CHAPTER - 2
JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

2.1 Introduction –

Judicial review, the power of courts to review statutes and the governmental action to determine whether they confirm to rules & principles laid down in constitution. Judicial review is based on the idea that a constitution which dictates the nature, functions and limits of a government – is the supreme law. Consequently, any action by a government that violates the principles of its constitution is invalid. The system of judicial review of administrative action has been inherited from Britain. It is on this foundation that the Indian Courts have built a superstructure of control mechanism. The whole law of judicial review of administrative action has been developed by judges on case to case basis. Consequently, a thicket of technicalities and inconsistencies surrounds it.

However, present trend of judicial decisions to widen the scope of judicial review of administrative action and to restrict the immunity from judicial review to class of cases whish relate to deployment of troops and entering into international treaties, etc.¹. That power corrupts a man and absolute power corrupts absolutely which ultimately leads to tyranny, anarchy, and chaos has been sufficiently established in course of evolution of human history, all round attempts have been made to erect institutional limitations on its exercise. When Montesquieu gave his Doctrine of Separation of power, he was obviously moved by his desire to put a curb on absolute and uncontrollable power in anyone organ of the government. A legislature, an executive and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these two powers against the other two that the efforts in human nature towards tyranny can alone be checked and restrained and any freedom preserved in constitution.

Judicial review means review by courts of administrative actions with a view to ensure their legality. Review is different from appeal. In appeal the appellate

¹ Indian Railway Construction Co. Ltd. v. Ajay Kumar, (2003)4 SCC 579
authority can go into the merits of the decisions of the authority appealed against. In judicial review, the court does not go into the merits of the administrative action; court’s function is restricted to ensuring that such authority does not act in excess of its power. The court is not supposed to substitute its decision for that of the administrative authority. In Judicial review of administrative action, the courts merely enquire whether the administrative authority has acted according to the law. Judicial Review of administrative action, according to de Smith, is ‘inevitably sporadic and peripheral’\(^2\). It undertakes scrutiny of administrative action on the touchstone of the Doctrine of *ultravires*. The administrative authorities are given powers by the statutes and such powers have to be exercised within the limits drawn upon them by the statutes. As long as an authority acts within the ambit of the power given to it, no court should interfere. It is in this sense that such an authority is said to have the liberty to act rightly as well as wrongly. It has been held that a court exercising judicial review should not act as a court of appeal over a tribunal as an administrative authority whose decision comes before it for review\(^3\). The Supreme Court reiterated this principle of judicial review in *State of M.P. v. M.V. Vyavasaya Co. Ltd.*\(^4\), as follows:

“It has been repeatedly held by this court that the power of the High Court under article 226 of the Constitution is not akin to appellate power. While exercising this power, the court does not go into the merits of the decision taken by the authorities concerned but only ensures that the decision is arrived at in accordance with the procedure prescribed by law and in accordance with the principles of natural justice wherever applicable. Further where there are disputed question of fact, the High Court does not normally go into or adjudicate upon the disputed question of fact.”

Judicial review is concerned with reviewing not the merits of a decision or an order but with how the decision has been arrived at. The review court is concerned with two questions:

---


a.) Whether the authority has exceeded its power? And

b.) Whether it has abused its power?

Origin of Judicial Review – Judicial review has gradually developed in all the countries. Here we will discuss the growth of Judicial Review in United States, in English Law and in India.

2.2 Judicial Review in United States –

In the U.S. the most important exercise of judicial review is by the Supreme Court. The court has used its power to invalidate hundreds of Federal, State and Local laws that it found to conflict with the Constitution of the U.S. The Supreme Court also has used judicial review to order Federal, State and Local officials to refrain from behaving unconstitutionally. However, the power of judicial review does not belong exclusively to the Supreme Court. In appropriate cases every court in the U.S. may strike down laws that violate the constitution. State courts have the power to review State government actions for compatibility with both State Constitution and the Federal Constitution.

The power of judicial review is essential to the political system of checks and balances established by the U.S. Constitution adopted in 1789. The United States would have a vastly different political system if the courts did not possess the power of judicial review. Without judicial oversight of government actions, the legislative branch would be legally supreme, and the fundamental protections included in the constitution, such as freedom of speech would be ineffective. The inclusion of fundamental rights in the Constitution, combined with the power of judicial review, serves to protect the minority from laws created by a slim majority because a supermajority (two-third of each house of congress plus ratification by three-fourth of the States) is required to modify the constitution.

2.2.1 Origin in United States –

Although the United States Constitution itself is silent about judicial review, evidence indicates that many people anticipated that the courts established by the constitution would exercise such a power to some degree. The framers of the constitution were familiar with the concept. Before the constitution was adopted,
State courts occasionally struck down laws for violating State Constitutions. Furthermore, the power was specially discussed in the debate surrounding adoption of the constitution. In ‘The Federalist Paper’, a series of essay advocating ratification of the constitution, Alexander Hamilton wrote that the courts have a duty “to declare all acts contrary to the manifest tenor of the Constitution, void.” Hamilton felt that without this power, the protection of fundamental rights included in the Constitution would amount to nothing. In 1803, in *Marbury v. Madison*\(^5\), the Supreme Court firmly established its authority to review and invalidate government actions that are incompatible with the constitution. In his controversial decision in that case, Chief Justice John Marshall declared that it is the duty of the courts “to say what the law is.” If a particular act of congress violates the higher law of the Constitution, then the courts must reject the incompatible law. In the year 1821 decision of *Cohens v. Virginia*\(^6\), Marshall made it clear that the federal courts may also review whether State Laws violate the Constitution.

### 2.2.2 Impact –

The Supreme Court has overturned more than 125 Federal Statutes, 1200 State laws and municipal ordinances, most of them since the late 19\(^{th}\) century. By contrast, the Supreme Court invalidated two federal laws before the American Civil War (1861-1865). The first was the law at the issue in *Marbury v. Madison*, which modified the jurisdiction (authority to hear and decide cases) of the Supreme Court. In the second instance, the court in 1857 invalidated a portion of the Missouri compromise that banned slavery in the territories north and west of Missouri. In that decision, known as the *Dred Scott* case, the court also declared that blacks could never be citizens of the U.S. the decision intensified debate over slavery, further polarizing the nation and spurring events leading to the civil war. After the war, the ruling was effectively overturned by the adoption of 13\(^{th}\) and 14\(^{th}\) amendments to the Constitution, which abolished slavery and provided that all people born in the United States are citizens of the nation and of the State in which they reside.

---

\(^5\) 1Cranch 137 : 2L Ed 60  
\(^6\) 19 U.S. 264 (1821)
2.2.3 Limitation –

Since the 1950’s the court has decided several prominent cases that have overturned unconstitutional laws. Many of the court’s decisions were controversial, and critics have charged that justices/ judges have written their own values into the constitution. There are several restrictions on the exercise of judicial review courts may strike down unconstitutional laws only when cases are brought to them. In the absence of a case, judges may not issue advisory opinion – that is, they may not say what they think a constitutional rule means or whether a law is invalid, moreover not every case presents the possibility of judicial review. The parties seeking review must have “standing”- that is, they must be the ones actually affected by the law in question. Also, the dispute must be “ripe” – a person may not ask a court to void a law if it has not yet been applied to that person. If the constitution says that other branches of the government have discretion to deal with an issue, the courts will not review such so called political questions. e.g, the courts have not reviewed such so called political questions. For example, the courts have no authority to overturn the President’s decision to pardon a felon since the constitution provides that the right to pardon is an executive function.

2.3 Judicial Review in English Law –

Judicial review is a procedure in English administrative law by which the courts supervise the exercise of public power on the application of an individual. A person who feels that an exercise of such power by a government authority, such as a minister, the local council or a statutory tribunal, is unlawful, perhaps because it has violated his or her rights, may apply to the administrative court (a division of the High Court) for judicial review of the decision and have it set aside (quashed) and possibly obtain damages. A court may also make mandatory orders or injunctions to compel the authority to do its duty or to stop it from acting illegally.

2.3.1 Constitutional Position –

The English constitutional theory as expounded by A.V. Dicey does not recognize a separate system of administrative courts that would review the decision of public bodies (as in France, Germany and many other European countries). Instead, it is considered that the government should be subject to the jurisdiction of
ordinary Common Law Courts. At the same time, the doctrine of Parliamentary Sovereignty does not allow for the judicial review of primary legislation (Acts of Parliament). This limits judicial review in English Law to the decisions of public bodies and secondary (delegated) legislation, against which ordinary common law remedies as well as special “prerogative orders” are available in certain circumstances. The constitutional theory of judicial review has long been dominated by the Doctrine of *ultra vires*, under which a decision of public authority can only be set aside if it exceeds the powers granted to it by the parliament. The role of the courts was seen as enforcing the “Will of Parliament” in accordance with the Parliamentary Sovereignty. However, the decision has been widely interpreted to include errors of law and of fact and the courts have also declared the decisions taken under the Royal Prerogative to be amenable to Judicial Review. Therefore, it seems that today the constitutional position of Judicial Review is dictated by the need to prevent the abuse of power by the executive as well as to protect individual rights.

2.4 Judicial Review in India –

Unlike the U.S., the constitution of India explicitly establishes the Doctrine of Judicial Review in several Articles, such as, 13, 32, 131-136, 143-226 & 246. The doctrine of judicial review is firmly rooted in India, and has the explicit sanction of the constitution. Article 13(2) even goes to the extent of saying that “The State shall not make any law which take away or abridges the rights conferred by this part (Part III containing the Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void.” The courts in India are thus under a constitutional duty to interpret the constitution and declare the law as unconstitutional if found to be contrary to any constitutional provision. The courts act as sentinel on the *qui vive* so far as the Constitution is concerned.

Underlying this aspect of the matter, the Supreme Court stated in *State of Madras v. V.G.Row* that the constitution contains express provisions for judicial

---

7 *Anisminic v. Foreign Compensation Comm.*, (1969)2 AC 147
9 Article 13, *Constitutional Law*, M.P. Jain, VI Ed., 2010
10 *AIR 1952 SC 196*
review of legislation as to its conformity with the constitution and that the courts “face up to such important and none too easy task” not out of any desire “to tilt at legislative authority in a Crusader’s spirit, but in discharge of the duty plainly laid upon them by the Constitution.” The Court observed further: “while the court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute.”

The doctrine of Supremacy of the Constitution and judicial review has been expounded very lucidly but forcefully by Bhagwati, J., as follows in State of Rajasthan v. Union of India:

“It is necessary to assert in the clearest terms particularly in the context of recent history, that the constitution is supreme lex, the permanent law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the constitution and it has to act within the limits of its authority. No one however highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the constitution or whether its action is within the confines of such power laid down by the constitution. This court is the ultimate interpreter of the constitution and to this court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what the limits are and whether any action of that branch transgresses such limits.”

Judicial Review has been justified from time to time in different cases. In Kesavananda Bharti’s case, the Supreme Court has emphasized upon the importance of Judicial Review:

“As long as some Fundamental Rights exist and are a Part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantee afforded by these Rights is not contravened. Judicial Review has thus become an integral part of our Constitutional system.”

---

11 AIR 1952 SC 196,199 ; 1952 SCR 597
12 AIR 1977 SC 1361 ; (1977)3 SCC 592
13 AIR 1973 SC 1461 ; (1973)4 SCC 225
The scope of judicial review in India is somewhat circumscribed as compared to that in the USA. In India, the fundamental rights are not so broadly worded as in the USA, and limitations thereon have been stated in the constitution itself and this task has not been left to the courts. The constitution makers adopted this strategy as they felt that the courts might find it difficult to work out the limitations on the fundamental rights and the same better be laid down in the constitution itself. The constitution maker also felt that the judiciary should not be raised to the level of the ‘super-legislature’14.

There is no denying the fact that there have been occasions when judicial pronouncements have not been palatable to the governments and the legislatures in India. The exercise of the power of judicial review has at times generated controversies and tensions between the courts, the executive and the legislature. For example, the judicial pronouncements in the area of property relations, legislative privileges and constitutional amendments have been controversial and have even led to several constitutional amendments which were undertaken to undo or dilute judicial rulings which the central government did not like.

The Law Minister in the Central Government once stated in Parliament that the courts had, through their exercise of power of judicial review, retarded the process of socio economic development of the country, and, therefore, he justified certain restrictions on the powers of the courts to declare laws unconstitutional15. But, in spite of all these hurdles, the institution of judicial review has a vibrancy of its own and has even been declared as the basic feature of the constitution.

2.4.1 Judicial Review: Object, Nature & Scope –

The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion which is incorrect in the eye of law16.

---

14 VII CAD 1195; IX CAD 1195-6; G. Austin, The Indian Constitution, 164 et. seq.
15 Parliamentary Debates on the Constitution (Forty-fourth) Amendment Bill.
As observed by the Supreme Court in *Minerva Mills Ltd. v. UOI*\(^{17}\), the constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and validity of legislation. It is the solemn duty of the judiciary under the constitution to keep different organs of the State within the limits of the power conferred upon them by the constitution by exercising power of Judicial Review as sentinel on the *quê vive*. Thus, judicial review aims to protect citizens from abuse or misuse of power by any branch of the State.

Judicial quest in administrative matters is to strike the just balance between the administrative discretion to decide matters as per government policy, and the need of fairness, any unfair action must be set right by administrative review\(^{18}\). Judicial review of administrative action is perhaps the most important development in the field of public law in the second half of this century. In India, the doctrine of judicial review is the basic feature of our constitution. Judicial review is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law. Judicial review is the touchstone of the Constitution. The Supreme Court and High Courts are the ultimate interpreters of the constitution. It is, therefore, their duty to find out the extent and limits of the power to co-ordinate branches, viz. executive and legislature and to see that they do not transgress their limits. This is indeed a delicate task assigned to the judiciary by the Constitution. Judicial Review is thus the touchstone and essence of the rule of law\(^{19}\). The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the constitution and it cannot be abrogated without affecting the basic structure of the Constitution\(^{20}\). The areas where judicial power can operate are limited to keep the executive and legislature within the schemes of division of powers between three

\(^{17}\) AIR 1980 SC 1789; *Fertilizer Corp. Kamgar Union v. UOI* AIR 1981 SC 344

\(^{18}\) *Tata Cellular v. UOI*, (1994)6 SCC 651; AIR 1996 SC 11& 13


organs of the State. The ultimate scope of judicial review depends upon the facts and circumstances of each case. The dimensions of judicial review must remain flexible\textsuperscript{21}. It is cardinal principle of our constitution that no one howsoever highly placed and no authority lofty can claim to be the sole judge of its power under the constitution. The rule of law requires that the exercise of power by the legislature or by the judiciary or by the government or by any other authority must be conditioned by the constitution. Judicial review is thus the repository of the supreme law of the land. It is a vital principle of our constitution which cannot be abrogated without affecting the basic structure of the Constitution\textsuperscript{22}.

The judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the legislature and the executive and try to provide every citizen what has been promised by the constitution under the Directive Principles of State policy. All this is possible thanks to the power of judicial review. All this is not achieved in a day, it took more than half of a century where we are right now. If anyone thinks that it has been a roller coaster ride without any hindrances, they are wrong. Judiciary has been facing the brunt of many politicians, technocrats, academicians, lawyers etc. Few of them being genuine concern, and among these criticisms one is the aspect of corruption and power of criminal contempt.

“Judicial review of administrative action is feasible and the same has its application to its fullest in even departmental proceedings where it is found that the recorded findings are based on no evidence or the findings are totally perverse or legally untenable.” This is a fundamental requirement of law that the doctrine of Natural Justice be complied with and the same has, as a matter of fact, turned out to be an integral part of administrative jurisprudence of this course\textsuperscript{23}.

The rule of law is the bedrock of democracy, and the primary responsibility for implementation of the rule of law lies with the judiciary\textsuperscript{24}. This is now a basic

\textsuperscript{21} Shreeram v. Settlement Comm. AIR 1989 SC 1038; S.R.Bommai v. UOI (1994)3 SCC 1
\textsuperscript{22} S.R.Bommai v. UOI (Supra); S.S.Bola v. B.D.Sardana, (1997)8 SCC 522 : AIR 1997 SC 3127
\textsuperscript{23} Source 26 Oct, 2000. Indian Express Newspaper.
feature of every constitution, which cannot be altered even by the exercise of new powers from Parliament. It is the significance of judicial review, to ensure that democracy is inclusive and that there is accountability of everyone who wields or exercises public power. As Edmund Burke said: “all persons in positions of powers ought to be strongly and lawfully impressed with an idea that ‘they act in trust’, and must account for their conduct to one great master, to those in whom the political sovereignty rests, the people”\textsuperscript{25}. India opted for a parliamentary form of democracy, where every section is involved in policy-making, the decision taking, so that every point of view is reflected and there is a fair representation of every section of the people in every such body. In this kind of inclusive democracy, the judiciary has a very important role to play. That is the concept of accountability in any republican democracy, and this basic theme has to be remembered by everybody exercising public power, irrespective of extra expressed expositions of the constitution\textsuperscript{26}.

The principle of judicial review became essential feature of written constitutions of countries. Seervai in his book Constitutional Law in India noted that the principle of judicial review is a familiar feature of the Constitutions of Canada, Australia and India; though the Doctrine of Separation of Powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government could not usurp the functions of another\textsuperscript{27}.

The power of judicial review has in itself the concept of Separation of Powers an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by the reason of a doubt raised in that behalf, by the courts. The power of judicial review is incorporated in Article 226 & 227 of the Constitution insofar as the High Courts are concerned. In regard to the Supreme Court Article 32 & 136 of the Constitution, the judiciary in India has come to control by judicial review every aspect of government and public function\textsuperscript{28}.

\textsuperscript{27} H.M.Seervai, Constitutional Law of India, 3rd Ed. Vol. 1

33
Sometimes, it is argued that the strength of the courts has weakened other parts of the government. This legal debate raises the important and inevitable question that how far this statement holds true about judicial review powers and capacities of the Indian Judiciary. The Indian Constitution, like other written Constitutions, follows the concept of ‘Separation of powers’ between the three sovereign organs of the Constitution. The Doctrine of Separation of powers stated in its rigid form means that each of the organ of the Constitution, namely, executive, legislature and judiciary should operate in its own sphere and there should be no overlapping their functioning. The Indian Constitution has not recognized the doctrine of separation of powers in its absolute form but the functions of the different organs have been clearly differentiated and consequently it can very well be said that our constitution does not contemplate assumptions, by one organ of the functions that essentially belong to another.\textsuperscript{29} Though the Constitution has adopted the parliamentary form of government, where the dividing line between the legislature and the executive becomes thin, the theory of separation of powers is still valid\textsuperscript{30}. Even though the Constitution of India does not accept strict separation of powers, it provides for an independent judiciary with extensive jurisdiction over the acts of the legislature and the executive\textsuperscript{31}. Independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but also to the people at large who seek judicial redress against perceived legal injury or executive excess. Judicial review is the basic structure, independent judiciary is the cardinal feature, and an assurance of faith enshrined in the Constitution. The need for independent and impartial judiciary is the command of the constitution and call of the people.

Broadly speaking, judicial review in India comprises of three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. The judges of the superior courts have been entrusted with the task of upholding the constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by

\textsuperscript{29} Ram Jawaya v. State of Punjab, AIR 1955 SC 549
the Constitution is maintained and that the legislature and the executive do not, in the discharge of functions, transgress Constitutional limitations. Thus, judicial review is a highly complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic feature of the Constitution. The court in its exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizen’s right to life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds, which could be expended on building, hospitals, roads and the like, or overseas aid, or compensating victims of crime.

In the landmark judgment of *P.U.C.L. v. UO*I, Jt. Shah observed: “The legislature in this country has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the courts. The legislature may remove the defect, which is the cause for invalidating the law by the court by appropriate legislation if it has power over the subject matter and component to do so under the constitution. The primary duty of the judiciary is to uphold the constitution and the laws without fear or favor, without being biased by the political ideology or economic theory. Interpretation should be in consonance with the constitutional provisions, which envisage a republic democracy. Survival of democracy depends upon free and fair election. It is true that political parties fight elections, yet elections would be farce if the voters were unaware of antecedents of candidates contesting elections. Such elections would be neither free nor fair.” These bold words of Jt. Shah reflect the status, which the Indian Judiciary is holding in the Constitutional set-up. The constitution-makers have reposed great confidence and trust in Indian Judiciary by conferring on it such powers as have made it one of the most powerful judiciary in the world. The Supreme Court has from time to time indulged in genuine and needful judicial activism and judicial review. It gave birth to the famous and most needed “Doctrine of Basic Structure”.

---

32 *L.Chandra Kumar v. UOI* (1997)3 SCC 261
34 (2003)3 SCALE 263
2.4.2 Extent –

The initial years of the Supreme Court of India saw the adoption of an approach characterized by caution and circumspection. Being steeped in the British Tradition of limited judicial review, the court generally adopted a pro-legislature stance. This is evident from the ruling such as *A.K. Gopalan*, but however it did not take long for judges to break their shackles and this led to a series of right to property cases in which the judiciary had strong disagreement with the Parliament. The nation witnessed a series of events where a decision of the Supreme Court was followed by a legislation nullifying its effect, followed by another decision reaffirming the earlier position, and so on. The struggle between the two wings of government continued on other issues such as the power of amending the constitution. During this era, the legislature sought to bring forth people-oriented socialist measures which when in conflict with fundamental rights were frustrated on the upholding of the fundamental rights of individuals by the Supreme Court. At the time, an effort was made to project the Supreme Court as being concerned only with the interests of propertied classes and being insensitive to the needs of the masses. Between 1950 and 1975, the Indian Supreme Court has held a mere one hundred Union and State laws, in whole or in part, to be unconstitutional. After emergency the judiciary was on the receiving end for having delivered a series of judgments which were perceived by many as being violative of the basic human rights of Indian citizens and changed the way it looked at the constitution. The Supreme Court said that any legislation is amenable to judicial review, be it momentous amendments to the constitution or drawing up of schemes and bye laws of municipal bodies which affect the life of a citizen. Judicial review extends to every governmental or executive action from high policy matters like the President’s power to issue a proclamation or failure of constitutional machinery in the States like the *Bommai Case*, to the highly discretionary exercise of the prerogative of

36 [*ADM v. Shivkant Shukla*, (1976)2 SCC 521]
pardon like in *Kehar Singh* case or the right to go abroad as in *Satwant Singh* case. Judicial Review knows no bounds except the restraint of the judges themselves regarding justifiability of an issue in a particular case.

In the initial stages of the judicial adjudication courts have said that where there is a political question involved it is not amenable to judicial review but slowly this changed, in *Kesavananda Bharti’s* case\(^\text{39}\), the court held that, “it is difficult to see how the power of judicial review makes the judiciary supreme in any sense of the word. This power is of paramount importance in a federal constitution…….. Judicial Review of constitutional amendments may seem involving the court in political question, but it is the court alone which can decide such an issue. The function of interpretation of a constitution being thus assigned to the judicial power, the question whether the subject of law is within the ambit of one or more powers of the legislature conferred by the constitution would always be a question of interpretation of the Constitution.”

It was in Special Court Bill, 1978, in re, case where the majority opined that, “The policy of the Bill and the motive of the mover to ensure a speedy trial of persons holding high public or political office who are alleged to have committed certain crimes during the period of emergency may be political, but the question whether the Bill or any provisions are constitutionally invalid is not a question of political nature and the court should not refrain from answering it.” What this meant was that though there are political questions involved the validity of any action or legislation can be challenged if it would violate the constitution. This position has been reiterated in many other cases\(^\text{40}\) and in *S.R. Bommai’s* case the court held, “though subjective satisfaction of the President cannot be reviewed but the material on which satisfaction is based are open to review……”, the Court further went on to say that, “the opinion which the President would form on the basis of Governor’s report or otherwise would be based on his political judgment and it is difficult to evolve judicially manageable norms for scrutinizing such political decisions.

---

\(^{39}\) (1973)4 SCC 225

Therefore, by the very nature of things which would govern the decision - making under Article 356, it is difficult to hold that the decision of the President is justiciable. To do so would be entering the political thicker and questioning the political wisdom which the court of law must avoid. The temptation to delve into the President’s satisfaction may be great but the courts would be well advised to resist the temptation for want of judicially manageable standards. Therefore, the courts cannot interdict the use of the constitutional power conferred on the President under Article 356 unless the same is shown to be malafide.” As Soli Sorabjee points out, “there is genuine concern about misuse, by the Center, of Article 356 on the pretext that the State government is acting in defiance of the essential features of the constitution. The real safeguard will be full judicial review extending to an inquiry into the truth and correctness of the basic facts relied upon in support of the action under Article 356 as indicated by Justices Satwant and Kuldeep Singh. If in certain cases that entails evaluating the sufficiency of the material, so be it.” What this meant was the judiciary was being cautious about the role it has to play while adjudicating matters of such importance and it is showing a path of restraint that has to be used while deciding such matters so that it does not usurp the power given by the constitution by way of power of review at the same time. It is also minimizing the misusing of the power given under Article 356 to the President.

Chief Justice of India, as he was then, Jt. K.G. Balakrishnan said “illusion” created by judicial review is ‘natural’ and ‘desirable’. Calling judicial review “one of the most baffling of legal services”, he said, it is often mistaken as a veto – power over legislation.

“The application to judicial review to determine Constitutionality of the legislation and to review the executive decision sometimes creates tension between the judge and legislative and executive branches..... such tension is natural and to some extent desirable”, Ex CJI Jt. Balakrishnan told in the conference of Chief Ministers and High Court Chief Justices held on April 9, 2007. He further added, “The principle of Separation of powers is kept in forefront and the judge should make sure each of the other branches operates within the boundaries of the law and judicial review of the constitutionality of the legislation and of administrative
actions realizes democracy”. He further mentioned that the process of constitutional interpretation is thus an integral part of the ordinary legal process, controlled by precedent and standards of judicial objectivity and propriety, although actually constitutional questions usually raise explosive political issues.

Jt. Balakrishnan’s views echo those of his predecessor. At the time of his retirement, talking to the reporters, Jt. Y.K. Sabharwal, had said that while there is no ‘friction’ between the judiciary and the legislature and both need to be in ‘harmony’ for the ‘smooth working of the democracy’, it would be ‘dangerous’ if the two developed a ‘cozy relationship’. Jt. Sabharwal had also said: “There is a difference of perception but it is healthy for judiciary. Relationship between judiciary, legislature and executive should not be cozy……. It is very dangerous if the relationship is cozy (between them) as it may come in the way of taking independent decision”. His remarks had come just two days after a Constitution bench had unanimously expanded the scope of judicial review and had underlined the Supreme Court as the ultimate arbiter of constitutional provisions vis-à-vis Parliament. The court had ruled that even laws protected in the Ninth Schedule can be invalidated if they violated fundamental rights and the basic structure of the Constitution. Jt. Balakrishnan added that “judicial review safeguards civil and political rights of individuals and sometimes define and control the powers of every organ of the State”. He stressed that the function of the Supreme Court is of vital importance and “it is the anchor which holds us to constitutional government – ever watchful guardians of the liberty of the people against transgression by legislative or executive action”. He also admitted that, “We are deeply concerned with the great responsibility developing upon the courts……..the judicial review of legislative and administrative actions has given right to some criticism of the way in which the courts are functioning……..like any other public institution, the judiciary can be subjected to fair criticism if and when occasion demands, but if the criticism is illegitimate and irresponsible, it may lead to incalculable damage to the institution of judiciary.”

2.4.3 Limitations of the power of Judicial Review –

In India the rule of law was adopted, where general rules of accountability were assumed. However, there is still scope for abusing power, and thus arises the need to evolve specific and concrete mechanisms of accountability in addition to
diffuse and general ones such as elections, impeachment and public opinion. Judicial Review evolved as such a specific and concrete method of checking the excess of administrative bodies. It is now read to be a part of the basic structure of the constitution\textsuperscript{41}, and has been the crux of administrative law in India.

The scope has been limited with the help of various principles as imbibed from common law\textsuperscript{42}, to the common pool of which the Indian courts have added, subtracted or modified such principles, as they thought fit in the Indian context\textsuperscript{43}. Sometimes a culture of arbitrariness can be gauged within the judicial circles while applying the principles of Judicial Review especially in recent times. A decision is said to be arbitrary when it is depending on individual discretion, or determined by a judge rather than by fixed rules, procedures or law. Such arbitrariness takes myriad forms. It can be observed that judicial arbitrariness itself in four major forms.

i) Courts substituting the decision it, with what it thinks fit.

ii) Courts misapplying the existing principles.

iii) Courts ignoring the existing principles and interfering on its own considerations.

iv) Courts not interfering when it is supposed to.

1.) Courts substituting the decision it, with what it thinks fit – One of the fundamental principles regarding judicial review is its restricted scope, when compared to judicial appeal. While appeal empowers the court to look into the merit of the case, based on which it gives its own decision, the scope of judicial review is restricted to a supervisory jurisdiction, not an appellate jurisdiction. Courts under review are to decide only about the decision-making process and not the decision itself. Sadly, this golden rule is often ignored, especially by the High Courts, and

---

\textsuperscript{41} Smt. Indira Gandhi v. Sh. Raj Narain AIR 1975 SC 2299; P. Sampath Kumar v. UOI (1987)1 SCC 124; I.R. Cohelo (By Irs)etc. v. State of T.N. AIR 1999 SC 3179

\textsuperscript{42} The broad articulation of general principles can be traced to Council of Civil Services Union v. Min. of Civil Services (1985) AC 374, where principles of illegality, irrationality, impropriety were laid down.

\textsuperscript{43} Wednesbury’s Principle of unreasonableness (Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. (1948)1 KB 223) has been extended a step further to include not only natural rights per se, but also the fundamental rights enshrined in the Constitution, something which is held to be indispensable for many decisions.
there is a growing trend regarding the same in recent times. *Jayabhai Jayanta Patel v. Anilbhai Jayantibhai Patel and ors.*\(^{44}\), is the most recent case exemplifying the same. This case is concerned with an election dispute, where certain people were prevented from casting a vote, resulting in the election of a certain President. This was challenged before a presiding officer, but he upheld the election. The matter was brought before the division bench of the Gujarat High Court. Here, the High Court not only quashed the election decision, but went out of its scope of review and held the other candidate standing to be the President. Fortunately, the Supreme Court overruled this. The High Court, under review had no power to substitute the decision with its own decision and elect the new President.

Another instance of the same nature can be found in *Govt. of A.P. and others v. Sridevi and others*\(^{45}\). Here, the respondents had brought agricultural land and wanted to convert it into housing land. For this, a no objection certificate from special officer-cum-competent authority was required and an application for the same was made. However, the special officer dismissed the application, without finally deciding about same. The respondents filed a writ in the High Court. The High Court not only quashed the decision of special officer but also substituted its decision, holding that since the land was outside the purview of the Urban Land Ceiling Act, the respondents be given the no objection certificate. Again the SC overruled the decision, reiterating the principles regarding the limited scope of review\(^{46}\).

Another instance where the High Court substituted the quantum of punishment with what it thought fit is *Sachanlakshri and Another v. Vijay Kumar Raghuvir Prasad Mehta and Another*\(^{47}\). In this case, a school teacher was terminated when he was found to have forged his service record from previous school. He appealed to the Tribunal, which took a lenient view and awarded punishment of

\(^{44}\) (2006) Ind law SC 481  
\(^{45}\) AIR 2002 SC 1801  
\(^{46}\) The view that errors of fact, could not be corrected by High Courts acting in its supervisory jurisdiction was concretized by Lord Sumner in *The King v. Nat Ball Liquor Ltd.* (1922)2 AC 128; The same view has also been followed by the Indian Supreme Court in number of cases: *Nagendra Nath Bohra v. Comm. Of Hills, Div. & Appeal, Assam* AIR 1958 SC 398  
\(^{47}\) AIR 1999 SC 578
stoppage of one increment. The school filed a writ petition in the High Court. The High Court upheld the decision of the tribunal and held that the punishment is disproportional so, instead of one increment, it ordered the stoppage of two increments as punishment. Again, the Supreme Court overruled the High Courts decision, because it erred in substituting the decision itself.

2.) Courts misapplying the existing principles – The principles of illegality, irrationality, impropriety and proportionality are to be looked into while deciding whether the courts have the power to interfere in a case or not. There are however recent instances where the courts have blatantly overlooked them.

The Supreme Court completely overlooked the principle of proportionality in *Regional Manager, UPSRTC, Etawah and ors. v. Hotilal and Another*\(^{48}\). In this case, a bus conductor had allowed certain people to travel ticket less and was caught through a superior check by the inspector. An inquiry was held against him and his offence was proved, for which his service was terminated. He filed a writ petition against the same in the High Court, which quashed the termination on the ground of proportionality, stating that the resulting loss to State was a meager Rs. 16/- which could be imposed as penalty on the wrongdoer, instead of terminating him. The SC on the other hand, while holding that the termination was proportional to the offence, stated that High Court had no right of interfering without stating reasons for the same (which is in fact laid down clearly). This is a prima facie case of court not applying the principles when it should have applied.

Another case of not applying proportionality with regards to punishment was *Kailash Nath Gupta v. Enquiry Officer (R.K. Rai), Allahbad Bank and Ors.*\(^{49}\). Here, the employees service was terminated because he caused misappropriation if the sum of Rs. 46000/-, that too because of certain misunderstanding on his part. But otherwise the employee had a clear record for 28 years. High Court found the termination to be proportional, a decision thankfully rectified by the Supreme Court.

3.) Courts ignoring the existing principles and interfering on its own considerations-A recent example in this regard would be *Allahbad Development

\(^{48}\) AIR 2000 SC 1462

\(^{49}\) AIR 2003 SC 1377
Authority v. Sabia Khan and others.\textsuperscript{50} In this case, the legality of certain charges of the Development Authority was challenged. Here High Court Innovatively decided that it had a power to interfere because it was high time that the rampant corruption in municipal authorities be checked. Such a consideration is completely out of context and Supreme Court upheld the same while rebuking the HC for going beyond its power of review.

Another such instance of courts devising grounds for interference would be the case of Municipal Corporation, Faridabad v. Sri Niwas\textsuperscript{51}. In this case, the respondent was a tubewell operator and he claimed retrenchment for, he had worked for 240 days in the past 12 months, as was mandatory. However, the Municipal Corporation claimed that he had worked only for 136 days and had not granted the retrenchment. He appealed to the Tribunal which dismissed his case, holding that he had worked only for 184 days. He then appealed to the High Court. The H.C. then quashed the decision of the Tribunal solely on the basis that the Municipal Corporation did not produce the required muster rolls (which were not produced by either of the parties) and hence an adverse inference was to be drawn against the Corporation. It is submitted that the Courts interfere with the decision of a Tribunal on the basis of an adverse inference. Such was also the opinion of Supreme Court while overturning the High Court’s decision.

4.) Courts not interfering when it is supposed to – The flip side of over interfering and substituting the decision with its own decision, is when the courts refuse to interfere when it is required under the limited scope of judicial review to interfere. Such check through judicial review is vital so that the edifice of rule of law is not shattered, and should not be given away, as is sadly noticed, increasingly. It can be noticed here, that more than High Courts, the Supreme Court has many a time failed to interfere when it should have.

In Delhi Development Authority and another v. UEE Electricals and Engg (P) Ltd.\textsuperscript{52}, the respondent was firstly awarded a tender by the DDA. However, due to a previous fight between the director of the respondent company and the employees

\textsuperscript{50} 2006(7) SCALE 313
\textsuperscript{51} 2004(4) AWC 2847 (SC)
\textsuperscript{52} AIR 2004 SC 2100
of DDA, the DDA informed the Authorizing body that it wished to cancel the tender. The body issued the show cause notice to the company, but before the notice reached the respondents, the tender was awarded to the party. The High Court awarded damages to the respondent company while not quashing the grant of the new tender, which, it is submitted was within the scope of Judicial Review. However, the Supreme Court upheld the decision of awarding it to the second bidder, because it felt that there was no arbitrariness or malafide on the part of the Authority. However, it is submitted that it completely overlooked the applicability of the natural justice principle of audi alteram partem\textsuperscript{53}.

Similarly in Krishna Mohan Shukla v. UOI and Others\textsuperscript{54}, while dealing with the arbitrary nature of compensation awarded by the welfare commission to the Bhopal Gas tragedy victims, the Supreme Court refused to entertain the petition, because it said that the victim should have gone to the High Court first, and only then approached the Supreme Court. Such self restraint, it is submitted, is neither prescribed by principles of Judicial Review nor any specific statute and hence should not be imposed while denying people their right\textsuperscript{55}.

The following case study helps us arrive at the conclusion, as has been highlighted by Prof. Upendra Baxi\textsuperscript{56} that the principles of Administrative Law, provide a scope for boundless manipulability which can be and are used in the disadvantage of various disregarded interests.

The existence of such judicial arbitrariness is dangerous for the very fabric of administrative justice in the country. Firstly, it undermines the very legitimacy of having judicial review over administrative bodies and results in tribulisation\textsuperscript{57}. Secondly, such ambiguity and fluidity in current decisions encourages the same in

\textsuperscript{53} Ridge v. Baldwin (1964) AC 40; UOI v. Tarachand Gupta (1971)1 SCC 486
\textsuperscript{54} Jt. 2000(1) AC 447
\textsuperscript{55} The situation is different when the statute itself prescribes an order for approaching various forums. In such a case Supreme Court has rightly declined to entertain the case as in Ram Saran Das v. CIT, AIR 1962 SC 1326; but this should not be followed when such a restraint is not prescribed in the statute itself.
\textsuperscript{56} The Myth & Reality of Indian Administrative Law, Introduced by Upendra Baxi in Administrative Law (I.P. Massey), 7\textsuperscript{th} Ed. 2008
\textsuperscript{57} The phenomenon involves growing number of Tribunals superseding the Courts with only limited scope of appeal, published in Journal of ILI 383 (1972)
future decisions, basing it on them. Thirdly, it discourages people to come to the
court with specific grievances, and makes impotent the judicial weapon of review,
so essential for the survival of rule of law.

While devising solution for the same, some eminent scholars\textsuperscript{58} have
suggested the codification of Administrative Law principles. But it is humbly
submitted that such a step is futile and also impossible. It is impossible and
undesirable to codify a body of law, which is evolutionary in its character and ever
expanding its scope. And also even if such codification is undertaken, it is the
application of such codified rules that creates the problem and would still be
problematic, regardless of the concrete or liquid form of the principles.

A constant vigil is the only weapon while fighting judicial arbitrariness which
is increasingly replacing administrative arbitrariness.

It is true that the courts have the wide powers of judicial review of
constitutional and statutory provisions. These powers, however, must be exercised
with great caution and self-control. The courts should not step out of the limits of
their legitimate powers of the judicial review. The parameters of judicial review of
Constitutional provisions and statutory provisions are totally different. In \textit{J.P.
Bansal v. State of Rajasthan}\textsuperscript{59}, the Supreme Court observed: “it is true that this
court in interpreting the constitution enjoys the freedom which is not available in
interpreting a statute. It endangers continued public interest in the impartiality of the
judiciary, which is essential to the continuance of rule of law, if judges, under guise
of interpretation, provide their own preferred amendments to statutes which
experience of their operation has shown to have had consequences that members of
the court before whom the matters come considered to be injurious to public interest
where the words are clear, there is no obscurity, there is no ambiguity and the
intention of the legislature is clearly conveyed, there is no scope for the court to
innovate or to take upon itself the task of amending or altering the statutory

\begin{footnotesize}
\textsuperscript{58} One of them is S.N. Jain, who opined that failure to consider the earlier decisions on the point
involved in a case being decided by the court—whether attributable to the court or to the counsels—
results in conflict of judicial opinion. One of the reasons for such failure seems to be that in India
we do not have a digest of Administrative Law. This is a desideratum; S.N. Jain, Legal Nature of
Administrative Instructions under the I.T.Act,14

\textsuperscript{59} (2003)3 SCALE 154
\end{footnotesize}
provisions. In that situation the judge should not proclaim that they are playing the role of Law-maker merely for an exhibition of judicial velour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased; this can be vouchsafed by an alert recognition of the necessity not to cross it and instinctive, as well as trained reluctance to do so.”

In case the court forgets to appreciate this judicial wisdom, it would undermine the constitutional mandate and will disturb the equilibrium between three sovereign organs of the constitution. In State (Government of NCT of Delhi) v. Prem Raj60, the Supreme Court took a serious note of this disturbing exercise when the High Court commuted the sentence by transgressing its limits. The Court observed:

“The power of commutation exclusively vests with the appropriate government. The appropriate government means the Central Government in cases where the sentence or order relates to a matter to which the executive power of union extends, and the State Government in other cases. Thus, the order of the High Court is set aside.”

Similarly, in Syed T.A. Haqshbandi v. State of J&K61, the Supreme Court observed: “Judicial Review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision itself, as such. Critical or independent analysis or appraisal of the materials by the court exercising powers of judicial review unlike the case of an appellate court would neither be permissible nor conducive to the interests of either the officer concerned or the system and institutions. Grievances must be sufficiently substantiated to have firm or concrete basis on properly established facts and further proved to be well justified in law, for being countenanced by the court in exercise of its powers of judicial review. Unless the exercise of power is shown to violate any other provision of the Constitution of India or any of the statutory rules, the same cannot be challenged by making it a justiciable issue before the court”.

The courts are further required not to interfere in policy matters and political

60 (2003)7 SCC 121
61 (2003)9 SCC 592
questions unless it is absolutely essential to do so. Even then also the courts can interfere on selective grounds only. In *P.U.C.L. v. UO*\textsuperscript{62}, the Supreme Court observed: This court can not go into and examine the need of Prevention of Terrorism Act. It is a matter of policy. Once legislation is passed, the government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. Moreover, mere possibility of abuse can not be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional”.

The expansion of the horizon of the judicial review is seen both with reverence and suspicion; reverence in as much as the judicial review is a creative element of interpretation, which serves as an omnipresent (widespread) and potentially omnipotent (having total power) check on the legislative and executive branches of government. But at the same time there is a danger that they may trespass into the powers given to the legislature and the executive. One may say that if there is any limitation on judicial review other than constitutional and procedural that is a product of judicial self restraint. As Jt. Dwivedi emphatically observed, “Structural socio-political value choices involve a complex and complicated political process. This court is hardly fitted for performing that function. In the absence of any explicit constitutional norms and for want of complete evidence, the Court’s structural value choices will be largely subjective. Our personal predilections will unavoidably enter into the scale and give color to our judgment. Subjectivism is calculated to undermine legal certainty, an essential element of rule of law\textsuperscript{63}.

The above observations also reveal another assumption to support an attitude of self-restraint, viz., and the element subjective ness in judicial decision on issues having socio-political significance. When one looks at the decisions of the Supreme Court on certain questions of fundamental issues of constitutional law one can see that there is a sharp division among the judges of the apex court on such basic questions of powers of the Parliament to amend the constitution, federal relations, powers of the President etc. This aptly demonstrates the observation of the judge.

\textsuperscript{62} (2003)10 SCALE 967
\textsuperscript{63} Kesavananda Bharti v. State of Kerala; AIR 1973 SC1461
This would mean that though there has been expansion of power of judicial review one cannot also say that this cannot be overturned.

Judicial self-restrain in relation to legislative power manifests (clear & obvious) itself in the form that there is a presumption of constitutionality when the validity of the statute is challenged. In the words of Fazal Ali, “the presumption is always in favor of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.”\(^\text{64}\)

In applying the presumption of constitutionality the courts sometime apply an interpretational device called ‘reading down’. The essence of the device is that “if certain provisions of law construed in one way would make them consistent with the constitution, and another interpretation would render them unconstitutional, the court would lean in favor of the former construction”\(^\text{65}\). But all this depends on the outlook and values of the judge\(^\text{66}\).

When it comes judicial review of administrative action through the presumption of validity is not as strong in the case of administrative actions as in the case of statutes, still, when the legislature expressly leaves a matter to the direction of an administrative authority the courts have adopted an attitude of restraint. They have said we can not question the legality of the exercise of discretionary power. Unless & until it is an abuse of discretionary power (which includes \textit{mala fide} exercise of power, exercising the power of an improper motive, decisions based on irrelevant considerations or in disregard of relevant consideration, and in some case unreasonable exercise of power) and non-exercise of discretion (which come when power is exercised without proper delegation and when it is acted under dictation).

The relevant considerations which should make the judicial choice in favor of activism or restraint are the policy and scheme of the statute, the object of conferring discretionary power, the nature and the scope of the discretion, and finally, the nature of the rights and the interests affected by the decision. Any

\(^{64}\) \textit{Charanjit Lal v. UOI}, AIR 1951 SC 41


\(^{66}\) Observations by C.J. Chandrachud in \textit{All Saints High School v. Andhra Pradesh}, AIR 1980 SC 1042
impulsive move to activism without a serious consideration of these factors may only be viewed as undesirable. Judicial activism, being an exception, not the general rule, in relation to the control of discretionary power, needs strong reason to justify it. In the absence of such strong support of reasons the interventionist strategy may provoke the other branches of government may retaliate and impose further limitations on the scope of judicial review.

The judicial review has certain inherent limitations. It is suited more for adjudication of disputes than for performing administrative functions. It is for the executive to administer the law and the function of the judiciary is to ensure that the government carries out its duty in accordance with the provisions of the constitution.\(^{67}\)

The duty of the court is to confine itself to the question of legality. It has to consider whether a decision making authority exceeded its power, committed an error, violated rules of natural justice reached a decision which no reasonable man would have reached otherwise abused its powers. Thought the court is not expected to act as a court of appeal, nevertheless it can examine whether the decision-making process, was reasonable, rational not arbitrary or not violative of Article 14 of the constitution. The parameters of judicial review must be clearly defined and never exceeded. If the authority has faltered in its wisdom, the court can not act as super auditor.\(^{68}\)

Unless the order passed by an administrative authority is unlawful or unconstitutional, power of judicial review can not be exercised. An order of administration may be right or wrong. It is the administrator’s right to trial and error so long as it is \textit{bona fide} and within the limits of the authority, no interference is called for. In short, power of judicial review is supervisory in nature. Unless this restriction is observed, the court, under the guise of preventing abuse of power by the administrative authority, will itself be guilty of usurping power.\(^{69}\)

\(^{67}\) \textit{S.R. Bommai v. UOI; G.B. Mahajan v. Jalgaeon M.C.}, AIR 1991 SC 1153

\(^{68}\) \textit{S.R. Bommai v. UOI; G.B. Mahajan v. Jalgaeon M.C.}, AIR 1991 SC 1153 (Supra); \textit{Fertilizer Corporation Kamgar Union v. UOI AIR 1981 SC 344}

\(^{69}\) \textit{Tata Cellular v. UOI}, AIR 1996 SC 11; \textit{Sterling Comp. Ltd. v. M&N Publications Ltd. AIR 1996 SC 51}
Bernard Schwartz\textsuperscript{70} rightly observed: “If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts. That would destroy the values of agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields. At the same time, the scope of judicial enquiry must not be so restricted that it prevents full inquiry into the question of legality. If that question can not be properly explored by the judge, the right to review becomes meaningless. It makes judicial review of administrative orders a hopeless formality for the litigant……… It reduces the judicial process in such cases to a mere feint”.

\textbf{2.5 Judicial review as a part of Basic Structure -}

In the celebrated case of \textit{Kesavananda Bharti v. State of Kerala}, the Supreme Court of India had propounded the basic structure doctrine according to which it said the legislature can amend the constitution, but it should not change the basic structure of the constitution. The judges made no attempt to define the basic structure of the constitution in clear terms. S.M. Sikri, C.J. mentioned five basic features:

i) Supremacy of the constitution

ii) Republican and democratic form of government

iii) Secular character of the constitution

iv) Separation of powers between the legislature, the executive and the judiciary

v) Federal character of the Constitution

He observed that these basic features are easily discernible not only from the preamble but also from the whole scheme of the constitution. He added that the structure was built on the basic foundation of dignity and freedom of the individual which could not by any form of amendment be destroyed. It was also observed in that case that the above are only illustrative and not exhaustive of all the limitations on the power of amendment of the constitution. The constitutional bench in \textit{Indira

\textsuperscript{70} Administrative Law 2\textsuperscript{nd} Ed. Cited in \textit{Tata Cellular v. UOI, AIR 1996 SC 11

50
Nehru Gandhi v. Raj Narain\textsuperscript{71} held that judicial review in election disputes was not a compulsion as it is not a part of basic structure. In S.P. Sampath Kumar v. Union of India\textsuperscript{72}, P.N. Bhagwati, C.J. relying on Minerva Mills Ltd.\textsuperscript{73}, declared that it was well settled that judicial review was a basic and essential feature of the constitution. If the power of judicial review was absolutely taken away, the constitution would cease to be what it was. In Sampath Kumar the court further declared that if a law made under Article 323-A(1) were to exclude the jurisdiction of the High Court under article 226 & 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure and hence outside the constituent power of parliament.

In L. Chandra Kumar v. Union of India\textsuperscript{74}, a larger bench of seven judges unequivocally declared: “that the power of judicial review over legislative action vested in the High Courts under article 226 and in the Supreme Court under article 32 of the Constitution is an integral and essential feature of the constitution, constituting part of its basic structure”.

Though one does not deny that power to review is very important, at the same time one cannot also give an absolute power to review and by recognizing judicial review as apart of basic feature of the constitution. Courts in India have given a different meaning to the theory of checks and balance this also meant that it has buried the concept of separation of power, where the judiciary will give itself an unfettered jurisdiction to review anything that it does by the legislature.

\textbf{2.6 Expansion of Judicial Review through Judicial Activism-}

After the draconian exposition of power by the executive and legislature during Emergency the expectations of the public soared high and the demands on the courts to improve the administration by giving appropriate directions for ensuring compliance with statutory and constitutional prescriptions. Likewise the judiciary has taken an activist view the beginning with the Ratlam Municipality case\textsuperscript{75} the

\textsuperscript{71} (1975) Supp SCC 1  
\textsuperscript{72} (1987)1 SCC 124  
\textsuperscript{73} (1980)3 SCC 625  
\textsuperscript{74} (1997)3 SCC 261  
\textsuperscript{75} Municipal Council v. Vardichand, (1980)4 SCC162
sweep of Social Action Litigation\textsuperscript{76} has empowered a variety of cases\textsuperscript{77}. With the interpretation given by the Supreme Court in \textit{Maneka Gandhi} case it brought the ambit of constitutional provisions to enforce the human rights of citizens and sought to bring the Indian Law in conformity with the global trend in the human rights jurisprudence. This was made possible in India, because of the procedural innovations with a view to making itself more accessible to disadvantaged sections of society giving rise to the phenomenon of Social Action Litigation\textsuperscript{78}. During the eighties and the first half of nineties, the courts have broken there shackles and moved much ahead from being a mere legal institution; its decisions have tremendous social, political and economic ramifications. Time and again it has sought to interpret constitutional provisions and the objective sought to be achieved by it and directed the executive to comply with its orders Public Interest Litigation, a manifestation of Judicial Activism, has introduced a new dimension regarding judiciary’s involvement in public administration\textsuperscript{79}. The sanctity of \textit{locus standi} and the procedural complexities are totally side tracked in the causes brought before the courts through PIL. In the beginning, the application of PIL/SAL was confined only to improving the lot of the disadvantaged sections of the society who by reason of their poverty and ignorance were not in a position to seek justice from the courts and, therefore, any member of the public was permitted to maintain an application for appropriate directions\textsuperscript{80}.

The new role of the Supreme Court has been criticized in some quarters as being violative of the doctrine of Separation of Powers, it is claimed that the Apex Court has, by formulating policy and issuing directions in respect of various aspects of the country’s administration, transgressed into the domain of the executive and the legislature. As Justice Cardozo puts it, “A Constitution states or sought to state

\textsuperscript{76} Prof. Upendar Baxi calls this as Social Action Litigation.
\textsuperscript{79} \textit{D. Satyanarayan v. N.T. Rama Rao}, (1988)1 Alt 178
not rules for the passing hour but principles for an expanding future\textsuperscript{81}. It is with this view that innovations in the rules of standing have come into existence.

Judicial Review is a great weapon in the hands of judges. It comprises the power of a court to hold unconstitutional and unenforceable any order based upon such law or another action by a public authority which is inconsistent or in conflict with the basic law of land\textsuperscript{82}.

2.7 Grounds for Judicial Review –

Judicial review is central in dealing with the malignancy in the exercise of administrative power. Outsourcing of legislative and adjudicatory powers to the administrative authorities as an imperative of modern system of governance has brought the law of judicial review of administrative action in prime focus. Law dealing with judicial review of administrative action is largely judge-induced and judge-led; consequently thickets of technicalities and inconsistencies surround it. Anyone who surveys the spectrum of judicial review finds that the fundamentals on which courts base their decisions include Rule of law, administrative efficiency, fairness and accountability. These fundamentals are necessary for making administrative action ‘people-centric’. Courts have generally exhibited a sense of self-restraint where judicially manageable standards do not exist for judicial intervention\textsuperscript{83}. However, “self-restraint” is not the absence or lack of power of judicial review. Courts have not hesitated, in exceptional situations, even to review policy matters and subjective satisfaction of the executive.

Generally, judicial review of any administrative action can be exercised on four grounds:

\begin{enumerate}
\item Illegality
\item Irrationality
\item Procedural Impropriety/ Fairness
\item Proportionality.
\end{enumerate}

---


\textsuperscript{82} Henry Abraham cited in \textit{Chander Kumar v. UOI}, (1997)3 SCC 261(292); AIR 1997 SC 1125

These grounds of judicial review were developed by the Lord Diplock in *Council of Civil Services Union v. Minister of Civil Services*\(^8\) . Though these grounds of judicial review are not exhaustive and can not be put in water tight compartments yet these provide sufficient base for the courts to exercise their review jurisdiction over administrative action in the interest of efficiency, fairness and accountability.

i) Illegality – decision makers must understand the law that regulate them. If they fail to follow the law properly, their decision, action or failure to act will be illegal. Thus an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers. This arises, for example when the legislation relating to a public body does not include the necessary power nor have precise limits or when the power can be used. Public bodies acting illegally in this way can be described as acting “*ultra vires*” (which means beyond or outside their powers).

Sometime legislation allows the exercise of a wide and seemingly unrestrained discretion by the public body, or provides that a duty should be discharged in certain circumstances, but does not prescribe a particular process for determining whether those circumstances arise in an individual case. Here, illegality can occur where the action, failure to act or decision in question in question violate the public law principles set down by the courts for processes of this kind. These principles require public bodies to:

a) take into account relevant information (and to assign the appropriate amount of weight to such information), and to ignore irrelevant information;

b) Ask the right questions and to undertake sufficient enquiry, for example by addressing the right issue and taking reasonable steps to obtain the information on which a proper decision can be based.

c) not to delegate a decision for which they are exclusively responsible, and that therefore only they can make-allowing another person to take a decision for them, means that they are giving their power away and fail to be properly accountable.

---

\(^8\) (1984)3 All ER 935(HL); (9185) AC 374 (CCSU Rules)
d) Ensure that they have not fettered their discretion by for example applying a very rigid policy as if it were legislation.

e) Comply with the Human Rights Act by acting compatibilities with the convention, so far as it is possible for them to do so.

So, all the decisions or actions taken should be within the scope of the relevant statutory (or occasionally non-statutory) legal powers. Many administrative decisions require decision-makers to consider the scope of their legal powers, as well as assessing the facts of each case. Many decisions also require the exercise of discretion.

ii) Irrationality – The courts may also intervene to quash a decision if they consider it to be so demonstrably unreasonable as to constitute ‘irrationality’ or ‘perversity’ on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the Wednesbury case:

“If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. ...but to prove a case of that kind would require something overwhelming...” Lord Greene

Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.85

This threshold is extremely difficult to meet, which is why the Wednesbury ground is usually argued alongside other grounds, rather than on its own. The onus is also on the claimant to establish irrationality or perversity.

It is important to note that this ground of review does not give judges much opportunity to review the merits of administrative decisions as the ground has a high threshold for judicial intervention which is rarely satisfied. The ground is directed at extremes of administrative behavior. Lord Greene in the Wednesbury case stated that for review to be successful on this ground the administrative decision taken must be something so absurd that no sensible person could ever dream that it laid within the powers of the authority.

85 [1948] 1KB 223 HL.
iii) Procedural Impropriety – Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached. The case must be heard and decided by the person to whom it is delegated and not by another. The process to arrive at some decision must be followed as it is expressed in the statute. The rule of natural justice must be applied by the deciding authority. The rules to be followed are:

a) “a man must not be judge in his own case” &

b) “hear the other side”.

This is the duty of the authority to act fairly while taking the matter before it. Fairness demands that a public body should never act so unfairly that it amounts to an abuse of power. This means that:

a) If there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them.

b) It must not breach the rules of natural justice. One of the key issues here is the rule against bias, which requires the public body to be impartial and to be seen to be so, e.g., the public body must not allow decisions to be made by people who have strongly held views which may cause them to reach a decision based on prejudice, nor allow decisions to be made by people who have a financial interest in the decision.

There must also be a ‘fair hearing’ before a decision is reached, although this does not always literally mean an oral hearing. Basically, a person is entitled to know the case against them, and must have the opportunity to put their case properly. Any other requirements above and beyond this will depend on the seriousness of the issue, e.g., if someone’s livelihood or liberty is at stake. Examples of unfairness could include the following:

a) Failing to tell the individual what the case was against them, or taking into account evidence or factors which she or he was not aware of.

b) Failing to allow the individual to put their case forward.

c) Failing to give the individual the facilities for putting their case forward properly.
d) Refusing to hear evidence which might have led to a different decision.

e) Denying access to relevant documents.

f) Holding a hearing in the absence of the individual when they had a good reason for not being able to attend.

g) Failing to notify the individual of the time and place of the hearing that would lead to the decision being taken.

h) Failing to consult those who the public body had a duty to consult or those who had a “legitimate expectation” that they would be consulted before the decision was made, perhaps because they had been consulted in the past or because it would seem obvious that someone has an interest in a matter and should be consulted.

Finally, fairness may also demand that the public body give reason for their decision. Certain statutory procedure will require this, although there is no specific requirement in law generally. However, more recent cases have suggested that in certain circumstances reasons should be given, and this will often depend on the nature of the decision and how important it is to an individual. Reasons for a decision may be required when the decision maker is a professional judge, the decision would otherwise appear aberrant (to diverge from the normal type), or where the subject matter is particularly highly regarded, such as a person’s liberty.

iv) Proportionality -- This principle provides that the means for achieving some object ought to be sufficient but not exercise for the purpose of achieving that object. Under this principle, the court will see that the legislature and administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose for which they were intended to serve.

2.8 Natural Justice – Habitat of Judicial Review –

The concept of natural justice is very important in the modern Administrative Law for it provides a basis for judicial control of the procedure followed by adjudicatory bodies, but it is vague, and has no fixed connotation. The concept of natural justice is flexible as its content depends *inter alia* upon the nature and
constitution of the body concerned, the function it is exercising the statute under which it is acting.

Principles of natural justice which are judge made rules are still continue to be a classical example of judicial activism were developed by the courts to prevent accidents in the exercise of outsourced power of adjudication to the administrative authorities. In India, there is no statute laying down the minimum procedure which administrative agencies must follow while exercising decision-making power. There is, therefore, a bewildering variety of administrative procedure. Sometimes the statute under which the administrative agency exercise power lays down the procedure which the administrative agency must follow but at times the administrative agency is left free to devise its own procedure. The question whether in particular case principles of natural justice have been contravened or not is a matter for the courts to decide from case to case\textsuperscript{86}. However, courts have always instated that the administrative agencies must follow a minimum of fair procedure. This minimum fair procedure refers to the principles of natural justice. So, with all its vagueness and flexibility, its two elements have been generally accepted, viz.

i) that the body in question should be free from bias, and

ii) that it should here the person affected before it decides the matters.

Rules of Natural Justice have developed with the growth of civilization and the content thereof is often considered as a proper measure of the level of civilization and Rule of Law prevailing in the community. Natural Justice is another name for common sense justice. Rules of natural justice are not codified canons. These are the principles ingrained in the conscience of man. Justice is based substantially on natural ideals and values which are universal. Natural Justice is not circumscribed by linguistic technicalities and grammatical niceties or logical prevarication. It supplies the omission of a formulated law. It is the substance of justice which has to determine its form. What particular form of natural justice should be implied and what its extent should be in a given case must depend to a great extent on the facts and circumstances of that case and the framework of the

\textsuperscript{86} A.K. Roy v. UOI, AIR 1982 SC 709
statute under which action is taken. The expressions ‘natural justice’ and ‘legal justice’ do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this purpose, natural justice is called in aid of legal justice. Natural justice meant many things of many writers, lawyers and system of law. It is a concept of changing content. However, this does not mean that at a given time no fixed principles of natural justice can be identified. The principles of natural justice through various decisions of courts can be easily ascertained, though their application in a given situation it may depend on multifarious factors. For fairness itself, it is a flexible, pragmatic and relevant concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in China shop or a Bee in one’s bonnet. Often the concept of natural justice is criticized as being an unruly horse. Replying to the criticism Lord Denning said, “With a good man in saddle, the unruly horse can be kept under control. It can jump over obstacles. It can leap fences put up by fiction and come down on the other side of justice”. Natural justice contents yield to change with exigencies of different situations and, therefore, do not apply in the same manner to situations which are not alike.

The Supreme Court has observed that the principles of natural justice have undergone a sea change and it is now settled that complainant must show that he has suffered from real prejudice. It is not applied in a vacuum without reference to the relevant facts. It is no unruly horse nor could it be put in a strait jacket formula. A decision will be vitiated where no hearing is given at all and nor where the infringement is technical. This decision like its precursors cited therein and particularly Sharma has caused confusion in the law. S.L. Kapoor which unqualifiedly stated that non observance of the principles of natural justice itself causes prejudice has not been overruled. So long as the view in Kapoor remains it is

---

90 P.D. Agarwal v. SBI (2006)8 SCC 776; AIR 2006 SC 2064
91 (1996)3 SCC 364; AIR 1996 SC 1669
92 (1980)4 SCC 379
almost impossible to reconcile the two inconsistent views which subsist in relation to invoking the principles of natural justice.

For some three or four hundred years, Anglo – American courts have actively applied two principles of natural justice. However, this reduction of the concept of natural justice to only two principles should not be allowed to obscure the fact that natural justice goes to “the very kernel of the problem of administrative justice”93. These two principles are:

1] *Nemo in propria causa judex, esse debet* – No one should be made a judge in his own cause, or the rule against bias.

2] *Audi alteram partem* – Hear the other party, or the rule of fair hearing, or the rule that no one should be condemned unheard.

These principles are the foundation on which the whole superstructure of judicial control of administrative action is based.

### 2.8.1 Rule against Bias –

The first principle means that the adjudicator should be disinterested and unbiased; that the prosecutor himself should not be a judge; that the judge should be a neutral and disinterested person; that a person should not be a judge in his own cause; that a person interested in one of the parties to the dispute should not, even formally, take part, in the adjudicatory proceeding. ‘Bias’ means an operative prejudice, whether conscious or unconscious, in relation to a party or issue. Such operative prejudice may be the result of a preconceived opinion or a predisposition or a predetermination to decide a case in a particular manner, so much so that it does not leave the mind open. In other words ‘Bias’ may be generally defined as partiality or preference which is not founded on reason and is actuated by self interest – whether pecuniary or personal94.

It is often said that justice should not only be done but it should appear to have been done. Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking: “The judge was biased”. The logic is

---

equally applicable to governmental action and the government.\textsuperscript{95}

The basis of this principle is that justice should not only be done, but should manifestly and undoubtedly be seen to be done.\textsuperscript{96}

Actual existence of bias is not necessary. The test of bias is “real likelihood of bias”. If, a reasonable man would think, on the basis, of the existing circumstances that he (i.e. adjudicator) is likely to be prejudiced, that is sufficient to quash the decision.\textsuperscript{97}

Bias may arise when the adjudicator has some interest in the subject matter of the proceedings before him. If the interest is pecuniary, disqualification arises however small the interest may be. In case of other interest, it is necessary to consider whether there is a reasonable ground for assuming the likelihood of bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice.

In a departmental inquiry against N,\textsuperscript{98} the person presiding over the inquiry himself gave evidence against N, and thereafter continued to preside over the inquiry. This clearly evidences a state of biased mind against N.

The all important Kraipak case\textsuperscript{99} may also be noted here. In a selection board for certain posts, a member was himself a candidate who was selected along with a few others. On a challenge by the candidates not selected, the Supreme Court quashed the list of successful candidates on the ground of bias in so far as a person personally interested in the matter sat on the selection committee. Similarly, selection of a candidate was quashed because his son-in-law was a member of the selection committee.\textsuperscript{100}

A senior officer expresses appreciation of the work of a junior in the

---

\textsuperscript{95} Center for Public Interest Litigation v. UOI, (2005)8 SCC 202; AIR 2005 SC 4413
\textsuperscript{96} Jain, A Treaties, op. cit. Ch. XI; Cases 1, op. cit, Ch X
\textsuperscript{98} State of U.P. v. Nooh, AIR 1958 SC 86; 1958 SCR 595
\textsuperscript{99} AIR 1970 SC 150; (1969)2 SCC 262
\textsuperscript{100} D.K. Khanna v. UOI, AIR 1973 HP 30; Also see S.P. Kapoor v. State of H.P., AIR 1981 SC 2181; (1981)4 SCC 716
confidential report. It does not amount to bias nor would it disqualify the senior officer from being a part of the Departmental promotion committee to consider the junior officer along with others for promotion. The Supreme Court has stated that every preference does not vitiate an action. “If, it is rational and unaccompanied by otherwise, it would not, vitiate a decision”\textsuperscript{101}.

2.8.2 Fair Hearing –

This is the second long arm of natural justice which protects the ‘little man’ from arbitrary administrative actions whenever his right to person or property is jeopardized. Thus one of the objectives of giving a hearing in application of the principles of natural justice is to see that an illegal action or decision does not take place. Any wrong order may adversely affect a person and it is essentially for this reason that a reasonable opportunity may have to be granted before passing an administrative order\textsuperscript{102}. That no one should be condemned unheard is an important maxim of civilized jurisprudence\textsuperscript{103}. But the court will not strike down an order merely because the order has been passed against the petitioner in breach of natural justice. It would be justified in refusing to do so if such striking down would result in restoration of another order passed earlier in favor of the petitioner and against the opposite party in violation of principle of natural justice or is otherwise not in accordance with law\textsuperscript{104}.

The right of fair hearing does not necessarily include an oral hearing. What is essential is that the party affected should not be given sufficient opportunity to meet the case against him and this could be achieved by filing written representations\textsuperscript{105}. The party concerned should have adequate notice of the case against him which he has to meet, and that the party affected should be apprised of the evidence on which the case against him is based and be given opportunity to rebut these materials\textsuperscript{106}.

\textsuperscript{101} G.N.Nayak v. Goa University, (2002)2 SCC 712; AIR 2002 SC 790
\textsuperscript{102} BALCO Employees Union v. UOI, (2002)2 SCC 333
\textsuperscript{103} Board of Education v. Rice, 1911 AC 179; Local Govt. Board v. Arlidge, 1915 AC 120; North Bihar Agency v. State of Bihar, AIR 1981 SC 1758; (1981)3 SCC 131
\textsuperscript{105} M.P. Industries v. UOI, AIR 1966 SC 671
\textsuperscript{106} D.C. Mills v. Commr. Income Tax, AIR 1955SC65; Prem Prakash v. Punjab University, AIR 1972 SC 1408; (1973)3 SCC 424
Refusal of sufficient time to file a reply to MP’s who were charged with incurring disqualification was recognized in principle, but on facts it was held that adequate time was given\(^{107}\).

No evidence should be taken behind the back of the back\(^{108}\). Though the Indian Evidence Act, as such, does not apply to quasi-judicial bodies, yet the rules of natural justice require that such a body does not act on Evidence which has no probative value\(^{109}\). A party should have the opportunity to adducing all relevant evidence on which he relies. Representation by a lawyer is not regarded as a necessary element of natural justice, but there may be circumstances when denial of a lawyer may amount to denial of natural justice, e.g., when one side is represented by a legally trained officer, it will be denial of natural justice to refuse representation by a lawyer to the other side\(^{110}\).

An obligation to give reasons for their decisions has also been imposed on quasi-judicial bodies\(^{111}\). And subsequently the court has emphasized that the necessity of giving reasons is not confined to tribunals, lower courts or administrative bodies but extends to High Courts also\(^{112}\). Interference by High Court without assigning any reason is unsustainable\(^{113}\). Where the High Court without recording any error or perversity in appointment process, reverses the collector’s decision which based its judgment on stray facts, the Supreme Court held the reversal was not proper and without jurisdiction\(^{114}\).

2.9 *Doctrine of Promissory Estoppel* –

Promissory or equitable estoppel has been developed by the courts for the purpose of ensuring that a party is faithful to a promise or representation made to

---


\(^{109}\) *UOI v. Verma*, AIR 1957 SC 882; *B.E. supply & Co. v. Workmen*, AIR 1972 SC 303


\(^{111}\) *Imperial Chemical Industries Ltd. v. Registrat Trade Marks*, AIR 1981 Del 190; *Cycle Equipment (P) Ltd. v. Municipal Corporation of Delhi*, AIR 1983 Del 94; *Alok Prasad Verma v. UOI*, AIR 2001 Pat 211


another party who relies upon this promise or representation. This intervention by
them prevents the party relying upon the promise from injustice if the promise or
representation is not being fulfilled. The core of the doctrine is ‘faith of the people’
in governance which has assumed tremendous importance in this era of global
economy. Estoppel is a rule whereby a party is precluded from denying the
existence of some state of facts which he had previously asserted and on which the
other party has relied or is entitled to rely on. Its need arose because the rigid
adherence to the common law principle requiring all contracts to be accompanied by
consideration led to several unjust outcomes. This led to the development of a
principle in the equity such that under certain circumstances parties could be held to
promises which were accompanied by consideration. This is the principle of
equitable estoppel. This doctrine of promissory estoppel has been evolved by courts,
on the principle of equity, to avoid injustice. A person who himself misled the
authority by making a false statement, can not invoke this principle.

The principle of estoppel in India is a rule of evidence incorporated in
Sec.115 of the India Evidence Act, 1872. The section reads as follows:

“When one person has, by his declaration, act or omission, intentionally
causc or permitted another person to believe such a thing to be true and to act upon
such belief, neither he nor his representative, to deny the truth of that thing.”

However, even where the case does now fall under section 115, promissory
estoppel can still be invoked. This doctrine is now well established in the field of
administrative law. Because the section talks about (Sec. 115) representations
made as to existing facts whereas promissory estoppel deals with further promises.
A man should keep his words, all the more so when the promise is not a bare
promise but is made with the intention that the other party should act upon it.

Promissory estoppel is a relatively new development. In order to trace the
evolution of the doctrine in England we need to refer to some of the English
decisions. The early cases did not speak of this doctrine as estoppel. They spoke of it

15
as ‘raising equity’. Lord Cairns stated the doctrine in its earliest form in the following words in *Hughes v. Metropolitan Railway Company*\(^{118}\),

“It is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties”.

This principle of equity made sporadic appearances but it was only in 1947 that it was restated as a recognized doctrine by Lord Denning in *Central London Properties Trust v. High Trees House Ltd.*\(^{119}\), he asserted:

“A promise intended to be binding, intended to be acted upon, and in fact acted upon is binding”.

In India, there are two stages in the evolution of the application of this doctrine; pre *Anglo Afgan* case and post *Anglo Afgan* case. Prior to this case, the position was that the promissory estoppel did not apply against the government. But the position altered with this case. In *Union of India v. Anglo Afgan Agencies*\(^{120}\), the government of India announced certain concessions with regard to the import of certain raw materials in order to encourage export of woolen garments to Afghanistan. Subsequently, only partial concessions were extended as announced. The Supreme Court held that the government was estopped by its promise. Thereafter, the courts have applied the doctrine of promissory estoppel even against the government. It is now settled that the doctrine of promissory estoppel applies equally to government and public authorities. But it is equally settled that this doctrine cannot be used to compel the government or public authority to carry out a representation or promise which is prohibited by law or which may be beyond the power of the officer making it. It will also not apply to government or public

---

\(^{118}\) [1877]2 AC 439

\(^{119}\) (1947) K.B. 130

\(^{120}\) AIR 1968 SC 718
authority if the larger public interest so demands. The judicial trend clearly indicated that, in India, estoppel would not be available against the government in violation of a statute or even if it jeopardizes the constitutional powers of the government. In C. Shankarnarayan v. State of Kerala121, as a result of an understanding between the employees and the government, a notification was issued under article 309 of the constitution raising the age for retirement, but a subsequent notification was brought down to 55 years. Rejecting the contention of estoppel, the court held that the power conferred by Article 309 of the constitution can not be curtailed by any agreement. The same point of view was reaffirmed in Ramanatha Pillai v. State of Kerala122. The same opinion was reiterated with greater vigor in State of Kerala v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd23. In this case the Supreme Court summarily dismissed the plea of estoppel against the government on the ground that the government can not abdicate their legislative powers by mere agreement. The most significant judicial decision, in which, the strict rule of non availability of estoppel against the Government, was relaxed, was in UOI v. Anglo Afghan Agencies124. The facts of this case were that the Textile Commissioner published a scheme of export promotion and represented to the exporters of woolen goods that they would be entitled to import raw material of the total amount equal to 100% of the F.O.B. value of exports. In the instant case, the respondent exported goods worth Rs.5 lacs but the Commissioner issued an import license for Rs.1.99 lacs only. On the order being challenged, the govt. took the plea that the scheme is merely administrative in character and, therefore, not binding on the govt. The Supreme Court rejected the contention and held that even if the scheme has no statutory force the government is not entitled to break promises at their whim. The Court observed that the government on some undefined and undisclosed ground of necessity or expediency can neither refuse to carry out the promise solemnly made by it, nor it can claim to be the judge of its own obligations to the citizens on an ex parte appraisement of the circumstances.

121 (1971) 2 SCC 361; AIR 1971 SC 1997
122 (1973) 2 SCC 650; AIR 1973 SC 2641
123 (1973) 2 SCC 713; AIR 1973 SC 2734
124 AIR 1968 SC 718
The case of *Motilal Padampat Sugar Mills v. State of U.P.*\(^{125}\) is a trendsetter regarding the application of the doctrine of promissory estoppel against the govt. In this case the Chief Secretary of the government gave a categorical assurance that total exemption from sales tax would be given for three years to all new industrial units in order them to establish themselves firmly. Acting on this assurance the appellant sugar mills set up a hydrogenation plant by raising a huge loan. Subsequently, the government changed its policy and announced that sales tax exemption will be given at varying rates over three years. The appellant contended that they set up the plant and raised huge loans only due to the assurance given by the government. The Supreme Court held that the government was bound by its promise and was liable to exempt the appellants from sales tax for a period of three years commencing from the date of production.

For attracting the doctrine of promissory estoppel what is necessary is only that the promise should have altered his position in relying on the promise. It is not necessary that he should suffer any detriment as well. The doctrine of promissory estoppel is not really based on the principle of estoppel, but it is a doctrine evolved by equity in order to prevent injustice. There is no reason why it should be given only a limited application by way of defense. It can be the basis of action\(^{126}\).

### 2.10 **Doctrine of Legitimate Expectation**

The doctrine of legitimate expectation belongs to the domain of public law and is intended to give relief to the people when they are not able to justify their claims on the basis of law in the strict sense of the term though they had suffered civil consequences because their legitimate expectation had been violated\(^{127}\).

The principles of natural justice have enriched law and constitutions the world over. Article 14 of the Indian Constitution applies not only to discriminatory class legislation but also to arbitrary or discriminatory class legislation but also to arbitrary or discriminatory State action, because violation of natural justice is violation of equality clause of Article 14\(^{128}\). Principles of natural justice are judge

---

\(^{125}\) (1979)2 SCC 409; AIR 1979 SC 621

\(^{126}\) Ibid

\(^{127}\) Clerk, R., In Pursuit of Fair Justice, AIR 1996(J)11

\(^{128}\) *Satyavir Singh v. UOI*, AIR 1986 SC 555
made rules and still continue to be a classical example of judicial activism. These principles are attracted whenever a person suffers a civil consequences or a prejudice is caused to him by any administrative action. Loss of ‘Legitimate Expectation’ also attracts the principles of natural justice.

The judiciary plays very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the administrative action. All this is possible thanks to the power of judicial review. It is the significance of judicial review, to ensure that the democracy is inclusive and that there is accountability of everyone who wields or exercise public power.

The Doctrine of Legitimate Expectation is a recent creation of the decisional law. It forms part of a judicial strategy to exclude the possibility of arbitrary administrative actions. The theory of legitimate expectation is a branch of administrative law. It is the newest entrant to long list of concepts introduced by the courts for the review of administrative action. This doctrine is one of the finest examples of judicial creativity. Legitimate expectation applies the principles of fairness and reasonableness to a situation where a person has an expectation or interest in a public body or private parties retaining a long-standing practice or keeping a promise.

The theory of legitimate expectation marches into operation when there is an express promise from any public authority/ official that there is a regular practice of a certain thing, which the claimant can reasonably expect to continue. In other words, it consists of either inculcating anticipation in the citizen, or assuring him that under certain rules and schemes he would continue to reap certain benefits of which he would not be deprived unless there is some overriding public interest. This doctrine of legitimate expectation has two aspects – procedural and substantive. The procedural aspect of it relates to a representation that a hearing or other appropriate procedure will be afforded before any decision is made. The substantive aspect of the doctrine overlap with the doctrine of promissory estoppel, with the difference that in promissory estoppel, there is a promise on behalf of the authority where as in legitimate expectation, disappointment is caused by sudden change of policy or
procedure. The doctrine of legitimate expectation is invoked to prevent an administrative authority from exercising its discretion arbitrarily. In its substantive sense, it is another parameter for judging the validity of the exercise of administrative discretion. Where discretion is exercised in a manner not consistent with the past practice or policy, its unreasonableness is examined with reference to the detriment caused by the non-fulfillment of legitimate expectation.

The natural habitat for this doctrine can be found in Article 14 of the Constitution which abhors arbitrariness and insists on fairness in all administrative dealings. It is now firmly sure that the protection of Article 14 is available not only in case of arbitrary ‘class legislation’ but also in case of arbitrary ‘state action’. Thus the doctrine is being hailed as a fine principle of administrative jurisprudence for reconciling power with liberty.\(^\text{129}\). The doctrine of legitimate expectation contributes to the expansion of the duty to observe the requirements of natural justice by extending the duty beyond the relatively narrow range of rights and interests to which natural justice had traditionally applied.

The doctrine of legitimate expectation is invoked in a range of cases, the common theme of which is, the principle that when administrative officials had created or induced a belief in a person about the possible exercise of their powers, any change affecting this belief should be conditioned by the rules of natural justice.

As legitimate expectation doctrine gained importance, it had been invoked in a wider range of cases, which can be conveniently summarized into four categories. The first category is in which a person had relied upon a policy or norm of general application but was then subjected to a different policy or norm. The second category, which is a slight variation on the first, includes cases in which a policy or norm of general application exists and continues but is not applied to the case at hand. The third category, arises when an individual receives a promise or representation which neither is nor honoured due to a subsequent change of a policy or norm of general application. The fourth category, which is variation on the third arises when an individual receives a promise or representation which is subsequently

\(^{129}\) FCI v. Kamdhenu Cattle Feed Industries, AIR 1993 SC 1601
dishonoured, not because there had been a general change in policy, but because the
decision-maker had changed its mind in that instance.

Lord Denning first introduced the concept of legitimate expectation in
Schmidt v. Secretary of State for Home Affairs\textsuperscript{130}, in the context of natural justice.
This doctrine is still in an evolutionary stage yet one thing is certain that it is an
equity doctrine and, therefore, the benefit of doctrine can not be claimed as a matter
of course. It is a flexible doctrine which can be molded to suit the requirements of
each individual case. The court did not apply the doctrine where applicant’s own
conduct was unlawful or claim was unworthy.

This doctrine has flourished tremendously in India in recent times. This
reference was found in State of Kerala v. K.G. Madhavan Pillai\textsuperscript{131}, in this case the
government had issued a sanction to the respondents to open a new unaided school
and to upgrade the existing ones. However after 15 days a direction was issued to
keep the sanction in abeyance. This order was challenged on the ground of violation
of natural justice. The court held that the sanction order created legitimate
expectation in the respondents which was violated by the second order without
following the principles of natural justice which is sufficient to vitiate an
administrative order.

This doctrine again made its mark in Scheduled Caste and Weaker Section
Welfare Association v. State of Karnataka\textsuperscript{132}; in this case the government had
issued a notification notifying areas where slum clearance scheme will be
introduced. However, the notification was subsequently amended and certain areas
notified earlier were left out. The court held that the earlier notification had raised
legitimate expectation in the people living in an area which had been left out in a
subsequent notification and hence legitimate expectation can not be denied without a
fair hearing.

The Supreme Court had explained the clear meaning and scope of this
document in UOI v. Hindustan Development Corporation\textsuperscript{133}. The court held that the

\textsuperscript{130} (1969)2 Ch. 149
\textsuperscript{131} AIR 1989 SC 49
\textsuperscript{132} (1991)2 SCC 604
\textsuperscript{133} (1993)3 SCC 499, pg.540
legitimacy of an expectation can be inferred only if it is founded sanction of law or
custom or an established procedure followed in a natural and regular sequence. The
expectation should be justifiable, legitimate and protect able. In Navjyoti Co-OP
Group Housing Society v. UOI \(^{134}\), it was held that the doctrine of legitimate
expectation imposes in essence a duty on public authorities to act fairly by taking
into consideration all the relevant factors bearing a nexus to such legitimate
expectation. The concerned authority can not act arbitrarily so as to defeat the
expectations, unless demanded by overriding reasons of public policy.

It is clear in Punjab Communications Ltd. v. UOI (1994), where Supreme
Court held that the doctrine of legitimate expectation in the substantive sense has
been accepted as a part of our law and that the decision maker can normally be
compelled to give effect to his representation in regard to the expectation based on
previous practice or past conduct unless some overriding public interest comes in the
way.

A number of recent judicial decisions have attempted to reduce uncertainty
in the doctrine of legitimate expectation. This doctrine concerns the relationship
between public administration and individual. This principle means that expectations
raised by administrative conduct have to be respected and fulfilled, lest public
interest and betterment demands otherwise. Non-fulfillment can have legal
consequences. The role of the courts in the entire transactions is to safeguard the
individual’s expectations in the name of change of policy. Precisely speaking, the
government and its department, in administering the affairs of the country are
expected to honor their statement can not be disregarded unfairly. Unfairness and
arbitrariness are akin to violation of principles of natural justice.

2.11 **Doctrine of Proportionality** -

With the growth of administrative law there was needed to control the
possible abuse of discretionary power by the administration. For this purpose courts
have evolved various principles like illegality, irrationality, procedural impropriety
and proportionality. This is the latest entrant in the administrative law.

\(^{134}\) AIR 1993 SC 155
Proportionality means that the administrative action should not be more drastic than it ought to be for obtaining desired result. This implies that cannon should not be used to shoot a sparrow. This doctrine tries to balance means with ends. Proportionality shares space with ‘reasonableness’ and courts while exercising power of review sees, ‘is it a course of action that could have been reasonably followed’. Courts in India have been following this doctrine for a long time but English Courts have started using this doctrine in administrative law after the passing of the Human Rights Act, 1998.

‘Doctrine of Proportionality’ is a theory, which has great practical and social significance in India. The said doctrine originated as far back as in the 19th century in Russia & was later adopted by Germany, France and other European countries. By Proportionality, it is meant that the question whether while regulating the exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve to achieve the object of the legislation or the purpose of the administrative order, as the case may be, under the principle, the court will see that the legislature and administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose for which they were intended to serve. Through the use of this doctrine court would not allow administration to use a sledge-hammer to crack a nut where a pairing knife would suffice. Thus it is a principle where courts would examine priorities and processes of the administration for reaching a decision or recalling a decision. However, courts have always tried to temper this doctrine with the doctrine of ‘flexibility’.

Proportionality is “concerned with the way in which the decision-maker has ordered his priorities, the very essence of decision-making consists in the attribution of relative importance to the factors in the case”. In the Human Rights context, proportionality involves a ‘balancing test’ and the ‘necessity test’. The former scrutinizes exercises and onerous penalties or infringement of rights or interest whereas the latter takes into account other less restrictive alternatives.


72
It was Lord Diplock who first alluded to the introduction of proportionality into English Law in the *CCSU case*[^137] where he referred to the grounds of review as irrationality, illegality and procedural impropriety and then went on to foresee the adoption into English Law of the principle of proportionality. This statement sparked debate as to whether proportionality should operate as part of the unreasonableness ground of review, whether it is in itself a completely separate ground of review or indeed whether it should have any role to play at all in reviewing discretion at all. Arguments in favour of it operating as a totally separate ground of review replacing that of unreasonableness is a vague standard, incapable of definite application, proportionality advocates a relatively specific principle – one that is at any rate far more specific than ‘unreasonableness’ or ‘irrationality’ – hence it focuses more clearly than those vaguer standards on the precise conduct it seeks to prevent. By concentrating on the specific it is more effective in excluding general considerations based on policy rather than principle.

In short, proportionality is presented as a principle capable of objective and certain application, one which does not encourage judicial usurpation of the administrative function. This doctrine plays as an important basis for exercising judicial review. This entails that administrative measures must not be more drastic than what is necessary for attaining the desired result. The doctrine operates both in procedural and substantive matters. This principle contemplates scrutiny of whether the power that has been conferred. Thus, any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of power conferred.

The next decision came in 1991 by the House of Lords in *R. v. Secy for Home Affairs, Brind, ex.p.*[^138], where it was again reiterated that doctrine of proportionality can not become a part of administrative law in England unless European Convention of Human Rights and fundamental freedoms are incorporated by the parliament into domestic law. Their Lordship denied that proportionality was a separate ground of review, but accepted that it could be of relevance in

[^137]: *Council of Civil Services Union v. Minister of Civil Services*, (1984)3 All ER 935(HL) : (1985)AC 374
[^138]: (1991)1 All ER 720
establishing *Wednesbury* unreasonableness.

In India Fundamental Rights form a part of the Indian Constitution, therefore, courts have always used the doctrine of proportionality in judging the reasonableness of a restriction on the exercise of fundamental rights. The law is clear on the point that while deciding the reasonableness of the restriction on fundamental rights the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, disproportion of the imposition, prevailing conditions at that time should all enter into judicial verdict\(^1\). Thus, while exercising the power of judicial review court performs the primary role in Brind’s sense of evaluating if a particular competing public interest justifies the particular restriction under the law. This situation arises when the court is deciding on the constitutionality of a law imposing unreasonable restriction on the exercise of fundamental rights.

It may perhaps seem coincidental that proportionality has only been analyzed in the context of misconduct in service matters in India. In *Hind Construction Co. v. Workmen*\(^2\), some workers remained absent from duty treating a particular day as holiday. They were dismissed from service. The industrial tribunal set aside the action. Confirming the order of the tribunal, the Supreme Court observed that the absence could have been treated as leave without pay. The workmen might have been warned and fined. “It is impossible to think that any reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this manner.”

In *Ranjit Thakur v. UOI*\(^3\), a signalman in the army was already serving 28 days punishment for insubordination. During this period he refused to eat his food even though directly ordered to do so. This further act of insubordination made his commanding officer try him for summary court-martial. He was subsequently


\(^2\) *AIR* 1965 SC 917 (919-920); (1965)2 SCR 85

\(^3\) (1987)4 SCC 611
removed from service. The High Court dismissed his writ petition. The Supreme Court after referring to Lord Diplock’s classic statement on judicial review in Council for Civil Services Union v. Minister of Civil Services and in Bhagat Ram held that a sentence should not be so disproportionate to the offence as to shock the conscience and that the doctrine of proportionality would ensure that if a decision of the court even as to sentence is an outrageous defiance of logic, than it was not immune from correction.

In Sardar Singh v. UOI, a jawan serving in the Indian Army was granted leave and while going to his home town, he purchased 11 bottles of rum from army canteen though he was entitled to carry only four bottles. In court-martial proceedings, he was sentenced to undergo R.I., for three months and was also dismissed from service. His petition under article 226 of the constitution was dismissed by the High Court. The petitioner approached the Supreme Court. Holding severe, the court set aside the order.

It is submitted that the observations made by the Supreme Court did not lay down the correct law in as much as, the doctrine of proportionality in awarding punishment has been recognized by the Indian Courts since long. It is no doubt true that in the facts and circumstances of the case, the punishment awarded to the petitioner could not be said to be excessively high or grossly disproportionate to the charges leveled and proved against him, wider observations were unnecessary. If the punishment imposed on employee is excessively harsh or disproportionate, a High Court or the Supreme Court, in exercise of the powers under articles 32, 226, 136 & 227 of the Constitution of India, can interfere with it. If the Central Administrative Tribunal could be said to be substitute of a High Court which position was conceded even by the Supreme Court, the Tribunal undoubtedly possessed power to interfere with the order of punishment.

Again, in UOI v. G. Ganayatham, on proved misconduct of an employee, 50% pension and 50% of gratuity were withheld. The Central Administrative

\[144\] (1997)7 SCC 463
Tribunal reduced the penalty. Holding that the scope of judicial review in such matters is very limited, the Supreme Court quashed the order of the Tribunal and upheld the action taken by the authorities. In the same manner in *Hombe Gowda Educational Trust v. State of Karnataka* 146, Supreme Court observed that through dismissal causes grave hardship but grave misconduct should not go unpunished. Thus courts are now more willing to provide more space to employers in labor relations in the interest of societal concerns. The Hon’ble Supreme Court in the case of *Teri Oat Estate (P) Ltd. v. U.T. Chandigarh* 147 discussed the doctrine of proportionality in its historical perspective. It has been held that the court has to see that the legislature and the administrative authority maintain a proper balance between the adverse effects, which the legislation or the administrative order may have on the rights, liberties or interests of persons, keeping in mind the purpose which they were intended to serve. It also been concluded that every case has to be examined on its own facts.

2.11.1 *Wednesbury’s principles of unreasonableness and Proportionality* -

It is clear that the principles of reasonableness and proportionality cover a great deal of common ground 148. The *Wednesbury* principle, lay down as early as 1947, continue to be of vital importance. Earlier, the English Court could interfere only with the decision of judicial and quasi-judicial authorities but not with administrative decisions. The decision in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* 149 altered this position. The court held that it can not interfere as an appellate authority overriding the decisions of such authority but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power. Lord Greene, who rendered the leading judgment, dealt with the law in detail and enunciated “principle of unreasonableness” and Indian Courts have followed these ‘*Wednesbury* principles of reasonableness’ in various decisions. Lord Greene M.R. went on to describe various grounds of challenge which went into the legality of public body’s action. Unreasonableness was used to describe actions.

---

146 (2006)1 SCC430  
147 (2004)1 RCR (Civil)540; (2004)2 SCC 130  
148 *Wade: Administrative Law*, (1994), pg.403  
149 (1947)2 All ER 680
based on illegality, irrationality and the like. This *Wednesbury* test has been the major tool used by the courts to control discretionary decisions.

These principles of *Wednesbury* unreasonableness underwent some modification by the decision of Lord Diplock in the celebrated case of *Council for Civil Services Union v. Minister of Civil Services*\(^{150}\), also known as GCHQ case. Through his judgment, Lord Diplock widened the grounds of judicial review. He mainly referred to these grounds upon which administrative action is subject to control by judicial review. The first ground being ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’. He also mentioned that by further development on a case to case basis, in due course, there may be other grounds for challenge. He particularly emphasized the principles of proportionality. Thus, in a way, Lord Diplock replaced the language of ‘reasonableness’ with that of ‘rationality’ when he said:

“By ‘irrationality’, I mean what can by now be succinctly referred to as ‘*Wednesbury* unreasonableness’……. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it………….”

The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between his particular goals and the means he employs to achieve those goals, so that his action impinges on the individual rights to the minimum extent to preserve public interest\(^{151}\). Thus implying that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred.

The principle of proportionality therefore implies that the court has to necessarily go into the pros and cons of any administrative action called into question. Unless, the impugned administrative action is advantageous and in the public interest, such an action can not, be upheld. At the core of this principle is the scrutiny of the administrative action to examine whether the power conferred is exercised in proportion to the purpose for which it has been conferred. Thus, any

\(^{150}\) (1985)AC 374

administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred. This is so as administrative decisions can often have profound implications on the day-to-day lives of our citizens, their rights, liberties and legitimate pursuits.

The test adopted by Lord Diplock also underwent criticism and it was said in another decision as “conduct which no sensible authority acting within due appreciation of its responsibilities would have decided to adopt” and these unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers.

Prof. Jeffrey Jowell in his article titled “Beyond the Rule of Law: Towards Constitutional Judicial Review”\(^\text{152}\) describes the proportionality test to involve a ‘sophisticated four stage process’ posing the following questions:

1) Did the action pursue a legitimate aim?

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

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

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

According to Prof. Jowell, such a four fold test can ensure that a \textit{prime facie} violation of a fundamental democratic right is not lightly sanctioned while providing for a heightened scrutiny of a decision called into question.

It must be appreciated that decisions concerning administrative law affecting fundamental freedoms have always been tested against the principle of ‘proportionality’ although it may not always expressly be stated that the principle being adopted was that of ‘proportionality’.

It is worth mentioning that even before the decision in \textit{Ex-P. Daly} (13 May 2001), the Supreme Court had firmly acknowledged this tool of judicial interpretation in \textit{Om Kumar v. UOI}\(^\text{153}\) decided on 17 Nov., 2000. In this case proportionality was held to mean whether while regulating the exercise of

\(^{152}\) (2000)PL 671 pg. 681

\(^{153}\) (2001)2 SCC 386

78
fundamental rights, the appropriate or least restrictive choice of measures have been adopted by the legislature or the administrator so as to achieve the object of the legislation or administrative order. And that it was for the superior courts to decide whether the choice made by the legislature or the administrative authorities infringed the rights excessively. This is the essence of the doctrine of proportionality.

In State of U.P. v. Sheo Shankar Lal Srivastava and Ors\textsuperscript{154}, the Supreme Court has supplied further credence to ex-parte Daly. In Commissioner of Police v. Syed Hussain\textsuperscript{155} a similar endorsement was made.

It is, therefore, beyond any doubt or dispute that the doctrine of proportionality has to be applied in appropriate case as the depth of judicial review will depend on the facts and circumstances of each case.

2.12 Doctrine of Public Accountability –

Accountability simply means that if a public officer abuses his office, either by an act of omission or commission, and in consequence of that there is an injury to an individual or the public at large, he must be held responsible for it. Once a top bureaucrat casually remarked that the main the main problems of administration in India are: (i) Faulty planning, (ii) corrupt execution, (iii) absence of public accountability. No one would perhaps disagree with this statement. Out of these three problems, public accountability is basic, in the sense that if the guilty are punished quickly and adequately, it will take care of the other two problems. Unfortunately, today the procedure of accountability are either non-existent or are very feeble and fragile, besides being dilatory and any person with sufficient money power or personal connection can bend them in any manner he likes. When it comes to accountability, the system, as it exists today at different levels, proves to be so strong and powerful that it defeats every real attempt in this direction. In other words, the politico-bureaucratic wall proves so strong that it defeats all possible attempts at enforcing liability. Therefore, in the name of enforcing liability, what one sees is merely shadow-boxing. The manner in which the Central Vigilance Commission Ordinance pulled down the directives of the Apex Court is a pointer in

\textsuperscript{154} (2006)3 SCC 276
\textsuperscript{155} (2006)3 SCC 173
that direction. It is for this reason alone that the Lokpal Bill has failed in its every attempt since 1968 to see the light of the day.

Doctrine of Public Accountability is one of the most important emerging facets of administrative law in recent times. The basic purpose of the emergence of this doctrine is to check the growing misuse of power by the administration and to provide speedy relief to the victims of such exercise of power. The doctrine is based on the premise that the power in the hands of administrative authorities is a public trust which must be exercised in the best interest of the people. Therefore, the trustee (public servant) who enriches himself by corrupt means holds the property acquired by him as a constructive trustee.

The celebrated decision of the Privy Council in A.G. of Hong Kong v. Reid\(^{156}\) has greatly widened the scope of this principle of jurisprudence in public law adjudication. Lord Templeman observed that engaging in bribery is an evil practice which threatens the foundations of any civilized society and that any benefit obtained by a fiduciary through the breach of duty belongs in equity to the beneficiary (the State), is the basic norm subject to which all legal principles require to be interpreted.

The concept of constructive trust and equity to enforce public accountability as laid down in Reid case\(^{157}\) was followed by the Supreme Court in A.G. of India v. Amrittal Prajivandas\(^{158}\). In this case, the court was dealing with the validity of the “illegally-acquired properties” in clause (c) of Section 3(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA). The Act provided for the forfeiture of properties earned by smuggling or other illegal activities whether standing in the name of other parties. The Court upheld the validity of the Act. The Supreme Court in, D.D.A. v. Skipper Construction Co.\(^{159}\), not only further allowed the above principle but enlarged its scope by stating that even if there was no fiduciary relationship or no holder of public office was involved, if it is found that someone has acquired properties by defrauding the

\(^{156}\) (1993)3 WLR 1143
\(^{157}\) Hong Kong v. Reid, (1993)3 WLR 1143
\(^{158}\) (1994)5 SCC 54
\(^{159}\) (1996)4 SCC 622
people, and if it is found that someone has acquired properties by defrauding the people, and if it is found that the persons defrauded should be restored to the position in which they would have been but for the said fraud, the court can go ahead with the necessary orders.

Thus, the concept of public accountability was extended to the private sector which is very relevant in this age of privatization and globalization of economy. The court further held that all properties must be immediately attached. The burden of proof to prove that the attached properties were not acquired with the aid of monies/properties received in the course of corrupt deals shall lie on the holder of such properties. This is what equity means and in India, courts are not only courts of law but also courts of equity. In this case a private company had purchased a plot of land in an auction from the Delhi Development Authority but did not deposit the bid amount. When the DDA proposed cancellation of the allotment, the company obtained a stay. Meanwhile, the company started selling space in the proposed building. Thus, prospective buyers of space were cheated to the tune of about Rs. 14 crores. This was done in the violation of the Supreme Court order.

Further elaborating the doctrine of public accountability the court applied the theory of ‘lifting the corporate veil’ in order to fix the accountability on persons who are the actual operators. The court observed that the concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegality or to defraud people. In such cases the court would look at the reality behind the corporate veil so as to do justice between the parties\(^\text{160}\). The court further held that in order to compensate those who are defrauded or cheated the Court can pass necessary orders under article 142 of the Constitution.

Though the court certainly put the right foot forward but did not take a long stride. It missed the opportunity of providing the doctrine of public accountability its due reach. The court did not express any opinion on the question whether the misdeeds of public servants, which are not only beyond their authority but none with \textit{malafide} intent, would also bind them personally or the Stage Corporation would be

\(^{160}\text{DDA v. Skipper Construction Company, (1996)4 SCC 622, 639}\)
vicariously liable. It can not be over-emphasized that if the doctrine of public accountability is to be given its full sweep, the concept of State/ Corporation liability should be shifted to the officer’s liability where possible, so that it may have an inhibiting effect on the temptation of public servants to misuse power for personal gains.

In order to strengthen public accountability further in the *State of Bihar v. Subhas Singh*\(^{161}\), the Court held that the Head of Department is ultimately responsible and accountable unless there are special circumstances absolving him of the accountability. The court has strengthened accountability procedures by applying the contempt law against those who deliberately violate court orders. The court has also imposed cost personally against erring officers for delay in the discharge of duties. In the same manner where the public servant has caused a loss to the public exchequer, the court has allowed the government to recover such loss personally from the erring officer. It has now become an established law that the courts can award compensation and exemplary cost for the abuse of power and violation of human rights by the State.

It is now established law that the courts while exercising jurisdiction under article 32 & 226 of the Constitution can award compensating and exemplary cost for the violation of a person’s fundamental rights and for the abuse of power by the State\(^{162}\). In *Nilabati Behra v. State of Orissa*\(^{163}\), the court held that a claim in public law for compensation for violation of human rights and abuse of power is an acknowledged remedy for the enforcement and protection of such rights. Thus every individual has an enforceable right to compensation when he is victim of violation of his fundamental rights and abuse of power. In such a situation, the court observed, that leaving the victim to the remedies available in civil law limits the role of constitutional courts as protector or guarantors of fundamental rights of the citizens. Thus courts are under an obligation to make the State or its servants accountable to the people by compensating them for the violation of their fundamental rights.

\(^{161}\) (1997)4 SCC 430


\(^{163}\) (1993)2 SCC 746
The courts in this country have been trying to combat this trend, with some success, as the recent events show. But how many matters can courts handle? The real question is how to swing the polity into action, a polity which has become indolent and soft in its vitals? Can the courts alone do it? Even if so, to what extent, in prevailing, state of affairs?

In the present-day context, strengthening of the public accountability system should be the top priority of the government. Any system has three components: (a) structures and procedures, (b) persons who manage the system, and (c) environment in which the system works. Improvement is required in all the three components. Every holder of public power, where public element is present, should consider himself a trustee of society and must exhibit honesty, integrity, sincerity, faithfulness and transparency in all facets of public administration.

2.13 Relevance of Judicial Review of Administrative Action -

Judicial Review of administrative action, in a sense, is the heart of administrative law. It is certainly the most appropriate method of inquiring into the legal competence of a public authority. The aspects of an official decision or an administrative act that may be scrutinized by the judicial process are the competence of the public authority, the extent of a public authority’s legal powers, the adequacy and fairness of the procedure, the evidence considered in arriving at the administrative decision and the motives underlying it, and the nature and scope of the discretionary power. An administrative act or decision can be invalidated on any of these grounds if the reviewing court or tribunal has a sufficiently wide jurisdiction. There is also the question of responsibility for damage caused by the public authority in the performance of its functions. Judicial Review is less effective as a method of inquiring into the wisdom, expediency or reasonableness of administrative acts and courts and tribunals are unwilling to substitute their own decisions for that of the responsible authority.

It is of course impractical to subject every administrative act or decision to investigation, for this would entail unacceptable delay. The complainant must, therefore, always make out a prima facie case that maladministration has occurred.

In judicial review of administration at a national level, a country’s history,
politics and constitutional theory all play their part. There are broadly, three major systems: the Common law model; the French, or council of State, model; and the procuracy model. The role model for governance and decision taken thereon should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but also must create an impression that the decision making was motivated on the consideration of probity. The government has to rise above the nexus of vested interests and nepotism and eschew window-dressing. The act of governance has to be tested on the touchstone of justice, equity and fair play. Though on the face of it the decision may look legitimate but as a matter of fact the reasons may not be based on values but to achieve popular accolade that decision can not be allowed to operate\textsuperscript{164}. The Constitution of India envisages separation of power between the three organs of the Constitution so that the working of the Constitution may not be hampered or jeopardized. This thin and fine line of distinction should never be ignored and transgressed upon by any of the organ of the Constitution, including the judiciary. The rigid perception and practice can be given a go by in cases of ‘abdication of duties’ by one of the organs of the Constitution. Thus, the judiciary can interfere if there is an abdication of duties by legislature or the executive. For instance, if the Legislature delegates its essential and constitutional functions to the executive, it would amount to ‘excessive delegation’ and hence abdication of the legislative functions by the legislature. In such cases, the theory of separation of powers would not come in the way of judiciary while exercising the power of judicial review.

This is more so, when the constitution-makers have conferred the important sovereign function of interpretation of the constitution and various statutes upon the judiciary. The Constitutional courts can even scrutinize the working of the lower courts besides analyzing legislative and executive actions. The Superior Courts, like Supreme Court and the High courts, can issue various writs to control the functioning of lower judiciary. Besides, the High court has supervisory jurisdiction over the lower courts. However, the High courts can not issue a writ against another

\textsuperscript{164} Onkarlal Bajaj v. UOI, AIR 2003 SC 2562
High court. Similarly, the decision of the High court or the Supreme Court can not be questioned by way of writ proceeding. Thus, a final decision of the Supreme Court can not be questioned under Article 32 of the Constitution of India, except by way of review petition. The Supreme court in *Rupa Ashok Hurra v. Ashok Hurra*¹⁶⁵ has judicially created an exception to this rule in the form of a ‘curative petition’. Thus, a curative petition can be filed before the Supreme Court under Article 32 in appropriate cases. The Supreme Court only in exceptional cases would exercise this power. This fantastic judicial innovation is based on the premises that no person should suffer due to the mistake of the court. Similarly, an order passed by the court without jurisdiction is a nullity and any action taken pursuant thereto would also be nullity. A party can not be made to suffer adversely either directly or indirectly by reason of an order passed by any court of law, which is not binding, on him¹⁶⁶.

The power to entertain a curative petition is not specifically conferred by the Constitution but can be exercised by the apex court under its inherent powers. This means that the Constitution is organic and living in nature. It is also well settled that the interpretation of the Constitution of India or statutes would change from time to time. Being a living organ, it is ongoing and with the passage of time, law must change. New rights may have to be found within the constitutional scheme.

The above discussion unerringly points towards the permissibility and democratic nature of judicial review in India. The judicial review in India is absolutely essential and not democratic because the judiciary while interpreting the constitution or the other statutes is expressing the will of the people of India as a whole who have reposed absolute faith and confidence in the Indian Judiciary. If the judiciary interprets the constitution in its true spirit and the same goes against the ideology and notions of the ruling political party, then we must not forget that the constitution of India reflects the will of the people of India at large as the will of the people who are represented for the time being by the ruling party. If we can appreciate this reality, then all arguments against the democratic nature of the judicial review would vanish. The judicial review would be undemocratic only if the

¹⁶⁵ (2002)4 SCC 388
judiciary ignores the concept of separation of powers and indulges in ‘unnecessary and undeserving judicial activism’. The judiciary must not forget its role of being an interpreter and should not undertake and venture into the task of law-making, unless the situation demands so. The judiciary must also not ignore the self-imposed restrictions, which have now acquired a status of ‘prudent judicial norm and behavior’. If, the Indian judiciary takes these two ‘precautions’, then, it has the privilege of being, the ‘most democratic judicial institution in the world, representing the biggest democracy of the world’.