CHAPTER-VI

Conclusion and Suggestion

Although conclusion and suggestion along with the analysis and comments have been given in detail throughout the chapters, however for the sake of brevity they are reproduced here with the suggestions.

Judicial review of administrative action is one of the important components of Administrative Law. It is inherent in our constitutional scheme which is based on rule of law and separation of power. It is considered to be the basic feature of our Constitution, which cannot be abrogated even by exercising the constituent power of parliament.\(^1\) It is the most effective remedy available against the administrative excesses. The main object is to keep the administration within the limits of law and to protect the rights and safeguards interests of citizens. It is, thus, the very heart and soul of administrative law.\(^2\)

Part - A

Administrative law is concerned with the powers of administrative authorities; the extent of such powers, the procedures prescribed for the exercise of such powers, the remedies available to the aggrieved citizens when such powers are abused or misused. First chapter of my research deals with Introduction. In this chapter, I have discussed the meaning of administrative law, growth and development of administrative law in India, England and America, reasons for the growth of administrative law, theories of administrative law which is classified in Red light theory and green light theory, advantages and disadvantages of administrative law, object of the study, hypothesis, Plan of the study and research methodology used in the study.

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To define the administrative law is very difficult task. Though many writers have defined the administrative law in his own way, yet none of them is able to give complete satisfactory definitions, either they are too broad or too narrow, some have leave out some essential aspect of administrative law. In this study, two different approaches have been followed to define the law i.e. English approach and American approach. Both have defined the administrative law in a different way. The basic difference between the American approach and the English approach to the Administrative Law is that while the former emphasizes on procedure used by administrative agencies in exercising their powers, the later does not mention procedure directly and specifically and is left to be implied from such broad words as “organisation, powers and duties”.

From these two approaches, it is concluded that administrative law is the law concerning the operation and control of administrative power. It sets out the jurisdiction to be exercised by the administrative authorities, lays down the principles governing the exercise of such jurisdiction and provides remedies to the person aggrieved by administrative action. It means that administrative law is not confined to regulating the relationship between the citizens and the state, but also serve to allow challenges by one arm of government to the legality of acts by another arm, in particular, challenges by local government to the legality of actions of central government or vice versa. As such, administrative law may be perceived as a weapon in the hands of the power holders themselves to ensure that each centre of power acts within the legal limits of its authority.3 It is concluded that although, all the definition given are true to their time but as law is of changing character, the definition of administrative law needs to be changed accordingly. Therefore, it is suggested that

(i) There should be one uniform definition of administrative law which defined the administrative law in a more precise and accurate form which should take into account the contemporary trend of the administrative law and can also be helpful for the times to come.

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Part - B

To understand the rule of law in the modern State, the two theories of administrative law was propounded by Harlow and Rawlings. It is categorized as Red Light theory and green light theory. The former is more conservative and control oriented which is aimed at to curb state activity so as to protect the individuals whereas the green light theory is more liberal and socialist in orientation which are based on the idea of collectivism and give preference to the state or administration to protect the right of individuals. For this executive have been given more and more powers and the functions of the courts is minimized to check the abuse of powers.\(^4\)

In India, the administrative law as a separate branch of legal discipline came to be recognised in the middle of 20\(^{th}\) century. There are various factors responsible for the phenomenal growth and development of administrative law. These are the change in the philosophy of the state, industrialization and modernization, expectations of people, to meet emergency situations, inadequacy of law making organs, inadequacy of traditional judicial system, non-technical character of administrative process, scope for experimentation in administrative process, adoption of preventive measures, regulatory measures, evolution of socialistic pattern of society and to establish new world economic order. These all factors have much contributed to the development of administrative law in present scenario. Now there is need to establish sound administrative laws and procedures for public welfare. For this active participation of people is very important.

In the present era, administrative law proves to be very beneficial to public at large. The main purpose of administrative law is to provide cheap and speedy justice to the litigants against misuse of power by administrative authorities. For this administrative tribunal play a very effective role to provide fair justice to the individuals. Alternative disputes resolution in the way of mediation, negotiation and conciliation is another methods to resolve the administrative disputes by amicable means. It is based on

principle of natural justice and it is flexible in nature. In the light of above mentioned conclusion it is suggested that;

(i) To establish sound administrative laws and procedures for public welfare, the active participation of people is very essential.
(ii) To provide cheap and speedy justice, it should be ensured through legislation that tribunals should work properly and effectively.
(iii) Administrative law should be codified for transparent and effective administrative working.

Part - C

Second chapter of this research deal with administrative discretion and concept of judicial review. In modern time no government can function without the grant of discretionary powers. For this the officials should be given some choice in the matter of deciding administrative matters. But that should be controlled powers because if complete freedom of action is given to the administration it would lead to the exercise of powers in an arbitrary manner seriously threatening individual liberty. The wider the discretion the greater is the possibility of its abuse. As it is rightly said, ‘every power tends to corrupt and absolute power tends to corrupt absolutely’. It is not only the power but the duty of the courts to see that discretionary powers conferred on the administration may not be abused and the administration should exercise them properly, responsibly and with a view to doing what is the best in the public interest. It is therefore necessary to control discretionary powers to restrain it from turning into unrestricted absolutism.\(^5\) What is necessary is that discretionary powers ought to be hedged by policy, standards, guidelines and procedural safeguards; otherwise the courts may declare the statutory provisions conferring sweeping discretion as void.

In its ordinary sense, the word 'discretion' means signifies unrestrained exercise of choice or will, freedom to act according to one's own judgment, the liberty or power of acting without control other than one's own judgment etc. It denotes the words 'may', 'it shall be lawful', 'adequate', 'advisable', 'appropriate', 'beneficial', 'expedient', 'sufficient' etc. These are not the words of compulsion. They are enabling words and they only confer capacity, power of authority and imply power to make a choice between an alternative course of action or inaction. The scope of administrative discretion should be spelled out from the statutory provisions and it is to be exercised according to the rules of reason and justice. It is not to be arbitrary, vague and fanciful, but legal and regular. Moreover, the discretionary jurisdiction has to be exercised keeping in view the purpose for which it is conferred, the object sought to be achieved and the reasons for granting such wide discretion and must be exercised within the four corner of the statute and should be open, fair, honest and completely above board.

Sometime administrative discretion can be challenged on the ground that it violates one or more of the fundamental rights guaranteed by part III of the constitution of India. In a large number of cases, the judiciary has rejected legislative attempt to confer unregulated and unguided discretion on administrative authorities in some of the Fundamental Rights, such as Arts. 14 and 19 and that it has insisted that the legislature should set up a standard or lay down a policy or principle, subject to which administrative discretion may be exercised. If any administrative authority by exercising its discretionary power in an arbitrary manner takes away or violates the fundamental right of equality and freedom, it is void and having no validity in the eyes of law.

It is well settled that when discretionary power is conferred on an administrative authority, it must be exercised according to law. If the mode of exercising a valid power is improper or unreasonable, there is an abuse of the power. There are certain grounds on

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which power can be abused e.g., Mala fide which is again classified into two categories. These are Malice in fact or malice in law. Malice in fact means when an administrative action is taken out of personal animosity, ill-will, vengeance or dishonest intention, the action necessarily requires to be struck down and quashed whereas malice in law means when an action is taken or power is exercised without just or reasonable cause or for purpose foreign to the statute, the exercise of power would be bad and the action is ultra vires. The burden of establishing mala fides is on the person who alleges it. It is not the law that mala fides in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order.\textsuperscript{10} If the discretionary power conferred on an administrative authority by a statute is exercised on wholly irrelevant or extraneous considerations or mixed considerations, the exercise of power by authority will be ultra vires and the action is bad. Another ground of abuse of discretion is the colourable exercise of power. It means when exercise of power does not serve the purpose envisaged under the statute, it amounts to colourable exercise of power. Even where the discretionary power is exercised unreasonably there is abuse of power and the action of administrative power will be ultra vires.

Where discretion has been conferred on an authority, it is expected to exercise the same to the facts and circumstances of the case. If there is failure on the part of the administration to exercise discretion, the action or decision will be bad and the authority is deemed to have failed to exercise its discretion. The circumstances giving rise to such flaws are condition precedent, acting mechanically, abdication of functions, acting under dictation, imposing fetters on the exercise of discretion, non-application of mind, non-compliance with procedural requirements etc. Therefore it is suggested that;

\textsuperscript{10} Indian Railway Construction Co. Ltd. v. Ajay Kumar, 2003 (2) RSJ 570 (S.C.).
(i) Discretionary powers should not be unguided and uncontrolled.\[^1\] It has to be limited by certain ways or methods so that they do not become unguided and in turn violate the actions of the administrative authority.

(ii) Administrative authorities should use discretionary powers in good faith and for a proper, intended and authorized purpose. They need to act in a reasonable and impartial manner.

(iii) Discretionary power should be used keeping in view the public interest and the welfare of the society.

(iv) It is of utmost importance that reasons should be given for discretionary administrative decisions especially where people’s lawful rights or interests are likely to be affected. For this administrative authorities should also have the duty to communicate their reasons to the individuals concerned.

(v) Judiciary has to evolve continuously new principles, standards, guidelines and parameters so that discretionary powers conferred on the administration may not misuse.

**Part - D**

The most important aspect of the study of the administrative law is the judicial Control of administrative action. The tremendous increase in the powers of the administrative authorities in the modern times and evolution of a new socio-economic order having its repercussions on the increased activities of the State has resulted in new vistas of administrative functions. In the context of increased powers of the administration, judicial control has become an important area of administrative law, because courts have proved more effective and useful than the legislature or the administration in that matter and it provides for control over the administration by an outside agency strong enough to prevent injustice to the individual while leaving the administration adequate freedom to enable it to carry on effective Government.\[^{12}\]


Judicial review is a highly complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic features of the constitution. The court in its exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizens’ rights of life and liberty. Since our Constitution was built upon the deep foundations of rule of law, the framers of the Constitution made sincere efforts to incorporate certain article in the Constitution to enables the courts to exercise effective control over administrative action. Pure administrative action involves both Statutory and non statutory functions which can be covered subjected to judicial review through various modes for which the proper remedy may be to issue an appropriate writ under Articles 32 and 226 of the Indian Constitution.

Article 32 provides a guaranteed, quick and summary remedy for the enforcement of Fundamental Rights. It confers one of the “highly cherished rights”. It is the right to move the Supreme Court for the enforcement of the fundamental rights. This right is an important and integral part of the basic structure of the Constitution. As regards the appropriate proceedings under Article 32, in Bandhua Mukti Morcha v. Union of India, the Supreme Court said that the Constitution makers deliberately did not lay down any particular form of proceeding for the enforcement of a fundamental right nor did they stipulate that such proceeding should conform to any right pattern or straight jacket formula because they knew that in a country like India, where there was so much of poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a rigid formula of proceeding for enforcement of a fundamental right, would become self-defeating.

Article 136 which is in the nature of a residiuary or reserve power of judicial review in the area of public law lays down that the Supreme Court may, in its discretion, grant

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14 Fertilizer Corporation Kamgar Union v. Union of India, AIR 1981 SC 344.
15 AIR 1984 SC 802.
special leave to appeal before from any judgment, determination, sentence, order passed or made by any court or tribunal in any cause or matter.\textsuperscript{16} Thus Article 136 does not confer a right to appeal on any party, but it confers a discretionary power on the Supreme Court to interfere in suitable cases to advance the cause of justice.\textsuperscript{17} The important aspect of Article 136 is the use of the word “tribunal” therein as discussed in Chapter III. It means that the Supreme Court can hear appeals from orders and determinations of such bodies as may not be courts strictly speaking. The Court can hear appeals from any tribunal even though the statute under which the tribunal functions makes no provision for such an appeal. Further, being a jurisdiction conferred by the Constitution, it cannot be diluted or circumscribed by ordinary legislative process and thus, the Supreme Court may hear an appeal even where the legislature declares the decision of a tribunal as final.

Article 136 does not confer any right of appeal in favour of any party as such and it is not that any and every error is envisaged to be corrected in exercising power under this Article. It is a special power extraordinary in nature and the main object of conferring power under Article 136 is to ensure that there has been no miscarriage of justice.\textsuperscript{18}

In the same way, Article 226 empowers the High Courts to issue directions, orders or writs for the enforcement of fundamental rights and for any other purpose also. Thus the power of judicial review of the High Court is wider than that of Supreme Court. The jurisdiction of the High Court under Article 226 for the enforcement of fundamental right is mandatory whereas for the enforcement of ordinary legal rights it is discretionary.\textsuperscript{19} It also empowers the High Courts to issue the writs, directions or order in the nature of habeas

\textsuperscript{17} N.Natarajan v. B.K.Subha Rao, AIR 2003 SC 541; Durga Shankar Mehta v. Thakur Raghuraj Singh, AIR 1954 SC 520. In state of U.P. v. Harish Chandra, AIR 1996SC 2173, it was held that the Supreme Court might grant special leave against judgement by single judge of High court. Availability of remedy of appeal to Division Bench, would not bar exercise of power by the Supreme Court under Article 136.
\textsuperscript{18} State of Rajasthan v. Sohan Lal, 2004 (5) SCALE 86.
\textsuperscript{19} Manjula v. Director of Public Instruction, AIR 1952 Ori 344. See also Kailash Chander v. State of Haryana, 1989 Supp (2) SCC 669.
corpus, mandamus, certiorari, prohibition and quo warranto. Where there has been infringement of fundamental rights, an application under Article 226 should not be thrown out simply on the ground that the proper writ has not been prayed for. The petitioner is, in such case entitled to a suitable order for the protection of his fundamental right or enforcement of the legal duty of the respondents.\textsuperscript{20}

Article 227 of the Constitution of India provides that every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. The power of superintendence casts a duty upon a High Court to keep the inferior courts and tribunals within the limits of their authority and they do not cross the limits, ensuring the performance of duty by such courts and tribunals in accordance with the law. The jurisdiction vested in High Court under this Article is revisional jurisdiction,\textsuperscript{21} which is to be exercised sparingly to correct errors but not to upset pure findings of fact, which fall on the domain of an appellate court only.\textsuperscript{22} The power under this Article may be exercised under the following circumstances;

(i) When the Subordinate Court/tribunal acts arbitrary or in capricious manner.\textsuperscript{23}

(ii) When subordinate Court or tribunal acts in violation of the principles of natural justice.\textsuperscript{24}

(iii) When the subordinate Court or tribunal acts in excess of jurisdiction vested in it or fails to exercise jurisdiction vested in it.\textsuperscript{25}

(iv) When there is error of law apparent on the face of the record.\textsuperscript{26}

(v) When the subordinate Court or tribunal arrives at a finding which is perverse or based on no material.\textsuperscript{27}

The main principles for exercising of writ jurisdiction under articles 32 and 226 are in accordance with judicial considerations and well established principles. The

\textsuperscript{20} State of Mysore v. Chander Shekhar, AIR 1965 SC 523.
\textsuperscript{22} Khinji Vidyu v. Premier High School, AIR 2000 SC 3495; Mani v. Phiroz, AIR 1991 SC 1492.
\textsuperscript{23} Santosh v. Mooi Singh, AIR 1958 SC 312.
\textsuperscript{24} Trimbak v. Ramchandra, AIR 1977 SC 1222.
\textsuperscript{25} Dahya Lal v. State of Maharashtra, AIR 1964 SC 1320.
\textsuperscript{26} Oriental Insurance Co. v. Jharua Sarkar, AIR 2000 Gau.189.
\textsuperscript{27} Nibaran v. Mahendra, AIR 1963 SC 1895
foremost principle of writ jurisdiction is discretionary and prerogative remedy which is in
the form of five writs incorporated in Indian Constitution. It grants an extraordinary
remedy which is essentially discretionary. It cannot be claimed as a matter of right and
will be exercised only in furtherance of interests of justice. The court has to weigh the
public interest vis-à-vis the private interest while exercising the power under Article
226\textsuperscript{28} and must keep in mind the well established principle of justice and fair play and
should exercise the discretion if the ends of justice require it.\textsuperscript{29}

Laches or delay is one of the fundamental principles of administration of justice
which is based on the maxim of equity *vigilantibus non dormientibus jura subveniunt*,
i.e., equity aid the vigilant and not the indolent. It means courts will help those who are
vigilant about their rights and who do not sleep on their rights. It is a rule of practice
based on sound and proper exercise of discretion and there is no inviolable rule that
whenever there is delay the court must necessarily refuse to entertain the petition. Each
case is to be decided on its facts and circumstances.\textsuperscript{30}

The High Court may also have discretion to refuse to grant relief where an
alternative remedy, equally efficient and adequate, exists, unless there is an exceptional
reason for dealing with the matter under the writ jurisdiction. But in spite of availability
of the alternative remedy, it has been held that the High Court may still exercise its writ
jurisdiction in at least three contingencies,\textsuperscript{31} viz.,

(i) Where the writ petition seeks enforcement of any of the fundamental rights;
(ii) Where there is failure of principles of natural justice; and
(iii) Where the orders or proceedings are wholly without jurisdiction or the vires
of an Act is challenged. Refusal to entertain writ petition on the ground of

\textsuperscript{31} L.K. Verma \textit{v. HMT Ltd.}, AIR 2006 SC 975; State of H.P. \textit{v. Gujarat Ambuja Cement Ltd.}, (2005) 5 SCALE 548;
Whirpool Corporation \textit{v. Trade Marks, Mumbai, Registrar}, AIR 1998 SC 22; Mumtaz Post Graduate Degree
existence of alternative remedy, in very exceptional situation, has been held to be unjustified.

In other words, where a remedy under Article 226 is available the Supreme Court would not normally entertain a petition under Article 32.

The doctrine of res-judicata is another principles of judicial review of administrative action which is founded on considerations of public policy as it envisages that finality should attach to the binding decisions pronounced by courts of competent jurisdiction and that individuals should not be made to face the same litigation twice. This rule has been extended to writ jurisdiction as well through the process of judicial interpretation. Once, therefore, a writ petition has been moved in a High Court or the Supreme Court and is rejected there on merit, then a subsequent writ petition cannot be moved in the same Court on the same cause of action.32 It is also known as “estoppel by record”, i.e., estoppel per rem judicatem.33 In order to sustain the plea of res judicata it is not necessary that all the parties to two litigations must be common. All that is necessary is that issue should be between same parties or between parties under whom they or any of them claim.34

In England, res judicata plays a restricted role in the field of Administrative Law. The rule it is said must yield to two fundamental principle of public law, i.e., that jurisdiction cannot be exceeded and that statutory powers and duties cannot be fettered. Within these limits, the principle of res judicata, can extend to a variety of statutory tribunals and authorities which have power to give binding decisions.35

Thus, the jurisdiction of High Court in dealing with a writ petition under Article 226 is substantially similar as that of the Supreme Court under Article 32 and in this way

scope of writs under both the articles is concurrent. Apart from practical convenience, it is also essential that for the breach of fundamental and other rights High Court should be approached first by the aggrieved person. If a writ is dismissed by the High Court only appeal thereto could be filed in the Supreme Court and not a writ under Article 32. In such cases principle of res judicata shall be applicable.

The powers of the Supreme Court under Article 32 of the Constitution are not circumscribed by any territorial limitation. It extends not merely over every authority within the territory of India but also those functioning outside, provided that such authorities are under the control of the Government of India. Therefore, from the above mentioned conclusion it is suggested that;

(i) In the present era, the protection of the fundamental rights is more important. Therefore judicial review should be made more effective by including more institutions in its fold.

(ii) For the protection of fundamental right, the scope of Article 12 should be widened and to bring more and more authorities within the ambit of judicial review. Even a private body which performs public duty should be amenable to Part-III of the Constitution.

(iii) The remedies under Article 32 and 226 cannot be claimed as a matter of right and will be exercised only in furtherance of interests of justice.

Part - E

Chapter fourth of the study is based on the grounds of judicial review of administrative action. Judicial review means review by courts of administrative actions

36 Article 32: (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the right conferred by this part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this part.
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.
with a view to ensuring their legality. The primary purpose is to provide a mechanism whereby the courts examine what a public body has done, or failed to do, with reference to the relevant legislation, and come to a determination as to the legality of the public body’s actions. The doctrine of ultra vires is one of ground of judicial review of administration action. Any administrative act or order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of legal effect. The Literal interpretation of the phrase ultra vires is beyond the powers or lack of power. It envisages that an authority can exercise only so much power as is conferred on it by law. In its purest form the ultra vires doctrine holds that an inferior body must act within the scope of powers, and that if it exceeds its powers its determination will be a nullity.

The doctrine of ultra vires is classified into two category – Substantive Ultra vires and Procedural Ultra vires. Substantive Ultra vires means where a decision has been reached outside the powers conferred on the decision taker. If an administrative authority acts outside the substance of the power conferred then it is, quite simply, ‘doing the wrong thing’. This is the concept of substantive ultra vires, whereas procedural ultra vires means where the prescribed procedures have not been properly complied with. An administrative authority may be exercising a power for an authorized purpose but, if it fails to fallow a required procedure, its actions will be open to challenge. The authority here may ‘doing the right thing’ but it is doing it ‘in the wrong way’. This is the concept of procedural ultra vires. The question arises as to whether the observance of the procedural requirement is mandatory or directory. It is for the courts to determine the question finally.

Wednesbury unreasonableness is a second ground which is used to refer to the principle enunciated in the British case of Associated Provincial Picture Houses v. Kunwar Pal Singh Rathi v. State of Uttar Pradesh, AIR 2002 All 27.


Ibid.
Wednesbury Corporation\textsuperscript{41} which is popularly known as wednesbury case, wherein the basic principles of judicial review were laid down. Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral and ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. As it is rightly observed by justice Markandey Katju, that the wednesbury principle is often misunderstood to mean that any administrative decision which is regarded to be unreasonable must be struck down. The correct understanding of the wednesbury principle is that a decision will be said to be unreasonable in the wednesbury sense if: (1) it is based on wholly irrelevant consideration, or (ii) it has ignored a very relevant material which it should have taken into consideration, or (iii) it is so absurd that no sensible person could ever reached to it.

While defining the parameters of scope of judicial review, it is ruled that the Court should not interfere with the administrative decision unless it is illogical or suffer from procedural impropriety or is shocking the conscience of the court.\textsuperscript{42} Lord Diplock in the celebrated cases \textit{Council of Civil Service Union v. Minister of civil Services},\textsuperscript{43} classify under three heads the grounds upon which administrative action is subject to control by judicial review. These grounds are as under:

(i) Illegality,

(ii) Irrationality and

(iii) Procedural impropriety.

The Plain meaning of illegality is that what is contrary to law. This ground of judicial review is based on the principle that administrative authorities must correctly understand the law and its limits before any action is taken. Therefore, if the authority lacks jurisdiction or fails to exercise jurisdiction or abuses jurisdiction or exceeds jurisdiction, it shall be deemed that the authority has acted illegally.

\textsuperscript{41} (1948) K.B.223.
\textsuperscript{42} V. Ramana v. A.P.S.R.T.C., AIR 2005 SC 3417.
\textsuperscript{43} (1984) 3 ALL ER 935; Indian Railway Construction Co. Ltd. v. Ajay Kumar, AIR 2003 SC 1843.
Irrationality simply means that administrative discretion should be exercised reasonably. Accordingly, a person entrusted with discretion must direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the subject he has to consider. If he does not obey those rules he can be said to be acting unreasonably.44

Procedural impropriety encompassed the obligation to observe procedural requirements lay down in the legislative instrument which conferred the power which is based on principles of natural justice and fair procedure.

In England, the development of the principles of judicial review was slow and gradual. Many of the principles which remained for years have undergone drastic changes. The Wednesbury principles, lay down as early as in 1947, continue to be of vital importance. Earlier, the English Courts could interfere only with the decisions of judicial and quasi-judicial authorities but not with administrative decisions. The decision in Associated Provincial Picture Houses Ltd. v Wednesbury Corporation,45 altered this position. Now, in considering whether an authority having so unlimited power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account. The Court cannot interfere as an appellate authority overriding the decisions of such authority but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power. Now, in modern time a new wave of thinking has come-whether the Wednesbury principles have to be reappraised or modified by adopting some other principles.

From the study of series of case laws, e.g., Council of Civil Service Unions v. Minister for the Civil Service,46 R v. Chief Constable of Sussex Ex. P. International

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44 Ibid.
45 Supra note 41.
46 (1985) AC 410.
Trader’s Ferry Ltd., 47 R. v. Secretary of state for the Home Dept. Ex. p. Daly, 48 Secretary of state for Education & Science v. Tameside Metropolitan Borough Council, 49 it is clear that earlier, the Wednesbury test was very popular, but with the passage of time its criticism has been started. Its basic postulate of reasonability was brought into question for being sufficient and impractical test to judge validity of administrative actions. In recent times, particularly as a result of the enactment of the Human Rights Act 1998, the judiciaries have resiled from this strict abstention’s approach, recognizing that in certain circumstances it is necessary for them to undertake a more searching review of administrative decisions. Thus the courts started developing a new test for judicial review of administrative actions, which came into existence with lots of opposition, which was the Doctrine of Proportionality. This is a test for judicial review of administrative actions on a more comprehensive basis. The Doctrine of proportionality checks the important link between the administrative objective to be achieved and the means adopted by the administration to achieve it.

As regards the judicial review of administrative action in India the concept of “reasonableness” and “non-arbitrariness” pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution. If the action of the administrative authority is found to be unreasonable, it would be quashed as violative of Article 14, 19 or 21 of the Constitution. 50 In India, the principle of primary review and proportionality on the one hand and the principle of secondary review and Wednesbury reasonableness on the other hand gave a new dimension to administrative law, the former applying in the case of fundamental freedoms and the latter, in other cases.

The doctrine of Proportionality relates to the principle of interpretation of statutory provisions maintaining fairness and justice. It is a mode of restricting the administrative action from being drastic, when it is used for obtaining desired results. It is a safeguard against the unlimited use of legislative and administrative powers and considered to be

48 (2001) 2 AC 532.  
49 (1977) AC 1014.  
50 Supra note 15.
something of a rule of common sense, according to which an administrative authority may only act to exactly the extent that is needed to achieve its objectives. It also envisages that a public authority ought to maintain a sense of proportion between his particular goals and the means he employs to achieve those goals, so that his action impinges on the individual rights to the minimum extent to preserve the public interest. This means that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred. Under this principle court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purposes which they were intended to serve. The legislature and the administrative authority are given an area of discretion or a range of choice but as to whether the choice made infringes the rights excessively or not is for the court to decide.51

In England, the doctrine of proportionality was extended in 1977 in 'skimmed milk powder case'.52 With the incorporation of European Convention on Human Rights into the domestic law of England in 1998, by Parliament passing the Human Rights Act, 1998, the legal parameters of judicial review has undergone a change and “wednesbury” Principle of unreasonable has been replaced by the doctrine of “Proportionality.” Now, the present position in English Administrative law is that both the principles wednesbury and proportionality continue to co-exist and the proportionality principle should be more applied, when there is violation of human rights and fundamental freedom. In case of violation of citizen ordinary rights, the wednesbury principle is more appropriate. The proportionality principle has not so far replaced the wednesbury principle and the time has not reached to say good bye to wednesbury much less its burial.53

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51 Om Kumar v Union of India, AIR 2000 SC 3689.
53 Wednesbury’s principles of reasonableness: The law revisited, available on legalperspectives.blogspot.in/2010/05/wednesbury-principles-of.html visited on 10.07.2013 at 9.45 a.m.
In India, the principle of proportionality is applied in a very limited sense. The principle is applied not as an independent principle by itself as in European Administrative law, but as an aspect of Article 14 of the Constitution, viz., an arbitrary administrative action is hit by Art. 14. If the administrative action is arbitrary, it could be struck down under Art. 14. In recent time, now, Proportionality is the most emerging concept of Administrative Law in India. It enjoins that if the administrative authority attempt to achieve a goal, then the means employed to achieve that goal should be such that they should infringe the Fundamental Rights to the minimum extent, i.e., it should be proportionate to the object sought to be achieved. From the various important case laws in India, it comes to conclusion that in cases where Article 14 is violated, proportionality has never been used but only applied in cases relating to excessive administrative sanctions.

The doctrine of legitimate expectation is the fourth important ground of judicial review of administrative action which belong to the domain of public Law and is intended to give relief to the people when they are not able to justify their claims on the basis of law in the strict sense of the term though they had suffered a civil consequences because their legitimate expectation had been violated. In India the doctrine has developed in order to check the arbitrary exercise of power by the administrative authorities. It has been developed both in the context of reasonableness and in the context of natural justice. It is also the constitutional principle of rule of law, which requires regularity, predictability and certainty in Government’s dealing with public. It is a positive concept and would apply only when a practice is found to be prevailing. But, in a case where purported expectation is based on an illegal and unconstitutional order, the same is wholly inapplicable, as the same cannot be founded on an order which is per se illegal and without foundation.

54 E. Royappa v State of Tamil Naidu, AIR 1974 SC 555
The doctrine has negative and positive contents both. If applied negatively an administrative authority can be prohibited from violating the legitimate expectations of the people and if applied in a positive manner an administrative authority can be compelled to fulfill the legitimate expectations of the people. Thus it is based on the principle that public power is a trust which must be exercised in the best interest of its beneficiaries - the people.59

In India, the doctrine of 'legitimate expectation' imposes in essence a duty on public authority with a view to check arbitrary exercise of power by the administrative bodies and to act fairly by taking into consideration all relevant factors relating to such legitimate expectation.60 The doctrine is still at a stage of evolution but it has generated a significant body of case law. It is based on the principle that good administration demands observance of reasonableness and where it has adopted a particular practice for a long time, even in absence of a provision of law, it should adhere to such practice without depriving its citizens of the benefit enjoyed or privilege exercised. It is said to be the latest recruit to a long list of concepts fashioned by the Courts for the review of administrative action. It is observed that the concept of legitimate expectation is not the key which unlocks the treasure of natural justice and it ought not to unlock the gates which shut the court out of review on the merits, particularly when the element of uncertainty and speculation is inherent in that very concept.61

Doctrine of Public Accountability is the fifth important ground of administrative action and one of the most important emerging facets of administrative law in recent time. In the present time, it is increasingly used in political discourse and policy matters because it conveys an image of transparency and trustworthiness. It is the Government that is accountable to the public for delivering a broad set of outcomes but more importantly it is the public service consisting of public servants that constitutes the delivery mechanism. It is based on the principle that the power in the hands of administrative authorities is a

60 Supra note 56.
public trust which must be exercised in the public interest. Therefore, the laws are to be made and implemented, keeping in view the welfare of the common man. Therefore it is suggested that;

(i) Doctrine of proportionality should be considered by courts in all cases coming before it irrespective of whether fundamental or ordinary rights of citizens/persons are involved.

(ii) In India, doctrine of proportionality should be applied only in cases where policy decisions are challenged as disproportionate as opposed to arbitrary powers. For this courts have to play active role to check whether the relevant considerations are followed against arbitrariness.

(iii) In India, doctrine of proportionality should also be applied in protection of fundamental rights especially in Article 14 of Indian Constitution.

(iv) The doctrine of legitimate expectation is still at a stage of evolution in India. Therefore, for public interest the courts have to follow this doctrine frequently to bring responsibility and accountability in the decisions of the executive.

(v) For misuse of public power not only the Minister but also the official working under him will be personally liable and punishment should also be given to them.

(vi) For oppressive, arbitrary and unconstitutional actions of public servants, they should also be liable to fine and punishment.

**Part - F**

Chapter fifth deals with writ jurisdiction and other remedies available to check abuse of administrative actions. It is in the form of writ jurisdiction to ensure that the decisions taken by the authorities are legal, rational, proper, fair and reasonable. For this, Articles 32 and 226 of the constitution of India has designed for the enforcement of fundamental rights and for a judicial review of administrative actions in the form of writs.

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62 Supra note 59.
63 Article 14 deals with right to equality.
It is a constitutional remedy available to a person to bring his complaint or grievance against any administrative action to the notice of the court. There are different statutes deals with writs jurisdiction in India under the Code of Criminal Procedure (Cr PC), 1898, Section 45 of the Specific Relief Act, 1877 and Section 115 of the Code of Civil Procedure 1908. Under Articles 32 and 226, the Supreme Court and High Courts have power to issue prerogative writs in the nature of habeas corpus, mandamus, prohibition, certiorari and quo warranto for the protection of fundamental right enshrined in part III of the Indian Constitution. This remedy exists in the form of Art.226 of the Constitution for filing a writ in the High Court concerned, it does not prevent or place any bar on an aggrieved person to directly approach the Supreme Court under Article 32 of the Constitution.

Habeas Corpus is a prerogative writ which is a renowned contribution of the English Common law to the protection of human liberty. The writ is in the form of an order calls upon the person in whose confinement the person is to let the court know the legal justification for the detention, and in the absence of such justification to release the person from his confinement. It has been described as a great constitutional privilege or the first security of civil liberty which aimed at to ensure swift judicial review of alleged unlawful detention on liberty or freedom of the prisoner or detenu. The remedy under it lies against the three organs of the State legislature, executive and judiciary, local authorities, other instrumentalities of the state, any administrative authority, and private persons including company or any association of persons but it would not lie against the decision pronounced by a court of competent jurisdiction.

The writ of Mandamus is regarded as one of the highest remedies in the Indian judicial System. It is in the form of specific orders from the Supreme Court or High Court

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64 Section 491, the Code of Criminal Procedure, 1898.
65 Article 32(2) of the Indian Constitution.
to the inferior court, tribunal, a board, corporation or any administrative authority, or a person requiring the performance of a specific duty fixed by law or associated with the office occupied by the person. The function of mandamus is to keep the public authorities within the limits of their jurisdiction while exercising public functions. It can be issued to any kind of authority in respect of any type of function-administrative, legislative, judicial and quasi-judicial. Generally, it would lie only to enforce a duty which is public in nature and it can be issued on all those grounds on which certiorari and prohibition can be issued. These grounds are error of jurisdiction which includes excess of jurisdiction and lack of jurisdiction, Jurisdictional facts, violation of the principles of natural justice, error of law apparent on the face of record and abuse of jurisdiction etc.

Certiorari is an extraordinary common law remedy of ancient origin. It is not a writ of right but one of discretion. It is in a form of judicial order issued to the lower judicial authority by the High Court or Supreme Court to show the record of proceeding ‘pending with’ such lower judicial authority for scrutiny and if necessary for quashing the same. The main object of the writ of certiorari is to keep the exercise of powers by judicial and quasi judicial tribunals within the limits of the jurisdiction assigned to them by law and to restrain them from acting in excess of authority. The jurisdiction of the High Court to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. It can be issued when a subordinate court is found to have acted without jurisdiction or by assuming jurisdiction where there exist none, or in excess of its jurisdiction by over stepping or crossing the limits of jurisdiction or acting in flagrant disregard of law or rules of procedure or acting in violation of principles of natural justice where there is no procedure specified and thereby occasioning failure of justice. A writ of certiorari can also be issued when there

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is infraction of fundamental rights of the petitioner, or where the order passed by the agency is mala fide, fraudulent or otherwise unjust.

Writ of prohibition means to forbid or to stop. It is in the nature a preventive writ with a view to an injunction or prevents order against a Court or tribunal. It is a command by the Superior Court to inferior courts and tribunals to refrain from doing what it is about to do. It prevents from assuming jurisdiction which is not vested in him. In India, prohibition is issued to protect the individual from arbitrary administrative actions. The main object is to confine courts or tribunals of inferior or limited jurisdiction within their bounds. The grounds for issuance of prohibition are lack or excess of jurisdiction, violation of principles of natural justice, infringement of fundamental rights, fraud, and contravention of the law of the land etc.

Quo warranto means what is your authority. It is a judicial order against a person who occupies a substantive public office without any legal authority. In other words the writ calls upon the holder of a public office to show to the court under what authority he is holding the office in question. It is a very effective method of judicial control which reviews the actions of the administrative authority which appointed the person. It gives the judiciary a weapon to control the executive, the legislature, statutory and non statutory bodies in matters of appointments to public offices. Conversely, it protects a citizen from being deprived of a public office to which he has a right. For this, the office in question must be a public office and the person must be in actual possession of the office.

Private law review is another kind of powers of ordinary courts of the land to control administrative action. It is known as equitable remedies. These are three in kinds: injunction, declaratory relief and an Action for damages. Injunction is an equitable remedy. It is a judicial process by which one who has invaded, or is threatening to invade

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the rights, legal or equitable, of another is refrained from continuing or commencing such wrongful act. It is coercive but not rigid and can be tailored to suit the circumstances of each individual case. At the present time, the law relating to injunctions is laid down in the Specific Relief Act, 1963. Under this act, it deals with two kinds of injunction prohibitory and mandatory injunction. A prohibitory injunction forbids a defendant to do a wrongful act which would be an infringement of some right of the plaintiff, legal or equitable which are further divided into temporary or perpetual injunctions. Temporary injunction is granted as an interim measure which is preventive in character. It is granted on an application by the plaintiff to preserve status quo until the case is heard and decided. Section 37(1) of Specific Relief Act, 1963 and Rules 1 and 2 of Order 39 of the Code of Civil Procedure, 1908 deal with temporary injunctions. It is granted in three conditions viz., making out a prima facie case, showing that the balance of convenience is in the applicant’s favour in that the refusal of the injunction would cause greater inconvenience to him or whether on refusal of the injunction he would suffer irreparable loss.

A perpetual injunction is granted on final disposal of the case on merits to prevent the infringement of those rights to which the plaintiff is entitled permanently. It is similar to a decree and decides a right. Section 38 of the Specific Relief Act deals with perpetual injunction which may granted where the defendant is a trustee of the property for the plaintiff, where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion; where the invasion is such that compensation in money would not afford adequate relief; and where the injunction is necessary to prevent multiplicity of judicial proceedings.

A mandatory injunction not only involves prohibition but also imposes a positive duty on the defendant to do something. Sections 39 and 40 of Specific Relief Act deal with mandatory injunction. From various case laws it is clear that the relief of injunction

76 Ibid.
is purely discretionary and cannot claim it as a matter of right. It is more in the nature of equitable relief than a legal remedy and the court must keep in mind the principles of justice and fair play while granting relief.

Declaratory relief in the form of remedy can be defined as a judicial remedy which conclusively determines the rights and obligations of public and private persons and authorities without the addition of any coercive or directory decree. The essence of declaratory remedy is that it states the rights or legal positions of the parties as they stand, without changing them in any way though it may be supplemented by other remedies in suitable cases. Section 34 of the Specific Relief Act 1963 deals with declaratory relief. The main characteristics of declaratory relief are as follows:

(i) Declaratory is an ordinary remedy.
(ii) Declaratory remedy is discretionary.
(iii) Declaratory judgment is not enforceable.
(iv) There is no sanction behind declaratory action.
(v) Declaratory decree is binding on the parties.

Though several advantages are in favour of the declaratory action, yet it is not as popular and effective remedy as the writs. The reasons are as following: Firstly, since a declaratory decree is a statutory remedy it can be excluded by a statute. Secondly, two months’ notice under s. 80, C.P.C., has to be given before a suit for declaration against the government can be filed. Thirdly, a suit for declaration is to be filed in a lower court where its disposal takes long while a person can go straight to the High Court for a writ.

Civil suits are another traditional remedy available to a person to vindicate his legal right if he is aggrieved by any action of an administrative authority. The Section 9 of Civil Procedure Code, 1908 deals with civil suits. This provision confers jurisdiction on civil courts to hear and decide all disputes of a civil nature, unless the jurisdiction of a civil court is barred either expressly or by necessary implication. Further Section 80 of the Civil Procedure Code says that before any suit is filed against the
government including for the purpose of the judicial review of administrative action, the plaintiff should give two months notice to the government. Therefore, remedy in ordinary could not be speedy. However, in cases of suitable cases where the situation demands, the condition of two months notice can be waived off by the court.

The remedy in the form of institution of lokpal is another step for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executive. It is strong anti-corruption institution towards bringing an end to the corruption and strengthening the beliefs of individuals in democracy. For this Lokpal Bill, 2011 was presented with a purpose to establish autonomous and independent institutions called Lokpal at the central level and and Lokayukta for states. But this bill has lots of loopholes. Then Justice Santosh Hegde (former Supreme Court Judge and former Lokayukta of Karnataka), Prashant Bhushan (Supreme Court Lawyer) and Arvind Kejriwal (RTI activist) along with the members of India against corruption movement drafted an alternative bill named as the Jan Lokpal bill. The draft Bill envisages a system where a corrupt person found guilty would go to jail within two years of the complaint being made and his ill-gotten wealth being confiscated. It also seeks power to the Jan Lokpal to prosecute politicians and bureaucrats without government permission. The differences between these two bills were discussed in detail in Chapter Vth.

Central Vigilance Commission as an integrity institution was also set up by the Government of India in 1964 with the purpose of checking corruption amongst Government servants. Its main concern is with matters of corruption, misconduct, lack of integrity or other kinds of malpractices or misdemeanors on the part of Government servants. Its role is limited but advisory in nature. In a very important case of Vineet Narain v. Union of India which is known as Jain Hawala case, the Supreme Court had directed the Central government to confer statutory status to Central Vigilance

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Commission, which was hitherto an advisory body, and also made it responsible for effective supervision of the functioning of CBI.

Establishment of service tribunals under Articles 323-A and 323-B is another most important remedy which provides that Parliament may by law provide for establishment of administrative tribunals in the service matter of public servants of Centre and States. For this Parliament passed the Administrative Tribunals Act, 1985 which play a very positive role. The Act was enacted with the salutary object of providing for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts.\(^{79}\)

In the modern time, the Right to information Act, 2005 is also welcoming step which is enacted to radically alter the administrative ethos and culture of secrecy and control, the legacy of colonial era and bring in a new era of transparency and accountability in governance.\(^{80}\) After the studying the important features of the said Act, it is clear that Parliament has enacted it keeping in mind the rights of an informed citizenry in which transformation of information is vital in eradicate corruption and making the government and its instrumentalities accountable.\(^{81}\)

Self help is also one of the remedy provided to aggrieved person against an illegal or ultra vires order of the administrative authority which is very effective in present time. From the above mentioned discussion and analysis, it is suggested that;

(i) Remedies in violation of right should be effective in term of both procedure and effect, i.e the procedure for obtaining the remedy should be clear, simple and speedy and the remedy once granted should be suitable to protect the legal right from infringement and to compensate the victim of such infringement.

(ii) The scope of writ jurisdiction under Article 32 and 226 must be widened.

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\(^{79}\) Clause (1) of Article 323-A of the Constitution of India.

\(^{80}\) Namit Sharma v. Union of India, 2012 (8) SCALE 593.

\(^{81}\) Ibid.
(iii) Today, the ordinary courts are overburdened with work. To lessen their burden, more and more administrative tribunals should be established as an alternative forum by which the disputes or grievances of the peoples could be settled expeditiously and economically.

(iv) Political executive should first critically review its own performance before expecting discipline and diligence from the administration.

(v) Judiciary being an unelected body is not accountable to the people through any institutional mechanism.

(vi) With a view to increase accountability and transparency in governance, the mandatory public consultation on new laws and rules must be necessary before they are brought to parliament.

(vii) To remove corruption in India, it is needed that a new lokpal bill containing the effective provisions of both the existing bills be enacted and implemented. Some hard provisions with deterrent effect must also be incorporated.

(viii) In India, there is growing anger against corruption and root cause of corruption is human greed. So what is necessary to inculcate right values in our people? Efforts must also be done to change the mindset of the people and this can only be done by public cooperation.

(ix) Central Bureau of Investigation (CBI) should be out of control of government.

(x) The Central Vigilance Commission (CVC) should be given statutory status.

(xi) The Central Vigilance Commission (CVC) should be responsible for effective supervision of the functioning of Central Bureau of Investigation (CBI).

(xii) Alternative dispute resolution mechanisms should be followed in each department of the government. For this, appropriate training should be provided in this regard. In order to facilitate resolution of dispute, the Vigilance Branch should also be associated at this stage of mediation/conciliation. The judicial discipline, decorum and propriety must be strictly adhered to while adjudicating disputes.82

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82 Researchers own ideas.
(xiii) Right to information Act, 2005 is welcome step of the government of India. It is second important check on the administrative working but for proper implementation of it, some hard penalties should be incorporated in it. It is further suggested that time bound services should be provided to the citizens whenever possible with the help of computer or internet.