ADMINISTRATIVE LAW

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Introductory

1. Its meaning

The expression "Administrative Law" may mean two different things, namely, (a) law relating to administration, and (b) law made by the administration. The latter would itself be of two kinds. Firstly, it may be rules, regulations, orders, schemes, bye-laws, *etc.*, made by the administrative authorities on whom power to make such subordinate legislation is conferred by a statute. This may be called rule-making. Secondly, certain administrative authorities have power to decide questions of law and/ or fact affecting particular person or persons generally, *i.e.*, adjudication. Most of such powers are exercised quasi-judicially. Such decisions apply a statute or administrative policy and instructions to specific cases. In doing so they create a body of administrative law.

Administrative law relating to administration engages the attention of lawyers. Administration is government or a department or an agency of the government. Under the Constitution of India the powers of the state are divided between the Union (including the Union Territories) on the one hand and the states on the other hand. Both the Union and the states are divided into three great departments, namely, (1) the executive, (2) the legislature, and (3) the judiciary.

Administrative powers are exercised by the executive in either of two ways. It may act in exercise of the executive power of the Union or of a state or it may act under the authority of a specific statute or subordinate legislation. The exercise of all administrative powers is subject to the rule of law. The legal control may be exercised by three authorities, namely, (1) the legislature, (2) the higher executive, and (3) the judiciary. Administrative law concerns itself mainly with the legal control of the government or of administrative authorities by the courts.

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2. The place of administrative law in the legal system

Broadly speaking, law in a modern state is divisible into public law and private law. The latter concerns the legal relations of individuals or groups of individuals or associations while the former deals with the relations between the states on the one hand and the individual or groups of individuals or associations on the other hand. Whenever a question arises as to the relationship in various circumstances between the state and the individual, it falls in the domain of public law; for instance, constitutional law, administrative law, criminal law, law of taxation *etc.*, are all branches of public law. The law of contracts, transfer of property, association *etc.*, would be private law particularly when the state is not a party to such private law relationships. While private law is found to prevail in any organized society, public law presupposes a government under the law. It is only when the structure of the state is formed by law and when the government functions according to law that the relations between the state and the individual can be governed by law which may be called public law. The basic structure of the state may be called its constitution. Constitutional law, therefore, deals with the distribution of the power of the state among its three branches and the rights and duties of the citizens of the state, *vis-à-vis* the state. In a wide sense it would include administrative law.

With the abandonment of *laissez faire* and advent of modern philosophy of a "welfare" state, the administrative organ in almost all the democratic countries is performing large variety of functions. The main task of the administrative organ is no longer merely policing and defense. It has expanded to regulatory and managerial functions. The enormous increase in the functions of the administration in the modern welfare state has gradually led to the treatment of administrative law as a separate subject. For, the increase in the powers and duties of administration has brought it in conflict with the individual in various walks of life. This has led to an increase in the content of administrative law which necessitated the treatment of administrative law as a separate subject. The main motivation for the growth of administrative law is the need of the government to extend its powers of control over different spheres of human activity and a corresponding need for the definition of the powers of the administration and their control in the interest of the individuals affected by their exercise.

The increase in functions and powers of administration calls for its control and regulation. Legislature can pass laws of general application. It cannot control the application of the law to the individual. It is true that members of the legislature can be approached by an individual aggrieved by an administrative action but the scope of redress of such grievances through the legislature is extremely limited. Questions in Parliament can be asked regarding the wrong action of the government or an administrative authority. As the government and the administration are responsible to the

legislature, they may try to redress the grievances of an individual through departmental action when a matter appears in discussion in Parliament but Parliament is busy with questions of general policy and law-making. Its influence on the redress of individual grievances is, therefore, necessarily limited.

The individual can, however, seek remedy against administrative action either by representation to the administrative authority concerned or by recourse to the law courts. A purely administrative authority can attend to a complaint of an individual and can give relief if some obvious wrong has been committed. But in the nature of things administrative authorities develop a departmental bias in favour of their own action or actions of their subordinates. For, they carry out administrative policies. It is generally difficult for them to be so objective and detached in their attitude as to discover flaws in their own actions. If an administrative authority is acting quasi-judicially then it acts objectively and according to the natural justice procedure. If a defect in procedure is pointed out to it, it is often likely to cure the same. But quite often it may believe that it has followed the correct procedure and would refuse to give relief against a complaint. In the vast majority of grievances, therefore, the remedy has to be sought in the courts of law. As Farewell, LJ., observed in *Dyson* v. *Attorney General*:[1]

> The Convenience in the public interest is all in favour of providing a speedy and easy access to the courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials... If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the courts are the only defence of the liberty of the subject against departmental aggression.

(A) *The nature of the powers exercised by the administration,* (B) *the grounds on which the exercise of these powers can be challenged in the court of law, and* (C) *the different remedies available to the individual against the administration in the law courts* would, therefore, be the three broad divisions of administrative law.

NATURE OF ADMINISTRATIVE POWERS

3. The variety of powers

The executive exercises variety of powers and performs considerable number of functions. It is, however, not easy to define executive power. Supreme Court in *Ram Jawaya's* Case[2] has attempted to cull out what is executive function and observed:

1. (1911) 1 K B 410.
2. *Ram Jawaya* v. *State of Punjab* AIR 1955 SC 549. Also see *Jayantilal Amritlal* v. *F N Rana* AIR 1964 SC 648.

> ... It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away...

There is vast expansion of administrative functions. It may be broadly classified as legislative, administrative and quasi-judicial. No scheme of classification, however, is fool-proof. Generally speaking, while exercising legislative power, the administration makes rules, by-laws, regulations or orders of a general nature. This is designated as delegated legislation. Under the administrative functions, it seeks to lay down and implement a general rule of conduct or policy to be followed in the generality of cases and execute the laws made by legislature. When the administrative action partakes of some judicial characteristics, it is characterized as 'quasi-judicial'.

Classification of administrative actions, though important, serves only a limited purpose. With respect to the procedure to be followed or the remedy to be provided, the good deal of rigidity in this regard has disappeared.[3] For instance, the principles of natural justice were earlier sough to be followed only in case of quasi-judicial functions, which developed dichotomy between legislative, administrative and quasi-judicial functions. But now it can be observed that this concept is being replaced by another similar concept of *fairness of action,* irrespective of the category of action.

The classification, however, is relevant for determining the scope and grounds of judicial review. In this regard, the distinction between administrative and quasi-judicial functions is less important. For, writ of *certiorary* and *prohibition,* which was earlier available only against the judicial bodies, may, now be issued against administrative bodies performing judicial functions. Executive body performing administrative and quasi-judicial functions is, thus, amenable to writ jurisdiction[4] and SLP (special leave petition) jurisdiction[5] of the Court. But from this point of view, the distinction between legislative functions on the one hand and administrative and quasi-judicial functions on the other hand are still important. For, delegated legislation cannot be challenged on the ground of not following the principles of natural justice. Similarly, *mandamus* may not be issued for performing legislative function but for administrative functions under certain circumstances.

Classification, though important, may not be easy in practice. This is because there is no precise test to distinguish the three functions. The fact that a single proceeding may at times combine some aspects of all the three

3. S P Sathe, *Administrative Law,* 2004, p.133.
4. Articles 32 and 226 of the Constitution of India.
5. Article 136 of the Constitution of India.

functions further complicates the problem of classification. The formula to classify will be dealt with later on in the chapter.

The present chapter deals with the administrative and quasi-judicial functions and its control in detail. The delegated legislation as it is generally called is kept beyond the scope of this chapter barring few references made here and there.

(a) Legislative Function: The Constitutional scheme in India essentially confers the power to legislate on Legislature. Over the years, however, due to qualitative and quantitative change in state functions, the executive has come to perform the law-making function to a large extent. Legislative function performed by executive is termed as "delegated legislation". It may include issuance of ordinance, making of rules, regulation and bylaws *etc.*

Before proceeding further, distinction between the legislative and administrative functions can be examined at this stage. In US, two tests have been propounded to identify legislative functions. One test depends upon the applicability and another test relates to the time and space. According to the first test, legislative function is normally directed towards the formulation of requirements having a general application to all members of a broadly identifiable class. As against this, an administrative decision is applicable to specific individuals or situations. According to another test, legislative act prescribes future patterns while an administrative decision determines liability on the basis of present or past facts. Both these test of "*generality*" and "*futurity*", though workable, fails to guide the distinction at times. These test have acquired, by and large, universal recognition.

In *Cynamide* case[6] the Supreme Court while making distinction between legislative and administrative functions followed the above test and observed:

> "a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy. Legislation in the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particulars act, of issuing particular orders or of making decisions which apply general rules to particular cases.'

The Court, however, cautioned against this classification by saying that this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there

6. *Union of India* v. *Cynamide India Ltd.* AIR 1987 SC 1802.

may be legislation of particular application only. The Apex Court in *State of Punjab* v. *Tehal Singh*[7] applied the distinction made out in Cynamide case and held that declaration made by the State government determining the territorial area of a Gram Sabha and establishing Gram Sabha for that area is an act legislative in character.

In India, the leading authority on distinction between legislative and quasi-judicial functions is the case of *Indira Gandhi* v. *Raj Narain*[8] decided by the Supreme Court. The Court objected to the use of the constituent power, which was legislative in character, for deciding a dispute between the two parties which could be done only through judicial process. While making distinction between the legislative and quasi-judicial act, it observed in *Cynamide* case:

> "Rule making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class" while, "an adjudication, on the other hand, applies to specific individuals or situations... Also, adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and the obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non legislative acts."

In India, the performance of legislative function does not necessarily invoke the application of principles of natural justice as is required in case of quasi-judicial functions. Now-a-days the trend is that the statutes themselves provides for hearing before taking certain actions. For instance, rate-fixing or price-fixing or wage-fixing,[9] in India have been regarded as legislative functions and not quasi-judicial function. Regulations made under Electricity Regulatory Commissions Act, 2002 prescribe the procedure for hearing consumers on proposed revision of tariffs. Similar provisions exist under the Telecom Regulatory Authorities Act, 2000. It may be noticed that hearing in such cases is purported to bring fairness in legislative functions too.

The delegated legislation is subject to judicial review at two stages, conferment stage and exercise stage. In the first category, the delegated legislation can be challenged if the *essential legislative function* has been delegated to the executive or if it is *ultra-vires* the Constitution. Subordinate

7. AIR 2002 SC 533.
8. AIR 1975 SC 229.
9. *Express Newspapers Ltd.* v. *Union of India* AIR 1958 SC 578; *Subhash Oil Industries* v. *Uttar Pradesh* AIR 1975 All 19 and *Tharoo Mal* v. *Puran Chand* AIR 1978 SC 306.

legislation can be *ultra-vires* the Constitution if the subject matter of a rule falls outside the plenary legislative power of the legislature by whom the power is delegated. For instance, the state government under Article 162 of the Constitution imposed a levy on government advertisements on newspapers and deducted such levy from the pension fund of the working journalist.[10] The Supreme Court struck down the above rule on the ground that there was a central legislation and matter fell within entry 92 of the List I of Seventh Schedule, the executive power of the state government could not be exercised in that respect. At the exercise stage, the delegated legislation may be challenged on grounds, which *inter alia* includes, *ultra-vires* the Constitution[11] or the enabling Act and on the ground of reasonableness.[12]

(b) Administrative Functions: According to the principles of separation of powers, general administration is the business of the executive and neither of the legislature nor of the judiciary. In the ultimate analysis, the executive being responsible to Parliament every act of administration is subject to the general control of Parliament. This merely means that the executive is responsible to Parliament. It rarely means that the Parliament actually interferes with particular actions of administration. While the executive must act according to law, each of its actions is not subject to the control of Parliament. While the nature of parliamentary control is general, the nature of judicial control by its very nature is restricted to individual cases. If, however, every acts of administration were subject to judicial control, the whole process of administration would be liable to be subject to judicial scrutiny. This would result in government by the judiciary rather than by the executive. This would be contrary to the principle of separation of powers. Under no system of government, therefore, can judicial control cover the whole field of administration.

Administrative functions are of numerous types. They range from such simple matters as registration of births and deaths to regulations of business activity, acquiring property for a public purpose, detaining a person on the subjective satisfaction of the executive and investigation, seizing or destroying the property of an individual in the interest of public health, safety and morality *etc.* The types of administrative powers are too numerous to be mentioned here.[13] Largely, the administrative functions include (a)

10. *Hindustan Times* v. *Uttar Pradesh* (2003) 5 SCC 516.
11. Delegated legislation will be *ultra-vires* the Constitution if it violates any of the fundamental rights guaranteed by the Constitution.
12. *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh* AIR 1984 SC 1543.
13. M P Jain and S N Jain, *Principles of Administrative Law*, 4th ed., 1986, Reprint 2003, p. 317.

evolving and implementing policies for general application and (b) execution of laws.

Formulation and Implementation of Policy: The essence of government is to formulate policies based on general principles and to carry on administration according to such policies. In its true sense policy is formulated on general and not individual considerations. The data on which the policies are based are general and not confined to an individual case. The formulation of the policy may be preceded by informal consultation of ascertainment of views. But that is a political process and not a judicial process. For, there is no proceeding against any individual.

The application of a policy would normally consist of purely executive acts, which includes formulation or evolution of standards and application of such standards for the application of policy.

In India, the executive does not always need a statutory power to act and execute a policy. The Supreme Court in *Ram Jawaya's* case [14] observed as under:

> The executive Government... can never go against the provision of the constitution or of any law... but... it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws...

Usually, policy-making is not directed to any individual. Typical polity functions not directed against individuals include foreign policy of the government, recognition of foreign states and governments and treaties entered into by government with foreign states. For instance, the extent of the territory of India under article 1 of the Constitution, when it is not patent, may be ascertained by the courts from the government inasmuch as this is a political matter determinable by the government as a policy function.[15] Policy may be implemented against a particular individual or an association in accordance with the facts of an individual case. Such action may be of two types. It may either consists of the administration unilaterally taking action against an individual. This is to say the administration is both the prosecutor and the judge or the investigator and the adjudicator. Such an act may be called administrative action affecting an individual. On the other hand there may be an existing dispute or a *lis* between two persons, which is to be decided by an administrative authority. The adjudication by the administrative authority would naturally follow the rudiments of a model of

14. *Ram Jawaya* v. *State of Punjab* AIR 1955 SC 549.
15. See *N. Masthan Sahib* v. *Chief Commissioner of Pondicherry* (1962) Supplement 1 SCR 981 and 997 at 1017 referring to the observations of Lawrence. L. J., in *The Fagrnes*, 1927 Probate 311 at 329.

judicial procedure. For instance, the parties will be heard before the authority gives its decision on the dispute. In such a case the action of the authority is called quasi-judicial.

It was formerly thought this purely administrative function of formulating and implementing the policy could not be a subject of review by the courts. Administrative acts were variously called acts of state or acts of policy to put them beyond the purview of judicial review. The most famous instance of the distinction between the two aspects of administrative function, namely, a decision on the policy-making level and a decision on the operational level is furnished by the decision of the U. S. Supreme Court in *Dalehite* v. *United States.*[16] The government of the United States decided at the policy level to manufacture fertilizer involving the use of a certain combustible material. In 1947 this combustible fertilizer exploded on board of a ship docked at Texas city causing widespread damage to person and property. Under the U.S. Federal Torts Claims Act, 1946,

> any claim... based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty on the part of a Federal agency or an employee of the Government....is withheld from jurisdiction of the courts.[17]

The Supreme Court held that the U.S. government was not liable for the explosion, which was caused by the negligence of the various government agencies and officials in planning, manufacturing and storing the fertilizer and fighting the explosion. The really crucial part of the holding of the court applied only to the government policy decision to manufacture fertilizer involving the use of the combustible material, which was taken by the government at the planning level. For any mistake of judgment in planning the government is not liable to any particular individual. Such a decision at the planning or policy level is, therefore, immune from judicial control. This is to be contrasted with the government decisions, which relate to the operation of the ordinary executive action of the government or any of its officers not involving planning or policy-making. But we are warned by Griffith and Street as follows:

> This word 'policy' must be looked circumspectly; it has an emotive force, which conjures up a vision of some matter, which should be steeled at Cabinet level.... The consideration of typical cases of regulatory action reveals that they do not involve policy in this sense at all... Properly understood. Policy should be limited to the ultimate value judgments. There is a graduated scale of decisions at one end of which the ethical judgment is all

16. 346 U.S. 15 (1953).
17. *Emphasis added.*

> important and at the other end of which is a factual proposition and all issues between are a blending of the two. Only where the normative or ethical element is relatively big in relation to the factual should there by merely political responsibility to Parliament.[18]

Today, the developments in the field of administrative law are moving towards what Griffith and Street has said. The scope of judicial review is expanding its horizon and the scope of non-reviewable policy decision is getting narrower. Expanding the scope of judicial review of policy made by the government, the Court in *Union of India* v. *International Trading Co*[19] held that the policy decision is to be tested upon the touchstone of article 14 of the Constitution of India. It observed:

> While the discretion to change the policy in exercise of the executive power, when not trammeled by any statute or rule is wide enough, what is imperative and implicit in terms of article 14 is that a change in policy must be made fairly and should not give the impression that it was done arbitrarily or by any ulterior criteria...

While according higher status to the policies made by the government, the Supreme Court in *Secretary, Ministry of Chemicals & Fertilizers, Government of India* v. *Cipla Ltd.*,[20] held that once a policy is made, the delegated legislation that follows the policy should be broadly and substantially in conformity with that policy otherwise it would be vulnerable to attack on the ground of arbitrariness resulting in violation of Article 14. The Court further observed:

> ... while it is axiomatic that the contents of a policy document cannot be read and interpreted as statutory provisions. Too much of legalism cannot be imported in understanding the scope and meaning of the clauses contained in policy formulations. At the same time, the Central Government which combines the dual role of policy-maker and delegate of legislative power, cannot at its sweet will and pleasure give a go-by to the policy guidelines evolved by itself...

Reiterating the position, Supreme Court observed in *Dinesh Engineering* case[21] that:

> Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy

18. J.A.G. Griffith and H. Street, *Principles of Administrative Law*, 5th ed., 1973, p. 149.
19. *Union of India* v. *International Trading Co.* (2003) 5 SCC 440.
20. (2003) 7 SCC 1.
21. *Union of India* v. *Dinesh Engineering Corp.* (2001) 8 SCC 491.

> decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution.

However, the Courts are exercising restraint while reviewing the policies made by the executive. In recent years, they have started making distinction between the exercise of discretion involved in making policy and in its application to individuals. In the area of policy making the courts are cautiously slow in exercising judicial review. The court is of the opinion that formulation of policy is the domain of government (executive),[22] which in its wisdom decides to take actions and court refuses to pass any order, which has the effect of amending the existing policy by way of judicial order[23] except where a policy is inconsistent with the express or implied provision of a statute which creates the power to which policy relates or where the decision made in purported exercise of power is such that a repository of the power acting reasonably and in good faith could not have made it.[24] The Supreme Court in *Aruna Roy* case[25] observed:

> It is not the province of the Court to decide on the good or bad points of an education policy. The Court's limited jurisdiction to intervene in implementation of a policy is only if it is found to be against any statute or the Constitution.

The Supreme Court in *cellular operators* case[26] observed that the courts must not transgress into the realm of policy making unless the policy is inconsistent with the Constitution and the laws. Whereas in *Federation of Railway Assn* v. *Union of India*,[27] the Supreme Court held that where discretion was to be exercised according to a policy, the Court would not interfere.

Execution of laws: By and large, the major functional area of the administrative organ in modern times has a statutory basis. Usually, the private rights of persons, property or business are affected by the implementation of any policy formulated by the executive, and so it becomes inevitable to seek the necessary statutory basis for the purpose of effectuating these policies. A few examples of statutes conferring administrative powers on executive may be given. To site an example, for the purpose of disciplining the government

22. *BALCO Employees Union (Regd.)* v. *Union of India* AIR 2002 SC 350; *Ugar Sugar Works Ltd.* v. *Delhi Admn.* AIR 2001 SC 1447 and *State of Punjab* v. *Ram Lubhaya Bagga* AIR 1998 SC 1703 and *Kendriya Vidyalaya Sangathan* AIR 2001 Raj. 35.
23. *Principal, Madhava Institute of Technology & Science* v. *Rajendra Singh Yadav* (2000) 6 SCC 608.
24. *G. B. Mahajan* v. *Jalgaon Municipal Council* (1991) 3 SCC 91.
25. (2002) 7 SCC 368. Also refer to *Association of Industrial Electricity Users* v. *State of AP* AIR 2002 SC 1361.
26. *Cellular Operators Assn. of India* v. *Union of India* (2003) 3 SCC 186; also refer to *Tata Iron and Steel Co. Ltd.* v *Union of India* AIR 1996 SC 2462.
27. (2003) 4 SCC 29: AIR 2003 SC 1344.

servants, the executive is given the power to dismiss, remove or reduce in rank a government servant to be exercised after giving a hearing to the concerned person. Central government is given power to requisition private immovable property for "purposes of the Union" under The Requisition and Acquisition of Immovable Property Act 1952. In the interest of public health, an inspector appointed may seize the drugs to prevent manufacture or sale of sub-standard or mis-branded drugs under the Drugs Act, 1940. An executive magistrate on sufficient grounds may issue order in urgent cases of nuisance or apprehended danger under section 144 of Cr. P.C. *etc.*

Discretionary powers

Related phenomenon with the implementation of policies and execution of laws is the conferment of discretionary powers on administrative authorities. Functions dischargeable by the administration may either be ministerial or discretionary. A ministerial function is one where the relevant law requires the duty to be performed under certain and specific terms leaving nothing to the judgment of the authority. Whereas discretionary power, broadly speaking, means an authority has freedom to make a choice between alternative courses of actions available. The range of ministerial functions is getting narrower day-by-day and that of discretionary powers is getting widened. This is because of the change in philosophy from *laisseze faire* to welfare state and emergency situations that may call for immediate actions. It is frequently realized that government having only ministerial duties with no discretionary functions will be extremely rigid and unworkable. The classification of administrative function as ministerial or discretionary is relevant for the purposes of judicial review of the ultimate decision as well as from the point of view of *modus operandi.*

The execution of law or policy required formulation of standards and application of same to the individual cases. This involves great deal of exercise of discretionary powers by the administrative authorities. For instance, it is a part of the public policy that people should not be allowed to live in houses which are in ruinous condition, which are likely to fall down and which constitute a danger to the occupants as also to persons passing by or living in the neighborhood. The policy was sanctioned by the legislature when it was embodied in section 348 of the Delhi Municipal Corporation Act, 1957 that applies to the union territory of Delhi. The standard for the application of the policy was laid down by section 348 (1) in the following words:

> If it appears to the Commissioner at any time that any building is in a ruinous condition, or likely to fall, or in any way dangerous to any person occupying, resorting to or passing by such building or any other building or place in the neighborhood or such building, the Commissioner may by order in writing require the

> owner or occupier of such building to demolish, secure or repair such building or do one or more of such things within such period as may be specified in the order, so as to prevent all cause of danger there from.

The question whether a particular building is in such a ruinous condition as to constitute a danger is to be decided primarily by the Commissioner. It is the opinion of the Commissioner that is final in this matter. A court of law is not entitled to decide this question independently of the Commissioner's opinion as an ordinary issue before it.[28] The discretion of the Commissioner has, however, to be exercised on the existence of some material before him showing the dangerous condition of the building. But who is to judge whether such material for the exercise of discretion existed or not? At one time it was thought that even the question whether such material existed or not was to be decided by the administration in its discretion.

The question arose in an acute form in *Liversidge* v. *Anderson.*[29] Regulation 18B of the Defence (General) Regulations, 1939 issued under the Emergency Powers (Defense) Act, 1939 in the United Kingdom provided that "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations...he may make an order against that person directing that he be detained." The government filed no affidavit stating the facts on the basis of which the Secretary of State could have a reasonable cause to believe that *Liversidge* was of hostile origin or associations. The Secretary of State acted on confidential information. The question was whether it was proved that the Secretary of State had reasonable cause to believe that the requirements for exercising the power of detention existed. Viscount Maugham, L.C. approached the question as follows:

> I am not disposed to deny that in the absence of a context, the *prima facie* meaning of such a phrase as "If AB has reasonable cause to believe" a certain circumstances or thing should be construed as meaning "if there is in fact reasonable cause for believing" that thing if AB believes it. But I am quite unable to take the view that the words can only have that meaning. It seems to me reasonably clear that if the thing to be believed is something which is essentially one within the knowledge of AB or one of the exercise of his exclusive discretion, the words might well mean if AB acting on what he thinks is reasonable cause believes the thing in question.

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28. *Municipal Corporation of Delhi* v. *Daulat Ram* ILR (1971) II Delhi 711.
29. (1942) A.C. 206.

The majority of members of the House of Lords agreed with this view. But Lord Atkin dissented on the ground that the words "having reasonable cause" import the existence of facts and not the mere belief by the person challenged that the fact or state of facts existed. The decision in *Liversidge* v. *Anderson,* however, soon came to be regarded as justified only by the special circumstances of the case, namely, the emergency and war conditions in which the power of detention had to be exercised. It came to be realized that in normal times the existence of the circumstances or material justifying the discretionary action had to be an objective fact and could not be in the subjective discretion of the authority. Lord Radcliffe speaking in *Nakkuda Ali* v. *Jayaratne*[30] stated the modern view in the following words:

It would be a very unfortunate thing if the decision of Liversidge's case came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments...But the elaborate considerations which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood; and the dissenting speech of Lord Atkin at least serves as a reminder of the many occasions when they have been treated as meaning 'if there is in fact reasonable cause for AB so to believe'.

The Supreme Court of India followed the majority decision in *Liversidge* in *A K Gopalan* case[31] to hold that the detaining authority's satisfaction that a person needed to be detained preventively was not open to judicial review. However this stand of the courts is changing and it is now well established that the subjective satisfaction of the detaining authority must be based on the relevant material, which a reasonable person would consider sufficient to lead to such satisfaction.[32] The judicial control over the administrative discretion is limited in scope and is non-reviewable on the merit of the decision.[33]

(c) Quasi-judicial functions

When an authority other than the judicial authority has to act judicially while exercising its legislative or administrative function, it is said to be acting quasi-judicially and its function is called the quasi-judicial function. The distinction between the judicial, quasi-judicial and administrative functions is highlighted by the Report of the Committee on Minister's Powers (1932).

30. (1951) A.C. 66 (P. C.).
31. *AK Gopalan* v. *State of Madras* AIR 1950 SC 27.
32. *AP Bankers & Pawn Brokers' Association* v. *Municipal Corporation of Hyderabad* (2001) 3 SCC 646.
33. *Tata Cellular* v. *Union of India* (1994) 8 SCC 150.

According to the report, a true judicial function pre-supposes an existing dispute between two or more parties and then involve following four requisites:[34]

> A true judicial decisions presupposes an existing dispute between two or more parties, and then involves four requisites—(1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties ; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice....Decisions which are purely administrative stand on a wholly different footing from quasi-judicial as well as from judicial decisions and must be distinguished accordingly.... In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts and the means which he takes to inform himself before acting, are left entirely to his discretion.

Further clarifying the distinction between administrative and quasi-judicial functions, the Supreme Court in *Indian National Congress (I)* v. *Institute of Social Welfare*[35] laid down the following principles to characterize the function of an authority as quasi-judicial:

> ... Where (a) a statutory authority empowered under a statute to do any act: (b) which would prejudicially affect the subject; (c) although there is no lis or two contending parties and the contest is between the authority and the subject; (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is quasi-judicial...

The examples given here would amply clarify as to what actions can be classified as quasi-judicial. Taking away the electricity or telephone

34. *Report of the Committee on Minister's Powers*, 1932, pp. 73-74 and 81.
35. AIR 2002 SC 2158.

connection on failure to pay the security deposit,[36] disconnecting the supply of electricity on the alleged commission of theft of electricity,[37] order of Registrar, cooperative societies directing the amalgamation[38] or winding up of society[39] or expelling any member of a society,[40] assessment of tax[41] and action of income tax authorities while considering applications for deduction, exemption or waiver[42] *etc.*

GROUNDS ON WHICH ADMINISTRATIVE ACTION CAN BE CHALLENGED

The essence of discretion is that it is exercised on the subjective satisfaction of an administrative authority. The subjective satisfaction, however, does not mean that it depends upon the whims and fancies of the person taking the action. As stated above, discretion has to be exercised based upon the objective material available before him. The decision thus taken is subject to judicial review. The cardinal principle of the judicial review of exercise of administrative discretion is that the courts do not act as appellate authority for the decision taken. They have no jurisdiction to substitute its own views.[43] The courts look into the adequacy, relevancy and appropriateness of the material depended upon by the authorities while taking decision. In other words, the courts look into the question of *how* the discretion has been exercised and not *what* decision has been taken.

The subjective satisfaction in matters of urgency is not ordinarily open to the courts' scrutiny of the propriety of the government's satisfaction on an objective appraisal of facts. Whether in a given situation there existed urgency or not is left to the discretion and decision of the government. The court can enquire whether the appropriate authority had all the relevant materials before it to reach such a conclusion.[44] The decision taken in emergency situations can, however, be challenged on the ground of non-application of mind or if the action is *mala fide.*[45]

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36. *Balu Ram* v. *Union of India* AIR 1972 Del 5.
37. *Municipal Corporation of Delhi* v. *Ajanta Iron and Steel Company (Pvt) Ltd.* (1990) 2 SCC 659 and *Contra MP Electricity Board* v. *Harish Wood Products* AIR 1996 SC 2258.
38. *GAC Co-op Society* v. *Asst. Registrar, Co-op Societies* AIR 1973 Ori. 148.
39. *President, Commonwealth Co-op Society* v. *Joint Registrar, Co-op Societies* AIR 1971 Ker 34.
40. *Brij Gopal* v. *State of Madhya Pradesh* AIR 1979 MP 173
41. *Dhakeshwari Cotton Mills* v. *Commissioner* AIR 1955 SC 65; *Mahadayal Premchandra* v. *Commercial Tax Officer* AIR 1958 SC 667 and *CIT* v. *B N Bhattacharjee* (1979) 4 SCC 121.
42. *Kishanlal* v. *Union of India* (1998) 2 SCC 392.
43. *Madhya Pradesh* v. *M V Vyavasaya* (1997) 1 SCC 156; *Uttar Pradesh* v. *Committee of Management of SKM Inter College* (1995) Supp (2) SCC 535; *Uttar Pradesh* v. *Nand Kishore Shukla* (1996) 3 SCC 750 and *Partap Singh* v. *State of Punjab* AIR 1964 SC 72.
44. *First Land Acquisition Collector* v. *Nirodhi Prakash Gangoli* AIR 2002 SC 1341.
45. AIR 2002 SC 1317.

1. Discretionary action

Judicial control of discretionary powers has two facets. One is to refrain the legislature from conferring too broad discretionary powers on administrative authority. This has brought in certain limitation on the conferment of such powers by invoking fundamental rights guaranteed by the Constitution which involves substantive as well as procedural safeguards in the exercise of powers. Two, to provide for the post-decisional review mechanism, so that authorities function within limits. The purpose of the judicial review is to ensure that there is no abuse the discretion. The abuse of discretion may be subject to judicial review on the following grounds.

Constitutionality: Article 14 of the constitution ordains equality before the law and equal protection of laws to all in India. Over the years, the Supreme Court has given a new dimension to article 14 by ruling that arbitrary action on the part of the administration amounts to denial of equality and hence void under Article 14."[46] This interpretation is reflected in a recent decision[47] of the Supreme Court in which the order of the railway board of rejecting a tender is quashed on the ground that it is "arbitrarily" and "in flagrant violation of the constitutional mandate of Art 14. The board justified its decision on the ground that it has power to reject any tender *without assigning any reasons.* According to the court, the power of the authority is not "unfettered" and it should be exercised by following the norms laid down by the courts.

An administrative action can be challenged as violative of Article 14 if it is discriminatory or arbitrary.[48] The Court opined in *Om Kumar* v. *Union of India*[49] that where administrative action is challenged as being discriminatory under article 14,[50] the issue is regarding the correctness of the level of discrimination applied. It should be inquired into, whether the action is excessive and it has a *nexus* with the objective intended to be achieved by the administrator. The court has advocated for the application of test of

46. *E.P. Royappa* v. *State of Tamil Nadu* AIR 1974 SC 555. This proposition has been reiterated in many further cases such as *Center for Public Interest Litigation* v. *Union of India* AIR 2001 SC 80. Also see *Alok Prasad Varma* v. *Union of India* AIR 2001 Pat. 211; S Y *Nawab* v. *Municipal Corpn. of Hyderabad* AIR 2001 AP 403 and *R D Shetty* v. *International Airport Authority* AIR 1979 SC 1628.
47. *Supra* note 21.
48. The Supreme Court has observed in *Shri Sita Ram Sugar Co. Ltd* v. *Union of India* AIR 1990 SC 1277 at 1297 (- per Thommen, J.):
"Any act of the repository of power, whether legislative or administrative or quasi-judicial is open to challenge, if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land, or if it so *arbitrary or unreasonable* that no fair minded authority could ever have made it."
49. (2001) 2 SCC 386.
50. The important deductive proposition of Art. 14 is that the equals be treated equally and unequals be treated differently.

"proportionality" in such cases.[51] Where administrative action is challenged as "arbitrary" under article 14,[52] the question will be whether the administrative order is "rational" or "reasonable" and for that *Wednesbury*[53] test would be applied.

The doctrine of proportionality is of European Origin[54] and from there it has traveled to Britain[55] and other countries. At present, the doctrine is applied in some or other form in all the common law countries. The doctrine of proportionality ordains that administrative measure must not be more drastic than is necessary for attaining the desired result.

The decision can, however, be critiqued on the point whether it viable and also desirable to draw a distinction between 'discrimination' and 'reasonableness' for the purpose of application of doctrine of proportionality? Because the concept of 'reasonableness' itself implies 'proportionality'. For example, failure to maintain a proper balance between various conflicting interests may be struck down both for 'disproportionality' as well as for "unreasonableness". For both, the courts are bound to assess whether the restriction is excessive than is actually required.[56]

Applying the 'proportionality' test, for instance, the Court has held[57] that unilateral decision by the authority canceling the list of selected candidates over a controversy is in excess of the nature and gravity in the given situation. The court is of the opinion that the decision is disproportionate and the contextual considerations have been overlooked.

It may be discerned that had *Wednesbury's* test be applied, ruling of the court would had been different. This is because, the decision to struck down the list by the authority could not be characterized as "so absurd that no sensible person could ever dream that it lay within the power of the authority." Even though, the court has characterized it as 'arbitrary' and 'not reasonable', it has adopted a lower standard of unreasonableness than that of *Wednesbury* test.[58]

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51. The court had discussed the doctrine earlier in *Union of India* v. *Ganayutham* (1997) 7 SCC 463.
52. Also see, *E. P. Royappa* v. *State of T.N.* (1974) 4 SCC 3, supra note 77.
53. The House of Lords in *Associated Provincial Picture Houses* v. *Wednesbruy Corp.*53 laid down the criteria for judicial review. These are known as *Wednesbury's* principles. The test has been adopted in India by the Supreme Court in *Tata Cellular* v. *Union of India* (1994) 6 SEE 651.
54. Rights contained in the European Convention on Human Rights and Fundamental Freedoms.
55. S P Sathe, *Administrative Law*, 7th ed., p. 444.
56. M P Jain, *Administrative Law*, XXXIX ASIL, 2003, p. 14.
57. *Union of India* v. *Rajesh PU Puthuvatnikathu* (2003) 7 SCC 285.
58. M P Jain, *Administrative Law*, XXXVII ASIL, 2001, p. 18.

Purpose of law

Administrative action if contrary to the fundamental provisions of law under which it purports to be taken,[59] is without jurisdiction and is subject to judicial review. Not only the exercise of discretion not violative of specific provisions of law, it must be exercised to carry out the legislative purpose. In this era of conferment of broad discretionary powers, "improper purpose" has become an important ground to control the exercise of administrative powers. Exercise of discretionary power for "improper purpose", is not challenged on the ground that the authority did not have the power to take action but on the ground that the action is taken to achieve the purpose other than what is authorised by the law. For instance in *Ahamed Hossain* case, the authority had the power to acquired the land to provide accommodation to the officer of the state but in fact the property was acquired as a means to eject the petitioner because of the religious susceptibilities of the landlord.[60] The Court disallowed the acquisition on the ground that land was not acquired for the purpose stated in the Act.

The power ought to be exercised in a lawful manner. It is a well settled legal proposition that the state or its executive officers cannot interfere with the rights of the others unless there is some provision of law which authorizes their acts. The state or its executive officers cannot take the law in their own hands as this will be destructive of the basic principle of rule of law.[61]

Again, the Supreme Court has emphasized in *Delhi Administration* v. *Manohar Lal*[62] that power conferred on the state government under section 493, CrPC,[63] has to be exercised by the government in accordance with the rules and established principles reasonably and rationally, keeping in view the reasons germane and relevant for the purpose of law under which the conviction and sentence has been imposed, commiserative facts necessitating the commutation, and the interest of the society and public interest.

Administrative action without jurisdiction is subject to judicial review either by way of a suit or under article 226 of the Constitution even though

59. *Dhulabai* v. *State of M.P.* (1968) 2 SCR 662.
60. *Ahamed Hossain* v. *State of Maharashtra* AIR 1951 Nag. 138.
61. *State of West Bengal* v. *Vishnunarayan & Associates (P) Ltd.* (2002) 4 SCC 134; Also see, *Bishan Dass* v. *State of Punjab* AIR 1961 SC 1570 and *Stae of U.P.* v. *Maharaja Dharmander Prasad Singh* (1989) 2 SCC 505. *On 'Rule of Law'*, see, Jain, *Treatise*, I Ch. II.
62. (2002) 7 SCC 222.
63. S. 433, Cr. PC, 1973, provides that the appropriate government may, without the consent of the person sentenced, commute a sentence of simple imprisonment or fine.

the statute under which the action is taken expressly bars the jurisdiction of the civil court. As observed by Lord Reid in the *Anisminic* case such an ouster of the jurisdiction of the court is operative only when administrative action is taken with jurisdiction. When it is without jurisdiction, it is a nullity and the bar of the jurisdiction does not apply against the courts when administrative action is a nullity.

Abuse of discretion

Mala fide: The exercise of any power vested by the statute in a public authority is to be always viewed as in trust, coupled with a duty to exercise the same in the larger public and societal, interest, too. Therefore, the government action must be based on utmost good faith, belief and ought to be supported with reason on the basis of the state of law. *Mala fides* on the part of the authority vitiates administrative action. The legal meaning of malice is "ill will" or spite towards a party and any indirect or improper motive in taking an action.[64] This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse." In other words, "it is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite."

Mere allegation of *mala fides*, however, is not sufficient because there is a presumption of constitutionality favouring state action. The burden lies on the individual to produce sufficient material to suggest *mala fides* on the part of the authority concerned.[65] Indirect motive or purpose, or bad faith or personal ill-will is not to be held established except on clear proof thereof. It is difficult to establish the state of a man's mind.[66] The difficulty does not become less when one has to establish that a person apparently acting on the legitimate exercise of power has, infact, being acting *mala fide* in the sense of pursuing an illegitimate aim. *Mala fides* need not be established only by direct evidence; it may be discerned from the order impugned or may be shown from the established surrounding factors preceding the order. It can be deduced as a reasonable and inescapable inference from proved facts.[67] General allegation of personal vendetta without any definite evidence cannot be accepted.[68]

Non-application of mind/ Acting under Dictation: The crux of the exercise of discretionary powers is that it should be exercised by the person/ authority in his individual judgement, on whom it is conferred. Discretion should be

64. *State of Andhra Pradesh* v. *Goverdhanlal Pitti* AIR 2003 SC 1941.
65. *Union of India* v. *Ashutosh Kumar Srivastava* (2002) 1 SCC 188.
66. *Indian Railways Construction Co. Ltd.* v. *Ajay Kumar* (2003) 4 SCC 579 at 592.
67. *S. Pratap Singh* v. *State of Punjab* AIR 1964 SC 72.
68. *State of Punjab* v. V. *K. Khanna* AIR 2001 SC 339.

exercised by applying mind to the material available. Non-application of mind gives a strong reason for judicial review. Even the proclamation of emergency by the President is reviewable by the courts if it is *mala fide* or based on the non-application of mind[69] or irrelevant considerations.[70] The extent of judicial review in such a case would be limited to the examination of existence of material for the satisfaction of the President for the issuance of proclamation of emergency. The court, however, is not to go into the adequacy of the material justifying the issuance of proclamation.

In a popular instance, the government resorted to mass cancellation of allotment of retail petroleum outlets without examining individual cases. The court quashed the order on the ground that it is arbitrary because there was no application of mind to any specific case. According to the court, it is well settled that an order passed without application of mind deserves to be annulled being an arbitrary exercise of power.[71] In this case, the main question for decision was: how could those against whom there was no insinuation be clubbed with the handful of those who were said to be allotted dealership because of political patronage? The court observed that, "the two were clearly unequal. This was violation of article 14."

Also, it should not be exercised on the instruction or dictation of any other person. Else it would amount to non-application of mind. The practice, which is gaining ground in administration, now -a-days is that the officials in whom the discretion is vested is exercising the same in accordance with the wishes of and on the instruction of his political bosses. In this eventuality, exercise of discretion is vitiated both by non-application of mind and acting under dictation.

The Supreme Court has shown adequate concern over this development and called for the reforms in governance. It came down heavily on bureaucrat-politician nexus scenario in which civil servant is prepared to do the bidding of the politician without demur.[72] In this case, the President of municipality was removed by an order by the Principal Secretary, Department of Local Government, Punjab. The order of removal was quashed on the basis of non-application of mind by the author of the order. The Court observed that if the discretion is exercised under the direction or instruction of some higher authority, then it is failure to exercise discretion altogether. The Allahabad High Court expressed the same sentiments in *Kunwar Pal Singh Rathi* v. *State of Uttar Pradesh.*[73]

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69. *Minerva Mills* v. *Union of India* AIR 1980 SC 1789.
70. *S R Bommai* v. *Union of India* AIR 1994 SC 1918.
71. The court drew support from two of its earlier pronouncements on this point, *viz.*, *Mahabir Auto Stores* v. *Indian Oil Corpn.* (1990) 3 SCC 752 and *Shrilekha Vidyarthi* v. *State of Uttar Pradesh* (1991) 1 SCC 212.
72. *Tarlochan Dev Sharma* v. *State of Punjab* AIR 2001 SC 2524.
73. AIR 2002 All 27.

It can be stated that the term *mala fide* is very broad and may include even the instance of non-application of mind or dictated decision. In other words, if an order is passed without applying mind or under the dictation of somebody else, such an order may be termed as *mala fide* because it is passed wrongfully and without any lawful reason, though devoid of ill will.

Refusal to exercise: Even refusal to exercise the statutory power in a proper case may amount to abuse of discretion just as the failure to exercise jurisdiction vested by law would make inaction equivalent to an action without jurisdiction.[74]

Irrelevant considerations: The discretion has to be exercised on relevant considerations. If the administrative authority misapprehends the questions for its decision and/or the considerations to be taken into account in arriving at a decision, then administrative action based on such misapprehension of question and/or on irrelevant considerations would be without jurisdiction or in excess of jurisdiction or an abuse of discretion.[75] According to the *Wednesbury's* principle, the authority exercising discretion must exclude from its determination matters that are irrelevant, and include matters that are relevant.

In other words, the discretion must be exercised taking into account the considerations mentioned in the statute.If the statute mentions no such considerations, then the power is to be exercised on considerations relevant to the purpose for which it is conferred. The court in such cases may, by looking into the purpose, tenor and provisions of the Act, assess whether extraneous or irrelevant considerations have been applied. In doing so, the courts also examine the facts of the case to find out whether those facts are relevant considerations or not.

In *Barium Chemicals*[76] case, the Company Law Board ordered the investigation into the affairs of the company on the ground that there had been delay and faulty planning of the project resulting in double expenditure and continuous losses to the company, value of its shares went down considerably and eminent persons resigned from the board of directors. The Court quashed the order of the government, as these facts had no relevance to the questions of fraud of the company, one of the grounds for order an inquiry against a company.

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74. See *Padfield* v. *Minister of Agriculture* (1968) AC 997.
75. See *Anisminic Ltd.* v. *Foreign Compensation Commission* (1969) 2 A.C. 147.
76. *Barium Chemicals Ltd.* v. *Company Law Board* AIR 1967 SC 295. Also see *Bhagat Singh* v. *State of Uttar Pradesh* (1999) 2 SCC 384; *Shivaji University* v. *Bharati Vidyapeeth* (1999) 3 SCC 224; *State of Kerala* v. *Joseph Antony* (1994) 1 SCC 302; *Rampur Distillery and Chemical Co. Ltd.* v. *Company Law Board* AIR 1970 SC 1789; *Rohtas Industries* v. *S D Agarwal* AIR 1969 SC 707 and *Narendra Kumar* v. *Union of India* AIR 1989 SC 2138.

Until recently, the courts left the matters concerning the necessity of appointing a commission and its terms of reference under the Commissions of Inquiry Act, 1952 to the will of the government. But in *Arjun Singh* case,[77] the Supreme Court quashed the decision of enlarging the terms of reference of a commission appointed to inquire into the affairs of the Churhat Lottery, to include whether the profits derived from such lottery were used for constructing a mansion. The Court was of the opinion that this is based on irrelevant consideration.

The judicial response to a discretionary action taken on mixed considerations, *i.e.*, based partly on relevant and partly on irrelevant consideration has not been uniform. In preventive detention cases, generally, the court takes a strict view of the matter if the order is based on any irrelevant ground along with the relevant grounds. The rationale, according to the courts, is that it is difficult to say, to what extent the bad grounds operated in the mind of the authority and what had been its decision if irrelevant considerations had been excluded.[78] Similarly, if the authority is bound by statute to take into consideration certain factors and it fails to take into consideration, the decision taken leaving out the relevant factors would vitiate the order passed by it. [79]

Reasonable Exercise: The very conception of discretion implies that it would be exercised reasonably. The administration purports to act under the law. If so, it cannot claim that its discretion in doing any administrative act is unfettered. Such a claim would be a "constitutional blasphemy". In other words, the unfettered discretion is "contradiction in terms."[80] Let us now understand carefully the implications of the law that administrative discretion must be exercised reasonably. If the administration acts under law, then the requirement to act reasonably must be a part of the law under which the administration acts. If the law expressly lays down the elements of reasonableness, then the administration has simply to comply with them. But the law may not say so expressly. The question then would be that of implying the requirement of reasonableness in the law. For instance, the law may authorise the administration to take some punitive or adverse action against an individual. In construing such a statute, the courts would imply that notice of the proposed action should be given to the individual who is to be affected by it and an opportunity to show cause why the action should not be taken against him should be afforded to him. These rules of natural

77. *State of Madhya Pradesh* v. *Arjun Singh* AIR 1993 SC 1239.
78. *Shibbanlal* v. *State of Uttar Pradesh* AIR 1954 SC 179.
79. See *Shangumugam* v. *S. K. V. S. (P) Ltd.* AIR 1963 SC 1626; *Rampur Distillery* v. *Company Law Board* AIR 1970 SC 1789 and *Ranjit Singh* v. *Union of India* AIR 1981 SC 461.
80. Bernard Schwartz and H.W.R. Wade, *Legal Control by Government*, 1972, pp. 54-55.

justice are based on the principles of statutory construction evolved by the courts.[81]

Insofar as the administration has to comply with law, the reasonableness of the administrative action may be viewed as one aspect of the *vires* of the administrative action. Such action is valid and within the law if it is reasonable, but is invalid and outside the law if it is unreasonable. Since the implication of reasonableness depends largely on an honest and sincere construction of the law, this requirement is also expressed by the statement that the administration must act in good faith. But good faith may be shown to be absent, even though outwardly the administrative action complies with the law. The bad faith or the *mala fides* can be exposed by showing that the impugned action does not seek to fulfil the object of the statute, but some other irrelevant purpose.[82]

If reasonableness is thus sometimes judged by the good faith of the actor, can it be always said that administrative action is reasonable, if it is taken in good faith? Unfortunately, while the absence of good faith may lead to the inference of bad faith and, therefore, of unreasonableness, the converse is not always true. The presence of good faith may or may not establish reasonableness. As Scrutton, L. J., observed:

> Some of the most honest people are the most unreasonable and some excesses may be sincerely believed in, but yet quite beyond the limits of reasonableness.[83]

If an honest and sincere actor may conceivably be unreasonable, surely the standard of reasonableness must be an objective standard. Had it been subjective, the honest and sincere actor must have believed that he was acting reasonably and his action would have to be regarded as reasonable. If the honesty and sincerity of the actor do not necessarily make his action reasonable, for the same reason the personal philosophy of a judge would not be an infallible guide to judge the reasonableness of an action. The distinction between the subjective and objective views of reasonableness has been expressed as follows.[84]

> Confusion has perhaps arisen because the test of reasonableness in this context is different from the standard of reasonable man so familiar in the law of tort and elsewhere. In applying the later standard the judge merely enforces what he thinks is reasonable.

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81. *Indian Institute of Technology* v. *Mangat Singh* I.L.R. (1973) 2 Delhi 6 F.B.
82. *C.S. Rowjee* v. *State of Madhya Pradesh* (1964) SCR 330 and *Pratap Singh* v. *State of Punjab* (1964) 4 SCR 733.
83. *R.* v. *Roberts ex parte Scurr* (1924) 2 KB 695 at 719.
84. Schwartz and Wade, *supra* note 80, at 253 citing *Associated Provincial Picture House* v. *Wednesday* (1948) 1 KB 223 approved in *Faweett Properties Ltd.* v. *Buckingham Country Council* (1961) AC 638.

> But in condemning unreasonable administrative action he asks himself whether the decision is one, which a reasonable body could have reached.

The judicial assessment of the reasonableness of administrative action is complicated when administrative action has a double motivation. On the one hand, it purports to act according to its statutory authority; on the other hand, it always purports to give effect to its own social policy. The question then arises, whether the social policy sought to be implemented is supported by the statutory provisions relied upon. If the statute is broad enough to authorise the administration to formulate and carry out such social policy, then action of the administration would be in accordance with the statute. It is an extremely difficult task to decide whether a social policy falls inside or outside the statute, when the statute does not either expressly authorise it or negative it. On the one hand, the administration would contend that the legislature left it to the administration to achieve by the statute such purposes as would be appropriate in the framework of the socio-economic conditions. On the other hand, it could be argued that administrative action was actuated by motives which were foreign to the object of legislation and was, therefore, invalid. A good example of such a conflict of views regarding the action of a local authority took place in England in the early twenties. The local government authorities of the Parish of Poplar in East London decided to offer a generous scale of wages as a minimum or fair or living wage. Their action was disapproved and criticized by the auditor. There was a good deal of discussion as to whether local authority or the auditor was right.[85]

The matter went to the court and in *Robert* v. *Hopwood,*[86] the House of Lords held the action of the local authority to be unreasonable and therefore invalid. It so happened that the local authority was of the Labour Party with socialistic views, which may have sounded *ultra vires* to a conservative House of Lords. A spirited criticism of the decision of the House of Lords was made by Harold J. Laski in an article called "Judicial Review of Social Policy" now published as chapter IX of the *Studies in Law and Politics.* Nevertheless, the decision in *Roberts* v. *Hopwood* has been followed by the Court of Appeal in *Prescott* v. *Birmingham Corporation,*[87] and is apparently regarded as still good law in England. One cannot escape, however, feeling that the standards of reasonableness applied by the judges have not always been uniform. Only a minimal requirement of reasonableness was regarded as sufficient by the Court of Appeal in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation,* approved by the House of Lords in *Fawcett*

85. B. Keith Lucas, "Popularism", *Public Law,* 1962, P. 52.
86. 1925 AC 578.
87. (1955) Ch. 210.

Properties Ltd. v. *Buckingham County Council.* A much stricter standard had been applied by the House of Lords in *Roberts* v. *Hopwood.*

There is a distinction between a decision, which has to be quasi-judicial, and a decision, which has to be only reasonable. When a question has to be decided either in a litigation between two parties judicially or objectively on the preponderance of the evidence quasi-judicially, the decision can be attacked as being based on no evidence. Such a decision is objective and not discretionary. When, however, the question is to be decided on a subjective satisfaction or in the discretion of an authority then the only requirement is that the discretion should be exercised reasonably. This does not, however, convert the decision into a quasi-judicial one. In *Nakkuda Ali* v. *Jayaratne* [88] Lord Radcliffe asked the question:

> Can one not act reasonably without acting judicially ?....It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process.

Commenting on this observation, Lord Reid said in *Ridge* v. *Baldwin*[89] as follows:

> I would agree that in this and other defence regulation cases, the Legislature has substituted an obligation not to act without reasonable grounds for the ordinary obligation to afford to the person affected an opportunity to submit his defence.

Where, therefore, an authority has to take a decision in its discretion, the following consequences follow: Firstly, the person who is to be affected by the decision does not have to be given a hearing. For instance, if a person does not have any right to hold the post after the age of superannuation, he cannot insist that he should be heard before a decision is taken by the government to retire him compulsorily on attaining the age at which according to the rules he can be retired compulsorily by the government.[90] Secondly, the satisfaction whether the material is sufficient for taking action has to be of the authority concerned. The sufficiency of the material and whether the authority was justifiably satisfied or not cannot be inquired into by a court of law afresh as if the question is to be decided by the court itself on the evidence adduced before it.

For instance, if action under the Companies Act has to be taken on the satisfaction of the authority concerned, the scrutiny of such action by the court would be confined to see whether material existed on which such

88. (1951) AC 56.
89. (1964) AC 40 at 78.
90. See *Union of India* v. *Col. J. N. Sinha* 1972 SCC 458.

satisfaction could be formed. The sufficiency of the material could not be scrutinised by the court.[91]

Formerly purely administrative action, particularly when it was based on policy and/or when it was taken on the subjective satisfaction of the administration, was thought to be beyond judicial control. The majority decision in *Liversidge* v. *Anderson*,[92] was a typical instance of such unreviewable action. Before the dissent of Lord Atkin in that case replaced, in course of time, the majority opinion as the accepted law, it was thought to be necessary to show that administrative action was quasi-judicial before it could be subjected to judicial review. Therefore, it was gradually realised, however, that it was not easy in practise to distinguish quasi-judicial and administrative action from each other. Further, such administrative action as was based either on policy or discretion but had to be taken on objective assessment of facts could not be immune from judicial review. Since the opinion of the House of Lords in *Ridge* v. *Baldwin*[93] was adopted by our Supreme Court in *Associated Cement Companies Ltd.* v. *P. N. Sharma*[94] and in *Shri Bhagwan* v. *Ram Chand*,[95] it has been recognised that even administrative acts would be open to judicial review if they are required to be taken on objective considerations and they have civil consequences, that is to say, they affect the civil rights of a person adversely. In *A. K. Kraipak* v. *Union of India*,[96] the Supreme Court held that the rule of natural justice that a person should not be a judge in his own cause was applicable to the performance of even a purely administrative act and observed[97] that "often times it is not easy to draw the line that demarcates administrative action from quasi-judicial inquiry". Since then the inquiry whether an act is quasi-judicial or administrative which used to occupy the attention of courts[98] has ceased to be the chief object of inquiry as a condition precedent of judicial review of administrative action. In *Maneka Gandhi* v. *Union of India*[99] the Supreme Court of India classified the impounding of passport as quasi-judicial action and held that 'hearing' being an essential requisite of fairness, must be incorporated within the administrative process, which contemplated such an action. The judgement of Lord Reid in *Ridge* v. *Baldwin* made a great contribution to the development of judicial review of administrative action

91. See *Barium Chemicals* v. *Company Law Board* 1966 Supplement SCR 311; *Rohtas Industries Ltd.* v. *S. D. Agarwal* (1969) 3 SCR 108 and *Rampur Distillery Ltd.* v. *Company Law Board* (1970) 2 SCR 177.
92. (1942) AC 206.
93. 1964 AC 403.
94. (1965) 2 SCR 866.
95. (1965) 3 SCR 218.
96. (1970) 1 SCR 457
97. *Id.* at 469.
98. See, for instance, *Province of Bombay* v. *Kushal Das Advani* 1950 SCR 621.
99. AIR 1978 SC 597.

by pointing out that the duty to act judicially on the part of the administration arises not from any specific statutory requirement but from the nature of the administrative action and the civil consequences flowing from it.

2. Quasi-judicial actions

Though the distinction between quasi-judicial and administrative action is losing its importance insofar as both these actions are liable to judicial review if they are vitiated by violation of rules of natural justice, *etc.*, the distinction between the two is still material for some purpose. For instance, under the Constitution of India, judicial review is available if administrative action violates a fundamental right guaranteed in part III of the Constitution. This guarantee is available against the action of the state. For this purpose, "state" is defined in article 12 of the Constitution as including the legislature and the executive but not the judiciary. Article 12 thus makes a crucial distinction between administrative action and quasi-judicial action. The nature of the quasi-judicial action is analogous to judicial action. Though the quasi-judicial action is taken by administrative authorities which are empowered to act judicially and though such administrative authorities are not proper courts, nevertheless the quasi-judicial function discharged by the administrative authorities is more analogous to the judicial function discharged by the courts than administrative functions performed by the government. The result of the distinction is that a violation of fundamental rights can be committed only by administrative action (or legislative action). It cannot be committed by judicial or quasi-judicial action. The decision of a sales-tax officer to impose sales-tax on a wrong construction of a particular sales-tax statute is, therefore, only a wrong quasi-judicial decision. Such a decision may be corrected in appeal or revision. It may also be open to judicial review by the high court in its supervisory jurisdiction under articles 226 and 227 of the Constitution or by the Supreme Court under article 136 of the Constitution. But a writ petition under article 32 of the Constitution cannot be filed in the Supreme Court on the ground that such a decision violated the fundamental rights of the petitioner.[100]

The reason is the analogy that the decision of a court of law can be corrected in an appeal or revision but a writ petition cannot be filed under article 32 of the Constitution in the Supreme Court on the ground that the order of the court directly violates the fundamental rights of the petitioner.[101] In this respect, the quasi-judicial and the judicial decisions are clearly distinguishable from administrative action.

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100. *Smt. Ujjambai* v. *State of U.P.* (1963) 1 SCR 778.
101. *Naresh* v. *State of Maharastra* (1966) 3 SCR 744.

The position has, however, undergone changes after this essay has been first written. Till 1988, the Supreme Court held the opinion that the judiciary is not state so far as pure judicial functions are concerned. That means, the decision of the court cannot be challenged on the ground that it contravenes any of the fundamental rights.[102] Shifting from its earlier stand, the Court in *Antulay* case,[103] held that a petition under article 32 did lie against another decision of the court on the ground that it was inconsistent with the fundamental right of the petitioner. Applying this analogy, it can be said that the quasi-judicial functions too may be impugned in a writ petition. It was held that where an error of law or fact committed by a tribunal resulted in violation of a fundamental right a petition under article 32 would be maintainable.[104]

H.W.R. Wade has summarised the grounds of judicial review of the exercise of statutory powers (which include quasi-judicial powers) by administrative authorities as follows:

> "There are two grounds on which the courts are entitled to control statutory powers : *ultra vires*, and error on the face of the record....They must therefore stretch the doctrine of *ultra vires*, i.e. lack of jurisdiction, to cover all the forms of error which they need to control and which yet do not appear on the record. Therefore, bad faith, breach of natural justice, "irrelevant considerations" and even now apparently "no evidence" must somehow be fitted into this bed of Procrustes.[105]

For convenience we may sub-divide the first basic grounds of review, namely, lack of jurisdiction into three parts:

A. Lack of initial jurisdiction;

B. Loss of jurisdiction during the pendency of proceeding, such as by violation of the rules of natural justice or by the decision being contrary to a fundamental provision of law; and

C. Basing the decision on irrelevant considerations or improper motivation including *mala fides.*

The second basic ground may be considered as—

D. Error of law apparent on the face of the record.

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102. *Naresh* v. *State of Maharashtra* AIR 1967 SC 1. Also see *Rupa Ashok Hurra* v. *Ashok Hurra* AIR 2002 SC 1771.
103. AIR 1988 SC 1531. Also see *Rupa Ashok Hurra* v. *Ashok Hurra* (2002) 4 SCC 388.
104. *Bihar Rajya Vidyut Parishad Field Kamgar Union* v. *State of Bihar* (1987) 3 SCC 512; *Akhil Kabir Panth Samaj* v. *Union of India* (1987) Supp SCC 603.
105. 93 *Law Quarterly Review*, 1977, p. 11.

(A) Lack of inital jurisdiction

It is well-known that quasi-judicial tribunals may be of two types, namely, (1) those whose jurisdiction depends on the pre-existing preliminary or collateral conditions, and (2) those whose jurisdiction depends on conditions the existence of which is to be determined by the tribunals themselves.[106] If the tribunal is of the former kind, the assumption of jurisdiction by it would be open to judicial scrutiny on the ground that the preliminary or the collateral conditions of jurisdiction are not satisfied. The preliminary conditions constituting jurisdiction may be questions of law such as interpretations of statutory provisions or questions of fact.

A distinction may be made between an "error of law affecting jurisdiction" and an "error of law going to the merit of the case". Questions of law constituting jurisdictional conditions are always reviewable on the ground of *ultra-vires* as no authority can be allowed to assume jurisdiction by taking a wrong view of the law. A writ of *certiorary* may be issued to correct jurisdiction errors. The latter is generally reviewable only when it is apparent on the face of the record in an appeal to the higher court. Thus, it can be said that the review powers of the courts in respect of jurisdictional error of law are broader than in respect of an error of law within jurisdiction. The distinction, however, is not easy to maintain.[107]

A statute may or may not give power to a body to determine the jurisdictional facts for itself. Jurisdictional facts are placed on the same footing as the facts forming the subject matter of the main enquiry in the sense that administrative authority is given the power to decide whether such facts exist. The general rule is that the questions of fact cannot be the subject of a collateral judicial review but the questions of fact constituting jurisdictional conditions can be subjected to an independent judicial review. The decision with respect to the jurisdictional facts must be based on the existence of facts. If the facts did not exist at all, then the formation of the opinion itself would be without jurisdiction. Judicial review may be invoked where the finding of facts is perverse or not based on any evidence at all. An example of this may be found in *Shauqin Singh* v. *Desa Singh*.[108] The Chief Settlement Commissioner had the power to cancel an allotment of a land if he was "satisfied" that the order of allotment of land had been obtained by fraud, false representation or concealment of any material fact. The Supreme Court held that the satisfaction of the commissioner is a jurisdictional fact on the existence of which alone his power of cancellation could be exercised. Thus a high court can review under writ jurisdiction whether

106. *Queen* v. *Commissioners for Special Purposes of Income-tax* (1888) 21 Q.B.D. 313 at 319.
107. *Tata Iron and Steel Co.* v. *S. R. Sarkar* AIR 1961 SC 65; *Ujjam Bai* v. *State of UP* AIR 1962 SC 1621 and *State Trading Corporation* v. *Mysore* AIR 1963 SC 548.
108. AIR 1970 SC 672.

there was due satisfaction by the commissioner on materials placed before him and that the order was not made arbitrarily, capriciously or perversely. A writ of *certiorary* may be issued to quash a decision.

In *Delhi Transport Corporation* v. *Delhi Administration*[109] the question was whether an industrial dispute existed which would be referred to adjudication by an appropriate government under section 10 of the Industrial Disputes Act, 1947. The court held that an industrial dispute consists in a demand by the workman and its rejection by the employer. In *State of Madras* v. *C. P. Sarathy*[110] the Supreme Court had observed that the order of reference by the government could not be examined by the High Court under article 226 of the Constitution if the government had material before it to support the contention that the dispute existed or was apprehended. In *Newspapers Ltd.* v. *State Industrial Tribunal, U.P.*,[111] however, it was held by the Supreme Court that in spite of the fact that the making of a reference by the government is in the exercise of its administrative powers, that is not destructive of the rights of an aggrieved party to show that what was referred was not an "industrial dispute" at all even though the factual existence of a dispute may not be subject to such a challenge. Did the Supreme Court intend to exclude judicial review of facts in testing the legality of a reference under section 10 (1) of the Industrial Disputes Act, 1947? With great respect, it appears that no such rigid conclusion was reached by the court in above-mentioned two decisions.

In *C.P. Sarathy's* case, the contention of Prabhat Talkies was that no dispute existed between them and their workmen and, therefore, they should not have been included along with the other cinema theatres in the reference made by the government to the Industrial Tribunal. The court on two grounds negatived this contention. First, it was said that the labour commissioner's report showed that an industrial dispute existed between the management and the employees of the cinema theatres. Second, reference could be made even when a dispute was apprehended (though it may not be existing) and, therefore, government had jurisdiction to make reference even in respect of the Prabhat Talkies.

In the *Delhi Transport Corporation* case, the question of a dispute being apprehended did not arise at all. Either the dispute existed or it did not. In *C. P. Sarathy's case,* a dispute was apprehended and it was not, therefore, necessary to decide if it existed. In *Newspapers Ltd.* v. *State Industrial Tribunal,* the question was purely one of law, namely, whether the dispute between a single workman and the employer was an "industrial dispute". It would appear, therefore, that neither of these two decisions finally established that judicial review of the factual basis of the reference was precluded in all

109. I.L.R. (1973) 1 Delhi 838.
110. AIR (1953) SC 53.
111. AIR (1957) SC 532.

circumstances. The observations pointing in that direction may, therefore, be respectfully regarded as *obiter.*

In *Sindhu Resettlement Corporation Ltd.* v. *Industrial Tribunal,*[112] the factual basis of the reference was directly in issue. So was also the case in *Jaipur Udyog Ltd.* v. *The Cement Work Karamachari Sangh,*[113] and in *Chhotabhai Jethabhai Patel and Co.* v. *The Industrial Court, Maharastra.*[114] In all the three cases, the factual basis could be challenged and was shown not to have existed at all, thus depriving the government of its jurisdiction to make the reference.

On the other hand, if the tribunal has the power to decide whether the conditions of its jurisdiction have been fulfilled or not, then the decision of the tribunal on such a question would itself become conclusive and not open to judicial review. For instance, the controller under the Delhi Rent Control Act, 1958 has the exclusive jurisdiction to decide whether any of the grounds pleaded by the landlord for the eviction of the tenant exists or not. According to the decision of the Supreme Court in *K.K. Chari* v. *R. M. Seshadri,*[115] these are jurisdictional conditions. But the decisions of the controller regarding them, is, nevertheless, final.

(B) Loss of jurisdiction during the pendency of proceeding

Even if, however, the quasi-judicial tribunal has the initial jurisdiction, it may lose its jurisdiction subsequently. In case, the authority continues to decide despite the loss of initial jurisdiction, the decision may be subject to judicial review under writ jurisdiction. *Anisminic* case[116] too supports the proposition. This may happen if the procedure of the tribunal violates the rules of natural justice. Such contravention of the rules of natural justice would make the decision of the tribunal one without jurisdiction to entertain the proceedings.[117] The earlier view was that, while acting within jurisdiction the administrative authority or tribunal may decide rightly or wrongly. A mere error within jurisdiction cannot sustain a collateral attack on the decision by way of judicial review. The proper remedy against it is by way of appeal or revision. The High Courts acting under article 226 have to keep in mind the distinction between a mere error within jurisdiction and an error which makes the order without jurisdiction. After review of case law, the Supreme Court has laid down several propositions of law to help finding out when an error can be said to make a decision as being without jurisdiction. If the decision is contrary to a fundamental provision of law, then such error

112. AIR 1968 SC 529.
113. (1972) 1 SCC 691.
114. (1972) 2 SCC 46.
115. (1973) 1 SCC 761.
116. *Anisminic Ltd.* v. *Foreign Compensation Committee* (1969) 2 AC 147.
117. *Union of India* v. *Tarachand Gupta* 1971 SCC 1 486 at 496.

makes it a decision without jurisdiction.[118]

The above position is now changing, views are expressed that the distinction between two types of errors be done away with and all errors of law be regarded as reviewable through writ jurisdiction. This view is further supported by *Anisminic*[119] decision, which was applied in *Attorney-General* v. *Ryan*[120] and *Re Racal Communications*[121] cases. The expression "jurisdictional error" is given wider interpretation. The decision in *Anisminic* has rendered obsolete the distinction between errors of law, which go to jurisdiction and errors of law, which do not. All errors of law result in decisions being taken outside the jurisdiction. In this particular case, the inquiry was within jurisdiction but excess of jurisdiction occurred at a later stage when the commission took into account a matter, which it was not entitled to take.

(C) Basing the decision on irrelevant considerations

While a question of fact constituting a preliminary or collateral condition of jurisdiction can be reviewed by a court of law through writ jurisdiction, ordinarily a question of fact to decide which a tribunal has the exclusive jurisdiction cannot be reviewed on merits under writ jurisdiction. A distinction is made between a jurisdictional fact and determination of fact, which is intra jurisdictional. If an authority or a tribunal determines a jurisdictional fact wrongly, it is deemed to have assumed jurisdiction, which it does not possess. Actions or decisions taken in pursuance of such jurisdiction are void *ab initio* and the same may be quashed in writ proceedings. Where an administrative authority or a tribunal has jurisdiction to determine the facts, it has power to assess them rightly as well as wrongly. Such a finding of fact intra jurisdiction will be interfered in writ proceedings only exceptionally on the grounds that it is based on irrelevant considerations or is perverse.

A classic expression of this view was by Lord Sumner in *The King* v. *Nat Bell Liquors Ltd.*[122] The only evidence of the fact of sale by the respondents in that case was that of an *agent provocateur* of the police, which, it was argued, could not be relied upon. Could the decision of the inferior court be quashed as *ultra vires* because it had no proper evidence before it? In rejecting the contention that "want of evidence" is the same as "want of jurisdiction", Lord Sumner said:[123]

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118. *Dhulabhai and other* v. *The State of Madhya Pradesh and another* (1968) 3 SCR 662.
119. *Anisminic Ltd.* v. *Foreign Compensation Committee* (1969) 2 AC 147.
120. (1980) 2 WLR 143.
121. (1980) 2 ALL E R 634. Also see *R.* v. *Chief Immigration Officer, ex p. Kharrazi* (1980) 3 ALL E R 373.
122. (1922) 2 AC 128.
123. *Id* at 152.

> To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong.

The view that a finding of fact by an inferior tribunal or authority cannot be reviewed even though it may be erroneous was also expressed by the Supreme Court in *Nagendra Nath Bora* v. *Commissioner of Hills Division and Appeals, Assam.*[124] In *Union of India* v. *H. C. Goel,*[125] the test of reviewing such a finding of fact was laid down in the following words:[126]

> [I]f the whole of the evidence led in the enquiry is accepted as true, does the conclusion follow that the charge in question is proved against the respondent? This approach will avoid weighing the evidence. It will take the evidence as it stands and only examine whether on that evidence the impugned conclusion follows or not.

But as pointed out by H.W.R Wade[127] 'no evidence' does not necessarily means a complete absence of evidence. The question is whether the evidence, taken as a whole, is reasonably capable of supporting the finding. This test is based on the decision in *Allinson* v. *General Council of Medical Education and Registration.*[128] The same wider view of judicial review is noticeable in the opinion of our Supreme Court in *State of Andhra Pradesh* v. *Sree Rama Rao,* where it was observed:[129]

> Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition of a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence.... The High Court may undoubtedly interfere where.... The conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion on similar grounds.

In *Syed Yakoob* v. *K.S. Radhakrishnan*[130] the court observed that if it is shown that in recording the finding, the tribunal erroneously refused to admit admissible and material evidence, or erroneously admitted the inadmissible evidence, which has influenced the impugned finding, such

124. AIR 1958 SC 398.
125. AIR 1964 SC 364. Also see *M S Bindra* v. *Union of India* (1998) 7 SCC 310.
126. *Id.*, at 370.
127. H.W.R. Wade, *Administrative Law,* 3rd ed., 1971, p.100.
128. (1894) 1 Q.B. 750 at 761.
129. AIR 1963 SC 1723 at 1724.
130. AIR 1964 SC 477. Also see *Director of Technical Education* v. *K Sitadevi* AIR 1991 SC 308 and *Bhagwan Das* v. *Jiley Kaur* AIR 1991 SC 266.

finding of facts may be quashed by writ of *certiorary*. In this case, however, the majority held that even if the tribunal had failed to consider material evidence but there was evidence to support its finding, then it could not be said that the finding of fact was based on no evidence at all.

In *Messus Parry and Co. Ltd* v. *P. C. Pal*[131] also the Supreme Court adopted this wider view of the reviewability of the findings of fact. To quote head-note (b):

> Where the Tribunal having jurisdiction to decide a question comes to a finding of fact, such a finding is not open to question under article 226 unless it could be shown to be wholly unwarranted by the evidence. Where the Tribunal has disabled itself from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or where its conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person can ever have arrived at that conclusion, interference under Article 226 would be justified.

Commenting on the present position of law, S.A.de Smith[132] observes as follows:

> If the drawing of an inference or the application of a statutory term is held or assumed to be a matter of fact (or fact and degree) for the "tribunal" of first instance, a court may still hold that the decision is erroneous in point of law if any of the defects [included in the concept of 'error of law'] listed in paragraph (5) is present or if the inference or conclusion is one that no reasonable body of person properly instructed in the law could arrive at (as where the evidence and primary facts point unmistakably to a different conclusion). If the formulation is slightly changed, and it is said that an error of law exists whenever the conclusion is one to which the competent authority cannot reasonably come on the evidence adduced, the scope of judicial review is potentially extended; there can be a wide difference between power to set aside unreasonable decisions and power to set aside only those decisions which no reasonable person could make. The adoption of the narrower test by the Divisional Court in relation to the concept of "material change of use" in enforcement notice appeals has aroused some criticism. Certainly it is open to the courts to expand the scope of review for errors of law by adopting the broader test.

131. AIR 1970 SC 1334.
132. S.A. de Smith, *Judicial Review of Administrative Action*, 3rd ed., 1973, p. 118.

The last stage would, of course, be the American law of judicial review in which a finding of fact by an administrative tribunal is reviewed on substantial evidence on the record. That stage is hardly distinguishable from the way an appellate power (as distinguished from judicial review) is exercised. But neither the English nor the Indian decisions have gone so far and are, therefore, clearly distinguishable in this respect form the American decisions.

It would appear, therefore, that even when findings of fact on the merits of the case are under review, the mechanical test of assuming of evidence to be true breaks down. For, a finding of fact does not become worthy of being left undisturbed merely because it is supported by the modicum of evidence, which is obviously false or unreliable. The modern test, therefore, is that a finding of fact even on the merits is reviewable if it is either baseless, *i.e.*, not supported by any evidence at all, or is perverse, *i.e.*, is such as no reasonable person would arrive at. In *Lalit Kumar Jain* v. *Jaipur Traders Corporation Pvt. Ltd.*[133] the court held that the decision of the high court was given without taking all relevant material on record and hence is subject to judicial review by Supreme Court. Similarly, in *State of Orissa* v. *Dibakar Naik*[134] it was held that a finding would be perverse, when it was based upon no evidence or inadmissible evidence or result of imaginative hypothesis and conjectures.

(D) Error of law apparent on the face of the record

There is distinction between error of law going to the root of jurisdiction and error of law, which is non-jurisdictional. A decision of the tribunal may be bad if there is an error of law, within jurisdiction, apparent on the face of the record. There ought to be a clear distinction between a mere error of law and an error of law apparent on the face of the record. The former is not open to judicial review. It can be corrected only by a vertical proceeding such as an appeal or a revision. The latter can be attacked collaterally by way of judicial review under articles 226 and 227 of the Constitution. When can an error of law be said to be apparent on the face of the record? A working test was laid down by Chief Justice Chagla in *Batuk K Vyas* v. *Surat Borough Municipality*[135] in the following words:

> "That an error was apparent if it was obvious or self-evident, and not, if it became apparent by a process of examination or argument, might be a satisfactory test in majority of the cases".

133. (2002) 5 SCC 383.
134. (2002) 5 SCC 323. Also see *Mohan Amba Prasad Agnihotri* v. *Bhaskar Balwant Aher* (2000) 3 SCC 190 and *M L Prabhakar* v. *Rajiv Singal* AIR 2001 SC 522.
135. AIR 1953 Bom 133.

This observation was taken note of by the Supreme Court in *Hari Vishnu Kamath* v. *Ahmad Ishaque*[136] and observed:

> "No error could be said to be apparent on the face of the record if it was not self-evident and if it required an examination or argument to establish it."

Therefore, the two essential requisites of error of law apparent on the face of the record are: (i) error should be demonstrable from the certified records, and (ii) it should have caused real injustice. The decision of the government to allot lands to occupants of adjacent land, on the basis of *de jure* occupancy was held to be vitiated by an error of law on the face of record. This is because the rule provided for the actual occupant and not the one owning the land.[137] Choice in favour of one interpretation where two are possible may not call for judicial review on this ground.[138] However, an interpretation of a statute at variance with the clear and simple language is an error of law apparent on the face of record. Similarly, an interpretation inconsistent with the earlier decision delivered by a coordinate or larger bench of that court, may be held to be an error of law apparent on the face of the record.[139]

The question regarding the difference between an error of law and error of law apparent on the face of record, in some cases may be one of degree rather than one of kind. This nature of the distinction as being one of degree rather than of kind is sometimes used to belittle the value of the distinction. But a brief notice of legal reasoning in judicial decisions will show that this basis of distinction is as valid as any other. Thorstein Veblen had commented on "the discrepancy between law and fact".[140] This came about by judicial decisions based on abstract reasoning only and in disregard of the actual conditions of life. Louis D. Brandeis, as a lawyer before he became a Judge of the Supreme Court of the United States, strove to convince the courts that economic and social data were as relevant as judicial precedents in deciding the validity of socio-economic legislation. The famous "Brandeis brief" submitted by him in *Muller* v. *Oregon*,[141] was full of such data. The fixation of maximum hours of work for women by law was thereby shown to be a reasonable exercise of legislative power. The impugned law prohibited more than ten hours of work per day for women.

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136. (1955) 1 SCR 1104 at 1123.
137. *Ramesh Kumar Satish Kumar & Sons* v. *Guru Singh Sabha* AIR 2001 SC 105. Also see *Shama Prasad Raje* v. *Ganpatrao* (2000) 7 SCC 522.
138. *Syed Yahoob* v. *K S Radhakrishnan* AIR 1964 SC 477 and *Kaushalya Devi* v. *Bachittar Singh* AIR 1960 SC 1168.
139. *Commissioner of Sales Tax, J & K* v. *Pine Chemicals Ltd.* (1995) 1 SCC 58. Also see *Vijayabai* v. *Shriram Tukaram* (1999) 1 SCC 693.
140. T. Veblen, *The Theory of Business Enterprise* (ed.), 1904, p. 278.
141. 208 U. S. 412 (1908).

This law was held by the Supreme Court of the United States to be valid as being justified by the "widespread belief that woman's physical structure and the functions she performs in consequence thereof justify [such] special legislation". The Supreme Court extended the principle to men in *Bunting* v. *Oregon*,[142] on the strength of another factual brief submitted, this time, by Professor (later Justice) Frankfurter. In *Adkins* v. *Children's Hospital*,[143] Professor Frankfurter put forward still another factual brief to support the legislation fixing minimum wages for women. The majority of the Supreme Court, however, struck down the law as interfering with the liberty of contract of the employers and the employees. In his famous dissent, Justice Holmes referred to *Muller* v. *Oregon* and *Bunting* v. *Oregon* and observed as follows:

> I fully assent to the proposition that here as elsewhere the *distinctions of the law are distinctions of degree,* but I perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half (i.e. hours or wages) you regulate...It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women or that legislature cannot take those differences into account....The fact that the statute warrants classification, which like all classifications may bear hard upon some individuals, or in exceptional cases,....is no greater infirmity than is incident to all law.

This observation and the discussion preceding it will show that the very distinction between what is reasonable and what is not which is a fundamental to law may be only one of degree in a given case. But it is as valid as any distinction, which can be called one of kind. Often the degree and the kind shade into one another. Together or independently of each other they provide an equally good ground for distinction in law.

Whether the law is so clear or not is for each judge concerned to decide. It may, therefore, happen, as was recognised by the Supreme Court in *Hari Vishnu Kamath's* case[144] that "an error that might be considered by one judge as self-evident might not be so considered by another". The conclusion in the words of the Supreme Court in *Hari Vishnu Kamath's* case may, therefore, be stated as below:

> What is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be left to be determined judicially on the facts of each case.

142. 243 U. S. 426.
143. 261 U. S. 525 (1923).
144. *Hari Shankar Kamath* v. *Ahmed Ishaque* (1900) 1 SCR 1104.

JUDICIAL REMEDIES AGAINST UNLAWFUL ADMINISTRATIVE ACTION

As observed in *M.K. Vasuraj* v. *Delhi Development Authority*,[145] it is a misconception to think that judicial review is confined to writ petitions under articles 226 of the Constitution. Judicial review is of two kinds, namely, (1) a true review which is made (a) where the administrative body applied to a court for enforcement of its action, and (b) where a statute provides for an appeal to a court against the action of an administrative authority, and (2) the independent or the collateral attack on the administrative decision by way of a writ petition under article 32 and 226 of the Constitution. Under articles 32 and 226, the Supreme Court and high courts have the power to issues directions, orders or writs including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari*. The rights to be enforced through such writs must be against the State, except in the case of the writ of habeas corpus, which may be issued even against a private person who might have detained another person illegally.

The original essay discusses article 226 as amended by Constitution (42nd Amendment) Act, 1976. It includes the position before and after the amendment and discussed, in detail, two pertinent issues arisen due to the amendment. One is about the discretionary powers of high courts to entertain a writ petition and another is whether the availability of suit in civil court is "any other remedy" to bar the entertainment of writ petition. The discussion and not the issues have, however, become irrelevant because of the Constitution (forty-fourth) Amendment Act 1978 in which amended provision is repealed and the original position is restored. The original discussion, therefore, is not included because of vainness and futility. But the issues are discussed at relevant places in this revised version.

Article 32, which itself is fundamental right, is invoked for the enforcement of fundamental rights guaranteed in Part III of the Constitution. Whereas the high courts have the power to issue writs not only for the enforcement of the fundamental rights but also 'for any other purposes'. The jurisdiction of the high courts under article 226 is wider in scope than the Supreme Court under article 32. Traditionally, the phrase 'for any other purpose' has been interpreted to mean, enforcement of any statutory or Common Law rights.[146] The proposition that purely contractual matters cannot be enforced through writ jurisdiction is no more accepted as a general proposition. Over the years, the judicial interference with respect to the contractual matters of the government has been on increase to ensure

145. ILR (1971) II Delhi 21 at 26 and 27.

146. *Calcutta Gas Co.* v. *West Bengal* AIR 1962 SC 1044 and *Orissa* v. *Madan Gopal* AIR 1952 SC 12.

fairness in actions.[147] For instance, claim under an insurance policy[148] or arbitrariness in distribution of largess by the State through contract can be enforced in the high courts through writ petitions.[149]

The courts in India are not restricted by the historical anomalies of the English common law. It can grant a remedy, which is suitable to the facts of a particular case without being inhibited by the technicalities of English law. Also the courts in India do not strictly follow the rules of pleadings and procedure while admitting the writ petitions. Even a letter written to the court or a judge of the Supreme Court was considered and relief was granted.[150] The Supreme Court has power to act *suo moto* when it comes to violation of fundamental rights.

The jurisdictions under articles 32 and 226 are concurrent and independent of each other so far as fundamental rights are concerned. There is choice of forum. One may move either the Supreme Court under article 32 or an appropriate high court under article 226.[151] The position, hitherto, has been that a petitioner seeking to enforce fundamental right can come straight to the Supreme Court without going to the high court first.[152] The Supreme Court's power to provide appropriate remedy is not discretionary but a matter of right. In *Fertilizer Corporation Kamgar Union* v. *India*[153] Chandrachud, C.J., said:

> The jurisdiction conferred on the Supreme Court by Article 32 is an important part of the basic structure of the Constitution because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated.

This position continued till the two-judge bench decision in *Paul Manickam*[154] case which gave a new dimension. In this case, the court seem to discourage the filing of petitions directly in the supreme court under article 32 without showing satisfactory reasons as to why the high court has or could not be approached or it is futile to approach the high court. This is

147. *Mahabir Auto Stores* v. *Indian Oil Corp.* AIR 1990 SC 1031.
148. *LIC of India* v. *Asha* Goel AIR 2001 SC 549.
149. *Union of India* v. *Dinesh Engineering Corporation* (2001) 8 SCC 491; *West Bengal Electricity Board* v. *Patel Engg. Co. Ltd.* AIR 2001 SC 682; *Alok Prasad Varma* v. *Union of India* AIR 2001 Pat 211 and *Tata Cellular* v. *Union of India* AIR 1996 SC 11.
150. *Sunil Batra (I)* v. *Delhi Administration* AIR 1978 SC 1675; *Sunil Batra (II)* v. *Delhi Administration* (1980) 3 SCC 488; *Kadra Pahadiya* v. *State of Bihar* AIR 1981 SC 939 and *Kadra Pahadiya* v. *State of Bihar* (1983) 2 SCC 104.
151. *Hussainara Khatoon* v. *State of Bihar* AIR 1979 SC 1360.
152. S P Sathe, *Administrative Law*, 2004, p. 470.
153. *Ramesh Thaper* v. *State of Madras* AIR 1950 SC 124. Also see K. *K. Kochunni* v. *Stage of Madras* AIR 1959 SC 725 and *Kharak Singh* v. *State of Uttar Pradesh* AIR 1963 SC 1295.
154. AIR 1981 SC 344 and 347: (1981) 1 SCC 568.

a serious departure from the established norm with respect to the writ jurisdiction. Certain fundamental questions may be raised regarding the decision. Can article 32, which in itself is a fundamental right, be abridged by a judicial verdict less than a statute prescribing the procedure? Can a two-judge bench give a U-turn to the hitherto established position for over five decades? Is it constitutionally right to subject a fundamental right provision to the other non-fundamental right provision of the Constitution? Is it not contradictory from the stand that fundamental rights be given expensive interpretation?[156] If we look at the entire scheme, this decision would make article 32 practically redundant. For after having gone to the high court first the petitioner would then approach the Supreme Court either in first appeal or under article 136 but never under article 32 because of application of the doctrine of *res judicata.*

The jurisdiction of high courts to entertain writ petition is discretionary. It is far more discretionary in respect of 'any other purposes'. The high courts may refuse to entertain writ petitions on certain grounds, which are discussed later. The legal position in this respect has been summarized in *T. P. Mahajan* v. *Union of India,*[157] in the following words:

> The power of the High Court to act under Article 226 of the Constitution is discretionary. It is a supervisory power, which is to be contrasted with an appellate power. While appeal is a matter of right, the collateral attack on administrative action under Article 226 is not so.

The courts in India have developed rules and norms to regulate writ jurisdiction. There are various grounds on which the high court may refuse to entertain a writ petition. For instance, the high court would have to scrutinize the conduct of the petitioner. If he comes to court with unclean hands, the High Court may refuse to entertain his petition. For, the high court is acting in the exercise of its extraordinary original jurisdiction only with a view to granting expeditious relief in the interest of justice. It cannot be compelled to entertain writ petitions when it is of the view that the interests of justice do not favour such a course. Other grounds on which writ petition may be refused are as follows:

(i) *Res judicata*
(ii) Inordinate delay
(iii) Exhaustion of alternative remedies
(iv) If involved a questions of disputed facts or interpretation of law within jurisdiction.

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155. (2003) 8 SCC 342.
156. See *Peoples Union for Civil Liberties* v. *Union of India* AIR 2003 SC 2363 and *Pathumma* v. *State of Kerala* AIR 1978 SC 771.
157. (1973) 1 S.L.R. 436.

The rule is that a petition under article 32 would be barred by *res judicata* if a petition on the same cause of action had been filed before the high court earlier and was rejected.[158] This decision was affirmed in *Amalgamated Coalfields* v. *Janapada Sabha*[159] where, in a writ petition under article 226, the petitioner had pressed for a relief of promotion to a higher post and his petition had been rejected, it was held that a subsequent petition under article 32 pressing for same relief was not maintainable.[160] However, the bar will not operate if writ petition is filed on fresh grounds.[161] In case of dismissal of special leave petition against a judgment of a high court, the apex court is barred to entertain a writ petition under article 32[162] unless the life of an individual is at stake.[163] This bar, however, would not operate on successive writ petitions under articles 32 and 226 if based on fresh or additional grounds.[164]

The principle of *res judicata* is applicable to petitions under article 226 in the same way as it is applicable to petitions under article 32. However, the bar of *res judicata*, would not apply to the dismissals[165] or rejection of writ petition not on merits but on some technical ground, such as delay or existence of an alternative remedy[166] or if the petition is withdrawn.[167] Where a matter is disposed of in appeal against the decision of any civil court, a writ petition on the same matter could not be entertained. This is not on the ground of *res judicata,* asmuchas on the grounds of judicial discipline, which purports to prevent the tendencies for forum shopping in matters relating to the exercise of discretion.[168]

To give finality to administrative as well as judicial decisions, laws are made prescribing periods of limitation to bring an action. Therefore, those who sleep over their rights loose their right to agitate them in the courts of

158. *Daryao* v. *Uttar Pradesh* AIR 1961 SC 1457. Also see Yogendra Singh, 'Principle of *Res Judicata* and Writ Proceedings', 16 *JILI,* 1974, p. 399.
159. AIR 1964 SC 964; *M/s KN Oil Industries* v. *MP* AIR 1986 SC 1929 and *Supreme Court Employees Welfare Assn.* v. *India* AIR 1990 SC 334.
160. *AK Bhattacharya* v. *India* AIR 1991 SC 468.
161. *Lallubhai Jogibhai* v. *Union of India* AIR 1981 SC 728: (1981) 2 SCC 427. In both cases, the Court confined its observations to the applicability of constructive *res judicata.*
162. *Jharia* v. *State of Rajasthan* AIR 1983 SC 1090.
163. *Harbans Singh* v. *UP* AIR 1982 SC 849.
164. *Kirit Kumar* v. *Union of India* AIR 1981 SC 1621: (1981) 2 SCC 436.
165. *India* v. *Sher Singh* AIR 1997 SC (Supp) 1796. Also see *Workman of Cochin Port Trust* v. *Board of Trustees of the Cochin Port Trust* AIR 1978 SC 1283.
166. *Virudhunagar S R Mills* v. *Madras* AIR 1968 SC 1196: (1968) 2 SCJ 621; *Pujari Bai* v. *Madan Gopal* AIR 1989 SC 1764 and *Uttar Pradesh* v. *Labh Chand* (1993) 2 SCC 495.
167. *Ahmedabad Mfg and Calico Printing Co. Ltd* v. *Workmen* AIR 1981 SC 960: (1981) 2 SCC 663; *Ram Sadashiv Shinde* v. *Khanderao Chintaman Panse* AIR 1990 Bom 262 and *Teja Singh* v. *Chandigarh* AIR 1982 P&H 169.
168. *Sorabji* v. *State* AIR 1988 Bom 127.

law. Writ petitions under article 32 and 226 too are not immune from disqualification on the ground of delay. Although the law of limitation does not directly apply to writ petitions,[169] the courts have held that a petition would be barred if it comes to the Court after the lapse of a reasonable time.[170] This is, however, not a rule of law but a rule of practice. The decision given in *Tilok Chand* case was severely criticized in academic and professional circles. The recent trend is to not reject a petition where violation of a fundamental right is alleged.[171] Delay by itself does not defeat the petitioner's claim for relief, unless the position of the respondent is irrevocably altered or would be put to undue hardship.[172] Where the petitioner explains the causes of delay to the satisfaction of the court, the delay may be condoned.[173] It was held that where grounds for judicial review were basic or fundamental, such as non-application of mind or the action being ultra vires, the writ petition was maintainable despite the delay.[174]

Hitherto, the position was that the Supreme Court has a duty to exercise jurisdiction under article 32 if the infringement of fundamental right is agitated. And availability of alternative remedies is not a ground for refusal to give relief.[175] It is not a matter of discretion for the Court but a matter of fundamental right of the petitioner. But the recent decision of the Supreme Court in *Paul Manickam*[176] case brought a twist in the earlier position. According to the decision, writ jurisdiction under article 226 may be considered as an alternative remedy, which should be exhausted before coming to the apex court. This case has been dealt earlier.

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169. *Vijaya Raje Scindia* v. *Uttar Pradesh* AIR 1986 SC 756 and *Hemraj* v. *IT Recovery Officer* AIR 1978 Raj. 184.
170. *SA Rasheed* v. *Director of Mines and Geology* (1995) 4 SCC 584; *Ahemsaveni* v. *Tamil Nadu* (1994) 6 SCC 51; *Tilok Chand Motichand* v. *HB Munshi* AIR 1970 SC 898: (1970) 1 SCJ 859; *Rabindra Nath Bose* v. *India* AIR 1970 SC 470: [1970] 2 SCR 697; *SS Moghe* v. *India* AIR 1981 SC 1495: (1981) 3 SCC 271; *Rup Diamonds* v. *India* (1989) 2 SCC 356. See Alice Jacob, 'Laches, Denial of Judicial Relief under Articles 32 and 226', 16 *JILI*, 1974, p. 352; Upendra Baxi, *'Laches and the Right to Constitutional Remedies* and Indian Law Institute, *Quis Custodiet Ipsos Custodies in Constitutional Developments since Independence'*, ed. by Alice Jacob, 1975, p. 559.
171. *K.Thimappa* v. *Chairman, Central Board of Directors* SBI (2001) 2 SCC 259. Also see *GP Doval* v. *Chief Secy, Uttar Pradesh* AIR 1984 SC 1527.
172. *Hindustan Petroleum Corpn Ltd.* v. *Dollydas* (1999) 4 SCC 450.
173. *M/s Dehri Rahtas Light Rly Co. Ltd* v. *District Board, Bhojpur* AIR 1993 SC 802. Also see *Ramjas Foundation* v. *India* AIR 1993 SC 852.
174. *Shanti Devi* v. *Uttar Pradesh* (1997) 8 SCC 22.
175. *Rashid Ahmed* v. *Municipal Board* AIR 1950 SC 163; *K K Kochunni* v. *State of Madras*; *Daryao Singh* v. *State of Uttar Pradesh* AIR 1961 SC 1457 and *Kharak Singh* v. *State of Uttar Pradesh* AIR 1963 SC 1295.
176. (2003) 8 SCC 342.

Availability of alternative remedy, generally speaking, is not a bar to move a writ petition in a high court to enforce fundamental right.[177] Otherwise, high courts have judicial discretion under article 226 to refuse to entertain writ petition where no fundamental right is involved.[178] The judicial discretion of high courts not to exercise writ jurisdiction, if alternative remedy is available, is not a rule of law but a rule of policy, convenience and discretion.[179] The policy may be justified on the ground that it discourages the aggrieved party to circumvent the mechanisms provided under the relevant statutes.

This judicial discretion is exercised where the alternative remedy is equally efficacious.[180] If the alternative remedy is inadequate[181] or onerous,[182] *e.g.*, depositing a huge sum of money amounting to Rs. 46 Lakhs and the demand of which itself was barred by limitation[183] or where the action is arbitrary[184] and without authority of law[185] or where enforcement of a fundamental right is sought or where the order or the proceedings are wholly without jurisdiction[186] or in violation of the rules of natural justice or there is an error of law apparent on the face of the record[187] or where the statute under which an administrative order is passed is unconstitutional, or where there is a clear violation of a statute[188] the courts granted the remedy under article 226.

The writ petition challenging the appointment obtained on false certificate was not maintained because remedies such as criminal prosecution had not been resorted to.[189] Similarly, a writ petition seeking

177. *Mohd. Yasin* v. *Town Area Committee* AIR 1952 SC 115 and *Himatlal* v. *State of Madhya Pradesh* AIR 1954 SC 403.
178. *Rashid* v. *I.T.I. Comm.* AIR 1954 SC 207; *A. V. Venkateswaran* v. *Wadhwani* AIR 1961 SC 1506 and *Abraham* v. *I TO* AIR 1961 SC 609.
179. *Uttar Pradesh* v. *Mohd Nooh* AIR 1958 SC 86: (1958) SCJ 242.
180. *Sadhana Lodh* v. *National Insurance Co. Ltd* (2003) 3 SCC 524; *Yoginder Lal Sharma* v. *Municipal Corporation of Shimla* AIR 1984 HP 137 (NOC); *Ram Ratan* v. *India* AIR 1984 Del. 224 and *Ranchi Club* v. *State* AIR 1978 Pat 32.
181. *Anthrayosa PK* v. *Senior Inspector of Cooperative Societies* AIR 1993 Ker 39.
182. *Himmatlal Harilal Mehta* v. *Madhya Pradesh* AIR 1954 SC 40-3: [1954] SCR 1122.
183. *J. M. Baxi & Co.* v. *Commr. of Customs* (2001) 9 SCC 275.
184. *Anil Kumar Bhattacharya* v. *India* AIR 2001 Gau 108.
185. *Himmatlal Harilal Mehta* v. *Madhya Pradesh* AIR 1954 SC 403: [1954] SCR 1122 and *Thansingh* v. *Supdt of Taxes* AIR 1964 SC 1419.
186. *Whirlpool Corpn* v. *Registrar of Trade Marks* (1998) 8 SCC 1. Also see *Chetkar* v. *Vishwanath* AIR 1970 SC 1832; *Satyabadi* v. *Tahasildar Digapahandi* AIR 1979 Ori 150; *Marchhia Sahun* v. *State* AIR 1979 Cal 94 and *Topasa Ramasa Patil* v. *Karnataka Electricity Board* AIR 1989 Kant 279.
187. *KS Venkataraman & Co* v. *Madras* AIR 1966 SC 1089: (1966) 2 SCR 229 and *Dhulabhai* v. *Madhya Pradesh* AIR 1969 SC 78: [1969] 3 SCR 662.
188. *Firozali Abdulkarim Jivani* v. *India* AIR 1992 Bom 179.
189. *Pratap Singh* v. *Haryana* (2002) 7 SCC 484.

direction to the Union of India to take over the management of a medical college and order CBI probe into the functioning of the Medical Council of India was not entertained because the petitioner had not approached the Central Government, which had ample powers under section 10-A of the Medical Council Act, 1956 to do the needful.[190] A writ petition filed for challenging the recounting in an election was refused because there were adequate remedies under the election law.[191] A writ petition filed without answering a notice issued under the Environment Protection Act, 1986 was held to be not maintainable.[192] A writ petition filed without exhausting the remedies available under the Income Tax Act, 1961 was held to be premature.[193] It was held that, for obtaining the interest on delayed payment from the Electricity Board, the proper remedy was a civil suit and not a writ petition.[194]

Further, the court is not disabled by this rule and it can give relief under peculiar and special facts.[195] Where a statutory authority cannot determine the question of its own legal competence, a writ would lie to raise such a question.[196] It has been held that the existence of an alternative remedy might not be a bar to a petition made for the vindication of the rights of the general public.[197] An alternative remedy is no bar where an appeal is filed against an arbitrary action, such as telephone billing for the period during which the telephone was dead. This case was taken up, because the telephone was billed, even though there was an executive instruction saying that no bill should be charged for such period.[198]

A writ court, as a rule, does not act as a court of appeal. It restricts itself from determining the questions that fall within the jurisdiction of authorities whose decisions have been challenged. Thus, the review court does not undertake reassessment of evidence to determine questions of facts. The enquiry is restricted to the question whether an authority or a body, to whom certain power has been entrusted by legislature, acts within its powers or fundamental rights have not been violated. Only in cases of *ultra-vires* or violation of fundamental rights, that the review courts exercise jurisdiction. The doctrine of *ultra-vires* is applicable where there is lack of jurisdiction or wrongful assumption of jurisdiction or error of law apparent on the face of

190. *All Lawyers Forum for Civil Liberties* v. *India* AIR 2001 Del 380.
191. *SK Mahboob Dee* v. *State Election Commission* (2000) 10 SCC 512.
192. *T.N. Godavaraman Thirumulkpad* v. *India* (2000) 10 SCC 494.
193. *GKN Driveshafts Ltd.* v. *Income Tax Officer* (2003) 1 SCC 72.
194. *M/s Equipment Conductors and Cables Ltd.* v. *Haryana State Electricity Board* AIR 2002 SC 2421.
195. *Himachal Pradesh* v. *Raja Mahendra Pal* AIR 1999 SC 1786.
196. *Enforcement Directorate* v. *Saroj Kumar* AIR 1978 Cal. 65.
197. *CK Rajan* v. *State* AIR 1994 Ker 179.
198. *Anil Kumar Bhattacharya* v. *Union of India* AIR 2001 Gau 108.

record within jurisdiction. These aspects have been discussed earlier in this paper.

Article 227(1) gives to high courts the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. A high court may call for returns or make and issue general rules and prescribe forms for regulating the practice and proceedings of these courts and tribunals. The court may also prescribe the forms in which officers of such courts and tribunals shall keep books, entries and accounts. Thus high courts have power of superintendence not only with respect to judicial but also administrative matters.[199]

The high court can exercise jurisdiction under article 226 against the decision of a tribunal if it has exceeded its jurisdiction[200] or violated the principles of natural justice[201] or findings are based on no evidence[202] or other wise perverse[203] or there is an error apparent on the face of record.[204] The court under article 227 does not sit in appeal and is not concerned with decision but with the decision-making process.[205]

The scope of article 227, in some respects, is wider than article 226. A high court may exercise jurisdiction *suo moto* under article 227[206] but not so under article 226. Also, under article 226, high court merely quashes the decision of a tribunal but under article 227, it can issue directions as to manner in which it would proceed or it can pass such a decision or direction as the inferior court or tribunal should have passed.[207] But this distinction between writ jurisdiction and power of superintendence is narrowing down. In a landmark decision, the Supreme Court not only sent the matter of dismissal of employee back to the tribunal but also imposed punishment on the delinquent employee in proportion to the gravity of misconduct.[208] However, jurisdiction under article 226 can be exercised against administrative and quasi-judicial actions whereas under article 227, it can be exercised against judicial and quasi-judicial functions. The wider interpretation of quasi-judicial bodies would bring into it various administrative bodies as well.

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199. *Achutananda Biidya* v. *Prafulla Kumar Gayen* (1997) 5 SCC 76.
200. *Jijabai* v. *Pathankhan* AIR 1971 SC 315.
201. *Trimbak Gangadhar Telang* v. *R G Bhide* AIR 1977 SC 1222.
202. *Mohan Amba Prasad Agnihotri* v. *Bhaskar B Aher* (2000) 3 SCC 190 and *Mani Nariman Daruwala* v. *Phiroz N Bhatena* (1991) 3 SCC 141.
203. *Maharashtra* v. *Harishchandra* (1986) 3 SCC 349.
204. *Nagendra Nath* v. *Commissioner of Hills Di.* AIR 1958 SC 398.
205. *Sugarbai M Siddiq* v. *Ramesh Hankare* (2001) 8 SCC 477.
206. *Jagdishlal* v. *State of Madhya Pradesh* AIR 1988 MP 4.
207. *Shail* v. *Manoj Kumar* (2004) 4 SCC 785 and *State of Orissa* v. *Murlidhar* AIR 1963 SC 404.
208. *Bhagat Ram* v. *State of Himachal Pradesh* AIR 1983 SC 454.

The jurisdiction under article 227 is discretionary and a petition may not be entertained if there is an adequate alternative remedy. From the decision of a single bench of the high court under article 226, the appeal lies to the division bench under Latent Patent jurisdiction. This is not applicable if the petition is filed under article 227. However, if the petition is filed under both articles and facts justify that it is eligible to be filed under either of the articles, the court is supposed to treat the petition as having been filed under article 226 so that LPA could be afforded to the petitioner.

Standing or *locus standi*

Earlier the position was that the Courts used to decide a question only in a litigation brought before them by parties and petitioners. The legal entitlement of a party to seek the decision of the courts against administrative action is called the standing or locus standi of the petitioner. As was observed elsewhere:[209]

> It is to be distinguished from the substantive right or interest possessed by the petitioner, which is alleged to be infringed or endangered. Standing is a right to review. It is the personal qualification of the petitioner to challenge an illegal administrative or legislative action.

Standing may arise either because a private right of the petitioner has been infringed by administrative action or because some public interest is harmed thereby. The standing of a person complaining of harm done to his private interest such as his property or reputation is clear enough. But when a person complains of an injury to public interest, the question arises whether any member of the public has standing to challenge administrative action alleged to be prejudicial to the public interest in a court of law. The general answer to such a question is that, a member of the public must be affected by the complained injury to public interest in some special way or more than an ordinary member of the public is affected thereby. That is to say, in addition to the general interest of the public, the petitioner must have some special interest of his own if he is to be held to have standing to challenge administrative action alleged to be contrary to public interest though not directed against any private individual.[210]

The modern trend is to broaden the basis of standing. At times the injury to public interest is to undesirable that courts are inclined to grant standing to sue in favour of any member of the public even though he may not have been specially aggrieved by the injury to the public interest. For instance, the proposed construction of a highway in a scenic river area was objected to by a group of citizens residing in that area on the ground that

209. "Standing and Justiciability", 13 *JILI*, 1971, pp. 153 at 154-155.
210. *Radhey Shyam* v. *Lt. Governor*, Delhi I.L.R. (1970) II Delhi 260.

the statutory requirements had not been followed. A Federal Court of Appeals in the United States ruled that such a group of citizens had the standing to sue on the following ground:

> The public interest in environmental resources is legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest.[211]

In *Radhey Shyam's* case referred to above, it was held that the petitioner had more interest in the construction of a children's park by the municipal corporation than the other members of the public had because he was residing very close to the plot of land on which the children's park had to be constructed while other members of the public were not residing that close to the plot. It is to be noted that the Federal Court of Appeals did not rest its finding as to the standing of the plaintiffs on such a distinction. It merely stated that the plaintiffs represented the public interest. If this argument were carried to its logical conclusion, any member of the public would be able to sue on the ground of injury to the public interest. For, he would in some measure represent the public.

The logical extension envisaged by the original author has now become the norm of the Indian legal system. The old conservative rule that the person aggrieved in his individual capacity only has the *locus standi* to approach the court has paved the way for new liberal rule. According to the contemporary practice, *locus standi* can be granted to the person, not aggrieved in conventional sense of having suffered personal injury, but has interest in the matter. The writ application may be filed for the redressal of public grievance caused due to the abuse of power or use of power for private gain or breach of public duty or for violation of fundamental rights *etc.* This is termed as public interest litigation, wherein petition may be filed by public-spirited individual[212] or group[213] or some person other than the person aggrieved, where such person is unable or disable to approach the court himself.[214]

In other words, public interest litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of community have pecuniary interest or some interest by which their legal rights or liabilities are affected.[215] And while

211. *Citizen's Committee* v. *Volpe* 425 F. 2nd 97 at 105 (2nd Circuit 1970).
212. *M C Mehta* v. *Union of India.*
213. Latest being *Sakshi* v. *Union of India* (2004) 6 SCALE 15.
214. *Sunil Batra (I)* v. *Delhi Administration* AIR 1978 SC 1675 and *Sunil Batra (II)* v. *Delhi Administration* (1980) 3 SCC 488.
215. *Dr. B Singh* v. *Union of India* (2004) 3 SCC 363. In this case, the Court has merely reiterated what was said in *Janata Dal* v. *H. S. Chaudhary* (1992) 4 SCC 305 and *S. P. Gupta* v. *Union of India* 1981 Supp SCC 87.

hearing the public interest litigation, the constitutional court acts as a sentinel on the *qui vive* discharging its obligations as custodian of the constitutional morals, ethics and code of conduct.[216]

Besides liberalization of *locus standi*, the high courts and Supreme Court have *Suo moto* power to entertain writ petition. The Supreme Court observed that public interest litigation may be registered by high court on its own in appropriate cases.[217] Even a private interest may be treated as public interest litigation and the court may inquire into the broader subject matter.[218]

It was apprehended that liberalizing the *locus standi* would lead to the flooding of litigations. And it has, in fact, been so. Plenty of public interest litigations are frivolous litigations, which either do not involve any substantial cause of action or injury to the public or is brought to the court for the sake of publicity or causing delay in administrative functions to satisfy personal interest[219] *etc.* Courts are developing mechanisms to fight this menace. Entertaining public interest litigation, being a discretionary power, the courts do not hesitate to reject such frivolous petitions at the threshold itself.[220] Also, it is emphasized that public interest litigation is a weapon, which should be used with great care and circumspection for protection of human rights involving social justice issues.[221] Keeping this object in view, certain guidelines have been framed to regulate the public interest litigation so that only genuine petitions are entertained. For example, court need to satisfy itself about the credential of the applicant and prima facie correctness and definiteness of the information disclosing cause of action and the gravity of it.

Public interest litigation has ushered in a new era called judicial activism. It signifies the expanding scope of judicial review. Judiciary is reviewing such aspects of administration, which were previously out of its purview. While, in many respects, this is a laudable development, the judiciary needs to keep in view that it does not encroach upon the territory of other organs such as executive or legislature. It should not become rule by judiciary. In addition, the courts need to balance the conflicting interests of maintaining the functional autonomy of public authorities on the one hand and protecting the rights of the public on the other hand.

The danger of judiciary encroaching upon the spheres of other organs is, now becoming, a matter of continuous debate. At the early stages of

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216. *Padma* v. *Hiralal Motilal Desarda* (2002) 7 SCC 564.
217. *Friends Colony Development Committee* v. *State of Orissa* (2004) 8 SCC 733.
218. *Indian Bank's Assn.* v. *Devkala Consultancy Service* (2004) 11 SCC 1 and *State of UP* v. *Satya Narain Kapoor* (2004) 8 SCC 630.
219. *N. K. Prasada* v. *Govt. of India* (2004) 6 SCC 299.
220. *Printers (Mysore) Limited* v. *M. A Rasheed* (2004) 4 SCALE 192.
221. *Printers (Mysore) Limited* v. *M. A Rasheed* (2004) 4 SCALE 192.

growth of public interest litigation, it was used as a tool to fight against domination, arbitrariness and abuses of power or for vindication of human rights of deprived and dispossessed sections of the community. But now public interest litigation is stretching itself to new areas where it is leading to governance by judiciary. For instance, with respect to the policy matters, the courts earlier maintained that the policy matters were out of the purview of judicial review[222] but now they have started involving themselves with policy-implementation issues.[223] Carrying it further, the Supreme Court recently has called upon the Union of India to file counter affidavit to state what steps have been taken by it to implement the recommendations of Justice Malimath Committee report and what proposal it has made to enact a law for the protection of witnesses and other matters of criminal justice delivery system.

The areas covered under judicial review in the garb of public interest litigation ranges from environment protection to ensuring cooperation between and among different authorities to preserve monuments. The courts in India have assumed wider jurisdiction and have entertained petitions to ensure cooperation between the municipal commissioner and the standing committee[224] or uphold the right to food and satisfaction of basic needs[225] and freedom from malnutrition[226] or to protect the monuments and religious shrines[227] or to check ragging in the universities[228] or to prevent encroachment of public places[229] or to interpret statutory provisions[230] or to ensure rehabilitation of oustees[231] or on inaction on the part of authorities to perform statutory obligations[232] or for irregular allotment of petrol pumps[233] or for better service conditions of subordinate

222. *Parents Teachers* v. *Chairman, Kendriya Vidyalaya Sangathan* AIR 2001 Raj 35.
223. This aspect has been discussed earlier also.
224. *Nandkishore Ganesh Joshi* v. *Commr., Municipal Corporation of Kalyan & Dombivali* (2004) 11 SCC 417.
225. *PUCL* v. *Union of India* (2001) 7 SCALE 484 and *PUCL* v. *Union of India* (2004) 5 SCALE 128.
226. *Peoples Union for Civil Liberties* v. *Union of India* (2004) 12 SCC 104.
227. *Wasim Ahmed Saeed* v. *Union of India* (2004) 8 SCC 74 and *M C Mehta* v. *Union of India* (1999) 6 SCC 611.
228. *Vishwa Jagriti Mission* v. *Central Govt.* (2001) 6 SCC 577
229. *M C Mehta* v. *Union of India* (2003) 10 SCC 619.
230. *Sakshi* v. *Union of India* (2001) 10 SCC 732 and *Sakshi* v. *Union of India* (2004) 6 SCALE 15.
231. *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664.
232. *Mehsana Distt. Central Cooperative Bank Ltd.* v. *State of Gujarat* (2004) 2 SCC 463 and *Almitra H. Patel* v. *Union of India* (2000) 2 SCC 679.
233. *Onkar Lal Bajaj* v. *Union of India* (2003) 2 SCC 673; *V. Purshotham Rao* v. *Union of India* (2001) 10 SCC 305; *Common Cause, A Regd. Society* v. *Union of India* (1996) 6 SCC 530 and *Center for PIL* v. *Union of India* (1995) Supp. (3) SCC 382.

judiciary[234] or to ensure right to decent burial of homeless deceased[235] or for protection of environment[236] and ecology[237] or ban on smoking in public places[238] *etc.*

Today, public interest litigations are not restricted to only civil matters but is also expanding to cover criminal matters. In criminal jurisprudence, the position, hitherto, was that only the victim has the right to move the court unless it involves violation of fundamental rights.[239] In a significant development, the Supreme Court of India has ventured into core criminal matter to bring to book the accused involved in burning alive 14 people in *Best Bakery* case, wherein the Special Leave Petition filed by the National Human Rights Commission was converted into public interest litigation.[240] In another related case,[241] the Supreme Court created history by ordering fresh trial of the case outside the state.[242] This is justified on the ground that the judicial criminal administration must be kept clean and beyond the reach of whimsical political will or agendas and be insulated from discriminatory standards or yardsticks of the type prohibited by the mandate of the Constitution. Giving human rights perspective to the entire issue, the court observes that preservation of rule of law is crucial for the protection of human rights.

Despite the fact that scope of judicial review is ever-increasing, the courts in India are aware of the danger in the process. In many cases, the Supreme Court has either rejected the petition or has refused to give relief. Supreme Court refused to direct the executive as to how to do its various jobs[243] to uphold the principle of separation of powers, one of the important features of the Constitution of India. Similarly, the questions of facts relating to assessment of tax[244] or fixation of reserve price[245] or

234. *All India Judge's Association* v. *Union of India* AIR 1992 SC 165.
235. *Ashray Adhikar Abhiyan* v. *Union of India* (2002) 3 SCC 31.
236. *Chandigarh Administration* v. *Namit Kumar* (2004) 8 SCC 446; *M C Mehta* v. *Union of India* (2003) 10 SCC 570; *M C Mehta* v. *Union of India* (2001) 9 SCC 520; *M C Mehta* v. *Union of India* (2001) 4 SCC 577 and *Goa Foundation* v. *Diksha Holdings* (P) Ltd. (2001) 2 SCC 97.
237. *N. D. Jayal* v. *Union of India* (2004) 9 SCC 362 and *Mohd. Haroon Ansari* v. *District Collector, Rangareddy Distt., AP* (2004) 1 SCC 491.
238. *Murli S. Deora* v. *Union of India* 2001 (8) SCALE 6.
239. *Sunil Batra (I)* v. *Delhi Administration* AIR 1978 SC 1675 and *Sunil Batra (II)* v. *Delhi Administration* (1980) 3 SCC 488.
240. *National Human Rights Commission* v. *Union of India* (2003) 9 SCALE 329.
241. *Zahira Habibulla H. Sheikh* v. *Union of India* (2004) 4 SCC 158.
242. See Parmanand Singh, "Public Interest Litigation", *Annual Survey of Indian Law*, Vol. XXXIX, 2003, pp. 678-679.
243. *Almitra H. Patel* v. *Union of India* (2000) 2 SCC 679.
244. *Union of India* v. *Azadi Bachao Andolan* (2004) 10 SCC 1.
245. *Anil Kumar Srivastava* v. *State of UP* (2004) 8 SCC 671.

financial and economic decisions of the government[246] or service matters[247] cannot be interfered in public interest litigations.

Justiciability

The relation of standing to justiciability may be likened to the relation of entry into the court to exit out of it. A petitioner cannot enter a law court unless he has standing. It gives him entry. But the petitioner is likely to be thrown out of the court if the question raised by him is not justiciable. Broadly speaking, administrative actions touching the interest of individuals are justiciable while those concerned with state policy are non-justiciable. But what is a matter of state policy and what is a matter of individual rights is itself to be decided according to the existing law. For instance, in the United States the proceedings of legislatures and the delimitation of constituencies from which members of the state and the federal legislatures are to be elected were for a long time regarded as essentially political functions of the state and execution of which was not open to judicial review.[248] But this doctrine was severely narrowed down by the subsequent decisions of the Supreme Court beginning with *Baker* v. *Carr*,[249] when the majority of the court held that the congressional districts not formed according to population violated the equality clause of the fourteenth amendment of the Constitution. Again in *Reyonlds* v. *Sims*[250] the majority decision in the *Baker* case was followed.

In India, on the other hand, there is no developed doctrine of "political questions" which are to be regarded as being outside judicial review. The justiciability of a question is decided more by the letter of the Constitution and the law concerned than by such a general doctrine. Therefore, in *Nain Sukh Das* v. *The State of U.P.*,[251] a complaint of discrimination arising out of separate electoral college formed on communal lines as being contrary to article 15 (1) of the Constitution was not rejected as being unjusticiable but failed on merits. In a sense, therefore, the standing of the petitioner to challenge unconstitutional or illegal action of the government would be wider in India because the complaint is based on a specific contravention of the Constitution or the statute. Owing to this reason courts would not dispute the standing of the petitioner in certain petitions, which raised

246. *BALCO Employees' Union (Regd.)* v. *Union of India* (2002) 2 SCC 333.
247. *Ashok Kuman Pnadey* v. *State of West Bengal* (2004) 3 SCC 349; *Duryodhan Sahu (Dr.)* v. *Jitendra Kumar Mishra* (1998) 7 SCC 273 and *B. Singh (Dr.)* v. *Union of India* (2004) 3 SCC 363.
248. *Coleman* v. *Miller* 302 U.S. 443 (1939) and *Colegrove* v. *Green* 328 U.S. 549 (1946).
249. *Baker* v. *Carr* 369 U.S. 186 (1962).
250. 377 U.S. 533 (1964).
251. (1953) SCR 1184.

disputes of a political nature. In *U.N.R. Rao* v. *Smt. Indira Gandhi,*[252] the petitioner questioned the continuance in office of the Prime Minister and the Council of Ministers after the dissolution of the House of the People on the ground that the Council of Ministers was to be collectively responsible to the House of the People under article 75 (3) of the Constitution. It was contended that this condition could not be fulfilled when there was no House of the People. It was urged, therefore, that the Council of Ministers must go out of office when the House of the People was dissolved. Even a petition with such highly political content could be entertained without any discussion as to the standing of the petitioner by the Supreme Court because it was concerned with the alleged contravention of article 75 (3).

An analogous development has taken place in the United States. The suits by tax-payers challenging the constitutionality of government expenditure were long regarded as non justiciable on the authority of *Frothingham* v. *Mellon.*[253] For, the petitioner could not be said to be specially aggrieved by the objected governmental expenditure even though he was one of the numerous tax-payers whose money went to the state exchequer, and was being spent by the government. In *Flast* v. *Cohen,*[254] such a suit was regarded as justiciable because the governmental expenditure on religious schools violated the specific guarantee given by the first amendment of the Constitution. The argument for the government was that the scheme of separation of power and the deference owed by the judiciary to the legislature and the executive presented an absolute bar to the entertainment of such an action by the courts. The court, however, held that the constitutional challenge by the tax-payers was justiciable inasmuch as the governmental expenditure violated a right which was specifically guaranteed by the Constitution.

A distinction between the Constitution on the one hand, and ordinary statutes on the other, must however, be noted. As had been pointed out elsewhere,[255] the provisions of the Constitution are of two types, namely:

I. Those which are not enforceable—

   (1) either because they are not justiciable, or

   (2) because they are not mandatory even if justiciable, and

II. Those, which are enforceable.

252. AIR 1971 SC 1002.
253. 262 U.S. 447 (1923).
254. 392 U.S. 83 (1968).
255. See V.S. Deshpande, *Judicial Review of Legislation,* 1975, p. 58.

On the other hand, the provisions of the ordinary statutes are always meant to be enforceable. It is only the provisions, whether of the Constitution or the statues, which are enforceable that can become the basis of judicial review. It would be useful, therefore, to consider the two types of constitutional or statutory provisions, which are not enforceable.

Non-justiciable provisions

In *Baker* v. *Carr*,[256] followed in *Powell* v. *Mc Cormack*,[257] the following criteria were laid down to determine when a question would be non-justiciable, namely:

(1) A textually demonstrable constitutional commitment of the issue to a co-ordinate political department;

(2) A lack of judicially discoverable and manageable standard for resolving it;

(3) The impossibility of deciding without an initial policy determination of a kind clearly for non- judicial discretion;

(4) The impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government;

(5) An unusual need for questioning adherence to a political decision already made; or

(6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

First category of non-justiciable issues is that of political matter. There are obvious examples of non-justiciable provisions contained in the Constitution. However, if the executive is assured that its discretion is unchallengeable, there is likely to be an unconscious tendency on its part to exercise the discretion without due care. The discretion may be exercised so arbitrarily or even with such questionable motivation that attempts will be made to challenge its exercise before the court. In *R. C. Cooper* v. *Union of India*,[258] the validity of the impugned ordinance issued by the President under article 123 of the Constitution was challenged, but the court did not consider it necessary to decide the contention. The Presidential proclamations issued under chapted XVIII of the Constitution (emergency provisions) are also generally non-justiciable because they are to be approved or disapproved by Parliament and, therefore, the courts would treat them as political matters, the validity of which are not suitable for decisions by courts. The exercise of the power to issue the proclamation of

256. 396 U.S. 186 (1962).
257. 395 U.S. 486 (1969).
258. AIR 1970 SC 564.

emergency on 25th June, 1975 and actions of the executive committed during the emergency have, however, led to numerous challenges to the validity of the declaration of the emergency as also the validity of the acts done under its cover. The exclusion of judicial review by statutory or constitutional provisions has been construed particularly after the decisions of the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission*[259] and *Padfield* v. *Minister of Agriculture*[260] as relating to judicial review of administrative actions done with jurisdiction. If such action is without jurisdiction then it is a nullity and the exclusionary clauses of the Constitution and the statutes will not bar the courts from entertaining challenges to its validity. Such circumstances have almost forced the courts to expand the scope of judicial review over ordinarily non-justiciable matters. This was well expressed by Chandrachud, J., in his judgment in the seven-judge decision of the Supreme Court in *State of Rajasthan and others* v. *Union of India,* in the following words:[261]

> It is an accepted fact of constitutional interpretations that the content of justiciability changes according to how the judge's value preferences respond to the multi-dimensional problems of the day. An awareness of history is an integral part of those preferences. In the last analysis, the people for whom the Constitution is meant, should not turn their faces away from it in disillusionment for fear that justice is a will-o'-the-wisp.

The area of non-justifiable issues is getting narrower. Proclamation of emergency[262] on dissolution of legislative assembly[263] on the advice of the Union Government, is political question, but can be challenged on various grounds. For instance, proclamation of emergency under article 352 is subjective, the court may interfere where – (a) there is no satisfaction at all; or (b) it is found on an irrelevant grounds or considerations; or (c) on the materials before the President, his satisfaction is evidently perverse or *mala fide.*[264]

Non-political subject matter pertaining to administrative policy of the government is, to an extent, immune from court's interference unless such a policy is capricious, arbitrary, whimsical so as to offend article 14 of the constitution.[265] For example, foreign policy or trade policy or export-import policy or decision regarding open or closing down a school or fixing prices of essential commodities *etc.* However, the scope of non-justiciability is

259. (1969) 2 AC 147.
260. (1969) 2 AC 147.
261. AIR (1977) SC 1361 at 1401.
262. *Bhutnath* v. *State of W.B.* AIR 1974 SC 806.
263. *State of Rajasthan* v. *Union of India* AIR 1977 SC 1361.
264. *S R Bommai* case.
265. *State* v. *Sevanivatra Karmachari Hitkari Samity* (1995) 2 SCC 117.

narrowing down. The court may interfere if (a) some fundamental right is offended;[266] (b) principles of natural justice are violated[267]; (c) constitutional or statutory powers of the authority are exceeded; (d) conclusions or findings of fact arrived at by such authority are not based on any evidence or there is no rational basis for them or they are made on extraneous considerations or they are inconsistent with the law of the land.[268] For instance, quantum and shape of benefits to be extended to the employees may be interfered on the ground of illegality, irrationality or procedural impropriety.[269] Or prescription of qualification for admission to a course or treating other qualification as equivalent to the former, though a matter of policy decision, can be questioned on the ground whether the policy decision is based on a fair rational and reasonable ground or decision has been taken on consideration of relevant aspects of matter or the exercise of the power is obtained with *mala fide* intention or the decision serves the purpose or it is based on irrelevant or irrational considerations or intended to benefit an individual or a group of candidates.[270] Similarly, reasonableness of a policy or reasonableness of restriction on the fundamental right is always open to judicial review.[271]

State may change the policies at any time and is not held bad even if it is departed form the decision of the Supreme Court.[272] Court generally does not question the wisdom of making a policy. If decision is not in accordance with the law, court can only direct the reconsideration of the policy but cannot itself make the decision.[273]

Besides, with respect to the foreign affairs, the correctness or validity of the decision of the government is not challengeable if it pertains to (a) Recognition of foreign state; (b) Recognition of person as the sovereign or accredited agent of foreign government; (c) Insufficient ratification by a foreign government; (d) Permission to foreign carrier to operate in the country; (e) Implementation of state's obligations under international treaty of obligation; and (f) Whether territory belongs to its state or to a foreign state.

Non-mandatory provisions

Clause (3) of article 320 which requires the central and the state

266. *State of Maharashtra* v. *Lok S.S.* AIR 1973 SC 588 and *State of Mysore* v. *Srinivasamurthy* AIR 1976 SC 1104.
267. *Id.*
268. *Asif* v. *State of K. & K.* AIR 1989 SC 1899.
269. *Assam Madhyamik Siksha Aru Karmachari Santha* v. *State* (1996) 9 SCC 186.
270. *State* v. *Lata Arun* (2002) 6 SCC 252.
271. *Union of India* v. *International Trading Co.* (2003) 5 SCC 437.
272. *State* v. *Ram Lubhaya Bagga* (1998) 4 SCC 117.
273. *Union of India* v. *Kannadapara Sanghatanegala Okkuta* (2002) 10 SCC 226.

governments to consult the Union and the state public service commission on all matters relating to methods or recruitment, *etc.*, has been held to be non-mandatory, that is to say, only directory.[274] The main reason why article 320 (3) is to be regarded only as directory is that under the proviso to it, the President or the Governor has the power to make regulations specifying the matters in which either generally, or in any particular class of cases, it shall not be necessary for a public service commission to be consulted. Further, the final say in a matter of appointment has to be with the government and cannot be given to the public service commission, because there can be only one government and not two in such a matter.

Besides, exercise of discretion in non-statutory matters cannot be challenged in the court of law because they confer only privileges or benefits and no enforceable legal right on subjects. A policy decision shall not be questioned unless it affects somebody's legal right.[275] For instance, declaration of compensatory dearness allowance does not confer on employees a right to claim so as to compel the government through legal process to grant it and at a particular rate.[276] However, not all the non-statutory discretionary matters are completely immune from judicial review. It may be challenged if it is arbitrary or unreasonable and thus is violative of article 14. For, instance, once the dearness allowance is declared, it may be challenged if it is arbitrarily implemented.

The problem of justiciability: On the one hand, the efficient functioning of the administration requires a free hand to the government and its officers in carrying out administrative measures according to the official policies. The interference by the courts must be limited to an individual case where the individual is said to be aggrieved by some illegality of the administrative action. No general control of administration by the judiciary can be contemplated without serious impediment to the governance of the country. On the other hand, an enlightened public opinion is increasingly seeking the protection of public interest through actions in court. A balance between these two situations has to be held by the courts.

The overall consideration in administrative law is this: the litigants, the lawyers and the judges are all a part of an integral system, the purpose of which is to do justice. This is the supreme test, which must be satisfied by rules of law, which are sought to be enforced by the courts. A technicality must not be allowed to defeat justice even if it is based on law. For, the ultimate goal of all rules of law is to do justice. The Constitution was enacted to enshrine the permanent values of justice to which the ordinary rules of law are subordinate. The object of administrative law under the

274. *State of U.P.* v. *Manbodhan Lal Srivastava* AIR 1957 SC 912.
275. *Union of India* v. *Manu Dev. Arya* (2004) 5 SCC 618.
276. *State of MP* v. *Mandawar* AIR 1954 SC 493.

Constitution is to serve that supreme purpose. The evolving rules of administrative law whether they relate to the nature of administrative powers or the grounds on which administrative action can be reviewed or the considerations on which judicial remedies would be granted by the courts have all to be shaped with this primary consideration in view.

Suggested Readings

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