

## **ADMINISTRATIVE LAW**

- **Subject code : 18MPA31C**
- **Prepared By : DR. P.MAGUDAPATHY**  
**Asst.professor**
- **Department : PG & Research Department of Public**  
**Administration**
- **Contact No. : 9994672379**

**The content is prepared according to the text book and reference book given in the syllabus.**

<b>Year</b>	<b>Subject Title</b>	<b>Sem.</b>	<b>Sub Code</b>
<b>2018 -19 Onwards</b>	<b>Core 8 : Administrative Law</b>	<b>III</b>	<b>18MPA31C</b>

### **UNIT – I: Introduction Meaning,**

Nature and scope of Administrative Law – Historical Growth and Development of Administrative Law – Rule of Law – Droit Administratif – Constitutional Law and Administrative Law.

### **UNIT – II: Government and Administrative Law**

Executive and Administrative law- Government Liability – Classification of Administrative Actions – Administrative Discretion - Administrative Law and Privileges.

### **UNIT – III: Delegated Legislation**

Legislature and Administrative Law -Delegated Legislation – Control over Delegated Legislation.

### **UNIT – IV: Judiciary and Administrative Law**

Judiciary and Administrative Law- Distinction between Judicial and Quasi – Judicial Function – Principles of Natural Justice – Administrative Tribunals – Judicial Remedies.

### **UNIT – V: Control over Administration**

Government Control Over Public Undertakings – Legislative control over Public Undertakings – Statutory Inquiries – Statutory and other Remedies – Judicial Review of Administrative Action – Ombudsman, Lokpal – Lokayukta.

### **Reference Books**

1. Durga Doss Basu, Administrative Law, Prentice Hall of India (p) Ltd New Delhi, 1986.
2. Kesari, U.P.D., Lecturers on Administrative Law,
- 3.C.K. Takwani, Lectures on Administrative Law, EBC Publishers, Noida. 2014

# **ADMINISTRATIVE LAW**

**DEGREE: II MA**

**SEMESTER: III**

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## **UNIT – I**

### **INTRODUCTION**

#### **MEANING, NATURE AND SCOPE OF ADMINISTRATIVE LAW**

##### **MEANING:**

Administrative law is the by-product of the growing socio-economic functions of the State and the increased powers of the government. Administrative law has become very necessary in the developed society, the relationship of the administrative authorities and the people have become very complex. In order to regulate these complex, relations, some law is necessary, which may bring about regularity certainty and may check at the same time the misuse of powers vested in the administration.

With the growth of the society, its complexity increased and thereby presenting new challenges to the administration we can have the appraisal of the same only when we make a comparative study of the duties of the administration in the ancient times with that of the modern times. In the ancient society the functions of the state were very few the prominent among them being protection from foreign invasion, levying of Taxes and maintenance of internal peace & order.

It does not mean, however that there was no administrative law before 20th century. In fact administration itself is concomitant of organized Administration. In India itself, administrative law can be traced to the well-organized administration under the Mauryas and Guptas, several centuries before the Christ, following through the administrative, system of Mughals to the administration under the East India Company, the precursor of the modern administrative system.

But in the modern society, the functions of the state are manifold, In fact, the modern state is regarded as the custodian of social welfare and consequently, there is not a single field of activity which is free from direct or indirect interference by the state. Along with duties, and powers the state has to shoulder new responsibilities. The growth in the range of responsibilities of the state thus ushered in an administrative age and an era of Administrative law.

The development of Administrative law is an inevitable necessity of the modern times; a study of administrative law acquaints us with those rules according to which the administration is to be carried on. Administrative Law A Module – 1 5 has been characterized as the most outstanding legal development of the 20th-century. Administrative Law is that branch of the law, which is concerned,

with the composition of powers, duties, rights and liabilities of the various organs of the Government.

The rapid growth of administrative Law in modern times is the direct result of the growth of administrative powers. The ruling gospel of the 19th century was Laissez faire which manifested itself in the theories of individualism, individual enterprise and self help. The philosophy envisages minimum government control, maximum free enterprise and contractual freedom. The state was characterized as the law and order state and its role was conceived to be negative as its internal extended primarily to defending the country from external aggression, maintaining law and order within the country dispensing justice to its subjects and collecting a few taxes to finance these activities.

It was era of free enterprise. The management of social and economic life was not regarded as government responsibility. But laissez faire doctrine resulted in human misery. It came to be realized that the bargaining position of every person was not equal and uncontrolled contractual freedom led to the exploitation of weaker sections by the stronger e.g. of the labor by the management in industries. On the one hand, slums, unhealthy and dangerous conditions of work, child labor wide spread poverty and exploitation of masses, but on the other hand, concentration of wealth in a few hands, became the order of the day.

It came to be recognized that the state should take active interest in ameliorating the conditions of poor. This approach gave rise to the favored state intervention in and social control and regulation of individual enterprise. The state started to act in the interests of social justice; it assumed a “positive” role. In course of time, out of dogma of collectivism emerged the concept of “Social Welfare State” which lays emphasis on the role of state as a vehicle of socio-economic regeneration and welfare of the people.

Thus the growth of administrative law is to be attributed to a change of philosophy as to the role and function of state. The shifting of gears from laissez faire state to social welfare state has resulted in change of role of the state. This trend may be illustrated very forcefully by reference to the position in India. Before 1947, India was a police state. The ruling foreign power was primarily interested in strengthening its own domination; the administrative machinery was used mainly with the object in view and the civil service came to be designated as the “steel frame”.

The state did not concern itself much with the welfare of the people. But all this changed with the advent of independence with the philosophy in the Indian constitution the preamble to the constitution enunciates the great objectives and the socioeconomic goals for the achievement of which the Indian constitution has been conceived and drafted in the mid-20th century an era when the concept of social welfare state was predominant. It is thus pervaded with the modern outlook regarding the objectives and functions of the state.

It embodies a distinct philosophy which regards the state as an organ to secure good and welfare of the people this concept of state is further strengthened by the Module – 1 6 Directive Principles of state policy which set out the economic, social and political goals of Indian constitutional system. These directives confer certain non-justiciable rights on the people, and place the government under an obligation to achieve and maximize social welfare and basic social values of life education, employment, health etc.

In consonance with the modern beliefs of man, the Indian constitution sets up machinery to achieve

the goal of economic democracy along with political democracy, for the latter would be meaningless without former. Therefore, the attainment of socio-economic justice being a conscious goal of state policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with state power-holder.

The Administrative law is an important weapon for bringing about harmony between power and justice. The basic law of the land i.e. the constitution governs the administrators. Administrative law essentially deals with location of power and the limitations thereupon. Since both of these aspects are governed by the constitution, we shall survey the provisions of the constitution, which act as sources of limitations upon the power of the state. This brief outline of the Indian constitution will serve the purpose of providing a proper perspective for the study of administrative law.

**Overview of Administrative Law** In the broadest sense, administrative law involves the study of how those parts of our system of government that are neither legislatures nor courts make decisions. These entities, referred to as administrative agencies, are normally located in the executive branch of government and are usually charged with the day-to-day details of governing. Agencies are created and assigned specific tasks by the legislature.

The agencies carry out these tasks by making decisions of various sorts and supervising the procedures by which the decisions are carried out. For example, Congress has charged the federal Social Security Administration (SSA) with the administration of the nation's social security program. Under that mandate, SSA does two things:

- (1) It makes general social security policy (within the terms of the statute, of course).
- (2) It processes individual applications for, and terminations of, social security benefits.

Affected persons who disagree with the agency's decisions on either the substance of the social security program or the procedures under which that program is implemented—and whose grievances are not resolved within the agency—are permitted to take their dispute into federal court for resolution. Occasionally, aggrieved persons return to the legislative branch in an attempt to persuade Congress to alter the statute under which the social security program functions.

This brief outline is the basic model for the American administrative process; and whether you are studying federal administrative law, a state administrative system, or even a single administrative agency, the process of decision-making is likely to be similar, even when the missions of the agencies differ. It is the unifying force of the administrative process — dramatic contrast to the wide variety of substantive problems with which agencies deal—that has persuaded most administrative law professors to concentrate on agency procedure rather than agency substance.

Accordingly, most contemporary administrative law courses analyze the manner in which matters move through an agency, rather than the wisdom of the matters themselves. In other words, the manner in which the federal Department of Transportation decided to impose a passive-restraint system on automobile manufacturers is a fascinating case history of the administrative process, irrespective of anyone's personal position on the wisdom of air bags versus seat belts.

Recognizing that the focus of most administrative law courses is on how decisions are made (rather than what those decisions are) should help you more readily understand the themes of the typical course in administrative law. Approaches to the Study and Practice of Administrative Law Administrative law can be approached in much the same fashion as many other law school courses.

If you regard the field merely as a collection of discrete legal doctrines, it may make a great deal of sense simply to memorize various general principles, to apply those principles to a final examination or a bar examination, and then forget about the topic.

This book can be used in that fashion. A more profitable approach, however, to truly understanding administrative law—and for practicing administrative law after your admission to the bar—is to keep two questions in mind from the beginning:

(1) What are the rules of the game, both substantive and procedural?

(2) How may I best represent my client before an administrative agency?

Thinking through the twin issues of doctrine and the application of that doctrine through the lawyering process will make you a much better lawyer, even if it doesn't necessarily have an immediate payoff in your law school course or on the bar examination.

The administrative law course will become less fuzzy if you keep in mind a few more fundamentals. First, under our constitutional system, agencies are creatures of the legislature. They do not spring up on their own, and they cannot be created by courts. Agencies function only insofar as a legislature respects casebook disagrees with this approach and postulates that administrative law can be properly understood only if one studies an individual agency in depth, both substantively and procedurally.

Glen O. Robinson, Ernest Gellhorn, & Harold H. Bruff, *THE ADMINISTRATIVE PROCESS* (4th ed. 1993). Administrative law questions on the bar examination tend to be very much like law school examination questions. Practitioners will find additional hints on practicing before federal agencies in William Fox, *Some Considerations in Representing Clients Before Federal Agencies*, *Law Practice*, legislature has given them the authority to function.

That authority may be exceptionally broad (e.g., telling an agency to regulate railroads by applying the standard of “public convenience and necessity”) or incredibly narrow (e.g., when Congress sets the specific income levels and other criteria for those persons who qualify for certain government benefits; or when Congress passes a Coal Mine Safety and Health Act, containing provisions that tell mine operators what size of mine roofing bolts to install).

Federal administrative agencies are typically endowed with broad, general powers. By contrast, state legislatures often enact far more detailed agency statutes because of a lingering reluctance to give state agencies unfettered power. For example, the Nebraska legislature once enacted a statute prescribing the thickness of the metal walls in milk cans, presumably because the legislature did not trust the relevant administrative agency to make a sound decision on this issue.

This kind of statutory detail frequently signals a legislature's distrust with one agency in particular, or, possibly, with the administrative process in general. It is much less common for the United States Congress to get bogged down in the minutiae of administering a particular federal regulatory program because Congress tends to have more confidence in the federal agencies.

Whatever form a new administrative agency takes, the legislature must enact a statute creating the agency. This statute, sometimes called an agency's organic act but more frequently referred to as an agency's enabling act, is the fundamental source of an agency's power. This principle—that the legislature creates agencies and sets limits on their authority—should be regarded as cardinal rule number one of administrative law. Far too many people in law school and, on occasion, even

experienced practitioners, lose sight of this fundamental principal.

A misunderstanding of this basic concept can lead to erroneous assumptions about an agency's ability to deal with a particular issue or problem. Some enabling acts contain specific provisions establishing agency procedures; but more often than not, when the legislature creates an agency, that agency acquires a specific substantive mission but derives its procedures from a more general statute setting out procedural requirements for all agencies sharing its jurisdiction.

The governing procedural statute at the federal level is the Administrative Procedure Act (APA), in place since 1946 and normally the thread that holds most law school administrative law courses together. While state administrative procedure statutes differ considerably, a prototype statute, the Model State Administrative Procedure Act, has been promulgated; and many states either have adopted.

Thus, you are likely to find at least some procedural uniformity among the states. Those students whose courses emphasize a single state's administrative system would do well to make constant reference to that state's administrative procedure act as they work through their course and this book. They will probably see many similarities between the state act and the federal APA.<sup>5</sup> Some law professors understandably disagree with a purely federal approach to understanding administrative law.

Professor Arthur Bonfield of the University of Iowa College of Law believes that a proper study of the state administrative process would pay large dividends for both students and professors.

He believes, among other things, that administrative law is best appreciated through a comparative approach to the topic, that there is a great deal of creativity (what he calls "state solutions") in state administrative systems that are never implemented by the stodgier, less innovative federal agencies, and, perhaps most importantly: State administrative processes operate under different circumstances than does the federal administrative process; consequently, some of the problems presented [in the states] differ either in degree or kind from those presented in the federal process.

Many of the feasible or effective solutions to federal administrative law problems are not feasible or effective in the state context. Therefore, a study of problems and solutions in the federal administrative process cannot be an adequate vehicle to prepare students for dealing with all of the major problems presented in the state administrative process. No matter how a legislature chooses to deal with an agency, your first task is simple: Read the agency's enabling act and that jurisdiction's administrative procedure act.

One way to create a lot of trouble for yourself, even at the beginning of the course, is to be casual about reading the 5 See, e.g., William Fox & Leonard Carson, A Comparison of the Florida and Federal Administrative Procedure Acts, 11 Florida Bar Journal 699 (1980).

Florida has more recently engaged in a great deal of administrative reform. Jim Rossi, The 1996 Revised Florida Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies, 24 Fla. St. U. L. Rev. 283 (1997). Arthur E. Bonfield, State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo, 61 Tex. L. Rev. 95, 103-04 (1982). More recently, Professor Peter Strauss has suggested that administrative law is one of the "hidden" comparative law courses in law school because it combines and requires comparisons between a large number of other law school courses. Peter L. Strauss, Administrative Law. The Hidden

## Comparative Law Course.

Reading and trying to understand the statutes should be regarded as cardinal rule 1–A for understanding administrative law. Agencies make a great deal of policy within the boundaries of their enabling acts. Within the boundaries of their administrative procedure act, they also establish procedures for efficient and fair decision–making. Remember that enabling acts and administrative procedure acts often establish only minimum standards and requirements for individual agencies.

These statutes are often so broadly phrased that agencies have enormous leeway to fill in the gaps—both procedural and substantive—of the legislation so long as they keep within the terms of the governing statutes. The areas in which many agencies are free to set their own policies and procedures are quite extensive. We refer to this freedom of action as agency discretion. Agency discretion is a second fundamental to keep constantly in mind.

Unfortunately, the concept of agency discretion is one of the least studied and most poorly understood aspects of administrative law. It is so little analyzed that it is frequently referred to as “the hidden component” of administrative law. Nevertheless, it is a phenomenon that both students and practitioner need to appreciate if they are to have a complete understanding of an agency. The first step is realizing that the vast majority of agency decisions are never reviewed by either the courts or the legislature.

Other parts of the executive branch, such as the president, governor or attorney general, occasionally get involved with agency action, but for the most part agencies function on their own, often with only sporadic outside scrutiny and accountability. A third fundamental that should never be forgotten is that courts have a relatively limited role in supervising agency conduct. These days, the federal courts, and many state courts, are required to take what amounts to a “hands off” attitude toward the agencies.

The days when a free– wheeling court could substitute its judgment in a dispute for that of the agency are largely over, irrespective of whether the issue before the court is substantive or procedural. The United States Supreme Court has been hammering this message home to the lower federal courts for years. <sup>7</sup> Many state courts are beginning to adopt a similar posture. This is not to say that judicial review of agency action is unimportant.

As we will see, in many cases it is the tail that wags the dog. But the mere fact that a case might be taken to court is no excuse for sloppy lawyering at the agency level that a reviewing court will correct any and all mistakes in the proceedings below, or, indeed, that a court has plenary review powers over agency action. That is simply not the case.

The ability of a court to change an agency decision is so limited these days that the second cardinal rule for agency practice is: A lawyer must win a case at the agency or likely will not win it at all. <sup>8</sup> A legislative solution for your client’s problem may be theoretically possible, but you should remain realistic about actually achieving a favorable result. Try to avoid too much wishful thinking.

## **NATURE:**

Administrative Law is, in fact, the body of those which rules regulate and control the administration. Administrative Law is that branch of law that is concerned with the composition of power, duties, rights and liabilities of the various organs of the Government that are engaged in public administration. Under it, we study all those rules laws and procedures that are helpful in properly regulating and controlling the administrative machinery.

There is a great divergence of opinion regarding the definition/conception of administrative law. The reason being that there has been tremendous increase in administrative process and it is impossible to attempt any precise definition of administrative law, which can cover the entire range of administrative process.

Let us consider some of the definitions as given by the learned jurists. Austin has defined administrative Law.

As the law, which determines the ends and modes to which the sovereign power shall be exercised. In his view, the sovereign power shall be exercised either directly by the monarch or directly by the subordinate political superiors to whom portions of those are delegated or committed in trust. Holland regards Administrative Law “one of six” divisions of public law.

In his famous book “Introduction to American Administrative Law 1958”, Bernard Schwartz has defined Administrative Law as “the law applicable to those administrative agencies which possess of delegated legislation and ad judicatory authority.”

Jennings has defined Administrative Law as “the law relating to the administration. It determines the organization, powers and duties of administrative authorities.” Dicey in 19th century defines it as.

Firstly, portion of a nation’s legal system which determines the legal statues and liabilities of all State officials. Secondly, defines the right and liabilities of private individuals in their dealings with public officials. Thirdly, specifies the procedure by which those rights and liabilities are enforced.

This definition suffers from certain imperfections. It does not cover several aspects of administrative law, e.g. it excludes the study of several administrative authorities such as public corporations which are not included within the expression “State officials,” it excludes the study of various powers and functions of administrative authorities and their control. His definition is mainly concerned with one aspect of administrative. Law, namely, judicial control of public officials.

A famous jurist Hobbes has written that there was a time when the society was in such a position that man did not feel secured in it. The main reason for this was that there were no such things as administrative powers. Each person had to live in society on the basis of his own might accordingly to Hobbes, “ In such condition, there was no place for industry, arts, letters and society. Worst of all was the continual fear of danger, violent death and life of man solitary poor, nasty and brutish and short.

The jurists are also of the view that might or force as a means for the enforcement of any decision by man could continue only for some time. To put it in other words, the situation of “might is right” was only temporary. It may be said to be a phase of development. This can be possible only through the medium of law. Hence, law was made and in order to interpret it and in order to determine the rights and duties on the basis of such interpretation, this work was entrusted to a special organ that we now call judiciary.

The organ, which was given the function of enforcing the decision of judicial organ, is called executive. It has comparatively a very little concern with the composition of the executive organ. K.C. Davis has defined administrative law in the following words: “ Administrative Law is the law concerning the powers and procedures of administrative agencies including specially the law governing judicial review of administrative action.”

In the view of Friedman, Administrative Law includes the following.

- The legislative powers of the administration both at common law and under a vast mass of statutes.
- The administrative powers of the administration.
- Judicial and quasi-judicial powers of the administration, all of them statutory.
- The legal liability of public authorities.
- The powers of the ordinary courts to supervise the administrative authorities.

The Indian Institution of Law has defined Administrative Law in the following words; “ Administrative Law deals with the structure, powers and functions of organs of administration, the method and procedures followed by them in exercising their powers and functions, the method by which they are controlled and the remedies which are available to a person against them when his rights are infringed by their operation.

A careful perusal of the above makes it clear that Administrative Law deals with the following problems: A. Who are administrative authorities? B. What is the nature and powers exercised by administrative authorities? C. What are the limitations, if any, imposed on these powers? D. How the administration is kept restricted to its laminose? E. What is the procedure followed by the administrative authorities? What remedies are available to persons adversely affected by administration?

Thus the concept of administrative law has assumed great importance and remarkable advances in recent times. There are several principles of administrative law, which have been evolved by the courts for the purpose of controlling the exercise of power. So that it does not lead to arbitrariness or despotic use of power by the instrumentalities or agencies of the state. During recent past judicial activism has become very aggressive.

It was born out of desire on the part of judiciary to usher in rule of law society by enforcing the norms of good governance and thereby produced a rich wealth of legal norms and added a new dimension to the discipline administrative law. In view of above discussion we can derive at the following conclusions so far as nature and scope of administrative law is concerned: -

The administrative law has growing importance and interest and the administrative law is the most outstanding phenomena in the welfare state of today. Knowledge of administrative law is as important for the officials responsible for carrying on administration as for the students of law. Administrative law is not codified like the Indian Penal code or the law of Contracts. It is based on the constitution.

No doubt the Court of Law oversees and ensure that the law of the land is enforced. However, the “very factor of a rapid development and complexity which gave rise to regulation made specific and complete treatment by legislation impossible and, instead, made necessary the choice of the body of officers who could keep abreast of the novelties and intricacies which the problems presented.”

Administrative law is essentially Judge made law.

It is a branch of public law as compared to private law-relations inter-se. Administrative law is an ever-expanding subject in developing society and is bound to grow in size as well as quality in coming the decades. We need an efficient regulatory system, which ensures adequate protection of the people’s Rights.

Principles of administrative law emerge and development whenever any person becomes victim of arbitrary exercise.

The administrative agencies derive their authority from constitutional law and statutory law. The laws made by such agencies in exercise of the powers conferred on them also regulate their action.

The principle features are:

- (a) Transfer of power by legislature to administrative authorities.
- (b) Exercise of power by such agencies.
- (c) Judicial review of administrative decisions.

Administrative law relates to individual rights as well as public needs and ensures transparent, open and honest governance, which is more people-friendly.

Inadequacy of the traditional Court to respond to new challenges has led to the growth of administrative adjudicatory process. The traditional administration of justice is technical, expensive and dilatory and is not keeping pace with the dynamics of ever increasing subject matter.

Because of limitation of time, the technical nature of legislation, the need for flexibility, experimentations and quick action resulted in the inevitable growth of administrative legislative process. Administrative law deals with the organization and powers of administrative and powers quasi-administrative agencies. Administrative law primarily concerns with official action and the procedure by which the official action is reached.

Administrative law includes the control mechanism (judicial review) by which administrative authorities are kept within bounds and made effective.

## **SCOPES OF ADMINISTRATIVE LAW**

Administrative law determines the powers and duties of administrative authorities. The significance of Administrative Law is on procedures for formal judgment based on the principles of Natural Justice and for rulemaking. Administrative law also resolves the nature and scope of the powers delegated to the government official by the specific legislation. Through legislation, the Parliament delegates specific powers as well as duties to government officials to enable them to act on behalf of the government.

The Administrative law is concerned with the structure, functions and powers of the Administrative structures. It also states the methods and procedures which are to be followed by them during the course of remedies which are available to the persons whose rights and other freedoms are damaged by their operations. Administrative law frames the rights and liabilities of private individuals in their dealings with public officials and also specifies the procedures by which those rights and liabilities can be enforced by those private individuals. It provides accountability in the administrative functioning.

Also, there are prescribed laws and rules and regulations that guide and direct the internal administration relations like hierarchy, division of labor etc.

**General Principles of Administrative Law** - In the administrative law context, the first step is to determine the legality or authority of the action by the government official. This includes looking at the basis of the legal authority to act, that is, the specific law that gives that administrator the lawful authority to act. Constitutional law essentially deals with who has the ability to make laws. Administrative law is handled with the government officials who have been empowered by these laws to act. so, there is a close relationship between constitutional and administrative law.

Particularly, if the law that empowered the government official to act was itself found to be unconstitutional, and therefore invalid, then any actions by the government official under that law will also be invalid. This may affect a legal remedy for an individual adversely affected by this action.

**The Rule of Law** – It is based on the notion of rule of law that supports Natural Justice, i.e. to judge based on impartiality, unjustness and the prescribed laws and legitimate methods instead of arbitrariness and abuse of official power on the part of the government. While serving the people and deciding cases brought before its Tribunals etc. Natural justice is primarily applied in cases where there are no laws prescribed, here the individual has to be given an opportunity to be heard and the judgment is to be taken into consideration the specific facts and cases of the case and the judgment should be free from bias.

It is to ward off violation of people's rights by officials in power. One of the best definitions of rule of law is that of Professor A V Dicey contained in his famous book The Law of the Constitution. He believed that the Rule of Law requires the recognition of the predominance of the regular law (as opposed to arbitrary or wide discretionary powers), equality before the law and that the constitution is the outcome of the ordinary law. In essence, therefore, the Rule of Law requires that there should be a government according to law and an avoidance of arbitrary action.

**Delegation of Powers** – Delegation of powers from the legislators to administrators is necessary given the great importance of the business of government. Due to the volume of decisions required, it

is not possible for the Parliament to decide all issues in a country. Another important reason for the delegation of power is that laws by their very nature need to be broad since the wording of laws cannot encompass all specific and often changing circumstances that occur.

Thus, the application of the law may require some aspect of discretion in order to apply to specific circumstances, and the laws themselves must set out criteria for the application of such discretion to ensure fairness and consistency. Almost all laws passed by Parliament identify specific powers for various government entities or officials such as a cabinet, a specific minister or civil servant, or a judge. Giving the importance of the delegation of powers, Parliament has developed control guidelines for their own delegation of powers to administrators.

Characterization of Powers and Sub-Delegation of Powers – Characterization of the function of the legislative powers enables the determination of the scope of these powers and the duties they grant, and the procedures the delegate is required to follow to lawfully exercise these powers. In turn, this determines the available remedies in court if the impugned act is found to be unlawful.

Powers can be characterized as:-

- Legislative
- Judicial (or quasi-judicial) or
- Administrative (or executive)

If the delegated power is legislative or judicial in nature, the general rule in administrative law is that such powers must be exercised by the exclusive person identified in the legislation. Such a person (government official) is prohibited from sub-delegating these powers and duties to another person. By contrast, powers distinguished as administrative can be sub-delegated.

**Characterization of Duties and Discretionary Powers** - Another main principle of administrative law distinguishes between delegated powers that are duties that the delegate must perform and delegated powers that are discretionary in nature. Some powers are mainly set out in the legislation with some discretionary feature to enable the delegate to apply the broad principle to specific circumstances. The rationale behind such discretionary powers includes the difficulty of providing a general rule that would apply to all circumstances; the difficulty in anticipating all possible factors for all situations; and the difficulty in ascribing weight of all factors in a broad legislation.

Discretionary powers in general compose either the delegate being authorized to exercise discretion on an ad hoc basis or the delegate being authorized to enact “subordinate legislation” to govern specific types of cases. Examples of subordinate legislation include regulations, codes, and bylaws. In administrative law, it is mainly to determine the scope of discretion of public authority in order to examine the validity of their acts, especially given that discretionary powers are generally granted within specific limits.

**Administrative Boards or Tribunals** – Federal and provincial laws have expressly generated administrative boards or tribunals as decision-making bodies for a variety of areas. The underlying rationale is to make the governmental decision-making process more efficient and accessible to the general public. The balances for these decision-making bodies are provided by the provincial superior courts who oversee them by providing judicial review of the administrative actions of the boards and tribunals.

**Administrative Remedies** – In reviewing the legitimacy of a challenging act, if a court determines that the act was beyond the legal authority it has the following remedies available: declarations; injunctions; damages; statutory appeals to a court or another administrative section; or prerogative remedies.

## **HISTORICAL GROWTH AND DEVELOPMENT OF ADMINISTRATIVE LAW**

### **The growth and development of administrative law:**

The administrative law has been one of the best legal developments of the 20th century and the reason for the rapid growth and development is the change of the government from the 'Laissez faire to the social welfare state'. This actually resulted in increased government functions. The state was meant for the social-economic regeneration and welfare of people. The state's function has grown vastly over time and the administration has a good place in progressive society and it has more power to regulate the society and its role has widened today than earlier.

The state assumed a positive role by doing what's good and necessary for individual's welfare and the society. Further with the emerging pattern of global governance as a consequence of globalized interdependence in fields like trade, development, environment, banking, security etc., the administrative authorities were not only exercising the functions like maintaining law and order but also their power in relation to rule making, decision making etc.

The administrative law has matured and grown rapidly in quantity and quality in the twentieth century, it does not mean that there was no administrative law earlier in any country before the twentieth century. In France the administrative law or "droit administratif" which means a body of rules which determine the organization, power and duties of public administration and regulate the relation of administration with the citizens of the country.

Droit administration does not represent the rules and principles enacted by Parliament. It contains the rules developed by administrative courts, however, in the twentieth century it has been given much more importance because the administrative authorities gained their position in all sections of social and economic life like industry, commerce, education, transport etc.

The factors which led to growth of administrative law are -

### **State Policy**

The change of philosophy regarding the role played by the state. The state has moved from its negative and minimal traditional policy of maintaining "Law and Order and of *"laissez faire"*, to adopt its positive policy as a welfare state.

Lack of speedy disposals

The judiciary was already overburdened and it was not possible to do the speedy disposals of the important matters like dispute between employees and employers, strikes, etc.

### **Need for Delegation**

The legislative system was involved in various functions and it has no time to evolve techniques to deal with each and every issue, the detailed provisions were also found to be defective and

inadequate, therefore there was a need to delegate some powers to the administrative authorities.

### **Experimentation**

The newly found administrative law provided a scope for experiments also in the administrative process.

### **Preventive measures**

The administrative authorities could take preventive measures eg - licensing and rate fixing etc. as opposed to the regular courts, which had to wait for parties to appear before issuing directions to them.

## **ADMINISTRATIVE LAW IN INDIA**

Administrative law was in existence in India even in the ancient times. The Rule of DHARMA that had the basic principle of natural justice and fair play were earlier also followed by the kings and their officials. In the modern sense the existence of administrative law in India can be traced from the early days of British rule in India. When India became independent the philosophy of welfare state made the essence of Indian Constitution and provisions were also made to secure all citizens social , economic and political justice equality of status and opportunity.

## **THE REASONS FOR THE GROWTH OF ADMINISTRATIVE LAW:**

### **Economic and Social:**

Administrative law seems to have developed from a combination of forces, some pressing on the legal system from without, others from within. From without came the most powerful forces, economic and social; from within came revolt against the impractical technicalities and rigidity of a structure adapted by and for older generations, conditions, and institutions, and which were welded too strongly on the present.

As observed by Aristotle the first of all causes and the principal one is necessity. The development of administrative agencies and of the law which governs them was a necessity-a "social necessity," as one writer has put it,' rather than an absolute one.

History reveals that: "The two legal systems that have impressed themselves most deeply upon the world, that of Rome and that of England, have for considerable periods managed to do without administrative intervention with private rights other than in judicial forms. ' The necessity, then, was a relative one and was so considered by the people whose demands for regulation of industry brought about the increase in administrative agencies and law.

### **Legal and Procedural:**

At best the legal system is not perfect. It is instituted and preserved by men for their common good. The very persons who are most responsible for its shaping often differ widely among themselves as to its proper fundamentals. It is adopted largely to meet the needs of its time and the economic conditions, culture, and traditions of the society of, which it is a part.

While law is natural and necessary it has certain disadvantages when molded by human agencies for, as it "formulates settled ethical ideas, it cannot, in periods of transition, accord with the more

advanced conceptions of the present." In the United States our legal system functioned chiefly when controversies had arisen between individuals rather than as one where the executive arm of government could interfere with individuals "of its own motion prior to and apart from the existence of any controversy between them."

Wholesale delegation was checked by a written Constitution embracing the principle of a separation of powers. As the demand for affirmative action or corrective intervention increased, Congress turned to the executive branch of the government which was capable of more rapid expansion and was not bound as rigidly by the system as were the other divisions. The executive, too, probably possessed more popular support and less popular control consequently a method of administration.

### **TENDENCIES INDICATING FUTURE DEVELOPMENT:**

The growth of administrative law has been inextricably bound up with the growth of the accompanying tribunals and of the system itself, as it is the "law covering the fields of legal control exercised by law administering agencies other than courts, and the field of control exercised by courts over such agencies."

The purpose of this discussion is to indicate very general trends, and no attempt will be made to differentiate at length between specific trends in the interwoven divisions mentioned. In an address delivered some years ago Dean Pound considered the growth of administrative justice, the primacy of the executive, and the rise of the legal standard, and stated that they were "but phases of a larger development that is heralding a new stage of legal development."

This was believed to be a tendency toward individualization; "to deal with the individuals; not the abstract individual but the concrete human being in a society of human beings." There is substantial evidence of this—crime is treated more as a disease, there is better segregation, classification and rehabilitation of the mentally sick as well as better care of the physically ill, different standards are applied to juvenile delinquency than to adult misconduct, and there is a general re-examination of similar fields.

This does not necessarily seem to result in an individualization of all administrative fields, however. We have injected abstract standards, for example, into one of the prime examples of the administrative system, the workmen's compensation laws. Thus schedules are provided which determine the amount that shall be paid for the loss of a leg, an arm, an eye, a life, and so on, although conceivably the actual damages may vary tremendously with individuals although doing the same work at the same pay.

We might say that in such cases the tendency is to establish a closer relationship between law and economics by making the particular industry bear the burden. A pronounced tendency is toward an enlargement of the system of corrective intervention which has been the "most recent and the most characteristic development of administrative powers.

This naturally means increased administrative powers as is emphasized when we consider the shifting from voluntary to mandatory action which has marked the various state and federal commissions. It also means an increased resort to administrative agencies, and a circumscribing of managerial independence as distinct from freedom in internal organization. It seems inevitable, however, that the more functions which administrative agencies are called upon to exercise the less will be their popular support and the less likely will they be granted new and sweeping powers.

The growth of administrative law resulted as the natural accompaniment of the growth of

administrative agencies in existence in the recognized governmental functions and of the new agencies set up to meet the needs of a changing society. The present form of the administrative system is accounted for by the fact that, while there are certain fundamental differences in American and English jurisprudence, our legal institutions were molded in the traditional principles of the common law which were familiar to, and a part of the culture of, the great majority of the colonists who established our system of government.

In the United States a written Constitution has prevented the same degree of growth and concentration of powers found in England. This constitution provided for a separation of legislative, executive, and judicial powers. An administrative system had been tried in England under the Tudors with great efficiency from the executive standpoint, but with such great abuse from the popular standpoint that it was virtually abolished.

The prime reason for the development seems to have been in the slowing down of the economic and social forces which were present by reason of tremendous territorial expansion and industrial revolution, and the necessity of meeting conditions which those forces, especially the latter, brought. We changed from a rural to an urban society, we greatly increased our standards of living, we concentrated our population in large cities, we began to be increasingly conscious of the disadvantages of this new life and sought to minimize them by governmental control.

The great uprisings of the farmers of the Middle West, the "Granger Movement," started the practical beginnings of the administrative system. Their demands for protection from the domination of the railroads in the control of eastern and foreign capital resulted in the establishment of state railroad commissions. Administrative agencies developed faster in the local and state units because the problems were first apparent there.

But as the problems assumed wider significance the administrative system became a part of the larger units of government. The establishment of these new agencies was perhaps made easier by the fact that tremendous numbers of immigrants had been accustomed to an administrative system in the countries of their origin. As the course of history emphasizes, abnormal conditions are usually marked by concentration of power.

We also met the extraordinary problems which were arising by a concentration of power in the executive through the establishment of administrative arms of government. This was especially true of the already highly centralized federal government. The change naturally produced conflict with the established customs of which the legal system is inherently the protector.

The existing legal system could not keep pace with the rapidly growing demands of society due to its outworn methods. Neither in England or in the United States was there a concerted effort by the bench or bar to recognize and eliminate the imperfections of the legal structure. The courts adopted a permissive attitude to the encroachments of administrative tribunals. The administrative method also had certain inherent characteristics and advantages which made it more adaptable to existing problems than the courts of law.

It was able to move more rapidly than the legislature. It was modern. The administrative agency was a flexible body which could take cognizance of changing conditions as they arose, marching almost step by step with the society of which it was a part. Specialists were in charge of particular fields, knowing not only the needs of society but having the power to harmonize these needs and correct abuses by their own motion, proceeding at relatively low cost by the curtailment of technical formalities and by disposing of large numbers of cases as one.

Exact tendencies are most difficult of determination. With the rising standards of education we are obtaining a better understanding of the nature of the problems of society. Due to closer contacts we are of necessity required to surrender certain freedom which we formerly possessed. By common consent our actions are regulated by government but these had become too complex for the method of the established common law.

Administrative agencies were created by Congress as a solution but even they have found it necessary to re-delegate their powers. Administrative agencies have been obtaining more powers. Their determinations have tended more and more to become final-if they are fairly arrived at there is no need for a complete re-examination by the courts. As these agencies grow older their own weaknesses appear.

A better understanding has tended to a consolidation of functions and the creation of more settled procedure. In brief the tendency is for the administrative system to proceed according to the rules of law rather than upon personal discretion. However, as the administrative agency becomes an increasing factor in determining economic policy it becomes more desirable to shape its decision.

The political power has tended to influence these determinations, especially in newer bodies, through its powers of appointment and removal. There is also some tendency to eliminate the checks of power which the ordinary courts possess by the establishment of a system of administrative courts. But the developing insistence on improvement of administrative procedure and a curtailment of its powers will probably prevent an extension that is manifestly unwise or determinations that are clearly personal.

On the whole the evidence is clearly against the theory that a completely administrative system is superior to the fundamental principles of government which exist in our country today. It is true that the administrative system is desirable in some aspects and almost a necessity in others, but it does not follow that it should encompass every field of human endeavor. The United States and England seem to have progressed far more than some of their much ruled brethren.

While the impossibility of measuring the multiplicity of factors is obvious, there is grave reason to well consider whether we should sacrifice, in even seemingly minor details, the fundamental principles of our government, substituting therefore the more flexible, less certain justice of our administrative system.

### **Reasons for the Growth of Administrative Law:**

The following factors are responsible for the growth of administrative law:

- There is a radical change in the philosophy of the role played by the state. The negative policy of maintaining law and order and social welfare is changing. The state has not confined its scope to the traditional and minimum functions of defense and administration of justice, but has adopted the positive policy and as a welfare state has undertaken to perform varied functions.
- The judicial system was proved to be an inadequate to decide and settle all types of disputes. It was slow, costly, inept, complex and formalistic. It was already overburdened and it was not possible to expect speedy disposal of even very important matters. The important problems could not be solved by mere literally interpreting the provisions of some statutes,

but required consideration of various other factors and it could not be done by the ordinary courts of law. Therefore, industrial tribunals and labour courts. Were established, which possessed the techniques and expertise to handle these complex problems.

- The legislative process was also inadequate. It had no time and technique to deal with all the details. It was impossible for it to lay down detailed rules and procedures, and even when detailed provisions were laid down by the legislature, they have found to be defective and inadequate. Therefore, it was necessary to delegate some powers to the administrative authorities.
- There is scope for experiments in administrative process. Here unlike, in legislation, it is not necessary to continue a rule until commencement of the next session of the legislature. Here a rule can be made, tried for some time and if it is defective, can be altered or modified within a short period. Thus, legislation is rigid in character, while the administrative process is flexible.
- The administrative authorities can avoid technicalities. Administrative law represents functional rather than a theoretical and legislative approach. The traditional judiciary is conservative, rigid and technical. It is impossible for courts to decide cases without formality and technicality. Administrative tribunals are not bound by rules of evidence and procedure and they can take a practical view of the matter to decide complex problems.
- Administrative authorities can take preventive measures. Unlike regular courts of law, they do not have 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 law. As Freeman says, Inspection and grading of meat answers the consumers need more adequately than does a right to sue the seller after the consumer injured.
- Administrative authorities can take effective steps for the enforcement of the aforesaid preventive measures e.g. suspension, revocation and cancellation of license, destruction of contaminated articles etc., which are not generally available through regular courts of law<sup>13</sup>

## **DEVELOPMENT OF ADMINISTRATIVE LAW IN INDIA**

The principle objective behind the study of administration law is to unwind how these administrative authorities could be kept within their limits with the goal that the discretionary powers may not be transformed into arbitrary powers. In simple words, administrative law restrains the authorities from using their powers in an abusive manner and ensure that the Administrative or public authorities works in a legal, reasonable and efficient way.

Administrative law has developed from a combination of forces, some pushing on the legal system from without while others from within. From without came the most powerful forces, economic and social; from within came resistance against the impractical technicalities and inflexibility of a structure adapted by older generations, conditions, and foundations, and which were welded too firmly on the present.

The law in India can be followed back to old history times. The Maurya and the Gupta dynasties of Ancient India had incorporated administrative framework. The rulers in the front time of history

were for the most part concerned significantly around Protecting the state from external aggression, maintaining law and order, and Collecting taxes. The law since then has evolved in order to be practiced in present nation.

## **EVOLUTION OF ADMINISTRATIVE LAW WITH INTRODUCTION OF EAST INDIA COMPANY**

With the arrival of the British in India and event of the British Rule in India there was the advent of modern administrative law. Establishment of East India Company increased the powers of government. Many Acts, statutes and Legislation were brought and passed by the British government regulating public safety, health, morality transport and labor relations. Practice of permitting Administrative license began with the State Carriage Act 1861.

The very first public corporation was established under the Bombay Port Trust Act 1879. The concept of delegated legislation was accepted as legitimate power of the Executive within the Northern India Canal and Drainage Act, 1873 and Opium Act 1878. Proper and effective steps were taken to manage the trade and traffic in explosives by the Indian Explosives Act 1884.

During the Second World War, the executive powers massively expanded Defense of India Act, 1939 and the guidelines made thereunder conferred abundant powers on the property of an individual with little or zero judicial authority over them, In addition to this, the government issued many orders and ordinances, covering several matters by way of Administrative directions.

Since independence, the activities and the functions of the government have additionally increased. To illustrate, the amendments in the Industrial Disputes Act 1947 and the Minimum Wages Act 1948 significantly standardized important social security measures to be taken for those employed in Industries.

## **INSIGHTS ON DEVELOPMENT OF ADMINISTRATIVE LAW IN INDIA WELFARE OF STATE**

The philosophy of welfare of state is well embodied in the Indian constitution. Post-independence, India adopted a welfare state approach, which successively increased state activities. In line with the doctrine the basic objective of the State Administration is to attain maximum welfare for the masses. All the policies of the state should aim at maximization of welfare of the people. With increase in power and activity of the Government and administrative authorities, the necessity for Rule of Law and Judicial Review of State actions also increased.

In the Constitution itself, provisions were made to secure citizens social, economic and political justice, equality of status and opportunity. The ownership and control of material resources of the society should be so allocated as best to sub-serve the common good.

Small steps were taken by the government for the development of the law, were, for example, the Industrial (Development and Regulation) Act 1951, The Urban Land (ceiling and Regulation) Act 1976, The Payment of Bonus Act 1965, The Companies Act 1956, the Essential Commodities Act, 1955, the Requisitioning and Acquisition of Immovable Property Act 1952, the Banking Companies (Acquisition and Transfer of undertakings) Act, 1969, The Maternity Benefits Act, 1961, The Equal

Remuneration Act 1976, The Beedi Worker's Welfare Fund Act, 1976 etc.

## **DELEGATED LEGISLATION**

When the functions of Legislature are entrusted to organs aside from the legislature by itself, the legislation made up by such organ is named Delegated Legislation. This power is delegated to the executives or the administrators to resolve the issues which they face on day to day basis. Delegation of legislation provides the chief room for experimentation. This provides for fast utilization of experience, talent and implementation of the changes as and when needed.

As an example, in matters of an experiment through with relation to traffic norms will help the administrative/ executive authority better understand the effect of such norms and work to cater the interests of the stakeholder involved. If the changes made are successfully implemented, they're satisfactory and in case there are problems, the same can be solved immediately.

## **ESTABLISHMENT OF COURTS**

The judicial system was proved to be an inadequate to determine and settle all kinds of disputes. It was slow, costly, inept and complex. The judiciary was already overburdened, and it was not possible to expect fast disposal of even very important matters. The important problems could not be solved by mere interpretation of the provisions of some statutes instead they required consideration of necessary factors which could not be done by the standard courts of law. Therefore, industrial tribunals and labour courts were established, which possessed the techniques and proficiency to handle these complex problems.

## **PREVENTIVE MEASURES**

Administrative authorities can take preventive measures. The authorities do not have to wait unlike the courts for the party to come before them with dispute. These preventive actions may prove to be more effective, practical and useful than punishing a person after he has committed a breach of law. It was well pointed out by Freeman that, 'Inspection and grading of meat answers the consumer's need more adequately than does a right to sue the seller after the consumer is injured'.

But the Principle of judicial review is also acknowledged in our constitution, and the order passed by the administrative authorities can be quashed and set aside in the event that they are ultravires or malafied or malafied the provisions or the Acts of the constitution.

To conclude we can say that the administrative law has become a fundamental part of the advanced government activity and its working incorporate legislative and judicial powers.

## **THE RULE OF LAW**

### **ORIGINS AND MEANINGS:**

The rule of law is a concept that describes the supreme authority of the law over governmental action and individual behavior. It corresponds to a situation where both the government and individuals are bound by the law and comply with it. It is the antithesis of tyrannical or arbitrary rule. The rule of law is the product of historical developments over centuries and is linked to the rise of the liberal democratic form of government in the West. The rule of law is the subject of competing theories.

For some, the concept has a purely formal meaning. Under this concept of the rule of law, the state must act in accordance with the laws it has promulgated and these laws must meet a certain number of minimum characteristics. For others, the concept has a wider, more substantive, meaning that incorporates ideals of justice and fairness. Further meanings can also be ascribed to the concept according to various political ideologies.

Although it is generally accepted that the extent to which a government adheres to the rule of law is indicative of the degree of legitimacy of its actions, the divergent use of the term illustrate that the concept is far from having achieved a universally accepted meaning. Indeed, while some declare the concept to have attained the status of a new universally-accepted political ideal following the end of the Cold War<sup>2</sup>, others have on the contrary gone as far as to assert that the term has been misused and abused to such an extent that it has become a meaningless phrase, devoid of any true meaning.

## **HISTORICAL EVOLUTION OF THE RULE OF LAW:**

The rule of law has evolved over centuries and is inextricably linked to historical developments that have led to the gradual emergence of liberal democracies and their underlying modes of governance and legal systems. The role that law plays in society was the subject of philosophical discussions in Greek and Roman antiquity. In one of his last dialogues, *The Laws* (circa 360 B.C.), Plato is credited with positing the idea that the government should be subservient to the law.

The idea was further refined by his student Aristotle in his work *The Politics* (circa 350 B.C.) in which he contrasted the rule of law, reason, with the rule of man, passion, to explain why the government should be bound by law as means to prevent arbitrary rule and the abuse of power. Both philosophers agreed that laws must be promulgated for the common good. These Greek works had a notable influence on Roman legal thought, most notably on Cicero, who emphasized in *De Legibus* (circa 54-51 B.C.) that the law must be for the good of the community as a whole, thereby subjecting law to ideals of justice.

The fall of the Roman Republic at the hands of emperors gave way to autocratic rule. During the reign of Emperor Justinian I, Roman law was codified. The resulting *Corpus Juris Civilis* (529 to 534 A.D) constituted a setback for the rule of law insofar as it provided that the emperor was above the law and not subject to it, thereby sanctioning the rule of man.

Although these philosophical works discussed various modes of government and the role played by the law in those systems, it is in Medieval Europe that the rule of law truly began to take shape, a period that was marked by the fragmentation of Europe following the disintegration of the Roman empire and the struggle for power between church authorities and monarchs. Popes and kings vied for control and authority over both religious and secular affairs. Conflict arose as a result of monarchs seeking to reserve to themselves the power to appoint religious leaders within their realms.

The Catholic church retaliated in kind by claiming the authority of the Roman Pontiff over all emperors and princes on the theological basis that the religious realm took precedence over the physical, most notably through the issue of the *Dictatus Papae* (1073) by Pope Gregory VII. While initially resisted, over the course of time, the coronation of monarchs came to incorporate the taking of an oath affirming the church's supreme authority and a commitment to uphold the law.

The disappearance of Greek and Roman texts and the loss of codified legal texts, meant that law in the Middle Ages in former Roman possessions reverted to customary law in unwritten form, though in time many rulers oversaw the codification of their customs. Customs enjoyed legitimacy by virtue

of being reflective of norms and traditions accepted by the community. In the Germanic lands that had not been conquered by the Romans, the customary law also applied to the monarch who came to be seen as the guardian of the law. This legal principle came to influence much of central and western Europe.

In England, the principle that the king was bound by the law was a prominent feature of the Magna Carta signed by King John in 1215. It was the product of a revolt by the nobility against the king following his attempts to extract more resources from them to fund war in France. The agreement sought to place constraints on the king's powers and protect the nobles' privileges.

Although King John repudiated the document soon after it was signed, the Magna Carta came to be confirmed and modified by successive monarchs and parliaments on numerous occasions. Amongst its many provisions, the Magna Carta declared that no person should be deprived of their liberty or property "except by the lawful judgment of his equals or by the law of the land"<sup>8</sup>. This historically significant document is seen by many not only as protecting individuals from the arbitrary will of the monarch, but also as the source of the fundamental right to a fair trial (the right to "due process of law" in US legal terminology).

It is also seen as the source of constitutionalism, the legal organization of the fundamental relationship between a government and the people it oversees. Later on in the Medieval period, the rediscovery of classical texts including those of Aristotle meant they became available again to European scholars. The Catholic priest Thomas Aquinas developed a theory of natural law in *Summa Theologicae* (1265 to 1274) in which he affirmed Aristotle's views that law is based on human reason and must be promulgated for the common good.

Although Aquinas acknowledged that the sovereign was exempt from the law because no other person was competent to pass sentence on him, he reasoned that it was proper for kings to submit to the law because whatever law a sovereign makes he should also respect it himself.

As a result of these developments, one of the Medieval era's major contributions to legal theory was to displace the idea that the monarch was above the law that had been inherited from Roman law by giving way to the convention that the sovereign was bound by law and marking a return to the position advocated by classical philosophers.

As a legal concept, the convention did not go unchallenged. The doctrine of the "Divine Right of Kings", according to which kings were appointed directly by God, was elaborated by French jurist Jean Bodin in the sixteenth century in response to the Wars of Religion occasioned by the Protestant Reformation and the split away from the Catholic Church. However, the convention that monarchs were bound by the law survived these challenges because, not only was it often in the monarch's interests to abide by the law, it had also become a firmly entrenched principle that was jealously protected by the legal profession.

There could be dire consequences for monarchs who sought to circumvent established legal conventions, most notably in the case of King Charles I of England, who sought to raise taxes without Parliamentary approval and frequently ordered the arbitrary detention and execution of dissenters. These actions, coupled with his opposition to religious reforms advocated by the Puritans who enjoyed strong support in Parliament, propelled England into civil war from 1642 to 1651 pitting Royalists against Parliamentarians. Parliament eventually emerged victorious and King Charles I was tried for treason and executed in 1649.

Demographic changes also played a part in shaping these legal developments. Through the centuries,

towns grew, populations increased and commerce began to thrive. The artisan and merchant classes, the bourgeoisie, had no part to play in land-based feudal systems and sought greater leeway to engage in their crafts and trades and accumulate wealth. Over time, the source of wealth gradually shifted from the holding of land to trade in goods and services. The bourgeoisie sought protection of their interests against oppressive feudal lords and monarchs and forged alliances with those who could provide it.

The bourgeoisie sought greater political influence and legal recognition of their interests, such as the freedom to contract, the provisions of means to enforce contracts and the protection of property rights.

The Renaissance and its renewed interest in the arts, science and learning; the gradual separation of church and state; and the bourgeoisie's desire for greater protections set the stage for the emergence of liberalism as a political theory during the Enlightenment. Although there are many variations of liberalism, at its core the political theory of liberalism places emphasis on individual liberty and its protection through the conferral of individual rights. The rule of law is a central concept at the heart of liberalism. In this sense it takes the guise of formal legality in which society operates according to structured rules that provide freedom for individuals.

For the English philosopher John Locke, who is considered by many as the "father" of liberalism, liberty means to be free from restraint and violence with law playing a role in preserving and enlarging this freedom. In *Two Treatises of Government* (1690), Locke formulated his idea of the "social contract" under which individuals voluntarily agree to be governed in exchange for the government agreeing to protect their personal freedoms and property. Under this arrangement, the government derives its legitimacy from popular consent and individuals delegate to the government the power to make, execute and enforce laws in the common good.

These laws should be enacted in the interests of the majority by a legislature that is separate from the executive and promulgated so that individuals are able to determine the extent of their duties. However, the existence of a separate judiciary was absent from Locke's discussion. From Locke's perspective, the government's primary purpose was the defense of individual rights and particularly the "preservation of property of all the members of that society, as far as is possible".

This theory set the stage for further evolution of the rule of law. In *L'Esprit des Lois* (1748), Montesquieu formulated a theory for the separation of powers as a means to prevent governmental abuse and preserve liberty, which he defined as "the right of doing whatever the laws permit". In his view, "power should be a check to power" and so that the legislative, executive and judicial functions of government should all be held in separate hands.

Compared to previous writers, he devoted significant attention to the central role of the judiciary. In his view, the judiciary should be independent from the other two branches of government, although he advocated that it be composed exclusively of juries rather than a professional corps of judges. For Montesquieu, the time, expense and burden of the judicial process was a price worth paying for liberty.

The theories of Locke and Montesquieu had a profound influence across the Atlantic upon the framers of the US Constitution. In the *Federalist Papers* (1787-1788), Alexander Hamilton, James Madison and John Jay argued for a representative democratic form of government with a multiple layers of divisions incorporating the vertical separation of powers between the federal and state levels and the horizontal separation of legislative, executive and judicial functions at the federal

level, with the legislature further divided between upper and lower houses.

Further safeguards were provided by giving the courts the power to control the constitutionality of enacted legislation by way of judicial review. This complex constitutional arrangement was intended to ensure that no particular group in society could exert undue influence on the levers of state power and thereby minimize the scope for their abuse.

The phrase “rule of law” only entered common parlance in the nineteenth century thanks to the writings of British constitutionalist Albert V. Dicey. His *Introduction to Study of the Laws of the Constitution* (1885) provides the first major explanation of what the rule of law entails in a liberal democracy. According to Dicey, the rule of law consisted of three inter-connected elements.

Firstly, the rule of law demands that no person should be subject to punishment except for a breach of a pre-established law, and it is the ordinary courts that are the proper venue for determining whether such a breach of law has occurred. The rule of law is therefore incompatible with the “exercise of wide, arbitrary or discretionary powers of constraint” by government officials. Secondly, under the rule of law everyone is equal in the eyes of the law.

This implies that government officials should not enjoy special immunities (save for the monarch) and should be held accountable for their actions before the ordinary courts. Thirdly, at least in the United Kingdom where there is no comprehensive written constitution, the rule of law flows from the judicial recognition of individuals’ rights. This aspect of the rule of law consists in the array of legal safeguards that protect individuals from arbitrary action taken by government, with the courts empowered to act as the custodians of those safeguards.

Dicey’s third component has been the subject of different interpretations. Despite the legal safeguards that may be adopted to provide a comprehensive system of checks and balances on governmental abuse, a state’s constitutional framework should not be seen to operate in a cultural or societal void. This helps to explain why the United Kingdom, which has no comprehensive written constitution and where the executive and legislative (and until recently the judiciary) are intertwined, is seen by many as the stronghold of the rule of law. Many believe that this is because ideals of justice and fairness are deeply engrained in British cultural traditions. The British have a deep sense of “fair play” – what constitutes just and fair conduct – and this reveals itself in the way that the public and officials believe and expect that the government should operate within the confines of the law.

The rule of law can therefore thrive in the absence of specific legal mechanisms contained in a written constitution. This suggests that for the rule of law to exist there must be a cultural tradition of respect for the law. Indeed, the existence of a strong and independent legal profession plays a significant role in the rule of law. In his seminal work, *Democracy in America* (1835), the French philosopher Alexis de Tocqueville warned against the potential abuses of democracy, what he termed the “tyranny of the majority”. For him, the legal profession played a central role in alleviating this risk.

Sixty years after Dicey first gave us an explanation of what the rule of law should entail, economist and philosopher Friedrich Hayek echoed many of Dicey’s prescriptions in *The Road to Serfdom* (1944). For Hayek, the rule of law requires that laws should be general, equal and certain and lastly the law must provide for recourse to judicial review<sup>16</sup>. Laws must be general in that they must be set out in advance in abstract terms and govern everyone’s conduct. Implicit in the need for law to be general is that laws must be adopted by a legislature that is separate from the judiciary.

Laws must be equal in that they should apply to everyone equally without providing for arbitrary differences in treatment. However, where differences do occur, these must be the subject of a law that is approved by the majority of those included and those excluded by the law. Laws must be certain so that individuals must be able to foresee in principle the legal consequences of their behavior and that of the others with whom they interact.

Finally, the rule of law requires that judicial review by independent courts must be available in all situations where the government interferes with an individual's person or property. In countries that follow the civil code tradition, the rule of law was influenced by Austrian legal theorist Hans Kelsen who helped draft the Austrian Constitution of 1920. In his view, the rule of law (Rechtsstaat) requires a hierarchy of norms within the legal order with the constitution at its apex.

All laws are subject to compliance with the constitution and government action is constrained by this legal framework. Kelsen's formulation is also the inspiration for the French legal concept of "état de droit".

Following the end of the Second World War, the rule of law as a global ideal was given expression by the adoption of the Universal Declaration of Human Rights in 1948 in which the General Assembly of the United Nations proclaimed that "it is essential if man is not to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law".

## **THE RULE OF LAW TODAY:**

The rule of law is a phrase that we hear with increasing regularity from diverse quarters. We hear it in the pronouncements of world leaders, such as President Barack Obama recalling that adherence to "the rule of law serves as the foundation for a safe, free, and just society". We hear it in the statements of diplomats commenting on key international events, such as United Nations Secretary General Ban Ki Moon emphasizing the central role which the rule of law should play in Libya following the overthrow of Muammar Gaddafi.

We hear it from dissidents who denounce their repressive government's abuses, such as pro-democracy activist Aung San Suu Kiy commenting on the importance of upholding the rule of law and calling on the authorities in Myanmar to release political prisoners. We may even hear it from unlikely quarters, such as Chinese President Hu Jintao who declared following his appointment that the People's Republic of China "must build a system based on the rule of law and should not pin our hopes on any particular leader". Perhaps most surprisingly, we even hear it from the likes of Robert Mugabe.

Zimbabwe's autocratic President, who has asserted that "only a government that subjects itself to the rule of law has any moral right to demand of its citizens obedience to the rule of law". It is clear from these examples that the concept can be the subject of disparate even contradictory usage. One of the reasons is that the rule of law today remains the subject of competing theories. Moreover, these do not always coincide with popular perceptions of what the rule of law consists in.

## **Competing Theories of the Rule of Law:**

For some, the concept has a purely formal meaning, in which the rule of law requires the state to act in accordance with the laws it has promulgated and these laws must meet a certain number of minimum characteristics. However, for others, the concept has a wider, more substantive, meaning that incorporate ideals of justice and fairness and respect for fundamental rights.

Under formalistic theories – termed by some as the “thin rule of law” or “rule by law” – the government must operate within the confines of the law, whatever those laws might be. Contemporary formalistic theories tend to share the liberal view of the rule of law as being equivalent to formal legality. From this perspective, the rule of law is therefore not concerned with the content of the laws, but rather the optimal functioning of the legal system with a view to providing individuals with a certain degree of predictability as regards the legal consequences of their actions.

Formal theories of the rule of law tends to be the most widely accepted and are embraced by international development agencies, because they are capable of universal appeal regardless of whether certain countries recognize fundamental rights or democratic values. In *The Morality That Makes Law Possible* (1964), Lon Fuller explained that, in order to act as a proper guide to behavior, the law must be characterized by the existence of a system of rules that meets a certain number of characteristics.

Although Fuller acknowledged that the occasional and partial absence of any of these criteria was unavoidable because a balance has to be achieved between legal certainty and society’s ability to change laws, he also stressed that the complete absence of one or more criteria would result in complete failure of the law. Although these criteria were not directed at providing a definition of the rule of law but rather a definition of law itself, Fuller’s list of characteristics has been incorporated one way or another in contemporary definitions of the rule of law.

Formalistic theories have been developed by several leading contemporary legal scholars. One classic definition has been formulated by Professor Joseph Raz in his essay on *The Rule of Law and its Virtue* in *The Authority of Law* (1979).

For Raz, the rule of law consists in a number of principles and went on to enumerate the most important:

- (i) All laws should be prospective, adequately publicised and contain clear, unambiguous rules.
- (ii) Secondly, all laws should be relatively stable and not be changed too often;
- (iii) The making of the laws themselves should be guided by public, stable, clear, and general rules;
- (iv) The independence of the judiciary must be guaranteed to ensure that the courts correctly apply the law;
- (v) The principles of natural justice must be observed, so that court hearings are both fair and open and decisions taken without bias;
- (vi) The courts should have the power of judicial review over both legislation and administrative action to ensure their compliance with the law;
- (vii) The courts should be easily accessible and minimize long delays and excessive costs; and finally.
- (viii) The discretion of the law enforcement agencies should not be allowed to circumvent the law.

Like Fuller, Raz recognizes that the rule of law requires compliance with these principles to a certain degree, but that total compliance with the rule of law should not be the ultimate aim of society: rather the rule of law should serve as a means to achieve other social goals. However, he disagreed with Fuller that the rule of law is necessarily a moral good. Instead, he takes the view that the rule of law is a morally neutral concept, which although it is necessary to achieve good ends, can also be put at the service of immoral ends, citing by way of example the existence of the rule of law in the United States when slavery was still legal. For Raz, the abuse of power is wider than the rule of law.

As a result, violations of the rule of law will necessarily amount to violations of human dignity, but violations of human dignity do not necessarily consist in violations of the rule of law. Formalists consider that the rule of law is not concerned about the content of laws: for them, it is immaterial whether the rule of law works for the common good. Like Hayek, Raz considers that the rule of law in its formalistic guise is nonetheless a useful concept because it enables individuals to plan their behavior by knowing in advance what the legal consequences of their actions will be.

As Raz himself acknowledged, observance of the thin rule of law does not guarantee that a government will refrain from enacting repressive and discriminatory laws. From this perspective, the enactment of the Nuremberg laws in Nazi-era Germany or apartheid laws in South Africa would appear to have been enacted in accordance with the rule of law, which most would agree is an abhorrent proposition.

Some critics argue that Raz's narrow take on the rule of law fails to have proper regard to its historical evolution which has mostly been concerned with the imposition of limits on sovereigns as a means to restrict abuse and arbitrary rule. As a result some observers also suggest that formal theories of the rule of law should also encompass equality before the law (as Dicey and Hayek advocated), meaning that the law applies equally to everyone irrespective of status or race.

Such an approach would help to ensure that government officials cannot extract themselves from the obligations imposed by law. In opposition to formal theorists, proponents of the substantive rule of law – also called “thick” rule of law – consider that the rule of law should also encompass ideals of justice and fairness. Ronald Dworkin is one of the leading protagonists of the substantive rule of law, which he calls “rights conception” of the rule of law, as opposed to the “rule-book” conception advocated by formal theorists.

In his view, the rule of law requires not only compliance with formal legality but also requires laws to recognize moral and political rights and permit individuals to enforce those rights through the courts or some other mechanisms. One of the problems with such an approach is that the nature of “moral rights” tends to be nebulous and can polarize opinions, an example being diverse public attitudes to same-sex unions or the death penalty.

Other substantive theorists, such as Professors Richard Bellamy and T R S Allan, go even further suggesting that democracy is an inherent part of the rule of law. However, this approach minimizes the uses to which the rule of law can be put as a legal concept. It is also criticized as conflating two inter-related but nonetheless distinct concepts: the rule of law and democracy.

While it is true that the rule of law is an essential component of democracy because it provides safeguards on governmental excesses, democracy is not a prerequisite for the rule of law. Substantive approaches to the rule of law are followed by some international organisations including the United Nations, whose definition of the rule of law includes a reference to compliance with international human rights standards.

UN Secretary-General's Report on the rule of law and transitional justice in conflict and post-conflict societies S/2004/616 (2004):

The “rule of law” is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

In addition, efforts have been made recently to develop measures of the rule of law. One ambitious project is the World Justice Project which has developed a Rule of Law Index that aims to measure the adherence of countries to the rule of law. The index is based on measures relating to the degree of compliance with the following principles

- (i) The degree to which government and their officials are accountable under the law;
- (ii) The laws are clear, publicised, stable and fair, and protect fundamental rights;
- (iii) The process for the enactment, administration and enforcement of laws are accessible, fair and efficient;
- (iv) Access to justice is provided by competent, ethical and independent lawyers and judges who are sufficient in number, have adequate resources and are representative of the society they serve.

## **The Rule of Law and International Development**

Following the end of the Cold War, many countries abandoned their former communist forms of government and embraced liberal democracy and capitalism. In the transitional period, many of those countries sought to reform their legal systems and international development agencies began funding projects to build “the rule of law” in those countries. The 1990s also saw, the imposition of rule of law benchmarks by development banks as a condition to the provision of financial assistance.

The establishment of rule of law is considered by donors as necessary to ensure sustainable economic development, encourage investment and trade, and ensure that countries emerging from conflict can transition to democracy. As a result, the rule of law has become a significant component of international development with billions of dollars spent in the last twenty years or so on reforming legal systems.

Donor agencies, including the European Commission, the United States Agency for International Development, the Japan International Cooperation Agency, as well as the World Bank, all fund rule of law projects in diverse locations around the globe, whether it be China, Ecuador, Liberia or the Papua New Guinea.

Technical assistance is often provided to donor recipients by specialised non-government organisations including Avocats sans Frontières, the American Bar Association Rule of Law Initiative and the International Legal Assistance Consortium, but private companies are also used on larger projects.

Such initiatives are not without criticism. In line with other international development activities, many commentators denounce the lack of empirical evidence as to the effects and impact of such programs, a lack of proper coordination between donors, as well as the unsustainable nature of many programs.

More damning is the charge that rule of law assistance programs have led to very limited long-term improvements on the ground, that programs are too narrow in focus because they only address judicial or legal institutions without at the same time addressing the police or prisons, that they lack clearly articulated objectives that are directly linked to improving the various constitutive elements of the rule of law and that, in some instances, such efforts have been counterproductive.

Aspects of these criticisms can be attributed to the absence of a universally accepted definition of what amounts to the rule of law. In any event, most observers agree that much more needs to be done to develop a more consistent approach to rule of law assistance and take meaningful steps to measure the impact of rule of law programs.

## **Criticisms of the Rule of Law**

It is undeniable that the rule of law forms an integral part of the liberal form of democratic government worldwide. It goes without saying that “freedom under the rule of law” is an oft-repeated mantra of Western liberal democracies. In this sense, adherence for the rule of law therefore appears to carry with it a number of connotations of a social and political nature. Seen in this light, the rule of law is not necessarily a politically neutral concept.

For instance, some argue that a model of government based on the welfare state is incompatible with the rule of law. In a later edition of *Introduction to Study of the Laws of the Constitution*, Dicey had deplored what he saw as the decline in the rule of law owing in part to the emergence of the welfare state and the adoption of legislation that gave regulatory and adjudicatory powers to administrative entities without recourse to judicial review by the courts.

This concern has been shared by liberal commentators over time. Like Dicey, Hayek argued that the welfare state was incompatible with the rule of law. Nonetheless, it could be argued that these concerns have been tempered by the rise of administrative law as a distinct area of law in common law countries, where the ordinary courts have developed an elaborate body of case law that has placed limits on administrative discretion, some of which has been codified into legislation.

Dicey criticized as being incompatible with the rule of law the existence in France of separate administrative laws that deal with relations between government and the governed and which did not fall within the jurisdiction of the ordinary courts. However, it is now recognized that the establishment of administrative courts that are distinct from the civil and criminal courts in countries following the civil code tradition has ensured to a large extent that discretionary actions taken by the government do not go unchecked.

Moreover, it is undeniable that certain countries that follow the civil law tradition – for example Belgium and Sweden – which pride themselves on having a political system that embraces social welfare, are also widely accepted as adhering to the rule of law.

The rule of law is criticized as serving a convenient justification for the capitalist system of economic governance and the social inequities that may flow from it.

Locke’s view that the government should serve to secure the property rights of individuals was

shared by Adam Smith, the pioneer of political economy. In *Lectures on Jurisprudence* (1763), he declared that “laws and government may be considered ... as a combination of the rich to oppress the poor, and to preserve to themselves the inequality of the goods which would otherwise be soon destroyed by the attacks of the poor”.

Hayek wrote “it cannot be denied that the Rule of Law produces economic inequality – all that can be claimed for it is that this inequality is not designed to effect particular people in a particular way”. Given the unapologetic stance of liberal theorists, it is not wonder that these views have fed the arguments of their ideological opponents. In the communist theory of class struggle elaborated by Karl Marx and supported by Friedrich Engels, the law is one of the means by which the capitalist class maintains their exploitation of the workers’ proletariat.

Supporters of the rule of law argue that the concept is not inherently ideological in nature and that the rule of law is essentially concerned with ensuring respect for the law, whatever that law may be. Proponents of the substantive rule of law also contend that the rule of law incorporates ideals of fairness and justice that can be used to address economic inequality.

The rule of law also falls victim to accusations of Western cultural imperialism or neocolonialism. By contrast to the west, law does not necessarily play a prominent role in the organization of eastern societies. For example, in Confucian theory, a far greater emphasis is placed upon the observance of rites (li) or rules of conduct to achieve civilized behavior and social harmony in society and limits the application of the tools of law (fa) and punishment (xing) to those who fail to abide by the Code of Rites (Liji).

In Confucian and the other distinctive cultural traditions of Asia and beyond, the modes of social governance which these traditions advocate often place an emphasis on the community rather than the individual. As a result, some see in the promotion of rule of law a means for the West to impose its values on the rest of the world. However, supporters of the rule of law point out that the majority of countries are members of the United Nations and as such agree to abide by the Universal Declaration of Human Rights which calls for the respect of human rights based on the rule of law.

Many developing countries are also signatories to a large array of international and regional treaties and declarations that commit them to upholding standards such as those relating to the functioning of their legal systems and the independence of the judiciary. Finally, and perhaps most importantly, many developing countries have adopted their own constitutions that encapsulate many elements of the rule of law.

In recent years, the leaders of many developing countries have made public pronouncements declaring their commitment to upholding the rule of law.

## **Conclusion and Future Prospects:**

In its present day meaning, the rule of law is often used as short hand for the existence of good governance in a particular country. In the West and other countries that have adopted a liberal democratic mode of governance, the rule of law is seen as essential for economic and social development and as a necessary prerequisite for the existence of democratic mode of government.

In his work, *On the Rule of Law, History, Politics, Theory* (2004), Brian Tamanaha has asserted that the rule of law “stands in the peculiar state of being the pre-eminent legitimating political ideal in the

world today, without particular agreement upon precisely what it means". He draws the analogy that the rule of law is like the concept of the good: "everyone is for it", but no-one knows precisely knows what it is.

While the concept of the rule of law is the subject of competing theories, the existence of a divergence of views as to its precise meaning does not invalidate the rule of law as a concept in law.

Most theorists tend to agree that, at the very minimum it does include a requirement that the government observe a country's laws and the existence of institutions and mechanisms which allow individuals to enforce the laws against officials. In time it is hoped that the rule of law will gain not just universal acceptance as to its desirability, but also further agreement as to its precise meaning.

## **RULE OF LAW IN INDIA**

India adopted the Rule of law from the common law system of justice which had its roots to the British Jurisprudence. The constitution of India shows this intention, a country governed by Rule of Law. It declares the constitution to be supreme law of the land from which the executive and the administration derives its power. The concept of Rule of Law can't be executed in its spirit and letter until unless all the instrumentalities of the state are bound by the duty to execute there function in a just and fair manner.

### **Rule of Law and Indian Judiciary:**

The Indian judiciary has played a primary role in giving proper shape to the rule of law in India. By adopting a positive approach and taking a dynamic view of the provisions of the constitution, it has made sure that the rule of law doesn't remain on paper and is incorporated in its spirit to. The courts in India especially the Supreme Court has strengthened this rule through its various judgments, primary case being, ADM Jabalpur v. Shivkanth Shukla<sup>4</sup>, in which the issue in front of the court was 'whether there was any Rule of Law in India apart from article 21?'.<sup>5</sup>

This was with reference to suspension of the rights of the citizens under Articles 14,19 and 215 of the Indian Constitution, during the proclamation of emergency. The 5 judges bench by the majority of 4:1, answered the issue in negative. However, Justice H.R. Khanna did not agree with the majority judgment and while giving his dissenting judgment observed that: Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. Rule of Law is now the accepted norm of all civilized societies.

## **RULE OF LAW IN INDIA: ANALYSIS**

Despite several provisions in place reflecting or conceptualizing rule of law, the exact words „rule of law“ are not found in the Indian Constitution. Amongst the groundbreaking constitutional cases in this regard was the KeshvanandaBharti v. State of Kerala<sup>30</sup> regarded as the most important case of Constitutional jurisprudence in India which outlined the basic structure doctrine of the constitution.

The Basic Structure doctrine forms the basis of power of the Indian judiciary to review, and strike down amendments to the Constitution of India enacted by the Indian parliament which are in confliction with or seek to alter the basic structure of the Constitution as was declared by the 7-6 majority judgement of the aforementioned case.

The opinion of majority of the judges in this respect was that rule of law is an “aspect of the doctrine of the basic structure of the Constitution, which even plenary powers of the parliament cannot reach to amend.” It further solidified preceding judgments, such as that of IC Golaknath<sup>31</sup> and Sajjan Singh<sup>32</sup>. In A.K. Kraipak v. Union of India<sup>33</sup> it was held that under our constitution, the rule of law pervades over the entire field of administration and organs of the state.

In the case of Indira Nehru Gandhi v. Raj Narain<sup>34</sup>, it was held by the honorable Supreme Court that clause (4) of the Constitution 39th Amendment Act, 1975 was unconstitutional and void on the ground that it was outright denial of the Right to Equality enshrined in Article 14. It was held by the Court that these provisions were arbitrary and hence declared void, thereby reinstating the first of the three principles propounded by AV Dicey. Furthermore, it was held that Article 329-A offended the rule of law by subduing the principle of predominance of legal spirit, exuberating the sense of arbitrary official action.

It was during one of the darkest times in democratic India, the Emergency, that the concepts of rule of law came under grave danger. An attempt to amend the constitution was made by the inculcation of 42nd amendment. There was a misuse of Article 356 weakening the basic federal structure of the country. In 1970s judiciary did not remain independent and uncontaminated body from political intervention, when Justice A.N. Ray was appointed as the Chief Justice of India, discarding the other three senior most judges. Even then, the spirit of rule of law was upheld by the judiciary thereby indicating the immense power that a concept such as rule of law holds, thereby vanquishing tyrannical government measures.

In the infamous case of ADM Jabalpur v. ShivakantShukla one of the fundamental questions in front of the Supreme Court was the determination of whether the predominance of legal spirit holds good in the Indian context and whether there was any rule of law in India except but for the presence of Article 21. This was famously answered by the dissenting opinion of Justice HR Khanna.

Discussing the sanctity of the Rule of Law, he says, Rule of Law is the mark of all civilized societies, he argues that the harmonizing of human rights with the requirements of public interest can only be attained by the existence of independent courts which can hold the balance between citizen and state and compel government to conform to the law.

Stating that the right to life and liberty “represented a fact of higher values which mankind began to cherish in its evolution from a state of tooth and claw to a civilized existence”, Justice Khanna claimed that “the idea about the sanctity of life and liberty as well as the principle that no one shall be deprived of his life and liberty without the authority of law are essentially two facets of the same concept”.

Emphatically arguing that the right to life and liberty is not a gift of the Constitution, the following famous paragraph from Justice Khanna’s judgment is produced here:

“Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and of men in all civilized nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning.

The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life, and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land”.

Justice Khanna stated in his judgment, “As observed by Friedman on page 500 of *Law in Changing Society*, 2nd Ed., in a purely formal sense, any system of norm based on a hierarchy of orders, even the organized mass murders of Nazi regime qualify as law. This argument cannot however, disguise the reality of the matter that hundreds of innocent lives have been taken because of the absence of rule of law. A state of negation of rule of law would not cease to be such a state because of the fact that such a state of negation of rule of law has been brought about by a statute.

Absence of rule of law would nevertheless be absence of rule of law even though it is brought about by a law to repeal all laws”. This dissent by Justice HR Khanna proved to be of utmost importance, since it kindled a spark that would give rise to subsequent judgments which would dilute the effect that the ADM Jabalpur case had. It also set a marvelous precedent for later generation of lawyers and judges, since it proved the importance of a dissenting judgment on a constitutional bench, which in turn proves and strengthens the predominance of legal spirit argument laid down by Dicey.

Subsequent to this, in the case of Chief Settlement Commr. Punjab v. Om Prakash<sup>37</sup> it was held by the Supreme Court that, „In our constitutional system, the central and most characteristic feature is the concept of rule of law”, thereby strengthening and reinstating the precedents on the same subject and ensuring that executive and administrative action face scrutiny of the law.

## CONCLUSION

It can therefore be concluded with sufficient evidence and authority that the principles of rule of law have been enshrined in the Indian Constitution. Although the landmark judgment in this regard refutes the aforementioned statement, several succeeding judgments have upheld the sanctity of rule of law in the Indian Constitution. One can therefore say with sheer factual accuracy that India is benefitted with the presence of rule of law in her Constitution.

Yet, this statement will be made with an immensely burdening sense of irony. Many scholars would argue that the statement is paradoxical, since in practicality, on several instances, rule of law is blurred, if not completely absent. To pick one instance, in the *SheryaSinghal v Union of India*<sup>38</sup> case, the Supreme Court had declared Section 66-A of the Information Technology Act to be void and unconstitutional.

Despite this judgment, police officials constantly made arrests using the same section, therefore violating the principles of rule of law. Recently, the Supreme Court allowed women entry into the Sabarimala temple, thereby sparking a series of controversial incidents, with violent protests and refusal of women entry into the temple post the delivery of the judgment. This is a clear indication of a gross disrespect to the rule of law in India. The villages of India, considered the grass-roots and the heart of this nation, reflect the sad and dismal state of rule of law in India.

The remotest of those, embedded with beauty and serenity, disguise a deep dark truth within. The presence of KhapPanchayats and honor killings, one of the worst forms of extra judicial sentencing, reflects the dire need for a stronger mechanism of rule of law. The Supreme Court has delivered several judgements to this regard, and the presence of explicit laws forbidding extra judicial killings are entirely futile, and the best example to support this claim is the Manoj-Bablihonour killing case.

Another infamous example of the disregard to rule of law would be the provisions of the Armed Forces Special Provisions Act, 1958 and its consequences. Section 3 of the said Act in particular has been extremely problematic, and its interpretation has faced widespread scrutiny. It has given arbitrary powers to the Executive to declare which land or region is a „disturbed area” and therefore

has led to mass politicization and tyrannical intervention into several regions for unwarranted reasons.

It is also alleged that several armed forces use these arbitrary powers to exploit people of the said regions. Going by the allegations and the provisions, this is a clear violation of the principles of rule of law, particularly those enshrined in our Constitution. Several outdated laws often prove to be contrary to the effect of rule of law, particularly those governing the executive, such as the police. The series of problems in connection to rule of law in India can be a very long, exhaustive list.

Our Constitution and various judicial precedents leading up to the most recent ones have clearly set the tone for the applicability of Rule of Law in India. Despite all of its hindrances, in hindsight, the practical effectuality of Rule of Law has made some significant progress in India over the years. Our forefathers envisioned a Constitutional India, where every citizen is treated with equality before the law and his or her liberty is not infringed upon. They envisioned an India that is free, open and democratic, rid of arbitrary power and ineffectual existence of Rule of law.

The Constitution and its makers' vision will stay intact and face the test of time. It is now upon the generations to come that the vision converts into a reality. In conclusion, to reflect upon the significance of rule of law, BR Ambedkar once said "Law and order are the medicine of the body politic and when the body politic gets sick, medicine must be administered."

## **DROIT ADMINISTRATIF**

### **Droit Administratif:**

A body of public law as commonly referred to in many sources, Droit Administratif lays down the obligations of public administrative organs along with which it helps in regulating the administrative relations between the State and its citizens. The body which is structured with the rules brought in by the administrative courts is attached to the name of Napoleon Bonaparte.

The atmosphere surrounding the French revolution of 1789 was mainly associated with the chaos between the traditionalist Bonapartists and the reformist Parliaments. While the former was in support of the supremacy of executive powers, the latter preferred the jurisdiction of ordinary courts only. The two bodies that overtook authority from one another during the pre and post-revolutionary France were then recognized as the *Conseil du Roi* and *Conseil d'Etat* respectively.

Conseil du Roi was the product of pre-revolutionary France. This body acted as an advisor in legal and administrative subjects for the King. Along with the executive function, Conseil du Roi also performed judicial activities which included settling disputes between the nobles of the nation. It was in the 16th century that the judiciary was slowly being overshadowed by the growing power of the executive in form of the Conseil du Roi.

Autonomy on the part of Conseil du Roi proved to be detrimental for the ordinary courts. Such discriminatory excess of power in the hands of the executive was limited as the atmosphere slowly changed from pre to post-revolution in 1789.

The revolutionary change that was brought about during the post-revolution is the restriction of power confined in the hands of the executive. Such change was regulated by the concept of separation of power. This subsequently resulted in the abolition of the Conseil du Roi under the governance of Napoleon Bonaparte who was a supporter of reforms and freedom on part of administrative actions.

It was this thought that gave birth to Conseil d'Etat in 1799 with an objective to eliminate difficulties in administrative courses. In the course of time, Conseil d'Etat started looking after judicial matters as well. Although the motive behind the formation of Conseil d'Etat was to remove suppression of the judiciary by the executive, the influence of the executive could not be totally done away with in this case also.

The appointment of the members was carried out by the decree issued by the executive which required the consent of the council of ministers. Therefore, the judiciary till then was unable to access its freedom and authority by itself. The jurisdiction of the Conseil d'Etat was decided to be final in all administrative matters by the Arrents Blanco which was the executive law during 1873.

It was decided that if any conflict would have arisen between the ordinary courts and that of the administrative courts, the same was supposed to be settled by the *Tribunal des Conflicts* which was presided over by the Ministry of Justice and involved an equal number of judges from both courts. The development of Conseil d'Etat was on the basis of its own doctrines with the function of regulation of excessive amounts of administration against the citizens.

### **Rules of Droit Administratif:**

Droit Administratif is a representation of judge-made rules decided in a court of law and not of the rules carved out from the French Parliament. The series of rules that, if compiled together, will result in the Droit Administratif are as follows:

1. Rules that deal with administrative authorities and officials associated with the same.
2. Rules that deal with public service operations to fulfil citizens' needs.

### 3. Rules that deal with administrative adjudication.

While the first rule applies to appointment, removal, allowances, obligations, the second rule was made to focus on the welfare of the public which was to be operated directly by the public officials or could have been delegated by them and carried out under their authority. Private agencies could also have been appointed to execute such rules.

The third rule makes it clear that the highest administrative court in the land is Conseil d'Etat. Infringement of any rights or causing of injury associated with the private citizens of the land would directly be handled by the administrative courts.

### **Characteristics of Droit Administratif:**

From the above highlights about Droit Administratif, what can be inferred are some of the characteristic features that this administrative law possesses. They are listed below :

1. The matters that are associated with the State and administration oriented litigation are to be decided by the administrative courts and not by the ordinary courts of the land.
2. While deciding matters concerning litigation as mentioned above, the rules that are applied in the same are developed from the courts itself.
3. The deciding agency in matters of jurisdiction conflicts between the two courts, namely the administrative and ordinary, is known as Tribunal des Conflicts.
4. The Droit Administratif acts as a safeguard for the government officials from the authority of the ordinary courts.
5. The development of Conseil d'Etat is not a one day plan but the product of a long going process surrounding the French Revolution. It played the role of both a consulting and an adjudicating body.

The characteristics mentioned above give a summary as to the application of Droit Administratif. They separate the French administrative structure with that of other common law countries. French administrative law includes activities more than just delegation and adjudication that affects public administration. The separation of courts for two classes of people, as the Droit Administratif lays down, supports specificity in carrying out the adjudicating procedure.

The explanation it provides is that the government officials carry with them the knowledge of the process in any administrative action hence, they are eligible to be ruled by administrative courts.

In the case of citizens, such things do not apply hence, they are subjected to ordinary courts. The French administrative system also lacks the usage or the principle of natural justice on aspects that there lies no application of the rule of Audi Alteram Partem for the French system believes that requirement of defending oneself is not required in the adjudicating procedure.

France also abandoned the immunity of the State from tort liability as is there in English jurisprudence. The interference of the administrative courts with that of ordinary courts is also not permitted in the atmosphere of France. The burden of precedent laws does not apply in the case of the French administrative system for it is based on the judge-made laws only.

### **Rule of Law and Droit Administratif: A Comparison**

Dicey's concept of rule of law delivers the supremacy of law holding that no man is above law or can produce any judgement above the established law of the land. Droit Administratif evolved as a concept opposing the very formulation by Dicey. Dicey preferred the usage of the term regime administrator while explaining Droit Administratif. The formation of Conseil d'Etat was made to provide limits to the exercise of unrestricted power of the executive.

But in doing the same, the judiciary was not able to gain recognition for the members who were elected to abide by the checks of the executive. The Conseil d'Etat was merely an advisory body for the ministers who were the real judges. No public sessions were held and the power to deliver judgments was also absent from the body. What the body reflected was based on the government's perspective only. This was what the Dicey concept of rule of law opposed.

If this argument, as laid down by Dicey, is viewed, one cannot easily point out that Dicey is wrong on his grounds. The judiciary is supposed to be separated from the executive on several aspects.

It is correct to say that these organs of the government are independently independent but not interdependently independent. The motive with which Napoleon Bonaparte formulated the adjudicating body was not transparent enough if it did not abide by the concept of rule of law which is universal in nature. According to Dicey, the Droit

Administratif was based on two beliefs:

1. The government and its servants possess special and privileged rights as compared to any normal citizen of the nation. Thus, there lies no equality as to the rights available to government officials and the citizens of the same nation.
2. Government officials are not subjected to the jurisdiction of the courts in the nation.

What Dicey claims is that the essence of the establishment of the judiciary is lost if rule of law is opposed. The administrative law which fails to abide by the same and evolved on the basis of its own formulated rule, would play a significant role in suppressing the executive and therefore, the administrative set up in England is much more developed compared to that of France.

The Droit Administratif established different rules for different levels of people in society. To go along with what Dicey suggested, this division in society was against equality. The perception of Dicey and that of the Droit Administratif were completely opposite to each other. While one promotes equality in every stratum of the society, the other wants an established administrative system providing specific power to some leaving behind the other. Both have their own merits and demerits as several scholars observed.

The presence of administrative law was there in England and France. The idea behind the evolution of the branch of law is different for both.

In the present scenario, as the world is setting into complexities in terms of government, there are a huge number of changes brought into the administrative process. For any country, administration plays an important role because it is what helps in the functioning of any kind of activity in the nation. A lot of terms associated with the French administrative system have amounted to being misleading for the exercise of public administration.

But the fact that there needs to be the presence of certain principles in order to be applicable in public administration is proven by the existence of Droit Administratif. It is on this ground that the establishment of Droit Administratif has proved to be beckoning in nature. Lacks in the system and absence of certain factors would not be enough to counter the concept of Droit Administratif for this alone can be a wheel to efficiently carry out public administration.

Meaning of Droit administratif French administrative law is known as Droit Administratif which means a body of rules which determine the organization, powers and duties of public administration

and regulate the relation of the administration with the citizen of the country. Droit Administrative does not represent the rules and principles enacted by Parliament. It contains the rules developed by administrative courts.

Napoleon Bonaparte was the founder of the Droit administrative. It was he who established the Conseil d'Etat. He passed an ordinance depriving the law courts of their jurisdiction on administrative matters and another ordinance that such matters could be determined only by the Conseil d'Etat.

Waline, the French jurist, propounds three basic principles of Droit administrative:

1. The power of administration to act suo motu and impose directly on the subject the duty to obey its decision;
2. The power of the administration to take decisions and to execute them suo motu may be exercised only within the ambit of law which protects individual liberties against administrative arbitrariness;
3. The existence of a specialized administrative jurisdiction.

One good result of this is that an independent body reviews every administrative action. The Conseil d'Etat is composed of eminent civil servants, deals with a variety of matters like claim of damages for wrongful acts of Government servants, income-tax, pensions, disputed elections, personal claims of civil servants against the State for wrongful dismissal or suspension and so on. It has interfered with administrative orders on the ground of error of law, lack of jurisdiction, irregularity of procedure and detournement de pouvoir (misapplication of power). It has exercised its jurisdiction liberally.

Main characteristic features of droit administratif. The following characteristic features are of the Droit Administratif in France:

1. Those matters concerning the State and administrative litigation falls within the jurisdiction of administrative courts and cannot be decided by the land of the ordinary courts.
2. Those deciding matters concerning the State and administrative litigation, rules as developed by the administrative courts are applied.
3. If there is any conflict of jurisdiction between ordinary courts and administrative court, it is decided by the tribunal des conflicts.
4. Conseil d'Etat is the highest administrative court.

Prof. Brown and Prof. J.P. Garner have attributed to a combination of following factors as responsible for its success

- i) The composition and functions of the Conseil d'Etat itself;
- ii) The flexibility of its case-law;
- iii) The simplicity of the remedies available before the administrative courts;
- iv) The special procedure evolved by those courts;
- v) The character of the substantive law, which they apply.

Despite the obvious merits of the French administrative law system, Prof. Dicey was of the opinion that there was no rule of law in France nor was the system so satisfactory as it was in England. He believed that the review of administrative action is better administered in England than in France.

The system of Droit Administratif according to Dicey, is based on the following two ordinary principles which are alien to English law.

Firstly, that the government and every servant of the government possess, as representative of the nation, a whole body of special rights, privileges or prerogatives as against private citizens, and the extent of rights, privileges or considerations which fix the legal rights and duties of one citizen towards another. An individual in his dealings with the State does not, according to French law; stand on the same footing as that on which he stands in dealing with his neighbor.

Secondly, that the government and its officials should be independent of and free from the jurisdiction of ordinary courts. It was on the basis of these two principles that Dicey observed that Droit Administratif is opposed to rule of law and, therefore, administrative law is alien to English system. But this conclusion of Dicey was misconceived. Droit Administratif, that is, administrative law was as much there in England as it was in France but with a difference that the French Droit Administratif was based on a system, which was unknown to English law.

In his later days after examining the things closely, Dicey seems to have perceptibly modified his stand.

Despite its overall superiority, the French administrative law cannot be characterized with perfection. Its glories have been marked by the persistent slowness in the judicial reviews at the administrative courts and by the difficulties of ensuring the execution of its last judgment. Moreover, judicial control is the only one method of controlling administrative action in French administrative law, whereas, in England, a vigilant public opinion, a watchful Parliament, a self-disciplined civil service and the jurisdiction of administrative process serve as the additional modes of control over administrative action.

By contrast, it has to be conceded that the French system still excels its counterpart in the common law countries of the world.

## **CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW:**

Relationship Between Constitutional Law And Administrative Law An Analysis: Both the constitutional and administrative law is a part of the public law in the modern State. It is logically impossible to distinguish between administrative law from constitutional law and all attempts to do so are artificial. Till recently, the subject of administrative law was dealt with & discussed in the books of constitutional law and no separate & independent treatment was given to it.

Many definitions of administrative law, was included in constitutional law. According to Holland, the constitutional law describes the various organs of the government at rest while administrative law describes them in motion. Therefore according to this view, the structure of the legislative and executive comes within the preview of the constitutional law but their functioning comes within the sphere of administrative law.

On one hand administrative law deals with the organization, function, powers and duties of administrative authorities while constitutional law deals with the general principles relating to the organization and powers of the various organs of the state and their mutual relationships and relationship of these organs with the individuals.

In other words constitutional law deals with fundamental while administrative law deals with details.

It may also be pointed out that the constitutional law deals with the rights and administrative law lays emphasis on public need. The countries which have written constitutional law likewise India, the difference between constitutional law and administrative law is not as nuclear as in England.

In such countries the source of constitutional law is constitution while the source of administrative law may be statutes, statutory instruments, precedents and customs. India has a written constitution while the constitutional law deals with the general principles relating to the organization and power of the legislature, executive and the judiciary.

According to Mait Land, constitutional law deals with structure and the broader rules which regulate the function while administrative law deals with the details of those functions. The dividing line between the constitutional law and administrative law is a matter of convenience because every researcher of administrative law has to study some constitutional law.

The importance of administrative law has not been adequately appreciated by governments, both centre as well as the states. Indian administrative law has grown rather sporadically and unsystematically.

Thus in India the administrative action can be tested on the following points:

The action must have been taken in accordance with the rules and regulations. The rules and regulations should be in accordance with the relevant statute. The action, the rules, regulations must in accordance with the provisions of the constitution. If the constitution is amended, the amendment of the constitution should be in accordance or conformity with the basic structure of the constitution.

The separate existence of administrative law is at no point of time disputed; however, if one draws two circles of the two branches of law, at a certain place they will overlap depicting their relationship and this area may be termed as watershed in administrative law. In India, in the watershed one can include the whole control mechanism provided in the Constitution for the control of administrative authorities i.e. Articles 32, 136, 226, 227, 300 and 311.

It may include the directives to the State under Part IV. It may also include the study of those administrative agencies which are provided for by the Constitution itself under Articles 261, 263, 280, 315, 323-A and 324. It may further include the study of constitutional limitations on delegation of powers to the administrative authorities and also those provisions of the Constitution which place fetters on administrative action i.e. fundamental rights.

Today administrative law is recognized as a separate, independent branch of the legal discipline. The correct position seems to be that if one draws two circles of administrative law and constitutional law at a certain place they may overlap and this area may be termed as the watershed in administrative law.

## **DOCTRINE OF WATER SHADES IN ADMINISTRATIVE LAW:**

The doctrine of water shades is very important as it gives a base to establish a line of proper demarcation of the proper boundaries for the functioning of both the laws. It defines the relationship between the constitutional law and administrative law which was defined by various English authors like Dicey and Holland. Their definition clearly states that the laws are dependent and interconnected to each other.

Evolution of constitutional law and administrative law in India: Administrative law has become the most eminent feature of the government in today's era and at the same time; it is also the most in ancient periods. Administrative law was alive even in ancient times. The history of the same can be traced back to the Mauryas and Guptas who have a well-organized and centralized administration.

The rule of Dharma was in action. Every man of the monarch observed this rule and no one claimed immunity. It was said that the administration could only be run on the principles accepted by dharma and thus was followed by the kings and his officers. Principles such as natural justice and fairness were few of the power which was in the ambit of dharma.

The parameter of dharma was wider than the rule of law or due process of law. For a better understanding of administrative law and its functions, it is necessary to know about the sources of it. In India, the Administrative law is the part of ordinary law of land. The sources of administrative law in India are different from other countries like America and England.

In America, the sources of Administrative law are statutes, common laws, and implied powers of the administration. In England, the sources of this law are statutes, precedent, subordinate legislation, and significant case laws.

Constitutional law is the most important source of administrative law in India. It is the origin and soul of administrative law. In other words, we can say that constitutional law is the mother of Administrative law. So, without a constitution, administrative law cannot perform its functions and work properly because it totally depends on the soul of our country constitutional law.

Statutes are also a great source of this law. It also came from the constitution. State legislature gives the lawmaking power to parliament. The powers for administration have been even guaranteed under statutes and all such powers have to conform to the statutory pattern.

The ordinance is also a good source of this law. It empowers the President and Governor to promulgate during the recess of parliament under Article 123 and during the recess of state legislature under Article 213 respectively. This provision brings flexibility on the level of union and the state to make laws which are necessary for the emergency situations and circumstances in which certain laws and acts declared void by courts of law.

The Chief Executive has the great ordinance making power but it cannot be unlimited. Ordinances can be issued by the Governor on the advice of Council of Ministers. There are a need and the requirements of approval for the confirmation of ordinance.

The relationship between constitutional law and administrative law is not very emboldened to be seen with naked eyes but the fact remains that concomitant points are neither so blurred that one has to look through the cervices of the texts with a magnifier to locate the relationship. The aforementioned veracities and illustrations provide a cogent evidence to establish an essential relationship between the fundamentals of both the concepts.

If doubts still persist, the very fact that each author, without the exception of a single, tends to differentiate between the two branches of law commands which create the hypothecation of a huge overlap.

Constitutional law viewed through administrative eyes The impact of constitutional law upon administrative law in England is meagre and blurred because the English Constitution is unwritten and, as Dicey elaborates it,<sup>3</sup> the rules which in other countries form part of a constitutional code are, in England, the result of the ordinary law of the land.

In the result whatever control the administrative authorities can be subjected to must be deduced from the ordinary law, as contained in statutes and judicial decisions. But, in countries having written constitution, there is an additional source of control over administrative action, and that is the written constitution which imposes limitations upon all organs of the body politic.

In these countries the sources and modes of exercising judicial control over the administrative agencies are twofold, constitutional and non constitutional. It is for this reason that while at the very outset every author endeavours to distinguish the scope of administrative law from that of constitutional law, they can never afford to forget to mention that in a country having written constitution with judicial review, it is not possible to separate the two into watertight compartments.

The reason being that the written constitution, being the organic law, not only sets up but also imposes limitations upon the powers of all the organs of the State, legislative, executive or judicial, and if any of these limitations be transgressed by any of these organs, the act so done will be unconstitutional and invalid.

So far as the acts of the executive or the administration is concerned, this is secured in India in various ways. The legislative acts of the administration i.e. statutory instruments (or subordinate legislation) are expressly brought within the fold of Article 13 of the Constitution, by defining.

- As including order, bye-law, rule, regulation, notification having the force of law
- A delegated legislation can therefore be challenged as invalid not only on the ground of being ultra vires the statute which confers power to make it (as in all common law countries), but also on the additional ground that it contravenes any of the fundamental rights guaranteed by Part III of the Constitution.

A non-legislative and a purely administrative action having no statutory basis will be void if it contravenes any of those fundamental rights which constitute limitations against any State action. Thus a non-statutory administrative act may be void if it offends Article 14, guaranteeing equal protection<sup>6</sup>; Article 29 or Article 30<sup>7</sup> guaranteeing minority rights; Article 19 guaranteeing freedom of speech, association, etc.; and Article 16<sup>8</sup> guaranteeing equality of opportunity in employment.

Thus the court would strike down any administrative instruction or policy, notwithstanding its temporary nature, if it operates as discriminatory, so as to violate fundamental right under Article 14

of the person or persons discriminated against.<sup>10-11</sup> Non-statutory administrative action will also be void if it seeks to affect a fundamental law by non-statutory action where the Constitution provides that it can be done only by making a law e.g.

- (a) Article 19(1)(2);
- (b) Article 21(1); and
- (c) Article 32(1).

An administrative act, whether statutory or non-statutory, will be void if it is in contravention of any of the mandatory and justiciable provisions of the Constitution, falling even outside the realm of fundamental rights like Articles 14, 19(1)(2), 21(1) and 32(1). In cases of statutory administrative actions, there is an additional constitutional ground upon which its validity may be challenged, namely, that the statute, under which the administrative order has been made, is itself unconstitutional.

Where the impugned order is quasi-judicial, similarly, it may be challenged on the grounds, that the law under which the order has been made is itself unconstitutional. Constitutional law thus advances itself into the judicial review chapter in administrative law in a country like the USA or India. The courts in these countries have to secure that the administration is carried on not only subject to the rule of law but also subject to the Constitution.

While an attack upon the constitutionality of a statute appertains to constitutional law, the constitutionality of an administrative action properly belongs to administrative law; but the provisions of the same Constitution constitute a touchstone in both the spheres.

The object of both the common law doctrine of rule of law or supremacy of law and a written constitution is the same, namely, the control of arbitrary power and while the rule of law insists that the agencies of the Government are no more free than the private individual to act according to their own arbitrary will or whim but must conform to legal rules developed and applied by the courts

The business of the written constitution is to embody these standards in the form of constitutional guarantees and limitations and it is the duty of the courts to protect the individual from an invasion of these guarantees not only by the departments of the Government but also by all administrative agencies, big or small.

Administrative growth in constitutional matrix Administrative law is a by-product of intensive form of Government. During the last century, the role of Government has changed in almost every country of the world; from laissez faire to paternalism and from paternalism to maternalism. Today the expectation from the Government is not only that it will protect its people from external aggression and internal disturbance, but also that it will take care of its citizens from the cradle to the grave.

Therefore, the development of administrative process and the administrative law has become the cornerstone of modern political philosophy. Today there is a demand by the people that the Government must solve their problems rather than merely define their rights. The rights are elaborately defined in the Constitution but the policies to protect these rights are formulated by the Government (the executive) and implemented by the administrative agents of the State.

There thus arises a direct nexus between the constitutional law and administrative law where the former acts as a source from which the rights of the individuals flow and the latter implements its policies accordingly mandated to preserve the sanctity of those rights. It is felt that the right of

equality in the American Constitution will be a sterile right if the black is the first to lose his job and the last to be re employed.

In the same manner the equality clause in the Indian Constitution would become meaningless unless the Government comes forward to actively help the weaker sections of society to bring about equality in fact. This implies the growth of administrative law and process under the aegis of welfare philosophy embodied in the constitutional law.

The constitutional law being the prior in origin to administrative law, therefore, manifests the phenomenon of absorption spectrum, from the former into the latter, of certain substantive characteristics, endorsing thereby a class of blood relationship between the two imperative branches of law.

The genus-species relationship Administrative law has been defined as the law relating to administration. It determines the organisation, powers and duties of administrative authorities.<sup>25</sup> This definition does not make any attempt to distinguish administrative law from constitutional law. Further, this definition is too wide, for the law which determines the powers of administrative authorities, may also deal with the substantive aspects of such powers.

It may deal with matters such as public health, housing, town and country planning, etc. These matters are not included within the scope of administrative law. Administrative law, however, tends to deal with these matters for the Constitution has embodied the principle of a welfare State and the State, only through administrative laws, can execute and implement these rules veraciously in the society. Prof. Sathe thus explicitly notes in his book Administrative Law that:

Administrative law is a part of constitutional law and all concerns of administrative law are also concerns of constitutional law.

An inference can therefore be drawn that constitutional law has a wide arena of jurisdiction, with administrative law capturing a substantive part. In other words, constitutional law can be termed as the genus of which substantive portion of administrative law is the species.

The identical mandate Protection against abuse. With the shift from laissez faire to welfare philosophy the State was confronted with numerous functions. The State has not confined its scope to the traditional and minimum functions of defence and administration of justice, but has adopted a positive policy and consequently welfare State has undertaken to perform varied functions.

This resulted in the rise of administrative authorities which act as the State instrumentalities to implement welfare policies of the Government in conformity with constitutional norms. Also, the distance of legislature from the masses led to the development of administrative law since the rules formulated by the legislature were not informed of accurate social dynamics and therefore brought inconvenience to the citizens.

Administrative laws and rules with its functional approach and pragmatism thus emerged to protect the citizens from becoming victims of ill-framed laws and arbitrary State action. According to Wade, the primary purpose of administrative law is to keep the powers of Government within their legal bounds, so as to protect the citizen against their abuse.

Similarly and importantly, the mandate of constitutional law too inclines towards the interests of the civilians. The constitutional law aims to protect the citizens from arbitrary State action or any other fundamental rights violation. The Constitution of India in Part III provides a vibrant list of fundamental rights and facilitates the remedy against violation under Articles 32 and 226/227.

The overlap of this very goal, which signifies the protection of citizens from violation of their cherished rights, running parallel through the domains of both the laws establish a never-ending virtuous relationship between the two concepts.

Constitutional determination of the scope of administrative function The Indian Constitution is unanimously and rightly termed as the grund norm.

As regards domestic legislations. The metaphor, however, is not used out of context and there lies a simultaneous series of relevant reasons behind the statement. The Constitution circumscribes the powers of the legislature and executive and limits their authority in various ways.<sup>29</sup> It distributes the governmental powers between the Centre and the States.

It guarantees the fundamental rights to the individuals and forbids the State from abridging them by either legislative or executive action. It is the function of the courts to interpret the Constitution and declare the acts of legislature as well as executive as unconstitutional if they contravene the provisions of the Constitution. However, it operates also against the legislature insofar as they cannot make a law which delegates essential legislative powers or which vests unbridled discretionary powers in the executive hands so as to make its arbitrary exercise possible.

The validity of an executive act is seen with reference to the power given to it by the legislature. The Constitution has, however, in turn laid down the framework defining the extent of laws made by Parliament and the State Legislatures.<sup>30</sup> Constitutional law therefore enjoys the status of the prime moderator monitoring legislative actions and in turn installs a yardstick upon the extent of the rules made by the executive while acting in the capacity of a delegate.

It can be inferred unequivocally that constitutional law plays the pivotal role of the principal channel from where flow the guidelines determining the scope of administrative action thereby establishing a unique relationship between the two distinct but intimate arenas of law.

The principles of natural justice as constitutional parameters The principles of natural justice act as a touchstone to administrative adjudication. Fair hearing is the most fundamental principle of administration of justice. Although the law of evidence and procedural laws ensure it and statutes also provide for it, the principles of natural justice, which include the essentials of a fair hearing are invoked wherever there are gaps in the statutory law.

The decision in A.R. Antulay case where one Bench of the Supreme Court decided the case without affording to the accused an opportunity of being heard, is an authority for the proposition that even a decision of the Supreme Court could be impugned on the ground of its alleged inconsistency with the fundamental rights guaranteed by Part III of the Constitution.

Constitutionally, the observance of the rules of natural justice may be one of the criteria of reasonableness of restrictions upon any of the rights guaranteed by Article 19 of the Constitution. If the discretion is conferred on an administrative authority, the fact that such an authority is not required to observe the rules of natural justice persuades the courts to hold that such discretion could be exercised arbitrarily and therefore in violation of Article 14 or Article 19 of the Constitution.

The courts have held that absolute discretion without any guidelines for its exercise and without having to follow the rules of natural justice imposed unreasonable restrictions upon the fundamental rights guaranteed by that article.<sup>35</sup> In *Workmen v. Meenakshi Mills Ltd.*<sup>36</sup> the Supreme Court

upheld Section 25-N of the Industrial Disputes Act, 1947 which gave power to the Government to permit retrenchment of workers in an industrial establishment.

This section, before its amendment, vested such powers in a Labour Court but the amendment gave that power to the Government. The Supreme Court held that the Government was bound to exercise such power quasi-judicially. Such an obligation to act quasi-judicially saved the vesting of such power in the Government from being unconstitutional on the ground of its alleged violation of the fundamental right to carry on any trade or business guaranteed by Article 19(1)(g) of the Constitution.

The administrative heritage clause fairness.

- Was also utilised to process the constitutional divine premise "procedure established by law."
- The Supreme Court has given liberal construction to the words "procedure established by law."
- Contained in Article 21 of the Constitution in *Maneka Gandhi v. Union of India*<sup>37a</sup> and now it means processual fairness. The Supreme Court has held that long detention as an undertrial prisoner, or denial of legal aid, torture of prison inmate, or handcuffing of an accused except in unusual situations, are against the procedure established by law.

Thus we witness the role of rules of natural justice as important parameters of the fairness of the procedure. Therefore, the rules of mandatory application in administrative adjudication importantly act as a touchstone to the constitutional cases liberalizing the interpretation of Part III clauses thereby establishing a firm relationship between administrative principles and constitutional requirements.

Constitution constituting administrative agencies Besides the contribution towards the growth of administrative process, which is possible through legislation and executive actions, the Constitution itself provides for the establishment of some administrative agencies to regulate a particular field e.g. Article 263, creation of Inter-State Council; Article 280, Finance Commission; Article 261, Inter-State Water Dispute Authority; Article 315, Public Service Commissions; and Article 324, Election Commission.

The Constitution is thus the begetter of these important administrative agencies which perform effectual administrative functions in vivid imperative fields of governance in the nation. It is very interesting to note that the constitution constructors, while establishing administrative bodies, have used the words in a lavish fashion and have elaborately laid down guidelines in connection with their functions and structure, etc.

For instance, the whole of Chapter II of Part XIV of the Constitution is devoted to the Public Service Commissions of the Union and the States.

The Constitution inherits comprehensive provisions dealing with the establishment, the functions and the expenses of Public Service Commissions including exact guidelines in the matters pertaining to appointment and term of office of members including their removal and suspension.

Apart from deciding the structure of this administrative body, the Constitution governs its regulation by making the body accountable to the administrative head i.e. the President of India by way of a provision making submission of annual reports mandatory. Similarly, the Constitution through Article 324 establishes the Election Commission and elaborates upon its functions and constitution including the appointment and removal of the Chief Election Commissioner, other Election Commissioners and Regional Commissioners.

While these bodies are established by the Constitution, they perform functions fairly administrative

in nature. This distinctly depicts the weighty interference of constitutional law into administrative environs and establishes a striking relation between these laws.

Constitutional impact on administrative adjudication In order to provide speedy and inexpensive justice to employees aggrieved by administrative decisions, the Government set up the Central Administrative Tribunal (CAT) in 1985, which now deals with all cases relating to service matters which were previously dealt with by courts up to and including the High Courts.

Establishment of the Central Administrative Tribunal under the Administrative Tribunals Act, 1985 (hereinafter also referred to as the Act) is one of the important steps taken in the direction of development of administrative law in India. This Act while stimulating the development of administrative law, drew its legitimacy and substance from the constitutional law and was passed by Parliament in pursuance of Article 323-A of the Constitution.

This article, is considered to be one of the plus points<sup>43</sup> of the Forty second Amendment<sup>44</sup> and that is why even one of the critics of the Forty-second Amendment, Dr. Rajeev Dhavan, said something positive about the new tribunal system, envisaged under Article 323-A. He observed: The Forty-second Amendment envisaged a tribunal structure and limited review powers by the High Courts.

In the long run, this could mean a streamlined system of tribunal justice under the superintendence of the Supreme Court. Properly worked out such a system is not a bad one. It would be both an Indian and a common law adaptation of the French system of *droit administratif*.

Indeed, the Administrative Tribunals are welcomed with a great applause and are performing supplementary function to the High Courts with 17 regular Benches of CAT functioning in various parts of the country, including its principal Bench in Delhi.

Although the relationship between constitutional law and administrative law is not very emboldened to be seen with naked eyes but the fact remains that concomitant points are neither so blurred that one has to look through the cervices of the texts with a magnifier to locate the relationship. The aforementioned veracities and illustrations provide a cogent evidence to establish an essential relationship between the fundamentals of both the concepts.

If doubts still persist, the very fact that each author, without the exception of a single, tends to differentiate between the two branches of law commands the hypothecation of a huge overlap. Conclusions Although the relationship between constitutional law and administrative law is not very emboldened to be seen with naked eyes but the fact remains that concomitant points are neither so blurred that one has to look through the cervices of the texts with a magnifier to locate the relationship.

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According to Maitland, while constitutional law deals with structure and the broader rules which regulate the functions, the details of the functions are left to the administrative law. According to Philips, Constitutional law is concerned with the organizations and functions of the Government at rest while administrative law is concerned with that organization and those functions in motion.

The Australian jurists note that the dividing line between constitutional law and administrative law is

a matter of convenience because every student of administrative law has to study some constitutional law. Finally, Keith pragmatically remarks, It is logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial.

The separate existence of administrative law is at no point of time disputed; however, if one draws two circles of the two branches of law, at a certain place they will overlap depicting their stern relationship and this area may be termed as watershed in administrative law. In India, in the watershed one can include the whole control mechanism provided in the Constitution for the control of administrative authorities i.e. Articles 32, 136, 226, 227 300 and 311.

It may include the directives to the State under Part IV. It may also include the study of those administrative agencies which are provided for by the Constitution itself under Articles 261, 263, 280, 315, 323-A and 324. It may further include the study of constitutional limitations on delegation of powers to the administrative authorities and also those provisions of the Constitution which place fetters on administrative action i.e. fundamental rights.