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Administrative law and judicial review of administrative action with a special emphasis on the writ of certiorari

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Abstract
The topic of "Administrative law and judicial review of administrative action" is a very important subject in modern times. In this paper I intend to dwell on the broad aspects of administrative law and various methods of judicial control over the administrative law with particular emphasis on the writ of Certiorari.

Keywords: administrative law, certiorari, judicial review, *Wednesbury*, natural justice, remedies

Introduction

According to Wade, administrative law is the law relating to the control of powers of the executive authorities. To consider why such a law became necessary, we have to consider its historical background.

Up to the 19th century the functions of the State in England were confined to (*i*) defence of the country from foreign invasion, and (*ii*) maintenance of law and order within the country.

Feudal, agricultural society was relatively simple and social relations were uncomplicated. There were few laws, mainly customary (not statutory). But with the advent of industrial revolution in the 18th and 19th centuries, society became complex. Concentration of people in urban areas called for new regulatory State authorities for town planning, housing improvement, public health, education, factory management, street lighting, sewerage, drainage, sanitation, schemes for providing water, electricity, etc. Also the early 20th century laid the foundation for a Welfare State dealing with health insurance, unemployment allowance, sickness and old age benefits, free and compulsory education, etc.

This vast expansion in the State functions called for a huge amount of legislation and also for wide delegation of State functions by Parliament to executive authorities, so also was there a need to create a body of legal principles to control and to check misuse of these new powers conferred on the State authorities in this new situation in the public interest. Thus, emerged administrative law. Maitland pointed out in his *Constitutional History*:

"Year by year the subordinate Government of England is becoming more and more important. We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes."

But in the early 20th century following the tradition of Dicey's classic exposition in his The Law of the Constitution, there was a spate of attacks on parliamentary delegation culminating in the book New Despotism by the then Chief Justice of England, Lord He wart published in 1929. In response, the British Government in 1932 set up a committee called the Committee on Ministerial Powers headed by Lord *Donoughmore*, to examine these complaints and criticisms. However, the *Donoughmore* Committee rejected the argument of Lord He wart and accepted the reality that a modern State cannot function without delegation of vast powers to the executive authorities, though there must be some control on them.

Parliament could theoretically exercise this control, but in practice it could not, since it did not have the time. Hence it became the duty of the Judges, though unelected, to become representatives of the people and ensure that executive authorities do not abuse their powers, but instead use it in the public interest.

But Judges too are not supposed to act arbitrarily. Hence a body of legal principles was created (largely by Judges themselves in their judgments and not by Parliament) on the basis of which Judges had to exercise their powers of judicial review of administrative action on settled principles but not arbitrarily. It is this body of rules which is known as administrative law.

Judge Made Law

Being largely Judge-made, administrative law is not contained in any Administrative Law Act, just as the other legislations like the income tax law and the sales tax law is contained in the Income Tax Act or in the Sales Tax Act. Hence some writers have criticised administrative law as a "wilderness of single instances, and not a separate, coherent branch of law". However, the fundamental principle behind administrative law has always remained the same, namely, that in a democracy the people are supreme, and hence all State authority must be exercised in the public interest.

It is a mistake to think that administrative law is necessarily antagonistic to efficient government. As Wade points out "intensive administration will be more tolerable to the citizen, and the Government's path will be smoother, where the law can enforce high standards of legality, reasonableness and

fairness".

As pointed out by Sir John Donaldson, M.R., in *R.*v. *Lancashire CC, ex p Huddleston* All ER p. 945*c*the development of administrative law "has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely, the maintenance of the highest standards of public administration".

In Tata Cellular. Union of India the Supreme Court laid down the following basic principles relating to administrative law: (SCC pp. 687-88, para 94)

1. The modern trend points to judicial restraint in administrative action;
2. the Court does not sit as a court of appeal over administrative decisions, but merely reviews the manner in which the decisions were made;
3. the Court does not have the expertise to correct administrative decisions. If a review of the administrative decisions is permitted it will be substituting its own decision without the necessary expertise, which itself may be fallible;
4. a fairplay in the joints is a necessary concomitant for the administrative functioning.
5. However, the administrative decision can be tested by application of the Wednesbury principle of reasonableness, and must be free from arbitrariness, bias or mala fides.

Control over the executive powers

There are two kinds of controls on executive powers viz.:

1. statutory, and
2. Non-statutory.

Statutory controls

Statutory controls are given in the statute (or rules or regulations made under the statute). Any executive action in violation of the same will be declared illegal by the courts, by applying the ultra vires doctrine.

Thus, where the London County Council had statutory powers to purchase and operate tramways, it was held by the House of Lords that it had no power to run omnibuses, which was not incidental to the running of tramways. Similarly a local authority with the power to acquire land other than "park, garden or pleasure house" acts in excess of jurisdiction in acquiring land which is part of a park.

An executive authority may also act unlawfully if it fails to perform a duty imposed upon it by statute such as maintenance of civic services (e.g. sewerage, drainage, water supply, etc.) by the Municipalities or other local bodies whose duty under the statute is to maintain such services. Here also a mandamus will issue from the courts to compel such authority to perform its statutory duty.

Where the statute delegates a power to a particular authority, that authority cannot sub-delegate that power to another authority or person unless the statute permits such sub-delegation.

Similarly, discretion exercised by the prescribed authority on the direction of a higher authority would be illegal.

When the statute prescribes the manner of doing an act, the authority must do it in that manner alone.

Difficulty, however, arises in the matter of what is called "subjective discretion" conferred by the statute. An instance of such subjective discretion is where the statute says that an executive authority can take such decision "as it deems fit". Another example is where the statute says that action can be taken or order passed where the authority has "reasonable grounds to believe" to take that action or pass such order e.g. Section 132 of the Income Tax Act which confers power on the Commissioner of Income Tax to order search and seizure where he has "reason to believe "that some person is concealing his income.

In *Liversidge*v. *Anderson* the Defence (General) Regulations, 1939 provided:

"If the Secretary of State has reasonable cause to believe any person to be of hostile origin or association he may make an order against that person directing that he be detained."

The detenu *Liversidge* challenged the detention order passed against him by the Secretary of State. The majority of the House of Lords, except Lord Atkin, held that the Court could not interfere because the Secretary of State had mentioned in his order that he had reasonable cause to believe that *Liversidge* was a person of hostile origin or association. *Liversidge* was delivered during the Second World War when the executive authority had unbridled powers to detain a person without even disclosing to the Court on what basis the Secretary had reached to his belief. However, subsequently, the British courts accepted Lord Atkin's dissenting view that there must be some relevant material on the basis of which the satisfaction of the Secretary of State could be formed. Also, the discretion must be exercised keeping in view the purpose for which it was conferred and the object sought to be achieved, and must be exercised within the four corners of the statute

Sometimes a power is coupled with a duty Thus, a limited judicial review against administrative action is always available to the courts.

Non-statutory controls

Some of the non-statutory controls are:

a) The *Wednesbury* principle
b) Rules of natural justice
c) Proportionality as referred to in the case of *Teri Oat* Estates (P) Ltd.v. Union Territory, Chandigarh and in the case of Union of India v. Rajesh P.U. etc.)
d) Promissory estoppel
e) Legitimate expectation

We may only consider some of these in detail.

***Wednesbury* Principle**

Up to 1947 the law in England was that the courts could interfere only with judicial or quasi-judicial decisions and not with administrative decisions. This legal position changed after the famous decision of Lord Greene in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*in which it was said:

A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said

to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

The above observation incorporates what is frequently called as the *Wednesbury principle.*

The courts often intervene to quash as illegal the exercise of administrative discretion on the ground that it suffers from "*Wednesbury* unreasonableness".

Thus, in *Dy. Director of Consolidation*v. *Deen Bandhu Rai*, the settlement officer rejected an application for permission to effect an exchange of holdings on the grounds (*i*) that the granting of the permission would entail considerable work on the part of officers of the department, and (*ii*) that the applicants were big landholders. The Supreme Court held that these reasons were not germane and pertinent for the rejection of the petitions.

In *Barium Chemicals Ltd.*v. *Company Law Board* the Secretary of the Company Law Board issued an order under Section 237(*b*) of the Companies Act, 1956 appointing inspectors to investigate the affairs of a company. Section 237(*b*) of the Act authorised such an appointment to investigate the affairs of a company "if, in the opinion of the Central Government" there were circumstances suggesting (*a*) that the business of the company was being conducted with the intent to defraud its creditors, members, or any other person; (*b*) that the persons concerned in the formation of the company or the management of its affairs had been guilty of fraud or misconduct towards the company or towards any of its members; (*c*) that the members of the company had not given out all the information with respect to its affairs. The Supreme Court held that before the discretion conferred by Section 237(*b*) of the Companies Act can be exercised, there must exist circumstances which in the opinion of the authority suggest the grounds set out in the statute.

Unfettered discretion would also be inconsistent with Article 19 of the Constitution which permits only reasonable restrictions on the rights conferred by that Article. Similarly, it would also be violative of Article 14 which prohibits arbitrariness. In *Shalini Soni*v. *Union of India*the Supreme Court observed:

"It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote."

In *Rohtas Industries*v. *S.D. Agarwal*, an investigation into the affairs of a company was ordered under Section 237 of the Companies Act, 1956. The Company Law Board took into account the fact that there were complaints of misconduct against one of the leading directors of the company in relation to other companies subject to his control for which he was being prosecuted. The Court held that this factor was irrelevant in establishing fraud.

The *Wednesbury* principle is often misunderstood to mean that any administrative decision which is regarded by the Court to be unreasonable must be struck down. The correct understanding of the *Wednesbury* principle is that a decision will be said to be unreasonable in the *Wednesbury* sense if (*i*) it is based on wholly irrelevant material or wholly irrelevant consideration, (*ii*) it has ignored a very relevant material which it should have taken into consideration, or (*iii*) it is so absurd that no sensible person could ever have reached to it.

As observed by Lord Dip lock in *Council of Civil Service Unions*v. *Minister for the Civil Service*, a decision will be said to suffer from *Wednesbury* unreasonableness if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

An administrative decision cannot be struck down by the Judge merely because he disagrees with the administrator. There may be degrees of unreasonableness, and the *Wednesbury* unreasonableness refers only to the *extreme degree of unreasonableness* which no sensible person could reach after taking into account the relevant materials or relevant considerations. Thus, in *W., Re,* Lord Hailsham observed:

"Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. ... Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable."

Hence, the *Wednesbury* unreasonableness means "*unreasonableness verging on absurdity*"as observed by the House of Lords in *Puhlhofer* v. *Hillingdon L.B.C.*

Rules of Natural Justice

The rules of natural justice were originally only two viz.:

1. Audi alteram partemi.e.

The person(s) to be affected by an order of the authority should be heard before the order is passed, and

2. The rule against bias

Subsequently, some more rules of natural justice are in the process of development e.g. that the administrative authority should give reasons for its decisions, particularly when the decisions affect the rights and liabilities of the citizens.

It must, however, be made clear that the rules of natural justice are flexible, and are not a straitjacket formula. In exceptional cases not only can they be modified but even excluded altogether Natural justice is not an unruly horse. If fairness is shown, there can be no complaint of breach of natural justice.

As regards the rule *audi alteram partem*, up to 1964 the legal position in England was that in judicial and quasi-judicial proceedings opportunity of hearing had to be given, but it was not necessary to do so in administrative proceedings. This legal position changed in *Ridge*v. *Baldwin*in which the House of Lords held that opportunity of hearing had to be given even in administrative proceedings if the administrative order would affect the rights and liabilities of the citizens. This view of the House of Lords was followed by the Supreme Court in *State of Orissa*v. *Dr. Binapani Dei* and *State of Maharashtra*v. *Jalgaon Municipal Council*wherein it was held that administrative orders which involve civil consequences have to be passed consistently with the rules of natural justice. The expression "civil consequences" means where rights and liabilities are affected. Thus, before blacklisting a person he must be given a hearing.

It may be noted that even if the statute does not expressly

require that opportunity of hearing must be given before passing an order which affects rights and liabilities, the courts have held that such opportunity of hearing must be given unless expressly excluded by the statute Thus, natural justice is an implied requirement of administrative decisions which affects rights and liabilities.

It may be mentioned that a hearing need not always be an oral hearing. In certain circumstances, the Administrator can only issue a show-cause notice to the party likely to be affected and on his/her reply can pass the decision without giving a personal hearing to the parties. However, in certain circumstances where the party may be very seriously affected the courts have insisted that an oral hearing with opportunity of presenting witnesses and cross-examining the witnesses on the other side must be given.

Similarly, the principle that "no man should be a judge in his own cause" disqualifies an Administrator from giving a decision which affects the rights and liabilities, if he is biased.

It may, however, be pointed out that in *H.C. Narayanappa*v. *State of Mysore* the Supreme Court observed that the Minister or officer invested with the power to hear objections to a scheme is acting in his official capacity and unless there is reliable evidence to show that he is actually biased, his decision will not be liable to be called in question merely because the objections to the government scheme are heard by the government itself or by its officers.

The requirement to give reasons in administrative decisions which affect rights and liabilities has been held to be mandatory by the Supreme Court in *S.N. Mukherjee*v. *Union of India* This reduces the chances of arbitrariness on the part of the authority, as the reasons recorded by him are subject to judicial scrutiny by the higher courts or authorities.

Before concluding, it must also be mentioned that there are certain administrative matters which are inappropriate for judicial review. One of these is policy decisions of the government or of the executive authority which ordinarily should not be interfered with by the courts unless they are clearly violative of the statute or shockingly arbitrary, *Union of India*v. *International Trading Co.*14, etc. In the instant case the facts were that the Central Government had initially decided to locate the headquarters of South Western Railways at Bangalore. Later it was decided to locate it at Hubli, and this decision was challenged. The Supreme Court held that it was a policy decision and hence the Court cannot interfere, even if the decision was political.

Similarly, maintenance of law and order is an executive function, and the courts should not ordinarily interfere with the same.

Apart from that, practically every legal system recognises certain subjects as inappropriate for judicial review e.g. foreign affairs, declaration of wars, etc.

Remedies

Remedies for enforcing administrative law are available before the higher judiciary e.g. the Supreme Court under Article 32 of the Constitution and the High Courts under Article 226 of the Constitution. The higher judiciary can issue writs of certiorari, mandamus, habeas corpus, prohibition and quo warranto and also issue orders or directions "in the nature of writs".

The language used in Articles 32 and 226 is thus wide, and it has been held that the Indian courts have wider powers than the British courts in issuing writs Article 226 confers powers on the High Court not only to issue prerogative writs, but also issue order or direction to enforce fundamental and other legal rights. Hence the High Courts in India are not confined to the procedural technicalities of the English rules. The Court can also mould the relief to meet the peculiar and complicated requirements of this country, provided the High Court does not contravene any provisions of the Constitution or the law.

A writ can be issued by the High Courts and the Supreme Court not only to the Government, but also to what are called instrumentalities of the State.

Certiorari

The writ of certiorari is an order of a High Court or the Supreme Court issued to inferior courts, tribunals or the authorities to transmit to it the record of the proceeding pending with them for scrutiny and, if necessary, for quashing the same. In *R.* v. *Electricity Commr.* Atkin L.J. said the certiorari may issue "wherever anybody 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." Thus if there are two parties who are opposed to each other and there is a dispute or contest ordinarily the deciding authority shall be held to be under a duty to act judicially and the decision of that authority to be a judicial or quasi-judicial act. The second proposition contemplates the situation where there are no two contesting parties but the contest is between the authority proposing to do the act and the citizen opposing it. The absence of *lis* does not necessarily negative the order being judicial, and in such cases, the authority will be bound to act judicially only if it is required by the statute to act judicially. In *R.* v. *Manchester Legal Aid Committee*it was observed that an administrative act is one in which can be made on the subjective opinion or discretion of the authority after giving an opportunity to the affected parties to put their cases. Here, there is no duty to act judicially in arriving at a decision and accordingly such acts are not subject to certiorari.

Generally, such words as "is of opinion", "if it appears to", "considers….likely to be secured", "reasonable grounds to believe" are indicative that the authority is to arrive at a decision administratively, that is there is no duty to act judicially.

In determining the jurisdiction of writ of certiorari, the courts in India have for some time been mainly guided by the principles laid down in *R.* v. *Electricity Commissioners, R.* v. *Legislative Assembly of the Church Assembly*and *Nakudda Ali*v. *Jayaratne*. Accordingly, in order that a body may satisfy the required test, it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to the characteristic, the further characteristic that the body has the "duty to act judicially". The House of Lords in the decision of *Ridge*v. *Baldwin*, has dissented from the view that no writ could be issued unless the duty to act judicially was laid down by statute either expressly or impliedly. The Lords held that the judicial character of the duty has to be inferred from the nature of the duty itself and and is not required to be superadded by

any provisions of the law granting the power. There may be exceptions such as the terms of a statute may exclude the duty to act judicially or no such duty may be inferred in wartime legislation or emergency legislation.

The aforesaid case of *Ridge*v. *Baldwin* is slowly permeating into the Indian Administrative Law. In *Associated Cement Companies* v. *P.N. Sharma,* the observations of Lord Reid in the *Ridge*case was approved in the following words:

"In other words, according to Lord Reid's judgment, the necessity to follow judicial procedure and observe the principles of natural justice, flows from the nature of the decision which the watch committee had been authorized to reach under Section 191(4). It would this be seen that the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently, the horizon of the writ jurisdiction has far been extended in a corresponding measure. In dealing with questions as to whether any impugned orders could be revised under Article 226, the test prescribed by Lord Reid in this judgment may afford considerable assistance."

The aforesaid view has been further affirmed by the Apex Court in the cases of *Shri Bhagwan*v. *Ram Chand, D.L. Board*v. *Zaffer Imam*and *P.L. Lakahanpal*v. *Union of India*.

The short period of disapproval of the Ridge's case by the Supreme Court, after the case of *Sadhu Singh*v. *Delhi Administration*was set right in the case of *State of Orissa*v. *Binapani*. The Court in this case held that if there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power.

The line of distinction between 'administrative' and 'quasi-judicial' functions is getting blurred and gradually obliterated so that the application of the principles of natural justice is being extended to administrative proceedings as well. In *A.K. Kraipak*v. *Union of India,* the Supreme Court extended the application of the principles of natural justice to administrative proceedings as well. After review of the relevant English and Indian case laws, in *Maneka Gandhi* v. *Union* of *India,* Bhagwati J., enunciated the principle that the duty to act judicially need not be superadded in the statutory provision, but may be spelt out from the nature of the power conferred, the manner of exercising it and the impact on the rights of the person affected and where it is found to exist, the rules of the natural justice would be attracted.

A writ of certiorari is discretionary. It is not issued merely because it is lawful to do so and is generally not issued where the petitioner has an adequate alternative remedy. A petition for the writ of certiorari may lie to the higher judiciary, where the order on the face of it erroneous or raises questions of jurisdiction or of infringement of fundamental rights of the petitioner.

Grounds for issue of certiorari

- Want or excess of jurisdiction
- Violation of the procedure or disregard of principles of natural justice.
- Error of law apparent on the face of the record.

a) Want or excess of jurisdiction

The writ of certiorari goes to a body performing judicial or quasi-judicial functions for correcting errors of jurisdiction, as when an inferior court or tribunal acts without jurisdiction or in excess of it or fails to exercise it. In all these cases, there is defect of jurisdiction or power and the writ of certiorari lies.

The want of jurisdiction may arise from the nature of the subject matter of the proceeding, so that the inferior court had no authority to enter on the enquiry or upon some part of it. The want may arise from the absence of some preliminary proceedings, for example, omission to serve notice when required by the law, or the court may not itself be legally constituted or suffer from certain disability by reason of extraneous circumstances, or where the law which purported to give jurisdiction is unconstitutional. Similarly, where a tribunal wrongfully declines to exercise the jurisdiction vested in it, a certiorari will issue to quash the decision.

b) Violation of the principles of natural justice

A writ of certiorari will lie to set aside the decisions in violation of the principles of natural justice. A detailed discussion regarding the principles of natural justice and the judicial review has been made above in this paper while dealing with the issue of the principles of natural justice and the same may be referred to.

c) Error of law

An error of law in the decision or determination itself may be amenable to a writ of certiorari, but it must be a "manifest error apparent on the face of the proceedings, e.g. when it is based on the clear ignorance or disregard of the provisions of law". In other words, it is a patent or self-evident error of law which can be corrected by the certiorari but not a mere wrong decision. An error of fact, however grave it may appear, cannot be corrected by a writ of certiorari. The reason for this rule is that the jurisdiction of the court to issue the writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court.

The courts issuing a writ of certiorari, acts in exercise of a supervisory and not appellate jurisdiction. Thus, the court will not review the findings of fact reached by the inferior court or tribunal even if they are erroneous. The function of certiorari is to quash the offending order and not to substitute a new order in its place.

A writ of certiorari is not an appropriate remedy to question a judicial order or decree of a High Court.

Moreover, a writ of certiorari cannot be issued for declaring an Act or an Ordinance unconstitutional or void. But it is worth considering whether a decision based on an unconstitutional Act or Ordinance also stands invalidated.

In the grants of public contracts the courts usually (though not invariably) insist that such grants be made by public auction/public tender after advertising the same in well-known newspapers having wide circulation so that there is transparency and compliance with Article 14 of the Constitution. Such grants by private negotiation are ordinarily disapproved.

A writ can be issued to enforce the statute or statutory rule or order. However, a question may arise whether it can be issued to enforce non-statutory government orders or executive instructions.

The earlier decisions of the Supreme Court were of the view that no mandamus will issue to enforce mere administrative

instructions which have no statutory force. However, subsequently, certain exceptions have been carved out to the above principle. In certain exceptional circumstances, mandamus can be issued to enforce a non-statutory administrative order. Some of such exceptions are:

1. Where the principle of promissory estoppel applies e.g. in Union of India v. Indo Afghan Agencies Ltd., Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. etc.
2. Where the principle of legitimate expectation applies
3. In service matters, where there are no statutory rules, administrative instructions can fill in the gap, and are enforceable
4. In many matters e.g. awards of public contracts, an executive authority must be rigorously held to the standards by which it professes its actions to be judged, even if such actions are non-statutory

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