THE INDIAN LAW INSTITUTE, NEW DELHI

Seminar

on

Administrative Law
Nainital-May, 1973

Administrative Law:- Suggestive definition and definition by various Authors and introduction

By

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Oppenheim defines law as "a Body of Rules For Human Conduct within the community which by common consent of this community shall be enforced by External Power". By "External Power" it means "external to the persons against whom the Rules are enforced". The "Community" means "number of persons who unite together for their common interest". Thus by common consent of the community, the law according to oppenheim is enforced against individuals or states.

According to some thinkers the end of law is making possible the maximum of individual free self assertion. Men even if they are born free will remain slaves of strict laws enacted by their fare-fathers and the firmanent, which we imagine as unchanging is the yielding of to day to the will of to marrow and submission of yesterday to the will of to day.

The conceptual phase of law equally applies to the sphere of the Administrative Law as well.

The Administrative Law has been defined by various Authors in different ways on account of their different approaches to the subject . Some of them are given below:

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Jennings defined Administrative Law "as the Law relating to the Administration. It determines Organisation, powers and duties of Administrative Authorities". This definition does not include that part which pertains to the procedure required to be adopted by Administrative authorities in exercising their powers.

K.C.Davis an eminent American Author defined "Administrative Law as the law concerning the powers and procedure of Administrative agencies including especially the law governing judicial review of administrative action." This definition appears not to include legislative and quasi-judicial function exercised by Administrative authorities.

While discussing the scope of Administrative Law, Friedman enumerated that the administrative law includes the law relating to:-

(i) the Legislative Powers of the Administration
(ii) the administrative powers of administration both at common law and under vast mass of statutes

(iii) the judicial and quasi-judicial powers of administration all of their statutory

(iv) the legal liability of Public Authorities

(v) the powers of ordinary courts to supervise administrative authorities.

M.C.Jain Kagzi sum up the topics of Administrative as under:-

(i) Governmental liability:— immunities of administrative agencies and bodies from suits, remedies available against the union of India and the State instrumentalities.

(ii) Delegated Legislation:- indispensibility, permissibility and constitutionality, modes of deligation, procedural formalities required to be observed by administrative agency, safeguards against abuse of power- judicial control.

(iii) Judicial Function of administrative agencies, administrative tribunals, procedural guarantees, finality of decisions, jurisdiction of

the Supreme Court and High Courts over the Administrative agencies and tribunals.

Friedman as well as M.C.Jain-Kagzi furnish scope of administrative law but do not put them in the form of definition.

The Indian Law Institute defined Administrative law in the following words:-

> "Administrative law deals with the structure powers and functions of organs of Administration, the method and procedure followed by them in exercising their powers and functions the method by which they are controlled and the remedies which are available to a person against them when his rights are infringed by their operation".

This definition does not clerify, whether the functions of Administrative authorities include their in functions other than administrative ones. Administrative agencies exercise judicial and quasi-judicial as well as the legislative functions also.

Coming to the conclusion of the topic of definition I would like to propose the following suggestive definition of Administrative law.

"Administrative Law is a body of rules dealing primarily with administrative functions and secondarily with legislative, Judicial and quasi-judicial functions of administrative agencies, procedure required to be followed by them, being subject to control by higher judiciary and furnishing remedy to individual when his right be infringed."

This definition includes the following :

(1) Administrative agencies are primarily having functions of administration and secondarily legislative, judicial and quasi-judicial functions.

(2) It provides what procedure will be required to be followed by administrative agencies when exercising functions (in the nature of administrative, judicial, quasi-judicial and Legislative characteristies).

(3) When the rights of individual are infringed it will also provide remedy to them.

(4) It will also provide control by higher judiciary (which means by High Courts and Supreme Court) over the acts of administrative agencies in exercising functions (whether in the nature of administrative, legislative, judicial or quasi-judicial functions.

Reasons for growth of Administrative Law:

Growth of administrative law is the out come of the modern times and more particularly the present century. There are various reasons which contributed for the growth of Administrative law, of which some are enunciated below:-

(a) The present day state is not merely a police state like a night watchman for the state but it is a welfare state undertaking numerous activities for serving the society for its welfare. Because of these varied activities of service and welfare for the community, the complex relations arise between governmental and public authorities on one hand and citizens on the other. This gave rise to a new branch of law, namely the administrative law.

(b) Under the provisions of Codes of Civil Procedure and Criminal Procedure, the Courts which have been been established or require to be established, with judicial system and procedure followed or pursued by them have proved to be inadequate for the purpose of adjudication of certain kinds of disputes and issues which may arise because of welfare activities and complexities as well as other allied activities on account of the present day concept of welfare state adopted by civilised communities of the world.

(c) Because of numerous and varied activities in consonance with the concept of welfare state, the legislatures are also under the great burden of work for (i) implementation

of socio-economic programme by various types legislative programmes. (ii) question hour period for eliciting information and criticising Govt. of its activities (iii) planning programmes in various fields viz., social, religious, economic and political spheres. More over the present day legislations require technical and expert knowledge of specialised nature, which the elected representatives of the people sitting in such legislatures generally may not possess and this Consequently lead to the development of the Delegated Legislation and the law allied thereto.

(d) The various Executive Authorities specialised in expert and technical knowledge, if associated in administration, they would be able to handle and solve the various complexitions of the varied types of problems which they may be facing on account of modern complicated situations in the community. The operational difficulties are much known to the executives who are directly concerned with implementation of the policy of the Govt.

(e) Under the Administrative law the Administrative Authorities including Administrative Tribunals can experiment and this very process of experimentation is flexible. The Authorities which make the Rules, the Tribunals which interprete enjoy a good degree of freedom for experiment. This process of experiment and its flexibility will not be possible in normal functioning of Govt. whose powers are rigidly separated. It may take hold of a problem at the preventive state, It does not wait for private parties to formulate case and begin litigation. It can utilise continuous supervision and guidance.

(f) Because of the modern system of Administrative law the Executive would be able to carry out the policy sympethetically rather than acting like judicial courts as impartial arbitrators. Some issues and disputes would require sympathies rather than tight impartialities only. In fields like labour legislations,

sympathies for labour, in the statute providing for workman compensation, the legislations create Rules atvarious with those applied by judicial courts. A sympethetic body with a new approach would therefore be needed for application of these new Rules.

(g) Administrative process can combine the functions which are usually kept separate. It may be able to establish prospective and positive rules of law by the process of rule making and establishing judicial principles case by case. This development of Rules of Law will not be left to the probability of litigation. Thus by combining the functions, the administrative process can also fit the rules into actual policy formation. This continuous process of devising rules and applying them is highly desireable.

Doctrine of separation of powers and Administrative Law with special reference to Bharat:

The Constitution of Bharat recognises three fold functional division of the powers of Govt. viz., (i) judiciary (ii) Executive and (iii) Legislature. The doctrine of separation of powers can be found from the time of Aristotle . But in modern times it was Montesquien who formulated the theory of separation of powers keeping in view constitution of great Britain. According to him Government consisted of three Organs namely (i) Executive, (ii) Legislature and (iii) judidary on the basis of the powers and functions exercised by these organs. He propounded that one person or body should not be allowed to exercise more than one type of powers enumerated here, The Executive should exercise powers of administration but should not be allowed to control or interfere with legislature and judiciary. Similarly Legislature should perform the legislative function and should not be controlled by executive. Similarly judiciary must remain independant of Executive and Legislature.

The essense of the doctrine of separation of powers as enunciated by Phillips and Wade is as under:-

(i) same persons should not sit in more than one department of three departments stated above;

(ii) one department should not control or interfere with the work of the other two departments;

(iii) one department should not exercise the functions of the other two departments.

The doctrine of separation of powers has not been fully realised in any of the Constitutions of the Civilised Countries of the world not England nor U.S.A. even though U.S.A. is theoratically considered to be based on this doctrine.

Even though Bharat recognises this doctrine of separation of power, it does not specifically incorporate this doctrine in the constitution. But Art.50 of the constitution of Bharat stating one of the directive principles of the state policy recognises that judiciary shall be separated from Executive. Art.50 runs as under:-

> "The state shall take steps to separate judiciary from the Executive in the public services of the state."

In Bharat during the Britishers' rule there was a demand for the separation of judiciary from Executive and the Art.50 meets with that demand. In this connection many states have passed laws to separate judiciary from Executive. In 1969 was passed the Union Territories (separation of Judicial and Executive functions) Act. This makes provision for appointment of Judicial magistrates and Executive magistrates. A similar law was passed a few years ago for the state of Punjab. The importance of this reform is not denied by any one. It is hoped that objective may be realised soon. Maharashtra, Gujarat, Mysore and West Bengal have accepted the doctrine by incorporating the provisions in Sec.6A in Criminal Procedure Codes of the respective states for appointments of judicial magistrates and Executive magistrates.

This Art.50 of Constitution of Bharat is a manitesto of aims and aspiration for separation of judicial institutions from Executive Institutions taking judicial functions out of the clutches,

interferance and influances of the Executives. This directive principle is an authoritative declaration of one of the very important airms and aspirations of people of Bharat formulated by the representatives of people after solemn and mature deliberation. So far as various Tribunals Constituted under particular statutes are concerned, they are the part and parcels of the administrative machinery. They are performing the judicial functions. Justification for them to be part and parcel of Administrative agency and as such covered under Administrative Law, of course appears to be some what tenable. But can we not find out the way that such tribunals be made part and parcel of judiciary rather than Executive? Of course Expert Executive personnel with special knowledge may render good help in solution of complicated problems. They are the persons while applying the law, know various complications and their solution, the operation difficulties in execution of law and the remedies therefor and as such their help in rendering justice may be welcomed.

I can understand that such experts and persons with technical and specialised knowledge may be of great help to the judges in interpretation of law and rendering justice when they (judges) are faced with complicated problems requiring technical and expert knowledge. Such expert's advice may be sought when required and when the purpose is served they (expert) would retire. I can not see the slightest justification for clothing the Executive Experts as deciding person or having right to vote when the question of rendering justice and interpretation arises. But if these Expert Executive personnel with specialised and expert technical knowledge are to be associated in rendering justice and interpretation such experts may be welcomed as good advisers in the form of assessors to the presiding officers or Chairman of the Tribunals sitting as judges rather than clothing them (Experts) with the power of judges. I can not possibly endorse a scheme where there are experts who are particles of Executive, to be clothed with the function of judiciary except rendering only advice.

If impartiality and independence are to be achieved in the field of justice there should be complete non-interference of Executive in the field where judicial function is to be performed. However a scheme need be devised by which Expert executive advice may be sought, if needed to be respected may be respected but not be allowed to prevail over the judicial function.

Administration is many a time equited with the Executive Branch of the Govt. yet it may be understood that the Administrative process in present times cannot be classified according to old traditional process. The Administrative process is a complex pattern cobining in itself the Executive, legislative and judicial process to some extent or the other. In modern times Administration may be entrusted with legislative function in the form of powers to make delegated legislation. Similarly it may entrusted with judicial and quasi-judicial function whereby it may adjudicate the rights and liabilities of private citizens. The modern administration may also enjoy wide discretionary power. Public Authority may be empowered to make an investigation or enquiry and apply its discretion in order to implement certain social and public policy.

The fields in which the complex pattern of administration may be found are mentioned below:

(1) For the purpose of security of the country during the times of emergency the administration may be entrusted with vide powers in order that activities and interests of individual may be regulated and controlled.

(2) In peace times also, wire a view to regulate socio-economic life of the country, various tasks may be entrusted to various Administrative Authorities, in the nature of wase fixation, registration, registration, grants of permits issue of licences, settlement of certain schemes powers may also be granted to public Authorities for acquiring or requisitioning property for public purpose.

(3) Assessment of tax is another instance of administrative action. Assessment of duty to be paid on the goods imported from foreign country is also an administrative function.

From the above, it can well be seen that the functions of administration are not simple but rather complicated ones. The function of granting licence may require enquiry, investigation and use of discretion in order to implement particular policy. Similarly preparing a scheme under the Motor Vehicles

Act may be for the purpose of providing an efficient adequate, economical and properly co-ordinated Road transport service. Such a scheme might involve function which might be mixture of Rule-making, quasi-judicial and Executive.

Many a times function of administration cannot be segragatted in simple terms to be solely executive, legislative or quasi-judicial. If the function is purely administrative the remedy would be with higher Administrative Authority. If it is judicial or quasi-judicial, the courts may be approached to exercise the powers of judicial review. If the function is legislative there could be an approach either to judiciary for exercising legislative control and supervision.

In modern times certain Administrative bodies are created which are considered to be Authorities and their functions cannot be characterised as perely administrative, judicial or legislative. The functions performed by such bodies can not be fitted into water tight compartments. To enumerate some such administrative bodies. I may mention as follows:-

(i) Territ Commission: Its function is to make enquiries and submit reports to Central Govt. in respect of matters pertaining to granting of terrif protection or withdrawal of such protection for any industry or in relation to increase or decrease of duties and customs or other duties in respect of industry. Commission is entrusted with power of Civil Courts in following matters:

(a) summoning and enforcing attendance of any person

(b) examining such person on oath

(c) requiring discovery and production of evidence

(d) receiving evidences and affidavits

(e) Requisition of public records

(f) Its a Civil Court for contempt of Court proceedings.

(ii) Advisory Board under preventive detention

Its function is to consider the case of preventive detention referred to it. It examines the grounds of detention and also representation made by detenue. It submits a report to Govt.such report is confidential. The proceedings of the Board cannot be demanded to be produced before the Civil Court.

(iii) Wage Boards: Its function generally is to fix wages having regard to cost of living , prevalent rates of wages in comparable employments, circumstances of the industry and other circumstances relevant to the matter. Recommendations of the Board require approval of appropriate govt. such approved recommendation binds not only to employers and employees in present but also the future employers and employee. Therefore Supreme Court held in Express Newspapers (Private) Ltd. vs. Union of India A.I.R.1958 S.C.578 that the Board is partly an Industrial Tribunal and partly a Legislative Body.

(iv) Commission of Enquiries:- Its functions are as under:-

(i) Commission is to make enquiry into any definite matter of public importance. It will have powers of Civil Courts in respect of following matters.

(a) summoning and enforcing the attendance of any person examining him on oath.

(b) Requiring production and discovery of any document.

(c) Receiving evidence and affidavits

(d) Requisitioning any public record or copy from any court or office

(e) issuing commission for examination of witnesses or documents.

(f) It may also be empowered with certain additional powers regarding search and seizure of books of Accounts or documents.

(v) Board of Marine Enquiry;-

The purpose of the Board is to enquire into a complaint made by the master or a member of the crew of an Indian-ship which requires immediate investigation. The Board may enquire into the allegations of incompetence or misconduct against a master or an officer of an Indian-ship. It may also enquire into loss of an Indian-ship or loss of life or serious injury to persons on Board an Indian ship. The Board investigates and hears complaints. The order of the Board in final subject to the order of the Central Govt. for re-hearing of the case if new and important evidence has been discovered or if there has otherwise been any miscarriage of justice.

Above Administrative bodies enunciated from (i) to (v) clearly show that it is not conveniently possible to separate Administrative, judicial, quasi-judicial or legislative functions in separate water tight compartments. Can we find out any solution to separate judicial function from other two functions viz., legislative and executive function?

Quasi-judicial and Judicial powers on Administrative Authorities:-

What are the reasons that Administrative Authorities are conferred with judicial power? Hood Phillips expresses his opinion in the following words:-

"The reasons why Parliament increasingly confers powers of a judicial nature on Ministers or Tribunals more or less closely related to the Govt. Department to Administrative Tribunals in the wide sense may be stated positively as showing the greater suitability of Administrative tribunals, or negatively as showing the inadequacy of the ordinary courts, for the particular kind of work that has to be done".

Characteristics of Administrative Tribunals:

(i) They are established by Executive under provisions of statute.

(ii) Though they perform judicial or quasi-judicial functions they are not courts.

(iii) They are not bound by technical rules of the C.P.C. and rules of evidence of the Evidence Act. But they adopt rules of procedure as prescribed by the statute or may be adopted by Tribunal itself.

(iv) Such Tribunals have powers of Civil Court in certain matters and their proceedings are considered to be judicial proceedings.

(v) They are to follow principles of natural justice.

(vi) Their function is to decide disputes arising out of programme of welfare state.

Every society has its scales of values for example between personal liberty, freedom of economic activity and freedom choice in respect of employment. United Nations Organisation also emphasizes on the human rights which require that basic individual values ought to be protected in every society. It order to bring out economic democracy there are various beliefs which the people hold that individualism is the best form of economic democracy. There are others who believe socialistic state as a best form of economic democracy. There are those who believe in Communistic idea as most perfact form of economic democracy. The basic criterion for determining the lines of advance towards economic democracy must not be increase in private profits but social gain. There should not only be appreciable increase in national income but also greater equality in incomes and wealth. Fundamental rights incorporated in constitution of Bharat, lay down stress on higher value of individualism. Whereas directive principles of state policy laid down therein envisage high hopes and aspirations for achieving welfare state an indeal of economic democracy with greater good of larger masses. Thus when there would be conflict

between higher values of individualism under Fundamental Rights and welfare state programme under directive principles of state policy, the latter should prevail even though this view is contrary to the view expressed by Supreme Court in some decided cases. However fundamental rights must be in accordance with those high hopes and aspirations incorporated in directive principles for achieving welfare state. The directive principles should be given very high place and even fundamental rights respecting individual values should be so changed as to fit in with the ideals of welfare states included in directive principles.

With a view to achieving this welfare state programme more and more activities in the nature of Administrative, judicial, quasi-judicial and legislative functions are being entrusted to the Administration.

We may therefore consider two issues:

(i) To what extent should the individual citizen obtain redress for grievances which he suffers at the hands of the Administration but at the same time we may pay attention to another issue;

(ii) as to how can we help the Administrators to carry out their task speedily efficiently and fairly, with a view to enable them to play their active Role for achieving welfare state.

With a view to strike a balance between the two, the check an administrative acts need be evolved, (i) by propergreater degree of control of the court over administrative actions or (ii) to put greater faith in the training and self descipline of the administrators. Of course this second is little bit dangerous.

In order to exercise proper degree of Control over the Administrative act we may consider whether:

(1) changes should be made in organisation and personnel of the courts in which proceedings are being brought against the administrative acts. If it is accepted that it is necessary to have simplification of procedures incidential to the existing kind of remedies

there does not appear much necessity to have extensive reform of the judicial courts giving such remedies.

(2) But more and more changes in the type of review in its scope and depth are demanded them only novel changes will have to be resorted to by introducing entirely new types of Administrative Courts with legal judges to be aided with some non-legal judges or assessors should be set up. This would require, for example, setting up an Administrative division in the High Court with specially experienced body of judges. Here the caution need be taken that legal judges may be aided with the assistance of assessor with technical expert knowledge rather than assessors to be made judges, excluding judicial brain with a judicial latest of mind.

So far as question of facts are concerned Tribunals are generally the final Authorities and there can be no appeal against their orders. Similarly decisions of tribunals bind the parties. In some cases decisions may be reopened under certain circumstances. Subject to the possibility of reopening the case decisions of Tribunal bindthe parties. Jurisdiction of High Courts and Supreme Court not being appellate, is to supervise and review the decisions of Administrative Tribunals. Thus the decisions of Tribunals may be challenged on the grounds of the question of law that (i) such decisions affect fundamental rights or (ii) on the ground of exercise of improper jurisdiction or (iii) contravening principles of natural justice.

When the question of law arises before the Tribunal it may make reference to the High Court also.

Can it not be possible to evolve a machinery that even on ascertainment of facts by the tribunal, there can be re-enquiry by judicial machinery on the principle of natural justice?

Administrative Tribunals are established to achieve certain results and also because those results could not be achieved by ordinary judicial process. If a general remedy is given to re-open decision of Tribunal before ordy Courts the very purpose of

establishing the tribunals would be defeated. It is for this reason that quite often statutes provide the decision of tribunal can not be challenged in any court of law. Some Acts provide that no order may in exercise of any power conferred under this Act or any rule made thereunder be called in question in any court. Thus ousting jurisdiction of the ordinary courts has become common characteristies of statutes establishing Administrative Tribunals.

This problem of ousting jurisdiction of ordy courts raise following controversies:-

(i) Super tribunal like the conseil d'etat of France be established being the supreme tribunal exercising appellate as well as supervisory powers over Administration and lower Administrative Tribunals being an effective check on abuse of Administrative Powers.

(ii) Supervision and review by High Courtsand Supreme Court as is the practice of present day may continue establishment of super tribunal may be inconsistant with the principle of Parliamentary Sovereignity and ministerial responsibility.

(iii) via-media between the above (1) and (ii) that super tribunal to supervise and control the lower tribunals and such super tribunal may be subjected to the Superintendance and appellate authority of the ordy. Higher judiciary.

In great Britain Tribunal and Enquiries Act 1958 provided for establishment of a "Council on Tribunals". Functions of that Council were as under:-

(i) To keep and review the constitution and working of the tribunals specified in the first schedule of that Act and from time to time to report on their constitution working.

(2) To consider and report the constitution and the working of such other tribunals when the matter is referred to the council.

(3) to consider and report matters referred to council in relation to administrative

procedure involving the holding of statutory enquiry by a Minister.

The Council to consist of not more than 15 members appointed by the Lord Chancellor and Secretary of State. The Council is to be purely advisory body with general superintendance over tribunals and enquiries into them.

H.W.Wade commented that " it is a watch dog independant of ministerial control. It is not therefore a court of appeal or a 'Council of State' on the French or Italian models. But it has to keep under review the constitution and working of the listed tribunals and report on any other tribunal question which the Govt. may refer to it. It can receive complaints from individuals and invite testimony from witness."

"It is also frequently consulted in the ordy. Course of departmental work. Its annual report is required to be laid before the Parliament. It is specifically empowered to make general recommendations as to the membership of the listed tribunals and it must be consulted before any now procedural rules for them are made."

The Law Commission in Bharat in its 14th report did not approve of Super Tribunal in the natur nature of Conseil d' etat; as they felt that its very pecular growth was rooted in French tradition and History. Nevertheless an advisory body modelled on the Council of Tribunals as in United Kingdom may be established in India to keep a watch over the working of innumerable administrative Tribunals.

Is not the time ripe enough to establish now council of tribunals without any further delay so far as Bharat is concerned? Looking to the very necessity of establishment of such council I feel, immediate steps need be taken to the establishment of such council at an early date.

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