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One Who Decides Must Hear

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The judicial process differs from the administrative process in one important respect. Whereas the exclusive task of the judiciary is to adjudicate on disputes, an administrative authority may have to discharge various other duties besides adjudication. This has resulted in the adoption of two different procedures of adjudication in case of the two processes. A judge himself hears and decides, but this may not be true of an administrative authority. In order to discharge the multifarious duties entrusted to it, an administrative authority not only takes but is compelled to take the assistance of subordinates. It may happen that one official may hear and another decide. This division in the decision-making process goes against the basic concept of the judicial process, though this is inevitable in the context of the modern administrative process. It is the task of the administrative law to reconcile this inevitability of the administrative process with fairness from the individual's point of view.

The advantage of "one who decides must hear" is that the individual is able to address directly to the person who really counts, and the adjudicator is able to watch the demeanour of witnesses and decide himself on the evidence presented to him and no one else. On the other hand, if hearing is conducted by someone else, the adjudicator merely acts vicariously and there is the problem of adjudicator familiarising himself with the evidence collected by others. Consequently, the chances of error by him relatively increase. The Supreme Court gave a fierce blow to the administrative practice of one hearing and another deciding by declaring in the Gulapalli case that such a practice was destructive of

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1. Gullapalli Nageswara Rao v. A.P. State Road Transport Corporation, A.I.R. 1959 S.C. 308.

"judicial hearing." This was, however, not a mortal blow as even after the Gullapalli case the administrative practice continues and in no other case subsequent to this case there has been condemnation of it. Neither has there been countenance of it. In taking the view which the court did in the Gullapalli case, it was exacting a higher degree of fairness from the administrative process in India than the United States or the United Kingdom. This case is a prologue to what is to follow in this paper, and we are not concerned with it further.

Assuming the validity of the rule that one may hear and another decide, what procedural safeguards ought to exist for the individual? In a few cases the question has arisen whether it is legally required to show the report of the hearing officer to the individual concerned before the final decision is taken by the deciding authority. Here the Supreme Court has oscillated, but on the whole, oddly enough, it has not demanded the same degree of fairness from the point of view of the individual as in case of the application of the proposition "one who decides must hear" itself. If in the latter case it has overdone it,[2] in the former case it has stopped short of the fair norms of hearing.

In Suresh Koshy George v. University of Kerala[3] disciplinary action was taken by the university against a student for malpractices during the examination. The enquiry was conducted by a person appointed by the Vice-Chancellor who was the ultimate deciding authority. After the inquiry, the Vice-Chancellor issued the show cause notice. Neither was the copy of the report asked for nor was the student supplied with it. Repelling the contention of the student that he should have been given the report of the inquiry officer, the court stated:

> There seems to be an erroneous impression in certain quarters evidently influenced by the provisions in Art. 311 of the Constitution particularly as they stood before the amendment of that Article that every disciplinary proceedings must consist of two inquiries, one before issuing the show cause notice to be followed by another inquiry thereafter. Such is not the requirement of the principles of natural justice. Law may or may not prescribe such a course. Even if a show cause notice is provided by law, from that it does not follow that a copy of the report on the basis of which the show cause notice is issued should be made available to the person proceeded against or that another

2. See Deshpande, The One Who Decides Must Hear, 2 J.I.L.I. 423 (1959-60); Nathanson, The Right to Fair Hearing in Indian, English and American Administrative Law, 1 J.I.L.I. 493 (1958-59).

3. A.I.R. 1969 S.C. 198.

inquiry should be held thereafter.[4]

An approach different from the Suresh Koshy case is depicted by the Supreme Court judgment in Kesava Mills Co. Ltd. v. Union of India.[5] In this case the Government of India had appointed an investigating committee to investigate the affairs of the mills under the Industries (Development and Regulation) Act, 1951. The committee submitted the report to the government after giving a reasonable opportunity to the mills, but the report was not shown to the management. As a result of the report of the committee, management of the mills was taken over under s. 18-A of the Act. In the opinion of the government there was substantial fall in the volume of production of the mills for which the government apparently found no jusitifcation having regard to the prevailing economic conditions. It was held by the court that it was necessary for the government to observe principles of natural justice before taking action under s. 18-A of the Act and give a hearing to the mills. However, the court was not ready to lay down an inflexible rule that the report of an inspector (here the investigating committee) was not necessary to be disclosed to the party concerned. "Whether the report should be furnished or not must ... depend in every individual case on the marits of that case." In the instant case the court was satisfied that the non-disclosure of the report of the committee did not cause any prejudice whatsoever to the mills as the management, on the facts of the case, had been given sufficient opportunity to present its case before the government against the take-over of the mills.

In the recent judgment in Shadi Lal Gupta v. State of Punjab,[5a] the Supreme Court has again fallen back on the Suresh Koshy case. In this case the appellant was a clerk in the Treasury at Ludhiana against whom disciplinary adtion of withholding one increment for one year with cumulative effect was taken under the Punjab Civil Services (Punishment and Appeal) Rules 1952. This was a minor penalty under the rules and for imposing minor penalty it was provided inthe rules that the employee concerned was to be given an adequate opportunity of making any representation that he may desire to make. (There was no provision for examination of witnesses, cross examination of witnesses and furnishing a copy of the report of the enquiry officer as in the rule providing for procedure for imposing a major penalty). The decision to withhold the incrments was

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4. Ibid. at 204.

5. A.I.R. 1973 S.C. 389.

5a. Decided 7.3.1973

taken by one Deputy Secretary to the Government. But before the decision, the Deputy Secretary has caused a local enquiry to be conducted by a subordinate official. The enquiry report was not shown to the appellant. Relying on Arlidge[6] and Suresh Koshy cases it was held by the court that principles of natural justice do not require that the enquiry report should have been supplied to the appellant.

The holding of the court in Suresh Koshy and Shadilal cases go against the recommendations of the Franks Committee of England and the provisions of Administrative Procedure Act, 1946. In proceedings involving decisions by the Minister in compulsory acquisition of land, town and country planning, and slum clearance, the Franks Committee had recommendedthat the report of the Inspector who conducts the hearing on behalf of the Minister should be published and that parties should have an opportunity, if they so desire, to propose corrections of facts in the inspectors (hearing officer's) report.[7] This recommendations was not accepted by the government, but it has been argued by Professor Wade that the practice contained in the Franks Committee recommendations is followed in Scotland "and ideally England ought to follow suit."[8] However, the difference between the English situation and the Indian situation should be noted. In England in such inquiries the Minister's decision involves policy and the inspector's report is only one of the factors to be taken into account in arriving at the ultimate decision by the Minister. The whole procedure is administrative with the superadded requirement of hearing at some stage. But such is not the position in the three Indian cases mentioned in this paper where the function involved was adjudicatory all through.

There is a clear provision in the Administrative Procedure Act that a hearing officer shall first make an initial or recommended decision which should be available to theparties before the final decision and an opportunity given to the parties to make representations against the proposed decision of the hearing officer. Schwartz points out: "In the United States the common practice has ... been for reports prepared by hearing officers to be submitted to the private individuals concerned. It has, in fact, generally been assumed by American Administrative Lawyers that those affected

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6. Local Government Board v. Arlidge, (1915) A.C. 120.
7. Report of the Committee on Administrative Tribunals and Enquiries 73-74 (1957)
8. Wade, Administrative Law 234 (1971).

have a constitutional right to see the report and to take exceptions to it before the decision of the agency is rendered. For an agency decision to be based upon a secret report, by an examiner or some other officer, would be for it to violatethe right of the private party to have his decision based only upon materials which he knows about and is given an opportunity to meet."9

Further, according to him the "American court's rejection of the Arlidge holding of non-disclosure was based primarily upon the fundamental principle against ex parte evidence which governs all adjudicatory proceedings."10 He quotes with approval the opinion of the Chief Justice Venderbiltll that "The hearing officer can be characterized as a 'witness' giving his evidence to the judge behind the back of the private individual who has no way of knowing what has been reported to the judge." Whatever actually plays a part in the decision should be known to the parties and be subject to being controverted by them. If the report is not shown to the party concerned doubt may well arise as to whether the true view of the facts has been taken. There is a danger that the hearing officer may have drawn an erroneous conclusion in his report or make some factual mistakes. It is, therefore, necessary that the report is available to the party. Finally, Schwartz argues: "Will not the Inspectors' report, like the opinion of a court, be a more considered and conscientious product if it has to run the ganlet of public scrutiny."12

As the practice of one deciding and the other hearing is often indispensable in administrative process and has come to play, it is appropriate to evolve norms of fair procedure from the angle of the individual. The minimum that should be insisted upon is that the hearing officer should make his own findings and conclusions and recommend/decision which should be available to the parties for comments. Prior to the final decision, the parties should be given an opportunity to make exceptions to those in writing before the deciding authority. In the United States, it may be noted, the APA provides for an opportunity to take exceptions at both the stages - at the stage of hearing by the hearing officer and at the final stage of decision -- and at times the administrative practice permits oral hearing at the latter stage.

9. An Introduction to American Administrative Law 156 (1962).
10. Ibid. at 157.
11. In Mazza v. Cavicchia, 105 A. 2nd 545 (N.J. 1954).
12. Supra note 9 at 159.