Judicial Review and Policy Decisions: Emerging Perspectives[1]

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I. Introduction:

The judicial trend emerging from the "hard look doctrine" followed by the United States Supreme Court in *State Farm case*[3], the "doctrine of proportionality" followed by the House of Lords in *Daly*[4] and by the European Court of Justice in the *Skimmed Milk Powder case*[5] and the "larger public interest doctrine" followed by the Supreme Court of India in *2G case*[6] is that there is an undercurrent of a paradigm shift in the process of judicial review of administrative actions, especially administrative policy making. The emerging trend is that the idea of absolute judicial deference to administrative policy decisions is no longer the mantra and the courts, in appropriate cases, would not shy away from taking a "hard look" on the administrative policy decisions and, if necessary, would examine a policy decision on the touchstone of "proportionality" and "larger public interest". The emerging trend also indicates towards, in the words of Krishna Iyer, J.[7], "emergence of common canons of judicial review which is a welcome trend towards a one-world public law".

Judicial review is a constitutional process. The powers and parameters of judicial review of courts in any jurisdiction are moulded on the constitutional matrix. The important elements in the constitutional matrix that shape the powers and parameters of judicial review are the democratic set up, nature of separation of powers between the executive, legislative and judicial branches of the government and the constitutional mandate with regard to judicial review.

II. Position in England:

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[3] *Motor Vehicle Manufacturers Association of the United States* vs. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

[4] *R (Daly)* vs. *Secretary of State for the Home Department,* [2001] AC 532.

[5] *Bela-Muhle Josef Bergmann KG* vs. *Groes-Farm GmbH* (1977) *25n26.*

[6] *Centre for Public Interest Litigation* vs. *Union of India,* (2012) 3 SCC 1.

[7] *Rohtas Industries Ltd.* vs. *Rohtas Industries Staff Union,* (1976) 2 SCC 82.

England does not have a written Constitution. Parliament is considered to be the sovereign. In the absence of written constitution, there is no express constitutional mandate with regard to courts' powers of judicial review. Because of the parliamentary form of government, there is overlap in the structure and functions of the executive and the legislative branches of the Government. Till recently, before the Supreme Court of the United Kingdom was established[8], there was overlap even between the legislative and judicial branches of the Government. The members of the Upper House of the British Parliament constituted the Appellate Committee of the House of Lords, which was the highest court of appeal in the United Kingdom. The doctrine of parliamentary sovereignty in England restricted judicial review of laws passed by the Parliament and thus judicial review was limited to delegated legislation and administrative actions[9]. The judicial review of administrative action was dominated by the doctrine of *ultra vires* under which a decision of a public authority could only be set aside if it exceeded the powers granted by the Parliament. The role of the Courts was seen as enforcing the "will of Parliament". In the aforesaid backdrop, the powers and parameters of judicial review were enunciated by the House of Lords in the *Wednesbury*[10]and *GCHQ*[11]cases.

In *Wednesbury*, the plaintiff company was granted a licence under the Cinematograph Act subject to the condition that "no children under the age of 15 years shall be admitted to entertainments whether accompanied by an adult or not". The condition was under challenge on the ground that it was unreasonable. Lord Greene MR ruled that the exercise of executive discretion could be invalidated only if the decision was 'so unreasonable that no reasonable body could reach it'. Lord Greene MR explained that when an executive discretion is entrusted by a Parliament to an authority, the discretion exercised by the authority can only be challenged in the Courts in a strictly limited class of cases. These principles of Wednesbury unreasonableness underwent some modification by the decision of the House of Lords in *Council of Civil Services Unions* vs. *Minister for the Civil Services (GCHQ case).* In *GCHQ* the House of Lords enunciated that "illegality", "irrationality" and "procedural impropriety"

[8] The Supreme Court of the United Kingdom was constituted under the Constitutional Reforms Act, 2005 and from 1st October 2009 replaced the Appellate Committee of the House of Lords as the highest court in the United Kingdom.

[9]*Bradlaugh* vs. *Gossett,* (1884) 12 QBD 271.

[10]*Associated Provincial Picture Houses* vs.*Wednesbury Corporation,* [1947] 2 All ER 680.

[11]*Council of Civil Services Unions* vs. *Minister for the Civil Services,* [1985] AC 374.

are the three grounds upon which an administrative action is subject to judicial control by judicial review.

The English jurisprudence of judicial review of administrative actions is couched in the Diceyan notion of parliamentary sovereignty and is reflected in the *Wednesbury* principles laid down in *Associated Provincial Picture Houses* vs. *Wednesbury Corporation*[12] and subsequently rationalized in *Council of Civil Services Unions* vs. *Minister for the Civil Services*[13]. The English jurisprudence of judicial review was succinctly expressed by Lord Green MR in an article written in 1994. "The function of the judiciary," he said, "is to interpret and enforce laws". It was "not concerned with policy". In particular, it was "not for the judiciary to decide what was in the public interest". The same principle was reiterated four decades later by Lord Diplock in *R.* vs. *England Revenue Commissioners, Ex parte National Federation of Self-employed and Small Businesses*[14]. "Ministers", he said, "were answerable to the Courts for the lawfulness of their acts. But they were accountable exclusively to Parliament for their policies for the efficiency with which they carried them out, and of these things Parliament was the sole judge". In *R.* vs. *Secretary of State for Education and Employment, Ex parte Begbie*[15], Laws LJ distinguished between cases which raised, directly or indirectly, "questions of general policy affecting the public at large or a significant section of it", and "cases affecting only the individuals concerned by some particular application of policy". The difference was that in the former category, to quash the decision on grounds other than irrationality would require the judges to "don the garb of policy-maker, which they cannot wear"; while the latter can be resolved judicially with "no offence to the claims of democratic power." The House of Lords in *Chief Constable of the North Wales Police* vs. *Evans*[16] *said,* "Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

[12]*Ibid.*

[13]*Ibid.*

[14]*R.* vs. *England Revenue Commissioners, Ex parte National Federation of Self-employed and Small Businesses,*(1982) AC 617

[15]*R.* vs. *Secretary of State for Education and Employment, Ex parte Begbie,*(2000) 1 WLR 1115

[16]*Chief Constable of the North Wales Police* vs. *Evans,*(1982) All ER 141.

The following observation of Lord Justice Lawton in *Laker Airways*[17] also reiterates the same principles:

> "In the United Kingdom aviation policy is determined by ministers within the legal framework set out by Parliament. Judges have nothing to do with either policy-making or the carrying out of policy. Their function is to decide whether a minister has acted within the powers given to him by statute or the common law. If he is declared by a court, after due process of law, to have acted outside his powers, he must stop doing what he has done until such time as Parliament gives him the powers he wants. In a case such as this I regard myself as a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play."

The Rules made it unusual for administrative decisions of the authorities to be successfully challenged on this ground, and hence set a very high standard for challenge. It was not generally considered to be within the courts' constitutional role to criticize executive decisions on their merits. Courts were to intervene in only the most inequitable of situations. The distinction suggested by Lord Diplock between matters of policy and efficiency within the exclusive domain of Parliament, and matters of law within the exclusive domain of the courts, till recently constituted the bench mark of the English jurisprudence of judicial review.

III. Position in the United States:

The American Constitution incorporates separation of powers in more clear terms. The structures and the functions of the executive, legislative and judicial branches of the government are clearly delineated. However, the power of judicial review is not expressly provided for in the Constitution. The United States Supreme Court has assumed the powers of judicial review under the "due process" clause in the Fifth and Fourteenth Amendments[18].Court formed the basis for the exercise of judicial review in the US under Article III of the Constitution. The powers of judicial review of administrative decisions are delineated by the Administrative Procedure Act, 1946 (APA). The Act has laid down the process for US federal courts to review agency decisions. Under Sec. 706 of the APA, the judiciary reviews agency actions to make sure that they are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law".

[17] *Laker Airways Ltd* vs. *Department of Trade*, (1977) 2 All ER 182.

[18] *Marbury* vs. *Madison*, 5 U.S. 137 (1803).

In the aforesaid constitutional and statutory matrix, the US Supreme Court has evolved the parameters of judicial review. The Court has, by adopting the principles of "justiciability", "political question doctrine" and "judicially discernible and manageable standards", has put self-imposed restraints on its powers of judicial review. In *Baker* vs. *Carr*[19], the US Supreme Court held, '*A controversy is non-justiciable where there is "a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially manageable and discoverable standards for resolving it*".

The judicial response in the United States to the agency policy decisions has also evolved in the direction of judicial deference. The courts have refrained from making "a second-guess" in the matters of "the policy choices made by an agency in a matter that Congress has committed to the agency's discretion"[20]. The classic restatement of this notion is presented by Judge Leventhal in *Niagara Mohawk Power Corp.* vs. *Federal Power Commission*[21]that "the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily to the fashioning of policies." The Court's power to review administrative policy is extremely limited[22]. According to the Supreme Court, "When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute"[23].

In *Vieth* vs. *Jubelirer*[24], a plurality opinion of the US Supreme Court again reiterated that partisan redistricting and political gerrymandering are not justiciable because there are no judicially manageable and discernible standards to test it.

The Supreme Court in *Phelps Dodge Corp*. vs. *NLRB*[25]held, "Courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of the law into the more spacious domains of policy".

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[19]*Baker* vs. *Carr*, 369 U.S. 186 (1962).

[20]*Schnall* vs. *Amboy National Bank*, 279 F.3d205: "Absent such a [procedural] challenge, a court may not second-guess the policy choices made byan agency in a matter that Congress has committed to the agency's discretion."

[21]*Niagara Mohawk Power Corp. vs. Federal Power Commission*, 379 F.2d 153.

[22]*Baltimore Gas &Electric Co.* vs. *Natural Res. Def. Council, Inc*., 462 U.S. 87.

[23]*ABF Freight System, Inc.* vs. *NLRB*, 510 U.S. 317,324 (1994).

[24]*Vieth vs. Jubelirer*, 549 U.S. 267 (2004).

[25]*Phelps Dodge Corp*. vs. *NLRB*, 313 US 177 (1941).

In *Chenery I*[26], *Pauly* vs. *Beth Energy Mines*[27], *Arkansas* vs. *Oklahama*[28] and *Brown & Williamson Tobacco*[29] the Court reiterated the judicial approach to administrative policy making that when Congress through express delegation has delegated policy making authority to an administrative agency, the extent of judicial review of the agency's policy determination is limited.

Judicial Review of policy decision thus was guided by the twin principles of *"a textually demonstrable constitutional commitment of the issue to a co-ordinate political department" and "lack of judicially manageable and discoverable standards for resolving it"* and the Courts have maintained an attitude of deference to agency policy decision.

IV. Position in India:

In India, we have a written Constitution, and the Constitution incorporates in broad terms the separation of powers among the executive, legislative and judicial branches of the government. The Constitution has sufficiently differentiated and demarcated the functions of the different branches of the government and the constitutional scheme envisages that the different branches of the Government function within their own spheres demarcated under the Constitution.

The Constitution of India expressly provides for the powers of judicial review to the Supreme Court and the High Courts. The Supreme Court has the power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus,* prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the fundamental rights.[30] A High Court has the power throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari*, or any of

[26]*SEC* vs. *Chenery Corp. (Chenery I),* 318 U.S. 80 (1943): "If the action rests upon an administrative determination – an exercise of judgment in an area which Congress has entrusted to the agency – of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconstrued the law."

[27]*Pauly* vs. *BethEnergy Mines, Inc*., 501 U.S. 680 (1991): "When Congress through express delegation has delegated policy making authority to an administrative agency, the extent of judicial review of the agency's policy determination is limited."

[28]*Arkansas* vs. *Oklahama,* 503 U.S. 91 (1992), " The Court of Appeals made a policy choice that it was not authorised to make."

[29]*FDA* vs. *Brown & Williamson Tobacco Corp*. 529 U.S. 120 (2000).

[30]Article 32(2).

them, for the enforcement of any of the fundamental rights conferred by Part III of the Constitution and for any other purpose.[31] The Constitution thus confers on the Supreme Court and the High Courts enormous power of judicial review of the executive and legislative action to keep the executive and the legislative branches of the Government within the structural parameters of the constitutional scheme.

Bhagwati, J., speaking for the Court in *State of Rajasthan* vs. *Union of India*[32] said:

> ".....This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law."

By virtue of powers under Articles 32(2), 131, 132, 133, 136 and 143 the Supreme Court and by virtue of powers under Articles 226 and 227, the High Courts, have the plenary power of judicial review of executive actions. In *A.K. Kaul* vs. *Union of India*[33] the Supreme Court held as follows:

> "Since the task of interpreting the provisions of the Constitution is entrusted to the Judiciary, it is vested with the power to test the validity of an action of every authority functioning under the Constitution on the touch stone of the Constitution in order to ensure that the authority exercising the power conferred by the Constitution does not transgress the limitations placed by the Constitution on exercise of that power. This power of judicial review is, therefore, implicit in a written constitution and unless expressly excluded by a provision of the Constitution, the power of judicial review is available in respect of exercise of powers under any of the provisions of the Constitution."

Thus the power of judicial review is plenary and comprehensive. The court can test the validity of every action of every authority on the touchstone of the Constitution. The power is comprehensive irrespective of whether the actions of the executive are in the realm of administrative action, administrative discretion, administrative policy making or

[31]Article 226(1).

[32]*State of Rajasthan* vs. *Union of India,* (1977) 3 SCC 592.

[33]*A.K. Kaul* vs. *Union of India,*1995 (4) SCC 73

administrative adjudication. The power of judicial review vests in the Courts to defend the values of the Constitution and the rights of the citizens. In *P. Ramachandra Rao* vs. *State of Karnataka*[34], Doraiswamy Raju, J., observed that though the Supreme Court does not consider itself to be an *imperium in imperio* or would function as a despotic branch of 'the State', the fact that the founding fathers of our Constitution designedly and deliberately, perhaps, did not envisage the imposition of any jurisdictional embargo on this Court, except in Article 363 of the Constitution of India is significant and sufficient enough, to identify the depth and width or extent of its powers.[35]

In India, a review of the judicial pronouncements show that the Supreme Court has all along maintained that there are no inhibitions on powers of judicial review under the Constitution and that "it is vested with the power to test the validity of an action of every authority functioning under the Constitution on the touch stone of the Constitution" and that "unless expressly excluded by a provision of the Constitution, the power of judicial review is available in respect of exercise of powers under any of the provisions of the Constitution."[36] But in actual exercise of powers of judicial review *qua* policy decisions, the attitude of the Supreme Court has been that of restraint and there was perceptible influence of the judicial approach in England and the United States. The Supreme Court followed the principles of separation of power, justiciability, political question doctrine and judicially manageable and discernible standards and adopted self-imposed limitations on the powers of judicial review, so that the courts do not transgress into the fields reserved for the legislative and executive branches of the Government. The observations of Krishna Iyer, J. in *State of Kerala* vs. *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.*[37], reflects the attitude of the Supreme Court towards the administrative policy decisions:

> "What programme of agrarian reform should be initiated to satisfy the requirement of rural uplift in a particular community under the prevailing circumstances is a matter for legislative judgment. Here, in this field the legislature is the policy maker and the court cannot assume the role of an economic advisor or censor competent to pronounce whether a particular programme of agrarian reform is good or bad from the point of view of the needs

[34] *P. Ramachandra Rao vs. State of Karnataka*, (2002) 4 SCC 578
[35] *Ibid.*
[36] *A.K. Kaul* vs. *Union of India*, 1995 (4) SCC 73.
[37] *State of Kerala vs. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.*,(1973) 2 SCC 713.

of the community. The sole issue for the Court is whether it is in fact a scheme of agrarian reform, and if it is, the prudence or folly thereof falls, outside the orbit of judicial review being a blend of policy, politics and economics ordinarily beyond the expertise and proper function of the court."[38]

In later decisions, the Supreme Court has asserted that any action of the executive, whether it is in the realm of administrative action, administrative discretion, administrative policy making or administrative adjudication, is within the purview of judicial review of the Supreme Court and the High Courts. In *Council of Scientific and Industrial Research* vs. *Ramesh Chandra Agrawal*[39], the Supreme Court held, "Indisputably, a policy decision is not beyond the pale of judicial review." In *State of Rajasthan* vs. *Basant Nahata*[40] the Supreme Court reiterated, "The contention raised to the effect that this Court would not interfere with the policy decision is again devoid of any merit."

In *Delhi Development Authority* vs. *Joint Action Committee, Allottee of SFS Flats*[41], the Supreme Court observed that an executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty-gritty of the policy, or substitute one by the other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision. It was held to be a matter which is subject to judicial review.

In *Directorate of Film Festivals* vs. *Gaurav Ashwin Jain*[42] the Supreme Court following the dicta in *Asif Hameed* vs. *State of J&K*[43], *Sitaram Sugar Co. Ltd.* vs. *Union of India*[44], *Khoday Distilleries Ltd.* vs. *State of Karnataka*[45], *BALCO Employees' Union* vs. *Union of India*[46], *State of Orissa* vs. *Gopinath Dash*[47] and *Akhil Bharat Goseva Sangh (3)* vs. *State of A.P*[48]., summed up the scope of judicial review of executive policy as follows:

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[38] *Ibid.*

[39] *Council of Scientific and Industrial Research vs. Ramesh Chandra Agrawal*,(2009) 3 SCC 35.

[40] *State of Rajasthan* vs. *Basant Nahata*, (2005) 12 SCC 77.

[41] *Delhi Development Authority* vs. *Joint Action Committee, Allottee of SFS Flats*, (2008) 2 SCC 672.

[42] *Directorate of Film Festivals* vs. *GauravAshwin Jain*,(2007) 4 SCC 737.

[43] *Asif Hameed* vs. *State of J&K*,1989 Supp (2) SCC 364

[44] *Sitaram Sugar Co. Ltd.* vs. *Union of India*,(1990) 3 SCC 223

[45] *Khoday Distilleries Ltd.* vs. *State of Karnataka*,(1996) 10 SCC 304

[46] *BALCO Employees' Union* vs. *Union of India*,(2002) 2 SCC 333

[47] *State of Orissa* vs. *Gopinath Dash*,(2005) 13 SCC 495

[48] *Akhil Bharat Goseva Sangh (3)* vs. *State of A.P*,(2006) 4 SCC 162

> "The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review."

In *Ugar Sugar Works Ltd. v. Delhi Admn.*[49], the Court said, "It is well settled that the courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of *mala fide,* unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and *mala fide* will render the policy unconstitutional."

In *Delhi Development Authority* vs. *Joint Action Committee, Allottee of SFS Flats*[50]**,** the Supreme Court said that broadly, a policy decision is subject to judicial review on the following grounds:

(*a*) if it is unconstitutional;

(*b*) if it is dehors the provisions of the Act and the regulations;

(*c*) if the delegatee has acted beyond its power of delegation;

(*d*) if the executive policy is contrary to the statutory or a larger policy."

Thus by a series of judicial pronouncements, the Supreme Court has settled the law that administrative policy decisions are within the purview of judicial review and has expounded the grounds on which a policy decision is subject to judicial review. The grounds on which a policy decision can be challenged are – violation of any of the provisions of the Constitution or violation of any statute, or where the policy is arbitrary, unreasonable, mala fide or irrational. Though the Supreme Court has over a series of decisions asserted time and again

[49]*Ugar Sugar Works Ltd.* vs. *Delhi Admn (2001) 3 SCC 635*.

[50]*Delhi Development Authority* vs. *Joint Action Committee, Allottee of SFS Flats (2008) 2 SCC 672*.

that policy decisions are not beyond the pale of judicial review and has also expounded the vices which would attract judicial wrath, however, in actual exercise of powers, till recent times, there were hardly any instances where the Supreme Court has in fact interfered with a policy decision. The Court maintained a stance of self-restraint either on the ground that the courts do not transgress into the fields reserved for the legislative and executive branches of the Government or there is lack of judicially manageable standards to resolve the issue or that the issue itself is non-justiciable.

V. Changing Dimensions:

The Montesquieuan doctrine of separation of powers is founded on the idea of a system of checks and balances between the executive, legislative and judicial branches of the government. Checks and balances are inherent in a system of government incorporating the concept of separation of powers. Each wing derives its power and jurisdiction from the Constitution. Each must operate within the sphere allotted to it. Trying to make one wing superior to the other would be to introduce an imbalance in the system and a negation of the basic concept of separation of powers inherent in the system of government.[51] The constitutionalism and separation of power envisage that each branch of the government performs its functions as per the Constitution and in synergy and reciprocity with the other coordinate branches of the government. If any branch of the government fails to perform its functions as per Constitution, it would also introduce imbalance in the system. Any imbalance in the system would lead to negation of rule of law and deprivation of citizens' rights and liberties.

Post 1960 there has been a remarkable change in the functions and functioning of the State. There has been rapid growth in the functions of the state. As S.B. Sinha, J., has observed in *State of U.P.* vs. *Jeet S. Bisht*[52], **"**If we notice the evolution of separation of powers doctrine, traditionally the *checks and balances* dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable *social and economic* entitlements…….., we have to perform the oversight function with more urgency and enlarge the field of checks and balances to include governmental inaction. Otherwise we envisage the country getting transformed into a state of repose. Social engineering as well as institutional engineering therefore forms part of this obligation." This

[51] *P. Kannadasan* vs. *State of T.N.*, (1996) 5 SCC 670.

[52] *State of U.P.* vs. *Jeet S. Bisht,* (2007) 6 SCC 586.

phenomenon has led to rapid expansion of the law of judicial review post 1960. The significant feature of this growth was that besides subjecting administrative actions to closer review, the Courts also began subjecting administrative policy decisions to closer scrutiny. It was felt that the traditional view that the function of the judiciary is to interpret and enforce laws and that making of policy is the business of executive for which they are accountable to the legislature required a relook.

In England, the *Wednesbury Principle* that occupied the field for over five decades was then seen with scepticism. In *Daly*[53], Lord Cooke of Thorndon said:

> *"…. And I think that the day will come when it will be more widely recognised that the Wednesbury case was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation."*

It was widely felt that the administrative power of discretion that has remained protected from judicial review unless challenged on the grounds of absurdity, irrationality or perversity was now open to the test of proportionality. The doctrine of proportionality which, primarily is a continental concept, started gaining ground as a head of judicial review.

In the United States in the late 1960s and early 1970s[54] the judges began subjecting agency explanations to more searching review. The D.C. Circuit[55] declared that:

> "We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the

[53] *R (Daly)* vs. *Secretary of State for the Home Department,* [2001] AC 532.

[54] Tobias R. Coleman. 2009. "Limiting Judges: Placing Limits on Judges' Power in Hard Look Review", Expresso, available at: http://works.bepress.com/tobias_coleman/1

[55] *Environmental Def. Fund, Inc*. vs. *Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971)

> decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions."

The public and the judiciary lost their faith in the executive agencies and there developed a concern that executive were working to further their personal and political interests instead of the public's interest. The need for more substantive judicial review was felt to ensure that "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of federal bureaucracy"[56]. In 1971, the Supreme Court agreed to give judges the power to perform more substantive reviews in *Citizens to Preserve Overton Park* v. *Volpe*[57]. In *Overton Park* the Court held that "the generally applicable standards of Sec. 706 require the reviewing court to engage in a substantial inquiry." This substantial inquiry looked beyond procedure to make sure that the agency had based its decision on "consideration of the relevant factors." This has led to growth of the "doctrine of hard look" in the American jurisprudence.

The judicial trend in India also reflected the same scepticism towards the traditional perception about the nature and scope of judicial review of administrative actions especially administrative policy making. As held by the Supreme Court in *Bangalore Medical Trust* vs. *B.S. Muddappa*:[58] "The rise in exercise of power by the executive and comparative decline in proper and effective administrative guidance is forcing citizens to espouse challenges with public interest flavour." The following observation in *Secy., Jaipur Development Authority v. Daulat Mal Jain*[59] reflects the judicial perception about the executive:

> "All purposes or actions for which moral responsibility can be attached are actions performed by individual persons composing the department. All government actions, therefore, means actions performed by individual persons to further the objectives set down in the Constitution, the laws and the administrative policies to develop democratic traditions, social and economic democracy set down in the Preamble, Part III and Part IV of the Constitution. The intention behind the government actions and purposes is to further the public welfare and the national interest. Public good is synonymous with protection of the interests of the citizens

[56] *Calvert Cliffs' Coordinating Comm.* vs. *AEC*, 449 F.2d 1109, 1111 (D.C. Cir. 1971)
[57] *Citizens to Preserve Overton Park* v. *Volpe*,401 U.S. 402 (1971).
[58] *Bangalore Medical Trust* vs. *B.S. Muddappa,* (1991) 4 SCC 54
[59] *Secy., Jaipur Development Authority* vs. *Daulat Mal Jain,* (1997) 1 SCC 35

as a territorial unit or nation as a whole. It also aims to further the public policies. The limitations of the policies are kept along with the public interest to prevent the exploitation or misuse or abuse of the office or the executive actions for personal gain or for illegal gratification. The so-called public policy cannot be a camouflage for abuse of the power and trust entrusted with a public authority or public servant for the performance of public duties. Misuse implies doing of something improper. The essence of impropriety is replacement of a public motive for a private one."

The Hard Look Doctrine

Hard look reviews empower judges to make substantive review of agency actions. Instead of confining himself to a procedural review, a judge should examine the information underlying the agency decision to make sure that it there is a "rational connection between the facts found and the choice made." The term "hard look" was coined by D.C. Circuit Judge Harold Levanthal in the 1970s. He believed that the "hard look" was "central to the rule of administrative law. The court does not make the ultimate decision, but it insists that the official or the agency take a 'hard look' at all relevant factors[60]." Levanthal's hard-look standard was adopted by the Supreme Court in *State Farm case*[61]. Hard Look Doctrine says that a court should carefully review an administrative-agency decision to ensure that the agencies have genuinely engaged in reasoned decision making. A court is required to intervene if it "becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems." The Administrative Procedure Act instructs federal courts to invalidate agency decisions that are "arbitrary" or "capricious." Close judicial scrutiny helps to discipline agency decisions and to constrain the illegitimate exercise of discretion. The hard look doctrine is simply a reflection of the courts' view of how an effective and meaningful process of judicial review should be conducted. In *Greater Boston Television Corp*. vs. *FCC*[62], "Judge Levanthal suggested that a court should overturn agency decisions "if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."

[60]Harold Levanthal, Environmental Decision Making and the Role of the Courts, 122 *U. PA. L. REV.* 509, 514 (1974).

[61]*Motor Vehicle Manufacturers Association of the United States* vs. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

[62]*Greater Boston Television Corp*. vs. *FCC*,444 F.2d 841 [D.C. (Cir. 1970)]

The leading Supreme Court case actually striking down an agency decision under the arbitrariness test, *State Farm*, is the best example of the hard look test in application. In this case, the Court reviewed the National Highway Traffic Safety Administration's abandonment of seatbelt regulations. Although the Court did not use the term hard look, its decision can best be characterized as a hard look approach to applying the arbitrariness standard. The Court did not reject the agency's policy change through a judicial hard look, but it did find danger signals suggesting that the agency had not taken a hard look at the issues involved in making that change. The Court held an agency's decision is "arbitrary and capricious if the agency has..... entirely failed to consider an important aspect of the problem" The Court after noting several danger signals, concluded that the agency had not conscientiously undertaken its responsibilities. The Hard Look principle has been followed by the American Courts in a series of decisions to quash and set aside policy decisions.[63]

Doctrine of Proportionality

Doctrine of proportionality signifies that administrative action should not be more drastic than it ought to be for obtaining desired result. The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between his particular goals and the means he employs to achieve those goals, so that his action impinges on the individual rights to the minimum extent. This means that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred. The implication of the principle of proportionality is that the court will weigh for itself the advantages and disadvantages of an administrative action. Only if the balance is advantageous, will the court uphold the administrative action. The administration must draw a balance-sheet of the pros and cons involved in any decision of consequence to the public and to individuals. The principle of proportionality envisages that an administrative action could be quashed if it was disproportionate to the mischief at which it was aimed. The measures adopted by the administration must be proportionate to the pursued objective.

According to de Smith[64], the doctrine of proportionality involves "balancing test" and "necessity test". Whereas balancing test permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the necessity test requires infringement of human rights to the least restrictive alternative. Prof.

[63] *Christensen* vs. *Harris County*, 529 U.S. 576 (2000); *United States* vs. *Mead Corp.*,533 U.S. 218 (2001).
[64] De Smith, *Judicial Review of Administrative Action* (1995)

Jeffrey Jowell[65] describes the proportionality test to involve a 'sophisticated four stage process' posing the following questions:-

(1) Did the action pursue a legitimate aim?

(2) Were the means employed suitable to achieve that aim?

(3) Could the aim have been achieved by a less restrictive alternative?

(4) Is the derogation justified overall in the interests of a democratic society?

The European Court of Justice in *Bela-Muhle Josef Bergmann KG* vs. *Groes-Farm GmbH*[66] popularly known as 'skimmed milk powder case' was considering a regulation. The regulation was passed for the purpose of reducing the vast over-supply of skimmed milk powder. The regulation attempted to solve the problem by making it compulsory for farmers to use skimmed milk powder for animal feed instead of cheaper soya milk powder. The European Court of Justice held that, although the Council had the powers necessary to issue such a directive, and that solving the oversupply was a legitimate aim, the measures prescribed were overly burdensome on farmers, and hence disproportionate to the problem.

The Courts in India, with a written Constitution, with a framework of supremacy of the Constitution and a clear constitutional mandate of judicial review, has the clear constitutional mandate of plenary powers of judicial review. The Courts are vested with the power to test the validity of every action of every authority functioning under the Constitution on the touch stone of the Constitution and the power of judicial review is available in respect of exercise of powers under any of the provisions of the Constitution. The power is comprehensive irrespective of whether the actions of the executive are in the realm of administrative action, administrative discretion, administrative policy making or administrative adjudication. There are no constitutional inhibitions on the powers of judicial review as are present in England or the United States. But in actual exercise of powers of judicial review, the attitude of the Supreme Court has been that of restraint, reticence and deference. There was perceptible influence of the judicial trends in England and the Court treaded the path of *Wednesbury* and *GCHQ.* The Court confined its role to supervising that the decisions are taken correctly and not that the correct decisions are taken. The Court treated itself as just any other branch of the government and confined itself to traditional role that has been assigned to the judiciary under

[65] Professor Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review", (2000) PL 671
[66] *Ibid*

the classical model of separation of powers. It felt that it should not transgress into the fields reserved for the legislative and executive branches of the Government.

However, with the changing needs and times, the Court realized that the traditional attitude of judicial hands off, especially in administrative policy matters, the traditional notion that the function of the judiciary is to interpret and enforce laws and that making of policy is the business of executive and that Court should not transgress into the fields reserved for the legislative and executive branches of the Government and the traditional tools of judicial review viz., the *Wednesbury* grounds of illegality, irrationality and procedural impropriety were not enough to meet the present day challenges. The Court also realized its inherent shortcomings in deciding technically complex issues which did not have any judicially manageable standards to resolve it and the Court realized that the time has come to develop such standards. The Court also realized that the changing circumstances needed new judicial concepts and judicial tools. The Court also realized that in the matter of social, economic and environmental policies where a large public interest is involved, the Court cannot remain as a mute spectator and allow the executive to act in a manner prejudicial to the public interest and conducive to their own private and political interests. The Supreme Court in *Mohd. Abdul Kadir* vs. *Director General of Police*[67] said:

> **"**We are conscious of the fact that the issue is a matter of policy having financial and other implications. But where an issue involving public interest has not engaged the attention of those concerned with policy, or where the failure to take prompt decision on a pending issue is likely to be detrimental to public interest, courts will be failing in their duty if they do not draw attention of the authorities concerned to the issue involved in appropriate cases. While courts cannot be and should not be makers of policy, they can certainly be catalysts, when there is a need for a policy or a change in policy."

The Court held that though Court would not enter into full-blown merit review of policies, but it can definitely examine whether the policy makers have considered all important factual aspects of the matter, have considered all policy choices, have genuinely engaged in reasoned decision making and that there is a rational connection between the facts found and the choice made. The Court would examine whether the policy makers have drawn

[67] *Mohd. Abdul Kadir* vs. *Director General of Police, Assam,* (2009) 6 SCC 611.

a balance sheet of pros and cons of all policy choices and based on the appreciation of pros and cons have chosen the most advantageous policy choice.

In the recent land mark judgment in 2G case[68], the Supreme Court, while summarily rejecting the State plea that in financial policy matters Court should not interfere with policy decisions of the matter, set aside 122 licences of 2G telecom which were given by the government to private telecom operators. The Court said:

> "[T]he power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters. There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State. However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters.
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> "When matters like these are brought before the judicial constituent of the State by public-spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest and ensure that the institutional integrity is not compromised by those in whom the people have reposed trust and who have taken an oath to discharge duties in accordance with the Constitution and the law without fear or favour, affection or ill-will and who, as any other citizen, enjoy fundamental rights and, at the same time, are bound to perform the duties enumerated in Article 51-A."

[68] *Centre for Public Interest Litigation* vs. *Union of India*,(2012) 3 SCC 1.

In *Brij Mohan Lal* vs. *Union of India*[69], the policy decision of the Government to wind up the Fast Track Courts was under challenge. Swatenter Kumar, J., speaking for the bench said:

> "Independence of judiciary is one of the most significant features of the Constitution. Any policy or the decision of the Government which would destroy or undermine the independence of judiciary would not only be opposed to public policy but would also impinge upon the basic structure of the Constitution…. It has been consistently held that writ of mandamus can be issued, perhaps not as regards the manner of discharge of public duty but with respect to the due exercise of discretion in the course of such duty. Such is not only the practice in India but even in the United States of America.
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> "It is thus clear that it is the constitutional duty of the Supreme Court to ensure maintenance of the independence of judiciary as well as effectiveness of justice delivery system in the country. The data and statistics placed on record ……. show that certain and effective measures are required to be taken by the State Governments to bring down the pendency of cases in lower courts. It necessarily implies that the Government should not frame any policies or do any acts which shall derogate from the very ethos of the stated principle of judicial independence. If the policy decision of the State is likely to prove counterproductive and increase the pendency of the cases, thereby limiting the right to fair and expeditious trial of the litigants in this country will tantamount to infringement of their basic rights and constitutional protections. Thus in these cases the court could issue mandamus."

The learned Judge further said:

> "The power of the Government, regarding how the policy should be shaped or implemented and what should be its scope, is very wide, subject to it being not arbitrary and unreasonable. In other words state may formulate or reformulate its policies to attain its obligations of governance or to achieve its objects, but the freedom so granted is subject to basic constitutional limitations and not so absolute in its terms that it would permit even arbitrary actions. Certain tests,

[69] *Brij Mohan Lal* vs. *Union of India*, (2012) 6 SCC 502.

whether the Supreme Court should or should not interfere in the policy decisions of the State, can be summed up as:

I. If the policy fails to satisfy the test of reasonableness, it would be unconstitutional.
II. The change in policy must be made fairly and should not give impression that it was so done arbitrarily on any ulterior intention.
III. The policy can be faulted on the grounds of mala fide, unreasonableness, arbitrariness or unfairness, etc.
IV. If it is de hors the provisions of the act or legislations.
V. If the delegate has acted beyond the powers of delegation.

"Cases of the nature where courts have exercised judicial review in relation to policy mattes can be classified into two main classes: one class being the matters relating to general policy decisions of the state and the second relating to fiscal policies of the State. In the former class of cases, the courts have expanded the scope of judicial review when the actions are arbitrary, mala fide or contrary to the law of the land; while in the latter class of cases, the scope of such judicial review is far narrower. Nevertheless, unreasonableness, arbitrariness, unfair actions, or policies contrary to the letter, intent and philosophy of law and policies expanding beyond the permissible limits of delegated power will be instances where the courts will step in to interfere with the government policy."

In *Shivaji University* vs. *Bharti Vidyapeeth*[70], the Government resolution which laid down as a matter of policy where there is a single law college in a district of the State, no other law college therein will be permitted, was under challenge. The Supreme Court said, "[A]ssuming that that is the policy, this is clearly arbitrary and unreasonable. Account has not to be taken of whether or not a law college exists in a district. What is relevant and what should be taken into consideration is the population which the existing law college serves and whether, therefore, there is need for an additional college.

In *Akhil Bhartiya Upbhokta Congress* vs. *State of Madhya Pradesh*[71]the decision of the Government of Madhya Pradesh to allot 20 acres land to late Shri Kushabhau Thakre Memorial Trust without any advertisement and without inviting other similarly situated

[70]*Shivaji University*vs. *Bharti Vidyapeeth*, (1999) 3 SCC 224.
[71]*Akhil Bhartiya Upbhokta Congress* vs. *State of Madhya Pradesh*, (2011) 5 SCC 29.

organisations/institutions to participate in the process of allotment was under challenge. The Supreme Court set aside the allotment after observing that any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

The Supreme Court in exercising the powers of judicial review over the policy decisions has been aware of its inherent shortcomings that policy matters involve appreciation of highly complex technical issues and Judges are not well equipped for the same. To overcome this constraint the Court has devised the novel tool of assigning the task of examining the merit or otherwise of such policy and regulatory matters to the expert bodies and regulators and then assuming the task of overseeing that appropriate decisions are taken and appropriate policies are adopted which will safeguard the public interest and will avoid arbitrary decisions by the executive. In *Avishek Goenka* vs. *Union of India*[72] the Supreme Court said:

> "The concept of "regulatory regime" has to be understood and applied by the courts, within the framework of law, but not by substituting their own views, for the views of the expert bodies like an appellate court. The regulatory regime is expected to fully regulate and control activities in all spheres to which the particular law relates.
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> "We have clearly stated that it is not for this Court to examine the merit or otherwise of such policy and regulatory matters which have been determined by expert bodies possessing requisite technical know-how and are statutory in nature. However, the Court would step in and direct the technical bodies to consider the matter in accordance with law, while ensuring that public interest is safeguarded and arbitrary decisions do not prevail.

In *Atyant Pichhara Barg Chhatra Sangh* vs. *Jharkhand State Vaishya Federation*[73], the policy adopted by the Jharkhand Government to amalgamate Extremely Backward Classes with the Backward Classes for the purpose of appointment was under challenge. The Court directed that the Jharkhand Government will look into the facts and circumstances that are peculiar to it by appointing an Expert Commission or a body as has been provided for in

[72] *Avishek Goenka* vs. *Union of India*,(2012) 5 SCC 275.

[73] *Akhil Bhartiya Upbhokta Congress v. State of Madhya Pradesh,* (2011) 5 SCC 29.

Mandal Commission case which can inquire into the representations/complaints made over under inclusion and over inclusion and make binding recommendations.

VI. Conclusion:

The Supreme Court in India always realized that it is the "ultimate interpreter" of the Constitution and it has been assigned the role of "the sentinel" by the Constitution. The role of the higher judiciary under the Constitution casts on it a great obligation as the sentinel to defend the values of the Constitution and the rights of Indians. The courts must, therefore, uphold the rule of law and harness their power in public interest.[74] With an increased activity in the executive sphere where enormous powers have been entrusted to the executive, the traditional concept of parliamentary control of the executive was not enough to keep the executive within its constitutional bounds. The Court realized that the traditional attitude of judicial hands off, especially in administrative policy matters, the traditional notion that the function of the judiciary is to interpret and enforce laws and that policymaking is the function assigned by the Constitution to the executive and that Court should not enter the uncharted territory of policy making, and that the Court is concerned only with the decision making process rather than the decision itself were not enough to meet the present day challenges. In the changing circumstances the Court undertook the role, which some may call as "judicial activism", and started exercising the powers of judicial review of all administrative actions, which hitherto it has been only asserting. The Court has started exercising the powers of judicial review regardless of whether such decisions are in the sphere of administrative action, administrative discretion, administrative adjudication or administrative policy making. In the process, the Courts have adopted the new principles and tools of judicial review developing in other jurisdictions. The Courts have adopted and applied the "doctrine of hard look" and the "doctrine of proportionality" and have also evolved its own doctrines and bestowing enormous consideration to "larger public good" and individual rights and liberties, started reviewing the administrative actions on the touchstone of "greater public interest". This is definitely a welcome trend insofar as it reflects integration of canons of judicial review and trends towards "a one-world public law".

[74] *Narmada Bachao Andolan* vs. *Union of India,* (2000) 10 SCC 664.