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STANDARDS OF ADMINISTRATIVE PROCESS  
UNDER THE FOREIGN EXCHANGE REGULATION  
ACT

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The object of study in this paper is confined to that aspect of the Foreign Exchange Regulation Act which relates to the application of administrative process in the Act and to the provisions effecting rights of persons by the exercise of administrative discretion by the authorities empowered to exercise such discretion. The approach to the subject presents two stand-points. Firstly, admitting that the performance of vast regulating and controlling tasks aimed at protection of the national interest under the Act have to be entrusted to an Administrative Authority, the administrative process provided in the Act must be rationally co-related to the legal standards to be provided in the Act itself within the framework of which such administrative body or authority should have its sphere of action. Secondly, the Appellate Authority empowered under the Act to hear and decide the appeals from the decision of the administrative authority should be one arm of the ordinary legal system of the country.

The relevant scheme of the Foreign Exchange Regulation Act will be analysed from the view of above two stand points.

There is a very brief **relevant** history behind the present Foreign Exchange Regulation Act. In the year 1939, when exchange control was first introduced in India and brought into force by virtue of the emergency powers derived from the Defence of India Rules, it was

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conceived as a means for increasing India's contribution to the war efforts. At that time India was not in a danger of running into any balance of payment difficulties. During the World War Second exchange control was confined to transactions with non-sterling countries, the currency of which particularly dollars had to be conserved for the purposes of purchasing the essential war materials. The operation of exchange control in India was, thus, directed to ensure the maximum economy in India's expenditure in non-sterling countries.

The system of exchange control was made effective by means of a series of Rules framed under the Defence of India Act, 1939. This system expired on the 30th day of September 1946 but it was, however, continued for another six months under the Emergency Provisions Continuance Ordinance, 1946. Thereafter the system of exchange control was placed on a temporary statutory basis by the Foreign Exchange Regulation Act, 1947, which came into force on the 25th day of March, 1947. It was to expire on the 31st day of September 1957.

The planning scheme in the country had already been taken up by the Government by that time. The first five year plan, in fact, did not present any foreign exchange problem in the country. The second five year plan, although it had a very heavy foreign exchange component, was confronted with a foreign exchange crisis in the very first year of the plan. There was a tremendous increase in imports accompanied by a sharp decline in exports resulting in shortage of foreign exchange and it became necessary to ensure that India's foreign exchange resources are conserved in the interest of the nation. Consequently, the continuance of the Foreign Exchange Regulation Act, 1947, became unavoidable and it was placed on a temporary footing in the year 1957 by Act 39 of 1957. The Act has been amended by the Foreign Exchange Regulation Act (Amendment) Act, 1964 (No.55 of 1964). The Act, as amended upto date, empowers the Government of India and the Reserve Bank of India to control and regulate dealings in foreign exchange and foreign securities in India, payments to persons resident outside India, export and import of currency notes, bullions, or precious stones, transfer of securities to non-residents and so on.

ADMINISTRATIVE HIERARCHY UNDER THE ACT

An administrative mechanism is created by the Foreign Exchange Regulation Act for dealing in breaches of the provisions of the Act and it is described as the Directorate of Enforcement. It is attached to the Ministry of Finance with Head Quarters at New Delhi and offices at Bombay, Calcutta and Madras. This organisation is headed by the Director of Enforcement appointed by Central Government for the purposes of enforcing the provisions of the Act:<sup>1</sup> There is a prescribed authority of adjudication vested in the Director of Enforcement.<sup>2</sup> After holding an enquiry if the Director of Enforcement is satisfied that a person has contravened the provisions of section 4, 5,<sup>3</sup> or sub-section (2) of section 12 of the Act,<sup>3</sup> he may impose a penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place or Rs.5,000/- or more as may be adjudged by him.

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1. Section 2(bb) of the Act.
  2. See Section 23(b) of the Act.
  3. Section 4 of the Act imposes restrictions on dealing in foreign exchange and it provides that except with the previous general or special permission of the Reserve Bank no person other than an authorised dealer shall, in India, and no person resident in India other than authorised dealer shall, outside India, buy or otherwise acquire and borrow from, or sell or otherwise transfer or lend to, or exchange with, any person not being an authorised dealer, any foreign exchange. It also provides that except with the previous general or special permission of the Reserve Bank, no person whether an authorised dealer or otherwise, shall enter into any transaction which provides for the conversion of India's currency into foreign currency or foreign currency into India currency at rates or exchange other than the rates for the time being authorised by the Reserve Bank. The only exception is that such restrictions will not prevent a person from buying from any post office in accordance with any law or rules made thereunder for the time being in force, any foreign exchange in the form of postal orders or money order.  
Section 5 of the Act imposes restrictions on payments.  
Section 9 of the Act deals with the acquisition by Central Government of foreign exchange.

For the contravention of the other provisions of the Act, or of any rule, direction or order made thereunder, the Act provides for trial by a Court of Magistrate.<sup>4</sup> A Court can, however, take cognizance of the offence only when a complaint, in writing, is made by the Director of Enforcement or any Officer authorised in this behalf by the Central Government or Reserve Bank by a general order or special order. The proviso to Section 23-C adds that where any offence is in contravention of any of the provisions of the Act, any rule, direction or order made thereunder which prohibits him from doing an act without permission, no such complaint will be made unless the person accused has been given an opportunity of showing that he had such permission. The peculiar feature, however, is that the burden of proving that such person accused of the offence had the requisite permission shall be on such person.<sup>5</sup>

If at any stage of the enquiry into the contravention the Director of Enforcement is of the opinion that the penalty which he is empowered to impose will not be adequate, he may file a complaint in writing with the Court. For all court proceedings involving contravention of the Act, the punishment upon the conviction is imprisonment for two years or fine or both. By Section 19 of the Act, the Central Government is empowered to call for information and by the same Section the Magistrate can, on a representation in writing made by a person authorised under the Act, issue a search warrant for the inspection, search and seizures of any book or other document from the custody or possession of any person. The Director of Enforcement, if he has reason to believe that the said document or documents would be evidence of the contravention of any of the provisions of this Act or of any rule, direction or order made thereunder, may retain<sup>6</sup> documents in his custody for a period not exceeding four months or if, before the expiry of the said period of four months, any proceedings under Section 23<sup>7</sup> have been commenced before him, until the disposal of those proceedings, including the Appellate proceedings, or if such proceedings have been commenced before a Court until the document has been filed in that Court.

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Under Section 12(2) of the Act if any export of goods has been made by virtue of Section 12(1)(g) of the Act, adoption of any method meant to delay the sale of goods is made an offence. Similarly payment for the goods in a manner otherwise than the prescribed one or acceptance of amount higher or lesser to that payable by the foreign purchaser has been made an offence.

Section 23(1)(a) of the Act.  
See Section 24 of the Act.

## APPEALS

Appeals are provided under the Act. In the administrative hierarchy the first appeal lies to the Appellate Board. Any person aggrieved by an order of the Director of Enforcement made under Section 23 of the Act, may, after depositing the sum imposed by way of penalty under Section 23 within 45 days from the date on which the order is sent to the person committing the contravention prefer an appeal to the Appellate Board constituted by the Central Government under Section 23E of the Act.

It will be observed, thus, that the jurisdiction, both as regards original enquiry and trial and as regards to appeals both on questions of fact and law has been vested in the administrative bodies.

The strength of the Appellate Board has been increased from two to three by the Amending Act of 1964. A further appeal lies to the High Court on questions of law from the decisions or order of the Appellate Board.<sup>8</sup>

## STANDARDS OF ADMINISTRATIVE DISCRETION IN THE ACT

While examining the powers vested in the Director of Enforcement, it will at once be noticed that the legislature has vested in him subjective discretion by using such expressions as "if the Director of Enforcement is of opinion"<sup>9</sup> and "the Director of Enforcement has reason to believe."<sup>10</sup> Discretion is vested in the Director of Enforcement to file or not to file a complaint in a Court having jurisdiction and he will take decision depending upon his subjective satisfaction. It will be seen that the Director of Enforcement can in his discretion stop adjudication proceedings before him at any stage and make a reference of the matter to a Court of Law. Jurisdiction of a court to take cognizance of any offence punishable under the Act vests in its only when the Director of Enforcement makes a complaint in writing to the Court and not otherwise.<sup>11</sup> Again, in matters directly effecting personal liberty of a person, the Act

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6. Section 19(a) of the Act.
  7. Prescribing penalty and procedure for trial of offences and adjudication.
  8. See Section 23 EE of the Act.
  9. See Section 2, 30, Proviso of the Act.
  10. Section 19-A of the Act.
  11. See Section 23(3) of the Act.

empowers the Officer<sup>12</sup> of the Enforcement to search<sup>13</sup> persons and premises<sup>14</sup> and effect seizure<sup>15</sup> and with power to arrest<sup>16</sup> if such an Officer 'has reason to believe' that such search and seizure or arrest is required or necessary.

An examination of the powers vested in the Director of Enforcement and Officer of Enforcement reveals that the exercise of administrative discretion by such authorities under the Act is totally uncontrolled and unfettered. The Act loses sight of two fundamental principles, firstly, it fails to set any standard with which such administrative authorities must conform so that there may not be abuse of the exercise of discretionary powers by such authorities. Secondly, the Act does not give sufficient guarantee of the independent judgment by the Director of Enforcement. The Act also loses sight of the basic principle that in exercise of administrative discretion effecting legal right of individual person or property, the judicial element which ought to be present in exercise of such discretion cannot be ignored. The result is that the Courts of law while applying the letter of law, normally, observe the rule that the question of satisfaction is a question of fact and it is subjective consideration and not an objective consideration.<sup>17</sup> On points of facts, thus, to every act of an administrative authority done on the basis of which is termed its "subjective satisfaction," an element of finality is attached.<sup>18</sup>

The trend of judgments of the Superior Courts in the Nineteenth Century<sup>19</sup> indicated that the courts would be prepared to apply the rule of judicial control even in those cases where the authority was empowered to act administratively. But the twentieth Century has been a reversion in the attitude of the superior Courts. Lord Radcliffe, while delivering the judgment of the court in *Nakkuda Ali v. M.P. De S. Jayaratne*<sup>20</sup> ruled that an administrative authority

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12. Officers of Enforcement is a class created by 2-A of the Act.
  13. See Section 19-A of the Act.
  14. See Section 19-B of the Act.
  15. See Section 19-C of the Act.
  16. See Section 19-D of the Act.
  17. *In re: Jayanti Lal*, A.I.R. 1949 Bom. 319 at p. 333 (F.B.). Also, *Ashutosh Lahiri v. State of Delhi*, A.I.R. 1950 S.C. 433 and *State of Bombay v. Atma Ram*, A.I.R. 1951 S.C. 157.

can act reasonably without acting judicially. Such a view of a Superior Court is undoubtedly based on the presumption that public officials will discharge their duties honestly and in accordance with the Rules of Law. In India the same trend is reflected in a number of cases. The case of Nilratan Sircar v. Lakshmi Narayan Ram Niwas<sup>21</sup> calls for notice in this connection. It was a case under the Foreign Exchange Regulation Act. The Director of Enforcement had retained in his custody the documents, seized in execution of warrant of seizure issued by the Magistrate, beyond the period prescribed under Section 19-A of the Act. The power to the Director of Enforcement to retain the custody of the seized documents was challenged and the Supreme Court speaking through Raghubar Dayal J., held that although there is no provision in the Act there is no provision in the Act which gives power to the Director of Enforcement to deal with the situation arising after the expiry of the prescribed period, the detention of the documents was not invalid because one "should presume that the Director of Enforcement will not by his order act against the provisions of Section 19."<sup>22</sup>

It is submitted that this sort of interpretation of law is really unfortunate inasmuch as it supports an artificial extension of the area of administrative discretion and widens the scope of subjective discretion to unlimited extent.

Again, it will be observed that in exercise of regulating and controlling functions, the Director of Enforcement has power to subject the persons to control, check or other interference, in furtherance of legislative policy of the Act. The administrative process to be applied for the exercise of such regulatory functions has two stages - a fact - finding one, followed by a decision in an action or inaction against a person. It is submitted that some form of direct judicial control of the first stage is necessary. Under the Act it will be seen that there is no scope for judicial control over the fact-finding of the Director of Enforcement inasmuch as the Appellate Board, itself

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18. See Section 26 of the Act which imposes a bar on legal proceedings.
  19. See for example Cooker v. Wansworth Board of Works (1863) 14 C.B.(N.S.)180.
  20. (1951) A.C. 66(76-79).
  21. A.I.R. 1965 S.C. 1.
  22. Ibid. at p.5.

an administrative body, is under the Act, the final authority to determine questions of fact. And on questions involving fact no appeal is further provided to a Court of Law.

Then, it will be seen that by Section 23E(2) of the Act, any person aggrieved by the order of the Director of Enforcement, can prefer an appeal to the Foreign Exchange Regulation Appellate Board. Now, the person aggrieved need not necessarily be a party<sup>23</sup> in a case before the Director of Enforcement and the grievance may involve determination of both questions of fact and of law. The Act fails to protect the right and interest of such a person if he fails to obtain proper redress on question involving fact from the Appellate Board. Even in adjudicating upon questions of fact and in drawing legal inferences out of the disputed questions of fact, one cannot safely rely on the wisdom of the Appellate Board. While it cannot be denied that the Appellate Board is a non-judicial body exercising judicial functions, the Act itself makes no provision for the Director of Enforcement or members of the Board being persons trained in law.

#### SECOND APPEAL ON POINTS OF LAW

The second appeal from the decision of the Board lies to the High Court only on questions of law. It appears that the provision for taking the appeal from the decision of the Board to the High Court only on the points of law has been borrowed from the British system of administrative law and it has been inserted into the Foreign Exchange Regulation Act.

In the modern times it has been increasingly common in the Parliament to give an appeal in those matters which really pertain to administrative rather than to the exercise of the judicial function of an ordinary court, to the authorities whose functions are administrative and not in the ordinary sense judicial and the Foreign Exchange Regulation Act is an example of the same trend. An examination of the position leads to the conclusion that there can be a justification for the difference of treatment between decisions passed on questions of fact and those passed on the questions of law. Questions of fact can be

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23. For the connotation of the words "persons aggrieved" is very wide and it includes any person directly effected or interested - See R.V. Surrey Justices (1870) L.R. 5 Q.B. 466.



properly determined by the administrative authority or Tribunal exercising primary jurisdiction. It may indeed be said with reason that when Government itself has undertaken the entire control and regulation of Foreign Exchange matters, there is no alternative choice. This distinction is based on the doctrine of separation of powers. In U.S.A. for example administrative decisions of a judicial nature are normally treated as conclusive of question involving facts but there are also appeals on questions of law. The question is where to demarcate in a given case the boundary line between the question of fact and the question of law. Perhaps in every case there is some or the other question of fact involved and simultaneously there is some or the other question of law which arises out of the given facts. Matters of law grow downward into the roots of the facts, and in the matter of fact go upward into the matters of law. Therefore, as regards question of law and those doubtful questions which lie on the narrow and marginal border line between fact and law, it is submitted that the decision of the administrative authority is never to be conclusive. So the words declaring under Section 23E of the Act that the decision of the Appellate Board, shall subject to the decision in appeal by the High Court under Section 23-EE, shall be final" have no cogent justification. It is the impression that one gathers from the pieces of legislation which come out in our country that provisions in many legislation in our country are reproduced verbatim after they are taken out bodily from the enactments of foreign countries, without taking into consideration whether the incorporation of such provisions would have any rational basis or not.

It is, therefore, submitted that under the Act the final authority to determine both questions of law and fact should be vested in a Court of Law and not in an administrative authority.

### CONCLUSION

On the basis of the foregoing discussion it may be concluded that a strong case can be made out for the establishment of the general administrative appellate body with jurisdiction to hear not only revisions from interlocutory orders of the Director of Enforcement but this high level Appellate body should also be vested with powers to provide some formal machinery for redress in case of administrative excess. Perhaps this les could be best done by making a provision in the Act itself vesting the High Court with general appellate jurisdiction to hear appeals arising out of decisions of the administrative mechanism provided in the Act both on questions of law as well as on questions involving facts.

