for judicial intervention[32].

As a general rule, courts have no power to interfere with actions taken by administrative authorities in exercise of discretionary powers. But this does not mean that there is no power of court to control over the discretion of administration. In India, the court will interfere with the discretionary powers exercised by the administration in the basically on two grounds: i.e. failure to exercise discretion and excess or abuse of discretion.

The judicial review of administrative action can also be exercised on the following grounds:

Illegality**:** means that the decision maker must correctly understand the law that regulates his decision making power and must give effect to it. Sometime legislation allows the exercise of a wide and seemingly unrestrained discretion by the public body, or provides that a duty should be discharged in certain circumstances, but does not prescribe a particular process for determining whether those circumstances arise in an individual case. Here, illegality can occur where the action, failure to act or decision in question in question violate the public law principles set down by the courts for processes of this kind.

Irrationality**:** means that the decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person could have arrived at such a decision.

[32] *EssarOilLtd.v.HalarVtkarshSamiti*,(2004)2SCC392

The benchmark decision on this principle of judicial review was made as long ago as l948 in the *Wednesbury case*[33].It is important to note that this ground of review does not give judges much opportunity to review the merits of administrative decisions as the ground has a high threshold for judicial intervention which is rarely satisfied. The ground is directed at extremes of administrative behavior. Lord Greene in the *Wednesbury case*[34] stated that for review to be successful on this ground the administrative decision taken must be something so absurd that no sensible person could ever dream that it laid within the powers of the authority.

Procedural impropriety**:** means that the procedure for taking administrative decision and action must be fair, reasonable and just. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached. The case must be heard and decided by the person to whom it is delegated and not by another. The process to arrive at some decision must be followed as it is expressed in the statute. The rule of natural justice must be applied by the deciding authority.

Proportionality/Unreasonablenes**:** means in any administrative decision and action the end and means relationship must be rational. In, *Ajai Hasia v. Khalid Mujib*[35],the Regional Engineering College made admissions on the ground that it was arbitrary and unreasonable because high percentage marks were allocated for oral test, and candidates were interviewed for very short time duration. The Court struck down the Rule prescribing high percentage of marks for oral test because allocation of one third of total marks for oral interview was plainly arbitrary and unreasonable and violative of Art. 14 of the Constitution.

In another case of *Air India v. Nargesh Meerza*[36]**,** one of the Regulation of Air India provided that an air hostess would retire from the service of the corporation upon attaining the age of 35 years, or on marriage , if it took place within the four years of service or on first pregnancy , whichever is occurred earlier. The

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[l948] 1KB 223 HL

*Ibid.*

[35]AIR 1987 SC 487

[36]AIR 1981 SC 1189

Supreme Court struck down the Air India and Indian Airlines Regulations on the retirement and pregnancy bar on the services of air hostess as unconstitutional on the ground that the condition laid down therein was entirely unreasonable and arbitrary.

These grounds of judicial review were developed by the Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*[37]. Though these grounds of judicial review are not exhaustive and cannot be put in water tight compartments yet these provide sufficient base for the courts to exercise their review jurisdiction over administrative action in the interest of efficiency, fairness and accountability**.**

### 4.7 Natural justice: Limits on Discretionary Powers of Administrative Authorities

The concept of natural justice is very important in the modern Administrative Law for it provides a basis for judicial control of the procedure followed by adjudicatory bodies, but it is vague, and has no fixed connotation. In India, there is no statute laying down the minimum procedure which administrative agencies must follow while exercising decision-making power. There is, therefore, a bewildering variety of administrative procedure.

Sometimes the statute under which the administrative agency exercise power lays down the procedure which the administrative agency must follow but at times the administrative agency is left free to devise its own procedure. The question whether in particular case principles of natural justice have been contravened or not is a matter for the courts to decide from case to case[38]. However, courts in India have always insisted that, the administrative agencies must follow a minimum of fair procedure. This minimum fair procedure refers to the principles of natural justice.

Natural justice meant many things of many writers, lawyers and system of law. It is a concept of changing content. However, this does not mean that at a given time no fixed principles of natural justice can be identified. The principles of natural justice through various decisions of courts can be easily ascertained,

[37] 1983 UKHL 6

[38] *A.K. Roy v. UOI,* AIR l982 SC 709

though their application in a given situation may depend on multifarious factors. It is not a bull in China shop or a Bee in one's bonnet[39].

Often the concept of natural justice is criticized as being an unruly horse. Replying to the criticism Lord Denning said, "With a good man in saddle, the unruly horse can be kept under control. It can jump over obstacles. It can leap fences put up by fiction and come down on the other side of justice"[40].

For some three or four hundred years, Anglo - American courts have actively applied two principles of natural justice. However, this reduction of the concept of natural justice to only two principles should not be allowed to obscure the fact that natural justice goes to "the very kernel of the problem of administrative justice"[41] . These two principles are:

Nemo in propria causa judex, esse debet - No one should be made a judge in his own cause, or the rule against bias.

Audi alteram partem - Hear the other party, or the rule of fair hearing, or the rule that no one should be condemned unheard.

These principles are the foundation on which the whole superstructure of judicial control of administrative action is based.

### 4.7.1 Rule against Bias

The first principle means that a person should not be a judge in his own cause that means a person interested in one of the parties to the dispute should not, even formally, take part, in the adjudicatory proceeding. 'Bias' means an operative prejudice, whether conscious or unconscious, in relation to a party or issue. Such operative prejudice may be the result of a preconceived opinion or a predisposition or a predetermination to decide a case in a particular manner, so much so that it does not leave the mind open.

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[39] *Jt.Krishna Iyer in Mohinder Singh Gill v. Chief Election Commissioner,(l978)l SCC 405; AIR l978 SC 85l*

[40] *Enderby Town Football Club v. Football Association,* (l97l) Ch.D. 59l
H.W.R.Wade, *Administrative Law,* Oxford University Press ,l967, p. l54.

The basis of this principle is that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Actual existence of bias is not necessary. The test of bias is "real likelihood of bias". If, a reasonable man would think, on the basis, of the existing circumstances that he (i.e. adjudicator) is likely to be prejudiced, that is sufficient to quash the decision".[42]

Bias may arise when the adjudicator has some interest in the subject matter of the proceedings before him. If the interest is pecuniary, disqualification arises howsoever small the interest may be. In case of other interest, it is necessary to consider whether there is a reasonable ground for assuming the likelihood of bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice.

The most important *A.K.Kraipak case*[43] may also be noted here. In a selection board for certain posts, a member was himself a candidate who was selected along with a few others. On a challenge by the candidates not selected, the Supreme Court quashed the list of successful candidates on the ground of bias in so far as a person personally interested in the matter sat on the selection committee. Similarly, selection of a candidate was quashed because his son-in-law was a member of the selection committee[44].

However in *G. N. Nayak v. Goa University*[45], where a senior officer expresses appreciation of the work of a junior in the confidential report. It does not amount to bias nor would it disqualify the senior officer from being a part of the Departmental promotion committee to consider the junior officer along with others for promotion. The Supreme Court has stated that every preference does not vitiate an action. "If, it is rational and unaccompanied by otherwise, it would not, vitiate a decision.

### 4.7.2 Rule of Fair Hearing

This is the second long arm of natural justice which protects the 'little man' from arbitrary administrative actions whenever his right to person or property is

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[42] *S. Parthsarathi v. State of A.P.,* AIR l973 SC 270l: (l974)3 SCC 459, *Tata Cellular v. UOI,* AIR l996 SCll, *Kumaon Mandal Vikas Nigam v. Girja Shankar Pant,* AIR 200l SC 24

[43] *Supra* n.29.

[44] *D.K. Khanna v. UOI,* AIR l973 HP 30

[45] AIR 2002 SC 790

jeopardized. Thus one of the objectives of giving a hearing in application of the principles of natural justice is to see that an illegal action or decision does not take place. Any wrong order may adversely affect a person and it is essentially for this reason that a reasonable opportunity may have to be granted before passing an administrative order[46]. That no one should be condemned unheard is an important maxim of civilized jurisprudence[47].

The development in India have been similar to those in England. The courts in India have realised the need to give a hearing to the effected person to the utmost limit. As the Supreme
Court has observed in *Mohinder Singh Gill v. Chief Election*

> *Commissioner*[48]*. To-day our jurisprudence, the advances made by natural justice for exceed old frontiers and if judicial creativity be lights penumbral areas it is only for improving the quality of government by injecting fair play into its wheels... Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity.*[49]

The extension of the principle of natural justice i.e. right of hearing to the person affected by administrative process has been consummated by extension of the scope of quasi-judicial and natural justice as well as by discarding the distinction between “quasi-judicial” and "administrative" and invoking the concept of fairness in administrative action. Hearing has thus become norm, rather than an exception, in administrative process at the present day. It was in1970, in *Kraipak case*[50] that the Supreme Court made a categorical statement that the distinction between quasi-judicial and administrative ought to be discarded for the purposes of giving a hearing to the affected party.

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[46]*BALCO Employees Union v. UOI,* (2002)2 SCC 333
[47]*Board of Education v. Rice,* l9ll AC l79*; Local Govt. Board v. Arlidge,* l9l5 AC l20*; North Bihar Agency v. State of Bihar,* AIR l98l SC l758; (l98l)3 SCC l3l
[48]AIR 1985 SC 851
[49]*Ibid.*
[50]*Supra* n.29.

In *Hindustan Petroleum Corporation v. H.L. Trehan*[51] the Supreme Court made it absolutely explicit that even when the authority has statutory power to take action without hearing it would be arbitrary to take action without hearing and thus violative of Article 14 of the constitution

The right of fair hearing does not necessarily include an oral hearing. What is essential is that the party affected should not be given sufficient opportunity to meet the case against him and this could be achieved by filing written representations. The party concerned should have adequate notice of the case against him which he has to meet, and that the party affected should be appraised of the evidence on which the case against him is based and be given opportunity to rebut these materials.

### 4.8. Doctrine of Legitimate Expectations

The concept of legitimate expectations consists of inculcating an expectation in the citizen that under certain rules and scheme, he would continue to enjoy certain benefits of which he would not be deprived unless there is some overriding public interest to deprive him of such an expectation. The term "legitimate expectation" was first used by Lord Denning in 1969 and from that time it has assumed the position of a significant doctrine of public law in almost all jurisdictions[52].

In England, the term 'legitimate expectation' was first used by Lord Denning in *Schmidt v. Secretary of State for Home Affairs*[53], wherein the government had cut short the period already allowed toa n alien to enter and stay in England, the court held that the-person had legitimate expectation to stay in England which cannot be violated without following a procedure which is fair and reasonable.

In this manner Lord Denning used the term 'legitimate expectation' as an alternative expression to the word 'right'. The emerged concept of legitimate expectation in administrative law has now gained sufficient importance. It belongs to the domain of public law and is intended to give relief to the people when they are not able to justify their claims on the basis of law in the strict sense of the term though they had suffered a civil consequences because their legitimate expectation has been violated.

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[51](1989) 1SCC 764

[52]Clerk, *In Pursuit of Fair Justice*, AIR 1996 (J)11.

[53](1969)1 All ER 904(CA)

With the aforesaid back ground we shall now examine the extent to which the principle of legitimate expectation has been accepted in India. The capacity of the Apex Court to import legal doctrines and to plant them in a different soil and climate and to make them flourish and bear fruits is tremendous. The importation of the doctrine of legitimate expectation is recent. The first reference to the doctrine is found in *State of Kerala v. K.G. Madhavan Pillai*[54], in the instant case, the government had issued a sanction to open a new unaided school and to upgrade the existing ones. However, after 15 days a direction was issued to keep the sanction in abeyance. This order was challenged on the ground of violation of the principle of natural justice. The court held that the sanction order created legitimate expectation in the respondents which was violated by the second order without following the principles of natural justice which is sufficient to vitiate an administrative order.

The doctrine was further applied in *Scheduled Caste and Weaker Section Welfare Association v. State of Karnataka*[55], where the government had issued a notification notifying areas where slum clearance scheme will be introduced. However, the notification was subsequently amended and certain areas notified earlier were left out. The Supreme Court held that the earlier notification had raised legitimate expectation in the people living in an area which had been left out ina subsequent notification and hence legitimate expectation cannot be denied without a fair hearing.

Thus where a person has legitimate expectation to be treated in a particular way which falls short of an enforceable right, the administrative authority cannot deny him his legitimate expectation without a fair hearing. Legitimate expectation of fair hearing mayarise by a promise or by an established practice.

Again in case of *Navjyoti Group Housing Society v. Union of India*[56]on the doctrine of legitimate expectation it has been held that person enjoying certain benefits/advantage under the old policy of the government derive a legitimate expectation even though they may not have any legal right under the private law in the context of its continuance. "The doctrine of legitimate expectation imposes in essence a duty on the public authority to act fairly by taking into consideration

[54]AIR 1989 SC 49
[55](1991)2 SCC 604
[56]AIR 1993 SC 155

all the relevant factors relating to such legitimate expectation that may have a number of different consequences is that the authority ought not to act to defeat the legitimate expectation without some overriding reasons of public policy to justify its doing so. Within the conspectus of fair dealing in the case of legitimate expectation, the reasonable opportunity to make representation by the parties likely to be affected by any change of consistent past policy came in. In a case of legitimate expectation if the authority proposes to defeat a person's legitimate expectation it should afford him an opportunity to make a representation in the matter.

The Supreme Court in the case of *Union of India v. Hindustan Development Corporation*[57], case it held that the principle of legitimate expectation gave the sufficient locus standi to seek judicial review and that the doctrine was confined mostly to a right to fair hearing before decision which resulted in negating a promise or withdrawing an undertaking was taken. It did not involve any crystallized right. The protection of such legitimate expectation did not require the fulfilment of expectation where the overriding public interest. In this case several English and Australian cases were referred to and conclusions were then reached[58].

In this case in the absence of any fixed procedure for fixing price and quantity for the supply of food grains, the Government adopted a dual pricing system (lower price for big suppliers and higher price for small suppliers) in the public interest in order to break the cartel. The court held that there is no denial of legitimate expectation as it is not based on any law, custom or past practice. The court said that it is not possible to give an exhaustive list wherein legitimate expectations arise but by and large they arise in promotion cases, though not guaranteed as a statutory right in cases of contracts, distribution of largess by the government and in somewhat similar situations[59].

Legitimate expectation in the substantive sense has been accepted as part of our law and that the decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way. As a doctrine it

[57]AIR 1994 SC 1988
[58]*Id.*See also *P.T.R. Exports v. Union of India,* (1996)5 SCC 268
[59]*Id.*

takes its place besides such principles as rules of natural justice, rule of law, non-arbitrariness, reasonableness, fairness promissory estoppel, fiduciary duty and, perhaps, proportionality to check the abuse of the exercise of administrative power.

### 4.9 Principle of Proportionality vs. Wednesbury Unreasonableness

The concept of "wednesbury unreasonableness" was developed in the case of *Associated Picture House* v. *Wednesbury Corporation*[60] and hence the name "wednesbury unreasonableness". It simply means that administrative discretion should be exercised reasonably. Accordingly, a person entrusted with discretion must direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the subject he has to consider. If he does not obey those rules he can be said to be acting unreasonably[61]. Lord Diplock beautifully sums up "wednesbury unreasonableness" as a principle that applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it[62]. Quite obviously the concept of wednesbury unreasonableness is extremely vague and is not capable of objective evaluation. Hence wednesbury unreasonableness cannot be defined in the form of standard tests for universal application.

#### 4.9.1 Application of Doctrine of Proportionality in India

The doctrine of promissory estoppel[63] is an "equitable principle evolved by the courts for doing justice".[64]The classical definition of proportionality has been given by none other than Lord Diplock when his Lordship rather ponderously stated "you must not use a steam hammer to crack a nut if a nut cracker would do"[65] Thus proportionality broadly requires that government action must be no

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*Supra* n.33.

[61]*Ibid.,* pp.682, 683

[62]*Council of Civil Service Unions. v. Minister for the Civil Services,* Supra n.37 at951

[63]For a general discussion on the doctrine of promissory estoppels see, Spencer, Bower and Turner, *Estoppel by Representation* Butterworths, London, 3rd Edition 1977,pp. 366-401; I.C. Saxena, The Twilight of Promissory Estoppel in India, 16, JILI., p. 187

[64]*M.P. Sugar Mills v. State of Uttar Pradesh,* AIR 1979 SC 621 *at p. 632. This doctrine is also called as equitable estoppels, quasi estoppels, new estoppels and estoppel.*

[65]*R v. Goldsmith* (1983) 1 WLR 151, p. 155

more intrusive than is necessary to meet an important public purpose[66]. However the greatest advantage of proportionality as a tool of judicial review is its ability to provide objective criteria for analysis. It is possible to apply this doctrine to the facts of acase through the use of various tests.

Lord Diplock even while giving the tripartite classification admits that proportionality in the future would be an additional ground of review[67]. However, today most authors accept proportionality as an additional head of judicial review within the concept of irrationality. Thus proportionality and Wednesbury unreasonableness is seen as the two aspects of irrationality. Initially proportionality was only a competitor with wednesbury unreasonableness but because of the high degree of objectivity associated with proportionality and the vast improvements that the concept has undergone in the last decade and a half, it is seeking to totally replace Wednesbury unreasonableness as the only sub-head of review under the concept of irrationality.

The Indian Supreme Court consciously considered the application of the concept of proportionality for the first time in the case of *Union of India* v. *G. Ganayutham*[68]. In that case the Supreme Court after extensively reviewing the law relating to wednesbury unreasonableness and proportionality prevailing in England held that the „wednesbury" unreasonableness will be the guiding principle in India, so long as fundamental rights are not involved. However the court refrained from deciding whether the doctrine of proportionality is to be applied with respect to those cases involving infringement of fundamental rights. Subsequently came the historic decision of the Supreme Court in *Omkumar* v. *Union of India*[69]. It was in this case that the Supreme Court accepted the application of proportionality doctrine in India. However, strangely enough the Supreme Court in this case suddenly discovered that Indian courts had ever since 1950 regularly applied the doctrine of proportionality while dealing with the validity of legislative actions in relation to legislations infringing the fundamental freedom enumerated in Article 19 (1) of the Constitution of India.

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[66] John Adler, *General Principles of Constitutional and Administrative law*, 4th ed., 2002, p. 385.

[67] *Supra n.37* at 950.

[68] (1997) 7 SCC 463
AIR 2000 SC 3689

According to the Supreme Court the Indian courts had in the past in numerous occasions the opportunity to consider whether the restrictions were disproportionate to the situation and were not the least restrictive of the choices[70]. The same is the position with respect to legislations that impinge Article 14 (as discriminatory), and Article 21 of the Constitution of India[71]. With respect to the application of the doctrine of proportionality in administrative action in India, the Supreme Court after extensively reviewing the position in England came to a similar conclusion. The Supreme Court found that administrative action in India affecting fundamental freedoms (Article 19 and Article 21) have always been tested on the anvil of proportionality, even though it has not been expressly stated that the principle that is applied is the proportionality principle[72]. Thus the court categorically held that the doctrine of proportionality is applicable to judicial review of administrative action that is violative of Article 19 and Article 21 of the Constitution of India.

However even after a decade since the decision in *Omkumar's case*[73], no further progress has been made. The law regarding proportionality in India remains at what has been stated in Omkumar's case. The only advancement could be the vague observation in a few subsequent judgments that the doctrine of unreasonableness is giving way to the doctrine of proportionality[74].

Thus, in India, under the current state of law, as declared by the Supreme Court, portionality review with respect to administrative action has only limited scope. This is because, in India much of the administrative action is challenged before the courts primarily on the ground of arbitrariness and this can be challenged only on the ground of wednesbury unreasonableness. Thus in reality the decision in Omkumar"s case has not significantly enhanced the scope of judicial review in India.

No reason as such is given by the Supreme Court in *Omkumar"s case*[75] as to why doctrine of wednesbury unreasonableness alone should be applied to challenges under the head of arbitrariness. However there can be at least two

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[70] *Id.*at p. 3697.
[71] *Id.*at p.3698.
[72] *Id.*at p.3702.
[73] *Supra* n.68.
[74] *Indian Airlines Ltd. v. Praba D. Kanan* AIR 2007 SC 548*; State of U.P. v. Sheo Shankar Lal Srivastava* (2006) 3 SCC 276
[75] *Ibid* n.72.

reasons for this. First of all, the Supreme Court was simply accepting a similar classification in England by which proportionality review was applicable only when convention rights were involved and wednesbury principle alone was applicable when non convention rights were involved[76]. Secondly, just like Lord Lowry[77]the Supreme Court may have feared a docket explosion when the threshold of review is lowered.

Proportionality is fast replacing wednesbury reasonableness which the Supreme Court itself has observed in a large number of recent cases. After all there is nothing wrong in a modern democratic society if the court examines whether the decision maker has fairly balanced the priorities while coming to a decision. At any rate, the intensity of proportionality review is variable depending upon the subject matter and the nature of rights involved.

## 4.10 Exercise of Administrative Discretion and the Doctrine of Promissory Estoppel in India

The administration in a welfare state has to tackle various problems for which generally no guidance is be provided by the statute or the Constitution. Therefore, the administration may make policies, schemes, give opinions, assurances, and promises regarding the manner of exercise of its discretion in these areas. Sometimes relying on the representation contained in the policies, schemes, opinion, assurances and promises a person changes his position by investing a huge sum of money or by taking a particular course of action which he would not have otherwise taken. In such situations the crucial question which arises is whether the administration has an absolute discretion to disregard the representation made by it earlier, arbitrarily or at its whim? While dealing with such situations the courts are faced with one of the general principles of administrative law, that the administration cannot fetter its future exercise of discretion.[78] This principle, it is submitted, has come into existence in the interest of maintaining flexibility and expediency in the exercise of executive functions. However, equally important is the consideration of justice to the concerned

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*Id.*

[77] *Brind v. Secretary of State for the Home Department*, (1991) 1 All ER 720 at p. 723.

. Jain and Jain, *Principles of Administrative Law*, N.M. Tripathi, Bombay, 3rd Edition, 1979, pp. 515-518.

individual. If administration is allowed to be unjust to an individual by disregarding its own earlier promise or representation, a general feeling of distrust and insecurity may be generated towards it which can never be in the interest of good administration. It is in such situations where the doctrine of promissory estoppels has been applied by the courts in India.

### 4.10.1Application of Doctrine against the Government

The Government is stopped in equity from going back on its representation relying on which a person has changed his position to his detriment. *Collector of Bombay v. Bombay Municipal Corporation*[79] seems to be the first case after Independence where the doctrine of promissory estoppels was applied against the Government by Chandrasekhara Aiyer, J., one of the majority judges of the Supreme Court, in 1951. The facts giving rise to this case were that Bombay Government asked the Bombay Municipal Corporation to remove the old market from a certain site and vacate it and granted to it another site by a resolution. In the same resolution it was mentioned that "the Government do not consider that any rent should be charged to the Municipality." The Municipal Corporation gave up the old site and spent a sum of about Rs. 17 lakhs in erecting and maintaining markets on the new site. Subsequently the Collector of Bombay assessed the new site to land revenue. This was challenged by the Municipal Corporation. The High Court of Bombay held in favor of the Municipal Corporation. On an appeal by Collector of Bombay to the Supreme Court, the majority judges held that the Government was not under the circumstances of the case entitled to assess the land revenue on the land in question, because the Municipal Corporation had taken possession of the land in terms of the Government resolution and had continued in such possession openly, uninterruptedly and of right for over seventy years and thereby acquired the right to hold the land in perpetuity free of rent. Chandrasekhara Aiyer, J., agreed with the conclusion reached by majority but rested his decision on the doctrine of promissory estoppels. Pointing out that the Government could not be allowed to go back on the representation made by it, he observed that even if "there was

AIR 1951 SC 469

merely the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfill it.

However, in *M/s. Jit Ram Shivkumar v. State of Haryana*,[80] some confusion sems to have been created by the general and very wide observations of Kailasam, J., that "...the principle of estoppels is not available against the Government in exercise of legislative, sovereign or executive power".[81] Similar observations in *Excise Commissioner, U.P. v. Ram Kumar*[82] and *Ramanatha Pillai v. State of Kerala*,[83] on which reliance was placed by Kailasam, J. were also in the nature of obiter.

The decision of the Supreme Court in Gujarat *State Financial Corporation v. M/s. Lotus Hotels Pvt. Ltd.*[84] emphasizes the point that the doctrine of promissory estoppels constitutes an important check against arbitrary exercise of discretion by the administration even after Jit Ram Shivkumar. In this case the Gujarat State Financial Corporation, which was an instrumentality devised to provide medium and long term credit to industrial concerns, sanctioned a loan of Rs. 29.93 lakhs to M/s. Lotus Hotels Pvt. Ltd. For construction of a four-star hotel. Consequently M/s. Lotus Hotels Pvt. Ltd. created an equitable mortgage of the land purchased for the purpose of construction of the Hotel in favor of the Corporation as a security for loan and proceeded to undertake and execute the project of setting up the four-star hotel in Baroda. However, the Corporation refused to disburse the loan subsequently. Relying upon the doctrine of promissory estoppels as expounded in M.P. Sugar Mills the court held that agreement to advance the loan was entered into in performance of the statutory duty cast on the Corporation by the statute under which it was created and set up. On its solemn promise M/s. Lotus Hotels incurred expenses, suffered liabilities. Presumably, if the loan was not forthcoming, the respondent may not have undertaken such a huge project. Therefore the Corporation is bound by its promise. The Corporation was directed to release Rs. 10 lakhs within one month's time in favor of M/s. Lotus Hotels and

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AIR 1980 SC1285
*Ibid*, at p. 1291.
AIR 1976 SC 2237
AIR 1973 SC 2641 at p. 2649
AIR 1983 SC 848

to pay the balance within a reasonable period. The court pointed out that Jit Ram Shivkumar cannot save the corporation from its liability because it only lays down that the principle of promissory estoppel cannot be invoked for preventing the Government from discharging its functions under law.

The doctrine of executive necessity constitutes an important limitation to the doctrine of promissory estoppels as it ensures a flexible approach by courts towards the problem of control of administrative discretion. However, the question arises, can the administration claim the exemption from its obligation under this equitable doctrine just by mentioning that 'executive-necessity' exists. The *Supreme Court in Union of India v. Anglo-Afghan Agencies*[85] held that the administration cannot claim exemption from its obligation under the doctrine of promissory estoppels on some 'undefined and undisclosed grounds of necessity or expediency". It must disclose to the court the reasons or grounds on which existence of executive necessity is claimed. It is only if the court is satisfied, on proper and adequate material placed by the government should not be held bound by the promise but should be free to act unfettered by it, that the court would refuse to enforce the promise against to Government.[86]

### 4.10.2 Ultra-Vires Representation and the Doctrine of Promissory Estoppel

Relief on the basis of promissory estoppels is refused by the courts when the representation by which the administration is sought to be bound is beyond the powers of the officer or the public authority.[87] Thus in *M/s. Jit Ram Shivkumar v. State of Haryana*,[88] it was held that since neither the Municipal Committee nor the Government have power to grant exemption from octroi to anyone, forever under the concerned statute, the declaration in the advertisement did not bind either the Municipal Committee or the Government.

Refusal by the courts to apply this doctrine of equity in cases of ultra-vires representation has caused injustice in many cases. For example, where a person, who was required to carry out certain construction work under a contract with

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[85] AIR1968 SC 718

AIR 1979 SC 621 at p. 644.

*State of Rajasthan v. Motiram,* AIR 1973 Raj. 223*; M.S. Industry v. Jt. Chief Controller,* AIR 1977 Mad. 377*; State v. Amrit Banaspati,* AIR 1977 P & H. 268*; S.K. Juwarkar v. Dr. Kumaria,* AIR 1982 Goa *1;Sah Mahadeolal Mohanlal v. State,* AIR 1982 Pat. 158

. AIR 1980 SC 1285

Government, carried out some additional constructions on the assurance of assistant executive Engineer was refused payment for additional work by the Government on the ground that the Assistant Executive Engineer had no authority to sanction additional work, the court refused to apply the doctrine of equitable estoppels on the ground that the representation was ultra-vires.[89]

In England, however, the doctrine of equitable estoppels was applied in a similar situation in *Lever Finance Ltd. v. Westminster (City) L.B.C.*,[90] where the developers who had obtained planning permission changed their plan slightly. The local authority planning officer said no further consent was required. The developers went ahead with their altered plan. Subsequently the construction was questioned on the ground that no planning permission was obtained. It was contended by the local authority that since the planning officer's assurance was ultra-vires it was not bound by it. It was held by the court that since the local authority allowed its planning officer to deal with such cases, it was bound by his representation. Speaking for the majority, Lord Denning M.R. propounded the following principle :

> "*There are many matters which public authorities can now delegate to officers. If an officer acting within the scope of his ostensible authority makes a representation on which another acts, then the public authority may be bound by it, just as much as a private concern would be*."[91]

However, the vigor of this principle is diluted in *Indian Aluminium Co. v. K.S.E. Board*[92] where the Supreme Court held that though generally the statutory discretion cannot be fettered but when the statute itself empowers the authority to bind itself in the exercise of its discretion, the authority is bound by agreement or contract entered into while exercising such discretion. The court held the K.S.E. Board bound by its agreement, not to enhance the rates of electricity, which it entered in the exercise of discretion under statute.

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*State of Rajasthan v. Motiram,* AIR 1973 Raj 223
(1971) 1 Q.B. 222
*Ibid* at p. 230.
AIR 1975 SC 1967

This principle is followed in many subsequent cases of assurances,[93] Promises,[94] agreement[95] or contract, given or entered into by the administration in the exercise of its discretion under statute. However, the doctrine of promissory estoppels has not been applied in the face of statutory prohibition.[96]

The courts have refused to estop the State from exercising its legislative function.[97] In *State of Kerala v. Gwalior rayon Silk Mfg. Co. Ltd.*[98] the State of Kerala was not estopped from expropriating vast forest lands belonging to the Company by passing a legislation even though the Company had invested a large amount of money in purchasing the land relying upon the undertaking of the State Government. It is evident from the facts of the case that justice required that the Government should have been bound. But in the face of State legislature's sovereign power' the individual interest had to give way. It is submitted that though it may seem hard but in view of their functional limitations the court could not direct the legislature either to pass or not to pass a particular legislation.

The courts in India have been too restrictive about the application of the doctrine of ultra-vires in this area. It is also submitted that the scope of the doctrine of promissory estoppels should be extended to cases of representation by an officer who had ostensible authority if justice towards individual so requires.

### 4.11 Power of Judicial Review and Discretionary Power of Administrative Tribunals in India

Legislatures usually establish various administrative tribunals or non-judicial bodies (hereafter also "administrative bodies" or "inferior tribunals") as well as the courts or judicial bodies. Examples of administrative bodies or inferior tribunals would include Government Ministers, minimum Wages Board or Tribunal, Workers Compensation Tribunal and Public Service Appeals Board. Often these bodies are established to deal with specific administrative or quasi-

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*Shri Krishan v. Kurukshetra University,* AIR 1976 S.C. 376 *Krishna v. Rewa University,* AIR 1978 M.P. 86

.*M.P. Sugar Mills v. State of U.P.* AIR 1979 SC 621

*Chowgule & Co. P. Ltd. v. Union,* AIR 1972 Goa *33; S.K.G. Sugar Ltd., v. State of Bihar,* AIR 1978 Pat. 157

[96]*Ranganath v. Institute of Chartered Accountants,* AIR 1975 Kant 188*; Haripada Das v. Utkal University, AIR 1978 Orissa 68; Kedarlal v. Secretary Board H.S. & T. Education,* AIR 1980 All

[97]*Sankaranarayanan v. State of Kerala,* AIR 1971 S.C. 1997*; State of Kerala v. Gwalior rayon Silk Mfg. Co. Ltd.,* AIR 1973 SC 2374*; Gajanan Saw Mills v. State of M.P.,* AIR 1973 MP 235

*Ibid.*

judicial matters. For instance, the Minister for Foreign Affairs has the powers under the Immigration Act to decide whether to grant or refuse to grant a visa to a foreigner to enter the country or to cancel it if such person breaches conditions of his visa. The Minimum Wages Tribunal deals with minimum wages claims by workers. The Worker's Compensation Tribunal deals with compensation claims by workers who are injured during the course of their duties while the Public Service Appeals Board deals with appeals from public servants against disciplinary actions taken against them by their employers.

The legislature may confer absolute discretionary powers on tribunals and purport to exclude courts from performing their usual function of supervising and reviewing the validity or otherwise of the exercise of such powers by tribunals. For instance, the legislature may, by inserting a provision in the enabling legislation, prevent or purport to prevent aggrieved parties from appealing or making an application to the court for review of a decision of the tribunals. Another way is by imposing a time-limit by which time a certain action is to be taken so that if the action is not taken within the prescribed time-limit, the aggrieved person will be barred from seeking any relief from the courts.

The legislature seeks to oust the jurisdiction of the courts to supervise the exercise of powers by tribunals; the courts would normally not look kindly upon such legislation. Consequently, the courts have developed various counter measures to safeguard themselves against legislative encroachment on judicial powers to review the exercise of the powers by the tribunals. This paper examines attempts made by the legislature in Papua New Guinea (hereafter "PNG") in the various legislations dealing with land matters (hereafter "acquisition statutes") to oust jurisdiction of courts and how the judiciary has responded to these incursions into its jurisdiction to counter these legislative attempts.

The legislature may attempts to oust the review jurisdiction of courts through the enactment of acquisition statutes. Among these are the imposition authorities or tribunals over matters which are of an administrative, as opposed to judicial, nature.

Acquisition statutes usually impose time-limits within which landowners or authorities acquiring land must act. For instance, under section 13 of the Land Act 1996 and section 8 of the lands Acquisition (Development Purposes)[99] Act (hereafter "Lands Acquisition Act") the landowner, who is served with a notice to treat, is required to respond to the notice within two months whereas under section 3 of the Land (underdeveloped Freeholds) Act the landowner upon being served with a development notice is to act within three months. A notice may be served on the landowner in a number of ways, including, (i) publication in the national Gazette or newspapers; (ii) broadcasting on radios and television; (iii) delivery by hand to affected persons; and (iv) displaying it in conspicuous places at the place where the land is situated.

In *Dent v. Minister for Lands*[100] the plaintiff was granted a government lease on the condition that he would affect certain improvements thereon. The land was subsequently forfeited on the basis that the plaintiff had failed the condition to effect the improvements on the land within the time-limit stipulated in the lease. The plaintiff applied to the National Court outside the statutory time-limit for an appeal against the forfeiture under the Land Act or a judicial review under the Rules of the Supreme Court, arguing that he had a genuine reason for not effecting improvements within the time-limit as he was carrying out preliminary work which was necessary before effecting actual improvements in pursuance of the terms of the lease. The court, in exercising its constitutional powers under section 155(4) of the Constitution, granted the application, holding that the plaintiff had good reason for not complying with the statutory time-limit and that to do otherwise would cause injustice to him. The Court, therefore, granted extension of time even though the application was made outside the statutory time-limit for an appeal or a review.

[99]This Act was repealed by the Land Act No. 45 of 1996 which came into force in the beginning of 1997. It must be noted that, although the Act was amended, references have been made to relevant provisions of the Act elsewhere in this paper merely to illustrate how the legislature attempts to oust jurisdiction of the courts in PNG. In the opinion of the author, the reference so made will not, therefore, affect the substance of this work.

[1981] PNGLR 488

The government's power to take land from the private landowner is usually exercised by some individual or authority on its behalf.[101] In some instances, acquisition statutes would confer absolute discretion on such individual or authority in respect of the exercise of the power. For instance, section 7 of the Lands Acquisition Act confers absolute discretionary power on the minister to acquire land by compulsory process. It provides:

> *Notwithstanding anything in any other law, where in the opinion of the Minister it is necessary to do so for the purpose of this Act, the Minister may acquire the land by compulsory process.*[102]

The words "in the opinion" indicate that the minister has discretion to decide on his own accord whether land is to be acquired and takes no advice from any person or authority. A discretionary power implies freedom of choice; the competent authority exercising discretion may decide whether or not to act[103]. For instance, the Minister for Lands may decide whether to purchase lands for public purposes in the National Capital District and, if so, how to act. For instance, (i) from whom should the land be acquired; and (ii) how much land should be bought.

While relying on the authority of a licensing case (not migration) of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*,[104] where an abuse of a discretionary power was alleged, the Supreme Court held that in the event of an administrative authority being granted an absolute discretion by law, it cannot be questioned in any court of law. The decision of the authority, however, can be upset only if proved to be unreasonable. The term "unreasonable" means "that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether."[105]

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S. 12, Land Act; s. 7, Lands Acquisition Acts; 9, Land (Underdeveloped Freeholds) Act provide for the Minister for Lands to exercise compulsory acquisition power on behalf of the government.

[102] *Ibid.*

S. A. de Smith, *Constitutional and Administrative Law*, Harmondsworth, Eng. ; Baltimore, Md., Penguin Education, 2nd ed. ,1973,p.531.

[1948] 1 KB 223 at 228

[105] *Supra* n.99.

The basis for the court's decision was that courts have a general jurisdiction over the administration of justice. However, from time to time the legislature establishes special tribunals to deal with special matters and gives them jurisdiction to decide these matters without any appeal to the courts. In such cases, they cannot hear appeals from such tribunals or substitute their own views on any matter which has been specifically committed to them by the legislature. However, such tribunals must confine themselves within the powers specifically vested in them and make their inquiry and decision according to the law of the land. The courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such cases, courts must intervene to correct the error. The courts, however, have always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from the appellate function. Their jurisdiction over inferior tribunals is supervision, not review.[106]

Another attempt by the legislature to oust jurisdiction of the courts is by conferring power on inferior administrative bodies or tribunals to be exercised to the exclusion of courts. In doing so, it purports to prevent aggrieved parties from seeking judicial remedies by way of an appeal or an application for review to have a decision of an inferior tribunal reviewed. It is apparent from cases where statutes purport to oust the jurisdiction of the Court by attempting to prevent any appeal or review that the court would invariably hold that although it may be prevented from entertaining an appeal, it cannot be prevented under any circumstances form entertaining an application for a review by means of prerogative writs.

As pointed out by Lord Esher, M.R., in *Queen v. Commissioners for Special Purposes of the Income Tax*[107], the preliminary facts on which the initial jurisdiction of a tribunal depends may either be determinable by ordinary courts or by the tribunal itself. In the latter event, Lord Esher thought that the decision of the tribunal would be final. This finality of administrative decision has,

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*See, Rex v. Nat Bell Liquors Ltd.,* [1992] 2 AC 128 at 156*, where it was held: "That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise".*

(1888) 21 Q.B.D. 313 at 319

however, in course of time, yielded place to judicial review as I shall show later in the light of the recent decisions of the House of Lords.

Fortunately, the courts in India were not handicapped by the technicalities, which limited the operation of the prerogative writs in England. In *Harinagar Sugar Mills Ltd. V. Shyam Sunder*[108] the order of the deputy secretary reversing the decision of the Board of Directors of a company was held to be bad inasmuch as the deputy secretary did not give reasons for his decision. The court simply based its decision on the ground that it could not exercise its appellate jurisdiction under article 136 of the Constitution without knowing the reasons for the decision under appeal. In *Sardar Govindrao v. State of Madhya Pradesh*[109], the Supreme Court went one step further by holding that the applicant who had applied for the award of a grant of money or pension to the state government was himself entitled to know the reasons for the rejection of his application by the state government. These grounds compelling the quasi-judicial authorities to give reasons for their decisions did not rest specifically on the provisions of the Constitution. They must be fairly based on the requirements of justice itself. This is an instance of judicial legislation. Justice itself has been made here as a source of law.[110]

A further extension of the concept of jurisdiction was to include in its ambit a violation of the rules of natural justice governing the procedure of a trial or inquiry. According to the majority of the House of Lords in *Ridge v. Baldwin*[111] a violation of natural justice rendered the proceeding a nullity or void. Lord Reid in *Anisminic Ltd. v. Foreign Compensation Commission*[112] has summed up the jurisdictional defects which may occur even though the initial jurisdiction to entertain a proceeding was possessed by the tribunal. His observation, approved later by the *Supreme Court in Union of India v. Tarachand Gupta*[113], is as follows:

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AIR 1961 SC1669
AIR 1965 SC 1222
See for further discussion, V.S. Deshpande, *'Speaking' Orders*, AIR (jour.) 147 (1969).
(1964) AC 40
(1968) AC 147
(1971) 1 SCC486 to 496

> *It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice.*

The judgment of Lord Reid in *Ridge v. Baldwin*[114] was a landmark in the extension of the duty to act judicially. He pointed out that such duty need not be imposed by a statute. It flows from the nature of the decision which the authority has to give. This enormously extended the scope of the concept of a quasi-judicial act to include all acts of the administrative authorities which were to be done after considering the pros and cons of a case and the result of which would adversely affect an individual. Lord Reid's view was approved by the Supreme Court in *Associated Cement Companies Ltd. v. P. N. Sharma*[115] and in *Shri Bhagwan v. Ram Chand*[116].

A quasi-judicial act proper could be done ordinarily when there was a lis between two parties which the quasi-judicial authority was deciding. But it was found that even though there may be no such lis and the authority was directly dealing with an individual, the authority would have to consider the case objectively in a quasi-judicial manner before taking action against the individual which would affect him adversely. Even such action was, therefore, held to be liable to judicial review. In *A. K. Kraipak and others v. Union of India*[117], the Supreme Court pointed out that the line of distinction between a quasi-judicial and an

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[114] *Supra* n. 110.
(1965) 2 SCR 366
(1965) 3 SCR 218
(1970) 1 SCR 457

administrative act was very thin and disappearing. It is the nature of the act concerned which would decide whether judicial review would lie against it or not irrespective of the question whether the act was strictly quasi-judicial or not.

It was a matter of great difficulty, however, in each case to decide whether the impugned action of an administrative authority contravened a fundamental provision of statute or amounted merely to an error of law in acting under the statute. If the former, its act would be without jurisdiction. If the latter, it would be within jurisdiction. Parliament has often striven to express its intention in legislation that certain acts were within the exclusive jurisdiction of the administrative authorities and beyond the scope of the judicial review.

In India such limitation in a statute would be of little avail if the impugned action amounted to an infringement of a fundamental right. For, the remedies given by the Constitution such as articles 226 and 227 could not be whittled down by legislation.

The statement of law by Lord Esher, M.R., in *Queen v. Commissioners for Special Purposes of the Income Tax*[118], referred to above, that the administrative decision is final when the legislature intends it to be final, held the field for a long time. But later decisions refused to concede finality to the decision of an administrative authority or tribunal by holding that no court of limited jurisdiction can give jurisdiction to itself on a point collateral to the merits of the case by wrongly deciding that point[119]. The recent decisions of the House of Lords have worked a silent revolution by finally negative the attempts of the legislature to secure finality for an administrative decision by excluding judicial review.

The grant of judicial review is, therefore, determined in each case by the courts. The attempt of the legislature to exclude judicial review has not succeeded.

Even though the tribunal has the primary jurisdiction to decide questions of fact, if its decision is totally unsupported by any evidence or if it is such that it could

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[118]*Supra* n.106.

[119]*King v. The Assessment Committee of the Metropolitan Borough of Shoreditch,* (1910) 2 K.B. 859 at 880, r*eferred to with approval in State of Madhya Pradesh v. Jadav,* A.I.R. 1968 S.C. 1186 at 1190, *and Rex v. Fulham, Hammersmith and Kensington Rent Tribunal; Ex part Zerek,* (1951) 2 K.B. 1 at 6.

not be arrived at by any reasonable person, then it would shock the conscience of the court. It would be in the same category of an error of law apparent on the face of the record and would be a ground for judicial review.

The apparent width of the language of articles 226 and 227 and the ever-widening scope of judicial review by the judicial decisions would tempt lawyers and litigants to rush to the High Courts for judicial review of all kinds of mistakes made by the administrative authorities and tribunals. It must be remembered, however, that this would disturb the balance of work between the tribunals and the High Courts. It would amount to an abuse of the process of court if the High Courts were approached for correction of errors committed by the tribunals in all sorts of cases. The great safe-guard against this abuse is that mandamus and certiorari to quash 9as distinguished from other kinds of certiorari) are both remedies which are within the discretion of the High Courts. Prohibition in English law may not be discretionary in that sense. But the issue of writs generally under article 226 has to be regarded as discretionary by the High Courts to prevent an abuse of the process of court.

By the rules of the Supreme Court in England comparatively short periods of limitation (six months) have been prescribed for making application for the issue of such writs.

In India, no periods of limitation were contemplated by the Constitution and, therefore, no legislation can perhaps be undertaken to prescribe them. But the discretion of the court is an integral part of the powers given by articles 226 and

It would not be correct to say, therefore, that a High Court is bound to entertain a writ petition in which contravention of fundamental right is alleged. The fundamental rights are no doubt guaranteed but their enforcement is not restricted to articles 226 and 227. On the contrary, the ordinary civil courts constitute the primary forum even for the enforcement of the fundamental rights.

Another authority generally relied on is *State of Uttar Pradesh v. Mohammad Nooh*[120]. With great respect, observations in that case are somewhat widely worded but they have to be understood in the context of the peculiar facts of that case. The departmental authority holding the disciplinary inquiry against the

(1958) SCR 595

petitioner in that case was shown to have been personally biased against the petitioner. The inquiry was, therefore on the authority of *Manak Lal v. Dr. Prem Chand*[121] that the petitioner could not be permitted to urge for the first time in a writ petition under article 226 of the Constitution before the High Court objections which should have been raised by him in the appeal and revisions before the appellate and the provisional authorities under the U.P. Police Regulations. It was further argued that the appellate and the provisional authorities were competent to decide the questions raised by the petitioner on merits. If they were to reject those contentions on merits, then it could not be said that there was any error apparent on the face of the record and consequently the matter could not come before the High Court under article 226. These contentions were rejected by the Supreme Court firstly by drawing a distinction between executive authorities holding disciplinary inquiries and a tribunal having the trappings of a court and presided over by a judge with legal training and background. It was, therefore, felt that no useful purpose would be served by asking the petitioner to go from one executive authority to another. Secondly, the bar of an alternative remedy was not as rigid in granting a certiorari as ti was in granting mandamus. Here it may be submitted with respect that there is a distinction between certiorari to quash and other kinds of certiorari. Their lordships of the Supreme Court referred to page 130 of 11 Halsbury's Laws of England for the distinction between mandamus and certiorari. But the discussion of the specific question as to the discretion of the court to grant the order of certiorari is at pages 139 onwards. Certiorari as of course is issued for certain purposes. This does not include certiorari to quash. At page 140 it is stated as follows:

> *So far as relates to applications for certiorari to quash the determinations of inferior courts, when the jurisdiction to quash exists at common law the discretion of the Court is not limited by statute, but is exercised upon grounds established at common law.*

The outstanding example so such illegality is that the provision of the statute under which the administrative authority is acting or which is sought to be applied against the petitioner is itself challenged as ultra vires by the petitioner.

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(1957) SCR 575

At one time, it was thought that even the plea of ultra vires had to be heard by the departmental authorities. An order "under the Act" was construed by the Privy Council in *Raleigh Investment Co. Ltd. v. The Governor General in Council*[122] to include even the decision of the question whether a provision of the Act was ultra vires. These decision was contrary to the well established principle that an authority acting under statute cannot itself decide whether the statute is unconstitutional or ultra vires. This part of the decision of the Privy Council is, therefore, no longer good law in India as held by the Supreme Court is *K. S. Venkataraman and Co. v. State of Madras.*[123]

The rules of natural justice require that there should be a fair hearing granted to the petitioner and the inquiry or trial should be held by an impartial tribunal. These are essentially principles of fairness and justice. They are not magic incantations. Therefore, the particular infraction of a rule of natural justice will have to be examined before it could be said whether the discretion of the court to entertain the writ petition should be exercised in favour of the petitioner or not. Except when the grievance of the petitioner cannot be redressed by recourse to alternative remedies, the discretion would be exercised against the petitioner. For instance, a disciplinary authority may not allow the petitioner to file certain documents or to inspect certain documents from the official record. If such an erroneous order affects the fair hearing of the case, the departmental appellate and revisional authorities would themselves give redress to the petitioner. A priori, there is nothing to show that alternative remedies of appeal and revision would not be adequate in such a case. For, all that the High Court would do is to direct the tribunal to allow the petitioner to file the documents or to inspect the documents.

It is an equally salutary safeguard for the High Court to insist that a petitioner should not be guilty of delay and laches in coming to it under article 226. It was once believed that the question of delay would be immaterial if the fundamental right of a person is infringed.[124] The question was, however, fully discussed in *Tilokchand Motichand v. H. B. Munshi*.[125] The majority held that even under

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(1947) 74 I.A. 50
(1966) 2 SCR 2293
[124]*Kamalabai Harjivandas v. T. B. Desai,* AIR 1966 Bom 36
(1969) 2 S C R 824

article 32 of the Constitution which itself is a guaranteed fundamental right, the Supreme Court also has a discretion to refuse to entertain a writ petition even though it is based on the contravention of a fundamental right. A fortiori, the High Court would be well entitled to exercise its discretion in insisting that a petitioner should come to it with the utmost expedition. The reason for this rule is stated by the Supreme Court in State of *Madhya Pradesh v. Bhailal Bhai*[126] in the following words:

> *At the same time we cannot lose sight of the fact that the special remedy provided in Art. 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defenses legitimately open in such action. It has been made clear more than once that the power to give relief under Art. 226 is a discretionary power.*[127]

It is well known that the fundamental rights are not waived merely because they are not exercised or because they are compromised.[128] The reason is that they are based on a public policy and do not exist merely for the private gain of an individual. This principle is not in any way opposed to the exercise of the discretion the High Court against the petitioner who is guilty of delay and laches. The lack of diligence on his part may not destroy his fundamental right.

Another principle of justice is that one who seeks justice must himself do justice. A petitioner must, therefore, come to the court with clean hands. A petitioner who has been refusing to pay rent for a long time to the landlord was not allowed to seek relief under article 226 even though he could point out that the impugned orders against him were illegal.[129]

The violation of the principles of natural justice is often made a fetish by certain petitioners. But the courts have to see beyond such violations. If the courts are convinced that in spite of a technical violation, no injustice has been done to the petitioner, they would be loath to entertain a writ petition on such a ground. This

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(1964) 6 SCR 261

*Id.* At 271.

[128] *Basheshar Nath v. C.I.T.,* (1959) 1 SCR (Suppl.)528

[129] *Bardu Ram v. Ram Chander,* (1970) RCJ 1078

is more particularly so even if the entertainment of such a writ petition does not help to alter the situation.[130]

Judicial review under the Constitution is, therefore, to be so administered as to serve that supreme purpose. Judges would be failing in their duty if in enforcing the law they are not vigilant to see that it is the interest of justice which is served and to see that justice is not delayed or defeated by technicalities.

### 4.12 Judicial Review of Policy Decisions in India

In our country, restraint consistently exercised by the Judiciary when it came to the review of policy decisions. In *Rustom Cavasjee Cooper v. Union of India*[131] (commonly known as "Bank Nationalization Case") the Supreme Court held that it is not the forum where conflicting policy claims may be debated; it is only required to adjudicate the legality of a measure which has little to do with relative merits of different political and economic theories.

In *Delhi Science Forum v. Union of India*[132] , a Bench of three learned Judges of the Supreme Court held while rejecting a claim against the opening up of the telecom sector, reiterated that the forum of debate and disclosure over the merits and demerits of a policy is the Parliament. It re-stated that the services of the Supreme Court are not sought till the legality of policy is disputed, and further, that no direction can be given or be expected from the courts, unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provisions.

In 2012, with regard to the legality on allocation of 2G spectrum on first time serve basis, the Apex Court held as follows:[133]

> *"To summarize in the context of the present Reference, it needs to be emphasized that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and*

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[130] *Smt. Harkartar Kaur v. The Lieutenant Governor,* AIR 1971 Delhi 195*; A. M. Allison v. B. L. Sen,* (1957) SCR 359

[131] *Supra n.11.*

[132] AIR 1996 SC 1356
*Centre for Public Interest Litigation v. UOI,* (2012) 3 SCC 1

*suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the Executive for such matters".*[134]

In the recent past, the Supreme Court has adjudicated upon various decisions which have had a detrimental effect on the political motives of the Executive. In case of *U. P. power Corpn. v. Rajesh Kumar*[135], the controversy was pertaining to reservation in promotion for the Scheduled Castes and Scheduled Tribes with consequential seniority as engrafted of relaxation grafted by way of a proviso to Article 335of the Constitution of India. Such reservation had always withstood judicial scrutiny by the dictum in *M. Nagaraj v. Union of India*. The more specific question involved in the present case was the validity of the provisions contained in Rule 8-A of the U. P. Government Servants Seniority Rules, 1991 9for brevity 'the 1991 Rules') that were inserted by the U.P. Government Servants Seniority (3rd Amendment) Rules, 2007.The Court observed that:

"*In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 Act and Rule 8A of the 2007 Rules are ultra vires as they run counter to the dictum in M. Nagaraj case. The appeals arising out of the final judgment of Division Bench at Allahabad are allowed and the impugned order is set aside."*

In 1995, T.N. Godavarman Thirumulpad filed a writ petition with the Supreme Court of India to protect the Nilgiris forest land from deforestation by illegal timber operations.1 The Supreme Court expanded the *Godavarman case*[136] from a matter of ceasing illegal operations in one forest into a reformation of the entire country's forest policy. In its first order on the Godavarman case, the Court suspended tree felling across the entire country, paralyzing wood-based industries.

Despite a series of subsequent orders with far-reaching implications, the case is still pending in the Supreme Court. In the process of hearing over 800 interlocutory applications since 1996, the Court has assumed the roles of policymaker, administrator of policy, and interpreter of law. The Supreme

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[134] *Id.*

(2012) 7 SCC 1

[136] *T.N. Godavarman Thirumulpad v. Union of India,* Writ Petition No. 202 of 1995

Court's vast assumption of powers concerning environmental issues has no precedence from past cases, neither in India nor in other developing countries. The Godavarman case opened a Pandora's Box that continues to affect industries and forest dwellers across the country.

The Hon'ble Supreme Court, In *B.A.L.C.O. Employees Union (regd.) v. Union of India* quoted[137]

"In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise Court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of the power, the Court will not interfere with such matters".

Much of judicial review's utility exist because it is highly flexible, and when a statute does not provide for a review or appeal, judicial review's inherent flexibility provides the citizen with a remedy where one might otherwise not exist. However, judicial review will not normally be permitted if there is alternative appellate provision.[138]

Then in the *Vodafone International Holding BV v. Union of India*[139], the Supreme Court ruled against tax demand to the tune of 11000 crores rupees and held that the transaction involved was a commercially planned transaction and was not a case of tax evasion or tax mitigation.

Moving in this direction, the apex Court in *Sidheswar Sahakari Sakhar Karkhana Ltd. v. Union of India*[140], was of the opinion that normally the Court should not interfere in policy matter which is within the purview of the government unless it is shown to be contrary to law or inconsistent with the provisions of the Constitution.

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(2002) 35 SCL 182

[138] *R. v. Brighton Justices*, ex parte Robinson [1973] 1 WLR 69

[139] (2012) 6 SCC 613

(2005) 3 SCC 369

Therefore, it was held that grant of concession, exemption, incentive and rebate is a matter of policy with the government under the Central Excise Act, 1944, and hence, Court should not interfere unless found violative of law and Constitution. The Court was quick to add that this principle of judicial review is not a matter of exclusion of the power of judicial review but of judicial "self-restraint". Before us there are various instances where serious administrative actions lapses in governmentdepartment.

### 4.12 A Sum Up

Undoubtedly, the people look up to the Courts, which are temples of justice, with great expectation, hope and confidence. Similarly, people look up to the Parliament and State Legislatives, of which the Executive is a part, also with expectation and hope, because under the Constitution, the Parliament is the supreme legislative institution of the country, the people's institution par excellence, through which laws for the people are made and executive accountability is enforced. We must recognize that Constitution is the supreme law and no organ of the State should go beyond the role assigned to it by the Constitution. It is the duty of all concerned, including the legislature, the Executive and the judiciary, to ensure that this balance is scrupulously adhered to. No organ can be the substitute of another. Visionary leaders of our country strove all through their life to preserve and protect this lofty ideal of our constitutional system, and ideal which needs repeated reiteration, as it has an eternal bearing on our parliamentary policy and constitutional and democratic framework.

Our Constitution makers ensured that the rights of the people were preserved and protected effectively against any Legislative or Executive excesses. Our constitutional set up has enabled the judiciary to set aside not only laws passed by the Parliament but also executive actions which are held to be not in concoctive actions which are held to be not in consonance with the rights of the citizens under our constitution and its several provisions. Our constitution contemplates that the courts will interpret and scrutinize the constitutionality or validity of laws and executive actions but not will decide what the law should be nor matters of policy nor will usurp the function of the executive.

It is fundamental principle of law that every power must be exercised within the four corners of law and within the legal limits. Exercise of administrative power is not an exception to that basic rule. The doctrines by which those limits are ascertained and enforced form the very marrow of administrative law. Unfettered discretion cannot exist where the rule of law reigns. Again, all power is capable of abuse, and that the power to prevent the abuse is the acid test of effective judicial review. Under the traditional theory, courts of law used to control existence and extend of prerogative power but not the manner of exercise thereof.

Judicial review means review by courts of administrative action with a view to ensuring their legality. Administrative authorities are given powers by statutes and such powers must be exercised within the limits of the powers drawn by such statutes. In judicial review of administrative action ours courts merely enquire in judicial review, the courts undertake scrutiny of administrative action on the touchstone of doctrine of 'ultra vires'.

Judicial review is central in dealing with the malignancy in the exercise of power. However, in the changed circumstances of socio-economic development in the country the Court is emphasizing 'self restraint'. Unless the administrative action is violative of law or the Constitution or is arbitrary or mala fide, Courts should not interfere in administrative decisions .So, the abusive discretionary power of Administrative action must be review by judiciary. If judiciary founds any ground of illegality of any administrative action, it is the duty of the judiciary to maintain check and balance.

Several tribunals are functioning in the country. Not all of them, however, have inspired confidence in the public mind. The reasons are not far to seek. The foremost is the lack of competence, objectivity and judicial approach. The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The last is their actual composition; men of caliber are not willing to be appointed as presiding officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning. For these and other reasons, the quality of justice is stated to have suffered and the cause of expedition is not found to have been served by the establishment of such tribunals.

Even the experiment of setting up of the Administrative Tribunals under the Administrative Tribunals Act, 1985, has not been widely welcomed. Its members have been selected from all kinds of services including the Indian Police Service. The decisions of the State Administrative Tribunals are not appealable except under Article 136 of the Constitution. On account of the heavy cost and remoteness of the forum, there is virtual negation of the right of appeal. This has led to denial of justice in many cases and consequential dissatisfaction. There appears to be a move in some of the States where they have been established for their abolition.

A tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, and approach.

The Malimath Committee specifically recommended that the theory of alternative institutional mechanisms be abandoned. Instead, it recommended that institutional changes be carried out within the high Courts, dividing them into separate divisions for different branches of law, as is being done in England. It stated that appointing more judges to man the separate divisions while using the existing infrastructure would be a better way of remedying the problem of pendency in the High Courts.

Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised.

To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Court's under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the frivolous claims are filtered out

through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

One reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem. We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction.

The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problems are compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State legislations. However, even in the uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set up, it is desirable that all such Tribuanls should be, as far as possible, under single nodal ministry which will be in a position to oversee the working of these Tribunals.

The judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the judges of the superior judiciary are not available to the judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Court's under Article 226 and in this court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore,

the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

The power of judicial review over legislative actions vested in High Courts under Art 226 and in Supreme Court under Art 32 of the Constitution is an integral and essential feature of the constitution, constituting part of its basic structure. Ordinarily, therefore, the power of high Courts and the Supreme Court to test the constitutional validity of legislations can never be excluded." Before that the power of appeal was out of the purview of the High Courts and Supreme Court. The only remedy from the tribunals was to appeal through a Special Leave Petition as per Article 136 of the Constitution of India. The court excellently interpreted the High Courts' powers as the basic structure of the constitution and finally drew a clear picture for the status under Article 226/227. Again further it analyzing the class (3) of Art 32, pronounced that there is no prohibition for the Supreme Court under Art 32 also.

An administrative agency is a government authority, other than a court and other than a legislative body, which affects the right of private parties through adjudication, rulemaking, investigating, prosecuting, negotiating, settling, or informally acting. An administrative agency may be called a commission, board, authority, bureau, office, officer, administrator, department, corporation, administration, division or agency. Nothing of substance hings on the choice of name, and usually the choices has been entirely haphazard. When the President, or a governor, or a municipal governing body exercises powers of adjudication or rulemaking, he or it is to that extent an administrative agency.

Now a days in society the administration is playing the vital and decisive role in designing and influencing the socio economic order. It enjoys a vast power. But on the same hand due to the vast powers vested in administrative functionaries and the administration, the agencies are resulting in mal-administration and the corruption. By the abuse of power or misuse of power, the administration forgets and disregards the individual's rights. Growing administrative illegality has increased court dockets with cases demanding judicial review of administrative action.

In the democratic countries like India the courts are given the special places and wide roles to play for the control and review the administrative actions. To balance the personal rights and freedoms with the administrative needs according to the social welfare state the Governments and parliament in the country are in fewer efforts. Rather the Courts are only playing the creative role in order to maintain the relations of the growth and development of administrative law. But again the scope of Judicial Review and the doman of the courts are handful, where it looks for the specific issues and burden is casted to give shape to the principles by which the administrative functioning can be regulated.