"DETOURNEMENT DE POUVOIR" IN INDIAN LAW

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The conception of *detournement de pouvoir* as a ground for setting aside administrative action was developed by the French Council of State about one hundred years ago. The principle is that an administrative authority commits an abuse of power when it uses its authority for purposes other than those that the one delegating the authority to it had in mind. Abuse of administrative power, in the French theory, is the use by the administrator of his authority for an illicit purpose, namely, a purpose other than that which the legislature intended. The case which in France led to the establishment of this principle is contained in the arrets of the *Conseil d'Etat*, dated the February 15, 1864, and June 17, 1865, on the *affair Lebats*, concerning a decree of a Prefect who was empowered to make regulations on the parking and circulating of hackneys or private carriages in the squares attached to railway stations, for the purpose of keeping orderly conditions in places of public use. The prefect took advantage of his power to grant the monopoly of city transport to a private undertaking. His order was quashed by the *Conseil d'Etat*, since it aimed at a purpose different from that for which the power was given by law. The principle underlying this case is that the power of the executive administration has been delegated to it by the legislature with certain goals in view. To deviate from these goals is to abuse the authority conferred by the legislature and it is, therefore, an illegal exercise of power. The principle is illustrated in a recent case, *Societe des Hauts Fourneaux de Rouen* (May 14, 1948), in which the *Conseil d' Etat* set aside the order of a prefect who used his powers to requisition a gas company in order to realise by an indirect means his own policy in favour of nationalization of public utilities. In another case, *Fleury*, (Council of State, May 22, 1942) a landowner applied for a permit to build near a public way. The permit could be refused only if the proposed building would infringe on the public way or violate the local zoning laws. The permit was, however, refused because the municipal administration was trying to force the applicant to sell his property to the municipality. The order was, however, set aside by the Council of State.

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II

A similar principle has been developed in English administrative law. The principle has been stated in a general form by Lord Cranworth in *Galloway* v. *London Corporation*[1] as follows:

> "When persons embarking in great undertakings for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorised cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers. . . It has become a well-settled head of equity, that any company, authorised by the legislation to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing."

In an important line of decisions the English courts have emphasised the duty of public authorities to make a *bona fide* use of their powers. If the power exercised is *mala fide*, there is a necessary implication that the power is not exercised for the purpose authorised by the law, and the action of the public authority is *ultra vires* and without jurisdiction. For instance, in *Goldberg & Son Ltd.* v. *Mayor, Aldermen etc. of the City of Liverpool*[2], Lindley, M. R. stated:

> "The first thing is to ascertain what powers the defendants had. The second thing to ascertain is whether they have *bona fide* exercised those powers for the purposes for which Parliament has conferred them...it is obvious that what the defendants have done is for the purpose and *bona fide* for the purpose of adapting the tramway for the use of electricity as a motive. It is for no other purpose at all. The pole is genuinely wanted for that purpose, to carry a wire, and a fuse box is genuinely wanted for the purpose of cutting off or adapting the line to practical work. So far there is no question at all about it...But it is said that the defendant's engineer has been actuated by motives of hostility to the plaintiff and that he has not been exercising the powers conferred on the defendants *bona fide* for the purposes of their undertakings. That is a matter which requires consideration."

So a case of *mala fide* use of power is equivalent to a case of *detournement de pouvoir* as recognized by the French *Conseil d'Etat*

1. [1866] L.R.H.L. 34.
2. (1900) 82 L.T. 362.

In *Westminster Corporation* v. *London & North Western Railway*[3], the Westminster Corporation having power to construct public conveniences, constructed underground conveniences in such a way that the subway leading to them also provided a means of crossing a busy street. When challenged on the ground that the real object of providing the subway was not public convenience, but the provision of a crossing, Lord Macnaghten observed :

> "It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second if not in the first . . . Then I come to the question of want of good faith. That is a very serious charge. It is not enough to shew that the corporation contemplated that the public might use the subway as a means of crossing the street. That was an obvious possibility. It cannot be otherwise if you have an entrance on each side, and the communication is not interrupted by a wall or a barrier of some sort. In order to make out a case of bad faith, it must be shewn that the corporation constructed this subway as a means of crossing the street *under colour and pretence* of providing public conveniences which were not really wanted at that particular place." (emphasis added).

In this case the Court of Appeal thought that "bad faith" was shown. The House of Lords, however, by a majority, reversed that decision. In another Privy Council case, *Municipal Council of Sydney* v. *Campbell*[4], a local authority had statutory power to acquire compulsorily land required for civic extension and improvement. When the land was acquired merely because of its probable increase in value, the court held that the local authority was endeavouring to give a new form to the transaction and was exercising its power for a purpose different from that specified in the statute. Therefore, if a municipal authority upon whom the power had been conferred exercised its power for purposes different from that contemplated by the statute, the court will declare the exercise of that power as *ultra vires*. Reference may be made in this connection to another case, *The King* v. *Minister of Health*[5], where an improvement scheme, purporting to be made under the provisions of the Housing Act, 1925, after providing for the acquisition and clearing of an unhealthy area, empowered the local authority to sell, lease or

3. [1905] A.C. 426.
4. [1925] A.C. 338.
5. [1929] 1 K.B. 619.

otherwise dispose of, as they thought fit, the cleared area or to appropriate or use it for any purpose approved by the Minister of Health. The scheme was held *ultra vires* because, as Lord Hewart, C. J. said, "under the name, and the agreeable name, of an improvement scheme, this particular council is minded to acquire a slice of very valuable land in the heart of the city of Derby, not for any purpose of rearrangement or reconstruction, but for the purpose, if and when the local authority thinks fit, of resale, and, of course, of resale at the highest obtainable price."

It is true that a case of bad faith can always be treated as equivalent to a case of *detournement de pouvoir*, but the contrary proposition is not always true, and even if the administrative authority acts *bona fide* it may well happen that it may pursue an object not authorised by law without being aware of it. A case of this kind occurs when the administrative authority takes extraneous considerations into account. For example, in *Reg* v. *Vestry of St. Pancras* [6], the vestry had power, at their discretion, to grant a retiring officer a pension not exceeding in any case two-thirds of his salary. Owing to a misinterpretation of the empowering Act, they concluded that they had no power, if they gave him a pension, to give him less than this maximum pension. They therefore decided to give him no pension at all, since they thought he did not deserve the full amount. It was held that their mistake of law had caused them to mistake the nature of their discretion and so they had not exercised their discretion in the eye of law. As Fry, L. J. said, they were given a "power to determine, not merely whether there shall be a pension, but, what the amount of the pension shall be within certain limits. . . It is obvious to my mind that the question of amount is not separated and cut off from the discretion as to the grant, but that the discretion is infused into both the questions whether there shall be a grant, and what shall be the quantum of the grant." Lord Esher, M. R. stated [7]:

> "I have no doubt that the vestry should take his application into their fair consideration, and do what they think fair to the man under the circumstances, and if they do this, I have equally no doubt that the legislature has entrusted the sole discretion to them, and that no mandamus could go to them to alter their decision. But they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise

6. 24 Q.B.D. 371.
7. *Ibid*, at p. 375.

a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."

Another important case is *Rex* v. *Board of Education*,[8] where the Court of Appeal granted a writ of *certiorari* to quash the decision of the Board of Education under section 7 of the Education Act on the ground that the Board of Education, by a wrong construction of the Act, failed to answer the real question submitted to them but answered a different question in respect of which it had no jurisdiction:

"...the Board, by acting on a wrong construction of the Act, have not exercised the real discretion given to them thereby: a discretion to say whether the sums provided are fit and proper, on the assumption that the Act allows the authority to prefer provided to non-provided schools as such is entirely different from a discretion to say whether they are fit and proper when such preference is unlawful...."[9]

III

I think that a principle similar to the principle of *detournement de pouvoir* has been developed in Indian administrative law. In *Nalini Mohan* v. *District Magistrate, Malda*,[10] it was held by the Calcutta High Court that a law, intended for the rehabilitation of persons displaced from their residences as a result of communal strife that took place in West Bengal, was used to provide accommodation for a person who came from Pakistan on medical leave owing to serious heart trouble. Harries, C. J. held that the order was *ultra vires* and illegal. In *Sukhnandan* v. *State*[11] it was held by the Patna High Court that a Government order, dated the January 23, 1954, giving preference to the "political sufferers" and the "displaced persons", violated the guarantee of equality of opportunity provided by Art. 16(1) of the Constitution and was, therefore, illegal and invalid. It was observed by the High Court in that case that the selective test employed was arbitrary and unreasonable, because the question of a candidate being a political sufferer or a displaced person was an extraneous and collateral consideration which should not have been taken into account. In the *Ahmedabad Manufacturing & Calico Printing Co.* v. *the Municipal Corporation, Ahmedabad*,[12] the Bombay High Court found that the power of

8. [1910] 2 K. B. 165.
9. *Ibid*, at p. 179.
10. A.I.R. 1951 Cal. 346.
11. I.L.R. 35 Patna 1.
12. A.I.R. 1956 Bom. 117.

the Corporation to refuse permit for the construction of a new building was used to bring indirect pressure on the owners to construct drainage to their other already existing building which the Municipal Corporation had no legal authority to order directly. In these circumstances the Bombay High Court granted a writ of *mandamus* directing the Corporation to grant the permission required. Similarly, in *Ahmed Hussain* v. *The State of M.P.*,[13] the Nagpur High Court prevented the Madhya Pradesh Government by a writ in the nature of *mandamus* from wielding its drastic power of requisition with the ulterior purpose of dislodging a particular tenant because of the religious susceptibilities of the landlord. In *State of Assam* v. *Keshab Prasad Singh*,[14] the Supreme Court censured the arbitrary act of the Government of Assam in cancelling the lease of fisheries recommended by the Deputy Commissioner and thus foiled the attempt of the State Government to play the part of a "brave bold despot which knows no law".[15] In *Captain Ganpati Singhji* v. *State of Ajmer and Anr.*,[16] the Supreme Court quashed, for similar reasons, the arbitrary order of a District Magistrate refusing permit to the appellant to hold a fair. In *K. N. Guruswamy* v. *State of Mysore and Others*,[17] the Supreme Court censured the action of the Dy. Commissioner of Bangalore in granting an excise contract to one Thimmappa because "the arbitrary improvisation of an *ad hoc* procedure to meet the exigencies of a particular case adopted in the secrecy of an office cannot be accepted". Again in *J. K. Iron & Steel Co. Ltd.* v. *Iron & Steel Mazdoor Union*,[18] the Supreme Court held that the Adjudicator and Labour Appellate Tribunal have the attitude of benevolent despots and have based their conclusion on irrelevant considerations and accordingly set aside the award and decision of the Labour Appellate Tribunal and remitted the matter to the tribunal for rehearing.

The principle of the doctrine is analogous to the principle of *ultra vires* which is a product of corporation law. The emphasis is upon the lack of capacity in corporations to do an *ultra vires* act. The question at issue is not what they can do. Statutory corporations, as opposed to corporations created by charter in virtue of Royal prerogative, are created by Acts of Parliament for the attainment of special objects and have limited powers. They cannot do anything contrary to the

13. A.I.R. 1951 Nag. 138.
14. [1953] S.C.R. 865.
15. See the judgment of Bose, J. at p. 876 of the report.
16. [1955] 1 S.C.R. 1065.
17. [1955] 1 S.C.R. 305.
18. [1955] 2 S.C.R. 1315.

provisions of the statute and whatever is done beyond the scope of their powers is *ultra vires* and void. The leading case is *Riche* v. *Ashbury Railway Carriage etc. Co.*[19], where a statutory corporation, its object being substantially to carry out the business of general contractors, had power to act as "mechanical engineers and general contractors". The Directors entered into an agreement for financing the construction of a Railway in Belgium. The company passed a special resolution to ratify the purchase. The House of Lords, nevertheless, held such contracts in question as *ultra vires*. Lord Selborne laid down that, "contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inabilities of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do". The general conception underlying the doctrine of *ultra vires* appears to be the logical basis of the doctrine of abuse of power developed by the English courts.

A similar, though not identical, principle has been applied in the realm of constitutional law. In a federal or quasi-federal type of constitution there is distribution of legislative powers between different bodies which have to act within their respective spheres marked out by the legislative entries. In such cases the courts have power to determine the validity of an enactment with reference to the power conferred on the particular legislature under the constitution. It may happen that legislature purports to act within the limits of its powers. Yet in substance and reality the legislature may transgress the limits of its powers and the purported exercise of power is merely "a pretence or disguise". Such a transgression will not be permitted by the courts. In other words "what cannot be done directly cannot be done indirectly". For example, in the *Bank Nationalization* case,[20] a question arose relating to the validity of the Banking Act, 1947, one of whose objects was "the taking over by the Commonwealth Bank of the Banking business of private banks and the acquisition on just terms of property used in that business." Dixon, J. discussed the acquisition of the interest of the shareholders in such banks and observed:

> "I have reached the conclusion that this is but a circuitous device to acquire indirectly the substance of a proprietary interest

19. [1875] L.R. 7 H.L. 653, at p. 694.

20. *Bank of New South Wales* v. *The Commonwealth*, 76 C.L.R. 1. (1948)

without at once providing the just terms guaranteed by section 52 (xxxi) of the Constitution";

and further explained:

> "when a Constitution undertakes to forbid or restrain some legislative course, there can be no prohibition to which it is more proper to apply to the principle embodied in the maxim *quando aliquid prohibetur et omne per quod devenitur ad illud.*"

The principle was again applied by Dixon, C. J. in *Grannall* v. *Marrickville Margarine Pty. Ltd.*[21] The question involved in that case was the constitutional validity of section 22A (1)(b) of the Dairy Industry Act, 1915-1951 of New South Wales, which provided that no person shall manufacture or prepare table margarine, unless he holds a licence to do so. It was argued that the Act infringes section 92 of the Australian Constitution. The High Court held that *prima facie* production could not come within the scope of the trade and commerce protected by section 92, but Dixon, C. J. warned that this doctrine might be used to effect an indirect impairment of section 92. He stated:

> "There is no provision of the Constitution to which the maxim *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud* could be more appropriately applied than to the constitutional guarantee given by section 92."

The same principle has been applied by the Supreme Court in *State of Bihar* v. *Kameshwar.*[22] One of the questions at issue in that case was the constitutional validity of section 4(b) and section 23(f) of the Bihar Land Reforms Act. Section 4(b) provided that it would be open to the State Government to appropriate to itself half of the arrears of rent due to the landlord prior to the date of acquisition without giving him any compensation whatsoever. It was held by the Supreme Court that taking of the whole and returning a half meant nothing more or less than taking a half without any return, and this was naked confiscation, no matter in whatever specious form it may be clothed or disguised. The impugned provision, therefore, in reality did not lay down any principle for determining the compensation to be paid for acquiring the arrears of rent, nor did it say anything relating to the form of payment, though apparently it purported to determine both. It was held by the Supreme Court in these circumstances that it was a colourable piece of legislation and was, therefore, void. Similarly, section 23(f) of the same Act provided for a deduction being made from the gross asset of an estate a sum representing the "cost of works for benefit of the *raiyat*",

21. 93 C.L.R. 55. (1955)
22. A.I.R. 1952 S.C. 252.

for determining the compensation payable to the landlord. It was held by the Supreme Court that as there was no definable pre-existing liability on the part of a landlord to execute any work for the benefit of the *raiyat*, this item of deduction was a fictitious item wholly unrelated to facts. What was attempted to be done was to bring within the scope of the legislation something which, not being existent at all, could not have any conceivable relation to any principle of compensation. It was, accordingly, a colourable piece of legislation which, though purporting to have been made under Entry 42 of List III, was not factually within its scope. Similarly in another case, *K. C. G. Narayan Deo* v. *State of Orissa*, [23] a question arose with regard to the constitutional validity of the Orissa Agricultural Income-tax (Amendment) Act. It appears that the Orissa Estates Abolition Bill was published in the Orissa Gazette in January, 1950. There was an Agricultural Income Tax Act in force in the State of Orissa since 1947. Shortly after the publication of the Estates Abolition Bill, an amendment of the Agricultural Income Tax Bill was published in the local Gazette, enhancing the rate of agricultural income-tax. The Agricultural Income Tax (Amendment) Act was passed in August, 1950, while the Estates Abolition Act was enacted in 1952. It was contended on behalf of the petitioner landlord that the Agricultural Income Tax (Amendment) Act was not a *bona fide* taxation statute at all but a colourable piece of legislation, having for its object a drastic reduction in the income of the intermediaries, so that the compensation payable under the Estates Abolition Act might be reduced almost to nothing. The Supreme Court negatived this contention on the ground that the agricultural income-tax, whatever might be its rate, was a pre-existing liability in 1952 when the Estates Abolition Act came into force and hence it was not a fictitious deduction as in the Bihar Land Reforms Act case and that it was a relevant item of deduction in the computation of net income for purposes of determining the compensation payable under the Estates Abolition Act. In the course of his judgment Mukherjea, J. stated the principle thus:

> " If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limit of its constitutional powers. Such transgression may be patent, manifest

23. A.I.R. 1953 S.C. 375.

or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise."

IV

A problem has arisen as to the legal position if an administrative authority acts both for an authorised purpose and an unauthorised purpose. In such a case where there is a mixture of authorised and unauthorised purpose, what should be the test to be applied to determine the legal validity of the administrative act? It has been held in some cases that the presence of an unauthorised purpose will invalidate the administrative act if it has materially influenced the action of the administrative authority. In *Sadler* v. *Sheffield Corporation*, [24] the question arose whether the notices of dismissal to the plaintiff teachers were based on educational grounds as required by section 29(2)(b) of the Education Act, 1921. It was held by the Chancery Court that the notices of dismissal were not based wholly upon educational grounds but were based in part on financial grounds and in part on educational grounds and so the notices of dismissal were invalid and inoperative. Lawrence, J. states: [25]

"Mixed financial and educational grounds, in my judgment are not educational grounds within the meaning of sub-section 2(a). In my opinion it would not be right (even if it were possible) to attempt to resolve the mixed grounds into their component parts, and then to cast away the financial grounds so as to leave the educational grounds as the undiluted and sole grounds for the dismissal. It seems to me (on the assumption that I have made as to the existence, in fact, of some educational grounds) that here the financial ground and educational grounds were inextricably mixed, and must stand or fall together, all the more so, as, on the uncontradicted evidence, the Education Committee would never have attempted, but for the existence of urgent financial reasons to exercise the powers conferred by sub-section 2(a) at all.

Another way of putting the same point is that sub-section 2(a) confers upon the local education authority a discretionary power to

24. [1924] 1 Ch. 483.

25. *Ibid*, at p. 504.

require the dismissal of a teacher in a non-provided school on educational grounds only, and, if the authority in exercising this discretionary power takes other grounds into account, the power is not well exercised".

In my opinion the more satisfactory test is as to what is the dominant purpose for which the administrative power was exercised. If the administrative authority pursues two or more purposes of which one is authorised and the other unauthorised, the legality of the administrative act should be determined by reference to the dominant purpose. This principle was applied in *Rex* v. *Brighton Corporation, ex parte Shoosmith.* [26] A Borough Corporation expended a large sum of money upon altering and paving a road, which was thereby permanently improved, but they decided to do the work at the particular time when it was done in order to induce an automobile club to hold races upon it. The Court of Appeal (reversing the decision of the Divisional Court), refused to intervene, and it was observed by Fletcher Moulton, L. J. as follows:

> "It cannot be denied that the physical act of changing the surface of a road when the corporation thought fit and proper so to do was within their statutory powers and there is no case proved by the evidence which shows either that they wastefully used the public money or that they did so with improper motives. The case would be quite different if one came to the conclusion that under the guise of improvement of a road, certain moneys had been used really for diminishing the expenses of the Automobile Club or anything of that sort and that there had been a turning aside of public moneys to illicit purposes." [27]

The principle was also applied by Denning, L. JJ. in *Earl Fitzwilliam's Wentworth Estate Co. Ltd.* v. *Minister of Town & Country Planning.*[28] It was a case concerning the validity of a compulsory purchase made by the Central Land Board, and confirmed by the Minister, under the provisions of the Town and Country Planning Act, 1947, in respect of a plot of land, ripe for development, which the owner was not prepared to sell at the existing use value. The landowner applied to have the order quashed, as not having been made for any purpose connected with the Board's function under the Act, but for the purpose of enforcing the Board's policy of sales at existing use values. The majority (consisting of Somerwell and Singleton, L. JJ.) held that, though the

26. 96 L.T. 762.

27. *Ibid*, p. 764.

28. [1951] 2 K.B. 284.

main purpose of the Board may well have been to induce landowners in general and the company, in particular, to adopt one of the methods of sale favoured by the Board, it was nevertheless in connection with their function as the authority operating the development charge scheme, and, at any rate, "the case was not one in which it could be said that powers were exercised for a purpose different from those specified in the statute." Denning, L. J. disagreed with the majority and held that the dominant purpose of the Board was not to assist in their proper function of collecting the development charge, but to enforce their policy of sales at existing use value only. The dominant purpose being unlawful, the order was invalid, and could not be cured by saying that there was also some other purpose which was lawful. The Board and the Minister had misunderstood the extent of their compulsory powers, and their affidavits showed that they had overlooked that their ultimate purpose in exercising their powers should be connected with the performance of the Board's functions under the Act. Denning, L.J. observed [29] as follows in the course of his judgment:

> "What is the legal position when the Board have more than one purpose in mind? In the ordinary way, of course, the courts do not have regard to the 'purpose' or 'motive' or 'reason' of an act but only to its intrinsic validity. For instance, an employer who dismisses a servant for a bad reason may justify it for a good one, so long as he finds it at any time before the trial. But sometimes the validity of an act does depend on the purpose with which it is done—as in the case of a conspiracy—and in such a case, when there is more than one purpose, the law always has regard to the dominant purpose. If the dominant purpose of those concerned is unlawful, then the act done is invalid, and it is not to be cured by saying that they had some other purpose in mind which was lawful: see what Lord Simon, Lord Maugham and Lord Wright said in *Crofter Hand Woven Harris Tweed Co.* v. *Veitch.*[30]
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> So also the validity of government action often depends on the purpose with which it is done. There, too, the same principle applies. If Parliament grants a power to a government department to be used for an authorised purpose, then the power is only validly exercised when it is used by the department genuinely for that purpose as its dominant purpose. If that purpose is not the main purpose, but is subordinated to some other purpose which is not authorised by law, then the department exceeds its powers and

29. *Ibid*, p. 307.
30. [1942] A.C. 445, at pp. 452-3, 469, 475.

the action is invalid. The department cannot escape from this result by saying that its motive is immaterial. Just as its real purpose is crucial, so also is its true motive, because they are one and the same thing."

The question of proper test to be applied to a case of this description has not directly arisen in any Indian case and it is only future pronouncements of the Supreme Court and High Courts which will throw illumination on this dark corner of Indian administrative law.

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Too numerous are the instances in constitutional law in which judicial lip service is rendered to a doctrine or a formula or a distinction although the dissenting opinions complain that there has been a departure from the previous application—too numerous to be enumerated. Sometimes the difference of judgment is confined to the characteristics of the situation involved, and this may be an isolated or a particularistic oddity or variation. Sometimes the difference between the Justices may turn on whether, in the particular case, form or substance shall have dominion. These two criteria lock horns in many legal forests. Some judges as individuals lean toward form; others lean toward substance. Still others lean now one way and now the other, according to which, the particular instance, will best support a judgment based on other factors, often not clearly delineated. From a practical standpoint, from the viewpoint of the particular litigant and his counsel, such teeterings and see-sawings are signs of an undulating course of the law. Whether the law that undulates is constitutional law depends upon how constitutional law is classified and defined.

Not infrequently a transparent departure from prior application of supposed principles or doctrine is the forerunner either of the overruling of precedents, or possibly of the creation of distinctions so finely drawn that one may doubt the degree of reverence in which they are held even by the imaginative artist who creates them.

—Thomas Reed Powell, *Vagaries and Varieties in Constitutional Interpretation* (1956), p. 95-96.

JUDICIAL REVIEW AND THE INTEGRITY OF THE LEGAL SYSTEM

The scope of judicial review is ultimately conditioned and determined by the major proposition that the constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system. I use integrity here in its specific sense of unity and coherence and in its more general sense of the effectuation of the values upon which this unity and coherence are built. In a society so complex, so pragmatic as ours, unity is never realized, nor is it necessary that it should be. Indeed there is no possibility of agreement on criteria for absolute unity; what is contradiction to one man is higher synthesis to another. But within a determined context, there may be a sense of contradiction sufficient to create social distress; and it is one of the grand roles of our constitutional courts to detect such contradictions and to affirm the capacity of our society to integrate its purposes. I have said much of statutory purpose as the guiding consideration in evaluating the validity of administrative action. It must be admitted, however, that the statute often has little or nothing to say concerning the matter at hand. It may do no more than establish the general framework of power—"jurisdiction"—within which the agency must establish a system of rules and principles. I have suggested that normally the courts should tolerate agency law making which does not in the courts' opinion seem clearly contrary to the statutory purposes as the courts understand them. But the statute under which an agency operates is not the whole law applicable to its operation. An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the "common law", and the ultimate guarantees associated with the Constitution. Thus in the review of administrative actions a court may appeal to criteria of validity which have no specific locus in the statute.

—Louis L. Jaffe, "Judicial Review: Question of Law," 69 *Har. L. Rev.* p. 274-5.