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NOTES AND COMMENTS

SPECIAL LEAVE APPEALS AND ADMINISTRATIVE TRIBUNALS

It is common knowledge that the judicial powers and functions of a sovereign state are primarily conferred on courts of justice; and it is they who normally adjudicate the disputes arising between citizens and citizens as also between citizens and the state. But a phenomenon discernible almost invariably in the modern world is that the state has become an active instrument of social and economic policy. A necessary concomitant of the vast increase of economic and social functions of the government has been the creation of administrative bodies or authorities entrusted with a wide variety of powers including the power of adjudication of disputes. Therefore, the judicial powers and functions of the state are not the monopoly of courts of justice alone but are being increasingly shared at the present-day by administrative tribunals as well.

This note proposes to examine the Supreme Court's approach in entertaining appeals from administrative authorities under article 136. Would the Court exercise its residuary appellate power in respect of administrative authorities exercising quasi-judicial powers? Or would the Court restrict its jurisdiction to administrative bodies invested with judicial powers of the state? And, are there any precise tests for identifying judicial powers?

Ever since the majority decision of the Supreme Court in *Bharat Bank* v. *Employees of Bharat Bank*[1] that quasi-judicial authorities would be subject to the special leave jurisdiction of the Court, article 136 has been considered a source of judicial control of administrative action. The Court has been hearing appeals from administrative authorities exercising adjudicatory powers irrespective of the fact whether the impugned action amounted to initial administrative determination[2] or a subsequent decision by a higher authority within the administrative

1. A.I.R. 1950 S.C. 188. An award pronounced by an industrial tribunal under the provisions of the Industrial Disputes Act, 1947, was brought to the Supreme Court by special leave. As to the preliminary objection whether or not the industrial tribunal was a tribunal under article 136, the Court held that appeal lies from an industrial tribunal which is a quasi-judicial body. Principles laid down in the *Bharat Bank* case have been reiterated in the later cases. See, *e.g.*, *Durga Shankar* v. *Raghuraj Singh*, A.I.R. 1954 S.C. 520.

2. In *Mahadayal* v. *Commercial Tax Officer*, A.I.R. 1958 S.C. 667, the Court interfered with the original order of assessment by the Commercial Tax Officer under article 136 on the basis that the assessing authority had not exercised its own judgment in the matter of the assessment; he took directions from the Assistant Commissioner and followed those directions. As a result, no opportunity was given to the assessee to meet the points made by the Assistant Commissioner.

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hierarchy.[3] However, in some cases, questions were raised whether certain authorities with adjudicatory powers were tribunals under article 136.

In *Harinagar Sugar Mills Ltd.* v. *Shyam Sunder Jhunjhunwala*[4] the issue was whether the Central Government, while exercising its powers under section 111(3) of the Companies Act, 1956, is a tribunal within the meaning of article 136. The dispute was with respect to the claim made by a transferee of a company's shares to have his transfer registered in the company's register. Analyzing the scheme of section 111, the Court observed that in an appeal preferred under it there was a lis between the contesting parties in regard to their civil rights and the Central Government was invested with powers to determine the dispute according to law and, therefore, it was a tribunal under article 136.

The case of *Jaswant Sugar Mills* v. *Lakshmi Chand*[5] involved the question whether the order of the Conciliation Officer under the U.P. Industrial Disputes Act, 1947, granting or refusing permission to alter the terms of employment of workmen at the instance of the employer during the pendency of an industrial dispute, is appealable under article 136. In analyzing the function of the Conciliation Officer the Court came to the conclusion that he has to act judicially. Nevertheless, it held that the officer is not invested with the judicial powers of the state; hence he is not a tribunal under article 136. In the words of Mr. Justice Shah:

> The duty to act judicially imposed upon an authority by statute does not necessarily clothe the authority with the judicial power of the State .... In deciding whether an authority required to act judicially when dealing with matters affecting rights of citizens may be regarded as tribunal, though not a court, the principal incident is the investiture of the "trappings of a court" ....[6]

The above decision seemed to upset the widely held assumption that quasi-judicial authorities were subject to the appellate jurisdiction of the Court. Emphasis was placed upon the "trappings of a court" to determine whether a body is a tribunal or not. Though the Court has refused to hear appeals from the decisions of quasi-judicial authorities on the ground of failure to exhaust available administrative remedies,[7] the above case seemed to mark the first instance in which the Court

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3. See, *e.g.*, *Dhakeswari Cotton Mills* v. *Commissioner of Income Tax, West Bengal*, A.I.R. 1955 S.C. 65; *Sree Meenakshi Mills Ltd.* v. *I. T. Commissioner*, A.I.R. 1957 S.C. 49; *Soyachand* v. *I. T. Commissioner*, A.I.R. 1959 S.C. 59; *J. K. Iron & Steel Co.* v. *Mazdoor Union*, A.I.R. 1956 S.C. 231. See also Jain, *Indian Constitutional Law* 154-58 (1962).
4. A.I.R. 1961 S.C. 1669.
5. A.I.R. 1963 S.C. 677.
6. *Id.* at 685.
7. See, *e.g.*, *Ram Saran* v. *Commercial Tax Officer*, A.I.R. 1962 S.C. 1326.

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reasoned that an administrative body acting judicially is not vested with the judicial powers of the state because it lacked the "trappings of a court."

Then came the decision in *Indo-China Steam Navigation Co.* v. *Jasjit Singh*[8] which raised the question whether the Chief Customs Authority, namely Board of Revenue exercising its appellate power under section 190[9] of the Sea Customs Act, 1878,[10] and the Central Government exercising its revisional powers under section 191,[11] are subject to the special leave jurisdiction of the Court. Mr. Chief Justice Gajendragadkar, speaking for the Court, observed that the basic criterion in deciding whether a body is a tribunal or not is to see if it has been invested with the judicial powers of the state, thus modifying the emphasis Mr. Justice Shah had placed in the *Jaswant Sugar Mills* case on the "trappings of a court." Analyzing the statutory scheme and the scope and effect of the power conferred, his lordship arrived at the conclusion that the above mentioned bodies are subject to the appellate jurisdiction of the Court.

Mr. Chief Justice Gajendragadkar adopted a similar line of reasoning in the subsequent case of *A. C. Company* v. *P. N. Sharma.*[12] The decision involved the question whether the State of Punjab, exercising its appellate jurisdiction under rule 6(6) of the Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952, is amenable to the jurisdiction of the Supreme Court under article 136. The appellant challenged the validity of the state government's order reinstating the respondent in its service. In turn the respondent raised a preliminary objection as regards the maintainability of the appeal inasmuch as the state government against whose decision the appeal was preferred is not a tribunal under article 136(1).

In deciding the preliminary objection the learned Chief Justice Gajendragadkar reviewed the earlier decisions[13] of the Court and stated

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8. A.I.R. 1964 S.C. 1140.

9. Sea Customs Act, 1878, § 190:

If, upon consideration of the circumstances under which any penalty, increased rate of duty or confiscation has been adjudged under this Act by an officer of Customs, the Chief Customs-authority is of opinion that such penalty, increased rate or confiscation ought to be remitted in whole or in part, or commuted, such authority may remit the same or any portion thereof, or may, with the consent of the owner of any goods ordered to be confiscated, commute the order of confiscation to a penalty not exceeding the value of such goods.

10. The Sea Customs Act, 1878, has been re-enacted as the Customs Act, 1962.

11. Sea Customs Act, 1878, § 191:

The Central Government may, on the application of any person aggrieved by any decision or order passed under this Act by any officer of Customs or Chief Customs-authority, and from which no appeal lies, reverse or modify such decision or order.

12. A.I.R. 1965 S.C. 1595.

13. *Id.* at 1602-03. See the cases discussed in the text, notes 4, 5, 8, *supra.*

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that the basic test is whether the authority in question had been constituted by the state and had been invested with a part of the state's inherent judicial powers. The "trappings of a court,"[14] namely the requisites of procedure followed in courts and the possession of subsidiary powers essential for the courts to try the cases before them, may aid in deciding whether the particular authority would fall within the ambit of article 136. But, he added, the latter is not a decisive test.

Applying the above principles the Court concluded that the state government in the instant case was a tribunal. In the words of Mr. Chief Justice Gajendragadkar :

> [T]he power which the State Government exercises under R. 66(5) and R. 6(6) is a part of the State's judicial power. It has been conferred on the State Government by a statutory Rule and it can be exercised in respect of disputes between the management and its Welfare Officers. There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding. Besides, it is an order passed on appeal.[15]

Mr. Justice Bachawat, while agreeing with the majority decision, did not approve of the emphasis laid by the Court in some earlier cases[16] on the phenomenon of "trappings of a court" in determining the nature of tribunals under article 136. Instead, in his view, the context and constitutional background of article 136, which forms the embodiment of residuary appellate power of the Supreme Court, determines the nature of tribunals. Consequently, all adjudicating authorities vested with the judicial power of the state irrespective of the presence of "trappings of a court" would come within the purview of that article. The next question is how to determine when an authority is vested with the judicial power or judicial functions of the state. According to him, an authority having adjudicatory powers "to determine conclusively the rights of two or more contending parties with regard to any matter in controversy between them satisfies the test of an authority vested with the judicial powers of the State."[17] Elucidating the above test, the learned Judge observed : "In order to be a tribunal, it is essential that the power of adjudication must be derived from a statute or a statutory rule."[18]

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14. The phrase was used by Lord Sankey, L.C., in *Shell Co. of Australia* v. *Federal Commissioner of Taxation*, [1931] A.C. 275, 296. The Privy Council held in that case that the Board of Review set up by section 41 of the Federal Income Tax Assessment Act, 1922-25, to review the decisions of the Commissioner of Taxation was not a court exercising the judicial power of the Commonwealth within the meaning of section 71 of the Constitution of Australia. In Australia, as a result of the rigid separation of powers, judicial powers and non-judicial powers cannot be vested in one tribunal. See *Attorney-General for Australia* v. *Queen*, [1957] A.C. 288.

15. A.I.R. 1965 S.C. 1595, 1606.

16. *Supra* notes 4, 5 and 8.

17. A.I.R. 1965 S.C. at 1609.

18. *Ibid.*

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The central thesis running through the foregoing cases seems to be that to invoke the special leave jurisdiction of the Supreme Court a body other than a court of law must be "invested with the judicial powers of the state." Is the phrase susceptible of articulate definition ? What are the tests for identifying judicial powers ?

Ordinarily the decisions of courts are binding and conclusive in that they have the force of law without the need of confirmation by any other authority.[19] This may be considered as one of the essential characteristics of judicial power. It must, however, be pointed out that if finality is attached to the orders of administrative authorities by being exempted from judicial review, those orders do not thereby become judicial in the absence of other attributes of judicial power.

Certain procedural characteristics also determine whether a body exercises judicial powers or not. The existence of a *lis inter* parties, initiation of cases by the parties, sitting in public, power to administer oaths and compel the attendance of witnesses, application of the rules of evidence, power to impose sanctions and enforce obedience to their orders are essentially the procedural aspects of judicial power. However, the conferment of some of the "trappings of a court" on a body may not always be decisive of the fact that it has been invested with judicial power.

Perhaps, the best known formulation of the substantive test of judicial power is to be found in the definition of judicial powers by the Committee on Ministers' Powers in England.[20] The Committee was of

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19. Advisory opinions probably stand on a different footing. They are not binding on anyone in that they are merely advices to the government.

20. The Committee defined "judicial powers" thus :

> A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites :—
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> (1) the presentation not (necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.
>
> A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action . . . .

Id. at 73-74. See also de Smith, *Judicial Review of Administrative Action* 37-51 (1959). The author refers to the most famous of the substantive tests :

> An authority acts in a judicial capacity when, after investigation and deliberation, it determines an issue conclusively by the application of a pre-existing legal rule or any fixed, objective standard to the facts of the situation.

Id. at 41.

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the view that a body irrespective of its being a court of law exercises judicial powers when it disposes conclusively a dispute between two or more parties by "a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law." But if the authority applies policy considerations to the facts, the final decision is not judicial but quasi-judicial. However, in both cases decision has to be preceded by a hearing in which the principles of natural justice apply.

It would seem that the Committee's analysis of the judicial process was based on the fallacious assumption that the regular courts of law did not exercise discretion in which considerations of public policy often play their part. In other words, the Committee tended to support the now discredited theory that judges only interpret or declare law and not make law.[21] They considered "the law of the land" as a complete structure ready to be applied to any controversy which arises. The Committee's distinction between "judicial" and "quasi-judicial" powers was based on the difference between "law" and "policy." Is it possible to have a clear-cut differentiation between "law" and "policy"? The idea that "law" is devoid of discretion is assailable. To quote Robson: "In my view one can distinguish 'policy' from 'law' only in theory, and even then the distinction is doubtful. In practice, the judge has been for centuries and still is today, a maker of policy. A great part of the law consists of judicial policy embodied in cases."[22] The courts in fact exercise a wide variety of discretionary powers.[23]

There seems to be another school of thought which, while recognizing the existence of discretionary powers in the courts, defended the Committee's classification of judicial and quasi-judicial powers. They are of the view that the discretion of the courts is judicial to be

21. Analyzing the role of the judge Cardozo observed:

> He fills the open spaces in the law .... The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom. There is in truth nothing revolutionary or even novel in this view of the judicial function. It is the way that courts have gone about their business for centuries in the development of the common law.

Cardozo, *The Nature of the Judicial Process* 113-16 (1921). See also Robson, *Justice and Administrative Law* 444-50 (3d ed. 1951). Refer to Ivor Jenning's comment on the statement that a judicial function involves no exercise of discretion:

> There is, no doubt, an emphasis in many cases upon the interpretation of the law and the ascertainment of the facts. In most cases, however, the problem is one of discretion.

Jennings, *The Law and the Constitution* 288 (5th ed. 1959).

22. Robson, *op. cit. supra* note 21, at 432.

23. Power to award costs, to sentence prisoners, to appoint and remove arbitrators, receivers, trustees, to alter the provisions of trusts, etc., are some of the discretionary powers of the courts. See Jennings, *op. cit. supra* note 21, app. I.

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exercised with reference to objective standards as opposed to subjective considerations of public policy.

It is, however, obvious that the degree of discretion vested in adjudicating bodies varies greatly between different types of cases and different bodies. This is so with respect to courts as well as of administrative tribunals. In some situations the courts are bound within narrow limits by precedents as well as statutes; whereas in other cases they enjoy the freedom to explore subject only to the necessity for maintaining some degree of coherence and consistency in the body of law. The same is true of administrative tribunals. The idea that administrative authorities enjoy unlimited freedom in the guise of policy may not seem to be correct because the discretions vested in them may be regulated by fixed standards and to that extent be judicially reviewed.

The foregoing discussion reveals the absence of any single definite and precise criterion for identifying "judicial powers." As to when a body would be invested with judicial powers of the state will depend on many variable indicia which it is virtually impossible and in fact inadvisable to enumerate. In fact often the classification of a function as "judicial" or "non-judicial" is nothing more than a rationalization of a decision influenced by considerations of public policy.[24] Therefore, the introduction of the analytical test "investment of judicial powers of the state" is bound to add yet another uncertainty in the area of classification of functions of administrative bodies which is not free

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24. See the observations of Wade:

> The "objective" character of the judicial function is derived from a standard (even though sometimes a discretionary one) enjoined upon the courts by Parliament or by the common law. The canons of policy are eternally flexible and today's decision may be revoked tomorrow. But once a rule has become law it must so continue (unless repealed by due process) irrespective of its rightness, wrongness, convenience or inconvenience. It is, in theory at least, certain and binding . . . . [J]udicial "law-making" differs entirely from the kind of legislation which proceeds from sovereign power: the judge in his judicial functions is allowed no political discretion. He is confined to a type of reasoning which is quite different from Parliament's. His discretions are "judicial discretions", which must conform to a norm, however indefinable, and which are accordingly liable to review on appeal. Of this type are Sir Ivor Jennings' examples of sentencing criminals, awarding damages, granting equitable remedies, and divorce cases. They are fundamentally different from true *administrative* powers, where the discretion is merely the administrator's own idea of expediency, incapable of being declared wrong in law by any higher authority. The vital line of division is obliterated if all discretions are treated as in their nature the same. All powers are discretionary; if they are not they are duties. But some powers differ from others none the less.

Wade, "'Quasi-Judicial' and Its Background," 10 *Camb. L.J.* 216, 223-24; see also Gordon, "'Administrative' Tribunals and the Courts," 49 *L.Q. Rev.* 94, 105-08 (1933).

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from ambiguity.[25]

The Court, it is suggested, must not whittle down the efficacy of article 136 as a means of regulating administrative action. A litigant must not be denied direct access to the superior court of the land when he has suffered injustice at the level of adjudicating authorities. While it is understandable that the aggrieved persons can resort to High Courts under article 226, it must not be forgotten that the scope of judicial review in writ petitions is narrower than in appeals. In effect, the argument amounts to restricting judicial review not only procedurally but also substantively.

*Alice Jacob**

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25. The question when an authority other than a court of law be said to be exercising quasi-judicial function has come up before the Supreme Court several times. See, *e.g.*, *Province of Bombay* v. *Khushaldas*, A.I.R. 1950 S.C. 222 ; *Nagendra Nath Bora* v. *Commissioner of Hills Division*, A.I.R. 1958 S.C. 398 ; *Radeshyam* v. *State of Madhya Pradesh*, A.I.R. 1959 S.C. 107 (involving the question of reviewability of administrative determinations on certiorari) ; *G. Nageswara Rao* v. *A.P.S.R.T. Corpn.*, A.I.R. 1959 S.C. 308 ; *Shiviji Nathubhai* v. *Union of India*, A.I.R. 1960 S.C. 606 ; *Board of High School* v. *Ganshyam*, A.I.R. 1962 S.C. 1111 (fairness of administrative proceedings) ; *Bharat Bank* v. *Employees of Bharat Bank*, A.I.R. 1950 S.C. 188 (applicability of article 136). The Court has laid down certain tests. (See Das, J.'s judgment in the *Khushaldas* case, *supra*, at 259-60.) But the well-nigh impossibility and impracticability of providing an articulate and precise definition of quasi-judicial functions has been aptly pointed out by Wanchoo, J.:

> The inference whether the authority acting under statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute. A duty to act judicially may arise in widely different circumstances which it will be impossible and indeed inadvisable to attempt to define exhaustively.

Board of High School v. *Ganshyam*, *supra*, at 1113-14.

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