CHAPTER ONE

THE WELFARE STATE:
PROBLEMS AND MECHANISMS OF CONTROL

The exact province and the functions of the State cannot be delineated or defined. These have varied from time to time in accordance with the socio-economic and political development of the society. To begin with, the State played a very limited role. Maintenance of law and order was its primary function. Today, the State participates in practically every sphere of human activity. Different views have been expressed about the need, the importance and the nature of the role of the State.

1:1: THE STATE - AN EVIL OR A NECESSITY?

The necessity for the State has been justified on number of grounds. Plato's justification for the State was that no man is sufficient unto himself. According to Aristotle, the satisfaction of economic wants was the chief reason for the State and its continuance lies in the fact that it is indispensable to good life. Hobbes observed that there can be no civilization without the security it (State) provides by its power over life and death. Locke said that

1. For views of Plato on State, refer Francis Ilinam Coker, Readings in Political Philosophy, 3-49 (1933). In this, selected extracts have been taken from The Republic of Plato, translated into English by Benjamin Jowett, (1933).
2. For views of Aristotle, Coker, id., 55-109. In this, selected extracts have been taken from The Politics of Plato, translated into English by Benjamin Jowett (1933).
3. For views of Hobbes, Coker, id., 460-63. In this, selected extracts have been taken from Leviathan edited by Holesworth, (1937).
only a common rule-making organ, to the operations of which men consent, can give us those rights to life and liberty and property without the peaceful enjoyment of which we are condemned to a miserable existence.  

On the other hand are the anarchists who are opposed to the very idea of the State. They believe that human justice cannot be attained within the State. They regard the State and the government as means of oppression and exploitation. William Godwin views the government as an evil, an usurpation upon the private judgment and individual conscience of mankind. Proudhon denounces State because it represents the power of passion over reason and justice and because it helps to perpetuate inequalities due to private property. Tolstoy, the Russian poet and novelist, thinks that the State and true Christianity are mutually exclusive: the State is the result of selfishness and force, Christianity is the gospel of altruism and peace. The anarchists claim that the truly moral life is realised by one's own effort and that the authority of the State is a hindrance to the development of such morality. The State is to them what a red rag is to a mad bull.

In the modern Indian political thought, the Sarvodaya theory is akin to anarchism. It is opposed to views of Locke, Coker, etc. In this, extracts have been taken from Book II of the Two Treatises of Government. The Works of John Locke.

4. For views of Locke, Coker, id., 529-90. In this, extracts have been taken from Book II of the Two Treatises of Government. The Works of John Locke (1949).


7. Id., 420.

to the State machinery\(^9\). Some of the contemporary Indian thinkers have denied the very need for government and have advocated a stateless society. Late Jayaprakash Narain has said, 'We want the State to either away\(^10\). The first President of India, Rajendra Prasad subscribed to the view that a stateless society - a society free from government, should be built up\(^11\). Vinoba Bhave desires that the self-reliant power of the people should be created which will do away with the need to use even the power of the State\(^12\). Gandhi like Tolstoy was opposed to the State. He pleaded for Swarajya - the inner rule of man over himself\(^13\).

The anarchists suggest that a system of voluntary associations should be adopted. Each individual should be free to join or not to join such an association. He should also feel free to withdraw if he so wants. This, according to them, will be a desirable substitute for the 'coercive state.' They believe that this will be a better system for there will be no element of force or compulsion. It would be a system based entirely upon the free consent of each individual and would therefore be a regime of complete liberty and of self-government.

The views of the anarchists are perhaps exaggerated and on the extreme side. The assumption from which they start viz., that all State activity is based on aggression and necessarily involves the use of force, is hardly correct. A large part of the

\(^9\) Jayaprakash Narayan, A Picture of Sarvodaya Social Order, 43(1955). It has been pointed out that: "It is not possible to achieve any success through developing the power of the State."

\(^10\) Id., 56.

\(^11\) Harijan, 113 (June 12, 1954)

\(^12\) Harijan, 66 (May 2, 1953)

\(^13\) Vishwanath Prasad Vaman, Modern Indian Political Thought 29 (1974),
activity of the modern State is in the form of aid and assistance and involves no compulsion upon any individual. Even otherwise, it needs to be understood that force and restraint cannot possibly be completely eliminated by eliminating the State. If all limitations upon individual freedom were removed and each individual is allowed to determine for himself the limits of his own liberty, the rule of 'might is right' shall prevail. The law of human life from the cradle to the grave is that of limitations. Bertrand Russell has rightly observed:

"If, as anarchists desire, there were no use of force by Government, the majority could still band themselves together and use force against the minority. The only difference would be that their army or their police force would be ad hoc, instead of being permanent or professional."

It is a well established rule of experience that no human association leaves the individual completely free.

Close to the anarchists are the individualists. In their laissez-faire theory, they also consider the State as an evil but, in contradistinction, advocate that the sphere of the activity of the State should be restricted to the narrowest possible limits. Minimum of government and maximum of individual liberty form the bed-rock of this theory. The individualists argue that the State exists merely because crime exists and its principal function is to protect and restrain and not to foster and promote. They believe that the State should give its individual thought and attention to the protection of the individual, but the promotion of his welfare falls outside its scope. They explain that the main business of the State is the suppression of violence and fraud.

15. For more details of Individualists, Sec. Raymond Garfield Gettell, _Political Science_, 393-400(1956); Gilchrist, _ supra_ note 6, pp.407-17.
The doctrine of individualism received a powerful stimulus from the publication of Adam Smith's, "Wealth of Nations" in 1776 which was largely a plea for a policy of non-interference by the State in economic matters. Later, J.S. Mill wrote his famous essay on 'Liberty' in which he supported the cause of the individualists. He drew distinction between self-regarding actions and actions which affect other people and pointed out that the State can best further the happiness of individuals by interfering in their personal affairs as little as possible. Herbert Spencer in his "Social Statics" and "Man versus the State" further spoke for the theory of individualism. He asserted that the doctrine that the State is justified in doing whatever seems to those in authority to be "expedient" is governmental despotism since there is no standard for determining what is expedient except the opinion of the governors themselves. In this context, he pleaded that the individual should 'ignore' the State.

It is a mistaken view of the individualists that the intervention of the State in the interest of common good always involves a curtailment of individual freedom. In reality, wisely organised and directed State action promotes the liberty of the individuals by removing obstacles placed in their way by the strong and self-seeking persons. Liberty without restraint cannot exist. Unrestrained and unrestricted liberty is licence. The laws of the State do not curtail liberty but maintain and promote it.

The social welfare theory is directly opposed to both the anarchist and the laissez faire theories. It regards the State as a "positive good" and advocates maximum of State participation for the social good. However, it does not belittle the importance of individual liberty. Prof. Garner has emphasised that freedom can be better secured through State action than through the laissez faire policy, which permits competition. Justice K.S. Hegde explains that the aim of the socialistic theories was to bring about a welfare state, wherein:

not merely the rights of the individuals were protected but the duty of the individual to the society was also emphasised. According to these theories the individual was not be merely considered as brick and mortar for building up a State. Rights known as human rights are to be guaranteed to the individual. At the same time he had duties to the society of which he was a part. He was not to be an instrument of exploitation of the society.

A social welfare State acts not only as a protector but also as dispenser of social services, as the industrial manager and the economic controller.

1:2: FROM THE POLICE STATE TO THE WELFARE STATE:

There is a complete transformation in the role of the State. It used to be a police State and is now a welfare State. Friedman observes that no

19. Id., 435
contemporary analysis of the rule of law can ignore the vast expansion of government functions which has occurred as a result both of the growing complexity of modern life and of the minimum postulates of social justice which are now part of the established public philosophy in all civilized countries. Hidayatullah, J. (as he then was), tells us that the State can be either a negative or a positive State. A negative State is one which protects the citizens from enemies, maintains internal law and order and provides essential public works and utilities. Restraints in that State begin where permissible social conduct ceases. A positive State does all this and more. State today cannot afford to be passive or inert. The present tendency all over the world is not a decrease in State activity but its increase. State action, in a positive State, so pervades the lives of the citizens that even a list of such actions would take a long time to read. In short, a long distance has been covered from the State function of mere maintenance of public order to the multifarious tasks and duties of a welfare State.

This welfare theory has been the cornerstone of democratic constitutions. The Constitution of India also embodies it. This objective had been made clear in the Constituent Assembly and has been included in the preamble to the Constitution of India and its parts dealing with fundamental rights and directive principles of State policy. They contain the philosophy of the Constitution. They connect India's future, present and
past and give strength to the pursuit of the social revolution. The harmonious interpretation of fundamental rights and directive principles is vital for achieving justice, social, economic and political. In this regard, it would be relevant to refer to the observations of Justice Beg that perhaps the best way of describing the relationship between the fundamental rights of individual citizens, which imposed corresponding obligations upon the State, and the Directive Principles would be -

    to look upon the Directive Principles as laying down the path of the country's progress towards the allied objectives and aims stated in the Preamble, with fundamental rights as the limits of that path.

For the fulfilment of the goals laid down in the Preamble and the Directive Principles and at the same time keeping in view the limitations in the form of fundamental rights, it is necessary for the State to participate in more and more areas of human activity. The experience of thirty years indicates how the area of State activity has widened. This means tremendous involvement of the State in activities covering almost all phases and aspects of human life.

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MALADMINISTRATION & CORRUPTION IN THE WELFARE STATE

The concept of the social welfare State has resulted in enhanced State activity. This, in turn, has led to an enormous increase in the powers of the government. Sir Alfred Denning had cautioned in 1949

24. Hegde, supra note 20 at 22.
in his Hamlyn lectures that at every point, the powers of the executive involve interference with private rights and interests and asserted that

(1) It is essential in a free community to strike a just balance in the matter. The need for striking a just balance has become progressively acute. The exercise of power, if properly regulated, can bring in positive results and if improperly carried out can lead to serious consequences. The power is so insidious that the user more often than not thinks that he is acting for the good of the public whereas actually, he may be asserting his authority. It has been rightly said that the Jack-in-office never realises that he is being a little tyrant.

There is another effect of the welfare state. The legislatures and the courts are finding it extremely difficult to keep pace with the needs of the time. As a consequence of this, modern governments have been exercising increasingly more legislative and judicial powers. There is so much of delegated legislation. The administrative tribunals, commissions of inquiry and various other bodies perform a large number of adjudicatory functions. There is no escape from this commingling of three powers which has rendered application of Montesquieu's theory of separation of powers impractical. Donning has rightly reminded us that if properly exercised, these powers of the executive lead to the welfare State but if abused they lead to the totalitarian State. If the government misuses its powers, the possibility of a situation when people may prefer to do away with the welfare state itself cannot be ruled out.

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27. Id., 100
28. Id., 125
29. There has been thinking in favour of 'no government' in India after we gave Constitution to ourselves. Reference may be made to the sources cited supra notes 9-12.
Government today suffer from number of maladies, the two main one's being: maladministration and corruption. Carelessness, inattention, lack of courtesy and delay on the part of the administration are routine features. The common man feels helpless. Differential treatment to individuals is meted out on considerations of kinship, social rank, wealth and other personal characteristics of those who come into contact with the authority concerned. Administration is also not free from graft, corruption, and oppressive behaviour. It has been rightly said by Gregory and Hutchesson that unless bureaucratic power is properly controlled, it can prove itself destructive of democracy and its values.

It has been observed recently by a senior civil servant that the Indian bureaucracy can justly be accused of being bloated, inefficient, undisciplined, self-seeking, slothful and venal. He adds that it is unused to functioning as a team, believes in narrow departmentalism and is given to intrigue, it is also insensitive to the needs of the citizen and more concerned with its own interests than with those of the tax payer. There is 'top-to-bottom' corruption rampant in India as elsewhere since it is a world-wide phenomenon. It has existed ever since man learned to

32. supra note 30 at p.15.
organise himself collectively.\textsuperscript{36} According to Ralph Bradbury\textsuperscript{37}, governmental corruption is found in all forms of bureaucracy and in all periods of political development. Even Communist States are not free from it. It has been observed that it appears that corruption may be as integral to Soviet life as vodka andasha.\textsuperscript{38}

Ancient India was not free from corruption.\textsuperscript{39} Modern India is full of it.\textsuperscript{40} The Satyanam Committee was appointed\textsuperscript{41} to deal with the growing menace of corruption in administration. It reported that it had been represented to them that corruption has increased to such an extent that people have started losing faith in the integrity of public administration. The Committee rejected the contention that, "at the political level, ministers, legislators and party officials were from this malady."\textsuperscript{42} It has come to be accepted that money makes the mare go and it seems that the wheels of the government would stop turning if corruption were to stop. The net result of all this is an explosion of public grievances. This gives rise to the problem of controls on the functioning of the government and the extent to which such controls are effective.

\begin{itemize}
\item \textsuperscript{36} N. Halayya, supra note 5.
\item \textsuperscript{37} Ralph Bradbury, "Reflections on Bureaucratic Corruption", \textit{Public Administration}, 357 (1962).
\item \textsuperscript{38} Steven J. Shaatz, "Corruption in the Soviet System", \textit{Problems of Communism}, Vol. 21 (1972) cited in N. Halayya, supra note 34, see also, C.S. Bhargava, supra note 35, pp 14-15.
\item \textsuperscript{39} N. Halayya, supra, note 34, pp 6-9.
\item \textsuperscript{40} Refer generally, C.S. Bhargava, and M. Halayya's works; Subhash C. Kashyap, Ministers and Legislators in India, The Parliamentarian, 39 (1975).
\item \textsuperscript{41} The Committee was appointed on 6-6-1962 under the Chairmanship of Sh. K. Santanam, comprising of Messrs S.K. Basu, T.R. Jalival, S.K. Nandikor, Nath Pal, S.P. Chaturvedi (Members of Parliament), L.R. Singh, Director, Administrative Vigilance Division, D.R. Kohli, Inspector General, Special Police Establishment, T.S. Ramanujachari, Joint Director, Administrative Vigilance Division (Secretary).
\item \textsuperscript{42} Report of the Committee on Prevention of Corruption, Ministry of Home Affairs, Govt. of India, 12 (1969).
\item \textsuperscript{43} Rajeev Khavan, 'Ingrafting The Ombudsman Idea on a Parliamentary Democracy - : Comment on The Lokpal Bill, 1977', 19 JILU, 257 at p. 259 (1977).
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Different controls have been provided on the functioning of the government and judicial processes. It needs to be examined how far these controls have been able to keep the government within bounds.

Parliamentary Control:

In the parliamentary system that we have adopted, the government is answerable for its acts of commission and omission to the Parliament. Government has to constantly report back to the representatives of the people and after a certain set duration, to the people directly. The parliamentary system has worked in India for thirty years now. Whether it has been able to effectively function or not warrants consideration:

(i) The Constitution provides that the ministers shall hold office during the pleasure of the President and shall be collectively responsible to the House of People. The President's pleasure is based upon the advice of the Prime Minister. So the ministers are answerable for their own actions as well as vicariously for the actions of the officials of their respective ministries to the House of People.

In practice, this responsibility does not mean much. The council of ministers comprises the leaders of the majority party in the Parliament. The cabinet can dominate the Parliament for it can rely on the support of the members of their party in the House. Normally, it is not possible to carry through no-confidence motion in the Parliament. This is not peculiar to India. Same is the position in England. The defeat of a

44. Constitution of India, Article 75(2)
45. Constitution of India, Article 75(3)
government in the Commons is rare, even in the case of a government with a thin majority.\(^{46}\) As Jennings has pointed out, the last word as well as the first rests with the Government. The Government not only proposes but through its majority disposes as well. It is a dictatorship for a term of years. The Parliament cannot govern. It can do no more than criticise.\(^{47}\) It will not be wrong to say that modern parliaments are incapable of keeping the Governments under check and control.\(^{49}\)

Besides this, the Parliament in India is not in a position to keep a constant watch on the Government for it remains more in recess than in session.\(^{48}\) The parliamentary ex-post-facto screening of the Government is no doubt useful but is not enough. Moreover, each majority decision commits violence on the minority, particularly when the minority is numerically close to the majority. The party whip curbs free voting, free thinking and reduces the whole parliamentary process to the mere stamping of Government actions. An elective assembly could be as despotic or tyrannical


\(^{49}\) British House of Commons meets even these days at least two and a half times longer than does the Lok Sabha. See, Inder Bhalerao, *Parliament and its Real Role - Need for a Sense of Proportion*, Times of India, N. Delhi, May 3, 1979.
as any dictatorship if its powers are left unfettered.

The history of thirty years of the Indian Parliament is that of complete dominance of the executive over the Parliament. It cannot be denied that often the executive takes the Parliament for granted. The most drastic laws affecting life, liberty and property have been passed by the Parliament without a ripple. The possibility of abuse of power during the time of emergency is much more. Jennings has recorded:

"Government can be carried on quite successfully without a Parliament. It is indeed a dilatory and inefficient talking machine .... The dogs bark in Parliament; if there were no Parliament, they might bite." 52

Jennings must have been in a bad mood when he wrote this. But it probably cannot be questioned that the Parliament merely provides an opportunity to hear the views of the opposition. Their acceptance or rejection is the prerogative of the government. The casual and easy-going attitude of the Members of Parliament is well known. Sometimes just five members conduct the business of the Lok Sabha. Quite a large number of members come only when they have to speak and thereafter they go away. It is only a microscopic minority which takes the Parliament seriously.

In this manner, there is a decline in the watchdog role of the Parliament over the Government.

(ii) There are a number of parliamentary devices to focus on public grievances, to solicit information and to criticise the Government. These are - the Question Hour, the Half-an-Hour Discussion, Adjournment Motions and Calling Attention Notices. But they are not very effective because the replies are prepared by the departments concerned and the documents remain in their possession. This kind of 'parliamentary looking into' is, therefore, not impartial in the sense that it is not conducted by an independent authority having access to all relevant documents. It also leaves an impression that the department has been made the judge of its own cause.

(iii) There is a committee on Petitions in the Lok Sabha as also in the Rajya Sabha. Any member of the public can address petitions to these committees with regard to bills, any other matter connected with the business pending before the House, or any matter of general public interest except certain specified matters. Petitions are examined, comments are asked for from ministries and departments concerned, evidence is taken and on-the-spot

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55. Rule 180 of the Lok Sabha Rules of Procedure and Rule 138 of the Rajya Sabha enumerate the items on which petitions cannot be made. These items are: (i) which fall within the jurisdiction of a court of law in India, or court of enquiry or statutory tribunal, authority or a quasi-judicial body or a commission; (ii) which do not concern the Government of India; (iii) which can be raised on a substantive motion or resolution; or (iv) for which remedy is available under the law.
studies are conducted. Thereafter, the report is submitted to the House suggesting remedial measures. In this manner relief is provided.

Speaking about the experience of the Parliamentary Committees in England, Sir Cyril Salmon has observed:

"Congressional Committees of investigation, like our Parliamentary Committees, consist of members representing the relative strength of the majority and minority parties. Clearly such bodies can never be free from party political influences."

It cannot be disputed that investigations through these political tribunals cannot be a satisfactory device which could inspire confidence to redress public grievances.

Parliament is primarily a factory, working for long hours after long intervals, even overtime, for the production of new laws to provide for newer situations arising frequently. It does not have the time and the means to play the role of a watchman. S.L. Shuker who has watched the Indian Parliament in action for a number of years says:

Given the range, magnitude and complexity of State activity in the present day, Parliament, as a body, is ill equipped to effectively scrutinize the detailed actions of the Executive. It has neither the time nor the expertise as a


body for a thorough and systematic scrutiny of the varied and complex details of modern administration.

It needs to be realised once and for all that the Parliament cannot lift the veil from executive power. The support of other means is necessary in order to strengthen the parliamentary control.

B - JUDICIAL CONTROL

Judicial control is the backbone of any system. Any book on Indian Administrative Law will stand testimony to the contribution that has been made by the Courts in keeping the administration within the requirements of rule of law. The Courts have developed over the period of three decades a number of grounds to attack administrative discretionary actions. But the fact remains that Judicial review in the area of administration is still only peripheral and, by and large, it does not comprehend the merits of the administrative action.


60. Without being exhaustive, the grounds are: Exercise of power malafide or in bad faith, or for an improper purpose or after taking into account irrelevant or extraneous considerations, or after leaving out of account relevant considerations or in an colourable manner or unreasonably or acting under dictation or mechanically or fettering discretion.

This is, by itself, a substantial limitation. Even in the area in which judicial review is available, it is difficult to get relief and get the action quashed. The main difficulty is encountered in adducing proof of such grounds as malafides, improper purpose, irrelevant considerations, etc. The records are with the Government. The courts are reluctant to order the production of relevant documents and files. Even where the court so orders, it is not difficult for the Government to claim privilege and get away without producing the record. The Government can claim privilege over 'unpublished official records' relating to 'affairs of State'. The concept of 'affairs of State' has been loosely interpreted and thereby entitle the State to claim privilege virtually on everything. 'Character rolls' and 'confidential reports' of a civil servant have been treated as 'affairs of State protected by the privilege'. 'Notings' by Government officers have been similarly treated. It has been observed that the court's reluctance to look into the files remains a major hindrance to challenge an administrative action at the present moment and this saps the efficacy of the judicial review to a considerable extent.

The courts have been generally granting relief when the action is not in accordance with law. The fact that a great deal of 'bad' or 'mal' administration which inflicts injustice on the citizen is not in breach of the law and is, therefore, quite beyond the reach

62. Indian Evidence Act, 1872, Sec. 123.
of the Judiciary. It has been recorded by the Administrative Reforms Commission of India that there is a vast area of cases arising out of the exercise of executive power which may involve injustice to individuals and for which no remedy is available.

The position in the U.K. is no better. According to Schwartz and Wade, the worst feature of administrative law in Britain is "the thicket of technicality and inconsistency" that surrounds court remedies. It is very difficult to pierce this thicket as a result of which the citizen suffers injustice. This complex problem was reviewed by the Law Commission in the U.K. in one of its working papers wherein it suggested that there should be a single remedy and procedure for the Judicial review of administrative actions and orders, which might be called "the application for review". The idea behind this application being that the applicant should be free to ask for any relief and equally the court should also not be handicapped in the grant of relief. Professor T. Harkose had advocated in 1956 that the Parliament acting under Article 139 should provide an independent access in cases of administrative actions to the

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69. Bernard Schwartz and ... Local Council of Government, 216 (1976); See also 'Justice', with, 'Thoughts on a British Council of State', 45 Hub. J. at 23 at p. 27 (1967).
71. Id., para 75 (emphasis added).
Supreme Court on the pattern of article 136\(^{72}\). K. Subba Rao, C.J., also expressed the view that if the Supreme Court and the High Courts instead of limiting the jurisdiction to articles 32, 226 and 136, exercise general jurisdiction in appropriate cases, this will result in minimising the arbitrariness of the authorities\(^{73}\). This kind of sweeping review will no doubt subject the administration to closer and wider scrutiny but it is submitted, will also result in a flood of cases with no set pattern emerging from the decisions of different courts. It would be confusion worse confounded. Ultimately, the remedy may prove worse than the disease itself. Some machinery outside the judicial and administrative set-up would be a better solution for reviewing the administrative actions on merits.

Litigation is not bad if it is for bonafide assertion of a grievance\(^{74}\). Then more Indians are conscious of right and wrong, obviously more litigation would and every legislation is habitually challenged so that stay, injunction and mysterious litigation should paralyse a nation.\(^{75}\) This has all caused an explosion of arrears of cases. The situation is so perilous that even a steep increase in number of Judges would not be able to help catch up with the tidal wave of cases. A very useful suggestion has been given by Justice Krishna Iyer that a high-level Jurists Committee should be set up to 'demonetise' unimportant decisions so that the burden of citations may be lightened\(^{76}\).

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75. Ibid.
76. Ibid.
The Judicial process is expensive and dilatory. It is beyond the reach of a vast multitude of people. This is so not only in India but elsewhere as well. Prof. Frank Stacey has observed that if the citizens remedy lay only through the courts, this would be irksome even to the well-to-do claimant and prohibitive to the person of small or moderate means.

It would not be out of place to make a mention of the position regarding claims for damages from the State for the wrongful acts committed by its servants. The citizens are handicapped by the dichotomy of sovereign and non-sovereign functions left by the Privy Council, continued in the Constitution and judicially recognised by the Supreme Court. It is not understandable as to what is the justification to continue with the immunity of the State regarding those wrongs which are committed during the course of sovereign functions. The principle based upon the maxim, 'The king can do no wrong' has been diluted to a large extent after the passing of the Jomun’s Proceeding Act, 1947, but in India it is still allowed to continue. The effect of this is that if a person is deprived of his 'valuables' by a constable or has the privilege of being knocked down by a military lorry belonging to the Government of India, he is without a remedy and cannot

78. Lam v. Steam Navigation Co. v. Secretary of State, 5 Bom. H.C.R. 425, p.1
79. Constitution of India, article 310.
81. Ibid.
82. Mangaraj v. U.C.I., AIR 1975 Mad. 32.
claim damages. The Parliament has not brought about any change so far and the Supreme Court is bound by the law of the Constitution. In the net result, the Government continues to enjoy the privileged position in relation to the people for whose welfare it is supposed to function.

There is no doubt that articles 32, 136, 226 and 227 have proved useful for the sustenance of rule of law. But in practice, persons charged with bribery and corruption have also been able to stall proceedings by taking recourse to these constitutional safeguards. The Santhanam Committee, therefore, felt that departmental proceedings, involving charges of bribery and corruption, should be put in a different category and the powers of the Supreme Court and the High Courts should be curtailed in these matters by an amendment in the Constitution. It advocated vesting of powers in Parliament to regulate by law all matters relating to maintenance of integrity and honesty in the services. In fact, these matters can be better investigated by bodies outside courts.

Justice Krishna Iyer is well justified in saying that democracy does not stand for Judicocracy. He is in favour of a more natural and systematised justicing modality. This needs serious consideration. Then a system cannot meet the challenges of the time it must be overhauled before it is allowed to perish under its own weight.

C - ADMINISTRATIVE CONTROL:

The administration also has its methods of control. Departmental appeals, revisions, reviews and inquiries are

84. supra note 42, 113-14.
85. Iyer, supra note 74.
an integral part of any administrative set-up. Besides these, there are administrative adjudicatory bodies also. How far have these bodies proved effective?

**Administrative Tribunals:**

Justice through tribunals is an accepted mode found not only in India but almost everywhere else as well. Tribunals with which we are so familiar today are a by-product of the welfare State. They owe their origin to the 20th century. Traditional protection of courts of law is not enough. Tribunals function like the family saloons. They render easy, cheap and immediate justice to the people. Court Justice is no doubt vital but let us not forget that it is so technical, so dilatory and so expensive. Courts lay great stress on giving statutes their literal meaning rather than examining the underlying purpose of the legislation. Tribunals on the other hand, function free from many technicalities of law and probe certain areas which the High Courts cannot do in their vitjurisdiction and are able to provide the necessary relief to the needy.

The Constitution of 1950 did not make any provision for the establishment of tribunals. However, the control of the Supreme Court and of the High Courts over tribunals was provided through articles 32, 136.

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Over a period of 25 years, number of tribunals were constituted. The Forty-second Constitutional Amendment added a new Part providing for tribunals. It contemplated two sets of tribunals. Parliament could by law provide for 'Administrative Tribunals' to deal with recruitment and conditions of service of persons appointed to public services and the appropriate legislature could constitute tribunals for various other matters. Before any new tribunal could be constituted, an effort was made through a constitutional amendment to omit the Part dealing with tribunals. The relevant clause, however, could not be carried through the Rajya Sabha. No tribunals have as yet been constituted under this Part of the Constitution.

At present the working of these tribunals is not satisfactory and systematic. These tribunals have been constituted under very many statutes. They differ in their constitution, procedure and in the matter of administrative appeals and reviewability of their orders by the Courts. This diversity can be attributed to the fact that they have been established from time to time without any set pattern. It is desirable to reduce this diversity and introduce some uniformity in this area.

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100. It was introduced in the Lok Sabha as Forty-Fourth Amendment Bill on 1-9-1976. The debate in the Lok Sabha took place from 25-10-1976 to 30-10-1976 and from 1-11-76 to 2-11-76 and in the Rajya Sabha from 4-11-76 to 5-11-76 and from 8-11-76 to 11-11-76. It received the assent of the President on 19-12-1976. Act published in Gaz. of India, 19-12-76, Part II-B, Ext. p.1483.
101. Part XIV containing articles 323-A and 323-B.
102. Article 323-A(1).
103. Article 323-A(2).
104. Constitutional (Forty-Fifth amendment) Bill, 1973, cl.35.
It has been observed that the functioning of these adjudicatory bodies is perhaps the most difficult and the least orderly segment of the Indian Administrative Law. This only goes to show that as yet we do not have a well-developed system of tribunals in India. Moreover, the area of maladministration is not covered by these tribunals for which a separate machinery is needed.

CENTRAL VIGILANCE COMMISSION:

The Central Vigilance Commission has been functioning since 1964. It was established on the recommendation of the N. Committee. The Ministry of Home Affairs, by a resolution, set up the Commission headed by the Central Vigilance Commissioner to inquire into any transaction where a public servant is suspected or alleged to have acted for an improper purpose or in a corrupt manner or into any complaint that a public servant had exercised or refrained from exercising his powers with an improper or corrupt motive or into any complaint of misconduct or lack of integrity or any malpractice or misconduct on the part of a public servant in respect of matters to which the executive power of the union extends. The question of grievances and that of corruption at the political level was left out of the jurisdiction of the Commission.

The Chief Vigilance Commissioner is assisted by five Commissioners for departmental inquiries. There are also vigilance cells in all ministries headed by

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97. Id., p. 197
98. supra note 42
99. Resolution No: 24/7/64-AVD, dated the 11th Feb., 1964.
100. Ibid., See also, Bernard Frank, Ombudsman and other
Complaint - handling systems survey, Vol. I-July 1, 1976 -
June 30, 1977, p. 16.
Chief Vigilance Officers. There are over 200 Chief Vigilance Officers functioning in various Central Government Ministries/Departments, public sector undertakings and nationalized banks who maintain close liaison with the Central Vigilance Commission and are appointed with its approval. The Central Bureau of Investigation also holds inquiries into the cases. All these authorities send their reports to the Chief Vigilance Commissioner who advises as to whether the matter ought to be gone into further or not, or what the further course of action ought to be i.e. whether disciplinary action under the rules should be taken or the matter would fall under the Prevention of Corruption Act.

The Commission acts in different situations: on the basis of (i) complaints made; (ii) anonymous complaints (with due caution, of course); or (iii) information obtained from any other source like newspapers, reports of Public Undertakings Committee, reports from the Auditor General or the Accountant General or the Public Accounts Committee. So he can initiate investigation on a complaint duly made or even suo moto as well. In fact, three-fourths of the Commission's work is based upon Government references. This according to N.S. Rau, an ex-Vigilance Commissioner.

is not a waste from the public point of view as it has been able to restore initiative and confidence on the part of higher functionaries. On one particular respect, the Commission functions a step ahead of courts. It has the advantage of access to documents which the Courts do not have because of Section 123 of the Indian Evidence Act. No material, which is considered important from the Commission's point of view, is kept back. In actual practice, every paper that is sought is made available, with the result, the Commission is able to function effectively.

Over the years, the Commission has accomplished very useful work in the field of corruption assigned to it. It has not only inquired into complaints and advised and supervised the work of ministries and departments in cases invested with the 'vigilance angle' but on account of its specialized experience, it has been in a position to suggest important procedural changes in the various administrative departments with a view to minimising chances of official derelictions. The Commission organises orientation courses for Chief Vigilance Officers in collaboration with the National Academy of Administration and undertakes preparation of background papers/case studies and other training material. It has also taken

106. Id., p. 137
initiative in bringing out a vigilance manual, including a digest of case law, relating to disciplinary cases for the guidance of Chief Vigilance Officers and disciplinary authorities.\textsuperscript{110}

The Central Vigilance Commission does not function as an appendage of government. Its terms of office are analogous to that of a Judge of the High Court or the Supreme Court or the Auditor-General or the Members of the Public Service Commission. Their tenure cannot be interfered with except by impeachment in Parliament. They are not subordinate to any Minister or Ministry.\textsuperscript{111}

The combined effect of the independence of the Commission, the nature of its functions and the fact that its reports are to be placed before the Parliament is that it makes the Commission a powerful force for eradication of corruption in public services.\textsuperscript{112}

The moot point is whether in view of the proposal for the Lokpal, the Commission should be wound up or not? The Administrative Reforms Commission had recommended that on the setting up of the institution of Lokpal, Vigilance Commissions will become redundant and will have to be abolished.\textsuperscript{113}

Prof. K.K. Tripathi, on the other hand has suggested that the Lokpal should be avoided but the institution of the Central Vigilance Commission should be utilized.\textsuperscript{114}

\begin{itemize}
  \item \textsuperscript{110} Shouvik L.M. Bhatia, 'Central Vigilance Commission - A Critique', VI J.C.F.S., 36 at p.42 (1972).
  \item \textsuperscript{111} Singhi, supra note 105.
  \item \textsuperscript{112} Statement laid on the tables of Lok Sabha and Rajya Sabha on December 16, 1963 clarifying the status and nature of the functions of the Central Vigilance Commission, Ministry of Home Affairs.
  \item \textsuperscript{113} Interim Report, supra note 69, p.19, para 23(1966).
  \item \textsuperscript{114} Tripathi, supra note 103 at p.151.
\end{itemize}
Prof. M.P. Jain and S.K. Agarwal have favoured the retention of both the institutions together. They are of the view that the Lokpal will take over the entire task of redressing public grievances and the Vigilance Commissioner will take care of the charges of corruption, favouritism, etc. They will function in close co-ordination and co-operation. If during the course of investigation by the one, same matters come to his notice which fall within the purview of the other, there should be no difficulty in making a reference to him. It will be much better if the Vigilance Commission is retained to look after corruption in the administration and a separate Lokpal is appointed for maladministration. In this way, the Lokpal and the Vigilance Commission will act as a team to supervise the government. The Vigilance Commission will provide the valuable inheritance which it has built up over the years. It will need certain changes as well. There has been a long-standing demand to give the Vigilance Commission statutory status. Such public institutions become more effective when they are given legal sanction. It should not be allowed anymore to be attached to the Home Ministry though it is merely for 'House Keeping'.

Prof. Donald C. Kowat in his review article:

116. Agarwal, supra, Note 102, p.25.
117. Jain, supra, note 115.
118. Agarwal, supra, Note 102, 25.
119. Tripathi, supra note 103, p. 151;
Agar-wal, supra note 102, p. 24;
Bhata, supra note 110, p. 33.
120. Tripathi, ibid.
has observed that Vigilance Commission needs to be strengthened and made more independent of the executive. Particularly, when its insulation from the Government has been acknowledged, there is no justification for not separating it from the Home Ministry. It should also have the statutory powers of a civil court. This will help the Commission to function more effectively.

These changes, if made, will provide the Vigilance Commission the requisite strength to discharge its obligations. It must be remembered that the Vigilance Commission alone will not be enough. Public grievances cannot be ignored, particularly in a democratic set-up. Already, the Commission is overburdened. It has become humanly impossible for one person to handle the large volume and variety of work transacted by the Commission. Similarly, the Lokpal alone will not be able to manage. Let both the institutions be provided so that both the areas of the Government are overseen effectively.

COMMISSIONS OF INQUIRY:

The practice of appointing Commissions of Inquiry is not of recent origin. In the U.K., from the middle of the 17th century, until 1921, the usual agencies of investigating events of public importance and misconduct of ministers or other public servants were selected committees appointed by the Parliament. In the early part of the present century, there occurred what came to be known as

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122. Upreti, supra note 110, p. 39.
the Marconi Scandal in which the shortcomings of the Select Parliamentary Committees were focussed. The Committee was divided on party lines. In 1921, grave allegations were made by a Member of Parliament against officials of a particular ministry. It was felt that new machinery should be created which should be better equipped to deal not only with the current matter but with any similar matter which might arise, in future. Thus the Tribunals of Inquiry (Evidence) Act, 1921 was born which empowered the Government to set up tribunals of inquiry into a definite matter of urgent public importance. Some of the other commonwealth countries have also enacted similar statutes.

In India, prior to the Commissions of Inquiry Act, 1952, commissions and committees used to be appointed either by executive orders or through _ad hoc_ legislation. The Commissions of Inquiry Act was enacted in order to have a 'general law' for appointment of commissions to inquire into matters of public importance. The Act that came into operation in 1952 applies to the whole of India and both the Central and State Governments.

129. Ibid.
130. The Act received the assent of the President on 14th August, 1952. Published in the Gazette of India Extraordinary, Part II, Sec. 1, 4279 dated 16.9.1952. It came into force on 1 Oct. 1952.
131. The Act applies to the State of Jammu & Kashmir only in so far as it relates to inquiries pertaining to matters relatable to any of the entries enumerated in list I or list III in the seventh schedule to the Constitution as applicable to that State (*Proviso to Sec. 1(2)*) substituted by Sec. 2 of the amending act (79 of 1971).
The Centre can appoint
Commissions pertaining not only to central matters, as well as
whereas the State government’s jurisdiction is limited to matters in the State and Concurrent lists.
If a Central Commission has been appointed, no state government can appoint another Commission to inquire into the same matter except with the approval of the Central Government.
If a State Commission has been appointed, the Central Government is barred from appointing a Commission to inquire into the same matter unless the Central Government is of the opinion that the scope of the inquiry should be extended to two or more States.
The appropriate government has the discretion to appoint a commission to probe into a definite matter of public importance but if a resolution is passed in this behalf by the House of People or the Legislature, then the Government has no option but to appoint the Commission. In the U.K., it can be done only when both the Houses pass a resolution. It is not left to the discretion of the government.
Interestingly, nearly 200 Commissions have been set up by the Central and State Governments under the Act, but they have all been appointed by way of 'Government Satisfaction' and not because of resolutions passed by the House of People or the State Assembly.

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132. Commissions of Inquiry Act, 1952, Sec.3(1).
133. Id., Sec.2(a)(i)
134. Id., Sec.2(a)(ii)
135. Id., Sec.3(1)(a)
136. Id., Sec.3(1)(b)
137. Id., Sec.3(1)
138. Tribunals of Inquiry (Evidence) Act, 1921, Sec.1(1)
140. As far as this writer’s information goes, no Commission has been constituted through a resolution of House of People or State Assembly.
as to how such a resolution is to be moved. In any case, it would be an exercise in futility if the Government is not desirous of appointing a Commission.

The Act has been used to inquire into a variety of issues of public importance, like the conduct of public men, police firing, accidents, working of large industrial houses, management of religious institutions, food contamination, contamination of river waters, communal clashes, assassination of national leaders, dam bursts, and subversion of lawful process. The English counterpart has been used sparingly.


142. Chaudhry Commission in 1953 to inquire into police firing in Chaval Khada (P.F.); Shutt Commission in 1957 to inquire into police firing at Raipur.


144. Chagla Commission in 1956 against Jhumra Group of Companies; Tendulkar Commission in 1956 against Dalmia Jain Group of Companies; Gupta Commission in 1977 against Haruti Ltd.


148. Bhave Commission in 1963 to inquire into the circumstances leading to clashes between Hindus and Satnams at Gursaini and Badjaka.


There have been only 15 inquiries. Ad hoc Commissions should not be made instruments of common use. They should be limited to matters of utmost public importance. They should be constituted when matters in the nature of a nation-wide crisis of confidence arise. They should be commissioned only when other methods of investigation would not be adequate. Frequent setting up of Commissions predated over by sitting Justices and thereafter not taking any action upon the reports does not reflect well on the attitude of the Government. This has the effect of weakening the institution of the Judiciary since these Commissions are appointed not on any grounds of propriety or principle, nor any well-thought out course of policy to punish the abuse of power, but merely on grounds of political expediency. The association of sitting Judges with these Commissions should be particularly avoided.

A peculiar and interesting feature of the Commissions of Inquiry has been that they are appointed almost always when one Government 'goes' and another 'takes over'. Of course, the Dai and Chagla Commissions were set up by the Congress Government against their own party Chief Minister and a Central Cabinet Minister. The Janata Government, however, set up the Grover Commission against the Chief Minister.

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152. Supra note 125, appendix 'C'.
156. Appointed in 1956.
belonging to the Congress party. It also appointed Commissions to probe into many acts of commission and omission of the pre-emergency and emergency period. A definite impression has gone round that a rat race is going on for Commissions. It is not that Commissions are not useful and no more public exposures are needed. It is also not that the actions of the erstwhile Ministers should not be made a matter of public inquiry. But if it is allowed to become a regular and routine matter that when the one ministry is defeated the new one sets up a Commission, no one will take the Commissions seriously. In fact, this position has already been reached. They are being dubbed as engines of political vendetta. Defeated Ministers are, after all, the political rivals of the new Ministers. Particularly in the changed political atmosphere, when the Centre and States have different parties in power, the Centre would be tempted to embarrass the States with Commissions. Even otherwise, it is a matter of fact that normally no Government in power is ready to appoint a Commission to investigate into the actions of its own members. It cannot be ordered to appoint a Commission since the Government enjoys majority in the House. Once the ministry is not in office, it becomes an 'ex-post-facto' investigation. Keeping in view this whole situation, Commissions should be confined only to matters of national importance. It will be better if political corruption is subjected to the scrutiny of a permanent body like the Lokpal, both at central and State levels.

Besides functioning like the Commission, it will have the added advantage of being not dependent upon the Government of the day. It will be able to vindicate or expose not only 'erstwhile' Ministers but the 'existing' ones also. We daily hear rumours being floated about one Minister or another. They are ignored because they are voiced by the opposition group. Even if there is any truth in them, the opposition cannot do anything, being in minority. So besides the Commissions for issues of national importance, we need a regular machinery which could be set in motion at any time by any individual. There is no justification for ministerial misdemeanours and official delinquences being given a moratorium of five years, by which time public memory gets blurred and people lose interest.

The above examination of the existing controls shows that something more needs to be done in order to make the controls real and effective. Our Parliamentary system lacks the 'cutting edge' of a really impartial and searching investigation into the working of our Ministers and ministries. Courts are impeded by technical procedural snags, by their settled reluctance to be drawn into pronouncing on the merits of administrative disputes and by the sheer expense of the process. The Government cannot be made the Judge of its actions for then the very system will become violative of natural justice. L.B. Gajendragadkar, C.J., has catalogued four major aspects of public administration which need control, namely, its operation within the letter of law, its discretionary powers, its responsibility for any damage it causes and its abuse of power. For this purpose,

two systems have been tried for quite some time now, the French system of *droit administratif* and the institution of Ombudsman. It is proposed to examine the working and the feasibility of the French system in India.

115: THE FRENCH system of *droit administratif*:

There is a "duality" of legal systems in France: *droit civil* and *droit administratif*.

*Droit civil* is the ordinary law administered by law courts.

*Droit administratif*, on the other hand, is administrative law which governs the dealings of state officials with private citizens and is administered by a separate set of administrative courts. Lord Stewart has explained that the underlying idea of *droit administratif* is that the position and liabilities of state officials and the rights and liabilities of private individuals in their dealings with officials as such, form a separate and distinct chapter of law which deals with principles different from the principles of the ordinary law. For these matters, a special procedure is provided which has its own courts, its own cases, its own precedents and its own methods. The state officials in their official dealings with private citizens are not above the law or a law unto themselves. Prof. Bernard Schwartz has pointed out that they are subordinate to the 'rule of law' which is incorporated in *droit administratif*.

Droit administratif is an old system of law. It is a product of the French Revolution. There was a strong demand from the suffering public for a strong and effective check on the excesses of the administration. The political thought prevailing in 1799 was in favour of stopping the ordinary courts from interfering in the activities of the administration. This was in consonance with Montesquieu's theory of separation of powers given in his famous Esprit des Lois. The first step taken in this direction was to break the power of the Judicial Courts. This was done under Article 12 of the Law of 16-24 August, 1790 which is still in force. The immediate effect of this was that there was no one to whom the citizen could appeal for protection against the excesses of the executive, and the administration was at complete liberty to do what it liked. But this was only a temporary phase. Some outlet for the aggrieved citizen had obviously to be provided if the new regime was not to be one of administrative tyranny. Then Napoleon assumed the charge of First Consul, he decided to build up a solid governmental machinery on the ruins of the revolution so that it could function effectively. But, at the same time, he was equally determined to establish a strong, almost military-like control over his administrators to keep them within their bounds. So in the Constitution of 1799, the Conseil d'État was established which was the beginning of droit administratif. The Conseil was assigned the duty to resolve difficulties which might occur in the course of the administration. It is this duty which provided the constitutional basis for the growth of the judicial activity of the Conseil.

165. The text of the law is given in Brown and Cameron, supra note 161, p. 19.
166. ibid.
167. ibid., p. 20.
Under the French administrative system, the control is entrusted to a special corps of Judges who sit in special courts. These courts form a two-tier hierarchy headed by the Conseil d’État. In the lower tier are grouped 24 Tribunaux Administratifs from which the appeals go to Conseil d’État. In addition to these administrative courts of general jurisdiction, there are number of other administrative bodies exercising control in particular spheres like disciplinary organs of various public professions, such as medical practitioners, architects, dentists, pharmaceutical chemists and all levels of the teaching profession. The Conseil d’État sits as a court of cassation from the decisions of these bodies and it may quash a decision for a procedural error or illegality but it does not go into the merits of a decision.\(^{169}\)

The Conseil d’État consists of roughly 250 members, but of these as many as a hundred are usually serving away from the Conseil on detachment with various ministries or government departments. It has five sections, four of them administrative and one Judicial. It is the Judicial Section which is charged with the judicial work of the Conseil. This judicial section has about 100 members and is divided into nine subsections.\(^{170}\)

The Conseil is composed of the cream of the French Civil Service.\(^171\) There are two avenues from which the Conseillers are appointed: examination and by invitation. Most members are recruited from the National School of Administration, admission to which is based upon an open

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169. ibid.
170. ibid, p. 369.
171. Brown and Cameron, supra note 161, p.31.
competitive examination, and the other, long standing practice is to recruit about a quarter of entrants from those who have already distinguished themselves in the practice of public administration. This mixed system of entry provides the Conseil with a remarkable combination of young intellect and mature experience. It ensures that the Conseil has within its ranks both theoretical and practical experience in public administration. This system has proved highly successful. Therefore, recruitment to the Tribunaux administratifs now follows the same pattern. 172

Judicial functions are exercised by the Conseil when it becomes seized of a case in one of the three ways: when a case is withdrawn from the competence of the Tribunaux administratifs, or by way of appeal from the Tribunaux, or by way of cassation from some other administrative jurisdiction. 173 Traditionally, there are four grounds for review of administrative action: want of authority (substantive ultra vires), procedural ultra vires, violation of law and misuse of power. 174 Mainly, two kinds of reliefs are provided: 'recours en annulation pour excess de pouvoir' and 'recours de plein jurisdiction.' In the first, only annulment is sought whereas in the second, damages are also claimed. 175 The position can be well summed up in the words of F.B. Mukharji that the Conseil d'Etat is really the High Court or the Supreme Court in respect of all administrative and bureaucratic decisions and procedures. 176

172. Id., p. 40.
173. Id., p. 25.
176. Id., p. 239.
The procedure followed by the conseil is quite unlike any court procedure in England or India and even differs from that of the civil courts in France. The plaintiff brings the complaint before the conseil by lodging a recours. It is to contain a short statement of facts, of the moyens - legal grounds on which the case is based and of the actual relief which is being sought. No court fees are payable on the lodging of a recours. Normally, the plaintiff is represented before the conseil by a legal representation. A system of legal aid is available for poor litigants.

When the case is received, it is numbered and is allocated by the Registrar to one of the nine judicial sections. The President of the sub-section makes it to one of the members of the sub-section who is known as rapporteur. This rapporteur will then write to the government department concerned inviting a reply to the plaintiff's complaint. It is made available to the plaintiff who in turn submits his reply. With this the exchange comes to an end. Only in exceptional cases, further clarification may have to be sought. The work of the rapporteur is not hampered by any principle such like 'Crown's Privilege'. The Court is trusted to decide for itself whether any question of State secrecy is involved and in that case the document would not be disclosed. If the administration refuses to answer a specific question, the court is entitled to draw its own conclusions. After this, the rapporteur proceeds to draft his report. It would contain the summaries of the views of both the parties and the law relevant to the case. The rapporteur is required to work in the

177. The details about the procedure are based upon Brown and Gamer, supra note 161, chapter 5, pp. 43-61.
library to look up the relevant case law, articles and textbooks. In case of difficulty, he can consult the president or his other colleagues.

After the report is complete, it is discussed in a session of the sub-section to which the case had been referred. The session is confined only to the members, even the legal representatives are not entitled to attend it. The rapporteur reads out the report, which is then discussed. The discussions are marked for their fairness. The president does not force his views on other members. After the discussion, if the report is approved, the president hands over the whole file to the member of the sub-section who is acting as Commissaire du Gouvernement, otherwise the rapporteur is asked to revise his report which is very rare and to present it on another occasion.

The office of the Commissaire du Gouvernement dates back to the year 1831. He is in no sense a representative of the Government. His function is to read the file. He will then undertake any further enquiries that he may consider to be necessary, in particular those matters that he considers the rapporteur has overlooked. He prepares his own report with two objects: to sum up the case as clearly as possible and, secondly, to relate the proposed solution to the general pattern of the case law.

When the conclusions of the Commissaire are ready, the case is listed for another hearing which consists of two stages: public audience and private audience. In case of public audience, two sub-sections sit together, one of which is the same to which the case had been initially referred. The public may be present at this stage. In addition, the legal representatives are also normally present. The case is called and the rapporteur
reads out rapidly the submissions of both the parties. The President will ask the advocates if they have to add anything to the submissions. Formally, the advocates do not plead. The advocate pleads only in cases where it is known (by prior enquiry) that the Commissaire is proposing to recommend unfavourable conclusions and even then only in an unusual case. As the client is seldom present before the conseil, the advocate does not feel obliged to make a good impression by addressing the court. The President then calls the Commissaire to read his conclusions. At this stage, the public audience is concluded and the members of the public are requested to leave the chamber. Only the Conseillers sit and discuss. The rapporteur is asked to support the arguments put forward in his original report. The Commissaire, if need be, is asked to clarify any point. After the discussion, the conseil arrives at a decision which is normally (but by no means necessarily) in consonance with the recommendations of the Commissaire. The rapporteur then is required to put it in the form of a concise judgment in consultation with, and with the approval of, the President of the section. The decision is pronounced at the next public audience which is after a fortnight. There is nothing like the dissenting judgment under the French administrative system. Such a process is alien to the jurisprudence developed by the conseil d'Etat as a collegiate body.

This is, in brief, the French administrative system. It will be equally important to appraise its strength and weakness in order to determine whether the system deserves to be 'imported' into India or not.

178 For detailed examination of 'Droit administratif' and Conseil d'Etat, see Marguerite René, The Administrative Functions of the French Conseil d'Etat, 1970; C.J. Hanson, Executive Discretion and Judicial Control, 1950; A.V. Dicey, Law of the Constitution, 495-516 (1952).
ITS STRENGTH:

The main strength of the Conseil d'État lies in the fact that it comprises able and experienced civil servants in France. This has been very well highlighted by M. N. Seervai in his third volume of *Constitutional Law of India*.¹⁷⁹ This has helped in building up the confidence both of the administration as well as of the citizenry of France.¹⁸⁰ Profs. Brown and Gamer point out that the biggest single category of citizens who resort to the administrative courts are civil servants and this, in itself, is testimony from those best competent to judge, to the efficacy of administrative justice.¹⁸¹

The Conseil d'État, while exercising judicial review of administrative actions, has adopted a case-law technique. In this technique, the Conseil does not slavishly follow the earlier decisions, though it gives them due respect. This has helped the conseil in playing a real dynamic role in the development of French administrative law. In fact, common law lawyers have been particularly struck by the surefootedness and balance with which the conseil has walked its judicial tightrope.¹⁸²

The procedure followed by the French administrative courts is both simple and inexpensive, the kind of which is not seen in common law systems. Coupled with this, the remedies are effective and cover the whole range of administration. The administrative Judge can penetrate

¹⁸¹. Id., p. 153.
¹⁸². Id., p. 154.
beyond the outward semblance of legality to examine
the motives of the administrator. He can review
mistakes not only of law but of facts as well.\(^{133}\)

**ITS WEAKNESS:**

The co-existence of two competing jurisdictions
raises issues of conflicts of jurisdiction. Who is to
deide these conflicts and on what principles are they
to be decided? In 1972, the Tribunal des conflits was
constituted\(^{134}\) to settle disputes of jurisdiction.
Its functioning has not been easy. Prof. K.C. Sheare
points out that all authorities seem to agree that
the rules which determine the dividing line between the
two jurisdictions are 'extremely complex'\(^{135}\) and
Professor M. Wall finds them full of 'excessive
technicality'\(^{136}\) Profs. Brown and Gamer point out
that the French lawyer is presented with a critical
problem at the very threshold of his task of obtaining
redress for his client, namely, to which of the two
sets of courts must the case in hand be brought.\(^{137}\) If
the French citizen happens to bring his case before the
wrong court, the whole exercise proves futile. Lord
Diplock warns us that the French remedy is worse than
the disease. It cannot be gainsaid that this is a
'loose thread' in the French administrative system.

\(^{133}\) *Ida*, p. 161.

\(^{134}\) This Tribunal is composed of an equal number of
Judges drawn (four from each) from the cour de
cassation and conseil d'Etat with Minister of
Justice as the titular President. See Brown and
Gamer, *Supra* note 161, pp. 76-77.


\(^{136}\) M. Wall, *The Strength and weakness of French


\(^{138}\) Lord Diplock quoted in *Wheare, Supra* note 175, p. 41
Administrative courts remain remote from the ordinary citizen. Conditions of review by the courts remain technical. Review is possible for an *acte administratif* (which is not easy to define), proceedings must be directed against a decision which has already been taken by the administration, the plaintiff must establish his *locus standi* and must bring the matter within a short time limit. If annulment of the decision has been sought, there must not be any other parallel relief available. Combined together, these conditions make the going tough for the citizen. Moreover, administrative courts have no jurisdiction with regard to certain aspects. They cannot deal with the mischief which follows from maladministration. This 'no man's land' has been well illustrated by I.M. Pedersen who points out that if officials fail to return documents put before them as evidence, if they are rude and arrogant; if they delay a case by collecting unnecessary evidence; if they have failed to give notice of a right of appeal, where there is no statutory duty to do so; if the general investigation of a problem has caused undue hardship to a citizen, if officials persist in writing unreadable signatures, if there is a wrongful exercise of discretionary power in most if not in all these cases, the citizen will have no remedy unless it has caused him economic loss.

Another admitted defect of the French system is the time taken in deciding cases. It is estimated that on an average, a case in the *Tribunaux administratifs* takes about eighteen months, and about the same time is


taken by the Conseil d'Etat. The position was still worse before 1953. In certain cases delay amounted to a denial of justice. An English political scientist has commented that one is impressed with the care taken to see that all sides of the case are examined, but at the same time one is impressed with the air of leisureliness and academic detachment with which it is all conducted and considers it to be a serious defect of the French system of droit administratif.

Again, there are no means of enforcing the decisions of the administrative courts against the administration itself if it refuses to accept them. Prof. Neil is justified in asking, what is the use of possessing so fine a tool for controlling administrative action if the Judge's decisions are not executed by the administration and if the Judge has no way of enforcing execution? As regards the reason for this problem, one can find it in the history and character of French administration. French administration has been modelled on military lines, its hierarchy closely resembles that of the army. The only function of the citizen is to obey. Even when the administrative action is appealed to the Conseil, its execution is not suspended. This problem is particularly relevant to student of public law in India where the State authorities are held guilty of contempt of court if the court orders are not executed. Even if the members of the Conseil belong to the administration, that does not mean that the administration is not to carry out their orders which have been passed.

191. Brown and Gamer, supra note 151, p.158.
192. Ibid.
195. Ibid., p.255.
in their judicial capacity. In the Indian set-up, if the Supreme Court gives a direction to the High Court or if the High Court gives a direction to the district court, it has to be carried out. The fact that they all belong to the judicial wing of the State will make no difference.

Citizens in France have not been provided enough safeguards in the actual functioning of the administration. The administration is not even required to give reasons for its decisions. More often than not, it is not concerned as to how the administrative decisions are taken. In France, 'administrative procedure' means the procedure followed in the administrative courts. It concentrates heavily on the 'Judicial phase'. It has been observed that France has a developed judicial control only because the Conseil has tried unconsciously to counterbalance the absence of safeguards. French administrative law often appears more aesthetically satisfying to the lawyer than to the ordinary citizen. Judicial control is important but is not everything for a sound administrative system. Judicial control would be all the more effective and meaningful if it were not the sole safeguard accorded to the citizen and if the latter felt himself more fully protected during the actual process of making a decision.

During its long innings, the French administrative system has remained confined to the European countries. Common law countries have also faced problems of administrative justice but they have not decided in favour

196. Ibid.
197. Idem., 257.
of the French model. The French pattern has been considered in England a number of times.\(^{199}\) Prof. J.A. Robson in his evidence before the Donoughmore Committee urged the creation of a unified system of administrative courts.\(^{200}\) It did not find favour with the Committee for it was of the view that it would be "inconsistent with the sovereignty of Parliament and the supremacy of the law."\(^{201}\) Robson has been a strong supporter of *Conseil d'Etat",\(^{202}\) he repeated his contention before the Franks Committee, but they thought that it would be a breach with tradition and a solution which will not be acceptable to the majority.\(^{203}\)

The Justice also rejected the French model for the reason that it draws its strength specifically from French history, traditions and methods of administration, and that to import an institution isolated from its supporting environment would be to invite failure.\(^{204}\) Hanson in his Nalym lectures has given this very justification for the *Conseil's non-transportability across the channel.\(^{205}\)

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205. Hanson, *supra*, note 179, at p. 21.
Leslie Seaman has pointed out that there is no popular movement for introducing in the English legal system any institution of control of the administration comparable with the French Conseil d'État. The need for such an institution is not yet felt and the civil service character of the Conseil d'État raises doubts in the English mind.

The United States has also not been enthusiastic about the French recipe. Bernard Schwartz's writings bear testimony to this. He admits that it cannot be denied that there are deficiencies in the present system of judicial control in the Anglo-American world but the answer to this is not the creation of separate administrative courts. He adds that there is at least as much danger of discord between the administration and administrative courts as there is between the administration and the ordinary law courts. The Judges of the administrative courts will, not unnaturally tend to consider themselves to be as expert in the field of administrative law as the agencies whose acts they are called upon to review. Simon Rikkind gives a cogent reason for not setting apart administrative law from the rest of the law. He counsels that it would contract the area of its exposure to the self correcting forces of the law and in time such a body of law, secluded from the rest, develops a jargon of its own, thought patterns that are unique internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law.

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207. Schwartz, supra note 162, Chapter Ten - 'Droit Administratif and The Rule of Law', 306-339.
208. id., at p. 319.
209. id., at p. 321.
america, as in Commonwealth countries, courts are not named by experts. They decide all type of litigation. Such experts tend too often to become sterile in their outlook and to make their decisions within the pigeonholes of their own restricted experience. Australia, Canada and New Zealand have also not voted in favour of a French system.

The Constitution of India provided for a unified system of Courts as in England and America, not separate courts for separate matters. The same courts administer different laws in their area of jurisdiction. During the last thirty years of Indian Constitutional history, the possibility of adopting the French model in India has been examined more than once. The matter was considered at length by the Law Commission of India and it recorded:

"It would be derogatory to the citizen's rights to establish a system of administrative courts which would take the place of the ordinary courts of law for examining the validity of administrative action. It may be that in view of certain inherent advantages like speed, cheapness, procedural simplicity and availability of special knowledge in extra-judicial tribunals, these may be useful as a supplementary system. But it will not be right to conceive them as a advice to supplant the ordinary courts of law. It would be unthinkable to allow Judicial Justice administered by Courts of Law to be superseded by executive Justice administered by administrative tribunals." 212

P.B. Mukharji, G.J., has warned against the adoption of French droit administratif in Indian Jurisprudence. He believed that it would result in throwing overboard the

211. Schwartz, supra note 207, p. 313.
The system was also recommended to the Swaran Singh constitutional committee. The proposal was rejected as we have not yet developed a system of administrative law. Having rejected the French system, the Committee recommended the constitution of administrative tribunals, both at the State and Central level, to decide cases relating to service matters and certain other categories of matters. It also recommended that the writ jurisdiction over these matters of the Supreme Court under article 32 and of the High Court under article 226 should be excluded. The relevant statutes governing these matters should also make a specific provision to exclude the jurisdiction of Courts over such matters. Reference to tribunals in article 227 should be omitted. The right to apply for special leave to the Supreme Court under article 136 against the decisions of the tribunals should, however, be retained.

These recommendations of the Swaran Singh Committee were incorporated in the Constitution in 1976 by way of the 42nd Amendment. Power was given to the Parliament and the States to provide for tribunals in different specified areas. They were also authorised to exclude the jurisdiction of all the courts, except that of the Supreme Court under article 136, over the tribunals. Tribunals were specifically excluded from the High Court's superintendence under article 227.

213. Bhopal, supra note 175, at p. 239.
214. Committee was appointed by the Congress President, Shri D.K. Barooah in Feb. 1976 to propose amendments to the Constitution.
216. Id., pp. 9-10.
217. Part XIV was added which included articles 323 A and B.
218. Constitution of India, arts. 323 A(1) & 323 B(1) and (2).
219. Constitution of India, arts. 323 A(2) & 323 B(2) and (3).
220. Constitution of India, article 227.
The 44th amendment restored the superintendence of the High Courts over the tribunals, but the rest of the position continues to be the same. In spite of the fact that the Janata Government was desirous of omitting the part relating to tribunals from the Constitution, it decided to set up administrative tribunals to deal with service matters, but before the decision could be implemented, it went out of power. So far, there is no move by the present Government in this direction. It is possible that in the near future the matter may be taken up. Under the Constitution, the Parliament can exclude the jurisdiction of the Courts over the tribunals and if, once again, the tribunals are also excluded from article 227, the only judicial review which will remain thereafter will be that of the Supreme Court under article 136.

If this scheme is implemented, it will be a step towards the French model. It was pointed out by Mr. C. Bhattacharyya in the Lok Sabha:

We are now in a phase of transition from rule of law and conventions of the Constitution and English jurisprudence to the droit administratif and ethos of French Jurisprudence.

Commenting upon the Swaran Singh Committee proposals relating to tribunals, Dr. Rajeev Dhavan said that they emulate the French system of administrative tribunals.

The point for consideration is, should this system be introduced in India or not? Dealing with cases of gross abuse of power during the emergency, the Shah Commission

221. Ibid.
222. The Constitution(Forty-fifth amendment)Bill,1971,Cl,35
suggested that adoption of droit administratif on the French model is one of the safeguards for looking after the interests of the employees of the Government which may be profitably considered.226 Shri B.N. Seervai has not approved of it under the conditions prevailing in India.227 The scheme of tribunals as contemplated by the Swaran Singh Committee or even a complete version of French administrative courts will not be workable in India.

It will give birth to ‘two court system’ which has an inherent weakness. However, specifically the boundaries of tribunals and courts be demarcated, jurisdictional problems will come up. This is what happened in England in regard to common law and equity jurisdiction and this is also the experience of the French system.

It was never intended by the framers of the Constitution that article 136 should be used as the only avenue for appeal from tribunals. The purpose was to give to the highest court a special power, so that it does not feel handicapped to do justice, under the circumstances of a case.228 If it is made the only outlet for judicial review, excluding the High Courts completely, it will not only flood the Supreme Court with special leave petitions, it will run counter to the basic scheme of the constitution. One cannot go to the Supreme Court under article 136 as a matter of right. It is discretionary with the Supreme Court to grant or not to grant special leave to appeal. This will mean that administrative tribunals will function without the cover of judicial review.

227. Seervai, supra note 179, pp.1763-1769.
228. VIII C.L.E., 634-640, 66, 1949, Debate on article 112 of the draft Constitution corresponding to article 136 of the Constitution.
In the enactment of constitutional provisions, we cannot afford to overlook the vastness of the country. It will be difficult for the people from the remoter parts of the country to come to Delhi to invoke the discretionary power of the Supreme Court. Tribunals should be constituted in different areas of work. But they should be required to function under the supervision of courts as in common law countries.

Introduction of a whole system similar to droit administratif will not be a progressive step. It cannot fit into the Indian constitutional set up. Today, our main task is to control, if not to eradicate, maladministration and corruption in public offices. If the French administrative courts with such rich experience have not been able to touch even the tip of this problem and even the French had to introduce an institution like the Ombudsman for that purpose, droit administratif merits no serious consideration in India.

The circumstances that are prevailing in the country warrant that an independent body like the Ombudsman should be set up. On the one hand, our administration is at its lowest ebb. Nothing seems to move. The citizenry is constantly complaining. On the other hand, our civil services are a harassed lot. With the frequent changes of government, they have been the worst sufferers. The warning given by Sardar Vallabhbhai Patel in the Constituent Assembly that "If you want an efficient all India service, you must allow the services to open their mouth freely" merits no serious consideration in India.

230. Mukharji, supra note 175, p. 315.
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\textit{Note}\textsuperscript{230} Mukharji, supra note 175, p.315.

\textit{Note}\textsuperscript{231} X C. A.Tim 51 (Oct. 10, 1949).
has been completely ignored by the Ministers. Administration cannot afford any more to be stereotyped. It has to act as the trustee of the people. It is not an easy matter to interpret the will of the people or in all cases to decide what is best for them. As in every human endeavour, there is a gap between ideals and practice, the efforts of the Government should be directed towards reducing this gap as substantially as possible.232 The Ombudsman has been tried successfully in other systems in dealing with problems of the public vis-a-vis the administration as also of the public servants vis-a-vis their own matters. It deserves to be given a fair trial in India.