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LECTURES ON ADMINISTRATIVE LAW

Lecture VI

NATURAL JUSTICE

...[I]t is beyond doubt that there are certain canons of judicial conduct to which all tribunals and persons who have to give judicial or quasi-judicial decisions ought to conform. The principles on which they rest are, we think, implicit in the rule of law. Their observance is demanded by our notional sense of justice.

—THE COMMITTEE ON MINISTERS' POWERS

A monkey does not decide an affair of the forest.

—THE KIGANDA PROVERB

Doth our law judge any man before it hear him and know what he doeth.

—JOHN

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1. General

Natural justice is an important concept in administrative law. In the words of Megarry, J.[1] it is 'justice that is simple and elementary, as distinct from justice that is complex, sophisticated and technical'. The principles of natural justice or fundamental rules of procedure for administrative action are neither fixed nor prescribed in any code. They are better known than described and easier proclaimed than defined.[2] 'Natural justice' has meant many things to many writers, lawyers and systems of law. It has many colours and shades and many forms and shapes. According to de Smith,[3] the term 'natural justice' expresses the close relationship between the Common Law and moral principles and it has an impressive ancestry. It is also known as 'substantial justice', 'fundamental justice', 'universal justice' or 'fair play in action'. It is a great humanising principle intended to invest law with fairness, to secure justice and to prevent miscarriage of justice.

In *Wiseman* v. *Borneman*[4], it is observed :

...[T]he conception of natural justice should at all stages guide those who discharge judicial functions is *not merely an acceptable but is an essential part of the philosophy of the law*.... (emphasis supplied)

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1. *John* v. *Rees*, (1969) 2 All ER 274.
2. *Abbot* v. *Sulivan*, (1952) 1 KB 189 (195).
3. *Judicial Review of Administrative Action*, (1973), p. 135.
4. 1971 AC 297 : (1969) 3 All ER 275.

2. Definition

It is not possible to define precisely and scientifically the expression 'natural justice'. It is a vague and ambiguous concept and, having been criticised as 'sadly lacking in precision'[5], has been consigned more than once to the lumber room.[6] It is a confused and unwarranted concept and encroaches on the field of ethics.[7] 'Though eminent judges have at times used the phrase 'the principles of natural justice', even now the concept differs widely in countries usually described as civilised.[8]

It is true that the concept of natural justice is not very clear and, therefore, it is not possible to define it; yet the principles of natural justice are accepted and enforced. In reply to the aforesaid criticisms against natural justice, Lord Reid in the historical decision of *Ridge* v. *Baldwin*[9] observed:

> In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist....

3. Historical Background

According to de Smith,[10] the term 'natural justice' expresses the close relationship between the Common Law and the moral principles and it has an impressive history. It has been recognised from the earliest times: it is not judge-made law. In days bygone the Greeks had accepted the principle that 'no man should be condemned unheard'. The historical and philosophical foundations of the English concept of natural justice may be insecure, nevertheless they are worthy of preservation. Indeed, from the

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5. Hamilton, L. J. in *R.* v. *Local Government Board, Ex Parte Alridge*, (1914) 1 KB 160 (195).
6. de Smith (supra) p. 134.
7. *Local Government Board* v. *Alridge*, (1915) AC 120.
8. Maugham, J. in *Maclean* v. *The Workers' Union*, (1929) 1 Ch D 602.
9. (1964) AC 40 (64).
10. *Judicial Review of Administrative Action*, (supra), p. 134.

legendary days of Adam and of *Kautilya's Arthashashtra*, the rule of law has had this stamp of natural justice which makes it social justice.[11]

4. Principles of Natural Justice and Statutory Provisions

Generally, no provision is found in any statute for the observance of the principles of natural justice by the adjudicating authorities. Then, the question then arises as to whether the adjudicating authority is bound to follow the principles of natural justice. The law is well-settled after the powerful pronouncement of Byles, J. in *Cooper* v. *Wandsworth Board of Works*[12], wherein His Lordship observed :

> A long course of decisions, beginning with *Dr. Bentley's* case and ending with some very recent cases, establish that, *although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.* (emphasis supplied)

de Smith[13] also says that where a statute authorising interference with property or civil rights was silent on the question of notice and hearing, the courts would apply the rule as it is 'of universal application and founded on the plainest principles of natural justice'. Wade[14] states that the rules of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of the power. He adds, 'the presumption is, it (natural justice) will always apply, however silent about it the statute may be'.[15]

The above principle is adopted in India also. In the famous case of *A. K. Kraipak* v. *Union of India*[16], speaking for the Supreme Court, Hegde, J. propounded :

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11. Per Krishna Iyer, J. in *Mohinder Singh Gill* v. *Chief Ele. Comsr.*, (1978) 1 SCC 405 (432) : AIR 1978 SC 851 (870).
12. (1863) 14 CBNS 180 (194).
13. *Judicial Review* (supra), p. 139.
14. *Administrative Law*, (1977), p. 395.
15. *Ibid.* at p. 429.
16. (1969) 2 SCC 262 : AIR 1970 SC 150.

> The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. *These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it.*[17] (emphasis supplied)

Very recently, in *Maneka Gandhi* v. *Union of India*[18], Beg, C. J. observed:

> It is well established that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action.

5. Principles of Natural Justice and Administrative Orders

There is no dispute that the principles of natural justice are binding on all the courts, judicial bodies and *quasi*-judicial authorities. But the important questions are: Whether these principles are applicable to administrative authorities? Whether those bodies are also bound to observe them? Whether an administrative order passed in violation of these principles is *ultra vires* on that ground? Formerly, courts had taken the view that the principles of natural justice were inapplicable to administrative orders. In *Franklin* v. *Minister of Town and Country Planning*[19], Lord Thankerton observed that as the duty imposed on the Minister was merely administrative and not judicial or *quasi*-judicial, the only question was, whether the Minister has complied with the direction or not. In the words of Chagla, C. J.[20] 'it would be erroneous to import into the consideration of an administrative order the principles of natural justice'. In *Kishan Chand* v. *Commissioner of Police*[21], speaking for the Supreme Court,

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17. (1969) 2 SCC 262 at. p. 272: AIR 1970 SC 150, 156.
18. (1978) 1 SCC 248 (402): AIR 1978 SC 597 (611).
19. (1947) 2 All ER 289.
20. *Bapurao* v. *State*, AIR 1956 Bom. 300 (301): BLR 418 (422).
21. AIR 1961 SC 705 (710): (1961) 3 SCR 135 (147-48).

Wanchoo, J. (as he then was) observed:

> The compulsion of hearing before passing the order implied in the maxim *'audi alteram partem'* applies only to judicial or *quasi*-judicial proceedings.

But as observed by Lord Denning[22], at one time it was said that the principles of natural justice applied only to judicial proceedings and not to administrative proceedings, but 'that heresy was scotched' in *Ridge* v. *Baldwin*[23]. Wade[24] states that the principles of natural justice are applicable to 'almost the whole range of administrative powers'. In *Breen* v. *Amalgamated Engineering Union*[25], Lord Denning observed: "It is now well settled that a statutory body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or *quasi*-judicial on the one hand, or as administrative on the other hand." Lord Morris declares:

> We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying these principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. *But I affirm that the area of administrative action is but one area in which the principles are to be deployed.*[26] (emphasis supplied)

This principle is accepted in India also. In *State of Orissa* v. *Dr. (Miss) Binapani*[27], speaking for the Supreme Court, Shah, J. (as he then was) observed:

> It is true that the order is administrative in character, but even an administrative order which involves civil consequences....must be made consistently with the rules of natural justice....

Again, in *Kraipak's* case (supra), the Court observed:

> Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under

22. *R.* v. *Gaming Board*, (1970) 2 All ER 528.
23. (1964) AC 40.
24. *Administrative Law* (1977), p. 429.
25. (1971) 1 All ER 1148.
26. Quoted in *Maneka Gandhi's* case (supra) at p. 285.
27. AIR 1967 SC 1269 (1272): (1967) 2 SCR 625 (630).

which it functioned to act judicially, there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. *If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries.*[28] (emphasis supplied)

In *Maneka Gandhi's* case (supra), Kailasam, J. pronounced:

The frontier between judicial or *quasi*-judicial determination on the one hand and an executive on the other has become blurred. The rigid view that principles of natural justice applied only to judicial and *quasi*-judicial acts and not to administrative acts no longer holds the field.[29]

6. Principles of Natural Justice

As stated above, 'natural justice' has meant many things to many writers, lawyers, jurists and systems of law. It has many colours, shades, shapes and forms. Rules of natural justice are not embodied rules and they cannot be imprisoned within the strait jacket of a rigid formula.[30] In *Russel* v. *Duke of Norfolk*[31], Tucker, L. J. observed:

There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

In the oft-quoted passage from *Byrne* v. *Kinematograph Renters Society Ltd.*[32], Lord Harman enunciates:

What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. *I do think that there really is anything more.* (emphasis supplied)

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28. *Kraipak's* case (supra) at p. 272 (SCC); p. 157 (AIR).
29. (1978) 1 SCC 248 (385): AIR 1978 SC 597 (690).
30. *P. K. Roy's* case (infra).
31. (1949) 1 All ER 109 (118).
32. (1958) 2 All ER 579.

The same view is taken in India. In *Union of India* v. *P. K. Roy*[33], speaking for the Supreme Court, Ramaswami, J. observed:

> [T]he extent and application of the doctrine of natural justice cannot be imprisoned within the strait jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case.[34]

English Law recognises two principles of natural justice:

(a) *Nemo debet esse judex in propria causa*: No man shall be a judge in his own cause, or the deciding authority must be impartial and without bias; and

(b) *Audi alteram partem*: Hear the other side, or both the sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority.

(1) Bias of interest

General

The first principle of natural justice consists of the rule against bias or interest and is based on three maxims: (*i*) No man shall be a judge in his own cause; (*ii*) "Justice should not only be done, but manifestly and undoubtedly be seen to be done";[35] and (*iii*) "Judges, like Caeser's wife should be above suspicion".[36]

Meaning

According to the Dictionary meaning 'bias' means 'anything which tends or may be regarded as tending to cause such a person to decide a case *otherwise than on evidence* must be held to be biased'.

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33. AIR 1968 SC 850 (858):(1968) 2 SCR 156 (202).
34. See also *Suresh Koshy* v. *University of Kerala*; AIR 1969 SC 198; *Hiranath* v. *Rajendra Medical College* (infra).
35. Lord Hewart in *R.* v. *Sussex Justices*, (1924) 1 KB 256.
36. Justice Bowen in *Leeson* v. *General Council*, (1889) 43 Ch D 366 (385).

In *Franklin* v. *Minister of Town Planning*[37], Lord Thankerton defines bias as under:

> My Lords, I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a *quasi*-judicial office, such as an arbitrator.

Principle explained

The first requirement of natural justice is that the judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a position to act judicially and to decide the matter *objectively*. If the judge is subject to bias in favour of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a judge, and the proceedings will be vitiated. This rule applies to judicial as well as administrative authorities required to act judicially or *quasi*-judicially.

Types of bias

Bias is of three types:

(*A*) Pecuniary bias,

(*B*) Personal bias, and

(*C*) Bias as to subject-matter.

(A) Pecuniary bias

It is well settled that as regards pecuniary interest 'the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a judge'.[38] Griffith and Street[39] rightly state that 'a pecuniary interest, however slight, will disqualify, *even though it is not proved that the decision is in any way affected*'. (emphasis supplied)

37. (1947) 2 All ER 289 (296).
38. Per Stephen, J. in *R.* v. *Farrant*, (1887) QBD 58(60).
39. *Principles of Administrative Law*: (4th ed.), p. 156.

Dr. Bonham's case[40]

In this case, Dr. Bonham, a doctor of Cambridge University was fined by the College of Physicians for practising in the city of London without the licence of the College. The statute under which the College acted provided that the fines should go half to the King and half to the College. The claim was disallowed by Coke, C. J. as the College had a financial interest in its own judgment and was a judge in its own cause.

Dimes v. *Grant Junction Canal*[41]

This is the classic example of the application of the rule against pecuniary interest. In this case, the suits were decreed by the Vice Chancellor and the appeals against those decrees were filed in the Court of Lord Chancellor Cottenham. The appeals were dismissed by him and decrees were confirmed in favour of a canal company in which he was a substantial shareholder. The House of Lords agreed with the Vice-Chancellor and affirmed the decrees on merits. In fact, Lord Cottenham's decision was not in any way affected by his interest as a shareholder; and yet the House of Lords quashed the decision of Lord Cottenham. Lord Campbell observed:

> No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but my Lords, it is of the last importance that the maxim, that no one is to be a judge in his own cause, should be held sacred.... And it will have a most salutory influence on (inferior) tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. *This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.*[42] (emphasis supplied)

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40. (1610) 8 Co. Rep. 113 b.
41. (1852) 3 HLC 579.
42. *Ibid.* at p. 793.

The same principle is accepted in India. In *Manak Lal* v. *Dr. Premchand*[43], speaking for the Supreme Court, Gajendragadkar, J. (as he then was) remarked:

> It is obvious that pecuniary interest, however small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a judge.

In *Jeejeebhoy* v. *Assistant Collector of Thana*[44], Chief Justice Gajendragadkar reconstituted the Bench on objection being taken on behalf of the interveners in Court on the ground that the Chief Justice, who was a member of the Bench was also a member of the co-operative society for which the disputed land had been acquired.

In *Visakapatanam Co-operative Motor Transport Ltd.* v. *G. Bangaruraju*[45], a cooperative society had asked for a permit. The Collector was the President of that society and he was also a Chairman of the Regional Transport Authority who had granted the permit in favour of the society. The court set aside the decision as being against the principles of natural justice.

(B) Personal bias

The second type of bias is personal one. Here a judge may be a relative, friend or business associate of a party or he may be personally hostile as a result of events occurring either before or during the course of a trial[46]

(i) Personal friendship

Personal friendship may be regarded as a disqualification provided there is a real likelihood of bias.

Cottle v. *Cottle*[47]

The Chairman of the Bench was a friend of the wife's family, who had instituted matrimonial proceedings against her husband. The wife had told the husband that the Chairman would decide

43. AIR 1957 SC 425 (429): (1957) SCR 575 (581).
44. AIR 1965 SC 1096: (1965) 1 SCR 636.
45. AIR 1953 Mad 709. See also *Annamalai* v. *State*, AIR 1957 AP 739.
46. Griffith and Street (supra), p. 156 de Smith (supra) at p. 232.
47. (1939)2 All ER 535.

the case in her favour. The Divisional Court ordered rehearing.

A. K. Kraipak v. *Union of India*[48].

In this historical case, one *N* was a candidate for selection to the Indian Forest Service and was also a member of the Selection Board. *N* did not sit on the Board when his own name was considered. *N* was recommended by the Board and was selected by the PSC. The candidates, who were not selected filed a writ petition for quashing the selection of *N* on the ground that the principles of natural justice were violated. The Supreme Court upheld the contention and set aside the selection of *N*.

(ii) Personal hostility

Strong personal hostility towards a party disqualifies a judge from adjudicating a dispute, if it gives rise to a real likelihood of bias.

R. v. *Handley*[49]

A magistrate was held to be disqualified from hearing a case filed against an accused, who had beaten up the magistrate recently.

Meenglass Tea Estate v. *Workmen*[50]

A manager himself conducted an inquiry against a workman for the allegation that he had beaten up the manager. Held, that the inquiry was vitiated.

Mineral Development Ltd. v. *State of Bihar*[51]

There existed political rivalry between *M* and the Revenue Minister, who had cancelled the licence of *M*. A criminal case was also filed by the Minister against *M*. It was held that there was personal bias against *M* and the Minister was disqualified from taking any action against *M*.

(iii) Family relationship

Like personal friendship, family relationship has always been

48. (1969) 2 SCC 262 : AIR 1970 SC 150.
49. (1921) 61 DLR 585.
50. AIR 1963 SC 1719.
51. AIR 1960 SC 468. See also *Dr. G. Sarana* v. *University of Lucknow*, (1976) 3 SCC 585 : AIR 1976 SC 2428.

considered as a ground to disqualify a judge in the province of adjudication.

Ladies of the Sacred Heart of Jesus v. *Armstrong*[52]

In this case, the Chairman was the husband of an executive officer of a body which was a party before the tribunal. The decision was set aside on that ground.

D. K. Khanna v. *Union of India*[53]

In this case, the selection of a candidate was quashed as the candidate's son-in-law was one of the members of the Selection Committee.

(iv) Professional relationship

Professional, business or other vocational relationship between a judge and the parties before him may debar him.

West End Service v. *I. T. Council*[54]

A garage proprietor applied to the Council to exempt him from a by-law requiring to close his garage early. The application was rejected by the Council. Three councillors were competitors in the business. The decision of the Council was quashed.

(v) Employer and employee

If a judge is an employer or employee of one of the parties to the dispute, the possibility or likelihood of bias cannot be ruled out and he cannot adjudicate upon the matter.

R. v. *Hoseason*[55]

A magistrate cannot convict his own employee for breach of contract on a complaint filed by his bailiff.

(C) Bias as to subject-matter

General

The third type is bias as to the subject-matter. This may arise when the judge has a general interest in the subject-

52. (1961) 29 DLR 373.
53. AIR 1973 HP 30.
54. (1958) 11 DLR 364.
55. (1811) 14 East 605.

matter. According to Griffith and Street[56] 'only rarely will this bias invalidate proceedings'. A mere general interest in the general object to be pursued would not disqualify a judge from deciding the matter. There must be some direct connection with the litigation. Wade[57] remarks that ministerial or departmental policy cannot be regarded as a disqualifying bias. Suppose a Minister is empowered to frame a scheme after hearing the objections. The procedure for hearing the objections is subject to the principles of natural justice insofar as they require a fair hearing. But the Minister's decision cannot be impugned on the ground that he has advocated the scheme or he is known to support it as a matter of policy. In fact, the object of giving power to the Minister is to implement the policy of the government. In *Ridge* v. *Baldwin*[58], referring to the schemes, Lord Reid rightly observed that the Minister "cannot be prevented from attaching more importance to the fulfilment of his policy than to the fate of individual objectors and it would be quite wrong for the courts to say that the Minister could or should act in the same kind of way as a board of works deciding whether a house should be pulled down".

Jain and Jain[59] have classified this bias into four categories:

(i) Partiality

A Judge may be disqualified if there is direct connection between the adjudicating authority and the issue in controversy.

State of U. P. v. *Mohammad Nooh*[60]

A departmental inquiry was held against *A* by *B*. As one of the witnesses against *A* turned hostile *B* left the inquiry, gave evidence against *A*, resumed to complete enquiry and passed the order of dismissal. The Supreme Court held that 'the rules of natural justice were completely discarded and all canons of fair play were grievously violated by *B*'.

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56. *Administrative Law*, (supra), p. 156.
57. *Administrative Law*, (1977) pp. 415-18.
58. (1963) 2 All ER 66 (76): (1964) AC 40 (72).
59. *Principles of Administrative Law*, (1973), p. 178.
60 AIR 1958 SC 86. See also *Andhra Scientific Co.* v. *Sheshagiri Rao*, AIR 1967 SC 408: (1961) 1 LLJ 117.

R. v. *Deal Justices*[61]

A magistrate was a subscriber to the Royal Society for the Prevention of Cruelty to Animals. As he had no control over any prosecution by the society, he was not disqualified from trying a charge of cruelty to a horse brought by the society.

(ii) Departmental bias

As discussed above, mere 'official' or 'policy' bias may not necessarily be held to disqualify an official from acting as an adjudicator unless there is total non-application of mind or has pre-judged the issue or has taken improper attitude to uphold the policy of the department, so as to constitute a *legal* bias.

Gullapalli Nageshwara Rao v. *A. P. S. R. T. Corp.*[62]

(*Gullapalli I*) The petitioners were carrying on motor transport business The Andhra State Transport Undertaking published a scheme for nationalisation of motor transport in the State and invited objections. The objections filed by the petitioners were received and heard by the Secretary and thereafter the scheme was approved by the Chief Minister. The Supreme Court upheld the contention of the petitioners that the official who heard the objections was 'in substance' one of the parties to the dispute and hence the principles of natural justice were violated.

But in *Gullapalli II*[63], the Supreme Court qualified the application of the doctrine of official bias. Here the hearing was given by the Minister and not by the Secretary. The Court held that the proceedings were not vitiated as 'the Secretary was a part of the department but the Minister was only primarily responsible for the disposal of the business pertaining to that department'.

(iii) Prior utterances and pre-judgment of issues

Sometimes, the Minister or the official concerned announces beforehand the general policy he intends to follow. In this regard, the correct legal position is that if the prior policy statement is

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61. (1861) 45 LT 439.
62. AIR 1959 SC 308: (1959) Supp (1) SCR 319.
63. *Gullapalli Nageshwara Rao* v. *APSRT Corpn.*, AIR 1959 SC 1376.

a 'final and irrevocable' decision, the same would operate as a disqualification, otherwise not.

K. S. Rao v. *State of Hyderabad*[64]

In this case, the inquiry officer was held to be disqualified to conduct enquiry against the delinquent for his removal from service on the ground that before the commencement of enquiry he had expressed a strong view that the delinquent should be dismissed from service.

Kondala Rao v. *A. P. Transport Corporation*[65]

A scheme of nationalisation of bus services was prepared by the Transport Corporation. The objections were invited and they were heard by the Minister of Transport, who had presided over a meeting of an official committee a few days earlier in which nationalisation was favoured. It was contended that the Minister had prejudiced the issue and therefore, he was disqualified to decide the objections filed against the proposed scheme. The court rejected the contention on the ground that the decision of the committee was not 'final and irrevocable', but merely a policy decision and therefore, there was no bias.

(iv) Acting under dictation

If any official, judge or minister is empowered to decide any matter, he must exercise his own judgment, decide it himself independently and he cannot leave it to any other authority, and if he decides the matter under dictation from a superior authority, the decision is not valid.

Mahadayal v. *C. T. O.*[66]

According to the Commercial Tax Officer, the petitioner was not liable to pay tax, and yet, he referred the matter to his superior officer and on instructions from him imposed tax. The Supreme Court set aside the decision.

Test: Real likelihood of bias

As discussed above, a pecuniary interest, however small it

64. AIR 1957 AP 614.
65. AIR 1961 SC 82: (1961) 1 SCR 642.
66. A R 1958 SC 667: *See also* Lecture VIII (infra).

may be, disqualifies a person from acting as a judge.[67] But that is not the position in case of personal bias or bias as to subject matter. Here the test is whether there is a *real likelihood of bias* in the judge.[68]

de Smith[69] says, a 'real likelihood' of bias means at least substantial possibility of bias. Vaugham Williams, L. J.[70] rightly says that the court will have to judge the matter 'as a reasonable man would judge of any matter in the conduct of his own business'. In the words of Lord Hewart, C. J.[71] the answer to the question whether there was a real likelihood of bias 'depends not upon what actually was done but upon what might appear to be done. *Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice*'. (emphasis supplied) As Lord Denning[72] says "the reason is plain enough. Justice must be rooted in confidence: and *confidence is destroyed when right minded people go away thinking: 'the judge was biased'*". (emphasis supplied)

The same principle is adopted in India. In *Manak Lal* v. *Dr. Prem Chand*[73], a complaint was filed by *A* against *B*, an advocate for an alleged act of misconduct. *A* disciplinary committee was appointed to make an enquiry into the allegations made against *B*. The Chairman had earlier represented *A* in a case. The Supreme Court held that the enquiry was vitiated even if it were assumed that the Chairman had no personal contact with his client and did not remember that he had appeared on his behalf at any time in the past. The Court laid down the test in the following words:

> In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal.[74]

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67. Griffith and Street (supra), p. 156.
68. *R.* v. *Camborne Justices*, (1955) 1 Q B 41.
69. *Judicial Review of Administrative Action*, (1973), p. 230.
70. *R.* v. *Sunderland*, (1901) 2 K B 357 (373).
71. *R.* v. *Sussex Justices*, (1924) 1 K B 256 (259).
72. *Metropolitan Properties Ltd.* v. *Lannon* (1969) 1 Q B 577.
73. AIR 1957 SC 425.
74. *Ibid.* at p. 429.

The same principle is followed by the court in a number of decisions.[75]

But at the same time, it should not be forgotten that the test of a real likelihood of bias must be based on the reasonable apprehensions of a reasonable man fully apprised of the facts. It is no doubt desirable that all judges, like Caesar's wife must be above suspicion, but it would be hopeless for the courts to insist that only 'people who cannot be suspected of improper motives' were qualified at common law to discharge judicial functions, or to quash decisions on the strength of the suspicions of fools or other capricious and unreasonable people.[76] The following observations of Frank, J. in *Re Linahan*[77] are worth quoting:

> If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial, and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition are prejudices.

As Slade, J.[78] states, it is necessary to remember Lord Hewart's principle that it is of fundamental importance that justice should not only be done, but should manifestly and

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75. *Gullapalli I*, AIR 1959 SC 308: 1959 Supp 1 SCR 319.
Gullapalli II, AIR 1959 SC 1376: (1960) 1 SCR 580.
Kraipak's case, (supra).
Dr. G. Sarana's case, (supra).

76. de Smith (supra) p. 230.

77. (1943) 138 F 2nd 650 (652).
See also the following observations:

> "I have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas! we are 'all the common growth of Mother Earth'—even those of us who wear the long robe."
>
> —MR. JUSTICE JOHN CLARKE

> "Judges have preferences for social policies as you and I. They form their judgments after the varying fashions in which you and I form ours. They have hands, organs, dimensions, senses, affections, passions. They are warmed by the same winter and summer and by the same ideas as a layman is."
>
> —THOMAS REED POWELL

78. *R.* v. *Camborne Justices* (supra) at p. 52.

undoubtedly be seen to be done without giving currency to 'the erroneous impression that *it is more important that justice should appear to be done than that it should in fact be done*'. (emphasis supplied)

(2) Audi alteram part em

Principle explained

The second fundamen tal principle of natural justice is *audi alteram partem*, i.e. no man should be condemned unheard, or both the sides must be heard before passing any order. de Smith[79] says, 'No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the case against him'. 'A party is not to suffer in person or in purse without an opportunity of being heard.'[80] This is the first principle of civilised jurisprudence and is accepted by laws of Men and God. In short, before an order is passed against any per son, reasonable opportunity of being heard must be given to him. Generally, this maxim includes two elements: (A) Notice; and (B) Hearing.

(A) Notice

Before any action is taken, the affected party must be given a notice to show cause against the proposed action and give his explanation. It is a *sine quo non* of the right of fair hearing. Any order passed without giving notice is against the principles of natural justice and is void *ab initio*.[81]

Bagg's case[82]

In this case, James Bagg, a Chief Burgess of Plymouth had been disfranchised for unbecoming conduct inasmuch as it was alleged that he had told the Mayor, 'You are cozening knave. I will make thy neck crack' and by 'turning the hinder part of his body in an inhuman and uncivil manner' towards the Mayor, said, 'Come and kiss'. He was reinstated by mandamus as no notice or hearing was given to him before passing the impugned order.

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79. *Judicial Review* (supra), p. 136.
80. *Painter* v. *Liverpool Oil Gas Light Co.*, (1836) 3 A & E 433 (448-49).
81. *Municipal Board* v. *State Transport Authority*, AIR 1966 SC 459; *Prem Bus Service* v. *R.T.A.*, AIR 1968 Punj. 344.
82. (1615) 11 Co. Rep. 93 b.

Dr. Bentley's case[83]

Dr. Bentley was deprived of his degrees by the Cambridge University on account of his alleged misconduct without giving any notice or opportunity of hearing. The Court of King's Bench declared the decision as null and void. According to Fortescue, J. the first hearing in human history was given in the Garden of Eden. His Lordship observed:

> [E]ven God himself did not pass sentence upon Adam, before he was called upon to make his defence. "Adam", says God, "Where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?"

Even if there is no provision in the statute about giving of notice, if the order in question adversely affects the rights of an individual, the notice must be given.[84] The notice must be clear, specific and unambiguous and the charges should not be vague and uncertain.[85] The object of notice is to give an opportunity to the individual concerned to present his case and therefore, if the party is aware of the charges or allegations, a formal defect would not invalidate the notice, unless the prejudice is caused to the individual.[86] Whether a prejudice is caused or not is a question of fact and it depends upon the facts and circumstances of the case. Moreover, the notice must give a reasonable opportunity to comply with the requirements mentioned therein. Thus, to give 24 hours time to dismantle structure alleged to be in a dilapidated condition is not proper and the notice is not valid.[87] If the inquiry is under Article 311 of the Constitution of India, two notices (first for charges or allegations and second for proposed punishment) should be given.[88] Where a notice regarding one charge has been given,

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83. *R.* v. *University of Cambridge*, (1723) 1 Str. 757.
84. *Copper's* case (infra); *East Indian Commercial Co.* v. *Collector of Customs*, AIR 1962 SC 1893: (1962) 3 SCR 338.
85. *N. R. Co-operative Society* v. *Industrial Tribunal*, AIR 1967 SC 1182; *B. D. Gupta* v. *State of Haryana*, (1973) 3 SCC 149: AIR 1972 SC 2472.
86. *Bhagwan Datta* v. *Ram Ratanji*, AIR 1960 SC 200; *Fazal Bhai* v. *Custodian General*, AIR 1961 SC 1397.
87. *State of J. K.* v. *Haji Vali Mohammed*, (1972) 2 SCC 402: AIR 1972 SC 2538.
88. It may be noted here that by the Constitution (42nd Amendment) Act, 1976, the provision regarding second notice has been deleted.

the person cannot be punished for a different charge for which no notice or opportunity of being heard was given to him.[89]

(B) Hearing

The second requirement of *audi alteram partem* maxim is that the person concerned must be given an opportunity of being heard before any adverse action is taken against him.

Cooper v. *Wandsworth Board of Works*[90]

The defendant board had power to demolish any building without giving any opportunity of hearing if it was erected without prior permission. The board demolished the house of the plaintiff under this provision. The action of the board was not in violation of the statutory provision. The court held that the Board's power was subject to the qualification that no man can be deprived of his property without having an opportunity of being heard.

Ridge v. *Baldwin*[91]

In this historic case, the plaintiff, a chief constable had been prosecuted but acquitted on certain charges of conspiracy. In the course of the judgment certain observations were made by the presiding judge against the plaintiff's character as a senior police officer. Taking into account these observations, the Watch Committee dismissed the plaintiff from service.

The Court of Appeal held that the Watch Committee was acting as an administrative authority and was not exercising judicial or *quasi*-judicial power, and therefore, the principles of natural justice did not apply to their proceedings for dismissal. Reversing the decision of the Court of Appeal, House of Lords by majority of four to one held that the power of dismissal could not be exercised without giving a reasonable opportunity of being heard and without observing the principles of natural justice. The order of dismissal was, therefore, held to be illegal.

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89. *Annamuthado* v. *Oilfields Workers*, (1961) 3 All ER 621; *Govindsinh* v. *G. Subbarao*, (1970) 11 GLR 897 (918-19).
90. (1863) 14 C B (N S) 180.
91. (1964) AC 40: (1963) 2 All ER 66.

State of Orissa v. *Dr. (Miss) Binapani Dei*[92]

The petitioner was compulsorily retired from service on the ground that she had completed the age of 55 years. No opportunity of hearing was given to her before the impugned order was passed. The Supreme Court set aside the order as it was violative of the principles of natural justice.

Maneka Gandhi v. *Union of India*[93]

In a recent case, the passport of the petitioner-journalist was impounded by the Government of India 'in public interest'. No opportunity was given to the petitioner before taking the impugned action. The Supreme Court held that the order was violative of the principles of natural justice.

The following propositions can be said to have been established:

(1) The adjudicating authority must be impartial and without any interest or bias of any type.[94]

(2) Where the adjudicating authority is exercising judicial or *quasi*-judicial power, the order must be made by that authority and that power cannot be delegated or sub-delegated to any other officer.[95]

(3) The adjudicating authority must give full opportunity to the affected person to produce all the relevant evidence in support of his case. In *Malikram* v. *State of Rajasthan*[96], the scope of hearing was confined by the enquiry officer only to the hearing of arguments and rejected the application of the appellant to lead oral or documentary evidence. The Supreme Court set aside the decision.

(4) The adjudicating authority must disclose all material placed before it in the course of the proceedings and cannot utilise any material unless the opportunity is given to the party against whom it is sought to be utilised.

92. AIR 1967 SC 1269: (1967) 2 SCR 625.
93. (1978) 1 SCC 248: AIR 1978 SC 597.
94. Supra pp. 122-133.
95. *See* Lecture V (supra).
96. AIR 1961 SC 1575: (1962) 1 SCR 978.

Thus, in *Dhakeshwari Cotton Mills* v. *C. I. T.*[97], the Supreme Court set aside the order passed by the Income Tax Appellate Tribunal on the ground that it did not disclose some evidence to the assessee produced by the department.

(5) The adjudicating authority must give an opportunity to the party concerned to rebut the evidence and material placed by the other side. In *Bishambhar Nath* v. *State of U. P.*[98], in revision proceedings, the Custodian General accepted new evidence produced by one party, but no opportunity was given to the other side to meet with the same. The Supreme Court held that the principles of natural justice were violated.

(6) As stated above, the adjudicating authority must disclose the evidence which it wants to utilise against the person concerned and also give him an opportunity to rebut the same; but it does not *necessarily* mean that the right of cross-examination of witnesses should be given to him. It depends upon the facts and circumstances of each case and the statutory provisions.[99]

Generally, in disciplinary proceedings under Article 311 of the Constitution of India against the civil servants[1] and in cases of domestic inquiries by employers against their employees under the factory laws,[2] it is held that the right of cross-examination of witnesses is necessary.

In *State of Kerala* v. *K. T. Shaduli*[3], the returns filed by the respondent-assessee on the basis of his books of account appeared to the Sales Tax Officer to be incomplete and incorrect, since certain sales appearing in the books of accounts of a wholesale dealer were not mentioned in the account books of the respondent. The

97. AIR 1955 SC 65. See also *Shivabasappa's* case (infra).
98. AIR 1966 SC 573; But see *Fedco* v. *Bilgrami*, AIR 1960 SC 415.
99. *See also* de Smith (supra), p. 188.
1. *Khemchand* v. *Union of India*, AIR 1958 SC 300; *Union of India* v. *T. R. Verma*, AIR 1957 SC 882.
2. *Central Bank of India* v. *Karunamoy*, AIR 1968 SC 266; *Meenglass Tea Estate* (supra).
3. (1977) 2 SCC 777 : AIR 1977 SC 1627.

respondent applied to the S. T. O. for opportunity to cross-examine the wholesale dealer which was rejected by him. Holding the decision of the S. T. O. to be illegal, the Supreme Court held that the respondent could prove the correctness and completeness of his returns only by showing that the entries in the books of accounts of the wholesale dealer were false and bogus and this obviously respondent could not do unless he was given an opportunity to cross-examine the wholesale dealer.

On the other hand in externment proceedings,[4] and in proceedings before the customs authorities to determine whether the goods were smuggled or not,[5] the right of cross-examination is not necessary.

In *Hiranath Mishra* v. *Principal, Rajendra Medical College*[6], the appellants-male students, entered quite naked into the compound of the girls' hostel late at night. Thirty-six girl students filed a confidential complaint with the Principal of the college, who appointed an Enquiry Committee. The Committee recorded the statements of girl students but not in presence of the appellants. The photographs of the appellants were mixed up with 20 photographs of other students and the girls 'by and large' identified the appellants. The appellants were then called upon by the Committee and they were explained about the charges against them. The appellants denied the charges and stated they had never left their hostel. The Committee found the appellants guilty and finally they were expelled from the college.

The said order was challenged by the appellants as violative of the principles of natural justice inasmuch as the statements of the girl students were recorded behind their back and that no opportunity was given to them to cross-examine those girl students. The Supreme Court rejected these contentions. According to the Court 'the girls would not have ventured to make their statements in the presence of miscreants because if they did, they would have most certainly exposed themselves to retaliation and harassment thereafter. The college authorities are in no position to protect the girl students outside the college precincts'.

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4. *Gurbachan* v. *State of Bombay*, AIR 1952 SC 221.
5. *Kanungo & Co.* v. *Collector of Customs*: (1973) 2 SCC 438: AIR 1972 SC 2136.
6. (1973) 1 SCC 805: AIR 1973 SC 1260.

(7) Oral or personal hearing is not a part of natural justice and cannot be claimed as of right.[7]

(8) Representation through counsel or an advocate also cannot be claimed as a part of natural justice.[8]

(9) The adjudicating authority is not *always* bound to give reasons in support of its order, but the recent trend is that it is considered to be a part of natural justice.[9]

(10) If hearing is not given by the adjudicating authority to the person concerned and the principles of natural justice are violated the order is void and it cannot be justified on the ground that hearing *'would make no difference'* [10] or *'no useful purpose would have been served,*[11] *In General Medical Council* v. *Spackman*[12], Lord Wright observed: "If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of natural justice. *The decision must be declared to be no decision.*" ((emphasis supplied)

Thus, in *Board of High School* v. *Kumari Chitra*[13], the Board cancelled the examination of the petitioner who had actually appeared at the examination on the ground that there was shortage in attendance at lectures. But no notice was given to her before taking the action. The said order was challenged as violative of the principles of natural justice. On behalf of the Board it was contended that the facts were not in dispute and therefore, *'no useful purpose would have been served'* by giving a show cause notice to the petitioner. The Supreme Court set aside the decision of the Board, holding that the Board was acting in a *quasi*-judicial capacity and therefore, it must observe the principles of natural justice.

7. *See* 'Oral hearing' (infra).
8. *See* 'Right of Counsel' (infra).
9. *See* 'Speaking orders' (infra).
10. Wade: *Administrative Law*, (1977), pp. 461–62.
11. *Kumari Chitra's* case (infra).
12. (1943) AC 627 (644-45).
13. (1970) 1 SCC 121: AIR 1970 SC 1039.

(11) A hearing given on appeal is not an acceptable substitute for a hearing not given before the initial decision[14].

7. Oral or Personal Hearing

As discussed above, an adjudicating authority must observe the principles of natural justice and must give a reasonable opportunity of being heard to the person against whom the action is sought to be taken. But in England[15] and in America[16] it is well settled law that in absence of statutory provision, an administrative authority is not bound to give the person concerned an *oral* hearing. In India also, the same principle is accepted and oral hearing is not regarded as a *sine qua non* of natural justice. A person is not entitled to an oral hearing[17], unless such a right is conferred by the statute.[18] In *M. P. Industries* v. *Union of India*[19], Subba Rao, J. (as he then was) observed :

> It is no doubt a principle of natural justice that a *quasi*-judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him (but) [*t*]*he said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal.*[20] (emphasis supplied)

Thus, it is well established that principles of natural justice do not require personal hearing and if all the relevant circumstances have been taken into account before taking the impugned action, the said action cannot be set aside *only* on the ground that personal hearing was not given.[21]

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14. Wade (supra) p. 465.
15. *Local Govt. Board* v. *Alridge*, (1915) AC 120 : *See also* Wade (supra) pp. 461-62 : de Smith (supra), pp. 177-78 ; 186-89.
16. *F. C. C.* v. *W. J. R.*, (1949) 337 U S 265.
17. *A. K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 (43) ; *F. N. Roy* v. *Collector of Customs*, AIR 1957 SC 648 ; *Union of India* v. *J. P. Mitter*, (1971) 1 SCC 396 : AIR 1971 SC 1093 ; *State of Assam* v. *Gauhati Municipality* AIR 1967 SC 1398.
18. *Farid Ahmed* v. *Ahmedabad Municipality*, (1976) 3 SCC 719 : AIR 1976 SC 2093.
19. AIR 1966 SC 671.
20. *Ibid.* at p. 675.
21. *State of Maharashtra* v. *Lok Sikshan Sansthan*, (1971)2 SCC 410 (425) ; *Union of India* v. *Prabhavalkar*, (1973) 4 SCC 183 (193).

As already discussed, the principles of natural justice are flexible and whether they were observed in a given case or not depends upon the facts and circumstances of each case. The test is that the adjudicating authority must be impartial, 'fair hearing' must be given to the person concerned, and that he should not be 'hit below the belt'.[22]

But at the same time, it must be remembered that a 'hearing' will normally be an oral hearing.[23] As a general rule, 'an opportunity to present contentions orally, with whatever advantages the method of presentation has, is one of the rudiments of the fair play required when the property is being taken or destroyed.[24] de Smith[25] also says that 'in the absence of clear statutory guidance on the matter, one who is entitled to the protection of the *audi alteram partem* rule is now prima facie entitled to put his case orally'. Again, if there are contending parties before the adjudicating authority and one of them is permitted to give oral hearing the same facility must be afforded to the other[26], or where complex legal and technical questions are involved it is necessary to give oral hearing.[27] Thus, in absence of statutory requirement about oral hearing courts will have to decide the matter taking into consideration the facts and circumstances of the case.

8. Right of Counsel

The right of representation by a lawyer is not considered to be a part of natural justice and it cannot be claimed as of right,[28] unless the said right is conferred by the statute.[29] In *Pett* v.

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22. Per Krishna Iyer, J. *Shrikrishnadas* v. *State of M. P.*, (1977) 2 SCC 741 (745) : AIR 1977 SC 1691 (1694).
23. Wade : *Administrative Law*, (1977) 461.
24. *Standard Airlines* v. *Civil Aeronautics Board*, (1949) F. 2nd 18 (21).
25. *Judicial Review of Administrative Action*, p. 177.
26. *R.* v. *Kingston-upon-Hull Rent Tribunal*, (1949) 65 T L R 209.
27. *Travancore Rayons* v. *Union of India*, (1969) 3 SCC 868 (871) : AIR 197 1SC 862 (864).
28. *Kalindi* v. *Tata Locomotive*, AIR 1960 SC 914; *Mohinder Singh Gill's* case, (1978) 1 SCC 405 (439).
29. *H. C. Sarin* v. *Union of India*, (1976) 4SCC 765 : AIR 1976 SC 1686.

Greyhound Racing Association (II)[30], Lyell, J. observed:

> I find it difficult to say that legal representation before a tribunal is an elementary feature of the fair dispensation of justice. It seems to me that *it arises only in a society which has reached some degree of sophistication in its affairs.* (emphasis supplied)

But speaking generally, the right to appear through a counsel has been recognised in administrative law. C. K. Allen[31] rightly says, '....[E]xperience has taught me that to deny persons who are unable to express themselves the services of a competent spokesman is a very mistaken kindness.'' In *Pett* v. *Greyhound Racing Association (I)*[32], Lord Denning observed:

> ....[W]hen a Man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor....*Even a prisoner can have his friend.* (emphasis supplied)

de Smith[33] is also of opinion that in general, 'legal representation of the right quality before statutory tribunals is desirable, and that *a person threatened with social or financial ruin by disciplinary proceedings in a purely domestic forum may be gravely prejudiced if he is denied legal representation'*. (emphasis supplied)

Some statutes do not permit appearance of legal practitioners; e. g. factory laws; some statutes permit appearance of advocates only with the permission of the tribunal concerned, e. g. Industrial Disputes Act, 1947; while in some statutes, the right to be represented through an advocate is recognised, e. g. Income Tax Act, 1961.

If the matter is very simple, e. g. whether the amount in question is paid or not,[34] or whether the assessment orders were correct[35], the request for legal representation can be rejected. On the other hand, if the oral evidence produced at the enquiry requires services of a lawyer for cross-examination of witnesses,[35] or legal complexity is involved therein[35] or where complicated

30. (1969) 2 All ER 221: (1970) 1 QB 46.
31. *Administrative Jurisdiction*, (1956), p. 79.
32. (1968) 2 All ER 545: (1969) 1 QB 125.
33. *Judicial Review of Administrative Action*, p. 188.
34. *H. C. Sarin's* case (supra).
35. *Krishna Chandra* v. *Union of India*, (1974) 4 SCC 374: AIR 1974 SC 1589.

questions of fact and law arise, where the evidence is voluminous and the party concerned may not be in a position to meet with the situation effectively or where he is pitted against a trained prosecutor,[36] he should be allowed to engage a legal practitioner to defend him 'lest the scales should be weighed against him'.[36] These are all relevant grounds and in these circumstances, refusal to permit legal assistance may cause serious prejudice to the person concerned and may amount to a denial of reasonable opportunity of being heard.

9. Speaking Orders

A speaking order means an order speaking for itself and giving reasons. de Smith[37] says there is no general rule of English law that reasons must be given for administrative or even judicial decisions. In India also, till very recently it was not accepted that the requirement to pass speaking orders is one of the principles of natural justice. But as Lord Denning[38] says, 'the giving of reasons is one of the fundamentals of good administration'. The condition to record reasons introduces clarity and excludes arbitrariness and satisfies the party concerned against whom the order is passed. Today, the old 'police state' has become 'welfare state'. The governmental functions have increased, administrative tribunals and other executive authorities have come to stay and they are armed with wide discretionary powers and there are all possibilities of abuse of power by them. To provide a safeguard against the arbitrary exercise of powers by these authorities, the condition of recording reasons is imposed on them. It is true that even the ordinary law courts do not *always* give reasons in support of the orders passed by them when they dismiss appeals and revisions summarily. But regular courts of law and administrative tribunals cannot be put at par with. I must quote here the following powerful observations of Subba Rao, J. (as he then was) in *M. P. Industries* v. *Union of India*[39]:

> There is an essential distinction between a Court and an administrative tribunal. A Judge is trained to look at

36. *C. L. Subramaniam* v. *Collector of Customs*, (1972) 3 SCC 542: AIR 1972 SC 2178.
37. *Judicial Review of Administrative Action*, p. 128.
38. *Breen* v. *Amalgamated Engg. Union*, (1971) 1 All ER 1154.
39. AIR 1966 SC 671.

> things objectively, but, an executive officer generally looks at things from the stand-point of policy and expediency. The habit of mind of an executive officer so formed cannot be expected to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of parties: and *the least they should do is to give reasons for their orders.*[40] (emphasis supplied)

If the statute requires recording of reasons, then it is the statutory requirement and therefore, there is no scope for further inquiry. But even when the statute does not impose such an obligation it is necessary for the *quasi*-judicial authority to record reasons, as it is the 'only visible safeguard against possible injustice and arbitrariness'[41] and affords protection to the person adversely affected. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision, whether it is purely administrative or *quasi*-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable.[41] The courts insist upon disclosure of reasons in support of the order on three grounds: (1) the party aggrieved has the opportunity to demonstrate before the appellate or revisional court that the reasons which persuaded the authority to reject his case were erroneous; (2) the obligation to record reasons operates as a deterrent against possible arbitrary action by executive authority invested with judicial power; and (3) it gives satisfaction to the party against whom the order is made. The power to refuse to disclose reasons in support of the order is of 'an exceptional in nature and *it ought to be exercised fairly, sparingly and only when fully justified by the exigencies of an uncommon situation.*[42] (emphasis supplied)

If the order passed by the adjudicating authority is subject to appeal or revision, the appellate or revisional court will not be in a position to understand what weighed with the authority and whether the grounds on which the order was passed were

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40. AIR 1966 SC 671 at p. 675.
41. *Union of India* v. *M. L. Capoor*, (1973) 2 SCC 836: AIR 1974 SC 87.
42. Per Chandrachud, J. in *Maneka Gandhi's* case (supra), at p. 323.

relevant, existent and correct; and the exercise of the right of appeal would be futile. It may be stated here that by a recent pronouncement of the Supreme Court in *Siemens Engineering* v. *Union of India*[43], it is held that the rule requiring reasons to be recorded by *quasi*-judicial authorities in support of the orders passed by them is a basic priniciple of natural justice. In the aforesaid case, speaking for the Court, Bhagwati, J. observed:

> If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising *quasi*-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. *The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice* which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.[44] (emphasis supplied)

Very recently, the same view is reiterated by the Supreme Court in *Maneka Gandhi's* case (supra), wherein Bhagwati, J. observed:

> ....[T]he Central Government was wholly unjustified in withholding the reasons for impounding the passport from the petitioner and this way not only in the breach of statutory provision, but *it also amounted to denial of opportunity of hearing to the petitioner. The order impounding the passport of the petitioner was, therefore, clearly in violation of the rule of natural justice embodied in the maxim audi alteram partem....*[44a] (emphasis supplied)

In *Commissioner of Income Tax* v. *Walchand*[45], Shah, J. (as he then was) rightly observed: "The practice of recording a decision without reasons in support cannot but be deprecated".

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43. (1976) 2 SCC 981: AIR 1976 SC 1785, see also *Testeels Ltd.* v. *N. M. Desai*, (1969) 10 GLR 622: AIR 1970 Guj 1 (FB).
44. *Ibid.* at pp. 986-87 (SCC); p. 1789 (AIR).
44a. (1978) 1 SCC 248 (292): AIR 1978 SC 597 (630).
45. AIR 1967 SC 1435 (1437): (1967) 3 SCR 214 (217).

The law relating to 'speaking orders' may be summed up thus:

(1) Where a statute requires recording of reasons in support of the order, it imposes an obligation on the adjudicating authority and the reasons must be recorded by the authority.[46]

(2) Even when the statute does not lay down expressly the requirement of recording reasons, the same can be inferred from the facts and circumstances of the case.[47]

(3) Mere fact that the proceedings were treated as confidential does not dispense with the requirment of recording reasons.[48]

(4) If the order is subject to appeal or revision (including special leave under Article 136 of the Constitution), the necessity of recording reasons is greater as without reasons the appellate or revisional authority cannot exercise its power effectively inasmuch as it has no material on which it may determine whether the facts were correctly ascertained, law was properly applied and the decision was just and based on legal, relevant and existent grounds. Failure to disclose reasons amounts to depriving the party of the right of appeal or revision.[49]

(5) There is no prescribed form and the reasons recorded by the adjudicating authority need not be detailed or

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46. *Collector of Monghyr* v. *Keshav Prasad*, AIR 1962 SC 1694 (1700); *Union of India* v. *M. L. Capoor* (supra); *Ajantha Ind* v. *Central Board*, AIR 1976 SC 437 (439-41).
47. *Bhagat Raja* v. *Union of India*, AIR 1967 SC 1606 (1610); *State of Gujarat* v. *Krishna Cinema*, (1970) 2 SCC 744: AIR 1971 SC 1650; *Bhagat Ram* v. *State of Punjab*, (1972) 2 SCC 170 (178-79): AIR 1972 SC 1571 (1577-78).
48. *Harinagar Sugar Mills* v. *Shyam Sunder*, AIR 1961 SC 1669 (1678, 1683).
49. *M. P. Industries'* case (supra) *Bhagat Raja's* case (supra) *Mahavir Prasad* v. *State of U. P.*, (1970) 1 SCC 764: AIR 1970 SC 1302; *Travancore Rayons* v. *Union of India*, (1969) 3 SCC 868: AIR 1971 SC 862; *Harinagar Sugar Mills'* case (supra); *Sardar Govindrao* v. *State*; AIR 1965 SC 1222.

elaborate and the requirement of recording reasons will be satisfied if only relevant reasons are recorded.[50]

(6) If the reasons recorded are totally irrelevant, the exercise of power would be bad and the order is liable to be set aside.[51]

(7) It is not necessary to record reasons by the appellate authority when it affirms the order passed by the lower authority.[52]

(8) Where the lower authority does not record reasons for making an order and the appellate authority merely affirms the order without recording reasons, the order passed by the appellate authority is bad.[53]

(9) Where the appellate authority reversed the order passed by the lower authority reasons must be recorded, as there is a vital difference between an order of reversal and an order of affirmation.[54]

(10) The validity of the order passed by the statutory authority must be judged by the reasons recorded therein and cannot be construed in the light of subsequent explanations given by the authority concerned[55] or filing affidavit. *'Orders are not like old wine becoming better as they grow older'*.[56] (emphasis supplied)

(11) If the reasons are not recorded in support of the order, it does not *always* vitiate the action.[57]

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50. *M. P. Industries'* case (supra); *Bhagat Raja's* case (supra); *Shri Ram Vilas* v. *Chandra Shekharan*, AIR 1965 SC 107; *Mohd. Yasin Ali* v. *Akbar Khan*, AIR 1976 SC 1866 (1882): (1977) 2 SCC 23 (41-42).
51. *Collector of Monghyr* (supra); *M/s. Hochtief Gammon* v. *State of Orissa*; (1975) 2 SCC 649: AIR 1975 SC 2226.
52. *Bhagat Raja's* case (supra); *M. P. Industries'* case (supra); *Travancore Rayons'* case (supra); *Tarachand Khatri* v. *Municipal Corporation of Delhi*, (1977) 1 SCC 472; AIR 1977 SC 567
53. *Bhagat Raja's* case (supra) at p. 1612-13
54. *M. P. Industries'* case (supra): *Bhagat Raja's* case (supra), at p. 1613; *State of Madras* v. *Shri Nivasan*; AIR 1966 SC 1827.
55. *Commissioner of Police, Bombay* v. *Gordhandas*, AIR 1952 SC 16.
56. *Per Krishna Iyer, J.*: *Mohinder Singh Gill* v. *Chief Election Commissioner*, (1978) 1 SCC 405 (417): AIR 1978 SC 851 (858)
57. *Mahavir Jute Mills* v. *Shibban Lal Saxena*, (1975) 2 SCC 818 (822): AIR 1975 SC 2057 (2060); *Rangnath* v. *Daulatrao*, (1975) 1 SCC 686: AIR 1975 SC 2146: *Nandram* v. *Union of India*, AIR 1966 SC 1922

(12) The duty to record reasons is a responsibility and cannot be discharged by the use of vague general words.[57a]

(13) The reasons recorded by the statutory authority are always subject to judicial scrutiny.[58]

This is the most valuable safeguard against any arbitrary exercise of power by the adjudicating authority. The reasons recorded by such authority will be judicially scrutinised, and if the court finds that the reasons recorded by such authority were irrelevant or extraneous, incorrect or non-existent, the order passed by the authority may be set aside. In *Padfield* v. *Minister of Agriculture*[59], the Minister gave reasons for refusing to refer the complaint to the Committee and gave detailed reasons for his refusal. It was admitted that the question of referring the complaint to a committee was within his discretion. When his order was challenged, it was argued that he was not bound to give reasons and if he had not done so, his decision could not have been questioned and his giving of reasons could not put him in a worse position. The House of Lords rejected this argument and held that his decision could have been questioned even if he had not given reasons. Lord Upjohn observed:

> [I]f he does not give any reason for his decision, it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly.

It is submitted that the aforesaid view is quite correct and as Lord Pearce[60] says, 'a Minister's failure or refusal to record reasons cannot be regarded as exclusion of judicial review. By merely keeping silence the Executive cannot prevent the Judiciary from considering the *whole question*'. The same principle is accepted in India. In *Hochtief Gammon* v. *State of Orissa* (supra), the Supreme Court held that it is the duty of the court to see that the Executive acts lawfully and it cannot avoid scrutiny by courts by failing to give reasons. "*Even if the Executive considers it inexpedient to exercise*

57a. *Elliot* v. *Southwark London Borough Council*, (1976) 1 WLR 499.

58. *Hochtief's* case (supra).

59. (1968) AC 997.

60. *Ibid.*

their powers they should state their reasons and there must be material to show that they have considered all the relevant facts.[61] (emphasis supplied)

I must conclude the matter by quoting the following powerful observations of Chandrachud, J. (as he was then) in *Maneka Gandhi* v. *Union of India*[62]:

> The reasons, if disclosed, being open to judicial scrutiny for ascertaining their nexus with the order impounding the passport, the refusal to disclose the reasons would equally be open to the scrutiny of the Court; or else, the wholesome power of a dispassionate judicial examination of executive orders could with impunity be set at naught by an obdurate determination to suppress the reasons. *Law cannot permit the exercise of a power to keep the reasons undisclosed if the sole reason for doing so is to keep the reasons away from judicial scrutiny.*[63] (emphasis supplied)

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61. Per Alagiriswami, J. in *Hochtief's* case (supra).
62. (1978) 1 SCC 248 : AIR 1978 SC 597.
63. *Ibid.* at p. 323 (SCC); p. 613 (AIR).

Lecture VII

ADMINISTRATIVE TRIBUNALS

Nothing is more remarkable in our present social and administrative arrangements than the proliferation of tribunals of many different kinds. There is scarcely a new statute of social or economic complexion which does not add to the number. —SIR C. K. ALLEN

The proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience and assisted by properly qualified advocates are fitted for the task. —LORD ROMER

.. [*T*]*ribunals have certain characteristics which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject.* —THE FRANKS COMMITTEE

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1. General

As discussed in Lecture III (supra), today the executive performs many legislative, *quasi*-legislative, judicial and *quasi*-judicial functions. Governmental functions have increased and even though according to the traditional theory, the function of adjudication of disputes is the exclusive jurisdiction of the ordinary courts of law, in reality, many judicial functions have come to be performed by the executive, *e.g.* imposition of fine, penalty leviable by Income Tax Officer for concealment of income, confiscation of smuggled goods, etc. The traditional theory of *'laissez faire'* has been given up and the old *'police state'* has now become a *'welfare state'*, and because of this radical change in the philosophy as to the role to be played by the state, its functions have increased. Today it exercises not only sovereign functions, but, as a progressive democratic state, it also seeks to ensure social security and social welfare for the common mass. It regulates the industrial relations, exercises control over production, starts many enterprises. The issues arising therefrom are not purely legal issues. It is not possible for the ordinary courts of law to deal with all these socio-economic problems. For example, industrial disputes between the workers and the management must be settled as early as possible. It is not only in the interest of the parties to the disputes, but of the society at large. Yet it is not possible for an ordinary court of law to decide these disputes expeditiously, as it has to function, restrained by certain innate limitations. All the same, it is necessary that such disputes should not be determined in an arbitrary or autocratic manner. Administrative tribunals are, therefore, established to decide various *quasi*-judicial issues in place of ordinary courts of law. These tribunals are recognised even by the Constitution of India.[1]

2. Definition

It is not possible to define the word 'tribunal' precisely and scientifically. According to the dictionary meaning,[2] 'tribunal'

1. Arts. 32, 136, 226 and 227 [prior to the Constitution (42nd Amendement) Act, 1976].
   Arts. 323A and 323B [after the Constitution (42nd Amendement) Act, 1976].
2. *Webster's New World Dictionary*, (1972), p. 1517.

means 'a seat or a bench upon which a judge or judges sit in a court', 'a court of justice'. But this meaning is very wide as it includes even the ordinary courts of law, whereas, in administrative law this expression is limited to adjudicating authorities other than ordinary courts of law.

In *Durga Shanker Mehta* v. *Raghuraj Singh*[3], the Supreme Court defined 'tribunal' in the following words :

> ...[T]he expression "Tribunal" as used in Article 136 does not mean the same thing as "Court" but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State and are invested with judicial as distinguished from administrative or executive functions.

In *Bharat Bank* v. *Employees*[4], the Supreme Court observed that though tribunals are clad in many of the trappings of a court and though they exercise *quasi*-judicial functions, they are not full-fledged courts. Thus, a tribunal is an adjudicating body which decides controversies between the parties and exercises judicial powers as distinguished from purely administrative functions and thus possesses some of the trappings of a court, but not all.[5]

Reasons for the Growth of Administrative Tribunals

According to Dicey's theory of rule of law the ordinary law of the land must be administered by the ordinary law courts. He was opposed to the establishment of administrative tribunals. According to the classical theory and the doctrine of separation of powers, the function of deciding disputes between the parties belonged to the ordinary courts of law. But, as discussed above, the governmental functions have increased and ordinary courts of law are not in a position to meet the situation and solve the complex problems arising in the changed socio-economic context. In these circumstances, administrative tribunals are established for the following reasons :—

(1) The traditional judicial system proved inadequate to decide and settle all the disputes requiring resolution.

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3. AIR 1954 SC 520 (522).
4. AIR 1950 SC 188.
5. Ibid. *All Party Hill Leaders' Conference* v. *Sangma*, (1977) 4 SCC 161 : AIR 1977 SC 2155.
   A.C.C. v. *Sharma*, (infra).

It was slow, costly, in-expert, complex and formalistic. It was already overburdened, and it was not possible to expect speedy disposal of even very important matters: e.g. disputes between employers and employees, lock-out, strikes, etc. These burning problems cannot be solved merely by literally interpreting the provisions of any statute, but require the consideration of various other factors and this cannot be accomplished by the courts of law. Therefore, industrial tribunals and labour courts were established, which possessed the technique and expertise to handle these complex problems.

(2) The administrative authorities can avoid technicalities. They take a functional rather than a theoretical and legalistic approach. The traditional judiciary is conservative, rigid and technical. It is not possible for the courts of law to decide the cases without formality and technicality. On the other hand, administrative tribunals are not bound by the rules of evidence and procedure and they can take practical view of the matter to decide the complex problems.

(3) Administrative authorities can take preventive measures; e.g., licensing, rate fixing, etc. Unlike regular courts of law, they have not to wait for parties to come before them with disputes. In many cases, these preventive actions may prove to be more effective and useful than punishing a person after he has committed a breach of any legal provision.

(4) Administrative authorities can take effective steps for enforcement of the aforesaid preventive measures e.g. suspension, revocation or cancellation of licences, destruction of contaminated articles, etc. which are not generally available through the ordinary courts of law.

(5) In ordinary courts of law, the decisions are given after hearing the parties and on the basis of the evidence on record. This procedure is not appropriate in deciding matters by the administrative authorities where wide discretion is conferred on them and the

decisions may be given on the basis of the departmental policy and other relevant factors.

(6) Sometimes, the disputed questions are technical in nature and the traditional judiciary cannot be expected to appreciate and decide them. On the other hand, administrative authorities are usually manned by experts who can deal with and solve these problems, e. g. problems relating to atomic energy, gas, electricity, etc

(7) In short, as Robson says, administrative tribunals do their work 'more rapidly, more cheaply, more efficiently than ordinary courts...possess greater technical knowledge and *fewer prejudices against government*...give greater heed to the social interests involved...decide disputes with conscious effort at furthering social policy embodied in the legislation'.[6] (emphasis supplied)

4. Administrative Tribunal Distinguished From a Court

An administrative tribunal is similar to a court in certain aspects. Both of them are constituted by the State, invested with judicial powers and have a permanent existence. Thus, they are adjudicating bodies. They deal with and finally decide disputes between parties which are entrusted to them. As observed by the Supreme Court in *Associated Cement Co.* v. *P. N. Sharma*[7], 'the basic and the fundamental feature which is common to both the courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign state'.

But at the same time, it must not be forgotten that an administrative tribunal is not a court. A tribunal possesses some of the trappings of a court, but not all,[8] and therefore, both must be distinguished:

(1) A court of law is a part of the traditional judicial system. Where judicial powers are derived from the state and the body deals with *King's justice* it is called

6. Quoted by Kagzi : *The Indian Administrative Law* : (1973), p. 284.
7. AIR 1965 SC 1595 (1599).
8. *Ibid.*

a 'court'. On the other hand, an administrative tribunal is an agency created by a statute and invested with judicial powers. Primarily and essentially, it is a part and parcel of the Executive Branch of the state, exercising excutive as well as judicial functions. As Lord Greene[9] states, administrative tribunals perform *'hybrid functions'*.

(2) Judges of ordinary courts of law are independent of the executive in respect of their tenure, terms and conditions of service, etc. On the other hand, members of administrative tribunals are entirely in the hands of the government in respect of the same.

(3) A court of law is generally presided over by an officer trained in law, but the president or a member of a tribunal may not be trained as well in law.

(4) In a court of law, a judge must be an impartial arbiter and he cannot decide a matter in which he is interested. On the other hand, an administrative tribunal may be party to the dispute to be decided by it.

(5) A court of law is bound by all the rules of evidence and procedure but an administrative tribunal is not bound by those rules unless the relevant statute imposes such an obligation.[10]

(6) A court must decide all the questions *objectively* on the basis of the evidence and materials produced before it, but an administrative tribunal may decide the questions taking into account the departmental policy or expediency and in that sense, the decision may be *subjective* rather than *objective*.

(7) While a court of law is bound by precedents, principles of *res judicata* and estoppel, an administrative tribunal is not strictly bound by them.[11]

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9. *B. Johnson* v. *Minister of Health*, (1947) 2 All ER 395 (400). See also *Bharat Bank's* case (supra).
10. For detailed discussion *see* pp. 164-166 (infra).
11. For detailed discussion *see* pp. 173-74 (infra).

(8) A court of law can decide the *'vires'* of a legislation, while an administrative tribunal cannot do so.[12]

5. Administrative Tribunal Distinguished From An Executive Authority

At the same time, an administrative tribunal is not an executive body or administrative department of the government. The functions entrusted to and the powers conferred on an administrative tribunal are not *purely* administrative in nature. It cannot delegate its *quasi*-judicial functions to any other authority or official. It cannot give decisions without giving an opportunity of being heard to the parties or without observing the principles of natural justice. An administrative tribunal is bound to act judicially. It must record findings of facts, apply legal rules to them correctly and give its decisions. Even when the discretion is conferred on it the same must be exercised judicially and in accordance with well established principles of law. The prerogative writs of *certiorari* and prohibition are available against the decisions of administrative tribunals. "They are 'administrative' only because they are part of an administrative scheme for which a minister is responsible to Parliament, and because the reasons for preferring them to the ordinary courts are administrative reasons."[13]

6. Characteristics

The following are the characteristics of an administrative tribunal:

(1) An administrative tribunal is the creation of a statute and thus, it has a statutory origin.

(2) It has some of the trappings of a court but not all.

(3) An administrative tribunal is entrusted with the judicial powers of the state and thus, performs judicial and *quasi*-judicial functions, as distinguished from pure administrative or executive functions and is bound to act judicially.

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12. *Bharat Bank's* case (supra) at p. 206.
Dhulabhai v. *State*, AIR 1969 SC 78.
13. Wade : *Administrative Law*, (1977), p. 744.

(4) Even with regard to procedural matters, an administrative tribunal possesses powers of a court; e. g. to summon witnesses, to administer oath to compel production of documents, etc.

(5) An administrative tribunal is not bound by the strict rules of evidence and procedure.

(6) The decisions of the most of the tribunals are in fact judicial rather than administrative inasmuch as they have to record findings of facts *objectively* and then to apply the law to them without regard to executive policy. Though the discretion is conferred on them, it is to be exercised objectively and judicially.[14]

(7) Most of the administrative tribunals are not concerned *exclusively* with the cases in which government is a party; they also decide disputes between two private parties e. g. Election Tribunal, Rent Tribunal, Industrial Tribunal, etc. On the other hand, the Income Tax Appellate Tribunal always decides disputes between the government and the assessees.

(8) Administrative tribunals are independent and they are not subject to any administrative interference in the discharge of their judicial or *quasi*-judicial functions.

(9) The prerogative writs of *certiorari* and prohibition are available against the decisions of administrative tribunals.

Thus, taking into account the functions being performed and the powers being exercised by administrative tribunals we may say that they are neither exclusively judicial nor exclusively administrative bodies, but are partly administrative and partly judicial authorities.

7. Working of Tribunals

There are a number of administrative tribunals in India. For example, Industrial Tribunals, Labour Courts, Workmen's Compensation Commissioners, established under the Industrial Laws, Railway Rates Tribunal established under the Indian Railways Act,

14. Wade: *Administrative Law*, (1977) at pp. 743-44.

Election Tribunals established under the Representation of People Act, Mines Tribunals established under the Indian Mines Act, Rent Controller appointed under the Rent Acts etc.

Let us study the actual working of some of the tribunals to understand the constitution of the tribunals, the procedure adopted by them and their powers and duties.

(i) Industrial Tribunal

The Industrial Tribunal is set up under the Industrial Disputes Act, 1947. It can be constituted by the Central Government if an industrial dispute relates or in any way concerns the Central Government, but where the Government of India has no such direct interest, the tribunal may be constituted by the 'appropriate government'.

The Industrial Tribunal may consist of one or more members, and they can be appointed by the Central Government or by the 'appropriate government' as the case may be. Where such tribunal consists of two or more members one of them will be appointed as the Chairman of the tribunal. There may be a one-man tribunal also. The Chairman of the tribunal should possess judicial qualifications i. e. he (*a*) is or has been a Judge of the High Court; or (*b*) is or has been a District Judge; or (*c*) is qualified for appointment as a Judge of the High Court. With regard to members other than the Chairman, they should possess such qualifications as may be prescribed. Where an industrial dispute affecting any banking or insurance company is referred to the tribunal, one of the members in the opinion of the Central Government or 'appropriate government' should possess special knowledge of banking or insurance as the case may be.

The jurisdiction of the tribunal extends to any industrial dispute, such as dispute between employers and their workmen or between workmen and workmen 'connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person'.

The procedure to be followed by the Industrial Tribunal is prescribed by the Act and the rules made thereunder. The tribunal has to act judicially as it is a *quasi*-judicial authority. It has some of the trappings of a court. It has to apply the law

and also the principles of justice, equity and good conscience.[15] The tribunal is vested with powers of civil court, and it can enforce attendance of any person and examine him on oath, compel the production of documents, issue commission for examination of witnesses and such inquiry and investigation shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860. Every member of the tribunal shall be deemed to be a 'public servant' within the meaning of Section 21 of the Penal Code.

At the same time the tribunal has to keep in view that it deals with special types of disputes and it should not merely enforce contractual obligations. It should prevent unfair labour practices and victimisation and restore industrial peace by ensuring the salutory principle of collective bargaining.[16]

Though the function of the tribunal is to adjudicate on industrial disputes, it has only some of the trappings of the court, but not all. It is not bound by the strict rules of procedure and can take decisions by exercising discretion also. Since its object is to do social justice, 'to a large extent' it is free from the restrictions of technical considerations imposed on ordinary law courts.[17] All the same, the tribunal is a *quasi*-judicial authority discharging *quasi*-judicial functions and is not purely an administrative body. Therefore, its adjudication must be on the basis of 'fairness and justness'. It has to act within the limits of the Industrial Disputes Act. Social justice divorced from the legal principles applicable to the case on hand is not permissible.[18] It has power to adjudicate and not to arbitrate. It can decide the dispute on the basis of the pleadings and has no power to reach a conclusion without any evidence on record. Though discretion is conferred on it, the same must be exercised judiciously. It has to hold the proceedings in public. It should follow fair procedure such as notice, hearing, etc. and must decide disputes fairly, independently and impartially.

The tribunal's awards are published in the Government Gazette. On due publication, the award becomes final. It is

15. *NTF Mills* v. *2nd Punjab Tribunal*, AIR 1957 SC 329.
16. *Llyod's Bank Ltd.* v. *Staff Association*, AIR 1956 SC 746.
17. *Bengal Chemical Works* v. *Employees*, AIR 1959 SC 733.
18. *JK Iron and Steel Co. Ltd.* v. *Mazdoor Union*, AIR 1956 SC 231.

required to be signed by all the members of the tribunal. If it is not signed by all the members, the same is illegal and inoperative.[19]

Thus, the proceedings conducted by the Industrial Tribunal are judicial proceedings and the decisions and awards are subject to the writ jurisdiction of the High Court under Article 226 of the Constitution.[20] The tribunal is also subject to the supervisory jurisdiction of the High Court under Article 227 of the Constitution.[21] Article 136 of the Constitution vests the Supreme Court with discretion to entertain appeals against the orders of tribunals by granting special leave. But having regard to the nature of powers of the Supreme Court under Article 136, the Supreme Court is slow in exercising such discretion and it interferes only in exceptional cases.[22]

(ii) Income Tax Appellate Tribunal

The Income Tax Appellate Tribunal is constituted under the Income Tax Act, 1961. It consists of as many judicial and accountant members as the Central Government thinks fit. A judicial member must have held at least for ten years a judicial post or must have been a member of the Central Legal Service (not below Grade III) for at least three years or must have been in practice as an advocate for at least ten years. An accountant member must be a Chartered Accountant under the Chartered Accountants Act, 1949 and must have practised as such for ten years or must have served as Assistant Commissioner for at least three years. The appointments are made by the Central Government. The Chairman of the Tribunal shall be appointed from amongst the judicial members. The conditions of service of the members are regulated by the President of India in exercise of powers conferred by the proviso to Article 309 of the Constitution. The tribunal sits in benches in various cities, such as Ahmedabad, Allahabad, Bombay, Calcutta, Delhi, Madras, etc. The tribunal functions under the control of the Ministry

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19. *Llyod's Bank's* case (supra); *United Commercial Bank* v. *Workmen*, AIR 1951 SC 230: (1951) SCR 380.
20. *Express Newspapers* v. *Workers*, AIR 1963 SC 569: (1963) 3 SCR 540.
21. Prior to the Constitution (42nd Amendment) Act, 1976.
22. *Bharat Bank's* case (supra).

of Law and not under the Ministry of Finance. This ensures independence of judgment by its members and inspires confidence in the assessees.

Appeals can be filed before the tribunal by an aggrieved party against the order passed by the Appellate Assistant Commissioner, Inspecting Assistant Commissioner or Commissioner within a period of 60 days.[23] The tribunal shall decide the matter only after giving both the parties to the appeal an opportunity of being heard. If the parties do not appear at the time of hearing, the appeal may be adjourned or heard *ex parte*. The assessee is entitled to appear before the tribunal personally or through an authorised agent including a lawyer. The tribunal is not governed by the rules of evidence applicable to the courts of law and is empowered to regulate its own procedure. It gives oral hearing to the parties and passes appropriate orders. The decisions may be unanimous or by a majority opinion. If there is equal division, the members state the points of difference and the President will refer the matter for hearing to one or more other members. The matter will then be decided by majority of all the members who have heard it. The order passed by the tribunal must be in writing and signed by the members of the bench. It will be communicated to the assessee as well as to the Commissioner of Income Tax.

The proceedings before the tribunal are deemed to be judicial proceedings. It has the power of summoning witnesses, enforcement of attendance, discovery and inspection, production of documents and issue of commissions, as it has been given powers of a civil court under the Code of Civil Procedure, 1908. It can order prosecution of persons who produce false evidence or fabricate such evidence and they may be punished under the Indian Penal Code, 1860. It may also take appropriate actions for its contempt. It may impound and retain books of account. The proceedings of the tribunal are not open to the public and there is no provision for publication of its decisions. Of course, there are various private tax journals reporting such decisions; e. g.. Taxation, Current Tax Reports, etc.

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23. S. 253.

The decisions of the tribunal on questions of fact are final.[24] No regular appeal is provided by the Act against the decision of the tribunal even on questions of law but a reference can be made at the request of either party to the High Court on any question of law or directly to the Supreme Court if the tribunal is of the opinion that there is conflict of opinions amongst the High Courts. From the judgment of the High Court on a reference from the tribunal, an appeal lies to the Supreme Court in a case in which the High Court certifies it to be a fit case for appeal to the Supreme Court.

(iii) Railway Rates Tribunal

The Railway Rates Tribunal was established under the Indian Railways Act, 1890. It consists of a Chairman who 'is or has been a judge of the Supreme Court or of a High Court' and two members, who have, in the opinon of the Central Government have 'special knowledge of commercial, industrial or economic conditions of the country or of the commercial working of the railways'. They shall be appointed by the Central Government and the terms and conditions of their appointment may be such as the Central Government may prescribe. The members so appointed are to hold office for such period as may be specified in the order of appointment, not exceeding five years. No member can be reappointed. The tribunal may, with the sanction of the Central Government, appoint such staff and on such terms and conditions as the Central Government may determine.

The tribunal is a *quasi*-judicial body, having all the attributes of a civil court under the Code of Civil Procedure, 1908. It has power to summon witnesses, take evidence, order discovery and inspection of documents, issue commissions, etc. The proceedings of the tribunal are deemed to be judicial proceedings within the meaning of Section 195, Chapter XXVI of the Code of Criminal Procedure, 1973. The tribunal is not bound by strict rules of evidence and procedure and is empowered to frame its own rules

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24. *C. I. T.* v. *Indian Woollen Mills*, AIR 1964 SC 735; *Indian Cements* v. *C.I.T.*, AIR 1966 SC 1053; *C. I. T.* v. *Meenakshi Mills*, AIR 1967 SC 819; *K.C. Thapar* v. *C. I. T.*, AIR 1971 SC 1590: (1972) 4 SCC 124; *Anil Kumar* v. *C. I. T.*, (1976) 4 SCC 716: AIR 1976 SC 772.

for the purpose of 'practice and procedure', subject to approval of the Central Government.

The tribunal has the power to hear complaints against the railway administration relating to discriminatory or unreasonable rates levied by it, classification of goods or in giving undue preference to a particular person.[25] The tribunal acts with the aid of assessors who are selected from a panel prepared by the Central Government. This panel includes representatives of trade, industry, agriculture and persons who have a working knowledge of the railways. They are selected after consultation with the interests likely to be affected by the decisions of the tribunal.

A party before the tribunal is entitled to be heard in person or through an authorised agent including a lawyer. The decision of the tribunal is to be made by a majority of members. Its decision is final and can be executed by a civil court 'as if it were a decree'. The tribunal can revise its order on an application being made by the railway administration if the tribunal is satisfied that 'since the order was made, there has been a material change in the circumstances'.

Since the tribunal is presided over by a judge of the Supreme Court or a High Court, independence and impartiality is assured.[26] This is the most valuable safeguard as the tribunal has to decide the disputes between an individual and the administration.

8. Administrative Tribunals and Principles of Natural Justice

As discussed above, administrative tribunals exercise judicial and *quasi*-judicial functions as distinguished from purely administrative functions. An essential feature of these tribunals is that they decide the disputes independently, judicially, objectively and without any bias for or prejudice against any of the parties to the dispute. The Franks Committee, in its Report (1957) has proclaimed three fundamental objectives; (*i*) openness, (*ii*) fairness, and (*iii*) impartiality. The Committee observed:

> In the field of tribunals openness appears to us to

25. *Union of India* v. *W. C. Paper Mills*, (1970) 3 SCC 606 : AIR 1971 SC 349.
26. Ibid. *Union of India* v. *Indian Sugar Mills*, AIR 1968 SC 22.

require the (publicity) of proceedings and (knowledge) of the essential (reasoning) underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent of Departments concerned with the subject-matter of their decisions.

The said principle is accepted in India also. The Law Commission in its Fourteenth Report (1958) has observed that administrative tribunals perform *quasi*-judicial functions and they must act judicially and in accordance with the principles of natural justice.[27] Administrative tribunals must act openly, fairly and impartially. They must afford a reasonable opportunity to the parties to represent their case and to adduce the relevant evidence. Their decisions must be *objective* and not *subjective*. Thus, in *State of U. P.* v. *Nooh*[28], where the prosecutor was also an adjudicating officer, or in *Dhakeswari Cotton Mill's* case[29], where the tribunal did not disclose some evidence to the assessee relied upon by it, or in *Bishambharnath's* case[30], where the adjudicating authority accepted new evidence at the revisional stage and relied upon the same without giving the other side an opportunity to rebut the same, the decisions were set aside. In *British Medical Stores* v. *Bhagirath*[31], on an application being made by the tenants, a Rent Controller made private inquiry, visited the premises in the absence of the landlord and without giving him the opportunity of being heard held that the contractual rent was excessive and fixed the standard rent. The High Court set aside the order as violative of the principles of natural justice.

9. Administrative Tribunals and Rules of Procedure and Evidence

Administrative tribunals have inherent powers to regulate their own procedure subject to the statutory requirements.

27. *Report on Reform of Judicial Administration*, Vol. II (1958), pp. 671-95; *Union of India* v. *T.R. Verma*, AIR 1957 SC 882 : (1958) SCR 499.
28. Supra, p. 128.
29. Supra, p. 137.
30. Supra, p. 137.
31. AIR 1955 Punj. 5.See also *State of Haryana* v. *Rattan Singh*, (infra).

Generally, these tribunals are invested with powers conferred on civil courts by Code of Civil Procedure, 1908 in respect of summoning of witnesses and enforcement of attendance, discovery and inspection, production of documents, etc. The proceedings of administrative tribunals are deemed to be judicial proceedings for the purposes of Sections 193, 195 and 228 of the Indian Penal Code, 1860 and Sections 345 and 346 of the Code of Criminal Procedure, 1973. But these tribunals are not bound by strict rules of procedure and evidence, provided that they observe principles of natural justice and 'fair play'. Thus, technical rules of evidence do not apply to their proceedings, and they can rely on hearsay evidence or decide the questions of onus of proof or admissibility of documents, etc. by exercising discretionary powers.[32] In *State of Mysore* v. *Shivabasappa*[33], the Supreme Court observed:

> ...[T]ribunals exercising *quasi*-judicial functions are not courts and that therefore they are not bound to follow the procedure prescribed for trial of actions in Courts nor are they bound by strict rules of evidence. They can, unlike Courts, obtain all information material for the points under enquiry from all sources, and through all channels, without being fettered by rules and procedure which govern proceedings in Court. *The only obligation which the law casts on them is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it.* What is a fair opportunity must depend on the facts and circumstances of each case but where such an opportunity had been given, the proceedings are not open to attack on the ground that the enquiry was not conducted in accordance with the procedure followed in Courts. (emphasis supplied)

In *State of Haryana* v. *Rattan Singh*[34], speaking for the Court, Krishna Iyer, J. observed:

> It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and

32. *State of Orissa* v. *Murlidhar*, AIR 1963 SC 404.
33. AIR 1963 SC 375 (377). See also *K.L. Shinde* v. *State of Mysore*, (1976) 3 SCC 76: AIR 1976 SC 1080.
34. (1977) 2 SCC 491 (493): AIR 1977 SC 1512 (1513).

credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act... *The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice.* (emphasis supplied)

It is submitted that the correct legal position has been enunciated by Diplock, J. in *R.* v. *Deputy Industrial Injuries Commissioner, ex parte Moore*[35]:

> ...'[E]vidence' is not restricted to evidence which would be admissible in a court of law. For historical reasons, based on the fear that juries who might be illiterate would be incapable of differentiating between the probative values of different methods of proof, the practice of the common law courts has been to admit only what the judges then regarded as the best evidence of any disputed fact, and thereby to exclude much material which, as a matter of common sense, would assist a fact-finding tribunal to reach a correct conclusion...
>
> These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising *quasi*-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts (relevant) to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. *It means that he must not spin a coin or consult an astrologer, but that he must take into account any material which, as a matter of reason, has some (probative value)... If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue: The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.* (emphasis supplied)

Yet as held by the Supreme Court in the case of *Bareilly Electricity* v. *Workmen*[36], this does not mean that administrative tribunals can decide a matter without any evidence on record or can act upon what is not evidence in the eye of law or on a document not proved to be a genuine one.

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35. (1965) 1 QB 456 (488).
36. (1971) 2 SCC 617 : AIR 1972 SC 330.

10. Reasons for Decisions

Recording of reasons in support of the order is considered to be a part of natural justice, and every *quasi*-judical authority including an administrative tribunal is bound to record reasons in support of the orders passed by it.[37]

11. Finality of Decisions

In many statutes, provisions are made for filing appeals or revisions against the orders passed by administrative tribunals and statutory authorities. For example, under the Bombay Industrial Relations Act, 1946, an appeal can be filed before the Industrial Tribunal against the order passed by the Labour Court; or to the Rent Control Tribunal against the order passed by the Rent Controller under the Delhi Rent Control Act, 1958 or to the Income Tax Appellate Tribunal against the order passed by the Appellate Assistant Commissioner, Inspecting Assistant Commissioner or Commissioner under the Income Tax Act, 1961.

However, sometimes, the provisions are made in a statute by which the orders passed by administrative tribunals and other authorities are made *'final'*. This is known as 'statutory finality' and it may be of two types:

(*i*) Sometimes no provision is made for filing any appeal, revision or reference to any higher authority against the order passed by the administrative tribunal or authority; or

(*ii*) sometimes an order passed by the administrative authorities or tribunals are *expressly* made final and jurisdiction of civil courts is also ousted.

With regard to the first type of 'finality', there cannot be any objection, as no one has an inherent right of appeal. It is merely a statutory right and if the statute does not confer that right on any party and treats the decision of the lower authority as final, no appeal can be filed against that decision. Thus, under the Income Tax Act, 1961, the decision given by the Income Tax Appellate Tribunal on a question of fact is made final and no appeal lies against that finding to any authority. In

37 Supra, pp. 143-149.

the same manner, under the Administration of Evacuee Property Act, 1951, the order passed by the Custodian of Evacuee Property is made final and no appeal or revision lies to any authority against the said decision.

With regard to the second type of finality, provisions are made in some statutes by which the decisions recorded by administrative tribunals are *expressly* made final and jurisdiction of civil courts is also ousted. And even though the subject-matter of the dispute may be of a civil nature and therefore, covered by Section 9 of the Code of Civil Procedure, 1908, a civil suit is barred by the statutory provision. For example, Section 170 of the Representation of the People Act, 1951 provides:

> No civil court shall have jurisdiction to question the legality of any action taken or any decision given by the returning officer or by any other person appointed under this Act in connection with an election.[38]

In these cases, the correct legal position is that the jurisdiction of civil courts must be ousted either expressly or by necessary implication. Even if the jurisdiction of civil courts is ousted, they have jurisdiction to examine the cases where the provisions of the Act and the Rules made thereunder have not been complied with and the order passed by the tribunal is *de hors* the Act or 'purported order',[39] or the statutory authority has not acted in conformity with the fundamental principles of natural justice,[40] or the decision is based on 'no evidence',[40] etc. as in these cases, the order cannot be said to be *'under the Act'*[41] and the jurisdiction of the civil court is not ousted.

In *Radha Kishan* v. *Ludhiana Municipality*[42], the Supreme Court observed:

> Under Section 9 of the Code of Civil Procedure the Court shall have jurisdiction to try all suits of civil nature

38. *See also* S. 27 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, S. 78 of the Estate Duty Act, 1953; S. 293 of the Income Tax Act, 1961, *Shyam Lal* v. *Smt. Kusum Dhavan*, AIR 1979 SC 1247.
39. *Union of India* v. *Tarachand Gupta*, (1971) 1 SCC 486: AIR 1971 SC 1558.
40. *Srinivasa* v. *State of A.P.*, (1969) 3 SCC 711: AIR 1971 SC 71; *Dhulabhai's* case (infra); *Dhrangadhra Chemicals* (infra).
41. *Dhulabhai's* case (infra); *Tarachand Gupta's* case (supra); *Premier Automobiles* v. *Kamalikar*, (1976) 1 SCC 496; *Srinivasa's* case (supra).
42. AIR 1963 SC 1547: (1964) 2 SCR 273.

excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication can bar the jurisdiction of civil courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil courts. The statute may specifically provide for ousting the jurisdiction of civil courts; even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the civil court's jurisdiction is not completely ousted. *A suit in a civil court will always lie to question the order of a tribunal created by statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions.*[43] (emphasis supplied)

Suffice it to say that in the classic decision of *Dhulabhai* v. *State*[44], after discussing the case law exhaustively, Hidayatullah, C. J. summarised the following principles in this regard:

(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is

43. AIR 1963 SC 1547 at p. 1551.

44. AIR 1969 SC 78 (89-90) : (1968) 3 SCR 662 (682-84).

necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act, but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or is illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.[45]

12. Decisions of Tribunals and Judicial Review

As discussed above, no appeal, revision or reference against the decision of an administrative tribunal is maintainable if the said right is not conferred by the relevant statute. Provisions can

45. See also *Premier Automobiles* (supra).

also be made for ouster of jurisdiction of civil courts; and in all these cases the decisions rendered by the tribunal will be treated as *'final'*. But this statutory finality will not affect the jurisdiction of the High Courts under Articles 226 and 227[46] and of the Supreme Court under Articles 32 and 136 of the Constitution of India. The power of judicial review of High Courts and the Supreme Court is recognised by the Constitution and the same cannot be taken away by any statute; and if the tribunal has acted without jurisdiction,[47] or has failed to exercise jurisdiction vested in it,[48] or if the order passed by the tribunal is arbitrary, perverse[49] or mala fide,[50] or it has not observed the principles of natural justice,[51] or there is an error apparent on the face of the record,[52] or the order is ultra vires the Act,[53] or there is no evidence in support of the order,[54] or the order is based on irrelevant considerations,[55] or where the findings recorded are conflicting and inconsistent,[56] or grave injustice is perpetuated by the order passed by the tribunal[57] or the order is such that no reasonable man would have made it,[58] the same can be set aside by the High Court or by the Supreme Court. It is appropriate at this stage to quote the following observations of Lord Denning, J.[59]:

If tribunals were to be at liberty to exceed their jurisdiction

46. Prior to the Constitution (42nd Amendment) Act, 1976.
47. *Express Newspapers* v. *Workers*, AIR 1963 SC 569; *J. K. Chaudhary* v. *Dutta Gupta*, AIR 1958 SC 722; *Venkataraman* v. *State of Madras*, AIR 1966 SC 1089; *I. S. Chettu* v. *State of A. P.*, AIR 1964 SC 322.
48. *Maha Dayal* v. *I.T.O.* (supra); *Police Commissioner* v. *Gordhandas* (supra).
49. *Dhiraj Lal* v. *I.T.C.* AIR 1955 SC 271; *D. Macropollo & Co.* v. *Employees*, AIR 1958 SC 1012; *Dhrangadhra Chemicals* v. *State*, AIR 1957 SC 264; *C.I.T.* v. *Radha Kishan*, (1975) 1 SCC 693, (95-96): AIR 1975 SC 893 (894).
50. *Ritz Theatre* v. *Workmen*, AIR 1963 SC 295; *P. T. Services* v. *State Industrial Court*, AIR 1963 SC 114: (1963) 3 SCR 650.
51. *Sangram Singh* v. *Ele. Trib.*, AIR 1955 SC 425, *Andhra Scientific Co.* v. *Shesagiri*, AIR 1967 SC 408: (1961) 2 LLJ 117.
52. *Union of India* v. *H. C. Goel*, AIR 1964 SC 364: (1964) 4 SCR 718.
53. *P. T. Services* (supra).
54. Ibid. *Dhrangadhra Chemicals* (supra).
55. *Dhiraj Lal's* case (supra).
56. *P. S. Mills* v. *Mazdoor Union*, AIR 1957 SC 95: (1956) SCR 872.
57. *D. C. Mills* v. *C.I.T.*, AIR 1955 SC 65; *Statesman Ltd.* v. *Workmen*, (1976) 2 SCC 223: AIR 1976 SC 758.
58. *C.I.T.* v. *Radha Kishan*, (supra).
59. *R.* v. *Medical Appeal Tribunal, ex parte Gilmore*, (1957) 1 QB 574 (586).

without any check by the courts the rule of law would be an end.

At the same time, it must be borne in mind that the powers of the High Courts and the Supreme Court under the Constitution of India are extremely limited and they will be reluctant to interfere with or disturb the decisions of specially constituted authorities and tribunals under a statute on the ground that the evidence was inadequate or insufficient,[60] or that detailed reasons were not given.[61] The Supreme Court and High Courts are not courts of appeal and revision over the decisions of administrative tribunals.[62]

13. Review of Decisions

There is no inherent power of review with any authority and the said power can be exercised only if it is conferred by the relevant statute. As a general rule, an administrative tribunal becomes *functus officio* (ceases to have control over the matter) as soon as it makes an order and thereafter cannot review its decision unless the said power is conferred on it by a statute,[63] and the decision must stand unless and until it is set aside by the appellate or revisional authority or by the competent court.[64]

This, however, does not mean that in absence of any statutory provision, the administrative tribunal is powerless. In fact the administrative tribunal possesses those powers which are inherent in every judicial tribunal. Thus, it can reopen *ex parte* proceedings, if the decision is arrived at without issuing notice to the party affected or on the ground that it had committed a mistake in overlooking the change in the law which had taken place before passing the order or to prevent miscarriage of justice or to correct grave and palpable errors committed by it or what the principles of natural justice required it to do.[65]

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60. *State of A. P.* v. *Rao* (supra).
61. *Sri Ram Vilas Service* v. *Chandrasekaran*, AIR 1965 SC 107: (1964) 5 SCR 869.
62. *Bombay Union* v. *State*, AIR 1964 SC 1617; *Hindustan Tin Works* v. *Employees*, AIR 1979 SC 75; *Prem Kakar* v. *State*, (1976) 3 SCC 433: AIR 1976 SC 1474. *See also* Lect. IX (infra).
63. *Patel Narshi* v. *Pradumansinhji*, AIR 1970 SC 1273; *Mehar Singh* v. *N. T. Das*, (1973) 3 SCC 731: AIR 1972 SC 2533.
64. *Pradumansinhji's* case (supra).
65. *Shivdeo Singh* v. *State of Punjab*, AIR 1963 SC 1909 (1911).

14. The Doctrine of Res Judicata

The doctrine of *res judicata* is embodied in Section 11 of the Code of Civil Procedure, 1908. It means that if an issue had been made the subject-matter of the previous suit and had been raised, tried and decided by a competent court having jurisdiction to try the suit the same issue cannot thereafter be raised, tried or decided by any court between the same parties in a subsequent suit.

Though Section 11 of the Code speaks about civil suits only, the general principle underlying the doctrine of *res judicata* applies even to administrative adjudication. Thus, an award pronounced by the Industrial Tribunal operates as *res judicata* between the same parties and the Payment of Wages Authority has no jurisdiction to entertain the said question again,[66] or if in an earlier case, the Labour Court had decided that *A* was not a 'workman' within the meaning of the Industrial Disputes Act, 1947, it operates as *res judicata* in subsequent proceedings.[67] In *Pandurang's* case (supra), the Supreme Court observed :

> The doctrine of *res judicata* is a wholesome one which is applicable not merely to matters governed by the provisions of the Code of Civil Procedure but to all litigations. It proceeds on the principle that there should be no unnecessary litigation and whatever claims and defences are open to parties should all be put forward at the same time provided no confusion is likely to arise by so putting forward all such claims.[68]

About a year later,[69] the Supreme Court entertained 'doubt' about the extension of the sophisticated doctrine of constructive *res judicata* to industrial law. In *I. G. N. Rly.* v. *Workmen*[70], the Supreme Court held that the principle of *res judicata* should be applied with caution in industrial adjudication.

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66. *Bombay Gas Co.* v. *Shridhar,* AIR 1961 SC 1196 : (1961) 2 LLJ 629.
67. *Bombay Gas Co.* v. *Jagannath Pandurang,* (1975) 4 SCC 690.
68. *Ibid.* at pp. 695-96 (SCC). See also *Devilal* v. *S. T. O.,* AIR 1965 SC 1150 ; *Daryao* v. *State of U. P.,* AIR 1961 SC 1457 : (1962) 1 SCR 574.
69. *Mumbai Kamgar Sabha* v. *Abdulbhai,* (1976) 3 SCC 832 : AIR 1976 SC 1455.
70. AIR 1960 SC 1286 : (1960) 1 LLJ 561.

It is submitted that the view taken by Gajendragadkar, J. (as he then was) in case of *Trichinopoly Mills* v. *Workers' Union*[71] is correct. In that case, His Lordship observed:

> It is not denied that the principles of *res judicata* cannot be strictly involved in the decisions of such points though it is equally true that industrial tribunals would not be justified in changing the amounts of rehabilitation from year to year without sufficient cause.[72]

15. Limitations

Many complaints had been made by people against the working of administrative tribunals to the Franks Committee:[73]

(1) Sometimes, there is no appeal against the tribunal's decision. e. g. Rent Tribunal. Tremendous power, which can ruin a person's life, has been put into the hands of three men. Yet there is no higher court in which their decisions can be rested.

(2) The three on the bench of the tribunal need have no proper legal qualifications. A court of no appeal has been put into the hands of men who are generally neither qualified lawyers, magistrates nor judges.

(3) There is no evidence on oath, and therefore there can be no proper cross-examination as in a court of law. Statements are made on both sides, but the time-honoured method of getting to the truth cannot be used.

(4) Procedure is as the tribunal shall determine. No rules have been laid down as to the procedure at a tribunal hearing. Witnesses may be heard or not heard at their pleasure.

Though, the aforesaid complaints are against the Rent Tribunals, they were present in all tribunals.

16. The Franks Committee

In 1955, a committee was appointed by the Lord Chancellor

71. AIR 1960 SC 1003: (1960) 2 LLJ 46.

72. *Ibid.* at p. 1004 (AIR): For Income Tax matters see *Maharana Mill* v. *I.T.O.*, AIR 1959 SC 881; *Visheshwara Singh* v. *I.T.C.*, AIR 1961 SC 1062; *Udayan Chinubhai* v. *CIT*, AIR 1967 SC 762: (1967) 1 SCR 913.

73. Wade: *Administrative Law*, (1977), pp. 754-55.

under the Chairmanship of Sir Oliver Frank to consider and make recommendations on the constitution and working of administrative tribunals in England. The Committee submitted its report in 1957 and made the following recommendations :[74]

(1) Chairmen of tribunals should be appointed and removed by the Lord Chancellor; members should be appointed by the Council and removed by the Lord Chancellor.

(2) Chairmen should ordinarily have legal qualifications and always in the case of appellate tribunals.

(3) Remuneration for service on tribunals should be reviewed by the Council on Tribunals.

(4) Procedure for each tribunal, based on common principles but suited to its needs, should be formulated by the Council.

(5) The citizen should be helped to know in good time the case he will have to meet.

(6) Hearings should be in public, except only in cases involving (*i*) public security, (*ii*) intimate personal or financial circumstances, or (*iii*) professional reputation, where there is a preliminary investigation.

(7) Legal representation should always be allowed, save only in most exceptional circumstances. In the case of national insurance tribunals the Committee were content to make legal representation subject to the chairman's consent.

(8) Tribunals should have power to take evidence on oath, to subpoena witnesses, and to award costs. Parties should be free to question witnesses directly.

(9) Decisions should be reasoned, as full as possible, and made available to the parties in writing. Final appellate tribunals should publish and circulate selected decisions.

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74. Wade: *Administrative Law*, (1977), pp. 757-58.

(10) There should be a right of appeal on fact, law and merits to an appellate tribunal, except where the lower tribunal is exceptionally strong.

(11) There should also be an appeal on a point of law to the courts; and judicial control by the remedies of *certiorari*, prohibition and *mandamus* should never be barred by statute.

(12) The Council should advise, and report quickly, on the application of all these principles to the various tribunals, and should advise on any proposal to establish a new tribunal.

Griffith and Street[75] have included:

(13) Adjudications of law and fact in which no policy question is involved should not be carried out by Ministers themselves or by Civil Servants in the Minister's name.

(14) The personnel of tribunals deciding issues of law or fact or applying standards should be independent of the departments with which their functions are connected.

(15) The personnel should enjoy security of tenure and adequacy of remuneration essential to the proper discharge of their duties.

(16) At least one member of the tribunal should be a lawyer if the questions of fact and law arise; one member may have expert knowledge where such knowledge would be helpful to guide discretion and apply standards.

(17) An appellate system should be provided so that those aggrieved by an adjudication may go to higher tribunal and ultimately matters of law should reach the court.

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75. *Principles of Administrative Law*: (1963), p. 193. *See also* Jain and Jain: *Principles of Administrative Law*, (1973), p. 171.

Lecture VIII

JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION

We will not make justices, constables, sheriffs or bailiffs who do not know the law of the land and mean to observe it well.

—MAGNA CARTA

Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler. . . . Where discretion is absolute man has always suffered.

—JUSTICE DOUGLAS

Discretion is a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.

—JUSTICE COKE

1. Introduction
2. Administrative discretion : Definition
3. Discretionary power and judicial review
   - (A) Failure to exercise discretion
     - (*i*) Sub-delegation
     - (*ii*) Imposing fetters on discretion by self-imposed rules of policy
     - (*iii*) Acting under dictation
     - (*iv*) Non-application of mind
   - (B) Excess or abuse of discretion
     - (*i*) Exceeding jurisdiction
     - (*ii*) Irrelevant considerations
     - (*iii*) Leaving out relevant considerations
     - (*iv*) Mixed considerations
       - (*a*) Conclusions based on subjective satisfaction
       - (*b*) Conclusions based on objective facts
     - (*v*) Mala fide
     - (*vi*) Improper purpose : Collateral purpose
     - (*vii*) Colourable exercise of power
     - (*viii*) Disregard of the principles of natural justice
     - (*ix*) Unreasonableness
   - (C) Infringement of fundamental rights

1. Introduction

As discussed in the previous lectures, the traditional theory of *'laissez faire'* has been given up by the state and the old 'police state' has now become a 'welfare state'. Because of this philosophy governmental functions have increased. The administrative authorities have acquired vast discretionary powers and generally, exercise of those powers are left to the subjective satisfaction of the administration without laying down the statutory guidelines or imposing conditions on it. The administration administers law enacted by the legislature and thus performs executive functions; it also enacts legislation when the legislative powers are delegated to it by the legislature and it also interprets law through administrative tribunals. Thus, practically there is concentration of all powers in the hands of the administration—legislative, executive and judicial.

2. Administrative Discretion: Definition

The best definition of 'administrative discretion' is given by Professor Freund[1] in the following words:

> When we speak of administrative discretion, we mean that a determination may be reached, in part at least, upon the basis of consideration not entirely susceptible of proof or disproof... It may be practically convenient to say that discretion includes the case in which the ascertainment of fact is legitimately left to administrative determination.

Thus, in short, here the decision is taken by the authority *not only on the basis of the evidence* but in accordance with policy or expediency and in exercise of discretionary powers conferred on that authority.

3. Discretionary Power and Judicial Review

Discretionary powers conferred on the administration are of different types. It may perform simple ministerial functions like maintenance of births and deaths register. It may exercise powers which seriously affect the rights of an individual; e.g. acquisition of property, regulation of trade, industry or business, investigation, seizure, confiscation and destruction of property, detention of a

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1. *Administrative Powers over Persons and Property*, (1928), p. 71.

person on subjective satisfication of an executive authority and the like.

As a general rule, it is accepted that courts have no power to interfere with the actions taken by administrative authorities in exercise of discretionary powers. In *Small* v. *Moss*, the Supreme Court of the United States observed :

> Into that field (of administrative discretion) the courts may not enter.

Lord Halsbury[2] also expressed the same view and observed :

> Where the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any court to contest that discretion.

In India also, the same principle is accepted and in a number of cases our Supreme Court has held that courts have no power to interfere with the orders passed by the administrative authorities in exercise of discretionary powers.[3]

This does not, however, mean that there is no control over the discretion of the administration. As discussed above, the administration possesses vast discretionary powers and if complete and absolute freedom is given to it, it will lead to arbitrary exercise of power. The wider the discretion the greater is the possibility of its abuse. As it is rightly said, 'every power tends to corrupt and absolute power tends to corrupt absolutely'. There must be control over discretionary powers of the administration so that there will be a 'government of laws and not of men'. It is not only the power but the duty of the courts to see that discretionary powers conferred on the administration may not be abused and the administration should exercise them properly, responsibly and with a view to doing what is best in the public interest. 'It is from this presumption that the courts take their warrant to impose legal bounds on even the most extensive discretion.'[4] 'Wide discretion must be in all administrative activity but it should be discretion defined in

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2. *Westminster Corp.* v. *London & North Western Rly. Co.*, (1905) AC 426 (427)
3. *Gopalan* v. *State of Madras*, AIR 1950 SC 27; *Bhimsen* v. *State of Punjab*, AIR 1951 SC 481; *Lakhanpal* v. *Union of India*, AIR 1967 SC 908; *Lohia* v. *State of Bihar*, AIR 1966 SC 740: (1956) 1 SCR 709.
4. Wade: *Administrative Law*, (1977), p. 337.

terms which can be measured by legal standards lest cases of manifest injustice go unheeded and unpunished.'[5] As early as in 1647,[6] it was laid down by the King's Bench that 'wheresoever a commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law, and that this Court hath power to redress things otherwise done by them'. In *Sharp* v. *Wakefield*[7], Lord Halsbury rightly observed:

> ... '[D]iscretion' means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion..according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself....

Thus, in almost all the democratic countries it is accepted that discretion conferred on the administration is not unfettered, uncontrolled or non-reviewable by the courts. To keep the administration within its bounds, the courts have evolved certain principles and imposed some conditions and formulated certain tests and taking recourse to these principles, they effectively control the abuse or arbitrary exercise of discretionary power by the administration. In India, the courts will interfere with the discretionary powers exercised by the administration in the following circumstances:

(*A*) *Failure to exercise discretion*;
(*B*) *Excess or abuse of discretion*; and
(*C*) *Infringement of fundamental rights.*

Let us consider each ground *in extenso*:—

(A) Failure to exercise discretion

The main object of conferring discretionary power on an administrative authority is that the authority itself must exercise the said power. If there is failure to exercise discretion on the part of that authority the action will be bad. Such type of

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5. Wade: *Courts and Administrative Process*, (1949) 63 LQR 173.
6. *Estwick* v. *City of London*, (1647) Style 42.
7. (1891) AC 173 (179).

flaw may arise in the following circumstances :—

(*i*) Sub-delegation;

(*ii*) Imposing fetters on discretion by self-imposed rules of policy;

(*iii*) Acting under dictation; and

(*iv*) Non-application of mind.

(*i*) *Sub-delegation*

de Smith[8] says, 'a discretionary power must, in general, be exercised only by the authority to which it has been committed. It is a well-known principle of law that when a power has been confided to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another'. As stated above the very object of conferring a power on a particular administrative authority is that the power must be exercised by that authority and cannot be sub-delegated to any other authority or official. 'Delegation may be the result of honest misapprehension by the authority concerned of the legal position. It sometimes arises out of a desire to expedite official business. But still it will be invalid if it is not legally permitted.'[9]

Thus, in *Allingham* v. *Minister of Agriculture*[10] and *Ganpati Sinhji* v. *State of Ajmer*[11], the sub-delegation of power was held to be bad.

But in *Pradyat Kumar* v. *Chief Justice of Calcutta*[12], the enquiry against the Registrar of the High Court was made by a puisne Judge of the Court. After considering the report and giving show-cause notice, he was dismissed by the Chief Justice. The Supreme Court held that it was not a case of delegation of power by the Chief Justice but merely of employing a competent officer to assist the Chief Justice. More recently, the same

8. *Judicial Review of Administrative Action*, (1973), p. 263.
9. Markose : *Judicial Control of Administrative Action in India*, (1956), p. 395.
10. (1948) 1 All ER 780 : *See* p. 79 (supra). See also *Barnard* v. *N. D. L. Board*, (1953) 2 QB 81 ; *Vini* v. *N. D. L. Board*, (1957) AC 448.
11. AIR 1955 SC 188 : (1955) 1 SCR 1065. *See* p. 80 (supra).
12. AIR 1956 SC 285 : (1955) 2 SCR 1331.

view has been taken by the Supreme Court in *State of U. P.* v. *B. D. P. Tripathi*[13].

(*ii*) *Imposing fetters on discretion by self-imposed rules of policy*

An authority entrusted with discretionary power must exercise the same after considering individual cases. Instead of doing that if the authority imposes fetters on its discretion by adopting fixed rules of policy to be applied in all cases coming before it, there is failure to exercise *discretion* on the part of that authority. What is expected of the authority is that it must consider the facts of each case, apply its mind and decide the same. If any general rule is pronounced, which will be applied to all cases, there is no question of considering the facts of an individual case at all and exercising discretion by the authority.

Gell v. *Teja Noora*[14]

Under the Bombay Police Act, 1863, the Commissioner of Police had discretion to refuse to grant a licence for any land conveyance 'which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public'. Instead of applying this discretionary power to individual cases, he issued a general order that any victoria presented for licence must be of a particular pattern. The High Court of Bombay held the order bad as the Commissioner had imposed fetters on his discretion by self-imposed rules of policy and failed to consider in respect of each individual carriage whether it was fit for conveyance of the public or not.

Keshavan Bhaskaran v. *State of Kerala*[15]

The relevant rule provided that no school leaving certificate would be granted to any person unless he had completed fifteen years of age. The Director was, however, empowered to grant exemption from this rule in deserving cases under certain circumstances. But in fact, the Director had made an invariable

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13. (1978) 2 SCC 102. See also *State of Bombay* v. *Shivbalak*, AIR 1965 SC 661 : (1965) 1 SCR 211.
14. (1907) 27 ILR Bom. 307.
15. AIR 1961 Ker. 23. See also *Registrar, T. M.* v. *Ashokchandra*, AIR 1955 SC 558 : (1955) 2 SCR 252.

rule of not granting exemption unless the deficiency in age was less than two years. The Court held that the rule of policy was contrary to law.

In *Tinker* v. *Wandsworth Board of Works*[16], a sanitary authority laid down a general rule that all cesspits and privies in its area should be replaced by water-closets and did not consider each case on merits. The Court of Appeal held the action bad. In *R.* v. *Metropolitan Police Commissioner*[17], a chief constable adopted a rigid rule not to institute any prosecution at all for an anti-social class of criminal offence. The action was held to be bad.

This does not, however, mean that no principle can be laid down or policy adopted. The only requirement is that even when a general policy is adopted, each case must be considered on its own merits. As Lord Reid[18] rightly states, a minister having a discretion, may formulate a policy or make a limiting rule as to the future exercise of his discretion, if he thinks that good administration requires it, *'provided the authority is always willing to listen to any one with something new to say'*. (emphasis supplied) The administrative authority exercising discretion must not 'shut its ears to an application'. It is submitted that the test is correctly laid down in *Stringer* v. *Minister of Housing*[19], wherein Lord Cooke, J observed:

> ... [A] Minister charged with the duty of making individual administrative decisions in a fair and impartial manner may nevertheless have a general policy in regard to matters which are relevant to those decisions, *provided that the existence of that general policy does not preclude him from fairly judging all the issues which are relevant to each individual case as it comes up for decision.* (emphasis supplied)

(*iii*) *Acting under dictation*

Sometimes, an authority entrusted with a power does not exercise that power but acts under the dictation of a superior authority. Here, the authority invested with the power

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16. (1858) 27 LJ Ch 342.
17. (1968) 2 QB 118.
18. *British Oxygen Co. Ltd.* v. *Minister of Technology*, (1970) 3 WLR 488 (495).
19. (1970) 1 WLR 1281 (1298).

purports to act on its own but 'in substance' the power is exercised by another. The authority concerned does not apply its mind and take action on its own judgment, even though it was not so intended by the statute. In law, this amounts to non-exercise of power by the authority and the action is bad.

Commissioner of Police v. *Gordhandas*[20]

Under the Bombay Police Act, 1902, the Commissioner of Police granted licence for the construction of a cinema theatre. But later on, he cancelled it at the direction of the State Government. The Supreme Court set aside the order of cancellation of licence as the Commissioner had acted merely as the agent of the Government.

Orient Paper Mills v. *Union of India*[21]

Under the relevant statute, the Deputy Superintendent was empowered to levy excise. Instead of deciding it independently, the Deputy Superintendent ordered levy of excise in accordance with the directions issued by the Collector. The Supreme Court set aside the order passed by the Deputy Superintendent.

Rambharosa Singh v. *State of Bihar*[22]

The relevant rules empowered the District Magistrate to give public ferries on lease subject to the direction of the Commissioner. Instead of the Commissioner, the Government gave certain directions, The District Magistrate acted in accordance with those directions. The High Court set aside the order passed by the District Magistrate.

There is however a distinction between seeking an advice or assistance on the one hand and acting under dictation on the other hand. Advice or assistance may be aken and then discretion may be exercised by the authority concerned genuinely without blindly and mechanically acting on the advice. For

20. AIR 1952 SC 16. See also *State of Punjab* v. *Sharma*, AIR 1966 SC 1081; *Ellis* v. *Dubowski*, (1921) 3 KB 621; *Simms Motor Units* v. *Minister of Labour*, (1946) 2 All ER 201.
21. (1970) 3 SCC 76: AIR 1970 SC 1498.
22. AIR 1953 Pat 370. See also *Orient Paper Mills* v. *Union of India*, AIR 1969 SC 48; *Purtabpore Co. Ltd.* v. *Cane Commr. of Bihar*, (1969) 1 SCC 308.

instance, a licensing authority may take into account the general policy of the government in granting licences, provide it decides each case on its own merits. In the *Gordhandas* case (supra), the Supreme Court observed that the Commissioner was 'entitled to take into consideration the advice tendered to him by a public body set up for this express purpose, and he was entitled in the bona fide exercise of his discretion to accept that advice and act upon it even though, he would have acted differently if this important factor had not been present in his mind when he reached a decision'.[23]

(iv) Non-application of mind

When a discretionary power is conferred on an authority, the said authority must exercise that power after applying its mind to the facts and circumstances of the case in hand. If this condition is not satisfied, there is clear non-application of mind on the part of the authority concerned. The authority might be acting mechanically, without due care and caution or without a sense of responsibility in the exercise of its discretion. Here also, there is failure to exercise discretion and the action is bad.

Emperor v. *Sibnath Banerji*[24]

In this case, the order of preventive detention was quashed as it had been issued in a routine manner on the recommendation of police authorities and the Home Secretary himself had not applied his mind and satisfied himself that the impugned order was called for.

Jagannath v. *State of Orissa*[25]

In the order of detention six grounds were verbatim reproduced from the relevant section of the statute. The Home Minister filed the affidavit in support of the order. In that affidavit, he has stated that his personal satisfaction to detain the petitioner was based on two grounds. The Supreme Court held that the detaining authority must be satisfied about each of the

23. *Supra*, at p. 18. See also *Union of India* v. *Roy*, AIR 1968 SC 850.

24. AIR 1945 PC 156.

grounds mentioned in the order. Since it was not done, as in the affidavit it was mentioned that the order was based only on two grounds and also from the fact that in the impugned order in which various grounds were mentioned, instead of using the conjunctive "*and*" the disjunctive "*or*" had been used, there was clear non-application of mind by the Home Minister and the order was liable to be quashed.

Barium Chemicals Ltd. v. *Company Law Board*[26]

In this well-known case, an order of investigation against the petitioner company was passed by the Central Government. Under the Companies Act, 1956, the Government was empowered to issue such order if, 'there are circumstances suggesting fraud on the part of the management'. It was held by the Supreme Court that it was necessary for the Central Government to state the circumstances which led to the impugned action so that the same could be examined by the Court. Shelat, J. observed:

> It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose.[27]

Hidayatullah, J. (as he then was) also took the same view and observed:

> No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to inference unless the existence of the circumstances is made out.[28]

Ananta Mukhi v. *State of W. B.*[29]

In this case, the order of detention was passed against the

26. AIR 1967 SC 295: 1966 Supp SCR 311.
27. *Ibid.* at p. 325 (AIR).
28. *Ibid.* at p. 309. See also *Rohtas Industries* (infra) *Barium Chemicals* v. *Rana*, (1972) 1 SCC 240: AIR 1972 SC 591; *Ashadevi* v. *K. Shivraj* (infra).
29. (1972) 1 SCC 580: AIR 1972 SC 1256.

petitioner 'to prevent him from acting in any manner prejudicial to the security of State or the maintenance of public order'. In spite of the use of the disjunctive *'or'* in between the two grounds, the Supreme Court held the order valid.

I. T. C. Ltd. v. *Labour Court, Patna*[30]

Very recently, the Supreme Court held the order of reference passed under the Industrial Disputes Act, 1947 valid even though the reference contained both the clauses, viz. the industrial dispute *'exists or is apprehended'*. The Supreme Court held that there was non-application of mind by the government, but the reference was not bad on that ground on 'the facts of the case'. However, the Court observed that 'care should always be taken to avoid a mere copying of the words from the statute'.

(B) Excess or abuse of discretion

When discretionary power is conferred on an administrative authority, it must be exercised according to law. But as Markose[31] says, 'when the mode of exercising a valid power is improper or unreasonable, there is an abuse of the power'. Thus, 'if a new and sharp axe presented by Father Washington (the Legislature) to young George (the statutory authority) to cut timber from the father's compound is tried on the father's favourite apple tree an abuse of power is clearly committed'.

There are several forms of abuse of discretion, e.g. the authority may exercise its power for a purpose different from the one for which the power was conferred or for an improper purpose or acts in bad faith, takes into account irrelevant considerations and so on. These various forms of abuse of discretion may even overlap. Take the classic example of the red-haired teacher, dismissed because she had red hair. In one sense, it is unreasonable. In another sense, it is taking into account irrelevant or extraneous considerations. It is improper exercise of power and might be described as being done in bad faith or colourable exercise of power. In fact, all these things 'overlap to a very great extent' and 'run into one another'.[32]

30. (1978) 3 SCC 504 : AIR 1978 SC 1428.
31. *Judicial Control* ...(supra), p. 417.
32. Per Lord Greene, M. R. in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corp.*, (1948) 1 KB 223 (229).

Excess or abuse of discretion may be inferred from the following circumstances:

(*i*) Exceeding jurisdiction;
(*ii*) Irrelevant considerations;
(*iii*) Leaving out relevant considerations;
(*iv*) Mixed considerations—
  (*a*) Conclusions based on subjective satisfaction;
  (*b*) Conclusions based on objective facts;
(*v*) Mala fide;
(*vi*) Improper purpose: Collateral purpose;
(*vii*) Colourable exercise of power;
(*viii*) Disregard of the principles of natural justice;
(*ix*) Unreasonableness.

Let us consider each ground in detail.

(i) Exceeding jurisdiction

An administrative authority must exercise the power within the limits of the statute and if it exceeds those limits the action will be held to be ultra vires.

For example, if an officer is empowered to grant loan of Rs. 10,000 in his discretion for a particular purpose and if he grants a loan of Rs. 20,000 he exceeds the power (jurisdiction) and the entire order is ultra vires and void on that ground.

London County Council v. *Attorney General*[33]

In this case, the local authority was empowered to operate tramways. The local authority also carried a bus service. An injunction against the operation of buses by the Council was duly granted.

C. E. S. Corporation v. *Workers' Union*[34]

If the authority is empowered to award a claim for the medical aid of the employees, it cannot grant the said benefit to the family members of the employees.

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33. (1902) AC 165.
34. AIR 1959 SC 1191: (1959-60) 16 FJR 182.

T. K. Chaudhary v. *Datta*[35]

If the relevant regulation empowers the management to dismiss a teacher, the power cannot be exercised to dismiss the principal.

(ii) Irrelevant considerations

A power conferred on an administrative authority by a statute must be exercised on the considerations relevant to the purpose for which it is conferred. Instead, if the authority takes into account wholly irrelevant or extraneous considerations the exercise of power by the authority will be ultra vires and the action bad.

This may, however, be distinguished from mala fide or improper motive inasmuch as, here 'the irrelevant considerations dominate not because of any deliberate choice of the authority but as a result of the honest mistake it makes about the object or scope of its powers'.[36]

Thus, the red-haired teacher was dismissed because she had red hair,[37] or because the teacher took an afternoon off in poignant circumstances[38] or that the teacher refused to collect money for pupils' meals[39] the action is bad in law.

Ram Manohar Lohia v. *State of Bihar*[40]

Under the relevant rules, the authority was empowered to detain a person to prevent subversion of 'public order'. The petitioner was detained to prevent him from acting in a manner prejudical to the maintenance of 'law and order'. The Supreme Court set aside the order of detention. According to the Court, the term 'law and order' was wider than the term 'public order'.

R. L. Arora v. *State of U. P.*[41]

Under the provisions of the Land Acquisition Act, 1894 the

35. AIR 1958 SC 722 : (1959) SCR 455.
36. Markose (supra).
37. *Wednesbury Corp.* (supra).
38. *Martin* v. *Eccles Corp.*, (1919) 1 Ch. 387.
39. *Price* v. *Sunderland Corp.*, (1956) 1 WLR 1253. See also *Roberts* v. *Hoophood* (infra).
40. AIR 1966 SC 740 : (1966) 1 SCR 709.
41. AIR 1962 SC 764 : 1962 Supp 2 SCR 149.

State Government was authorised to acquire land for a company if the Government was satisfied that 'such acquisition is needed for the construction of a work and that such work is likely to prove useful to the public'. In this case, the land was acquired for a private company for the construction of a factory for manufacturing of textile machinery. The Supreme Court, by majority, held that even though it was a matter of subjective satisfaction of the Government, since the sanction was given by the Government on irrelevant and extraneous considerations, it was invalid. Wanchoo, J. (as he then was) observed:

> *The Government cannot both give meaning to the words and also say that they are satisfied on the meaning given by them.* The meaning has to be given by the Court and it is only thereafter that the Government's satisfaction may not be open to challenge if they have carried out the meaning given to the relevant words by the Court.[42] (emphasis supplied)

Hukam Chand v. *Union of India*[43]

Under the relevant rule, the Divisional Engineer was empowered to disconnect any telephone on the occurrence of a 'public emergency'. When the petitioner's telephone was disconnected on the allegation that it was used for illegal forward trading (*satta*) the Supreme Court held that it was an extraneous consideration and arbitrary exercise of power by the authority.

(iii) Leaving out relevant considerations

As discussed above, the administrative authority cannot take into account irrelevant or extraneous considerations. Similarly, if the authority fails to take into account relevant considerations, then also, the exercise of power would be bad. But it is very difficult to prove that certain relevant factors have not been taken into consideration by the authority, unless detailed reasons are given in the impugned order itself from which it can be inferred. Still, however, sometimes the relevant considerations are prescribed by the statute itself, e. g. "regard shall be had

42. AIR 1962 SC 764 at p. 772. See also *State of Bombay* v. *Krishnan*, AIR 1960 SC 1223; *Binny Ltd.* v. *Workmen*, (1972) 3 SCC 806: AIR 1972 SC 1975.

43. (1976) 2 SCC 128: AIR 1976 SC 789. See also *R.* v. *Marsham*, (1892) 1 QB 371; *L. D. Sugar Mills* v. *Ram Sarup*: AIR 1957 SC 82: (1956) SCR 916; *Sanmugam* v. *V. S. K. V. ...etc.*, AIR 1963 SC 1626: (1964) 1 SCR 809.

to", "must have regard to", etc. Here, the matter so specified must be taken into account.

Rampur Distillery Co. v. *Company Law Board*[44]

The Company Law Board refused to give its approval for renewing the managing agency of the company. The reason given by the Board for not giving its approval was that the Vivian Bose Commission had severely criticized the dealings of the Managing Director Mr. Dalmia. The Court conceded that the past conduct of the directors was a relevant consideration, but before taking a final decision, it should take into account their present activities also.

Ashadevi v. *K. Shivraj*[45]

An order of detention was passed against the detenu under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Cofeposa Act). The order was based on the detenu's confessional statements made before the Customs Authorities. But the said confessional statements were subsequently retracted by the detenu before the order of detention. The Supreme Court held that the question whether the earlier statements recorded were voluntary or not was a 'vital' fact which ought to have been considered by the detaining authority before passing the order of detention. As it was not done, the order was invalid and illegal.

(iv) Mixed consideration

Sometimes, a peculiar situation arises. Here the order is not *wholly* based on extraneous or irrelevant considerations. It is based *partly* on relevant and existent considerations and *partly* on irrelevant or non-existent considerations There is no uniformity in judicial pronouncements on this point. It is submitted that the proper approach is to consider it in two different situations:

(*a*) Conclusions based on subjective satisfaction; and

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44. (1969) 2 SCC 744, AIR 1970 SC 1789.
45. (1979) 1 SCC 222: AIR 1979 SC 447. See also *Sk. Nizamuddin* v. *State of W. B.*, (1975) 3 SCC 395: AIR 1974 SC 2353; *Suresh Mahato* v. *District Magistrate*, (1975) 3 SCC 554: AIR 1975 SC 728.

(*b*) Conclusion based on objective facts.

(*a*) *Conclusion based on subjective satisfaction*

If the matter requires *purely* subjective satisfaction; e. g. detention matters, a strict view is called for, and if the order of detention is based on relevant and irrelevant considerations, it has to be quashed. The reason is very simple and obvious. It is very difficult for the court to say as to what extent the irrelevant (or non-existent) grounds have operated on the mind of the detaining authority and whether it would have passed the same order even without those irrelevant or non-existent grounds. In *Dwarka Das* v. *State of J. K.*[46], setting aside the order of the detention which was based on relevant and irrelevant grounds, the Supreme Court observed :

> Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. That is so because the matter being one for subjective satisfaction, it must be properly based on all the reasons on which it purports to be based. *If some out of them are found to be non-existent or irrelevant, the Court cannot predicate what the subjective satisfaction of the said authority would have been on the exclusion of those grounds or reasons.*[47] (emphasis supplied)

The same principle is applied by the Supreme Court in a number of cases.[48]

But in the *Dwarkadas* case (supra), the Court further observed :

> In applying these principles, however, the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, *might reasonably have affected the subjective satisfaction of the appropriate authority.* It is not merely because some ground or reason of a *comparatively unessential nature* is defective that such an order based on subjective

46. AIR 1957 SC 164 : (1956) SCR 948.

47. *Ibid.* at p. 168 (AIR).

48. *Ram Manohar Lohia* v. *State of Bihar*, AIR 1966 SC 740; *Manu Bhusan* v. *State of W. B.*, (1973) 3 SCC 663 : AIR 1973 SC 295; *Pushker* v. *State of W. B.*, (1969) 1 SCC 10 : AIR 1970 SC 852.

satisfaction can be held to be invalid. The Court while anxious to safeguard the personal liberty of the individual will not lightly interfere with such orders. It is in the light of these principles that the validity of the impugned order has to be judged.[49] (emphasis supplied)

It is respectfully submitted that these observations are unwarranted and very wide and do not lay down the correct law. They leave the courts to speculate. If the order is based on *subjective satisfaction* and if it is not permissible for the court (as the court itself conceded) 'to substitute the objective standards of the court for the subjective satisfaction of the statutory authority' one fails to see how the *objective standard* can be applied? It is therefore, submitted that in detention matters, the orders must necessarily be quashed if they are based on mixed considerations.

(*b*) *Conclusion based on objective facts*

If the conclusion of the authority is based on *objective facts* and the action is based on relevant and irrelevant considerations the court may apply the *objective standard* and decide the validity or otherwise of the impugned action.

State of Maharashtra v. *Babulal*[50]

In this case, the State Government had superseded the municipality on two grounds. One of them was held to be extraneous by the Court and yet the order was upheld as the Court felt 'reasonably certain that the State Government would have passed the order on the basis of the second ground alone' as in the show-cause notice itself it was mentioned that the grounds 'jointly as well as severally' were serious enough to warrant action.

State of Orissa v. *Bidyabhusan*[51]

In this case, *A* was dismissed from service on certain charges. The High Court found that some of them were not proved and therefore, directed the government to consider the case whether on the basis of the remaining charges the punishment of dismissal

49. *Supra*, at p. 168 (AIR).
50. AIR 1967 SC 1353: (1967) 2 SCR 583.
51. AIR 1963 SC 779: 1963 Supp 1 SCR 648.

was called for. On appeal, the Supreme Court reversed the judgment of the High Court and upheld the order of dismissal. According to the Court, if the order could be supported on any of the grounds, it was not for the Court to consider whether on that ground alonet he punishment of dismissal can be sustained[52].

It is submitted that the aforesaid view is correct. The principle has been succinctly laid down by Shelat, J. in *Zora Singh* v. *J. M. Tondon*[53], wherein His Lordship observed :

> The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective facts or evidence, but on subjective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior court to find out which of the reasons, relevant or irrelevant, valid, or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. *If it is found that there was legal evidence before the Tribunal, even if some of it was irrelevant, a superior court would not interfere if the finding can be sustained on the rest of the evidence.*[54] (emphasis supplied)

Recently, the Supreme Court has reiterated the same principle in the case of *State of U. P.* v. *Chandra Mohan Nigam*[55].

(v) Mala fide

This phrase has two meanings. In the popular sense, it means dishonesty, fraud or ill-will, but in the legal sense, it has a very broad connotation. When the administrative action is taken out of personal animosity, ill-will or vengeance, the action will necessarily be struck down on the ground of 'malice in fact'. But even in the absence of malice in fact, the action will be ultra vires if it was taken to achieve some purpose foreign to the statute.

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52. See also *Rly. Board* v. *Niranjan*, (1969) 1 SCC 502 : AIR 1969 SC 966; *Sarwan Singh* v. *State*, (1976) 2 SCC 868 : AIR 1976 SC 232.
53. (1971) 3 SCC 834 : AIR 1971 SC 1537.
54. *Ibid.* at p. 838 (SCC); pp. 1540-41 (AIR).
55. (1977) 4 SCC 345 : AIR 1977 SC 2411.

In *Jaichand* v. *State of W.B.*[56] our Supreme Court has defined mala fide in the following words:

> ... [M]ala fide exercise of power only means that the statutory power is exercised for the purposes foreign to those for which it is in law intended.

In *Smt. S.R. Venkataraman* v. *Union of India*[57], the Supreme Court has defined malice in wide terms and observed:

> Malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.

Municipal Council of Sydney v. *Campbell*[58]

Under the relevant statute the Council was empowered to acquire land for 'carrying out improvements in or remodelling any portion of the city'. The Council acquired the disputed land for expanding a street. But in fact the object was to get the benefit of probable increase in value of the land as a result of proposed extension of the highway. No plan for improving or remodelling was proposed or considered by the Council. It was held that the power was exercised with ulterior object and hence it was ultra vires.

Pratap Singh v. *State of Punjab*[59]

In this case, the petitioner was a civil surgeon and he had taken leave preparatory to retirement. Initially the leave was granted, but subsequently it was revoked. He was placed under suspension, a departmental enquiry was instituted against him and ultimately, he was removed from service. The petitioner alleged that the disciplinary proceedings had been instituted against him at the instance of the then Chief Minister to wreak personal vengeance on him as he had not yielded to the illegal demands of the former. The Supreme Court accepted the contention, held the exercise of power to be mala fide and quashed the order.

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56. AIR 1967 SC 487: 1966 Supp SCR 464.
57. (1979) 2 SCC 491, 494: AIR 1979 SC 49. *See also* Bailey, Cross, Garner: *Cases and Materials on Adminitsrative Law*, (1977) pp. 268-69; A. S. Misra: *The Law of Bias and Mala fides*, (1977).
58. (1925) AC 338.
59. AIR 1964 SC 72: (1964) 4 SCR 733.

C. S. Rowjee v. *State of A.P.*[60]

In this case, the State Road Transport Corporation had framed a scheme for nationalisation of certain transport routes. This was done as per the directions of the then Chief Minister. It was alleged by the petitioner that the particular routes were selected to take vengeance against the private transport operators of that area as they were his political opponents. The Supreme Court upheld the contention and quashed the order.

Burden of proof

The burden of proving mala fide is on the person making the allegations and the burden is 'very heavy'.[61] There is a presumption in favour of the administration that it always exercises its power bona fide and in good faith. The reason is obvious. 'The allegations of mala fide are often more easily made than made out, and *the very seriousness of such allegations demands proof of a high order of credibility*'.[62] (emphasis supplied). It is the last refuge of a losing litigant.[63]

(vi) Improper purpose : Collateral purpose

A statutory power conferred on the authority must be exercised for that purpose alone and if it is exercised for a different purpose, there is abuse of power by the authority and the action may be quashed. Improper purpose must be distinguished from 'mala fide' exercise of power. In the latter, personal ill-will, malice or oblique motive is present, while in the former it may not be so, and the action of the authority may be bona fide and honest and yet, if it is not contemplated by the relevant statute, it may be set aside. In other words, 'a power used under the misappre-

60. AIR 1964 SC 962 : (1964) 6 SCR 330.
See also *G. Sadanandan* v. *State*, AIR 1966 SC 1925 : (1966) 3 SCR 590.

61. *E. P. Royappa* v. *State of T. N.*, (1974) 4 SCC 3 (41) AIR 1974 SC 555 (586).

62. *Ibid.* at p. 41 (SCC), p. 586 (AIR) (Per Bhagwati, J.). See also *Rowjee's* case, (*supra*), at pp. 969-70.

63. *Gulam Mustafa* v. *State of Maharashtra*, (1971) 1 SCC 800 (802) : AIR 1977 SCC 448 (449) ; *Kedarnath* v. *State of Punjab*, (1978) 4 SCC 336 : AIR 1979 SC 220 ; *Tara Chand* v. *Municipal Corp. Delhi*, (1977) 1 SCC 472 (484) : AIR 1977 SC 567 (577) ; *State of Punjab* v. *Ramjilal*, (1970) 3 SCC 602 : AIR 1971 SC 1228 : (The allegations of mala fide need not be against a named official).

hension that it was needed for effectuating a purpose, which was really outside the law or the proper scope of the power, could be said to be an exercise for an extraneous or collateral purpose.[64]

Nalini Mohan v. *District Magistrate*[65]

The relevant statute empowered the authority to rehabilitate the persons displaced from Pakistan as a result of communal violence. The power was exercised to accommodate a person who had come from Pakistan on medical leave. The order was set aside.

Ahmedabad Manufacturing and Calico Printing Co. v. *Municipal Corporation, Ahmedabad*[66]

The Commissioner was empowered under the Act to disapprove the construction of any building if it contravened any of the provisions of the Act. If the said power is exercised to bring pressure on the company to provide drainage facility to its other existing buildings, the order cannot be sustained.

State of Bombay v. *K. P. Krishnan*[67]

In this case, the government refused to make a reference on the ground that 'the workmen resorted to go slew during the year'. The Supreme Court held that the reason was not germane to the scope of the Act and set aside the order.[68]

(vii) Colourable exercise of power

Where a power is exercised by the authority ostensibly for the purpose for which it was conferred, but in reality for some other purpose, it is called colourable exercise of power. Here, though the statute does not empower the authority to exercise the power in a particular manner, the authority exercises the power under the 'colour' or guise of legality. In *Somawanti* v. *State of Punjab*[69], the Supreme Court held that the power must be exercised for the

64. *State of Mysore* v. *P. R. Kulkarni*, (1973) 3 SCC 597 (600): AIR 1972 SC 2170 (2172).
65. AIR 1951 Cal. 346.
66. AIR 1956 Bom. 117.
67. AIR 1960 SC 1223: (1961) 1 SCR 227.
68. See also *Roberts* v. *Hopwood* (infra).
69. AIR 1963 SC 151: (1963) 2 SCR 774.

purpose for which it was conferred and if it was used for different purpose, there was colourable exercise of power, as not being relatable to the power conferred upon the authority by the statute and the order will be a nullity.

But it is very difficult to draw a dividing line between improper or collateral purpose on the one hand and colourable exercise of power on the other. It is obvious that if the statutory power is exercised for an 'improper' or 'collateral' purpose, there is 'colourable' exercise of power. Similarly, if there is 'colourable' exercise of power, it cannot be said that it was exercised for proper purpose. Thus, both the phrases can be used interchangeably. In fact, as the learned authors on administrative law[70] state, the phrase "colourable" is confusing and it is better to avoid the use of that phrase.

(viii) Disregard of the principles of natural justice

By now, it is well settled law that even if the exercise of power is purely administrative in nature, if it adversely affects any person, the principles of natural justice must be observed and the person concerned must be heard. Violation of the principles of natural justice makes the exercise of power ultra vires and void.[71]

(ix) Unreasonableness

A discretionary power conferred on an administrative authority must be exercised by that authority reasonably. If the power is exercised unreasonably, there is an abuse of power and the action of the authority will be ultra vires.

The term 'unreasonable' is ambiguous and may include many things e. g. irrelevant or extraneous considerations might have been taken into account by the authority or there was improper or collateral purpose or mala fide exercise of power by it or there was colourable exercise of power by the authority and the action may be set aside by courts.

Roberts v. *Hopwood*[72]

In this leading case, the local authority was empowered to

70. Jain and Jain: *Principles of Administrative Law*, (1973), p. 402.
71. *See* Lecture VI (*supra*).
72. (1925) AC 578.

pay "such wages as it may think fit". In exercise of this power, the authority fixed the wages at £4 per week to the lowest grade worker in 1921-22. The Court held that though discretion was conferred, it was not exercised reasonably and the action was bad. According to Lord Wrenbury, 'may think fit' means 'may reasonably think fit'. His Lordship observed:

> Is the verb "think" equivalent to "reasonably think" ? My Lords, to my mind there is no difference in the meaning, whether the word "reasonably" or "reasonable" is in or out...I rest my opinion upon higher grounds. A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. *A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought.* In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably.[73] (emphasis supplied)

Rohtas Industries Ltd. v. *S. D. Agrawal*[74]

In this case, an order of investigation was issued by the Central Government against the petitioner company under the Companies Act, 1956. The Supreme Court set aside the order as the material in possession of the Government did not suggest that there was fraud on the part of the company.

Pukhraj v. *Kohli*[75]

Under Section 178A of the Customs Act, 1878, the burden of proof that the goods are not smuggled goods is on the person from whom they are seized in the 'reasonable belief' that they are smuggled goods. The Supreme Court took a narrow view and held that it was not sitting in appeal over the decision of the authority and all that was necessary was the prima facie ground about the reasonable belief. But in *Sheonath* v. *Appellate Assistant Commissioner*[76], the Court held that the expression 'reason to believe' suggests that the 'belief must be of an honest man and reasonable

73. (1925) AC 578 at p 613. See also *Liversidge* v. *Anderson*, (1942) AC 206; *Nakkuda Ali* v. *Jayratne*, (1951) AC 66.
74. AIR 1969 SC 707: (1969) 1 SCC 325.
75. AIR 1962 SC 1559: 1962 Supp 3 SCR 866.
76. (1972) 3 SCC 234: AIR 1971 SC 2451.

person based upon reasonable grounds and not on mere suspicion'.[77]

At the same time, it should not be forgotten that the action of the authority should not be held to be unreasonable merely because the court thinks it to be unreasonable.[78] The Court cannot sit in appeal over the decision of the administrative authority.[79] It can interfere only if the decision is 'so unreasonable that no reasonable man could have ever come to it',[80] or perverse[81] or there is 'no evidence' to justify the conclusion.[82]

(C) *Infringement of fundamental rights*

Under the Constitution of India, certain fundamental rights are conferred upon citizens and other persons. An administrative authority must exercise its discretionary powers in consonance with those rights. Any action taken in contravention of the provisions of Part III of the Constitution will be ultra vires on that ground also.[83]

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77. (1972) 3 SCC 234, at. p. 239 (SCC) : p. 2454 (AIR).
78. *Kruse* v. *Johnson*, (supra) p. 89.
79. *Pukhraj* case (supra) ; *Sri Ram Vilas Service* (supra) ; *Bombay Union* v. *State* (supra) : *Prem Kakar* v. *State* (supra) ; *Hindustan Tin Works* v. *Employees*, (1979) 2 SCC 80, 84 : AIR 1979 SC 75.
80. Lord Greene, M. R. in *Wednesbury Corp.* (supra) ; *C.I.T.* v. *Radha Kishan* (supra) ; *Rohtas Industries* (supra) ; *Pukhraj* (supra).
81. *Dhirajlal* v. *I.T.C.* (supra) ; *D. Macropollo* v. *Employees* (supra) ; *Dhrangadhra Chemical* (supra). *See also* Bailey, Cross, Garner (*supra*) pp. 299-300 de Smith (*supra*) pp. 303-311.
82. *Dhrangadhra Chemical* (supra) ; *State of A. P.* v. *Rao* (supra).
83. *See* Lecture IX (*infra*).

Lecture IX

JUDICIAL AND OTHER REMEDIES

"Ubi jus ibi remedium"

The King is at all times entitled to have an account, why the liberty of any of his subjects is restrained.

—BLACKSTONE

We have a legislative body, called the House of Representatives, of over 400 men. We have another legislative body, called the Senate, of less than 100 men. We have, in reality, another legislative body, called the Supreme Court, of nine men; and they are more powerful than all the others put together.

—GEORGE W. NORRIS

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1. Introduction

Administrative law provides for control over the administration by an outside agency strong enough to prevent injustice to the individual while leaving the administration adequate freedom to enable it to carry on effective government.[1] Due to increase in governmental functions, administrative authorities exercise vast powers in almost all fields. But as has been rightly observed by Lord Denning[2] 'properly exercised the new powers of the executive lead to Welfare State, but abused they lead to the

1. Garner: *Administrative Law*, (1963) p. 95.
2. *Freedom under the Law*: (1949) p. 126.

Totalitarian State'. Without proper and effective control an individual would be without remedy, even though injustice is done to him. This would be contrary to the fundamental concept in English and Indian legal systems in which the maxim *'ubi jus ibi remedium'* (wherever there is a right there is a remedy) has been adopted since long. In fact, right and remedy are two sides of the same coin and they cannot be dissociated from each other. The remedies available to an individual aggrieved by any action of an administrative authority may be classified as follows :

Judicial remedies ; and

Other remedies

2. Judicial Remedies

These remedies may further be sub-divided into the following categories :

(1) Prerogative remedies ;
(2) Statutory remedies ;
(3) Equitable remedies ; and
(4) Common law remedies.

Let us now consider each of them in detail.

Prerogative remedies

Historical background

In England, the high prerogative writs played a very important role in upholding the rights and liberties of subjects and in providing effective safeguards against arbitrary exercise of power by public authorities. Under the provisions of the Regulating Act, 1773 the Supreme Court was established at Calcutta in 1774 by issuing a Royal Charter and it was vested with power to issue the high prerogative writs. The said power was also conferred on High Courts established under the Indian High Courts Act, 1861 and since then, High Courts exercise the power to issue the prerogative writs to protect the rights of individuals.

Constitutional provisions

The Founding Fathers of the Constitution of India were aware of the part played by these writs. In these circumstances,

under the Constitution, the Supreme Court and High Courts are empowered to issue writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* for the enforcement of fundamental rights (Article 32) and also for other purposes (Article 226).[3] Thus, the Supreme Court and High Courts are empowered to issue the following writs:

1. *Habeas corpus*;
2. *Mandamus*;
3. Prohibition;
4. *Certiorari*; and
5. *Quo warranto*

Locus standi: *Who may apply*

The Supreme Court can issue a writ under Article 32 of the Constitution only for enforcement of any fundamental right conferred by the Constitution. The powers of a High Court are very wide in this respect as it can issue a writ for enforcement of any fundamental right and also for other purposes mentioned in sub-clauses (*b*) and (*c*) of clause (1) of Article 226. As a general rule, a person who approaches the court must prove *his* right which can be enforced by the court by issuing an appropriate writ.[4] But this rule does not strictly apply in cases of writs of *habeas corpus*[5] and *quo warranto*.[5] Thus, a non-citizen cannot file a writ petition for the enforcement of a fundamental right conferred only on citizens.[6] Such right must be an existing right.[7] A busy body is not to be encouraged to challenge an act or omission of an authority which does not prejudicially affect him.[8] It is not

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3. By the Constitution (42nd Amendment) Act, 1976, the words 'for any other purpose' occurring in clause (1) have been deleted and purposes for which writs may be issued have been mentioned in sub-clauses (*a*), (*b*) and (*c*) of clause (1) of Art. 226.
4. *Calcutta Gas Co.* v. *State of W. B.*, AIR 1962 SC 1044; *Venkateswari Rao* v. *Government of A. P.*, AIR 1966 SC 828; *Charanjit Lal* v. *Union of India*, AIR 1951 SC 41.
5. *Infra.*
6. *M. S. M. Sharma* v. *Shrikrishnan*, AIR 1959 SC 395.
7. *State of Orissa* v. *Ramchandra*, AIR 1964 SC 685; *Maganbhai* v. *Union of India*, (1970) 3 SCC 400: AIR 1969 SC 783.
8. *J. N. & Co.* v. *State of A. P.*, (1971) 2 SCC 163: AIR 1971 SC 1507.

necessary that a writ petition can be filed only when there is actual invasion of a right. It can be filed even when there is reasonable apprehension of invasion of the right of the petitioner.[9]

Against whom a writ would lie

Under Article 226(1), every High Court is empowered to issue a writ "to any person or authority, including in appropriate cases, any Government". Thus, a writ can be issued against a 'person' or an 'authority' including 'Government' for certain purposes. After the well-known decisions in the cases of *Rajasthan Electricity Board* v. *Mohanlal*[10] and *Sukhdev Singh* v. *Bhagat Ram*[11], it is clear that a writ can be issued against a department of the government, a statutory authority or even against a non-statutory authority, if it has to function under a statutory provision. Thus, a writ can be issued against the Railway Board,[12] Panchayat,[13] Municipality,[14] Road Transport Corporation,[15] Oil and Natural Gas Commission,[16] Electricity Board,[17] Life Insurance Corporation of India[18], Reserve Bank of India,[19] etc.

Alternative remedy

As the Supreme Court and the High Courts are the apex judicial bodies in the nation and the States respectively, it is but natural that if alternative and equally efficacious remedy is available to the party, they may refuse to exercise this extraordinary jurisdiction and direct the party concerned to first avail of the said alternative remedy. The effect of availability of an alternative remedy may be considered under the following heads:

(*i*) Article 32

9. *K. K. Kochuni* v. *State of Madras*, AIR 1959 SC 725; *Bengal Immunity Co.* v. *State of Bihar*, AIR 1955 SC 66.
10. AIR 1967 SC 1857: (1967) 3 SCR 377.
11. (1975) 1 SCC 421: AIR 1975 SC 1331.
12. *Railway Board* v. *Observer Publications*, (1972) 2 SCC 266: AIR 1972 SC 1792.
13. *Ajit Singh* v. *State of Punjab*, AIR 1967 SC 355.
14. *Rashid Ahmed* v. *Municipal Board*, AIR 1950 SC 163.
15. *Mysore S. R. T. C.* v. *Devraj*, (1976) 2 SCC 863: AIR 1976 SC 1027.
16. *Sukhdev Singh's* case (supra).
17. *Rajasthan Electricity* case (supra).
18. *L. I. C.* v. *Sunil Kumar*, AIR 1964 SC 847.
19. *Reserve Bank of India* v. *N. C. Paliwal*, (1976) 4 SCC 838: AIR 1976 SC 2345.

(*ii*) Article 226

(*a*) Position prior to 1976

(*b*) Position after 1976

Article 32.—Article 32 confers a fundamental right to move the Supreme Court by appropriate proceedings for the enforcement of fundamental rights conferred by Part III of the Constitution of India. The right to move the Supreme Court by a petition under Article 32 being itself a fundamental right, availability of an alternative remedy cannot *per se* be a good and sufficient ground for not granting a relief to the petitioner.[20] If the petitioner *prima facie* satisfies the Supreme Court that his fundamental right is violated, it is not only the *right* but the *duty* of the Court to see that the petitioner's fundamental right is safeguarded.[21] Thus, to issue an appropriate writ under Article 32 is not a matter of *discretion* for the Supreme Court and it cannot refuse to grant relief to the petitioner.[22] On the contrary, the State cannot place any hindrance in the way of an aggrieved person seeking to approach the Supreme Court.[22] But here also Hidayatullah, C. J.[23] states: "Although there is no rule or provision of law to prohibit the exercise of its extraordinary jurisdiction, this Court has always insisted upon recourse to ordinary remedies or the exhaustion of other remedies. It is in rare cases, where the ordinary process of law appears to be inefficacious, that this Court interferes even where other remedies are available. This attitude arises from the acceptance of a salutary principle that extraordinary remedies should not take the place of ordinary remedies".

Article 226.—Even with regard to the jurisdiction of High Courts under Article 226, the position is similar when there is a violation of any fundamental right of the petitioner. The principle that a High Court may not issue a prerogative writ when an adequate alternative remedy would be available could not apply where a party came to the court with an allegation that his funda-

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20. *K. K. Kochuni's* case (supra) at pp. 729-30; *Daryao* v. *State of U. P.*, AIR 1961 1457 (1461).
21. *N. Masthan* v. *Chief Commr.*, AIR 1962 SC 787.
22. *Tilokchand Motichand* v. *H. B. Munshi*, (1969) 1 SCC 110: AIR 1970 SC 898.
23. *Ibid.* at p. 114 (SCC); p. 901 (AIR).

mental right had been infringed and sought relief under Article 226.[24]

(*a*) *Position prior to 1976.*—Prior to the Constitution (42nd Amendment) Act, 1976, the availability of an alternative remedy was not considered to be an absolute bar for granting the relief to the petitioner under Article 226 of the Constitution. But at the same time it was a consideration upon which the Court might refuse to issue a writ. Generally, a High Court may not issue a writ except in cases involving infringement of fundamental rights under Article 226 if other adequate remedies are available to the petitioner. The remedy available under Article 226 to move a High Court cannot be permitted to be utilised as substitutes for other statutory remedies. In such cases, generally, a High Court will not exercise its discretion in favour of the petitioner.[25] But it was not a rigid or inflexible rule. It was a matter of *discretion* and not of *jurisdiction*.[26] And in spite of an alternative remedy being available, the court did not throw away the petition but exercised its discretion if there were good grounds to do so.[27] The correct law was laid down by the Supreme Court in *State of U. P.* v. *Mohd. Nooh*[28], wherein the Court observed:

> The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory

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24. *Himatlal* v. *State*, AIR 1954 SC 403; *Mohd. Yasin* v. *T. A. C.*, AIR 1952 SC 115; *State of Bombay* v. *United Motors*, AIR 1953 SC 252; *Bengal Immunity Co.*, (supra).
25. *Rashid Ahmed* v. *I. T. C.*, AIR 1954 SC 207; *A. V. Venkateswaran* v. *Wadhwani*, AIR 1961 SC 1506; *Abraham* v. *I. T. O.*, AIR 1961 SC 609; *Champa Lal* v. *I. T. C.*, AIR 1970 SC 645: (1971) 3 SCC 20: *Baburam* v. *Zila Parishad*, AIR 1969 SC 556.
26. *Union of India* v. *T. R. Verma*, AIR 1957 SC 882; *Baburam's* case (supra); *Addl. Collector* v. *Shantilal*, AIR 1966 SC 197; *Rohtas Industries* v. *Union of India*, (1976) 2 SCC 82: AIR 1976 SC 425.
27. *Union of India* v. *Verma* (supra); *State of U. P.* v. *Abdul Samad*, AIR 1962 SC 1506.
28. AIR 1958 SC 86: (1958) SCR 595.

remedies, if any. *But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law.....*[29] (emphasis supplied)

(b) *Position after 1976.*—But after the Constitution (42nd Amendment) Act, 1976, the position is radically changed by inserting clause (3) to Article 226. Clauses (1) and (3) of Article 226 as amended by the Constitution (42nd Amendment) Act, 1976 read as under :

(1) Notwithstanding anything in Article 32 but subject to the provisions of Article 131A and Article 226A, every High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them,—

(*a*) for the enforcement of any of the rights conferred by the provisions of Part III; or

(*b*) for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made thereunder; or

(*c*) for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-clause (*b*) where such illegality has resulted in substantial failure of justice.

(2) .. .. ..

(3) No petition for the redress of any injury referred to in sub-clause (*b*) or sub-clause (*c*) of clause (1) shall be entertained if any other remedy for such redress is pro-

29. *Ibid.* at p. 93 (AIR).

vided for by or under any other law for the time being in force.

Reading these two clauses together, it becomes clear that except in cases of the enforcement of any fundamental right, the existence of an alternative remedy is an *absolute bar* to the jurisdiction of a High Court under Article 226. Thus, after the 42nd Amendment, it is a matter of *jurisdiction* and not of *discretion*. Still however, 'where power is sought to be exercised without jurisdiction or authority of law, not backed by law or without sanction of law or the order is a purported order'[30] or where the exercise of power is '*ab-initio* void' and therefore a nullity,[31] the fetter of clause (3) of Article 226 would not restrain the High Court in entertaining a writ petition under Article 226 even after the Constitution (42nd Amendment) Act, 1976.[32]

Delay and laches

As discussed above, to issue a writ is in the discretion of the court and if the court finds that there is inordinate delay and laches on the part of the petitioner in approaching the Court, it may dismiss the petition on that ground alone.[33] The principle underly ing this proposition is that the courts do not encourage agitation of stale claims and exhuming matters which have already been disposed of or where the rights of third parties have accrued in the meantime,[34] or where there is no reasonable explanation for the delay.[35]

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30. *Ahmedabad Cotton Mfg. Co.* v. *Union of India*, AIR 1977 Guj. 76 : (1977) 18 GLR 714 (FB).
31. *Mehmoodmiyan Kadri* v. *Sirishkumar*, (1978) 19 GLR 97.
32. It may be mentioned at this stage that by the Constitution (44th Amendment) Act, 1978, the original position is sought to be restored with regard to jurisdiction of a High Court under Article 226.
33. *M. K. Krishnaswamy* v. *Union of India*, (1973) 4 SCC 163 : AIR 1973 SC 1168; *Aflatoon* v. *Lt. Governor, Delhi*, (1975) 4 SCC 285 : AIR 1974 SC 2077; *Amrit Lal* v. *Coll. of Central Excise*, (1975) 4 SCC 714 : AIR 1975 SC 538; *Kamini Kumar* v. *State of W.B.*, (1972)2 SCC 420 : AIR 1972 SC 2060.
34. *Ravindra* v. *Union of India*, (1970) 1 SCC 84 : AIR 1970 SC 470; *Amrit Lal's* case (supra); *Devdhar's* case (infra). *R. K. Soni* v. *State*, AIR 1977 Guj. 76.
35. *State of Punjab* v. *B. D. Kaushal*, AIR 1971 SC 1676; *H. Lawrence* v. *Union of India*, 1975 UJSC 471.

This principle applies even in case of infringement of fundamental rights.[36]

The real difficulty is about the measure of delay. Since the Limitation Act does not apply to writ petitions and no period of limitation is prescribed by the Constitution to move the Supreme Court under Article 32 or High Courts under Article 226, the matter is 'more or less' left to judicial discretion. In *Smt. Narayani Devi* v. *State of Bihar*[37], speaking for the Supreme Court, Gajendragadkar, C. J. observed:

> No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is a matter which must be left to the discretion of the High Court and like all matters left to the discretion of the Court, in this matter too discretion must be exercised judiciously and reasonably.

In *Tilokchand Motichand* v. *H. B. Munshi*[38], Hidayatullah, C. J. observed:

> ... [T]he question is one of discretion for this Court to follow from case to case. There is no lower limit and there is no upper limit. A case may be brought within Limitation Act by reason of some article but this Court need not necessarily give the total time to the litigant to move this Court under Article 32. Similarly in a suitable case this Court may entertain such a petition even after a lapse of time. *It will all depend on what the breach of the Fundamental Right and the remedy claimed are and when and how the delay arose.*[39] (emphasis supplied)

Thus, while on the one hand, writ petitions filed within the period of limitation prescribed for a civil action for the same remedy may be dismissed on the ground of delay and laches,[40] on

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36. *Tilokchand* v. *Munshi* (supra); *Durga Prasad* v. *Chief Controller*, (1969) 1 SCC 185: AIR 1970 SC 769.
37. C. A. 140 of 1964 decided on September 22, 1964 (unrep.) *Durga Prasad's* case (supra), at p. 187.
38. (1969) 1 SCC 110: AIR 1970 SC 898.
39. *Ibid.*, at p. 116 (SCC); *Ramchandra Deodhar* v. *State of Maharashtra*, (1974)1 SCC 317 (325-27): AIR 1974 SC 259 (264-66).
40. *State of M. P.* v. *Bhilal Bhai*, AIR 1964 SC 1006; *Durga Prasad's* case (supra); *Tilokchand's* case (supra).

the other hand, there may be cases in which writ petitions filed after 'the period of limitation' may be entertained.[41]

It is submitted that the correct view is as laid down by the Supreme Court in *P. S. Sadasivaswamy* v. *State of T. N.*[42], in the following words:

> It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. *But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters.*[43] (emphasis supplied)

Writs in particular

I. *Habeas Corpus*

Scope and object.—The Latin phrase *'habeas corpus'* means 'have the body'. This is a writ in the nature of an order calling upon the person who has detained another to produce the latter before the Court, in order to let the Court know on what ground he has been confined and to set him free if there is no legal justification for the imprisonment[44]. In other words, by this writ, the Court directs the person or authority who has detained another person to bring the body of the prisoner before the Court so that the Court may decide the validity, jurisdiction or justification for such detention. As Lord Wright[45] states, 'the incalculable value of *habeas corpus* is that it enables the immediate determination of the right of the appellant's freedom'. 'If the Court comes to the conclusion that there is no legal justification for the imprisonment of the person concerned, the Court will pass an order to set him at liberty forthwith.'[46] Thus, the object of the

41. *Haryana State Electricity Board* v. *State of Punjab*, (1974) 3 SCC 91 : AIR 1974 SC 1806; *Tilokchand's* case (supra); *R. S. Deodhar's* case (supra).
42. (1975) 1 SCC 152 : AIR 1974 SC 2271.
43. *Ibid.* Per Alagiriswami, J. at p. 154 (SCC) p. 2272 (AIR). See also *R. K. Soni* v. *State* : AIR 1977 Gaj 76.
44. *State of Bihar* v. *Kameshwar*, AIR 1966 SC 575 (577).
45. *Greene* v. *Home Secretary*, (1942) AC 284 (302).
46. *Ghulam Sarwar* v. *Union of India*, AIR 1967 SC 1335.

writ of *habeas corpus* is to release a person from illegal detention and not to punish the detaining authority. "The question for a *habeas corpus* court is whether the subject is lawfully detained. If he is, the writ cannot issue, if he is not, it must issue."[47] Blackstone states:

> It is a writ antecedent to statute, and throwing its root deep into the genus of our common law.... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I.

Conditions.—The writ of *habeas corpus* may be issued when the procedure established by law has not been followed in case of detention of a person,[48] or the order of detention is not in accordance with the provisions of the Constitution,[49] or the law under which he has been detained is *ultra vires* or invalid,[50] or where there is abuse of statutory power,[51] or *mala fide* exercise of power[52] by the detaining authority.

Who may apply.—An application for the writ of *habeas corbus* may be made by the person illegally detained. But if the prisoner himself is unable to make such application, it can be made by any other person having interest in the prisoner. Thus, a wife,[53] a father[54] or even a friend[55] may in such circumstances make an application for the writ of *habeas corpus*.

47. *Per* Scott, L. J. in *R.* v. *Home Secretary, Ex parte Greene,* (1941) 3 All ER 104 (105).
48. Art. 21. *Coll. of Malabar* v. *E. Ebrahim,* AIR 1957 SC 688, *Parshottam* v. *B. M. Desai,* AIR 1956 SC 20.
49. Art. 22. *A. K. Gopalan's* case (supra); *Coll. of Malabar* (supra); *In re Madhu Limaye,* AIR 1969 SC 1014.
50. *State of Bihar* v. *K. P. Verma,* AIR 1965 SC 575.
51. *Dwarkadas* v. *State* (supra), *Dr. Lohia's* case (infra).
52. *Ram Manohar Lohia* v. *State of Bihar,* AIR 1966 SC 740; *G. Sadanandan* v. *State of Kerala,* AIR 1966 SC 1925; *A.K. Gopalan's* case (supra), *Dwarkadas* (supra), *Pannalal* v. *Union of India,* AIR 1958 SC 163.
53. *Cobbet* v. *Hudson,* (1850)15 QB 988; *Sundarajan* v. *Union of India,* AIR 1970 Del 29.
54. *In re Thompson,* (1860) 40 LJ MC 19 *Sundarajan's* case (supra).
55. *In re Rajadhar,* AIR 1948 Bom 334.

Procedure.—Every application for the writ of *habeas corpus* must be accompanied by an affidavit stating the facts and circumstances leading to the making of such application. If the Court is satisfied that there is a *prima facie* case for granting the prayer, it will issue a *rule nisi* calling upon the detaining authority on a specified day to show cause as to why the *rule nisi* should not be made absolute. On the specified day, the Court will consider the merits of the case and will pass an appropriate order. If the Court is of the opinion that the detention was not justified, it will issue the writ and direct the detaining authority to release the prisoner forthwith. On the other hand, if according to the Court, the detention was justified, the *rule nisi* will be discharged. Where there is no return to the *rule nisi*, the prisoner is entitled to be released forthwith.[56]

When may be refused.—Since the object of the writ of *habeas corpus* is remedial and not punitive, the legality or otherwise of the detention must be decided by the Court with reference to the date of *return* of the *rule nisi* and not with reference to the date of *making* such application. Thus, the writ would not be issued if at the time of the *rule nisi*, the prisoner was not illegally detained, even though at the time of detention the order was illegal.[57] Similarly, if during the pendency of the petition for the writ of *habeas corpus* the prisoner is released, it will become infructuous.[58] In *Talib Hussain* v. *State of J. K.*[59], the Supreme Court rightly observed :

> ... [I] t is sufficient to point out that in *habeas corpus* proceedings the Court has to consider the legality of the detention on the date of hearing. If on the date of hearing it cannot be said that the aggrieved party has been wrongfully deprived of his personal liberty and his detention is contrary to law, a writ of *habeas corpus* cannot issue.[60]

Successive applications.—For many years it was accepted in

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56. *State of Bihar* v. *Kameshwar* (supra).
57. *Barnando* v. *Ford*, (1862) AC 326 ; *Naranjan Singh* v. *State of Punjab*, AIR 1952 SC 106 ; *B. R. Rao* v. *State of Orissa*, (1972)3 SCC 256 : AIR 1971 SC 2197 ; *Kidar Nath* v. *State of Punjab*, AIR 1960 Punj 122.
58. *Kidar Nath's* case (supra).
59. (1971) 3 SCC 118 : AIR 1971 SC 62.
60. *Ibid.* at p. 121 (SCC) : p. 64 (AIR).

England that an unsuccessful applicant could go from judge to judge and court to court successively and get his application renewed on the same evidence and on the same grounds for the writ of *habeas corpus*.[61] Thus the applicant "could go from one judge to another until he could find one more merciful than his brethren"[61a]. But *in re Hastings (No. 2)*[62] the earlier view was overruled. Today, a person has no right to present successive applications for the writ of *habeas corpus*.[63]

Effect of proclamation of emergency.—Article 359 of the Constitution of India empowers the President to suspend the right to move any court for the enforcement of such of the fundamental rights conferred by Part III as may be mentioned in the Presidential Order. In *Makhan Singh* v. *State of Punjab*[64] the Supreme Court held that the Court cannot issue a writ of *habeas corpus* to set at liberty a person who has been detained under the Defence of India Act, 1962 even if his detention was inconsistent with his constitutional rights guaranteed under Part III of the Constitution. But the Presidential Order does not debar the jurisdiction of the Court to decide as to whether the order of detention was under the Defence of India Act, 1962 or rules made thereunder. It is open to the petitioner to contend that the order was *mala fide* or invalid and in either of the cases, he was entitled to move the court for the protection of his rights under Articles 21 and 22 of the Constitution of India.[65]

Mandamus

Nature and scope.—*Mandamus* means a command. It is an order issued by a court to a public authority asking it to perform a public duty imposed upon it by the Constitution or by any other law.[66] *Mandamus* is a judicial remedy which is in the form of an

61. *Eshugbayi* v. *Govt. of Nigeria*, (1928) AC 459.
61a. Per Harman, J. in *In re Hastings* (*No.* 3), (1959) Ch. 368 (379).
62. (1958) 3 WLR 768.
63. *P. N. Lakhanpal* v. *Union of India*, AIR 1967 SC 908; *Ghulam Sarwar's* case (supra), *In re Prahalad Krishna*, AIR 1951 Bom 25 (FB).
64. AIR 1964 SC 381.
65. *Ram Manohar Lohia* v. *State of Bihar*, AIR 1966 SC 740. *See also* Lecture II (supra).
66. *State of Mysore* v. *Chandrasekhara*, AIR 1965 SC 532; *S. I. Syndicate* v. *Union of India*, AIR 1975 SC 460.

order from a superior court (the Supreme Court or a High Court) to any Government, court, corporation or public authority to do or to forbear from doing some specific act which that body is obliged under law to do or refrain from doing, as the case may be, and which is in the nature of a public duty and in certain cases of a statutory duty.[67]

(*ii*) *Conditions.*—A writ of *mandamus* can be issued if the following conditions are satisfied by the petitioner :

(*i*) The petitioner must have a legal right. Thus, when the petitioner contended that his juniors had been promoted by the Government and he had been left out, and the Court held that the petitioner was not qualified for the post, his petition was dismissed.[68]

(*ii*) A legal duty must have been imposed on the authority and the performance of that duty should be imperative, not discretionary or optional. There must be in the applicant a right to compel the performance of some duty cast on the opponent.[69] Thus, if at its own discretion, Government makes a rule to grant dearness allowance to its employees, there is no legal duty and the writ of *mandamus* cannot be issued against the Government for performance of that duty.[70]

(*iii*) The duty must be *statutory* i.e. one imposed either by the Constitution,[71] or by any other statute,[72] or by some rule of common law,[73] but should not be contractual.[74]

(*iv*) In certain circumstances, however, even if discretionary power is conferred on the authority and the

67. Markose : *Judicial Control*...., (supra), at p. 364.
68. *Umakant* v. *State of Bihar*, AIR 1973 SC 965.
69. *State of M.P.* v. *Mandavar*, AIR 1954 SC 493.
70. *Ibid. State of Mysore* v. *Syed Mahmood*, AIR 1968 SC 1113.
71. *Rashid Ahmed* v. *Municipal Board*, AIR 1950 SC 163; *Wazir Chand* v. *State of H.P.*, AIR 1954 SC 415.
72. *State of Bombay* v. *Hospital Mazdoor Sabha*, AIR 1960 SC 610; *Guruswamy* v *State of Mysore*, AIR 1954 SC 592.
73. *Commissioner of Police* v. *Gordhandas*, AIR 1952 SC 16.
74. *Lekhraj* v. *Dy. Custodian*, AIR 1966 SC 334.

statutory provisions are made for such exercise of the said power, the writ of *mandamus* can be issued for the enforcement of that duty.[75]

(v) The duty must be of a *public nature*.[76]

(vi) If the public authority invested with discretionary power abuses the power,[77] or exceeds it,[78] or acts *mala fide*,[79] or there is non-application of mind by it,[80] or irrelevant considerations have been taken into account,[81] the writ of *mandamus* can be issued.

(vii) Demand and refusal:—

The petition for a writ of *mandamus* must be preceded by a demand of justice and its refusal. In Halsbury's Laws of England[82] it is stated:

> As a general rule the order will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the *mandamus* desires to enforce, and that that demand was met by a refusal.

The above principle has been accepted in India also.[83] In *Naubat Rai* v. *Union of India*[84] the petitioner was in military service. He was removed from service and

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75. *Commr. of Police* v. *Gordhandas*, (supra).
76. *Sohanlal* v. *Union of India*, AIR 1957 SC 529.
77. *State of Punjab* v. *Ramji Lal*, (1970) 3 SCC 602: AIR 1971 SC 1228. *State of Haryana* v. *Rajendra*, (1972) 1 SCC 267: AIR 1972 SC 1004;
78. *Calcutta Discount Co.* v. *I.T.O.*, AIR 1961 SC 372.
79. *Pratap Singh* v. *State of Punjab*, AIR 1964 SC 72; *Rowjee* v. *State of A.P.*, AIR 1964 SC 692.
80. *State of Punjab* v. *Hari Kishan*, AIR 1966 SC 1081; *Kishori Mohan* v. *State of W.B.*, (1972) 3 SCC 845: AIR 1972 SC 1749.
81. *Rohtas Industries* (supra); *Manu Bhusan* v. *State of W.B.*, (1973) 3 SCC 663: AIR 1973 SC 295.
82. *Halsbury's Laws of England*, (3rd Ed.) Vol. 13, p. 106.
83. *Kamini Kumar's* case (supra); *Amrit Lal's* case (supra); *S.I. Syndicate* v. *Union of India*, AIR 1975 SC 460.
84. AIR 1953 Pun. 137.

therefore, he applied for the writ of *mandamus*. It was not shown that he had at any time applied for reinstatement against the order of removal. The Court held that the application was not maintainable. The plea was not of form but of substance, and before issuing the writ of *mandamus*, the Court must be satisfied that the demand was made by the aggrieved person and it was refused by the authority.

Who may apply—A person whose right has been infringed may apply for the writ of *mandamus*. Such right must be subsisting on the date of filing the petition.[85] Thus, in case of an incorporated company, the petition must be filed by the company itself.[86] In case any individual makes an application for the enforcement of any right of an institution, he must disclose facts to relate what entitled him to make an application on behalf of the said institution.[87]

Against whom mandamus will not lie—A writ of *mandamus* will not lie against the President or the Governor of a State for the exercise and performance of powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.[88] It will not lie against the State Legislature to prevent them from considering enacting a law alleged to be violative of constitutional provisions.[89] It will not lie against an inferior or ministerial officer who is bound to obey the orders of his superior. "The writ of *mandamus* will not be granted against one who is an inferior or ministerial officer, bound to obey the orders of a competent authority, to compel him to do something which is part of his duty in that capacity."[90] It also does not lie against

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85. *Kalyan Singh* v. *State of U. P.*, AIR 1962 SC 1183.
86. *Charanjit Lal* v. *Union of India*, AIR 1951 SC 41.
87. *Raj Rani* v. *U. P. Government*, AIR 1954 All 492
88. Art. 361.
89. *Narinder Chand* v. *Lt. Governor, H. P.*, (1971) 2 SCC 747; AIR 1971 SC 2399
90. *Halsbury's Laws of England*, (2nd Ed.), Vol. 9, p. 763.

a private individual[91] or any incorporate body.[92]

Alternative remedy.—A writ of *mandamus* will not be refused on the ground of alternative remedy being available if the petitioner approaches the court with an allegation that his fundamental right has been infringed.[92a] As discussed above, it is the duty of the High Court to safeguard the fundamental rights of the petitioner and the writ of *mandamus* will be issued. But if the complaint is not about the infringement of any fundamental right by the petitioner, the availability of an alternative remedy may be a relevant consideration. And if equally efficacious, effective and convenient remedy by way of appeal or revision is available against the impugned order the court may refuse to issue a writ of *mandamus*.[92b] This prerogative remedy is not intended to supersede other modes of obtaining relief provided in statutes. As the Supreme Court of the United States observed: "The office of a *mandamus* is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such performance, and *who has no other alternative remedy*".[92c] (emphasis supplied) But application of this rule is discretionary and does not bar jurisdiction of the court and if the alternative remedy is ineffective, inadequate or onerous, the court may not throw away the application of *mandamus* on that ground.[93]

Prohibition

Nature and scope.—The writ of prohibition is a judicial writ. It can be issued against a judicial or *quasi*-judicial authority, when such authority exceeds its jurisdiction or tries to exercise jurisdiction not vested in it.[94] When an inferior court hears a

91. *Praga Tools* v. *Imanual*, (1969) 1 SCC 585: AIR 1 69 SC 1306.
92. *Barada Kanta Adhi Adhikary* v. *State of W. B.*, AIR 1963 Cal 161; *Nagpur Corporation* v. *Nagpur E.L. & P. Co. Ltd.*, AIR 1958 Bom. 498.
92a. *Himatlal* v. *State*: AIR 1954 SC 403; *State of Bombay* v. *United Motors*, AIR 1953 SC 252.
92b. *Veerappa* v. *Raman*, AIR 1952 SC 192; *Rashid Ahmed* v. *I.T.C.*, AIR 1954 SC 207.
92c. *In the matter of Robert L. Cutting*, 94 US 14.
93. *Himatlal's* case (supra); *Commr. of Police* v. *Gordhandas*, AIR 1952 SC 16
94. *East India Commercial Co.* v. *Collector of Customs*, AIR 1962 SC 1893.

matter over which it has no jurisdiction, the High Court or the Supreme Court can prevent it from usurping jurisdiction and keep it within its jurisdictional boundaries.[95]

In *East India Commercial Co.* v. *Collector of Customs*[96], the Supreme Court observed:

> A writ of prohibition is an order directed to an inferior Tribunal forbidding it from continuing with a proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise.

The moral underlying the writ of prohibition is 'prevention is better than cure'.

Grounds.—A writ of prohibition may be issued against judicial or *quasi*-judicial authority on the following grounds:

(1) Where it proceeds to act without[97] or in excess[98] of jurisdiction.

In case of absence or total lack of jurisdiction a writ of prohibition would be available against a judicial or *quasi*-judicial authority prohibiting it from exercising jurisdiction not vested in it. In *Govinda Menon* v. *Union of India*[99], the Supreme Court rightly observed:

> A clear distinction must, therefore, be maintained between want of jurisdiction and the manner in which it is exercised. If there is want of jurisdiction then the matter is *coram non judice* and a writ of prohibition will lie to the Court or inferior tribunal forbidding it to continue proceedings therein in excess of its jurisdiction.[1]

In case of excess of jurisdiction a writ of prohibition can be issued to a judicial or *quasi*-judicial authority to the extent of such excess of jurisdiction allowing it to exercise jurisdiction

95. *Govinda Menon's* case (infra).
96. AIR 1962 SC 1893 (1903); *Mackonochie* v. *Lord Penzance*, (1881) AC 424.
97. *East India Commercial Co.* (supra); *Govinda Menon's* case (infra); *Asst. Collector, Central Excise* v. *National Tobacco Co.*, (1972) 2 SCC 560, AIR 1972 SC 2563.
98. *Sewpujanrai* v. *Coll. of Customs*, AIR 1958 SC 845; *National Tobacco Co.'s* case (supra).
99. AIR 1967 SC 1274: (1967) 2 SCR 566.
1. *Ibid.* at p. 1277 (AIR).

vested in it, provided such proceedings conducted by that authority are severable.[2]

(ii) Where there is violation of the principles of natural justice.

A writ of prohibition can also be issued when there is violation of the principles of natural justice. In fact, if the principles of natural justice have not been observed, e. g., if no notice was issued to the person against whom the action is sought to be taken there is no jurisdiction vested in the authority to proceed with such matter.[3]

(iii) Where there is infringement of the fundamental right of the petitioner.[4]

Limits of the writ of prohibition

(a) The object of the writ of prohibition is to prevent unlawful assumption of jurisdiction. Therefore, it can be issued only when it is proved that a judicial or *quasi*-judicial authority has no jurisdiction or it acts in excess of jurisdiction vested in it. Prohibition cannot lie in cases where such authority having jurisdiction exercises it irregularly, improperly or erroneously.[5]

(*b*) A writ of prohibition can lie only in cases where the proceedings are pending before a judicial or *quasi*-judicial authority. Thus, when such authority hears a matter over which it has no jurisdiction, the aggrieved person may move a High Court for the writ of prohibition forbidding such authority from proceeding with the matter. But if the proceedings have been terminated and such authority has become *functus officio*, a writ of prohibition would not lie.[6] There the remedy may be a writ of *certiorari*.

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2. *R.* v. *Local Govt. Board*, (1882) QB 309; *Sewpujanrai* v. *Collector of Customs*, AIR 1958 SC 845.
3. *Manak Lal* v. *Premchand*, AIR 1957 SC 425; *See* also Lecture VI (supra).
4. *Bidi Supply Co.* v. *Union of India*, AIR 1956 SC 479.
5. *Narayana Chetty* v. *I. T. O.*, AIR 1959 SC 213; *R.* v. *Comptroller-General*, (1953) 1 All ER 862.
6. *Hari Vishnu Kamath* v. *Ahmed*, AIR 1955 SC 233.

(*c*) If the proceedings before a judicial or *quasi*-judicial authority are partly within and partly without jurisdiction, the writ of prohibition may be issued in respect of latter. Thus, if the Collector of Customs imposes invalid conditions for release of certain goods on payment of fine in lieu of confiscation, the writ of prohibition may be issued against the Collector from enforcing illegal conditions.[7] Similarly, if some proceedings are disposed of and some are still pending, in respect of the pending proceedings, the writ of prohibition may be issued.[8]

Alternative remedy.—If any alternative remedy is available to the aggrieved person, the Court may refuse to issue a writ of prohibition and may direct him to first resort to the alternative remedy. But if there is patent lack of jurisdiction in an inferior tribunal,[9] or the law which confers the jurisdiction to such tribunal is unconstitutional or *ultra vires*[10] or there is infringement of any fundamental right of the petitioner,[11] the existence of an alternative remedy is irrelevant and the writ of prohibition will be issued as of right.

Certiorari

Nature and scope.—'Certiorari' means 'to certify'. It is so named as in its original Latin form it required "the judges of any inferior court of record to certify the record of any matter in that Court with all things touching the same and to send it to the King's Court to be examined".[12] It is an order issued by the High Court to an inferior court or any authority exercising judicial or *quasi*-judicial functions to investigate and decide the legality and validity of the orders passed by it.

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7. *Sewpujanrai's* case (supra)
8. *Hari Vishnu Kamath's* case (supra).
9. *Bengal Immunity Co.* v. *State*, AIR 1955 SC 661; *Calcutta Discount Co.* v. *I. T. O.*, AIR 1961 SC 372.
10. *Sales Tax Officer* v. *Budh Prakash*, AIR 1954 SC 459; *Carl Still* v. *State of Bihar*, AIR 1961 SC 1615.
11. *Bengal Immunity* (supra); *S. T. O.* v. *Budh Prakash* (supra); *Himatlal's* case (supra).
12. *R.* v. *N. Tribunal*, (1952) 1 All ER 122.

Object.—The object of the writ of *certiorari* is to keep inferior courts and *quasi*-judicial authorities within the limits of their jurisdiction; and if they act in excess of their jurisdiction their decisions can be quashed by superior courts by issuing this writ.[13]

Conditions.—In *R.* v. *Electricity Commissioner*[14], Lord Atkin observed:

> Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.[15]

From these observations, it becomes clear that a writ of *certiorari* (and prohibition) can be issued if the following conditions are fulfilled:

(*i*) The judicial or *quasi*-judicial body must have legal authority;

(*ii*) Such authority must be an authority to determine questions affecting rights of subjects;

(*iii*) It must have duty to act judicially; and

(*iv*) It must have acted in excess of its authority.

Grounds.—A writ of *certiorari* may be issued on the following grounds:

(*i*) Absence or excess of jurisdiction, or failure to exercise jurisdiction.

When an inferior court or tribunal acts without jurisdiction, in excess of its jurisdiction or fails to exercise jurisdiction vested in it by law, a writ of *certiorari* may be issued against it.

In *R.* v. *Minister of Transport*[16], even though the Minister was not empowered to revoke a licence, he passed an order of revocation of licence. The order was quashed on the ground

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13. *T. C. Basappa* v. *T. Nagappa*, AIR 1954 SC 440.
14. (1924) 1 KB 171.
15. *Ibid.* at p. 205. *See also* Lecture III (supra).
16. (1934) 1 KB 277. See also *S. T. O.* v. *Shiv Ratan*, AIR 1966 SC 142; *C. I. T.* v. *A. Raman*, AIR 1968 SC 49; *Chetkar* v. *Vishwanath*, (1970) 1 SCC 121: AIR 1970 SC 1039.

that it was without jurisdiction and therefore *ultra vires*. Under the provisions of the Industrial Disputes Act, 1947, the appropriate Government is empowered to refer an 'industrial dispute' to a tribunal constituted under the Act. But if the Government refers a dispute to the Industrial Tribunal for adjudication which is not an 'industrial dispute' within the meaning of the Industrial Disputes Act, 1947, the Tribunal has no jurisdiction to entertain and decide such dispute.[17] Similarly, in absence of any provision in the relevant statute, after a man is dead, his property cannot be declared as an evacuee property. The decision of the authority would be without jurisdiction.[18]

Lack of jurisdiction may also arise from absence of some preliminary facts, which must exist before a tribunal exercises its jurisdiction. They are known as 'jurisdictional' or 'collateral' facts. The existence of these facts is a *sine qua non* or condition precedent to the assumption of jurisdiction by an inferior court or tribunal. If the jurisdictional fact does not exist, the court or the tribunal cannot act. If an inferior court or a tribunal wrongly assumes the existence of such a fact, a writ of *certiorari* can be issued. The underlying principle is that by erroneously presuming such existence, an inferior court or a tribunal cannot confer upon itself jurisdiction which is otherwise not vested in it under the law.[19]

State of M. P. v. *D. K. Jadav*[20]

Under the relevant statute all jagirs, including lands, forests, trees, tanks, wells, etc. were abolished and vested in the State. However, all tanks, trees, private wells and buildings on *'occupied land'* were excluded from the provisions of the statute. If they were on *'unoccupied land'* they stood vested in the State. The Supreme Court held that the question whether the tanks, wells, etc. were on 'occupied' land or on 'unoccupied' land was a jurisdictional fact.

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17. *Newspapers Ltd.* v. *State Ind. Tribunal*, AIR 1957 SC 532.
18. *Ebrahim Aboobaker* v. *Tek Chand*, AIR 1963 SC 298.
19. *Raja Anand* v. *State of U. P.*, AIR 1967 SC 1081: *Naresh* v. *State of Maharashtra*, AIR 1967 SC 1.
20. AIR 1968 SC 1186: (1968) 2 SCR 823.

Shauqin Singh v. *Desa Singh*[21]

The relevant statute empowered the Chief Settlement Commissioner to cancel an allotment of land if he was "*satisfied*" that the order of allotment was obtained by means of 'fraud, false representation or concealment of any material fact'. The Supreme Court held that the satisfaction of the statutory authority was a jurisdictional fact and the power can be exercised only on the existence thereof.[22]

But if an inferior court or a tribunal acts within the jurisdiction vested in it, the writ of *certiorari* cannot be issued against it. In *Ebrahim Aboobaker* v. *Custodian General*[23], the Supreme Court observed:

> It is plain that such a writ cannot be granted to quash the decision of an inferior court within its jurisdiction on the ground that the decision is wrong. Indeed, it must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it....[24]

(ii) Error apparent on the face of the record.

If there is an error of law, which is apparent on the face of the record, a decision of an inferior court or a tribunal may be quashed by a writ of *certiorari*. But such error must be manifest or patent on the face of the proceedings and should not require to be established by evidence. But what is an error of law apparent on the face of the record? Even though precise and exhaustive definition is not possible, it may be stated that if an inferior court or a tribunal takes into account irrelevant considerations or does not take into account relevant considerations or erroneously admits inadmissible evidence or refuses to admit admissible evidence or if the finding of fact is based on no evidence, it can be said that there is such an error. In short,

21. (1970) 3 SCC 881 : AIR 1970 SC 672.
22. See also *Munni Devi* v. *Gokal Chand*, (1969) 2 SCC 879: AIR 1970 SC 1727; *Raja Anand* v. *State of U. P.* (supra); *Nalini* v. *Ananda*, AIR 1952 Cal. 112; *Natwarlal* v. *State of Gujarat*, AIR 1971 Guj 264: (1971) 12 GLR 319.
23. AIR 1952 SC 319: (1952) SCR 696.
24. *Ibid.* at p. 322 (AIR).

'the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record'.[25]

But an error of fact, 'however grave it may appear to be' cannot be corrected by a writ of *certiorari*.[26] Where two views are possible, if an inferior court or tribunal has taken one view, it cannot be corrected by a writ of *certiorari*. Thus, in *Ujjam Bai* v. *State of U. P.*[27], the question was one of interpretation of a notification. By wrongly interpreting the said notification tax was imposed, which was challenged by the petitioner. The Supreme Court refused to interfere under Article 32 and observed:

> Where a *quasi*-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, *whether it is wrong in law or in fact*.[28] (emphasis supplied)

But Subba Rao, J. (as he then was) rightly stated: "In a sense he (Sales Tax Officer) acts *without jurisdiction* in taxing goods which are not taxable under the Act".[29] (emphasis supplied)

(iii) Violation of the principles of natural justice.

A writ of *certiorari* can be issued when there is violation of the principles of natural justice.[30]

(*iv*) A writ of *certiorari* can also be issued when there is infringement of fundamental right of the petitioner[31] or where the order passed by the inferior court or tribunal is *mala fide*, fraudulent or otherwise unjust.[32]

Alternative remedy.—A writ of *certiorari* is a discretionary

25. *Syed Yakoob* v. *Radhakrishnan*, AIR 1964 SC 477 (480). See also *A. C. C.* v. *P. D. Vyas*, AIR 1960 SC 665; *Shaikh Mohammed* v. *Kadalaskar*, (1969) 1 SCC 741 : AIR 1970 SC 61.
26. *Syed Yakoob* (supra), at p. 479.
27. AIR 1962 SC 1621 : (1963) 1 SCR 778.
28. *Ibid.* at p. 1629.
29. *Ibid.* at p. 1653.
30. *See* Lecture VI (supra).
31. *Ujjam Bai's* case (supra); *Himatlal's* case (supra); *Sinha Govindji* v. *Dy. Chief Controller of Imports*, (1962) 1 SCJ 93.
32. Supra. See also *Mohasinali* v. *State*, AIR 1957 Bom 303.

remedy and the fact that the aggrieved party has another adequate remedy may be taken into consideration and it may not be issued on that ground. But as discussed above, it is a rule of policy, convenience and discretion and not of jurisdiction and in spite of alternative remedy being available it may be issued where the order is on the face of it erroneous or the inferior court or tribunal has acted without jurisdiction or in excess of its jurisdiction or contrary to the principles of natural justice or there is infringement of a fundamental right of the petitioner.

Prohibition and certiorari: distinction.—There are some common features in both these writs. Both writs are available against a judicial or *quasi*-judicial body or any other 'authority' having 'duty to act judicially' but cannot be issued against a 'purely administrative' authority. The object of both these writs is also common, namely, restraining the inferior courts and tribunals from exceeding their jurisdiction.[33]

Yet there is a fundamental distinction. They are issued at different stages of the proceedings. As observed by the Supreme Court in *Hari Vishnu Kamath's* case (supra): "When an inferior court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior court for a writ of prohibition, and on that, an order will issue forbidding the inferior court from continuing the proceedings. On the other hand, if the court hears that cause or matter and gives a decision, the party aggrieved would have to move the superior court for a writ of 'certiorari', and an order would be made quashing the decision on the ground of want of jurisdiction".[34]

Sometimes, both the writs might be necessitated. Thus, in a proceeding before an inferior court a decision might have been arrived at which did not completely dispose of the matter, in which case it might be necessary to apply both for *certiorari* and prohibition. *Certiorari* for quashing what had been decided; and

33. *Hari Vishnu Kamath* v. *Ahmad*, AIR 1955 SC 233.
34. *Ibid.* at p. 241.

prohibition for restraining the further continuance of the proceed-ing.[35]

V. Quo warranto

Nature and scope.—'*Quo warranto*' literally means 'what is your authority'. The writ of *quo warranto* may be issued against the holder of a public office of a substantive nature. By issuing this writ the person concerned is called upon to show to the Court by what authority he holds the office. If the holder has no authority to hold the office he can be ousted from its enjoyment.[36] On the other hand, this writ also protects the holder of a public office from being deprived of that to which he may have a right.[37] In *University of Mysore* v. *Govinda Rao*[38], the Supreme Court observed :

> ... [T]he procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen being deprived of public office to which he may have a right.[39]

Conditions.—Before the writ of *quo warranto* can be issued the following conditions must be satisfied :

(*i*) The office must be a public office.[40] By public office is meant an office in which the public have an interest. Before the writ can be issued the court must be satisfied that the office in question is a public office and the holder thereof has no legal authority to hold the said office. This writ will not lie in respect of office of a private nature.[41]

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35. *Kamath's* case (supra) ; *R.* v. *Paddington Rent Tribunal*, (1949) 1 All ER 720 (729) ; *R.* v. *Electricity Commissioner* (supra).
36. *University of Mysore* v. *Govinda Rao*, (infra).
37. *Ibid.*
38. AIR 1965 SC 491 : (1964) 4 SCR 575.
39. *Ibid.* at p. 494 (AIR).
40. *Ibid.*
41. *R.* v. *Mousley*, (1846) 115 ER 1130; *Amarendra* v. *Narendra*, AIR 1953 Cal 114 : *Jamalpur Arya Samaj* v. *Dr. D. Ram*, AIR 1954 Pat 297.

(*ii*) The office must be of a substantive character.[42] The words 'substantive character' mean the office in question must be an independent office. The holder of such office must be an independent official and not merely a deputy or servant of others.[43]

(*iii*) The office must be statutory or constitutional. Thus, a writ of *quo warranto* may be issued in respect of offices of the Prime Minister,[44] Advocate-General,[45] Judge of a High Court,[46] Public Prosecutor,[47] Speaker of a House of the State Legislature,[48] members of a municipal body,[48a] University officials,[48b] etc. .

(*iv*) The holder must have asserted his claim to the office.

Locus standi: Who may apply.—As stated above, the object of the writ of *quo warranto* is to pervent a person who has wrongfully usurped a public office from continuing in that office. Therefore, an application for a writ of *quo warranto* challenging the legality and validity of an appointment to a public office is maintainable at the instance of any private person even though he is not personally aggrieved or interested in the matter.[49] In *G. D. Karkare* v. *T. L. Shevde*[50], the High Court of Nagpur observed:

> In proceedings for a writ of 'quo warranto' the applicant does not seek to enforce any right of his as such, nor

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42. *G. Rao's* case (supra).
43. *Darley* v. *R.*, 8 ER 1513 (HL).
44. *U. N. Rao* v. *Mrs. Indira Gandhi*, (1971) 2 SCC 63.
45. *G. D. Karkare's* case (infra).
46. *Chandra Prakash* v. *Chaturbhuj*, C. A. 2231/1968 decided on Dec. 18, 1969 (SC) (unrep).
47. *Mohambaran* v. *Jayavelu*, AIR 1970 Mad. 63.
48. *A. Nesamony* v. *T. M. Varghese*, AIR 1952 TC 66.
48a. *Shyabuddinsab* v. *Municipality of GB*, AIR 1955 SC 314.
48b. *G. Rao's* case (supra).
49. *Biman Chandra* v. *Governor of W. B.*, AIR 1952 Cal; 799; *Surendra Mohan* v. *Gopal Chandra*, AIR 1952 Ori 359; *Rajendra Kumar* v. *Government*, AIR 1957 MP 60; *Nitya Nand* v. *Khalil Ahmed*, AIR 1961 Pun 105; *M. U. Shah* v. *Abdul Rehman*, AIR 1953 All 193; *Rex* v. *Speyer*, (1916) 1 KB 595; *G. Rao's* case (supra).
50. AIR 1952 Nag 330 (334). See also *Kashinath* v. *State*, AIR 1954 Bom 41.

does he complain of any non-performance of duty towards him. What is in question is the right of the non-applicant to hold the office and an order that is passed is an order ousting him from that office.

When may be refused.—*Quo warranto* is a discretionary remedy and the petitioner cannot claim this writ as of right. The court may refuse to grant this writ taking into account the facts and circumstances of the case. This may include instances where the issue of a writ would be vexacious,[51] or where there was acquiescence on the part of the petitioner,[52] or where it would be futile as the holder of an office has ceased to hold the office in question.[53]

A writ of *quo warranto* may also be refused on the ground that alternative statutory remedy is available to the petitioner. Thus, when a writ of *quo warranto* was sought to be enforced against a member of the State Legislature, it was refused on the ground that there was an alternative remedy by way of making an election petition.[54] But if the objection taken by the petitioner falls outside the statutory remedy, the existence of an alternative will be no bar to the writ of *quo warranto*.[55]

Writ of *quo warranto* may as well be refused in case of delay. The reason is simple and obvious. In *Sonu Sampat* v. *Jalgaon Municipality*[56], the High Court of Bombay observed:

> If the appointment of an officer is illegal, every day that he acts in that office a fresh cause of action arises; there can, therefore, be no question of delay in presenting a petition for *quo warranto* in which his very right to act in such a responsible post has been questioned.

51. *Rameshwar* v. *State of Punjab*, AIR 1961 SC 816; *Baij Nath* v. *State of U. P.*, AIR 1965 All 151.
52. *Ruttonjee* v. *State*, AIR 1967 Cal 450.
53. *Rameshwar* v. *State*, (supra).
54. *Pundlick* v. *Mahadev*, AIR 1959 Bom 2; *Bhairulal* v. *State of Bombay*, AIR 1954 Bom 116; *Deshpande* v. *Hyderabad State*, AIR 1955 Hyd 36.
55. *Shiam Sunder* v. *State of Punjab*, AIR 1958 Pun 128; *Chaturvedi* v. *Chatterjee*, AIR 1959 Raj 260.
56. ILR 1958 Bom 113 (126): 59 BLR 1088 (1096). See also *Baijnath's* case, (supra). See also *Baijnath* v. *State* (supra); *Sonu Sampat* v. *Jalgaon Municipality*, (1958) ILR Bom 113.

Statutory remedies

In addition to the prerogative remedies available to an individual under Articles 32 and 226 of the Constitution of India, remedies are also provided by different statutes to aggrieved persons. As the statutory provisions are not similar with regard to remedies provided, it is not possible to generalise the circumstances in which the said remedies are available. But they may be classified as under:

(1) Ordinary civil suits;
(2) Appeals to courts;
(3) Appeals to tribunals;
(4) Special leave to appeal to the Supreme Court; and
(5) High Court's power of superintendence.

(1) *Ordinary civil suits*

This is the traditional remedy available to a person to vindicate his legal right if he is aggrieved by any action of an administrative authority. Section 9 of the Code of Civil Procedure, 1908 provides that courts shall have jurisdiction to try all suits of a civil nature excepting suits in which their cognisance is either expressly or impliedly barred. Thus, if the dispute is of a *'civil nature'*, under Section 9 of the Code, a civil court can entertain, deal with and decide the said dispute, unless the jurisdiction of a civil court is barred either *expressly* or by *necessary implication*. In *Smt. Ganga Bai* v. *Vijay Kumar*[57], the Supreme Court observed:

> There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit.[58]

(2) *Appeals to courts*

In a number of statutes provisions are made for filing appeals or revisions or making references to 'ordinary' courts of law

57. (1974) 2 SCC 393: AIR 1974 SC 1126.
58. *Ibid.* at p. 397 (SCC): p. 1129 (AIR): *See also* Lecture VII (supra).

against the decisions taken by administrative authorities. For example, under the provisions of the Workmen's Compensation Act, 1923, a person aggrieved by the order passed by the Commissioner may file an appeal in the High Court on a 'substantial question of law',[59] or an appeal lies to the High Court against the award made by the Motor Accident Claims Tribunal under the Motor Vehicles Act, 1939,[60] or a reference to the District Court is competent under the Land Acquisition Act, 1894 against the award made by the Land Acquisition Officer,[61] or the High Court or the Supreme Court against the order passed by the Income Tax Appellate Tribunal under the Income Tax Act, 1961.[62]

(3) *Appeals to tribunals*

Sometimes a statute creates an appellate tribunal and provides for filing an appeal against orders passed by the administrative officers in exercise of their original jurisdiction. For example, under the Customs Act, 1962, an appeal against the order passed by the Collector of Customs lies to the Central Board of Customs and Excises,[63] or an appeal lies to the Rent Control Tribunal against the order passed by the Rent Controller under the Delhi Rent Control Act, 1958,[64] or to the Copyright Board against any decision of the Registrar of Copyrights under the Copyright Act, 1957.[65] Generally, at this stage, the jurisdiction of the appellate tribunal is not restricted and appeal can be heard on questions of fact and law. In many cases, further appeal on point of law is provided either to a tribunal or to a regular court of law. For example, a second appeal lies to the High Court against the order of the Rent Control Tribunal under the Delhi Rent Control Act, 1958 on substantial questions of law only.[66]

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59. Section 30.
60. Section 110D.
61. Section 18.
62. Ss. 256-262.
63. S. 128.
64. S. 38.
65. S. 72.
66. S. 39. *See also* S. 30 Workmen's Compensation Act, 1923.

(4) *Special leave to appeal to the Supreme Court*

Position prior to 1976.—Under Article 136 of the Constitution of India, a discretionary power is conferred on the Supreme Court to grant special leave to appeal from any judgment or order passed by any 'tribunal'.

This provision confers very wide and plenary power on the Supreme Court. It is not subject to any limitation. Moreover, as the said power is constitutional, it cannot be diluted or curtailed by ordinary parliamentary process. The Supreme Court can grant special leave and hear appeals even though no statute makes provision for such an appeal,[67] or under the relevant statute an alternative remedy is provided,[68] or an order passed by the tribunal is made final.[69]

The rapid growth of administrative law has brought into existence many administrative tribunals and adjudicatory bodies. They are invested with wide judicial and *quasi*-judicial powers thereby necessitating effective control. With this object in mind, the framers of the Constitution have conferred very wide and extensive powers on the Supreme Court.

Though this power is comprehensive and undefined, the Court has imposed certain limitations upon its own powers. This power is extraordinary and it should be exercised only in exceptional circumstances.[70] Thus, the Supreme Court would not ordinarily grant a leave against the order of a tribunal where the alternative remedy is available,[71] or finding of fact is challenged,[72] or the matter falls within the discretion of the

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67. *Raigarh Jute Mills* v. *Eastern Rly.*, AIR 1958 SC 525.
68. *Mahadayal* v. *C. T. O.*, AIR 1958 SC 667; *Master Construction Co.* v. *State of Bihar*, AIR 1966 SC 1047; *P. D. Sharma* v. *State Bank of India*, AIR 1968 SC 985.
69. *See* Lecture VII (supra).
70. *State of Maharashtra* v. *Dadaniya*, (1972) 3 SCC 85: AIR 1971 SC 1722; *Union of India* v. *G. K. Apte*, (1971) 3 SCC 460: AIR 1971 SC 1533.
71. *State of Bombay* v. *Ratilal*, AIR 1961 SC 1106; *Ram Saran* v. *C. T. O.*, AIR 1962 SC 1326; *Indian Aluminium Co.* v. *C. I. T.*, AIR 1962 SC 1619; *C. I. T.* v. *K. W. Trust*, AIR 1967 SC 844.
72. *Basappa* v. *Nagappa*, AIR 1954 SC 440: *Tata Iron and Steel Co.* v. *Workmen*, (1969) 2 SCC 319: AIR 1970 SC 390; *Amarchand* v. *C. I. T.*, (1971) 1 SCC 458: AIR 1971 SC 720.

authority,[73] or where a new point is raised for the first time before the Supreme Court,[74] or where the petitioner is unable to show the presence of special circumstances to grant special leave.[75]

On the other hand, in the following circumstances the Supreme Court would entertain the appeal under Article 136:

(*i*) Where the tribunal has acted in excess of jurisdiction or has failed to exercise jurisdiction vested in it.[76]

(*ii*) Where there is error apparent on the face of the record.[77]

(*iii*) Where the order is against the principles of natural justice.[78]

(*iv*) Where irrelevant considerations have been taken into account[79] or relevant considerations have been ignored.[80]

(*v*) Where the findings of the tribunal are perverse.[81]

(*vi*) Where there is miscarriage of justice.[82]

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73. *UCO Bank* v. *Secretary*, AIR 1953 SC 437; *Registrar, Trade Marks* v. *Ashok Chandra*, AIR 1955 SC 573; *Bishamhar Nath* v. *State of U. P.*, AIR 1966 SC 573; *Union of India* v. *W. C. Paper Mills*, (1970) 3 SCC 606: AIR 1971 SC 349.
74. *Bharat Fire and General Insurance Co.* v. *C. I. T.*, AIR 1964 SC 1800; *Alembic Chemical Works* v. *Workmen*, AIR 1961 SC 647; *State Bank, Hyderabad* v. *V. A. Bhide*, (1969) 2 SCC 491: AIR 1970 SC 196.
75. *Soorajmull Nagarmull* v. *C. I. T.*, AIR 1963 SC 491; *Chandi Prasad* v. *State of Bihar*, AIR 1961 SC 1708; *Indian Aluminium Co.* v. *C. I. T.*, (supra); *Govindarajulu* v. *C. I. T.*, AIR 1959 SC 248.
76. *J. K. Iron and Steel Co.* v. *Mazdoor Union*, AIR 1959 SC 231; *UCO Bank* v. *Workmen*, AIR 1951 SC 230.
77. *Raj Krishna* v. *Binod*, AIR 1954 SC 202; *Rattan* v. *Atma Ram*, AIR 1954 SC 510; *Hindustan Antibiotics* v. *Workmen*, AIR 1967 SC 948.
78. *Dhakeswari Cotton Mills* (infra); *Muir Mills* v. *Suti Mills Mazdoor Union*, AIR 1955 SC 170.
79. *Dhirajlal* v. *I. T. C.*, AIR 1955 SC 271.
80. *Standard Vacuum Co.* v. *Workmen*, AIR 1961 SC 895.
81. *Surendra Nath* v. *Dalip Singh*, AIR 1957 SC 242; *National Engineering Industries* v. *Hanuman*, AIR 1968 SC 33; *Sovachand* v. *C. I. T.*, AIR 1959 SC 59.
82. *Dhakeswari Cotton Mills*, (infra).

It is submitted that the correct principle is laid down by Mahajan, C. J. in *Dhakeswari Cotton Mills* v. *C. I. T.*[83] in the following words:

> It is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in this court by the constitutional provision made in Article 136. The limitations, whatever they be, are implicit in the nature and the character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations. Beyond that it is not possible to fetter the exercise of this power by any set formula or rule.[84]

Position after 1976.—The Constitution (42nd Amendment) Act 1976, has radically changed the position. Prior to the amendment the aggrieved person had other remedies available to him and the Supreme Court in those circumstances rightly did not grant special leave to appeal under Article 136. But by the 42nd Amendment, the High Court's power of superintendence over tribunals has been taken away by amending Article 227 and also by adding Articles 323A and 323B. Administrative tribunals have 'more or less' been placed in the position of 'final' adjudicatory bodies and therefore, it is not only the discretionary *power* but the *duty* of the Supreme Court to see that these tribunals exercise their powers within the limits of law and no injustice is done to the subjects.

(5) *High Court's power of superintendence*

Position prior to 1976.—Prior to the Constitution (42nd Amendment) Act, 1976, every High Court had jurisdiction under Article 227(1) of the Constitution over all courts and *tribunals* within its territorial jurisdiction. This power spanned both the administrative and judicial spheres. As held by the Supreme Court, this article devolves on the High Court a duty to see that all tribunals act "within the bounds of their authority, that they do what their duty requires and that they do it in a legal manner".[85]

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83. AIR 1955 SC 65: (1955) 1 SCR 941.
84. *Ibid.* at p. 69 (AIR).
85. *Umarsaheb* v. *Kalalaskar*, (1969) 1 SCC 741: AIR 1970 SC 61; *State of Gujarat* v. *Vakhatsinhji*, AIR 1968 SC 1481; *Nagendra Nath Bora* v. *Commr. Hills Dvn. Assam*, AIR 1958 SC 12; *Nibaram Chandra* v. *Mahendra*, AIR 1963 SC 1895.

Thus, the High Court can interfere with the order passed by any inferior tribunal on the grounds, *inter alia*, of excess of jurisdiction,[86] or refusal to exercise jurisdiction,[87] where there is an error apparent on the face of the record,[88] in case of violation of the principles of natural justice,[89] where power or discretion is used arbitrarily or capriciously,[90] or where there is miscarriage of justice.[91] In a fit case, the High Court can act even *suo motu*.[92]

As stated above, the power of superintendence is only to be exercised to keep inferior tribunals within the ambit of their authority and jurisdiction. The High Court is not a regular court of appeal[93] or revision[94] over the decisions given by administrative tribunals. It cannot correct any error of fact[95] or even of law.[96] The High Court cannot substitute its own decision for that of the tribunal.[97]

Position after 1976.—By the Constitution (42nd Amendment) Act, 1976 the supervisory jurisdiction of the High Court over all administrative tribunals has been taken away by deleting the word *'tribunals'* from clause (1) of Article 227. After the amendment, High Courts have no jurisdiction over these tribunals and their decisions cannot be tested by the High Courts *under Article 227*. (It may, however, be mentioned at this stage that an administrative tribunal is an 'authority' within the meaning of Article 226 of the Constitution, and therefore, the decision given by the tribunal is subject to the jurisdiction of the High Court under Article 226 It may further be noted that the

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86. *Rukumanand* v. *State of Bihar*, (1971) 1 SCC 167 : AIR 1971 SC 746.
87. *Dahya Lala* v. *Rasul Mohd.*, AIR 1964 SC 1320.
88. *Vakhatsinhji's* case (supra).
89. *Santosh* v. *Mool Singh*, AIR 1958 SC 321.
90. *Ibid.*
91. *D. N. Banerjee* v. *P. R. Mukherjee*, AIR 1953 SC 58.
92. *Ahmedabad Mfg. Calico Ptg. Co. Ltd.* v. *Ramtahel*, (1972) 1 SCC 898 : AIR 1972 SC 1598.
93. *Bhutnath* v. *State of W. B.*, (1969) 3 SCC 675.
94. *Rajkamal* v. *Indian Motion Pictures Union*, (1965) 11 SCWR 233.
95. *Babhutmal* v. *Laxmibai*, AIR 1975 SC 1297 : (1975) 1 SCC 858.
96. *Maruti* v. *Dashrath*, (1974) 2 SCC 615 : AIR 1974 SC 2051.
97. *D. C. Works* v. *State of Saurashtra*, AIR 1957 SC 274; *Filmistan (Pvt.) Ltd.* v. *Balkrishna*, AIR 1972 SC 171 : *Lonad Gram Panchayat* v. *Ramgiri*, AIR 1968 SC 222.

Constitution (44th Amendment) Act, 1978, has restored the original position in respect of the supervisory jurisdiction of the High Court under Article 227 over all administrative tribunals.

Equitable remedies

As discussed above, against any arbitrary action of administrative authorities generally prerogative remedies are available to the aggrieved persons. But apart from England, U. S. A. and India, the said remedy is not pressed into aid in other countries. Moreover, issue of writs is an extraordinary remedy and is subject to the discretionary power of the Court. In these circumstances ordinary equitable remedies can be obtained against the administration. Here, the following remedies are available to theaggrieved person :

(1) Declaration ; and
(2) Injunction.

(1) *Declaration*

In a declaratory action, the rights of the parties are declared without giving any further relief. The essence of a declaratory judgment is that it states the rights or the legal position of the parties as they stand, without altering them in any way though it may be supplemented by other remedies in suitable cases.[98] The power of a court to render a purely declaratory judgment is particularly valuable in cases where a legal dispute exists but where no wrongful act entitling either party to seek coercive relief has been committed. By making an order declaratory of the rights of the parties the court is able to settle the issue at a stage before the status quo is disturbed. Inconvenience and the prolongation of uncertainty areavoided.[99]

In the field of administrative law, the importance of declaratory action cannot be underestimated. de Smith[1] states: "A public authority uncertain of the scope of powers which it wishes to exercise but which are disputed by another party may be faced with the dilemma of action at the risk of exceeding its powers or inaction at the risk of failing to discharge its responsibilities, unless it is able to obtain the authoritative guidance of a

98. Wade: *Administrative Law* (1977) p. 499.
99. de Smith: *Judicial Review of Administrative Action*, (1973) p. 424.
1. *Ibid.* at p. 425.

court by bringing a declaratory action. It is equally for the public benefit that an individual whose interests are immediately liable to sustain direct impairment by the conduct of the Administration should be able to obtain in advance a judical declaration of the legal position''.

The distinction between a declaratory order and other judicial order lies in the fact that while the latter is enforceable, the former is not. In private law this is a serious defect; in public law it is insignificant, as 'no administrative agency can afford to be so irresponsible as to ignore an adverse decision of a High Court judge'.[2]

Barnard v. *National Dock Labour Board*[3]

In this case, some dock workers had been suspended from employment. Their appeal to the tribunal failed and they were dismissed from employment. In actions for declarations, discovery was ordered. It was revealed at that time that their suspension and dismissal were not in accordance with law. Ultimately, they succeeded. Had they applied for *certiorari*, they would probably have failed.[4]

Similarly, a declaration can be sought by the plaintiff that his nomination paper at a municipal election has been illegally rejected[5] or that an order compulsorily retiring him is illegal and *ultra vires*.[6]

This is a discretionary relief and the object of granting declaration is removal of existing controversy and to avoid chances of future litigation. The courts are not acting as 'advisory' bodies and they can refuse to grant declaration if the question is academic and has not actually arisen. Thus, in *Re Bernato* v. *Sanges*[7], when trustees desired to ascertain whether, if they took certain steps, the trust fund would be liable to estate duty, and posed a hypothetical question of law the prayer for declaration

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2. Garner: *Administrative Law*, (1963) p. 149.
3. (1953) 2 QB 18.
4. Wade: *Administrative Law*, (1977) pp. 553-54.
5. *Sat Narain* v. *Hanuman Prasad*, AIR 1946 Lah 85.
6. *Union of India* v. *Kedareswar*, AIR 1959 HP 32.
7. (1949) 1 All E R 515.

was refused. But in *Bai Shri Vaktuba* v. *Thakore*[8], the plaintiff-husband prayed for declaration that a boy aged two years born to the defendant-wife was not his son and to restrain his wife from proclaiming him to be such son and claiming maintenance in that behalf. In spite of the objection by the wife that the suit was premature as neither maintenance nor rights in the plaintiff's property were being claimed, the declaration was granted. But if no controversy has arisen, the court will not grant declaration in vacuum. As early as in 1847, Bruce, V. C.[9] rightly observed:

> Nakedly to declare a right, without doing or directing anything else relating to the right, does not, I conceive, belong to the functions of this Court.

Section 34 of the Specific Relief Act, 1963 provides for a declaratory action in respect of any legal character or any right as to any property where it is questioned.

Generally, a declaration cannot be obtained without praying for consequential relief. The proviso to Section 34 of the Specific Relief Act requires the plaintiff to claim further relief if he can. The object of the said provision is to avoid multiplicity of proceedings. If the consequential reliefs are not claimed by the plaintiff, the suit for declaration is liable to be dismissed.

(2) *Injunction*

Definition.—An injunction is an order of a court addressed to a party to proceedings before it, requiring him to refrain from doing, or to do a particular act.[10]

Injunction is an equitable remedy. It is a judicial process by which one who has invaded, or is threatening to invade the rights, legal or equitable, of another is refrained from continuing or commencing such wrongful act.[11]

Types.

Injunction are of two types:

(*i*) Prohibitory injunction; and

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8. (1910) 34 ILR Bom 676.
9. *Clough* v. *Ratcliffe*, (1847) 1 De G. & S. 164 (178-79).
10. de Smith (supra), p. 388.
11. *Manjural* v. *B. Banerjee*, AIR 1954 Cal 202.

(*ii*) mandatory injunction.

Sometimes, prohibitory injunction is also divided into two categories—(*a*) Temporary injunction and (*b*) Perpetual injunction.

Generally, injunction is a negative remedy and in administrative law, it is granted when an administrative authority does or purports to do anything *ultra vires*. But in some cases the remedy may be positive and mandatory in nature and an administrative authority may be ordered to do a particular act which it is bound to do. But mandatory injunctions are rare, and in particular they play little part in public law because there is a special procedure for enforcing the performance of a public duty in the prerogative remedy of *mandamus*.[12]

Metropolitan Asylum District v. *Hill*[13]

In this leading case, the relevant Act empowered the authority to build a hospital for children for treatment of small-pox. A prohibitory injunction was obtained by the neighbouring inhabitants on the ground of nuisance.

Harrington v. *Sendall*[14]

The plaintiff was not present at a general meeting of the club. A majority of the members, in breach of the rule of the club (which made unanimous concurrence a prerequisite) increased the annual subscription for existing members. As the plaintiff did not pay the increased subscription, he was expelled. An injunction was granted to prevent such expulsion.

Administrator of the City of Lahore v. *Abdul Majid*[15]

In this case, the plaintiff submitted a building plan to the municipal authorities for necessary permission. The permission was initially granted but thereafter revoked even though such permission was granted in respect of other buildings. The order

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12. Wade: *Administrative Law*, (1977) p. 491.
13. (1881) 6 AC 193.
14. (1903) 1 Ch 921.
15. (1947) ILR Lah 382. See also *Montgomery Municipality* v. *Sant Singh*, AIR 1940 Lah 377.

of mandatory injunction was issued against the municipal authorities.

An injunction is a discretionary remedy, but the discretion must be exercised judicially. The plaintiff must be 'an aggrieved person'. Since this is an equitable relief it may not be granted if the conduct of the plaintiff disentitles him from the assistance of the court or if some alternative remedy is available to him. But if there is violation of any provision of law, the courts will not hesitate to take the 'drastic step' of issuing an order of injunction, and they will not be deterred by the fact that it will bring the machinery of the government to a standstill. "Even if chaos should result, still the law must be obeyed."[16]

In India, the law relating to temporary injunction is laid down in Order XXXIX of the Code of Civil Procedure, 1908, perpetual injunction in Sections 36, 37 and 38 of the Specific Relief Act, 1963 and mandatory injunction in Section 39 of the said Act.

Common law remedies[17]

3. Other Remedies

Other remedies may also be sub-divided into the following categories—

(1) Parliamentary remedies;
(2) *Conseil d' Etat*;
(3) Ombudsman; and
(4) Self-help.

Let us consider each of them in detail :—

(1) *Parliamentary remedies*

England and India are democratic countries having parliamentary form of government. There is effective control of the Parliament over the Executive. The Ministers are responsible to the Parliament. As Lord Kilmuir[18] said : "Criticising a Minister's policy is a matter for Parliament". Therefore, as Garner[19]

16. Per Lord Denning, M. R. in *Bradbury* v. *Enfield London Borough Council*, (1967) 1 WLR 1311.
17. See Lecture X (infra).
18. In the House of Lords on Dec. 7, 1961.
19. *Administrative Law*, (1963) p. 88.

states, the 'natural' remedy open to a subject aggrieved as a consequence of a policy decision taken by an agency of Government, is for him to write to his Member of Parliament in an attempt to obtain redress. The Member may then raise the matter informally with the Minister concerned, or formally in the House of Commons, usually by question or exceptionally on a motion for adjournment of the House, or in the course of a Supply Debate. Where the grievance is considered to be of sufficient public importance, the member may press for a special court of inquiry to be set up to investigate the matter, under the Tribunals of Inquiry (Evidence) Act, 1921.

Even this Parliamentary procedure is not free from defects. And though it is an effective instrument in theory, many defects in it are patent in its exercise.[20]

(i) After the complaint has been made by the aggrieved person to the member, the result depends very largely on the persistence, ability and status of the said member.

(ii) If the member is of the opposition party, he may attack the Minister vigorously, but his protests would be much milder if he belonged to the ruling party.

(iii) Again, if the member is a leader of the opposition party or a member of opposition's 'Shadow Cabinet', there are greater chances of getting substantial results, but it would not be so in case of an 'obscure backbencher'.

(iv) In the course of discussion in the House, political considerations may affect the issue to such an extent that the personal element in the original complaint may be forgotten and the complainant may not get appropriate relief.

(v) There is a wide range of administrative activity and no Minister can be held responsible for decisions taken by public corporations and other local authorities.

20. *Ibid.* at pp. 89-90.

(vi) Even where the ground of complaint falls within the sphere of responsibility of the Minister concerned and he undertakes to investigate the matter, the process of obtaining a remedy is slow and cumbersome. "Many members are too busy or preoccupied with other interests, to be able to spare the time to pursue a matter of this kind to any considerable extent. *There are, of course, many exceptions to this observation, but it is certainly no fault of the original complainant if his member is not one of the exceptions*[21]". (emphasis supplied)

(2) *Conseil d' Etat*

In France, there are two types of laws and two sets of courts independent of each other.[22] The ordinary law courts administer the ordinary civil law as between subjects. The administrative courts administer the law as between the subjects and the State. Although, technically speaking *Conseil d' Etat* is a part of the administration, in practice and reality it is very much a court. The actions of the administration are not immune from judicial control of this institution. It is staffed by judges and professional experts. In fact, *Conseil d' Etat* provides expeditious and inexpensive relief and better protection to the subjects against administrative acts or omissions than the common law courts. It has liberally interpreted the maxim *ubi jus ibi remedium* and afforded relief not only in cases of *injuria sine damno* but also in cases of *damnum sine injuria*.[22]

(3) *Ombudsman*

Meaning—'Ombudsman' means 'a delegate, agent, officer or commissioner'. A precise definition of 'Ombudsman' is not possible, but Garner[23] rightly describes him as 'an officer of Parliament, having as his primary function, the duty of acting as an agent for Parliament, for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executive'.

In *Justice Report*,[24] it is observed:

He is not a super-administrator to whom an individual

21. *Ibid.* at p. 90
22. For detailed discussion *see* Lecture II (supra).
23. *Administrative Law*, (1963) p. 91.
24. Para 18 (quoted by Garner).

> can appeal when he is dissatisfied with the discretionary decision of a public official in the hope that he may obtain a more favourable decision. His primary function....is to investigate allegations of maladministration.

This institution originated in Sweden in 1809 and thereafter it has been accepted in other countries including Denmark, Finland, New Zealand, England (Parliamentary Commissioner) and India (Lokpal and Lokayukta).

The Ombudsman enquires and investigates into complaints made by citizens against abuse of discretionary power, maladministration or administrative inefficiency and takes appropriate actions. For that purpose, very wide powers are conferred on him. He has access to departmental files. The complainant is not required to lead any evidence before the Ombudsman to prove his case. It is the function and duty of the Ombudsman to satisfy himself whether the complaint was justified or unjustified. He can even act *suo motu*. He can grant relief to the aggrieved person and his powers are not limited unlike the powers of a civil court.

Generally, the Ombudsman is a judge or a lawyer or a high officer and his character, reputation and integrity are aboveboard. He is appointed by the Parliament and thus, he is not an officer in the administrative hierarchy. He is above party politics and is in a position to think and decide *objectively*. There is no interference even by Parliament in the discharge of his duties. He makes a report to the Parliament and sets out reactions of citizens against the administration. He also makes his own recommendations to eliminate the causes of complaints. Very wide publicity is given to those reports. All his reports are also published in the national newspapers. Thus, in short, he is the 'watch-dog' or 'public safety valve' against maladministration.

Defects: criticism

Of course, there are some arguments against setting up of the office of the Ombudsman.[25]

(*i*) It is argued that this institution may prove successful in those countries which have a comparatively small

25. Garner: *Administrative Law*, (1963) p. 91

population, but it may not prove very useful in populous countries, like U. S. A. or India, as the number of complaints may be too large for a single man to dispose of.

(*ii*) It is also said that the success of the institution of Ombudsman in Denmark owes a great deal to the personality of its first Ombudsman Professor Hurwitz. He took a keen interest in the complaints made to him and investigated them personally. Prestige and personal contact would be lost if there are a number of such officers, or if there is a single officer who has always to depend upon a large staff and subordinate officers.

(*iii*) According to Mr. Justice Mukherjea,[26] in India this institution is not suitable. He describes it as 'an accusatorial and inquisitorial institution—a combination unprecedented in democracy with traditions of independent judiciary'. It is an 'impracticable and disastrous experiment' which will not fit into the Indian Constitution.

(4) Self-help

An aggrieved person is also entitled to resist an illegal or *ultra vires* order of the authority. If any person is prosecuted or any action is sought to be taken against him, he can contend that the by-law, rule or regulation is *ultra vires* the power of the authority concerned. In case of 'purported' exercise of power he may disobey the order passed against him.

Benjamin Curtis, a former Judge of the Supreme Court of the United States, while arguing before the Senate on behalf of President Andrew Johnson during the latter's impeachment trial, said:

> I am aware that it is asserted to be the civil and moral duty of all men to obey those laws which have been passed through all the forms of legislation until they shall have been decreed by judicial authority not to be binding; but this is too broad a statement of the civil and moral duty incumbent either upon private citizen or public officers. If this is the

26. Quoted by S. Rajgopalan: *Administrative Law*, (1970) p. 55

measure of duty there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it. I submit to senators that not only is there no such rule of civil or moral duty, but that it may be and has been a high and patriotic duty of a citizen to raise a question whether a law is within the Constitution of the country.

This view has been adopted by the California Supreme Court. One *Y* entered the country unlawfully. He was, therefore, arrested by the Dy. Sheriff without authority to arrest. *Y* escaped from the custody, and his abettor in the escape was convicted by the lower court. Reversing the order of conviction, the California Supreme Court held that since the order of imprisonment was unlawful, the escape was no offence.

Nawabkhan v. *State of Gujarat*[28]

In this case, an order of externment was passed against the petitioner on September 5, 1967 under the Bombay Police Act, 1951. In contravention of the said order, the petitioner reentered the forbidden area on September 17, 1967 and was, therefore, prosecuted for the same. During the pendency of this criminal case, the externment order was quashed by the High Court under Article 226 of the Constitution of India on July 16, 1968. The trial Court acquitted the petitioner but the High Court convicted him, because according to the High Court, the contravention of the externment order took place when the order was still operative and was not quashed by the High Court. Reversing the decision of the High Court, the Supreme Court held that as the externment order was illegal and unconstitutional, it was of no effect and the petitioner was never guilty of flouting 'an order which never legally existed'.

Stroud v. *Bradbury*[29]

In this case, the Sanitary Inspector entered the house of the appellant under the provisions of the Public Health Act, 1936.

27. Kadish and Kadsih: *Discretion to Disobey*; Quoted in *Nawabkhan* v. *State of Gujarat* (infra). *See also* I. P. Massey: *Discretion to Disobey Invalid Orders*: (1978) 1 SCC (Journal Section) p. 32.
28. (1974) 2 SCC 121: AIR 1974 SC 1471.
29. (1952) 2 All E R 76.

Even though there was a provision regarding giving of prior notice, this requirement was not heeded by the inspector. The appellant obstructed the entry of the Sanitary Inspector. The Court held that the appellant had the right to obstruct the entry of the inspector as 'the Sanitary Inspector had not done that which the statute required him to do before he had a right of entry'.

Kesho Ram v. *Delhi Administration*[30]

The Section Inspector of the Municipality went to the house of the appellant in the discharge of his duty to seize the appellant's buffalo as he was in arrears of milk tax. The appellant struck the Inspector on the nose causing a fracture. A criminal case was, therefore, filed against the appellant. The appellant's main contention was that the recovery of the tax was illegal inasmuch as no notice of demand as required by the statute was given to him. Negativing this contention, the Supreme Court held that the Inspector was acting in good faith and was honestly exercising his statutory duty and had '*sadly*' erred in the exercise of his powers. According to the Court, the Inspector 'could not be fairly presumed to know that a notice....must precede any attempt to seize the buffalo' and therefore, the right of private defence was not available to the appellant. Although it appears that the *Bradbury* decision was not brought to the notice of the Court, it could have been distinguished on the ground that in that case, the appellant had merely *obstructed* the entry of the Inspector, whereas in the case before the Supreme Court, the appellant had *assaulted* the Inspector. Had he merely obstructed the entry of the Section Inspector, probably, relying upon the *Bradbury* decision, he could have justified his action, contending that 'the Section Inspector had not done that which the statute required him to do before he had a right of entry'.

30. (1974) 4 SCC 599: AIR 1974 SC 1158.

Lecture X

LIABILITY OF THE GOVERNMENT

The King can do no wrong.

The King must not be under man, but under God and the wla, because it is the law that makes the King.

—BRACTON

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1. INTRODUCTION

In England, in the eye of law the Government was never considered as an 'honest man'.[1] Wade[2] rightly states: "It is fundamental to the rule of law that the Crown, like other public authorities, should bear its fair share of legal liability and be answerable for wrongs done to its subjects. The immense expansion of governmental activity from the latter part of the nineteenth century onwards made it intolerable for the Government, in the name of the Crown, to enjoy exemption from the ordinary law". English law has always clung to the theory that the King is subject to law and, accordingly answerable for breach thereof. As far as 700 years ago, Bracton had observed: "The King must not be under man, but under God and under the law, because it is the law that makes the King".

Though theoretically there was no difficulty in holding the King liable for any illegal act, there were practical problems[3] Rights depend upon remedies and there was no human agency to enforce law against the King. All the courts in the country were his courts and he could not be sued in his own courts without his consent. He could be plaintiff but never be made defendant. No writ could be issued nor could any order be enforced against him. As '*the King can do no wrong*', whenever the administration was badly conducted, it was not the King who was at fault but his Ministers, who must have given him faulty advice[4] But after the Crown Proceedings Act, 1947, the Crown can now be placed in the position of an ordinary litigant.

In India, history has traced different path. The maxim 'the King can do no wrong' has never been accepted in India. The Union and the States are legal persons and they can be held liable for breach of contract and in tort. They can file suits and suits can be filed against them.

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1. GARNER : *Administrative Law*, (1963) p. 215.
2. WADE : *Administrative Law*, (1977) pp. 663-64.
3. *Ibid.*
4. GARNER (supra).

2. Contractual Liability

(a) Constitutional provisions

The contractual liability of the Union of India and States is recognised by the Constitution itself.[5] Article 298 expressly provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and the acquisition, holding and disposal of property and the making of contracts for any purpose.

(b) Requirements

Article 299(1) prescribes the mode or manner of execution of such contracts. It provides :—

> All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

Reading the aforesaid provision, it becomes clear that it lays down the following conditions and requirements which contracts made by or with the Union or a State must fulfil—

(1) All such contracts must be expressed to be made by the President or the Governor as the case may be;

(2) All such contracts are to be executed by such persons and in such manner as the President or the Governor may direct or authorise; and

(3) All such contracts made in the exercise of the executive power are to be executed on behalf of the President or the Governor as the case may be.

(1) A contract to be valid under Article 299(1) must be in writing. The words *'expressed to be made'* and *'executed'* in this article clearly go to show that there must be a formal written contract executed by a duly authorised person.[6] Consequently,

5. Arts. 294, 298, 299 and 300.

6. *Bhikraj Jaipuria* v. *Union of India*, AIR 1962 SC 113; *Karamshi* v. *State of Bombay*, AIR 1964 SC 1714; *Chatturbhuj* v. *Moreshwar*, AIR 1954 SC 236; *Thavardar* v. *Union of India*, AIR 1955 SC 468; *New Marine Coal Co.* v. *Union of India*, AIR 1964 SC 152.

if there is an oral contract, the same is not binding on the government.[7] This does not, however, mean that there must be a formal agreement properly signed by a duly authorised officer of the Government and the second party. The words *'expressed'* and *'executed'* have not been literally and technically construed. In *Chatturbhuj Vithaldas* v. *Moreshwar Parashram*[8], speaking for the Supreme Court, Bose, J. observed:

> It would, in our opinion, be disastrous to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form...

In *Union of India* v. *A. L. Rallia Ram*[9], tenders were invited by the Chief Director of Purchases, Government of India. *R's* tender was accepted. The letter of acceptance was signed by the Director. The question before the Supreme Court was whether the provisions of Section 175(3) of the Government of India Act, 1935 (which were in *pari materia* with Article 299(1) of the Constitution of India) were complied with. The Court held that the Act did not expressly provide for execution of a formal contract. In absence of any specific direction by the Governor-General, prescribing the manner or mode of entering into contracts, a valid contract may result from the correspondence between the parties. The same view was reiterated by the Supreme Court in *Union of India* v. *N. K. Pvt. Ltd.*[10], where the Court observed:

> It is now well settled by this Court that though the words 'expressed' and 'executed' in Article 299(1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can

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7. *Karamshi's* case (supra).
8. AIR 1954 SC 236 (243): 1954 SCR 817 (835).
9. AIR 1963 SC 1685: (1964) 3 SCR 164.
10. (1973) 3 SCC 388: AIR 1972 SC 915.

also come into existence if the acceptance is by a person duly authorised on this behalf by the President of India.[11]

(2) The second requirement is that such a contract can be entered into on behalf of the Government by a person authorised for that purpose by the President or the Governor as the case may be. If it is signed by an officer who is not authorised by the President or Governor, the said contract is not binding on the Government and it cannot be enforced against it.

In *Union of India* v. *N. K. Pvt. Ltd.* (supra), the Director was authorised to enter into a contract on behalf of the President. The contract was entered into by the Secretary, Railway Board. The Supreme Court held that the contract was entered into by an officer not authorised for the said purpose and it was not a valid and binding contract.

Bhikraj Jaipuria v. *Union of India*[12]

Certain contracts were entered into between the Government and the plaintiff-firm. No specific authority had been conferred on the Divisional Superintendent, East India Railway to enter into such contracts. In pursuance of the contracts the firm tendered large quantity of food grains and the same was accepted by the Railway Administration. But after some time, the Railway Administration refused to take delivery of goods. It was contended that the contract was not in accordance with the provisions of Section 175(3) of the Government of India Act, 1935 and, therefore, it was not valid and not binding on the Government. The Supreme Court, after appreciating the evidence—oral as well as documentary—held that the Divisional Superintendent acting under the authority granted to him could enter into the contracts. The Court rightly held that it was not necessary that such authority could be given 'only by rules expressly framed or by formal notifications issued in that behalf'.[13]

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11. *Ibid.* at p. 394 (SCC) : p. 919 (AIR). See also *D. G. Factory* v. *State of Rajasthan* (infra).
12. AIR 1962 SC 113 : (1962) 2 SCR 850.
13. *Ibid.* at p. 118 : But ultimately the Court found that the contracts were not expressed to be made on behalf of the Governor-General and hence were unenforceable.

State of Bihar v. *K. C. Thapar*[14]

The plaintiff entered into a contract with the Government of Bihar for construction of an aerodrome and other works. After some work, a dispute arose with regard to payment of certain bills. It was ultimately agreed to refer the matter for arbitration. The said agreement was expressed to have been made in the name of the Governor and was signed by the Executive Engineer. After the award was made, the Government contended in civil court that the Executive Engineer was not a person authorised to enter into the contract under the notification issued by the Government, and therefore, the agreement was void. On a consideration of the correspondence produced in the case, the Supreme Court held that the Executive Engineer had been '*specially authorised*' by the Governor to execute the agreement for reference to arbitration.

(3) The last requirement is that such a contract must be expressed in the name of the President or the Governor, as the case may be. Thus, even though such a contract is made by an officer authorised by the Government in this behalf, it is still not enforceable against the Government if it is not expressed to be made '*on behalf of*' the President or the Governor.

In *Bhikraj Jaipuria's* case (supra), the contracts entered into by the Divisional Superintendent were not expressed to be made on behalf of the Governor-General. Hence, the Court held that they were not enforceable even though they were entered into by an authorised person.

Karamshi Jethabhai v. *State of Bombay*[15]

The plaintiff was in possession of a cane farm. An agreement was entered into between the plaintiff and the Government for supply of canal water to the land of the former. No formal contract was entered into in the name of the Governor but two letters were written by the Superintending Engineer. The Supreme Court held that the agreement was not in accordance

14. AIR 1962 SC 110: (1962) 1 SCR 827.
15. AIR 1964 SC 1714: (1964) 6 SCR 984.

with the provisions of Section 175(3) of the Government of India Act, 1935 and, consequently, it was void.

D. G. Factory v. *State of Rajasthan*[16]

A contract was entered into by a contractor and the Government. The agreement was signed by the Inspector-General of Police, in his official status without stating that the agreement was executed 'on behalf of the Governor'. In a suit for damages filed by the contractor for breach of contract, the Supreme Court held that the provisions of Article 299(1) were not complied with and the contract was not enforceable.

(c) Effect of non-compliance

The provisions of Article 299(1) are mandatory and not directory and they must be complied with.[17] They are not inserted merely for the sake of form, but to protect the Government against unauthorised contracts. If, in fact, a contract is unauthorised or in excess of authority, the Government must be safeguarded from being saddled with liability[18] to avoid public funds being wasted. Therefore, if any of the aforesaid conditions is not complied with, the contract is not in accordance with law and the same is not enforceable by or against the Government.[19] Formerly the view taken by the Supreme Court was that in case of non-compliance with the provisions of Article 299(1), a suit could not be filed against the Government as the contract was not enforceable, but the Government could accept the liability by ratifying it.[20]

16. (1970) 3 SCC 874: AIR 1971 SC 141. See also *Chatturbhuj's* case (supra) *K. P. Chaudhary* v. *State of M. P.*, AIR 1967 SC 203.

17. *Bhikraj Jaipuria's* case (supra); *B. K. Mondal's* case (infra); *K. P. Chaudhary's* case (supra); *New Marine Coal Co.* v. *Union of India*, AIR 1964 SC 152.

18. *Chatturbhuj's* case (supra) at p. 243.

19. *Bhikraj Jaipuria's* case (supra); *K.P. Chaudhary's* case (supra); *New Marine Coal Co.* (supra).

20. *Chatturbhuj's* case (supra); *B.K. Mondal's* case (infra); *Laliteshwar Prasad* v. *Bateshwar Prasad*, AIR 1966 SC 580; *K.C. Thapar's* case (supra); *Rallia Ram's* case (supra).

Section 196 of the Indian Contract Act, 1872 reads:

"Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such

But in *Mulamchand* v. *State of M. P.*[21], the Supreme Court held that if the contract was not in accordance with the constitutional provisions, in the eye of law, there was no contract at all and the question of ratification did not arise.[22] Therefore, even the provisions of Section 230(3) of the Indian Contract Act, 1872[23] would not apply to such a contract and it could not be enforced against the Government officer in his personal capacity.[24]

(d) Effect of a valid contract

If the provisions of Article 299(1) are complied with, the contract is valid and it can be enforced by or against the government and the same is binding on the parties thereto.[25] Article 299(2) provides that neither the President nor the Governor shall be personally liable in respect of any contract executed for the purpose of the Constitution or for the purpose of any enactment relating to the Government of India. It also immunes a person making or executing any such contract on behalf of the President or the Governor from personal liability.

(e) Quasi-contractual liability: The doctrine of unjust enrichment

As discussed above, the provisions of Article 299(1) of the Constitution [and Section 175(3) of the Government of India Act, 1935] are mandatory and if they are not complied with, the contract is not enforceable in a court of law at the instance of any

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acts. If he ratify them, the same effects will follow as if they had been performed by his authority."

21. AIR 1968 SC 1218: (1968) 3 SCR 214.
22. *See* also *K.P. Chaudhary's* case (supra); *State of U. P.* v. *Murari Lal*, (1971) 2 SCC 449: AIR 1971 SC 2210; *Bihar E.G.F. Co-opt. Society Ltd.* v. *Sipahi Singh*, (1977) 4 SCC 145: AIR 1977 SC 2149.
23. Section 230 reads:

"In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them."

Such a contract shall be presumed to exist in the following cases:
(1)....(2)....
(3) Where the principal, though disclosed cannot be sued."

24. *Murari Lal's* case (supra); *Chatturbhuj's* case (supra).
25. *State of Bihar* v. *Abdul Majid*, AIR 1954 SC 245; *State of Assam* v. *K.P. Singh*, AIR 1953 SC 309.

of the contracting parties. In these circumstances, with a view to protecting innocent persons, courts have applied the provisions of Section 70 of the Indian Contract Act, 1872 and held the Government liable to compensate the other contracting party on the basis of *quasi*-contractual liability.[26] What Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed, then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties, but on the basis of the fact that something was done by one party for the other and the said work so done has been voluntarily accepted by the other party.[27] Thus, Section 70 of the Contract Act prevents 'unjust enrichment'. This doctrine is explained by Lord Wright in *Bobrosa* v. *Fairbairn*[28], in the following words:

> ....[A]ny civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

The doctrine applies as much to corporations and the Government as to private individuals.[29] The provision of Section 70 may be invoked by the aggrieved party if the following three conditions are satisfied.[30] The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done

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26. *Chatturbhuj's* case (supra) at p. 243; *B.K Mondal's* case (infra) at p. 789; *Mulamchand's* case (supra).
27. *B.K. Mondal's* case (infra) at pp. 786-87.
28. (1943) AC 32. *See* also *Mulamchand* v. *State*, AIR 1968 SC 1218.
29. *B.K. Mondal's* case (infra) at p. 789; *Piloo Dhunjishaw* v. *Municipal Corpn., Poona*, (1970) 1 SCC 213: AIR 1970 SC 1213.
30. *Ibid.* at p. 786 (para 14); *Mulamchand's* case (supra) at p. 1222.

or to whom something is delivered must enjoy the benefit thereof. If these three conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered.

State of W.B. v. *B.K. Mondal*[31]

At the request of a government officer, the contractor constructed a building. The possession was obtained by the officer and the building was used by the government, but no payment was made to the contractor. It was contended that as the provisions of Article 299(1) of the Constitution had not been complied with, the contract was not enforceable. The Supreme Court held that the contract was unenforceable but the government was liable to pay to the contractor under Section 70 of the Indian Contract Act, 1872 on the basis of *quasi*-contractual liability.[32]

3. Tortious Liability

The doctrine of vicarious liability

Since the State is a legal entity and not a living entity, it has to act through human agency, *i.e.* through its servants. When we discuss the tortious liability of the State, it is really the liability of the State for the tortious acts of its servants that has to be considered. In other words, it refers to when the State can be held vicariously liable for the wrongs committed by its servants.

Vicarious liability refers to a situation where one person takes or supplies the place of another so far as liability is concerned.[33] Winfield[34] explains the doctrine of vicarious liability thus: "The expression 'vicarious liability' signifies the liability which *A* may incur to *C* for damage caused to *C* by the negligence or other tort of *B*. It is not necessary that *A* shall have participated in any way in the commission of the tort nor that a duty owed in law by *A* to *C* shall have been broken. What is required is that *A* should

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31. AIR 1962 SC 779: (1962) Supp (1) SCR 876.
32. See also *Mulamchand* v. *State of M. P.* (supra); *Piloo Dhunjishaw's* case (supra); *Hansraj Gupta* v. *Union of India*, (1973) 2 SCC 637: AIR 1973 SC 2724.
33. *Launchbury* v. *Morgans*, (1971) 2 QB 245.
34. '*The Law of Tort*", (1971) p. 525.

stand in a particular relationship to *B* and that *B*'s tort should be referable in a certain manner to that relationship". Thus, the master may be held liable for the torts committed by his servant in the course of employment.

The doctrine of vicarious liability is based on two maxims:

(i) *Respondeat superior* (let the principal be liable); and

(ii) *Qui facit per alium facit per se* (he who does an act through another does it himself).

As early as in 1839, Lord Brougham[35] observed:

> The reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it.

The doctrine of vicarious liability is based on 'social convenience and rough justice'.[36]

There is no reason why this doctrine should not be applied to the Crown in respect of torts committed by its servants. In fact, if the Crown is not held vicariously liable for such torts, the aggrieved party, even though it had sustained a legal injury, would be without any effective remedy, inasmuch as the government servant may not have sufficient means to satisfy the judgment and decree passed against him.[37]

(a) In England

In England, at Common law, absolute immunity of the Crown was accepted and the Crown could not be sued in tort for

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35. *Duncan* v. *Finlater*, (1839) 6 Cl. & F. 894 (910).
36. *Per* Lord Pearce in *I. C. I. Ltd.* v. *Shatwell*, (1965) AC 656 (686). *See also* Salmond: *The Law of Torts*, (1973) p. 461; Winfield: *The Law of Tort*, (1971) p. 525.
37. It should be borne in mind that what we are discussing here is the immunity of the State from the doctrine of vicarious liability and not the immunity of the government servants from his personal liability to compensate the aggrieved party. Of course, some statutes grant such immunity to the government servant in respect of an act done by him in good faith in the official capacity; e. g. S. 40 of the Indian Arms Act, 1950, S. 159 of the Bombay Police Act, 1951, etc.

wrongs committed by its servants in the course of their employment.[38] The rule was based upon the well-known maxim of English law "the King can do no wrong". In 1863, in *Tobin* v. *R.*[39], the Court observed: "If the Crown were liable in tort, the principle (the King can do no wrong) would have seemed meaningless". But with the increase of governmental functions, the immunity afforded to the Crown in tortious liability proved to be incompatible with the demands of justice.[40] The practice of general immunity was very much criticised by Prof. Dicey,[41] by the Committee on Ministers' Powers[42] and by the House of Lords in *Adams* v. *Naylor*[43]. The time had come to abolish the general immunity of the Crown in tort, and in 1947, the Crown Proceedings Act was enacted. This Act placed the Government in the same position as a private individual. Now, the Government can sue and be sued for tortious acts.

(b) In India

(i) Constitutional provisions

Under Article 294(*b*) of the Constitution, the liability of the Union Government or a State Government may arise 'out of any contract *or otherwise*'. The word '*otherwise*' suggests that the said liability may arise in respect of tortious acts also. Under Article 300(1), the extent of such liability is fixed. It provides that the liability of the Union of India or a State Government will be the same as that of the Dominion of India and the Provinces before the commencement of the Constitution. It is, therefore, necessary to discuss the liability of the Dominion and the Provinces before the commencement of the Constitution of India.

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38. *Canterbury* (*Viscount*) v. *Att. General*, (1842) 1 Ph 306; *France Fenvick & Co.Ltd.* v. *R.*, (1927) 1 KB 52; *Minister of Supply* v. *British T. H. Co.*, (1943) KB 478; Winfield: *The Law of Tort*, (1971) p. 601.
39. (1863) 14 CBNS 505. See also *Feather* v. *R.*, (1865) 6 B. & S. 257.
40. *Bainbridge* v. *Post Master-General*, (1906) 1 KB 178; *Royster* v. *Cavey*, (1946) 2 All ER 646; *Adams* v. *Naylor*, (1946) 2 ALL ER 241: (1947) KB 204: (1946) AC 543.
41. *Law of the Constitution*, (10th edn.) pp. 24-26.
42. Cmd. 4060 (1932) p. 112.
43. (1946) AC 543: (1947) KB 204: (1946) 2 All E R 241.

(ii) Sovereign and non-sovereign functions

(*a*) *Before the commencement of the Constitution.*—The English law with regard to immunity of the Government for tortious acts of its servants is partly accepted in India also. As observed by the High Court of Calcutta[44], 'as a general rule this is true, for it is an attribute of sovereignty, and an universal law that a State cannot be sued in its own courts without its consent'. Thus, a distinction is sought to be made between 'sovereign functions' and 'non-sovereign functions' of the State. In respect of the former, the State is not liable in tort, while in respect of the latter, it is. Let us try to understand the distinction between sovereign and non-sovereign functions with reference to some concrete cases on the point:

Peninsular and Oriental Steam Navigation Co. v. *Secretary of State*[45]

This is considered to be the first leading case on this point. In this case, a servant of the plaintiff-company was taking a horse-driven carriage belonging to the company. While the carriage was passing near the Government Dockyard, certain workmen employed by the Government, negligently dropped an iron piece on the road. The horses were startled and one of them was injured. The plaintiff-company filed a suit against the defendant and claimed Rs. 350 as damages. The defendant claimed immunity of the Crown and contended that the action was not maintainable. The High Court of Calcutta held that the action against the defendant was maintainable and awarded the damages. The Court pronounced:

> There is a great and clear distinction between acts done in the exercise of what are usually termed as sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.[46]

Holding the Government liable, the Court further observed:

> The Secretary of State is liable for damages occasioned by the negligence of servants in the service of Government. if

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44. *Steam Navigation Co.'s* case (infra).
45. (1861) 5 Bom. HCR App. 1.
46. *Ibid.* at p. 15.

the negligence is such as would render an ordinary employer liable.[47]

From the aforesaid observations of the Court, it is clear that the Court classified the acts of the Secretary of the State into two categories—(*i*) sovereign acts; and (*ii*) non-sovereign acts. In respect of the former category of acts, the Secretary of State was not liable, but in the latter category of acts, he was. As the impugned act fell within the second category, the action was maintainable.

(*b*) *After the commencement of the Constitution*

State of Rajasthan v. *Vidhyawati*[48]

A jeep was owned and maintained by the State of Rajasthan for the official use of the Collector of a district. Once the driver of the jeep was bringing it back from the workshop after repairs. By his rash and negligent driving of the jeep a pedestrian was knocked down. He died and his widow sued the driver and the State for damages. A Constitution Bench of the Supreme Court held the State vicariously liable for the rash and negligent act of the driver. The Court after referring to the *Steam Navigation Co.'s* case (supra), did not go into the wider question as to whether the act was a sovereign act or not. But it held that the rule of immunity based on the English law had no validity in India. After the establishment of Republican form of Government under the Constitution there was no justification in principle or in public interest, that the State should not be held liable vicariously for the tortious acts of its servants.[49]

Kasturi Lal v. *State of U.P.*[50]

In this case, certain quantity of gold and silver was attached by police authorities from one *R* on suspicion that it was stolen property. It was kept in government *malkhana* which was in the custody of a Head Constable. The Head Constable misappropriated the property and fled to Pakistan. *R* was prosecuted but

47. *Ibid.*
48. AIR 1962 SC 933: (1962) Supp (2) SCR 741.
49. *Ibid.* at p. 940 (AIR).
50. AIR 1965 SC 1039: (1965) 1 SCR 375.

acquitted by the court. A suit for damages was filed by *R* against the State for the loss caused to him by the negligence of police authorities of the State. The suit was resisted by the State. Following the ratio laid down in *Steam Navigation Co.'s* case (supra), the Supreme Court held that the State was not liable as police authorities were exercising 'sovereign functions'. Speaking for a Constitution Bench of the Court, Gajendragadkar, C. J. observed:

> If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: Was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie.[51]

Distinguishing *Vidhyawati's* case (supra), the Court held that when the Government employee was driving the jeep car from the workshop to the collector's residence for the collector's use, he was employed on a task or an undertaking which cannot be said to be referable to, or ultimately based on, the delegation of sovereign or governmental powers of the State. *That is the basis on which the decision must be deemed to have been founded..*'[52] (emphasis supplied)

State of Gujarat v. *Memon Mahomed Haji Hasan*[53]

In this case, certain goods of the respondent were seized by the Customs Authorities under the provisions of the Customs Act, 1962, *inter alia* on the ground that they were smuggled goods. An appeal was filed against that order by the respondent. During the pendency of the appeal the goods were disposed of under an order passed by the Magistrate. The appeal filed by the respondent was allowed and the order of confiscation was set aside and the authorities were directed to return the goods. In an action against the Government, the Supreme Court held that the

51. *Ibid.* at p. 1046(AIR).
52. *Ibid.*
53. AIR 1967 SC 1885: (1967) 3 SCR 938.

Government was in a position of a bailee and was, therefore, bound to return the goods. The Court observed:

> Just as a finder of property has to return it when its owner is found and demands it, so the State Government was bound to return the said vehicles once it was found that the seizure and confiscation were not sustainable. There being thus a legal obligation to preserve the property intact and also the obligation to take reasonable care of it so as to enable the Government to return it in the same condition in which it was seized, *the position of the State Government until the order became final would be that of a bailee.*[54] (emphasis supplied)

Smt. B. K. D. Patil v. *State of Mysore*[55]

Some ornaments were stolen from the house of the appellant. They were recovered by the police authorities in the course of investigation and produced before the criminal court. The goods were retained by the police authorities under the order of the Court. The goods were, however, stolen from police custody before the disposal of the case. After the final disposal of the criminal proceedings, the appellant applied under the Code of Criminal Procedure, 1898,[56] for return of the ornaments or their equivalent value. The application of the appellant was rejected by the Magistrate on the ground that the goods had not reached the custody of the Court. The said order was confirmed by the Sessions Court and the High Court of Mysore. The Supreme Court set aside the orders passed by the courts below and ordered the State to pay cash equivalent of the property to the appellant.

It is true that in this case, the application was filed under the Code of Criminal Procedure and thus, the proceedings were criminal in nature, but in almost similar circumstances, in *Kasturi Lal's* case (supra), the civil action failed on the ground that the act involved was a 'sovereign function'. It is also important to note that *Kasturi Lal's* case (supra) was not even

54. *Ibid.* at p. 1889 (AIR).
55. (1977) 4 SCC 358: AIR 1977 SC 1749.
56. S. 517.

referred to by the Supreme Court, though it had been referred to by the High Court of Mysore.[57]

(iii) Test

From the above discussion, the principle which emerges is that if the function involved is a 'sovereign function', the State cannot be held liable in tort, but if it is a 'non-sovereign function', the State will be held liable. But the difficulty lies in formulating a definite test or criterion to decide to which category the act belongs. In fact, it is very difficult to draw a distinction between the two. "The watertight compartmentalisation of the State's functions into sovereign and non-sovereign is highly reminiscent of the *laissez faire* era.'[58] Thus, on the one hand, it could have been argued in *Kasturi Lal's* case (supra), that the act of keeping another's goods was that of a bailment, which could be undertaken by a private person also and in fact, in *Memon Mahomed's* case (surpa), on similar facts, the impugned act was held to be a bailment. On the other hand, in *Vidhyawati's case* (supra), it could have been argued that as the vehicle was maintained for the use of a collector, who was an administrator and also a District Magistrate and had police duties to perform, it was a 'sovereign function'.[59]

The test whether the act in question could have been performed only by the Government or also by a private individual is also not helpful in deciding the issue. In a welfare state, the governmental functions have increased and today, not all the functions performed by the Government are sovereign functions; *e. g.* commercial activities like the running of the railways.

It is also said that if the act in question is statutory, it may be regarded as a sovereign function, but it is a non-sovereign function if it is non-statutory. But this test is also defective. An activity may be regarded as sovereign even though it has no

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57. *See* B. B. PANDE: *Governmental Liability for the goods lost in custody: A step in the direction of reasonable accountability*, (1977) 4 SCC (Jour.) p. 13.
58. ALICE JACOB: *Vicarious liability of Government in Torts* (1965) 7 J.I. L. I. p. 246 (247).
59. Jain and Jain: *Principles of Adminstrative Law*, (1973) p. 472.

statutory basis, (power to enter into a treaty with a foreign country) and conversely, it may be regarded as non-sovereign even though it has a statutory basis (running of railways).[60]

Moreover, sometimes a particular act may be held to be a sovereign function by one court but non-sovereign by another. For example, running of the railways was held to be sovereign function by the High Court of Bombay,[61] but non-sovereign by the High Court of Calcutta,[62] and this may lead to further uncertainty in law.[63] Un. of India v Ladulal Jain

Even if the governmental functions can be classified into one or the other category, the principle is unsatisfactory from yet another view point. Generally in a civil action in tort, the principal idea is to compensate the aggrieved person and not to penalize the wrongdoer or his master. And if in compensating the aggrieved party, the wrongdoer or his master has to pay damages, the resultant burden on the latter is merely incidental and not by way of penalty. It is, therefore, absurd and really inhumane to hold that the Government would not be liable if a military truck supplying meals to military personnel struck a citizen,[64] but it would be liable if such an accident occurred when the truck carried coal to an army headquarters.[65]

The Law Commission[66] has also criticised the existing situation and has recommended the removal of this distinction, for according to the Commission there is no justification for such distinction. The Commission observed:

> There is no convincing reason why the Government should not place itself in the same position as a private employer subject to the same rights and duties as are imposed by statute.[67]

60. *Ibid.*
61. *Bata Shoe Co.* v. *Union of India*, AIR 1954 Bom 129.
62. *Maharaja Bose* v. *G.G. in Council*, AIR 1952 Cal. 242.
63. *Ultimately*, in *Union of India* v. *Ladulal Jain*, the Supreme Court held it to be a non-sovereign function, AIR 1963 SC 1681; see also *Satya Narain* v. *Dist. Engineer*, AIR 1962 SC 1161.
64. *Union of India* v. *Harbans Singh*, AIR 1959 Punj. 39.
65. *Union of India* v. *Smt. Jasso*, AIR 1962 Pun. 315.
66. *Law Commission of India*, First Report (1956), *Liability of the State in Tort.*
67. *Ibid.* at p. 36.

4. Whether the State is Bound by a Statute

As discussed in preceding lectures, the governmental functions have increased. Today, the State undertakes not only the 'law and order' functions, but as a 'Welfare State', it performs many non-sovereign and commercial activities also. The important question therefore arises, whether the State is subject to the same rights and liabilities which the statute has imposed on other individuals. In other words, whether the State is bound by a statute, and if it is, to what extent the provisions of a statute can be enforced against the State. Let us discuss this point with reference to English Law and then Indian Law.

(a) English law

According to the general principles of common law, 'no statute binds the Crown unless the Crown was expressly named therein'.[68] But the aforesaid rule is subject to one exception. As it has often been said, the Crown may be bound by a statute 'by necessary implication'.[69] Thus, as Wade[70] states, 'an Act of Parliament is presumed not to bind the Crown in the absence of express provision or necessary implication'. In England, the Crown enjoys the common law privilege and it is not bound by a statute, unless 'a clear intention to that effect appears from the statute itself or from the express terms of the Crown Proceedings Act, 1947'.[71] This principle is based on the well known maxim 'the King can do no wrong'. In theory, it is inconceivable that the statute made by the Crown for its subjects could bind the Crown itself. This general principle of the common law is preserved even under the provisions of the 1947 Act.[72]

(b) Indian law

The above principle of common law was accepted in India and applied in some cases.

68. "*Roy n'est lie par ascun statute si il ne soit expressement nosme*".
69. *Bombay Muni. Corporation's* case (infra) at p. 35.
70. *Administrative Law*, (1977) p. 681.
71. Garner: *Administrative Law*, (1963) p. 227. *See also* Street: *Government Liability*, (1953) Ch. VI; Glanville William: *Crown Proceedings*, (1948) pp. 48-58, *Willion* v. *Berkley*, (1561) 1 Plowd. 222.
72. Section 40(2)(*f*) of the Crown Proceedings Act, 1947.

Province of Bombay v. *Municipal Corporation of the City of Bombay*[73]

This is the leading case on the point before independence. The Corporation of Bombay wanted to lay water mains through land which belonged to the Government. The Government agreed to the said proposal upon certain conditions. The said land was acquired by the Crown under the provisions of the Municipal Act. Under the provisions of the Municipal Act, the municipality had power 'to carry water mains within or without the city'. The question was whether the Crown was bound by the statute, viz. the Municipal Act. Following the English law, the Privy Council held that the Government was not bound by the statute.

Director of Rationing v. *Corporation of Calcutta*[74]—(Corporation of Calcutta I)

In this case, the Director of Rationing of the Food Department, West Bengal used certain premises for storing rice, flour, etc. Though under the relevant Act a licence was required to be taken from the Corporation of Calcutta for such premises, it was not taken by the Director. He was, therefore, prosecuted by the Corporation. The question before the Supreme Court was whether the State was bound by the statute. The Court by a majority of 4 : 1 held that the Director was not liable as 'the State is not bound by a statute, unless it is so provided in express terms or by necessary implication'.[75]

Wanchoo, J. (as he then was), however, did not agree with the majority view. In his dissenting judgment, His Lordship observed :

> In our country the Rule of Law prevails and our Constitution has guaranteed it by the provisions contained in Pt. III thereof as well as by other provisions in other parts. It is to my mind inherent in the conception of the Rule of Law that the State, no less than its citizens and others, is bound by the laws of the land. When the king as the embodiment of all power--executive, legislative and judicial--has disappeared, and in our Constitution, sovereign power has been distributed among various organs created thereby, it seems to me

73. AIR 1947 PC 34.
74. AIR 1960 SC 1355 : (1961) 1 SCR 158.
75. *Ibid.* at p. 1360 (AIR).

that there is neither justification nor necessity for continuing rule of construction based on the royal prerogative.[76]

Superintendent and Remembrancer of Legal Affairs, W. B. v. *Corporation of Calcutta* (Corporation of Calcutta II)

The State was carrying on the trade of a daily market without obtaining a licence as required by the relevant statute. The Corporation filed a complaint against the State. When the matter came up for hearing before the Supreme Court, the point was already covered by the judgment of the Court in *Corporation of Calcutta I.* The Supreme Court was called upon to decide the correctness or otherwise of the aforesaid decision in *Corporation of Calcutta I.* By a majority of 10 : 1, the decision in *Corporation of Calcutta I* was overruled and it was held that the State was bound by the statute.[78]

It is submitted that the majority view is correct and is in consonance with the doctrine of Rule of Law and Equality enshrined in the Constitution of India. In a Republican State, this archaic rule has no justification whatsoever. The Law Commission has also suggested that the common law rule should not be followed in India.[79] Even in England, its survival is 'due to little but the vis inertiae'.[80]

5. Estoppel Against the Government

a) Principle explained

Explaining the principle, Garner[81] states: "Estoppel is a rule whereby a party is precluded from denying the existence of some state of facts which he had previously asserted and on which the other party has relied or is entitled to rely". The basic principle of estoppel is that a person, who by some statement or representation of fact causes another to act to his detriment in reliance on the truth of it, is not allowed to deny it later, even

76. *Ibid.* at pp. 1365-66.
77. AIR 1967 SC 997: (1967) 2 SCR 170.
78. See also *Union of India* v. *Jubbi*, AIR 1968 SC 360.
79. *Law Commission of India*: (First Report) (1956) pp. 31-35.
80. *Corporation of Calcutta I* (supra) at p. 1365; Jain and Jain: *Administrative Law* (supra), p. 492.
81. *Administrative Law*, (1963) p. 233.

though it is wrong.[82] Here justice prevails over truth. This principle is embodied in Section 115 of the Indian Evidence Act, 1872. It provides: "When one person by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing". The illustration to the section reads as under:

> *A*, intentionally and falsely leads *B* to believe that certain lands belong to *A*, and thereby induces *B* to buy and pay for it.
>
> The lands afterwards become the property of *A*, and *A* seeks to set aside the sale on the ground that at the time of sale he had no title. He must not be allowed to prove his want of title.[83]

(b) Application of the doctrine

The important question is whether this doctrine can be applied against the Government also: Is the Government also bound by principle of 'equitable estoppel'? Let us discuss the problem in details

(*i*) *Traditional view*:

According to the traditional view, the doctrine of equitable estoppel or promissory estoppel applies to private individuals only and the Crown is not bound by it.[84] Thus, in *R. Amphitrite* v. *R.*[85], an undertaking was obtained by a ship-owner from the Government to the effect that on certain conditions being fulfilled, the ship would not be detained. Relying on this assurance the ship was sent and contrary to the promise, she was detained by the Government. The owner sued on a petition of right for damages. The Court dismissed the action and held that the

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82. WADE: *Administrative Law*, (1977) p. 220.

83. *See also* S. 43 of the Transfer of Property Act, 1882.
S. 28 of the Indian Partnership Act, 1932.

84. Garner: *Administrative Law*, (1963) p. 233.

85. (1921) 3 KB 500.

undertaking was not binding on the Government.[86] In American Jurisprudence[87] it is stated:

> Generally, a State is not subject to an estoppel to the same extent as an individual or a private corporation. Otherwise, it might be rendered helpless to assert its powers in Government. Therefore, as a general rule the doctrine of estoppel will not be applied against the State in its governmental, public or sovereign capacity.

(ii) *Modern view*

But the traditional view has not been accepted and the rule of estoppel applies to the Crown as well. There is no justification for not applying this rule against the Government and exempt it from liability to carry out its promises given to an individual. The Crown cannot escape from its liability saying that the said doctrine does not bind it. Lord Denning[88] has rightly observed:

> I know that there are authorities which say that a public authority cannot be estopped by any representations made by its officers. But those statements must now be taken with considerable reserve. There are many matters which public authorities can now delegate to their officers. If an officer acting within the scope of his ostensible authority makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be.[89]

Robertson v. *Minister of Pensions*[90]

R, an army officer claimed a disablement pension on account of war injury. The War Office accepted his disability as attributable to Military service. Relying on this assurance *R* did not take any steps which otherwise he would have taken to support his claim. The Ministry thereafter refused to grant the pension. The Court held the Ministry liable. According to

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86. See also *M. R. Pillai* v. *State of Kerala*, (1973) 2 SCC 650: AIR 1973 SC 2644; *Excise Commissioner* v. *Ram Kumar*, (1976) 3 SCC 540: AIR 1976 SC 2237, *S. O. S. Corp.* v. *Hodgson Ltd.* (1962) QB 416.
87. *American Jurisprudence*: (2nd End.) p. 783, Para 123.
88. *Lever (Finanee) Ltd.* v. *Westminister Corp.*, (1971) 1 QB 222.
89. *Ibid*, at p. 230.
90. (1948) 2 All E R 767: (1949) 1 KB 227.

Denning, J., the Crown cannot escape by saying that estoppels do not bind the Crown, for *that doctrine has long been exploded*'.[91] (emphasis supplied)

Union of India v. *M/s. Anglo Afghan Agencies*[92]

This is the classic judicial pronouncement in India on the doctrine of promissory estoppel. In this historic case, 'Export Promotion Scheme' was published by the Textile Commissioner. It was provided in the said scheme that the exporters will be entitled to import raw materials up to 100 per cent of the value of the exports. Relying on this representation, the petitioner exported goods worth 5 lacs of rupees. The Textile Commissioner did not grant the import certificate for the full amount of the goods exported. No opportunity for being heard was given to the petitioner before taking the impugned action. The order was challenged by the petitioner. It was contended by the Government that the scheme was merely administrative in character and did not create any enforceable right in favour of the petitioner. It was also argued that there was no formal contract as required by Article 299(1) of the Constitution and therefore, it was not binding on the Government. Negativing the contentions, the Supreme Court held that the Government was bound to carry out the obligations undertaken in the scheme. Even though the scheme was merely executive in nature and even though the promise was not recorded in the form of a formal contract as required by Article 299(1) of the Constitution, still it was open to a party who had acted on a representation made by the Government to claim that the Government was bound to carry out the promise made by it. Speaking for the Court, Shah, J. (as he then was) stated:

> We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment.[93]

The Court further observed:

> We cannot therefore accept the plea that the Textile Commissioner is the sole judge of the quantum of import

91. *Ibid.* at p. 770 (AER): p. 231 (KB); See also *Lever Case* (supra).
92. AIR 1968 SC 718: (1968) 2 SCR 366.
93. *Ibid.* at p. 723 (AIR).

licence to be granted to an exporter, and that the Courts are powerless to grant relief, if the promised import licence is not given to an exporter who has acted to his prejudice relying upon the representation. *To concede to the Departmental authorities that power would be to strike at the very root of the rule of law.*[94] (emphasis supplied)

Century Spg. and Mfg. Co. v. *Ulhasnagar Municipality*[95]

This is another leading case decided by the Supreme Court following its earlier pronouncement in *Anglo-Afghan* case (supra). In this case, the petitioner company set up its factory in the 'Industrial Area'. No octroi duty was payable for the goods imported in that area. The State of Maharashtra published a notification constituting with effect from April 1, 1960, a municipality for certain villages including the 'Industrial Area'. On representation being made by the petitioner company and other manufacturers, the State excluded the Industrial Area from the municipal jurisdiction. But in pursuance of the agreement by the municipality that it will not charge octroi for 7 years, the Industrial Area was retained within the municipal limits. Thereafter, before the expiry of 7 years, the municipality sought to levy octroi duty on the petitioner-company. The company's petition challenging the said levy was dismissed by the High Court of Bombay *in limine*. The company approached the Supreme Court. Allowing the appeal, the Supreme Court observed:

> Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced ex-contractu by a person who acts upon the promise: when the law requires that a contract enforceable at law against public body shall be in certain form or be executed in the manner prescribed by statute, the obligations may be enforced against it in appropriate cases in equity.[96]

The Court further pronounced:

> If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot

94. *Ibid.* at p. 726.
95. (1970) 1 SCC 582: AIR 1971 SC 1021.
96. *Ibid.* at p. 586 SCC: p. 1024 AIR.

ordinarily be permitted. A public body is, in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice.[97]

Very recently, in *M/s. Motilal Padampat Sugar Mills* v. *State of U. P.*[98], after discussing the case-law exhaustively, the Supreme Court has reiterated the above principle and has held that the assurance given by the Government could be enforced against it by invoking the doctrine of promissory estoppel.

(c) Estoppel against a statute

It should not, however, be forgotten that there cannot be any estoppel against a statute.[99] The doctrine cannot be allowed to operate so as to validate an *ultra vires* act[1] or to override the clear words of a statute[2] nor does it apply to criminal proceedings.[3] The doctrine cannot be used against or in favour of the administration so as to give *de facto* validity to *ultra vires* administrative acts.[4]

Howell v. *Falmouth Boat Construction Co.*[5]

The relevant statute required a licence to do ship repair work. An assurance was given by the designated official that no such licence was necessary. The plaintiff sued for payment of work done by him. It was argued that the work was illegal as no written licence was obtained by him. The Court of Appeal decided in favour of the plaintiff on the basis of the doctrine of estoppel. Reversing the judgment of Lord Denning and dismissing the claim of the plaintiff, the House of Lords pronounced:

> It is certain that neither a Minister nor any subordinate officer of the Crown can by any conduct or representation bar

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97. *Ibid.* at p. 587 SCC: p. 1025 AIR.
98. (1979) 2 SCC 409: AIR 1979 SC 621.
99. *Amar Singhji's* case (*infra*) at p. 534.
1. *Ministry of Agriculture* v. *Hulkin*, (unrep.); *Ministry of Agriculture* v. *Mathews*, (1950) 1 KB 148.
2. Garner: *Administrative Law*, (1963) p. 233.
3. *Lund* v. *Thompson*, (1959) 1 QB 283.
4. Schwartz: *An Introduction to American Administrative Law*, p. 233.
5. (1951) 2 All ER 278: (1951) AC 837.

the Crown from enforcing a statutory prohibition or from prosecuting for its breach.[6]

Amar Singhji v. *State of Rajasthan*[7]

In this case, the Secretary to the Government wrote a letter to the Collector of Tonk that the Jagir of the petitioner would not be acquired during her life time. Subsequently, resumption proceedings were initiated against the petitioner. It was contended by the petitioner that the Government was estopped from initiating resumption proceedings. Negativing the contention, the Supreme Court held that the powers of resumption were regulated by the statute and must be exercised in accordance with law. "The Act confers no authority on the Government to grant exemption from resumption, and an undertaking not to resume will be invalid, and *there can be no estoppel against a statute.*"[8] (emphasis supplied)

Mulamchand v. *State of M.P.*[9]

If the provisions of Section 175(3) of the Government of India Act, 1935 are not complied with, the contract is void. No question of estoppel therefore arises. If the plea of estoppel is upheld, it would mean in effect the repeal of an important constitutional provision.[10]

Excise Commissioner, U. P. v. *Ram Kumar*[11]

In this case, the Supreme Court held that the sale of country liquor which had been exempted from sales tax at the time of auction of licences could not operate as an estoppel against the Government. The Supreme Court observed:

> It is now well settled by a catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers.[12]

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6. *Ibid.* at p. 285 (AER) : p. 849 (AC).
7. AIR 1955 SC 504 : (1955) 2 SCR 303.
8. *Ibid.* at p. 534 (AIR).
9. AIR 1968 SC 1218 : (1968) 3 SCR 214.
10. See also *Bihar EGF Co-opt. Socty.* v. *Sipahi Singh,* (1977) 4 SCC 145 : AIR 1977 SC 2149.
11. (1976) 3 SCC 540 : AIR 1976 SC 2237.
12. *Ibid.* at p. 545 (SCC) : p. 2241 (AIR). See also *Nookala* v *Kotiah,* (1970) 2 SCC 13 : AIR 1970, 1354; *Mulamchand's* case (supra). *C. Sankaranarayanan* v. *State of Kerala,* (1971) 2 SCC 131 : AIR 1971 SC 1997.

6. Crown Privilege

(a) In England

In England, the Crown has the special privilege of withholding disclosure of documents, referred to as 'Crown privilege'. It can refuse to disclose a document or to answer any question if in its opinion such disclosure or answer would be injurious to the public interest. This doctrine is based on the well known maxim *solus populi est suprema lex* (public welfare is the highest law). The public interest requires that justice should be done, but it may also require that the necessary evidence should be suppressed.[13] This right can be exercised by the Crown even in those proceedings in which it is not a party.

Duncan v. *Cammell, Laird & Co. Ltd.*[14]

This is the leading case on the point. At the time of the Second World War, the submarine *Thetis* sank during her trials and 99 lives were lost. In an action for negligence, the widow of one of the dead persons sought discovery of certain documents in order to establish liability against the Government contractors. The Admiralty claimed 'Crown privilege' which was upheld by the House of Lords. It observed that the affidavit filed by the Minister that disclosure would be against the 'public interest' could not be called into question. Lord Simon observed:

> The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld.[15]

But this decision was very much criticised. It was regarded as a 'very formidable impediment to justice and fair play' by Sir C.K. Allen and by Goodhart as 'opposed to the whole course of British Constitutional history'. In fact, that was not the law previously. As Wade[16] states: 'The power thus given to the Crown was dangerous since, unlike other governmental powers, it

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13. Wade: *Administrative Law*, (1977)p. 683.
14. (1942) AC 624: (1942) 1 All ER 587.
15. *Ibid.* at p. 636 (AC); p. 592 (AER).
16. *Administrative Law*, (1977) p. 684.

was exempt from judicial control. The law must of course protect genuine secrets of State. But 'Crown privilege' was also used for suppressing whole classes of relatively innocuous documents, thereby sometimes depriving litigants of the ability to enforce their legal rights. This was, in effect, expropriation without compensation. It revealed the truth of the United States Supreme Court's statement on the same problem, that 'a complete abandonment of judicial control would lead to intolerable abuses'. (*U.S.* v. *Reynolds*, 345 U.S. 1 (1953). 'Privilege was claimed for all kinds of official documents on purely general grounds, despite the injustice to litigants. It is not surprising that the Crown, having been given a blank cheque, yielded to the temptation to overdraw.'[17] de Smith[18] rightly states: "No one seriously suggested that the decision in relation to the particular facts of the case was unsatisfactory; the documents which the Admiralty had sought to withhold from production included blueprints of a new type of submarine, and the proceedings had been instituted in wartime. Critics fastened on to the broader proposition enunciated by the House of Lords: that a Minister, by virtue of his *ipse dixit*, could make an unreviewable pronouncement excluding relevant evidence merely because, in his opinion, it fell within a class of document which it would be contrary to the public interest to disclose in court. Provided that a Minister performed a suitably elaborate ritual beforehand, he would be allowed in substance to do as he thought fit. *The interests of litigants, and the public interest in securing the due and manifestly impartial administration of justice, had thus been subordinated to executive discretion*, subject only to extra-legal checks; and all this in a case where a general abdication by the courts had been unnecessary for the decision". (emphasis supplied)

Ellis v. *Home Office*[19]

Ellis, an undertrial prisoner was violently assaulted by another prisoner, who was under observation as a suspected mental defective. Ellis alleged negligence on the part of the Prison Authorities,

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17. *Ibid.* at p. 686.
18. *Judicial Review*.... (supra) at pp. 32-33.
19. (1953) 2 QB 135: (1953) 2 All ER 149.

but the Crown claimed privilege in respect of the medical reports and consequently, Ellis lost his action.

It is submitted that the evidence could have been made available without any injury to the public interest. Devlin, J. rightly observed:

> ....[B]efore I leave this case I must express, as I have expressed during the hearing of the case, my uneasy feeling that justice may not have been done because the material evidence before me was not complete, and something more than an uneasy feeling that, *whether justice has been done or not, it certainly will not appear to have been done.*[20] (emphasis supplied)

Conway v. *Rimmer*[21]

In this case, the House of Lords reviewed the earlier legal position and laid down 'more acceptable law'. A police constable was prosecuted for theft of an electric torch and was acquitted. He sued the prosecutor for malicious prosecution and applied for discovery of certain documents relevant for that purpose. 'Crown privilege' was claimed. The House of Lords took advantage of their newly discovered power to depart from the doctrine of *stare decisis*,[22] overruled the *Duncan* case (supra) and disallowed the claim for privilege. It held that a statement by a Minister cannot be accepted as conclusively preventing a court from ordering production of any document. It is proper for the Court 'to hold the balance between the public interest, as expressed by a Minister to withhold certain documents or other evidence and the public interest in ensuring the proper administration of justice'.[23] Certain types of documents ought not to be disclosed: *e.g.* cabinet minutes, documents relating to national defence, foreign affairs, etc. On the other hand, privilege should not be claimed or allowed for routine or trivial documents. To decide whether the document in question ought to be produced or not, the judge must inspect the document without it being shown to the parties. Accordingly,

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20. *Ibid.* at p. 137 (QB); p. 155 (AER).
21. (1968) 1 All ER 874: (1968) AC 910: (1968) 2 WLR 998.
22. *See* Announcement by Lord Chancellor Gardiner on July 26, 1966: 110 *Solicitor's Journal* 584.
23. *Per* Lord Reid in *Conway's* case (supra).

in this case, the document was ordered to be produced as the disclosure was not prejudicial to the public interest. As Wade graphically puts it, 'the House of Lords has contributed to Human Rights Year, by bringing back into legal custody, a dangerous executive power'.[24]

(b) In India

In India the basic principle is incorporated in Section 123 of the Evidence Act, 1872, which reads as under:

> No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.[25]

As a general rule, the principle is that both the parties to the dispute must produce all the relevant and material evidence in their possession. The Evidence Act has prescribed elaborate rules to determine relevance and has accepted the doctrine of onus of proof. And if any party fails to produce such evidence, an adverse inference can be drawn under Section 114 of the said Act. Section 123 confers a great advantage on the Government inasmuch as inspite of non-production of relevant evidence before the Court, no adverse inference can be drawn against it if the claim of privilege is upheld by the court. Thus, it undoubtedly constitutes 'a very serious departure' from the ordinary rules of evidence. The principle on which this departure can be justified is the principle of the 'overriding and paramount character of public interest'. The claim proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and that, where a conflict arises between public interest and private interest, the latter must yield to the former. No doubt the litigant whose claim may not succeed as a result of the non-production of the relevant and material document may feel aggrieved by the result, and, the Court, in reaching the said decision, may feel dissatisfied, but that will not affect

24. See also *R.* v. *Lewes Justices*, (1971) 2 All ER 1126; *N.P. Co.* v. *Customs and Excise Commr.*, (1972) 1 AER 972; *Burma Oil Co. Ltd.* v. *Bank of Eng.*, (1979) 1 WLR 473.

25. *See also* Ss. 124, 162; Arts. 22(6), 74(2) and 163(3) of the Constitution of India.

the validity of the basic principle that public good and interest must override considerations of private good and private interest.[26]

State of Punjab v. *Sodhi Sukhdev Singh*[27]

This is the leading case on the subject. One *S*, a District and Sessions Judge was removed from service by the President of India. In pursuance of the representation made by him, he was re-employed. Thereafter, he filed a suit for declaration that the order of removal was illegal, void and inoperative. He also claimed arrears of salary. He filed an application for production of certain documents. The State claimed privilege. The Supreme Court by majority held that the documents in question were protected under Section 123 of the Evidence Act and could be withheld from production on the ground of public interest. Laying down the general rule relating to Executive privilege in respect of production or non-production of documents, Gajendragadkar, J. (as he then was) observed:

> It must be clearly realised that the effect of the document on the ultimate course of litigation or its impact on the head of the department or the Minister in charge of the department, or even the Government in power, has no relevance in making a claim for privilege under Section 123. The apprehension that the disclosure may adversely affect the head of the department or the department itself or the Minister or even the Government, or that it may provoke public criticism or censure in the Legislature has also no relevance in the matter and should not weigh in the mind of the head of the department who makes the claim. *The sole and the only test which should determine the decision of the head of the department is injury to public interest and nothing else.*[28] (emphasis supplied)

The Court conceded that it could not hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. 'That is a matter for the authority concerned to decide; but the Court is competent, *and indeed is bound*, to hold a preliminary enquiry and determine the validity

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26. *Sodhi Sukhdev Singh's* case (infra) at p. 510.
27. AIR 1961 SC 493: (1961) 2 SCR 371.
28. *Ibid.* at p. 504 (AIR).

of the objections to its production'.[29] (emphasis supplied) The Court observed:

> It is true that the scope of enquiry in such a case is bound to be narrow and restricted; but the existence of the power in the Court to hold such an enquiry will itself act as a salutory check on the capricious exercise of the power conferred under Section 123....[30]

Amar Chand v. *Union of India*[31]

In this case, the Supreme Court reiterated the principle laid down in *Sodhi Sukhdev Singh's* case (supra). Here, *A* had filed a suit against the Government for recovery of certain amounts. During the course of the trial, *A* called upon the defendants to produce certain documents. The defendants claimed privilege. Following *S. S. Singh's* case (supra), the Supreme Court rejected the claim of the defendants.

State of U. P. v. *Raj Narain*[32]

Raj Narain had filed an election petition against the then Prime Minister Smt. Indira Nehru Gandhi. During the trial, he applied for production of certain documents. The Government claimed privilege in respect of those documents. The High Court of Allahabad rejected the claim. The Supreme Court allowed the appeal and set aside the order passed by the High Court. In his concurring judgment, Mathew, J. observed:

> The Court....has to consider two things; whether the document relates to secret affairs of State; and whether the refusal to permit evidence derived from it being given was in the public interest. No doubt, the words used in Section 123 "as he thinks fit" confer an absolute discretion on the head of the department to give or withhold such permission.... An overriding power in express terms is conferred on the Court under Section 162 to decide finally on the validity of the objection. The Court will disallow the objection if it comes to the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-

29. *Ibid.* at p. 505.
30. *Ibid.*
31. AIR 1964 SC 1658: (1965) 1 SCJ 24
32. (1975) 4 SCC 428: AIR 1975 SC 86

disclosure or that the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. It is therefore, clear that even though the head of the department has refused to grant permission, it is open to the Court to go into the question after examining the document and find out whether the disclosure of the document would be injurious to public interest and the expression "as he thinks fit" in the latter part of Section 123 need not deter the Court from deciding the question afresh as Section 162 authorises the Court to determine the validity of the objection finally.[33]

State of U.P. v. *Chandra Mohan Nigam*[34]

In a later judgment, the Supreme Court held that when an order of compulsory retirement was challenged as arbitrary or *mala fide* by making clear and specific allegations, it was certainly necessary for the Government to produce all the necessary materials to rebut such pleas to satisfy the Court by voluntarily producing such documents as will be a complete answer to the plea. "*Ordinarily, the service record of a Government servant in a proceeding of this nature cannot be said to be a privileged document which should be shut out from inspection.*"[35] (emphasis supplied)

7. Miscellaneous Privileges of the Government

Over and above the aforesaid privileges, the government enjoys many other privileges, some of which are as under:

(1) Under Section 80 of the Code of Civil Procedure, 1908, no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months after a notice in writing has been given.

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33. *Ibid.* at pp. 451-52 (SCC): pp. 882-83 (AIR).
34. (1977) 4 SCC 345: AIR 1977 SC 2411.
35. *Ibid.* at p. 358 (SCC): p. 2421 (AIR); See also *Mohd. Hussain* v. *K.S. Dalipsinhji*, (1969) 3 SCC 429; *S. K. Neogi* v. *Union of India*, AIR 1970 A. & N. 130; *State* v. *Midland Rubber Co.*, AIR 1971 Ker 228; *Mohd. Yusuf* v. *State of Madras*, AIR 1971 Mad 468; *Union of India* v. *Lalli*, AIR 1971 Pat 264; *M. P. Mathur* v. *State of Bihar*, AIR 1972 Pat 93; *Chamarbugwala* v. *Parpia*, AIR 1950 Bom. 230; *Tilka* v. *State*, AIR 1959 All 543.

2) Under Section 82 of the said Code, when a decree is passed against the Union of India or a State or a public officer, it shall not be executed unless it remains unsatisfied for a period of three months from the date of such decree.

(3) Under Article 112 of the Limitation Act, 1963, any suit by or on behalf of the Central Government or any State Government can be instituted within the period of 30 years.

Lecture XI

PUBLIC CORPORATIONS

"Uncle Sam has not yet awakened from his dream of government of bureaucracy, but ever wanders further afield in crazy experiments in state socialism. Possibly some day he may awaken from his irrational dreams, and return again to the old conceptions of government, as wisely defined in the Constitution of the United States.

—JAMES M. BECK

Today, probably the giant corporations, the labour unions, trade associations and other powerful organisations have taken the substance of sovereignty from the State. We are witnessing another dialectic process in history, namely, that the sovereign state having taken over all effective legal and political power from groups surrenders its powers to the new massive social groups.

—FRIEDMANN

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1. INTRODUCTION

As stated in the previous lectures, the passive policy of *'laissez faire'* has been given up by the State. Today it has not confined its scope to the traditional, minimum functions of defence and administration of justice. The old 'police state' has now become a 'welfare state'. It seeks to ensure social security and social welfare for the common mass. It also participates in trade, commerce and business. With a view to achieving the object of 'socialist',[1] democratic republic, constitutional protection is afforded to State monopoly[2] and necessary provisions are incorporated in the Constitution itself by laying down the 'Directive Principles of State Policy'.[3] It is also provided that 'notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such

1. Preamble to the Constitution of India, as amended by the Constitution (42nd Amendment) Act, 1976.
2. Art. 19 (6) (ii).
3. Part IV.

policy shall be called in question in any court on the ground that it does not give effect to such policy'.[4] The political philosophy of the 20th century has, therefore, impelled the Government to enter into trade and commerce with a view to making such enterprises pursue public interest and making them answerable to the society at large.

Once, the Government entered the field of trade and commerce, it became increasingly evident that the governmental machinery hitherto employed merely for the maintenance of law and order was wholly inadequate and unsuitable for business exigencies, which demanded a flexible approach. It was, therefore, felt necessary to evolve a device which combined the advantages of flexibility with public accountability. It was in response to this need that the institution of public corporation grew.

2. Definition

No statute or court has ever attempted or been asked to define the expression 'public corporation'.[5] It has no regular form and no specialised function. It is employed wherever it is convenient to confer corporate personality.[6] In *Sukhdev Singh* v. *Bhagatram*[7], Mathew, J. enunciated:

> The crux of the matter is that public corporation is a new type of institution which has sprung from the new social and economic functions of government and that it therefore does not neatly fit into old legal categories. Instead of forcing it into them, the latter should be adapted to the needs of changing times and conditions.

Garner[8] rightly elucidates:

> A public corporation is a legal entity established normally by Parliament and always under legal authority, usually in the form of a special statute, charged with the duty of carrying out specified governmental functions in the national interest, those functions being confined to a comparatively restricted field, and subjected to control by the Executive, while

4. Art. 31C.
5. Garner: *Administrative Law*, (1967), p. 277.
6. Wade: *Administrative Law*, (1977), p. 140.
7. (1975) 1 SCC 421 (458-459): AIR 1975 SC 1331 (1357).
8. Quoted in *Sukhdev Singh's* case (supra) at p. 450.

the corporation remains juristically an independent entity not directly responsible to Parliament.

3. Characteristics

Even though a precise definition of 'public corporation' is not possible, generally, it possesses the following characteristics[9]—

(a) Legal entity

A public corporation is established by or under a statute; nevertheless it possesses an independent corporate personality and it is an entity different from the Union or the State Government. It is a body corporate with perpetual succession and common seal. It can sue and be sued in its own name.

(b) Statutory functions

A corporation performs functions entrusted to it by its constituent statute or charter by which it is created.

(c) Autonomy

As stated above, a corporation has a separate and independent existence. It has properties and funds of its own. And even though the ownership, control and management of the statutory corporation might be vested in the Union or the State, in the eye of law, the corporation is its own master. The employees of a corporation do not hold a 'civil post' under the Union or the State within the meaning of Article 311 of the Constitution of India.[10]

4. Classification

A logical classification of public corporations is not possible, and neither the Parliament nor the courts have made any serious attempt in that direction. But jurists have tried to categorise public corporations. Prof. Griffith and Street[11] divide public corporations into two groups: (*i*) Managerial economic bodies; and (*ii*) Managerial social bodies. Prof. Hood Phillips[12] divides them into four

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9. *See also* Garner (supra); *Prafulla Kumar* v. *C. S. T. Corpn.*, AIR 1963 Cal 116; Seervai: *Constitutional Law of India*, Vol. II (1976), p. 1314.
10. *Infra* at p. 296.
11. *Principles of Administrative Law*, (1967), pp. 281-84.
12. *Constitutional and Administrative Law*, (1967), pp. 556-57.

classes: (*i*) Managerial-industrial or commercial corporations; (*ii*) Managerial-social services corporations; (*iii*) Regulatory corporations; and (*iv*) Advisory corporations. According to Prof. Garner[13], they can be divided into three groups: (*i*) Commercial corporations; (*ii*) Managerial corporations; and (*iii*) Regulatory corporations. In India, public corporations may be classified into four 'ill-assorted' main groups:

(*i*) Commercial corporations;
(*ii*) Development corporations;
(*iii*) Social services corporations; and
(*iv*) Financial corporations.

(i) Commercial corporations

This group includes those corporations which perform commercial and industrial functions. The managing body of a commercial corporation resembles the board of directors of a public company. As their functions are commercial in nature, they are supposed to be financially self-supporting and they are also expected to earn profit. At the same time they are required to conduct their affairs in the interests of the public and do not operate merely with a profit-earning motive unlike a private industry. State Trading Corporation, Hindustan Machine Tools, Indian Airlines Corporation and Air India International are some of the commercial corporations.

(ii) Development corporations

The modern state is a 'Welfare State'. As a progressive State, it exercises many non-sovereign functions also. Development corporations have been established with a view to encourage national progress by promoting developmental activities. As they are not commercial undertakings, they may not be financially sound at the initial stage and may require financial assistance from the government. Oil and Natural Gas Commission, Food Corporation of India, National Small Industries Corporation, Damodar Valley Corporation, River Boards, Warehousing Corporations, are development corporations.

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13. *Administrative Law*, (1963), pp. 257-58.

(iii) Social Services corporations

Corporations which have been established for the purpose of providing social services to the citizens on behalf of the government are not commercial in nature and therefore, are not expected to be financially self-supporting. In fact, as their object is to render social service, they are not required to conduct their affairs for the purpose of earning profits. Generally, they depend on the government for financial assistance. Hospital Boards, Employees' State Insurance Corporation, Housing Board, Rehabilitation Housing Corporation are examples of social services corporations.

(iv) Financial corporations

This group includes financial institutions, like Reserve Bank of India, State Bank of India, Industrial Finance Corporation, Life Insurance Corporation of India, Film Financing Corporation. They advance loans to institutions carrying on trade, business or industry on such terms and conditions as may be agreed upon. They may provide credit to those institutions which find it difficult to avail of the same or which do not find it possible to have recourse to capital issue methods (e. g. Industrial Finance Corporation). They may give financial assistance on reasonable terms to displaced persons in order to enable them to settle in trade, business or industry (e.g. Rehabilitation Finance Corporation).

5. Working of Public Corporations

The constitution of the corporations and their functions, powers and duties,[14] may be understood by a study of the actual working of a few public corporations.

(i) Reserve Bank of India

The Reserve Bank of India was constituted under the Reserve Bank of India Act, 1934. It was nationalised in 1948 by the Reserve Bank (Transfer to Public Ownership) Act, 1948. It is a body corporate having perpetual succession and a common seal.

14. *See also* R. S. Arora: *State Liability and Public Corporations in India,* (1966) Public Law 245.

It can sue and be sued. It was primarily established to regulate the credit structure, to carry on banking business and to secure monetary stability in the country. It is managed by a Board of Directors, consisting of a Governor, two Deputy Governors and a number of directors. The Governor and the Deputy Governors are whole-time employees and receive such salaries and allowances, as may be fixed by the Board with the approval of the Central Government. They are appointed by the Central Government for a term of five years and are eligible for re-employment.

Under the Banking Companies Act, 1949, the Reserve Bank has extensive powers over the banking business in India. It grants licences without which no company can carry on banking business. Before granting such licence, it can enquire into the affairs of the company to satisfy itself as regards the company's capacity to pay back to its depositors. It can cancel a licence on the ground that the conditions specified therein have not been complied with. Even after granting such a licence it may enquire into the affairs of any bank, inspect its books of accounts and hold an investigation either under the direction of the Central Government or *suo motu*. The report of the enquiry will have to be sent to the Central Government. A copy of such report will also be given to the banking company concerned. It can make a representation to the Central Government on any point arising out of the report. Upon this report, the Central Government may order the suspension of the banking business by the company concerned or direct it to apply for its liquidation.

Very wide discretionary powers have been conferred on the Reserve Bank. It determines the policy relating to bank advances, frames proposals for amalgamation of two or more banks. It may make a representation for the operation of the Banking Companies Act to be suspended. The Governor of the Bank is empowered to suspend the operation of the Act for 30 days in an emergency. The validity of these wide discretionary powers has been upheld by the courts.[15]

(ii) Oil and Natural Gas Commission (ONGC)

The Commission was first established in the year 1956 as a

15. *Velleukulu's* case (supra), p. 11: *Sajjan Bank* v. *Reserve Bank of India*, AIR 1961 Mad 8.

government department. By the Oil and Natural Gas Commission Act, 1959, the Commission was given a status of a public corporation. It is a body corporate enjoying perpetual succession and a common seal. It can sue and be sued. It can hold and dispose of property and can enter into contracts for any of the objects of the Commission. The Commission consists of a Chairman and two or more (not exceeding eight) members, to be duly appointed by the Central Government. Except a Finance Member, others may be part-time or full-time members. The Central Government prescribes the rules fixing their terms of office and conditions of service. It can remove any member even before the expiry of the period, after issuing a show-cause notice and a reasonable opportunity of being heard. The Commission has its own funds and all receipts and expenditures are to be made to and from such funds. It also maintains an account with the Reserve Bank of India. It can borrow money with the prior approval of the Central Government. Its functions range from planning, promotion, organisation or implementation of programmes for the development of petroleum resources to production and sale of petroleum products it produces. It conducts geological surveys for the exploration of petroleum and undertakes drilling and prospecting operations. The Commission determines its own procedure by framing rules and its decisions are by majority vote. The Government can acquire lands for the purposes of the Commission under the provisions of the Land Acquisition Act, 1894. The purposes connected with the Commission's work are deemed to be public purposes within the meaning of the aforesaid Act.

(iii) Damodar Valley Corporation (DVC)

The Damodar Valley Corporation was established under the Damodar Valley Corporation Act, 1948. Like other corporations, it is a body corporate having perpetual succession and a common seal. It can sue and be sued. The Board of Management consists of a Chairman and two members appointed by the Government of India in consultation with the Governments of the States of Bihar and West Bengal. The members are whole-time, salaried employees of the Corporation. The Government of India is empowered to remove any member for incapacity or

abuse of position. It also appoints the Secretary and the Financial Advisor of the Corporation. Their pay and conditions of service are fixed by the regulations of the corporation, made by the Corporation with the approval of the Central Government.

The objects of this Corporation are to promote and operate irrigation schemes, water supply, drainage, generation of electricity and electrical energy, navigation, etc. in the river Damodar. The river is well known for its notorious propensities. Due to heavy flooding which causes widespread damage and destruction in the States of Bihar and West Bengal, one of the important objects of the Corporation is flood control. It is empowered to establish, maintain and operate laboratories, experimental institutions and research stations to achieve the above-mentioned objects. It helps in construction of dams, barrages, reservoirs, power houses, etc. It supplies water and electricity and can levy rates for it.

The Corporation is empowered to acquire, hold and dispose of property. It has its own funds deposited in the Reserve Bank of India. It can borrow money with the previous approval of the Government of India. It is liable to pay taxes on its income. It has a separate and independent existence and it is an autonomous body independent of the Central or the State Governments. There is no interference by the government in the matter of execution of its programmes and day-to-day administration. Nevertheless, the Corporation is subject to overall control of the Central Government, the Parliament and the State Legislatures of Bihar and West Bengal. It is to send its annual reports to the governments. They are placed on the tables of the Parliament and the two State Legislatures. Parliament and the State Legislatures exercise their legislative control through debates, questions and resolutions. The Central Government may also give directions to the Corporation with regard to its policy. The accounts of the Corporation are to be audited in the manner prescribed by the Auditor-General of India. Any dispute between the Corporation and the three governments associated with it has to be settled by an arbitrator appointed by the Chief Justice of India.

(iv) Life Insurance Corporation of India (LIC)

The Life Insurance Corporation of India was established

under the Life Insurance Corporation Act, 1956. It shares certain common characteristics with the other corporations. It is a body corporate with perpetual succession and a common seal. It has power to acquire, hold and dispose of property. It can sue and be sued. The Corporation was established 'to carry on life insurance business' and given the privilege of carrying on this business to the exclusion of all other persons and institutions. The Act requires the corporation to develop the business to the best advantage of the community. The Central Government may give directions in writing in the matters of policy involving public interest. The Corporation shall be guided by such directions. 95 % of the profits are to be reserved for policy holders and the balance is to be utilised as the Central Government may decide.

The Corporation is an autonomous body as regards its day-to-day administration. It is free from ministerial control except as to the broad lines of policy.

(v) Road Transport Corporations

Various State Governments have established Road Transport Corporations for the respective States under the Road Transport Corporations Act, 1950; e. g. Gujarat State Road Transport Corporation. A Road Transport Corporation is managed by a Chief Executive Officer, a General Manager and a Chief Accountant appointed by the State Government concerned. The Central Government contributes the capital in part, while the remaining capital is to be borne by the State Government concerned in agreed proportions. The Corporation can raise capital by issuing non-transferable shares. The capital, the shares and the dividends are guaranteed by the government. The Corporation is a legal entity independent of the State Government. It is a body corporate having perpetual succession and a common seal. It can sue and be sued in its own name. Its employees are not 'civil servants' within the meaning of Article 311 of the Constitution of India,[16] though they are deemed to be 'public servants' within the meaning of Section 21 of the Indian Penal Code, 1872.

16. See *infra*, at p. 296.

The primary function of the Corporation is to provide efficient, adequate, economical and a properly co-ordinated system of road-transport services in the country. The State Government is empowered to issue general instructions for the efficient performance of the functions of the Corporation. It manufactures, purchases, maintains and repairs rolling stock, appliance, plant and equipment. It can acquire, hold and dispose of property. It can borrow money subject to the approval of the State Government. The budget has to be approved by the State Government. Its accounts are to be audited by government auditors. The government is empowered to ask for the statements, accounts, returns and any other information. It can order enquiries into the affairs of the Corporation. It may take over any part of the undertaking in public interest or supersede the Corporation, if it appears that the Corporation is wholly unfit and unable to perform its functions. It can also be wound up by a specific order of the State Government made after the previous approval of the Central Government.

(vi) Rehabilitation Finance Corporation

The Rehabilitation Finance Corporation was established under the Rehabilitation Finance Corporation Act, 1948. It is a body corporate with perpetual succession and a common seal. There are neither directors nor shareholders. It is managed by a Chief Administrator as its Chairman and a number of official and non-official members appointed by the Central Government. They hold their offices during the pleasure of the Central Government. The Chairman (Chief Administrator) is a whole-time employee and the terms and conditions of his service are such as may be determined by the Central Government. Its moneys are deposited with the Reserve Bank of India and duly invested in approved government securities. The Central Government is empowered to issue directions to the Corporation in respect of its general policy and the Corporation is required to act in accordance with those directions.

The object of the Corporation is to provide financial assistance on reasonable terms to displaced persons in order to enable them to settle in trade, business or industry. The Corporation is assisted by an Advisory Board and Regional Committees. In

reality, the Administrator acts as a big money-lender, with very extensive powers of recovery of loans, not available to a private money-lender. For example, he can recover the amount of loan as arrears of land revenue. The Corporation is exempted from payment of income tax. The provisions regarding winding up of companies and insolvency do not apply to it. However, it has to furnish a half-yearly report and other necessary information of its activities as required by the Central Government.

6. Status and Rights of Public Corporations

(a) Legal and constitutional status

As stated above, a public corporation possesses a separate and distinct corporate personality. It is a body corporate with perpetual succession and a common seal. It can sue and be sued in its own name. Public corporations have been recognised in the Constitution. It expressly provides that the State may carry on any trade, industry, business or service either itself or through a corporation owned or controlled by it to the exclusion of citizens.[17] The laws providing for State monopolies are also saved by the Constitution.[18]

(b) Rights

A public corporation is a legal entity and accordingly, like any other legal person, it can sue for the enforcement of its legal rights. It should not, however, be forgotten that it is not a natural person, but merely an artificial person, and therefore cannot be said to be a citizen within the meaning of the Citizenship Act, 1955. Therefore, a corporation cannot claim any fundamental right conferred by the Constitution only on citizens.[19] All the same its shareholders, being citizens, can claim protection of those fundamental rights.[20]

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17. Arti. 19(6) (ii).
18. Arti. 305.
19. Arti. 19, *S. T. Corpn. of India* v. *C. T. O.*, AIR 1963 SC 1811; *Indo-China Steam Navigation Co.* v. *Jagjit Singh*, AIR 1964 SC 1140; *Tata Eng. Co.* v. *State of Bihar*, AIR 1965 SC 40; *Barium Chemicals* v. *Company Law Board*, AIR 1967 SC 295: (1969) 1 SCC 475; *Amritsar Muni.* v. *State of Punjab* AIR 1969 SC 1100; *State of Gujarat* v. *Ambica Mills*, (1974) 4 SCC 656: AIR 1974 SC 1300.
20. *Barium Chemicals*, (supra); *R.C. Cooper* v. *Union of India*, (1970) 1 SCC 248:

An interesting question which arises is whether fundamental rights conferred by the Constitution on a person or a citizen can be enforced against a public corporation. The rights conferred by Part III of the Constitution can be enforced not only against the 'State' but also against all 'local or other authorities'.[21] In *University of Madras* v. *Shanta Bai*[22], a narrow view had been taken by the High Court of Madras and it was held that the fundamental rights cannot be enforced against a University. But in *Rajasthan Electricity* case (supra), the Supreme Court took a liberal view and held that the Electricity Board fell within the category of 'other authorities' within the meaning of Article 12 of the Constitution and fundamental rights can be enforced against it. After the momentous pronouncement of the Supreme Court in *Sukhdev Singh* v. *Bhagatram*[23], now it is well settled that fundamental rights can be enforced against public corporations.

7. Liabilities of Public Corporations

(a) Liability in contracts

Since a public corporation is not a government department, the provisions of Article 299 of the Constitution of India do not apply to it and a contract entered into between a public corporation and a private individual need not satisfy the requirements laid down in Article 299. Similarly, the requirement of statutory notice under Section 80 of the Code of Civil Procedure, 1908 for filing suits against the Government does not apply in case of suits against a public corporation.

(b) Liability in torts

A public corporation is liable in tort like any other person. It will be liable for the tortious acts committed by its servants and

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AIR 1970 SC 564; *Bennet Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788: AIR 1973 SC 106; *Neptune Assurance Co.* v. *Union of India*, (1973) 1 SCC 310: AIR 1973 SC 602; *State of Gujarat* v. *Ambica Mills*, (supra); *Godhra Electricity Co. Ltd.* v. *State of Gujarat*, (1975) 1 SCC 199: AIR 1975 SC 32.

21. Arti. 12.
22. AIR 1954 Mad 67.
23. (1975) 1 SCC 421 (446-47): AIR 1975 SC 1331 (1347-48)1356. See also *Sirsi Municipality* v. *C. K. Francis*, (1973) 1 SCC 409: AIR 1973 SC 855. For detailed discussion see the recent decision of the SC in *Ramana Dayaram Shetty* v. *International Airport Authority*: C.A. No. 895 of 1978; decd. on 4-5-1979.

employees 'to the same extent as a private employer of full age and capacity would have been'.[24] This principle was established in England in 1866[25], and has been adopted in India also. A public corporation cannot claim the immunity conferred on the government under Article 300 of the Constitution. Similarly, all defences available to a private individual in an action against him for tortious acts will also be available to a public corporation. But a statute creating a public corporation may confer some immunity on the corporation or on its servants or employees with regard to the acts committed by them in good faith in discharge of their duties. For example, Section 28 of the Oil and Natural Gas Commission Act, 1959 reads as under:[26]

> No suit, prosecution or other legal proceedings shall lie against the Commission or any member or employee of the Commission for anything which is in good faith done or intended to be done in pursuance of this Act or of any rule or regulation made thereunder.

It is submitted that the immunity conferred on statutory corporations for tortious acts committed by its servants is unjustifiable and against the principle of equality before the law and equal protection of law guaranteed under the provisions of the Constitution of India. Jain and Jain[27] rightly state: "In the modern welfare state, when the State is entering into business activities of all kinds, the protection clause in the statutes establishing corporations seems to be incongruous and unjustified".

(c) Crown privilege

A public corporation is only 'a public authority with large powers but in no way comparable to a Government department' and therefore, the doctrine of 'Crown privilege' cannot be claimed by public corporations. In *Tamlin* v. *Hannaford*[28], Denning, L. J. (as he then was) observed:

> In the eye of the law, the corporation is its own master

24. R. S. Arora: *State Liability and Public Corporations in India*, (1966) Public Law 238.
25. *Mersey Dock Trustees* v. *Gibbs*, (1866) LRIHL 93.
26. *See also* S. 47 of the LIC Act, 1956.
27. *Principles of Administrative Law*, (1973), p. 557.
28. (1950) 1 KB 18.

and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government.[29]

8. Servants of Public Corporations

Since a public corporation is a separate and distinct legal entity from the government, its employees and servants are not civil servants and cannot claim any protection of the provisions of Article 311 of the Constitution. Recently, in the leading case of *Sukhdev Singh* v. *Bhagatram*[30], the Supreme Court remarked:

> The employees of these statutory bodies have a statutory status and they are entitled to declaration of being in employment when their dismissal or removal is in contravention of statutory provisions.[31]

Thus, an employee of the Oil and Natural Gas Commission,[32] the Life Insurance Corporation of India,[33] the Industrial Finance Corporation,[34] the Hindustan Steel Ltd.,[35] the Hindustan Antibiotics Ltd.,[36] the State Transport Corporation,[37] the State Bank of India,[38] the Damodar Valley Corporation,[39] the Hindustan Cables Ltd.,[40] the State Electricity Board,[41] or the District Board,[42]

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29. *Ibid.* at p. 24. *See also* Garner: *Administrative Law,* (1963), p. 249.
30. (1975) 1 SCC 421: AIR 1975 SC 1331.
31. *Ibid.* at p. 447 (SCC); p. 1348 (AIR).
32. *Sukhdev Singh's* case (supra).
33. *Ibid.*
34. *Ibid.*
35. *S. L. Agrawala* v. *Hindustan Steel Ltd.* (1969) 1 SCC 177: AIR 1970 SC 1150.
36. *Hindustan Antibiotics Ltd.* v. *Workmen,* AIR 1967 SC 948.
37. *Mafatlal* v. *State Transport Corpn.,* AIR 1966 SC 1364.
38. *Suprasad* v. *State Bank of India,* AIR 1962 Cal 72.
39. *Ranjit Ghosh* v. *Damodar Valley Corpn.,* AIR 1960 Cal 549.
40. *Abani Bhusan* v. *Hindustan Cables,* AIR 1968 SC 124.
41. *Jai Dayal* v. *State of Punjab,* AIR 1965 Punj 316.
42. *R. Srinivasan* v. *President, District Board,* AIR 1958 Mad 211.

the Sindri Fertilisers and Chemicals Ltd.[43], cannot be said to be a 'civil servant' so as to claim protection under Article 311 of the Constitution of India.

The following principles have been deduced by an eminent author on Constitutional Law[44] with regard to the status of employees of a statutory corporation—

(*i*) a statutory corporation has a separate and independent existence and is a different entity from the Union or the State Government with its own property and its own fund and the employees of the corporation do not hold civil post under the Union or the State;

(*ii*) it makes little difference in this respect, whether the Union or the State holds the majority share of the Corporation and controls its administration by policy directives or otherwise;

(*iii*) it also makes little difference if such a statutory Corporation imitates or adopts the Fundamental Rules to govern the service conditions of its employees;

(*iv*) although the ownership, control and management of the statutory corporation may be, in fact, vested in the Union or State, yet in the eye of law the corporation is its own master and is a separate entity and its employees do not hold any 'civil post under the Union or the State';

(*v*) if, however, the State or the Union controls a post under a statutory corporation in such a manner that it can create or abolish the post or can regulate the conditions subject to which the post is or will be held and if the Union or the State pays the holder of the post out of its own funds, then although the post carries the name of an office of the statutory corporation, it may be a civil post under the State or the Union.

To these, one more may be added—

(*vi*) even if the statute creating a public corporation confers

43. *Subodh Ranjan* v. *Sindri Fertilisers*, AIR 1957 AP 402.
44. Seervai: *Constitutional Law of India*, Vol. II (1976), pp. 1487-88.

on its employees the status of public servants for certain purposes[45] they cannot thereby become civil servants so as to attract the provisions of Article 311 of the Constitution.[46]

Thus, in *Ranchhodbhai* v. *Collector of Panchmahals*[47], a Division Bench of the Gujarat High Court held that by virtue of a fiction created by the legislature under Section 60(4) of the Bombay Village Panchayats Act, 1958, a person appointed as a Secretary under the Act of 1933 was deemed to be one appointed by the State Government under Section 60(2) of the Act of 1958, but the said fiction did not confer on such person the status of a government servant. The Court in conclusion, stated:

> In our judgment, applying the aforesaid principles to the facts of the present case, one important fact which emerges is that petitioner was a servant of the panchayat, entrusted with the duties of the panchayat and under the executive and disciplinary control of the panchayat, before the Act of 1958 came into operation. The panchayat, though carrying out the functions which usually one associates with a Government, is not the same thing as a Government. It is a corporate body, having perpetual succession, a common seal and is capable of holding property in its own right. It is under such a body that petitioner was employed at the time of the coming into operation of the Act of 1958. As we have already pointed out, the status of petitioner substantially remains the same after the coming into operation of the Act of 1958. The only change which has taken place is that, instead of his having been appointed by the panchayat, by a legal fiction, he is to be treated as having been appointed by the Government. In our judgment, this single factor does not make any radical change in the status of petitioner. Even if we were to proceed on the basis that the panchayat was not liable to make payment to petitioner and that petitioner was entitled to receive his salary and allowances from the Government,

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45. S. 56 of the Damodar Valley Corporation Act, 1948 reads:
"All members, officers and servants of the Corporation, whether appointed by the Central Government or the Corporation, shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Act to be public servants within the meaning of S. 21 of the Indian Penal Code."

46. Jain and Jain (*supra*) at p. 541.

47. AIR 1967 Guj 92: (1966) 7 GLR 1024.

having regard to the facts that petitioner still has to perform the duties assigned to the panchayat and remains under the disciplinary control of the panchayat, it cannot be stated that the post that petitioner was holding, though a civil post, was under the State. In our judgment, therefore, the contention of petitioner that he was entitled to the protection under Article 311 of the Constitution, must be rejected.[48]

Even though the employees of public corporations are not civil servants and cannot claim protection under Article 311 of the Constitution, they can claim the protection of Articles 14 and 16 of the Constitution. The rules and regulations framed by such corporations containing terms and conditions of appointment are imperative and the corporations are bound to apply them as they have the force of law. The employees of public corporations have a statutory status and they are entitled to a declaration of being in employment when their dismissal or removal is held to be in contravention of statutory provisions. An ordinary individual governed by the contractual relationship of master and servant can sue his master only for damages for breach of contract. In the case of statutory bodies, there is no 'personal element' whatsoever because of the impersonal character of statutory bodies. And compliance by a public corporation with the requirements of law may be enforced by a court of law by declaring dismissal in violation of rules and regulations to be void and by granting reinstatement.[49]

9. Controls Over Public Corporations

The main purpose of establishing public corporations is to promote economic activity through autonomous bodies. In fact, these corporations have been granted very wide powers and there is no interference by any authority in exercise of these powers by the corporations. Yet, it is necessary that some control over these corporations should be present so that the powers conferred on such corporations may not be arbitrarily exercised or abused, and it may not become the 'fourth organ' of the government. The various controls may now be discussed:

48. AIR 1967 Guj 92, at p. 100; (1966) 7 GLR 1024, pp. 1038-39.
49. *Sukhdev Singh's* case (supra); *Sirsi Municipality's* case, (supra).

(a) Judicial control

(i) *General*

Since a public corporation is a legal entity it can sue and be sued. It is a body corporate having perpetual succession and a common seal. Legal proceedings may be taken by or against a corporation in its corporate name. It is a distinct and separate entity from the Crown or the Government.[50] Jurisdiction of courts over a public corporation is the same as it is over any private or public company except that the powers of the former depend on the provisions of a special statute while the powers of a company are derived from the terms of its Memorandum of Association.[51] In some statutes an express provision is made enabling a corporation to be sued. But even in the absence of such a provision, a corporation can be sued like any other person. In fact, when any statute refers to a 'person' it includes a corporation also.[52] Accordingly, a public corporation is liable for a breach of contract and also in tort for tortious acts of its servants like any other person.[53] It is liable to pay income tax unless expressly exempted and cannot invoke the exemption granted to the State under Article 289 of the Constitution of India.[54] It is bound by a statute. It cannot claim 'Crown privilege'.[55]

(ii) *Writ of mandamus*

As discussed in Lecture IX (p. 214), a High Court or the Supreme Court may issue a writ of *mandamus* against a corporation directing performance of its statutory duty.[56] The point is concluded by the Supreme Court in the well-known case of *Sukhdev Singh* v. *Bhagatram* (p. 299), wherein the Court held that a public cor-

50. *S. L. Agrawala* v. *Hindustan Steel Ltd.*, (1969) 1 SCC 177 : AIR 1970 SC 1150 ; *H. E. M. Union* v. *State of Bihar*, (1969) 1 SCC 765 : AIR 1970 SC 82 ; *State of Bihar* v. *Union of India*, (1970) 1 SCC 67 : AIR 1970 SC 1446.
51. *Smith* v. *London Transport Executive*, (1951) AC 555.
52. S. 3(42) of the General Clauses Act, 1897.
53. *Supra*, at pp. 294-95.
54. *A.P.S.R. T. C.* v. *I. T. O.*, AIR 1964 SC 1486.
55. *Supra*, at pp. 295-96.
56. *Supra*, at p. 214. See also *R. D. Shetty's* case (supra).

poration is an 'authority' within the meaning of Article 12 of the Constitution and is amenable to the writ jurisdiction of the Supreme Court and High Courts under Article 32 and Article 226 respectively.

Even though, theoretically, there is no difficulty in issuing a writ of *mandamus* against a corporation, there are many practical problems.[57]

(1) Sometimes, duties imposed by a statute are so vague that it is impossible for the court to issue a writ of *mandamus* for the performance of that duty. Generally, statutory provisions require a public corporation 'to do such things as may seem to it necessary and expedient' or to provide 'efficient' or 'adequate' service to the public at 'reasonable' charges. It is doubtful whether any court could be persuaded to avoid a contract made with the corporation on the ground that the charges were not 'reasonable',[58] as it involves more or less subjective satisfaction on the part of the corporation concerned.

(2) Sometimes, the duty imposed on a public corporation is expressed in such general terms that, apart from establishing that failure has occurred, it does not seem that the legislature intended to give a cause of action to any person for failure to discharge the duty.[59] Garner[60] rightly states: "In many cases, however, the statutory powers of a public corporation are so widely drawn that it becomes virtually impossible even to visualise circumstances in which any court could hold any particular act of such a corporation to be *ultra vires*".

(3) The very object of establishing a public corporation is to set up an autonomous body with wide discretionary powers to enable it to survive and make headway in the competitive and dynamic business world and to free it from stringent control ordinarily imposed on government

57. Garner: *Adminstrative Law*, (1963), p. 260; Jain and Jain (*supra*), pp. 557-58.
58. Garner (*supra*).
59. Jain and Jain (*supra*), p. 558.
60. *Administrative Law*, (supra).

departments. In view of the above, the courts will be loath to label many duties as mandatory. Consequently there will be very few cases in which a writ of *mandamus* can be issued.

(4) Sometimes, even though the statute uses the expression "shall", the court may interpret the said provision as directory and not mandatory or obligatory and may not issue a writ of *mandamus* for performance of that duty imposed upon a corporation by the statute.

(5) There is one more practical difficulty in the way of the petitioner for getting a writ of *mandamus*. Generally, before a writ of *mandamus* is issued against a corporation, the petitioner has to prove that a legal duty was imposed on the corporation and that he has a legal right to ask for performance of that duty, and thus, he was an 'aggrieved' person. But this is very difficult to prove and the court may hold that the interest of the petitioner was not *directly* affected by non-performance of the duty by the corporation and may not issue *mandamus* on the ground that the petitioner has no '*locus standi*'.

(6) Generally, the grievances against a public corporation are more in respect of quality of services rendered by the corporation rather than the legality of its actions.

(7) If an alternative remedy is available to the petitioner, the court may refuse to grant *mandamus*.

(8) As Prof. Robson[61] states, sometimes, a statute confers powers on a public corporation in *subjective* terms and empowers it to be the judge of the extent of those powers. In such cases, the doctrine of *ultra vires* ceases to have any meaning, by whatever legal machinery it is sought to be invoked.

Taking into account all these difficulties, Garner[62] states: "There has yet been no litigant bold enough to ask for an order of *mandamus* against a public corporation and it is perhaps doubtful whether he would achieve much by so doing".

61. Cited by Garner (*supra*) at p. 253.
62. *Ibid*. at p. 252.

(b) Governmental control

As the judicial control over public corporations is not effective it needs to be supplemented by other controls. Government also exercises some control and supervision over such corporations as the custodian of public interest in different ways:

(i) Appointment and removal of members

Generally, the power of appointment and removal of the Chairman and the members of a public corporation is vested in the Government.[63] This is the key provision and the most effective means of control over a public corporation. In some cases, the term of office of a member is also left to be determined by the government. In some statutes, a provision is made for removal of a member on the ground that the member is absent from meetings for a specified period, he is adjudged a bankrupt or is *"otherwise unsuitable"* to continue as a member. In addition to appointment and removal of members, previous approval of the government is required for framing the rules relating to service conditions of such members.

(ii) Finance

The government exercises effective control over a public corporation when such corporation is dependent on the government for finance. A statute may require previous approval of the government for undertaking any capital expenditure exceeding a particular amount.[64] It may also provide to submit to the government its programme and budget for the next year and to submit the same in advance.[65] The Comptroller and Auditor-General exercises control in the matter of audit of accounts submitted by public corporations.

(iii) Directives

An important technique involved to reconcile governmental control with the autonomy of the undertaking is to authorise the government to issue directives to public undertakings on matters of

63. S. 4 of the Damodar Valley Corporation Act, 1948.
64. S. 35 of the Air Corporations Act, 1953.
65. S. 26 of the Food Corporations Act, 1964.

"policy".[66] A statute may empower the government to issue such directives as it may think necessary on questions of policy affecting the manner in which a corporation may perform its functions.[67] The corporation will give effect to such directives issued by the government. A statute may also provide that in case 'any question arises whether a direction relates to matter of policy involving public interest, the decision of the Central Government thereon shall be final'.[68] It is very difficult to draw a dividing line between matters of 'policy' and 'day-to-day' working of a public corporation and by this method, the government can exercise effective control over public corporations. But unfortunately, in practice, the government hardly exercises its power to issue policy directives. Considering the provisions of Section 21 of the Life Insurance Corporation Act, 1956, the Chagla Commission has rightly observed:

> In my opinion, it is most unfortunate that the wise and sound principle laid down in Section 21 has not been adhered to in the working of the Life Insurance Corporation.[69]

c) Parliamentary control

Public corporations are created and owned by the State, financed from public funds and many a time they enjoy full or partial monopoly in the industry, trade or business concerned. They are expected to exercise their powers in the public interest. It is, therefore, necessary for Parliament to exercise some degree and mode of control and supervision over these corporations. The methods adopted to exercise such control are numerically four.

(i) *Statutory provisions*

All public corporations are established by or under statutes passed by Parliament or State legislatures. The powers to be exercised by such corporations can be defined by them. If any corporation exceeds or abuses its powers, Parliament or the State legislature can supersede or even abolish the said corporation. Even though this

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66. Jain and Jain (*supra*) at p. 546.
67. S. 21 of the LIC Act, 1956.
68. *Ibid. See also* S. 34(1) of the Air Corporations Act, 1953.
69. CHAGLA COMMISSION: *Report on the Life Insurance Corporation*, (1958).

type of control is not frequently employed, it is a salutary check on the arbitrary exercise of power by the corporation.

(ii) Questions

Through this traditional method, the members of Parliament put questions relating to the functions performed by public corporations to the Minister concerned. But this method has not proved to be very effective because of the authority of public corporations in their fields. As Garner[70] states: "The House of Commons is not a meeting of the shareholders of a public corporation, nor are the Ministers of the Crown in the position of directors of corporation".

Accordingly, broad principles subject to which questions relating to these undertakings can be asked have been laid down, namely, questions relating to policy, an act or omission on the part of a Minister, or a matter of public interest (even though seemingly pertaining to a matter of day-to-day administration or an individual case), are ordinarily admissible. Questions which clearly relate to day-to-day administration of the undertakings are normally not admissible.[71]

(iii) Debates

A more significant and effective method of parliamentary control is a debate on the affairs of a public corporation. This may take place when the annual accounts and reports regarding the corporation are placed before the Parliament for discussion in accordance with the provisions of the concerned statute. There is no general obligation on the part of all corporations to present their budget estimates to Parliament. Estimates Committee[72] therefore recommended that corporations should prepare a performance and programme statement for the budget year together with the previous year's statement and it should be made available to Parliament at the time of the annual budget.

(iv) Parliamentary Committees

This is the most effective form of parliamentary control and supervision over the affairs conducted by public corporations.

70. *Administrative Law* (1963), p. 265.
71. Jain and Jain (*supra*), p. 550.
72. *Ibid.* at p. 551.

The Parliament is a busy body and it is not possible for it to go into details about the working of these corporations. Parliament has therefore constituted the Committee on Public Undertakings in 1964. The functions of the Committee are to examine the reports and accounts of the public undertakings, to examine the reports, if any, of the Comptroller and Auditor-General on the public corporations, to examine in the context of the autonomy and efficiency of the public corporations, whether their affairs are being managed in accordance with sound business principles and prudent commercial practices.

The recommendations of the Committee are advisory and therefore, not binding on the government. Yet, by convention, they are regarded as the recommendations by Parliament itself, and the government accepts those recommendations; and in case of non-acceptance of the recommendations of the Committee, the ministry concerned has to give reasons therefor.

(d) Control by public

In the ultimate analysis, public corporations are established for the public and they are required to conduct their affairs in the public interest. It is, therefore, necessary that in addition to judicial, parliamentary and governmental control, these corporations must take into account the public opinion also. There are two different means of representation of the 'consumer' or public interest.[73]

(i) Consumer councils

These are bodies established under the authority of the statute constituting the corporations concerned with the object of enabling "consumers" to ventilate their grievances, or make their views known to the corporations. The outstanding examples of consumer councils are to be found in the electricity and gas industries.[74] The difficulty about these councils is that the members of the general public have neither the technical knowledge nor a keen interest in the affairs of certain consumer councils; e. g.

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73. Garner: *Administrative Law*, (1963), pp. 266-69.
74. *Ibid.* at p. 267.

Gas or Electricity Consumer Councils. These councils may make recommendations to their area boards, but there have been very few occasions when alterations of policy decisions have resulted. Garner[75] states: "It is by no means clear that the Consumer Councils are really able to justify their continued existence in the administrative machinery of the gas and electricity industries".

(ii) Membership

In other cases, Parliament has arranged for members of certain of the public corporations to be nominated by local authorities and other bodies interested in the functions of the particular corporation.[76] Thus, members of Hospital Management Committees are appointed by the Regional Hospital Boards after consultation with local health authorities, executive councils and other officials, as required by the statute. Sometimes, such consultation is made mandatory. Some statutes also provide that certain members of a council must possess particular qualifications.

10. Conclusion

From the above discussion, it is clear that public corporations must be autonomous in their day-to-day working and there should be no interference by the government in it. At the same time, the wide powers conferred on such corporations should not be abused or arbitrarily exercised and they should not become the 'fourth branch' of the government. The discussion would be well concluded by quoting the following observations of a learned author on Administrative law:[77]

> A powerful corporation, having great financial resources, employing many personnel and possessing monopolistic powers conferred by statute, should be answerable in some measure to the elected representatives of the nation and to the courts of law. In many cases this control seems tenuous and ineffective. On the other hand, any large-scale commercial enterprise must be allowed freedom to carry on

75. *Ibid* at p. 268.
76. *Ibid.*
77. Garner: *Administrative Law*, (1963), p. 270.

research, to experiment, and even on occasion to make mistakes. Indeed, the justification for the constitutional device of the public corporation has been said to be so as to secure freedom from civil service (and particularly Treasury) controls, and from the influence of party politics. It is one of the modern problems of public administration, how these conflicting objectives can be reconciled.

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