Chapter I

Introductory
A CRITICAL STUDY OF THE CONCEPT OF JURISDICTIONAL PRINCIPLE
IN ADMINISTRATIVE LAW - A COMPARATIVE STUDY

CHAPTER I

INTRODUCTORY

Statement of the problem

Owing to the positive role of the welfare state and the vast expansion of social welfare activities in India an unprecedented growth of the administrative process has taken place. The problem arising out of this development affects not only the legal system, but also the rights of individuals who come into contact with the administrative authorities. A brief investigation of the causes of this development is necessary to understand the nature of the problem under investigation. It is not necessary for the purpose of the present enquiry to trace elaborately the development of Administrative process. It is accepted that administrative process is bound to grow as the state is engaged in its positive role. The purpose of the present discussion is only to review the developments with reference to the problem surveyed in this work.

The principles of administrative law are developed through the interpretation of different statutes by the court. In this process the courts have strong inclination to protect the rights
of citizen, coupled with a strong desire for consistency in maintaining the legal norms through which the courts control administrative authorities. By the judicial interpretation of statute, emerge many administrative law principles. Some critics criticised analytical study as "conceptualism". Prof.

H.W.R. Wade¹ says that

"All law is 'conceptual' in that it demands synthesis of concepts and inductive logic. Administrative law, in particular, is in especial need of clear analysis in some of its most important parts, as later chapters will make plain. Its fundamental ideas are often by-products of the process of statutory interpretation, and it is only by comparison and analysis of numerous cases, often arising under very different statutes, that a coherent picture of the law can be drawn."

It is one of the reasons why the study of the development of administrative law is totally neglected. This made Lord Reid to observe in Ridge v. Baldwin that "we do not have a developed system of Administrative Law perhaps because until fairly recently we did not need it."

Seven years later, Lord Denning observed that administrative law was fully developed in England. He says "... There have been important developments in the last twenty two years which have transformed the situation. It may truly now be said that we have a developed system of administrative law".³

2) Ridge v. Baldwin (1964) A.C., P.40 at 72.
3) Lord Denning in Breen v. Amalgamated Engineering Union (1971) 1 All E.R. 1148 at P.1153(C.A.)
In view of the above facts the observation of Dr. Friedmann must be mentioned. Dr. Friedmann says that

"The problem of the relations between public authority and the citizen (private or corporate) cannot be solved in terms of conceptual absolutes, nor can it be solved simply by the elaboration of procedural safeguards. Whether and to what extent such safeguards have to be provided, must in large measure depend on the fundamental adjustment of the relations between public power and private rights."

Today the welfare State is obliged to invest the administrator with almost unlimited discretion in order that he may assist in fulfilling social needs of the society. Once this is realised it will be easy to appreciate the dangers underlying in this development when it gains momentum. The central issue of administrative justice is the reconciliation of administrative discretion with individual liberty. Critics point out that in the name of efficiency and expedition individual rights are taken away by the arbitrary power vested in administrative authorities without proper limitations or clear rules of procedure.

In order to provide adequate safeguards to individual rights the Committee on Ministers' Powers set up in England declared that

"No considerations of administrative convenience or executive efficiency should be allowed to weaken the control of the Courts and no obstacle should be placed by Parliament in the way of the subjects' unimpeded access to them."


2) Committee on Ministers' Powers, P.144

3) Dicey - An introduction to the law of constitution 10th Edn. 1960

Ibid: P.114
They point out that uncontrolled power is apt to be abused. Arbitrary discretion leads to abuse of power. The question thus arises: Is the administration to be left absolutely unfettered to do what it likes with the rights of the individual? There arose carping critics as also ardent defenders of the administrative system. The defenders observe that "the administrative process is, in essence, our generation's answer to the inadequacy of the judicial and legislative processes". They proceed to demonstrate how the incompetency of the courts to deal with the modern governmental problems, is caused by technicalities inherent in the judicial process. The drawback in the judicial system has made the administrative process inevitable. These defenders observe that the courts are unnecessarily complicating the law by restrictive interpretation of social legislation thus necessitating further legislative amendments.

The critics of the administrative process are not satisfied with the development of administration process untrammelled by the supervision of superior courts. They demonstrate the inadequacies of administrative bodies as repositories of unlimited and uncontrolled power. There is a faceless anonymity in its

1) Havert : The New Despotism, 1929
   Allen : Law and Order, 1945
   Hayek : The Road to Serfdom, 1944
2) Robson : Justice and Administrative Law, 1947
3) Landis : Administrative Process, 1938, P.46
4) W. L. Jennings : Judicial Process at its worst, (1937)49, M. L. R., 496
method and decisions which says alike the confidence of the
citizen and the responsibility of the administrator. 1

The control of executive power is essential. It can be
achieved only through judicial review where the court will pro-
tect the individual interest keeping in view the necessity of
administrative process in the social welfare state. If the
tribunals are empowered under the law with unlimited power, the
faith of people in the concept of justice may be undermined.
The only agency which can maintain the balance is a vigilant
judiciary, charged with supervisory control to keep the admini-
stration within the jurisdictional limits. The relation between
State and law depends mainly on the quality and scope of such
judicial control. The relation of law and State is co-extensive
with the problem of law and power. The problem in the modern
state is the problem of co-ordination of power with law.
Co-ordination of power and law cannot be effected without judi-
cial control whatever might be the other devices that may be
employed.

Consequently it is felt that a study of judicial control

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1) "Now it is to be expected that a party against whom a deci-
sion has been given in a hole-and-corner fashion should
believe that he has had justice". Hewart, The New Despotism,
on Administrative Procedure (1941) P.52. Dean Landis remarks:
"If one coming before an administrative tribunal does not
know who is going to decide his case and if he has his suspi-
cion that it is going to be decided by some two-pence-half-
penny clerk down the line you will never get anywhere. In
my judgement, to bring into existence a feeling that
justice is being done". Symposium on Administrative Law
(1939) Am. L. School Rev. 139 at P.182.
in terms of the jurisdictional principle would be a safe and reliable method to discover the defects and merits of the existing system of control and for suggesting suitable changes, where necessary. No attempt has been made in this Thesis to define administrative action. This is not done because all such attempts are bound to be inconclusive. For the purpose of the present work the view is adopted that administrative action includes ministerial duties, adjudicatory functions and discretionary powers.

After achieving independence, India embarked upon extensive development programmes in order to play positive role as a welfare state. More powers have to be given to the administrative bodies to achieve this aim. The result is that there has been a massive intervention of state in the life of the individual.

In the post-independence era, the inevitability of the administrative process has been well recognised by the constitution makers in India. Thus Art. 19 of the Indian Constitution, while guaranteeing to all citizens the right 'to practice any profession, or to carry on any occupation, trade, or business', subjects this right to 'reasonable restrictions' which may be imposed by the State in the interests of the general public under Art. 19(6). Art. 39 of the Indian Constitution in the chapter on 'Directive Principles of State Policy' enjoins the state to direct its policy towards securing that the ownership

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and control of the material resources of the community are so
distributed as best to subserve the common good and that the
operation of the economic system does not result in the concentra-
tion of wealth and means of production to the common detriment.
These constitutional provisions have sanctioned the operation of
administrative adjudicatory authorities which have been set up
under the specific statutes.¹

The post-independence era have seen the emergence of a
plethora of administrative tribunals, boards, and agencies, widely
differing from one another in constitution, powers, and procedure,
some approximating closely to the courts in the strict sense of
the term, others bearing a nearer resemblance to informal
committees or interviewing boards.² There are statutory bodies
like the Railway Board, Mining Boards, Transport Authorities,
Industrial Tribunal, Employees’ Insurance Court, Court of Survey,
Railway Rates Tribunal, Compensation Tribunals, and the Tax-
Appellate Tribunal, enjoying varying degrees of autonomy and
independence. There are also departmental authorities like the
Income Tax Authorities, the Estate Duty Controller, the Customs
Authorities, the Rent Controller, the Custodian of Evacuee Property

¹ See, e.g., Administrative Process under the Essential Commo-
dities Act, 1955 (Indian Law Institute Studies No.9, 1964); Report of the Monopolies Commission, 1965 appointed under
the Commission of Inquiry Act, 1952.

² For accounts of administrative tribunals in general see
Bosson, Justice and Administrative Law (3rd Ed.1951)
Allen, “Administrative Jurisdiction (1956); Jackson,
“The Machinery of Justice in England (5th Ed.1967); The
Report of the Frank Committee (Cmd.218) 1957.”
the Controller of Import and Export, the Controller of Essential Commodities, the Wage Board, the Registrar of Copyright, the Registrar of Trade Marks, the Controller-General of Patents and Designs, the Central Board of Film Censorship, Central Road Traffic Board, etc.\(^1\) Commissions of Inquiry are set up by the Government under the provisions of different statutes\(^2\) for the purpose of making a full and complete investigation into the circumstances of various cases involving general questions of public importance with a view to framing policies. Again departmental inquiries are conducted against the public servants under the Public Servants (Inquiries) Act, 1850, and also under other statutes. The direct result of this has been the growth of administrative adjudication of claims or rights of private individuals which is in some way a technique of adjudication better fitted to respond to the social requirements of the time than the elaborate and costly system of decision provided by litigation in the courts of law\(^3\).

Once it is accepted that the administrative authorities are inevitable, it poses many other problems of our time, firstly "the relation between the public power and personal rights".\(^4\)

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1) See A.P. Hasumi, Some Problems of Administrative Law in India (1964) Chap.2

2) e.g., under (i) the Commissions of Inquiry Act, 1952 (ii) The Industries (Development and Regulation) Act 1951; (iii) The Tariff Commission Act, 1951, in India.

3) Robson, 'Justice and Administrative Law', p.33

4) Griffith & Street, Principles of Administrative Law, 4th Edn, 1967, p.2
secondly, the problem is how 'to reconcile freedom and justice for the private citizen with the necessities of a modern government charged with the promotion of far reaching social or economic policies',\(^1\) the problem of how 'to prevent the potential threat to justice and freedom from the greatly extended powers and functions of the modern state',\(^2\) 'properly exercised, the new powers and functions lead to the welfare state but abused they lead to the totalitarian state.'\(^3\) The crucial question, therefore, is: how and to what extent is the administrative process to be subjected to legal control? How to impart the standards of justice to administrative determinations? These are the problems, that the present system administrative law has created in India.

The constitution makers clearly envisaged a welfare state with unprecedented extension of the administrative process. They prepared a list of rights known as "Fundamental rights" with a suitable machinery to enforce them. They also incorporated in the Constitution certain provisions which invested the courts with broad powers of review. Art. 32 empowers the Supreme Court to issue 'writs, directions, or orders' for the enforcement of fundamental rights. Art. 136 confers plenary powers upon the

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2) 'Law Commission of India (Fourteenth Report)', P. 674.
Supreme Court to entertain appeals from the determination or order made or passed by any tribunal.\(^1\) Art. 227 gives the High Courts power of superintendence (not appeals as under Art. 136) over all inferior courts and tribunals. The most important provisions for the purpose of judicial review, however, is Art. 226, which empowers the High Courts \( to \) issue to any person or authority, including in appropriate case any Government \( ... \) directions, orders, or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, the certiorari or any of them.\(^1\) Thus the Constitution sought to provide the necessary safeguards against the extended powers of administration.

The people in India accepted such safeguards as an inevitable consequence of the welfare State. Therefore the focus of inquiry has been shifted from the question of desirability of the administrative process to that of control.

**Role of the Court**

The task of the court is to maintain the balance of the constitutional system. The constitutional function of the court is to serve as a check upon the executive. This regular function of the court has become more important in order to preserve the rule of law in a welfare State. Under such circumstances it is imperative that there must be an independent body which can act as a check upon the executive and this role is well performed by the Courts.

In the development of Administrative process, it is asserted that there should not be any need for check on the administrative authorities as the courts are inadequately equipped to carry out the tasks which are before the welfare state. The courts are ill-fitted both by training and tradition to give adequate scope to the ends of modern government. In this context Dr. W. A. Robson\(^1\) points out that

"Limitations to the suitability of the Courts to act as tribunals of review for certain types of administrative decisions. These limitations may arise from various causes such as (a) Lack of special knowledge or experience of the subject matter; (b) Absence of a body of case-law appropriate to the circumstances. The result of this is either a mere transfer of discretion from the Executive to a non-expert judicial body unconcerned with functional ends, or a refusal by the Courts to disturb the administration determination. (c) Existence of a body of hardened legal doctrine, unsuited to the unforeseen circumstances which may now have arisen. (d) Traditional lack of sympathy with the positive aims of modern government. (e) Defects in the procedural machinery and legal forms which must be used in order to obtain access to the Courts. For example, such remedies as mandamus, prohibition, certiorari, and ultra vires are in many cases useless for the purpose of getting a review of administrative determinations. (f) Expense and difficulty of litigation. (g) The absence of a body of public law and the concepts appropriate thereto in English jurisprudence. (h) Volume of business which would press upon the Courts and produce congestion."

These limitations in relation to the judicial process require further comment, because, if accepted, they tend to destroy the whole basis on which the present enquiry has rested.

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1) Minutes of Evidence, 32.
First, judicial inexpertness. The role of the experts in the modern government is a vital one and this has given rise to the development of administrative process. The utility of executive expertness does not militate against control by the Court. It is a fundamental rule that experts should be kept "on tap and not on top". They must serve and not command. There are also some limitations of the expert - inability to see the issue with broad view, the excessive zeal in carrying out his policy, regardless of the cost to others, it is necessary for the fair administration of justice that the expert should be subject to the control of the superior court, where the judges are not biased and would examine the issue objectively. It is a great virtue of the judicial process that it employs judges who are not specialists in any one field of endeavour but who by disposition and training can deal with all types of cases. They take broader view in deciding issues than that of merely promoting administrative policy irrespective of its ultimate cost. What is important in the present context is that role of the court must be to check the abuses of the administrative authorities and not to convert executive action into a mere preliminary to court proceedings. Review must not supplant the administrative action. It should not be used so as to destroy the values - expertness, specialisation etc. It is also well recognised that judicial discretion is a disciplined one, exercised on the basis of reason and not arbitrary will.

The absence of public law is another factor limiting the suitability of courts to review administrative action. In fact,
the absence of public law concept is not a defect, on the contrary it is one of the assets in the judicial system. The court decides public law issues, if required, on the analogy of private law concepts. It prevents the State from placing its own official in a privileged position. The basic premises upon which we must proceed are that executive action must be subject to judicial control and exercised according to common law principles. It is true that the courts themselves are unable to cope with the great mass of problems that arise. They can still exercise the most salutary influence through their review function to check executive absolutism.

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative authorities and courts. Administrative law is now at a turning point in its history. We seem to be moving toward a new period whose outlines are not yet clear. The problem is complicated by current disillusionment with the administrative process. The goal of cheap and inexpensive justice by experts, one of the chief factors for setting up administrative bodies, has proved illusory. Public interest is equated more and more with the interest of those being regulated.

**Law and Justice**

The concept of law as a check upon arbitrary power is as old as political theory. "He who bids the law rule, said Aristotle, bids the God and reason rule, but he who bids men
rule adds an element of the beast; for desire is a beast, and passion perverts rulers, even though they be the best men. Therefore the law is reason free from desire.\(^1\) It is true that a system of law in its purest form is an unreachable ideal. Therefore, there is a continual progression between law and power, between government by law and government without law.

Power and law are antagonistic poles. One represents the idea of arbitrary power, unrestrained by any rules of conduct, the other represents the idea of a social system in which power is limited by effective checks and guarantees. Historically, the course of development is towards law. This principle holds good both in England and India.

The most significant characteristic feature of the common law world is the rule of law or supremacy of law. The concept of rule of law is an expression of an attitude of liberal and democratic principles.

"It is not enough to say with Dicey that 'Englishmen are ruled by the law, and by the law alone' or, in other words, that the powers of the Crown and its servants are derived from the law, for that is true even of the most despotic State. The powers of Louis XIV, of Napoleon I, of Hitler, and of Mussolini were derived from the law, even if that law be only 'The Leader may do and order what he pleasures'.\(^2\)

It must be emphasised that law in the sense in which it is used here is not the same formal legality in the judicial sense.

1) Aristotle: Politics III XVI 5.
Sir Ivor Jennings has gone to the extent of asserting that Dicey's theory of rule of law is 'meaningless' as there is no opposition between law and governmental power. The rule of law is thus relegated to the position of a "principle of political action, not a purely judicial principle". The result is whatever official do about disputes is the law itself. As Prof. Pound observed, "It is not, as we used to think under the influence of the common law doctrine of supremacy of the law, that things may be done officially according to law or without law or against law, with appropriate remedy in the last two cases. What is done officially is law itself".

Law is but one of the competing elements in juristic and political theory and practice. The other is power, unrestrained by law. The concept of law is represented by the judiciary and power by the executive. Every power is associated with discretion. Therefore the rule-discretion dichotomy is essential in understanding the rule of law. There has been a continual movement in history back and forth between wide discretion and detailed rule. Historically, the struggle has been among the crown and legislature and judiciary. The emphasis is shifted. Recently, it has taken new form in conflict between law and administration. What is needed is the proper exercise of legitimate administrative discretion, though ultimately controlled by law. The distinction between law and administration, so fundamental in constitutional theory, is ignored, for every act of administration is clothed at the same time with legal validity.

1) ibid. P.307
2) Pound: Administrative law 1942, P.18
Thus the concept of law as a command has thus had within it, 
the seeds of a revived absolutism. The doctrine that administra-
tion should be above law or that it should be synonymous and co-
extensive with law is repugnant to the basic norms upon which our 
theory and practice rest.

In this connection two meanings given by Dicey\(^1\) to the 
_rule of law_ are relevant for our purpose.

_"We mean, in the first place, "says Dicey, "that no 
man is punishable or can be lawfully made to suffer 
in body or goods except for a distinct breach of law 
established in the ordinary legal manner before the 
ordinary courts of the land. In this sense the rule 
of law is contrasted with every system of government 
based on the exercise by persons in authority of wide, 
 arbitrary, or discretionary powers of constraint ..."

_"We mean, in the second place, when we speak of the 
'rule of law' as a characteristic of our country, 
not only that with us no man is above the law, but 
(what is a different thing) that here every man, 
whatever be his rank or condition, is subject to 
the ordinary law of the realm and amenable to the 
jurisdiction of the ordinary tribunals"._

If _rule of law_ is treated as the antithesis of the _power 
State_, the concept must include something more than _Dissian_ 
analysis. Then his first meaning is clearly at variance with 
the development of the administrative process. He asserted that 
"such transference of authority says the foundation of that rule 
of law which has been for generations a leading feature of the 
English constitution._\(^2\)_

The weakness of Dicey's analysis is shown by its inability 
to take into account the rise of the administrative process,

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1) Dicey: _Law of Constitution_ (9th Ed. 1939) 156.
2) Dicey: _The Development of Administrative Law in 
His inability to recognise the development of Administrative process was due to his presupposition of the competition between legal and executive justice. It is true that law and administration have been rival agencies of social control in the common law world. This gives rise to mutual distrust on the part of courts and administrative authorities. This condition is now a thing of the past. The problem today is seen not in terms of one or the other seeking to take over the field. Both law and administration are recognised as complementary, not as competing, elements of social control.

While admitting the development of the administrative powers it does not mean that it should be free of checks. Very few will dispute the need for increased power in the Executive to cope with modern conditions. At the same time, in Madison’s phrase “it will not be denied that power is of an encroaching nature.” Such power must be controlled by law lest it should become arbitrary.

Justice according to law is the outstanding characteristic of the State in which the rule of law prevails. It is not assumed that the rule of law required judicial justice in deciding the disputes. The concept (rule of law) requires justice according to law either as the determining or the controlling factor. When disputes are referred to the administrative bodies, judicial control of their determinations is essential. It is only to the extent that judicial justice serves to keep these other agencies in line that the rule of law can be

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1) Quoted in Allen: Law and orders (1943) 10.
said to be maintained. For this specific reason the problem of judicial review of administration is the pivotal one in all discussions of administrative law.

This problem will grow as the state is involved in social legislation leading to welfare state. Consequently there is massive interference of the State in the individual rights. The only important point to be noted is that such welfare state will not lead to executive absolutism. Prof. Hayek asserts that only an all-powerful executive is competent to perform the tasks of Government. 1 Some people believe that power is needed to increase the efficiency of administration. Any check upon administration must be limited. To allow an alien branch of Government to interfere would unduly hamper administrative efficiency. According to the followers of this view the great safeguard lies in the development of checks similar to those upon the judicial process - the formation of professional standards and settled ideals of quasi-judicial conduct, the development of adequate procedural rules, professional criticism, internal review, and the like. Above all, great stress is laid upon the acquisition by the administrator of the "judicial mind". "If that can once be grasped," remarked a leading British administrator before the royal commission, "none of the rest matters". 2

Such a statement ignores the basic difference between judicial and administrative processes. The administrator can never acquire an independent mind. He lacks independence. He cannot

1) Hayek: The Road to Serfdom (1944) C. VI.
2) Sir Claude Schuster, quoted in Robson: Justice and Administrative Law, 2nd Ed. 1947, P. 266
judge the issue impartially. The very purpose of administration is to get things done. Dean Landis points out that administrators have "a proper bias toward its point of view". ¹ Administration that is wholly impartial will fail to perform those tasks which the legislature has assigned to it.

These defects are inherent in administration. Attempts to ameliorate them through purely internal checks lose sight of the fact that administration and not justice is the prime purpose of the administrative process. So the assertion of judicial control over administrative excesses is needed. An attempt to make the courts do more than control, an attempt to substitute judicial for executive justice, will be a repetition of our error of the last century.

It is the endeavour of this study to show the necessity of judicial control in terms of the jurisdictional principle in India from the study of the past as reflected in the case law.

All the problems alluded to are connected with the central issue. How and to what extent are legal controls exercised. The subject calls for constant research and re-examination in the light of new developments, new problems, new experiences in solving the old problem.

The second chapter investigates the development of the jurisdictional principle as a tool to control administrative authorities within the framework of power conferred upon them by the legislature. The third chapter seeks to confute the pure theory of jurisdiction which the courts invoke whenever they

¹ Landis: The Administrative Process 1936, P.104
do not wish to interfere in the findings of the administrative authorities. A study of the jurisdictional principle would appear incomplete without an inquiry into the legislative attempts to exclude judicial control and judicial approach to such attempt. The fourth chapter deals with the question of law as distinguished from questions of jurisdiction. The fifth chapter discusses the scope of control over question of fact. The sixth chapter deals with the effect of the violation of the principles of natural justice, which again represents the procedural aspect of the jurisdictional principle. The seventh chapter focuses attention on the necessity of reforms in the present day administrative process and judicial control in India.

The existence of the above factors is essential if the rule of law is to be preserved. Judicial review of administrative action recognises the place of administration and the need for its control. It would not unduly hamper those whose role must grow as the positive function of the State increases, but would ensure that growth of executive power would not lead to the Power State.

This comparative study is followed up by an attempt to formulate workable rules in relation to the jurisdictional principle. The conclusion is that the existence of jurisdiction and its exercise are mutually closely connected. In consequence, any attempt to show them as separate entities to be distinguished from each other may result in failure. Both are essential elements to unravel the concept of jurisdiction and are necessary to keep the administration within the framework of adequate judicial review.