JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN INDIA, PAKISTAN AND BANGLADESH (2nd ed. 1990). By M.A. Fazal. The Law Book Company (P) Ltd., Allahabad. Pp. xxxv + 444. Price Rs. 220.

ADMINISTRATIVE LAW was still in its infancy in India when the book under review[1] first appeared in 1969. It was not yet a subject in most of the Indian universities at the LL.B. stage and even at the LL.M. stage it was taught only in a few universities. For lack of adequate literature and competent teachers to handle it, very few students opted for it. Interestingly, wherever there was a choice, students preferred British or American administrative law over the Indian because they could get required literature and competent teachers more easily in the former than in the latter. True, some works like N. Ghose's[2] and A.T. Markose's[3] did exist but they were either too old or too limited in their scope to give a complete picture of the administrative law as it operates in the Indian subcontinent. Fazal's work based as it is on his Ph.D. thesis submitted to the University of Oxford also does not cover everything that is covered under the administrative law today, but it treats its core thoroughly.

Since the first appearance of Fazal's book administrative law has taken major strides in India. It has become a subject of study in almost all the universities which impart legal education at the LL.B. as well as LL.M. levels and many titles on the subject have appeared. Some of these titles are quite comprehensive and normally cover all those topics and more which are covered by the books on administrative law in other leading common law countries, particularly in USA and UK. Fazal's book must have played a decisive role in this transformation. Although it has not changed its scope even in the second edition, it can very well be compared with such works as S.A. de Smith's.[4]

The book is divided into seven chapters. Chapter I which is introductory gives a short historical account of the administrative process in UK, USA and the Indian subcontinent and identifies the basic issues with which the administrative process and its judicial review is concerned. The issues include determination of appropriate machinery for the administrative process, statutory powers and regulation of the adjudicatory bodies, procedure for administrative decisions, safeguards to the groups affected by administrative action, and finally the question: what ought to be the scope of judicial review? These issues have been discussed with reference to USA/UK and the Indian subcontinent though more space is occupied by the former two than the latter. Towards the end of the chapter he points out:

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1. M.A. Fazal, *Judicial Control of Administrative Action in India, Pakistan and Bangladesh* (1990).
2. *Comparative Administrative Law* (1918).
3. *Control of Administrative Action* (1959).
4. *Judicial Review of Administrative Action*.

> All the issues attended to are connected with the central issue: the scope of judicial control of administrative action. If administrative law is all about legal controls of the administrative process then it must concern itself with the question: How and to what extent are legal controls exercised?[5]

Referring to some of the solutions to the central issue in USA, UK and some other common law countries the author emphasises the need of finding suitable solutions in the Indian subcontinent.

Chapter II deals with the jurisdictional principle. Acknowledging that "the judicial review of administrative action in the Indo-Pak subcontinent, was derived historically from the common law, the dominant feature of which was the enforcement of controls over the powers of the public authorities through the ordinary courts"[6], the author deals with the jurisdictional principle, *i.e.*, the excess of jurisdiction which is based on the doctrine of *ultra vires* in UK. He distinguishes the jurisdictional principle as it operates in UK from the principle of review in USA which in the sphere of facts is based on the substantial evidence rule and in the realm of question of law on "reasonable basis in law" and "warrant in the record". Various heads of jurisdictional principle such as reasonableness, improper motive, wrong procedure, procedural *ultra vires* are discussed as they operate in UK. As a prelude to the discussion on the growth of jurisdictional principle as a means of control of administrative action in the Indian subcontinent, the author finds that though the basis of judicial control in the subcontinent is also jurisdictional principle in practice it has proved very elusive. The application of the principle in different judicial pronouncements on the subcontinent has been discussed under the rubric of reasonableness, improper motive, irrelevant considerations, acting under dictation, fettering of discretion, abdication of discretion, rule against delegation and subjective discretion.

Dealing with the working of the jurisdictional principle, the author says that the courts in India and Pakistan have experienced the same difficulty as the courts in UK in drawing the distinction between reviewable jurisdictional matters and unreviewable errors committed within jurisdiction[7] and have quite often gone into the merits of the case in the exercise of review.[8] Discussing some of the cases in which the courts have gone into the substance of the issues, he concludes that these cases demonstrate that "the jurisdictional principle which is the basis of judicial control in English law has become, to a very large extent, irrelevant in India. The courts rarely apply their minds to the question of excess or want of jurisdiction. The availability of review depends on whether or not any given decision of the administrative authorities is justifiable in the opinion of the reviewing court."[8a] Supporting his point from some more cases, he concludes: "To say that a tribunal acts in excess of its jurisdiction by failing to come to the correct decision is a

5. *Supra* note 1 at 43.
6. *Id.* at 45.
7. *Id.* at 61.
8. *Id.* at 66.
8a. *Id.* at 69.

contradiction in terms."[9] And "in Pakistan the notion of want of jurisdiction has been stretched to the point of the rightness test."[10]

Discussing the patterns of review, the author points out that while notwithstanding *Anisminic Ltd.* v. *Foreign Compensation Commission,*[11] the English courts uphold the dichotomy of reviewable jurisdictional defects and unreviewable non-jurisdictional errors, in the subcontinent the courts have sometimes relied on the jurisdictional principal, sometimes discarded it, and, in some cases, granted review without any reference to the issue. Tracing some patterns of review on the subcontinent he finds that some cases may be justified on the ground of transgression of constitutional limits, breach of legal rights, true interpretation of statute, without any strict adherence to the jurisdictional principle. In his opinion the courts on the subcontinent have departed from English position without adopting the position in USA. He is not suggesting that the courts must follow one or the other but he would like that the courts should state some clear principles on which to base the judicial review.[12]

Review of fact and law is the subject matter of chapter III. It begins with a discussion on the distinction between law and fact because the courts do not intervene on questions of fact "unless the absence of evidence or the perversity of the finding required them to intervene."[13] Some facts are, however, considered jurisdictional facts on which the courts rest their power of examining the factual basis of administrative determinations in UK as well as in the subscontinent. It is different from USA where a finding of fact by an administrative agency is set aside if it is not supported by substantial evidence. While the law on jurisdictional facts is well settled at times it is difficult to distinguish jurisdictional facts from other facts. Discussing the tests for drawing such distinction the author prefers the tests that draw the distinction between the "collateral facts" and "facts in issue" over the test of enabling powers.[14] He, however, acknowledges that "at bottom characterisation of an issue as "collateral" or "inherent" is one of judicial policy, rather than "implied legislative intent."[15]

The courts can also set aside administrative determinations for lack of evidence in support of them. In such cases the courts also take the view that "a public authority has no jurisdiction to act in the absence of evidence to support its action."[16] The author does not find the no evidence rule in any way dissimilar to the substantive evidence rule in USA.[17] In India, the author opines, "absence of evidence has always been recognised as sufficient justification for interfering with the finding of facts even when they are within the jurisdiction of the tribunals."[18]

9. *Id.* at 72.
10. *Id.* at 73.
11. (1969) A.C. 147.
12. *Supra* note 1 at 86.
13. *Id.* at 88.
14. *Id.* at 102.
15. *Id.* at 103.
16. *Id.* at 104.
17. *Id.* at 108.
18. *Id.* at 110.

The author suggests that the "no evidence" rule in India ought to be based on the *ultra vires* principle (*i.e.*, lack of jurisdiction) rather than error of law apparent on the face of the record.[19]

Admitting the difficulty in shifting from no evidence to substantial evidence the author argues that "there is a case for the introduction of the substantial evidence principle selectively in the sphere of important individual rights. As far as the Indian Constitution is concerned two such areas have been marked out. These are the spheres of personal liberty and the freedoms guaranteed by Article 19 of the Constitution."[20]

Dealing with the review of questions of law the author finds that both in UK as well as the subcontinent, jurisdictional questions of law and error of law apparent on the face of the record are well established grounds of review. Discussing the details of the operation of error of law apparent on the face of the record in the subcontinent the author finds that this rule has been denuded by the rule of "true interpretation of the statute" but retains its utility to the extent it provides a basis for review of no evidence, wrong evidence, and wrong conclusions from evidence.[21]

Chapter IV deals with the Anglo-American perspective of judicial control of administrative discretion. Here the author finds that while the courts in UK have been reviewing discretionary powers for long, in USA they have traditionally remained unreviewable. It is only through the efforts of jurists like K.C. Davis in recent years that they are now being reviewed. In UK, however, unfettered discretion may be given to the administrative authorities which is not possible in USA particularly because of the due process clause. Discussing the fettering of discretion by the administrative authorities in UK, the author draws a distinction between the policy and rule and suggests that while fettering is possible by way of former it is not so by way of latter. Review of abuse of power, justiciability of discretion, review of motives and problems associated with it such as burden of proof are also discussed in this chapter. The difficulties of proving bad motives in English law have been pointed out which have been overcome in USA through the procedural safeguards in the Administrative Procedure Act. The author pleads for the introduction of such safeguards in English law also.

Judicial control of administrative discretion on the subcontinent is covered in chapter V. To begin with, this chapter tells that conferment of unfettered discretion is impermissible under the Constitution of India, particularly under articles 14 and 19. All the relevant decisions under these two provisions are discussed. Perhaps the new development could have been very well under article 14 as interpreted and applied since *Maneka Gandhi* v. *Union of India*,[22] and could be related to other fundamental rights also like life and personal liberty under article 21. Discussion on unregulated discretion, as discussion on some other points, is based on the minority opinion of Justice Bhagwati in *Bachan Singh* v. *State of*

19. *Id.* at 112.
20. *Id.* at 117.
21. *Id.* at 136.
22. A.I.R. 1978 S.C. 597.

Punjab,[23] without any indication that it was minority opinion. Judicial review extends to subjective discretion in India, is also clearly pointed out. Various heads under which judicial review is exercised such as failure to exercise discretion, sub delegation of discretion, purpose and motives, relevant and irrelevant considerations, *etc.*, are discussed in detail. It is supported by the discussion on the requirement of reasoned decisions and grounds for the exercise of discretion as well as the discovery of documents. With almost no discussion on Pakistan and Bangladesh this chapter ends with the conclusion that inspite of the shackles of common law the courts in India have been able to expand the net of judicial control of administrative action with the help of the Constitution.

Chapter VI which is the longest of all deals with the principles of natural justice. Its tone is set by a general statement that in the "Indo-Pak subcontinent the principles of natural justice stand on the same footing as in English law, there being nothing in the constitution akin to the 'due process' in USA's Constitution."[24] This could be true about Pakistan and pre *Maneka* India but since *Maneka* principles of natural justice have acquired a constitutional position in India. Discussion on bias deals with three major categories of such bias. As regards bias on issues of law and policy the position is the same as in Anglo-American law, *viz.*, "bias in the sense of preconceived views on issues of policy is no ground for disqualification."[25] In respect of personal bias the Indo-Pak courts have applied the rule against bias strictly if personal prejudice or ill-will could be proved from the proceedings or from the conduct of the parties. The courts have applied the test of "reasonable likelihood" rather than of "reasonable suspicion".[26] In respect of pecuniary interest the courts have held that even the slightest interest in the subject matter of the inquiry would result in the disqualification of the judges as a matter of course.[27]

On the principles of hearing noting the developments in UK and Pakistan in the latter "there is no difference between proceedings which are strictly judicial and those which are in the nature of judicial proceedings though administrative in form".[28] Most revealing is the holding in *Faridsons Ltd.* v. *Government of Pakistan,*[29] about which it is said that "precisely this position was subsequently affirmed by the House of Lords in *Ridge* v. *Baldwin*".[30] Special attention is drawn to the fact that the Pakistani decisions emphasise that "whenever an exercise of power affects the rights of the private citizens that exercise of power is judicial and is subject to the observance of natural justice".[31] About India, special attention is drawn to the distinction between judicial, quasi-judicial and admin-

23. A.I.R. 1982 S.C. 1325.
24. *Supra* note 1 at 192.
25. *Id.* at 198.
26. *Id.* at 201.
27. *Id.* at 202.
28. *Id.* at 256.
29. PLD 1961 S.C. 537.
30. (1964) A.C. 40.
31. *Supra* note 1 at 258.

istrative acts which the courts seem to have abandoned generally but keep alive for certain purposes. *A.K. Kraipak* v. *Union of India*,[32] which rejected this distinction has been presented as an example of the requirement of acting fairly. In conclusion it is said that in UK and India the distinction between judicial and administrative acts returns again and again and remains relevant for certain purposes though even administrative acts are subject to certain procedural safeguards and can be brought under the requirement of acting fairly.

Considerable space has been devoted to the discussion on the effect of violation of the principles of natural justice, particularly bias. The author claims that in the first edition of the book he had argued that bias rendered a decision void rather than voidable. His argument was that "an action or decision successfully challenged in proceedings for judicial review over acts of inferior jurisdictions (as opposed to appeal) was always void (except in the case of an error of law apparent on the face of the record which rendered a decision voidable)." This view, the author claims, "has now emerged as the dominant view among academic lawyers and judges."[33] The author, however, admits that the law is not yet clear on this point either in UK or India as is evident from the conflicting decisions and opinions of the courts. Perhaps the civil law system provides much more clear guidelines on this complex issue.[34]

Finally, chapter VII deals with the judicial remedies. Action for damages and limitations arising from the doctrine of sovereign immunity in India are discussed. The doctrine of sovereign immunity is criticised in strong terms as a contradiction in a constitution based on the rule of law.[35] Recent cases which circumvent the doctrine are welcomed and a hope has been expressed that perhaps a public law of tort will emerge.[36] On this point special attention is drawn to the constitutional provision in Pakistan which says that "to be treated in accordance with law, and only in accordance with law... is the inalienable right of every citizen" and to some court decisions in Pakistan which make serious inroads in the doctrine of sovereign immunity.[37] Discussing the reliefs against the state in contractual matters the doctrine of executive necessity has been found drastically qualified in India.[38]

Dealing with specific remedies the author says that injunction is more effective in the subcontinent than in UK where it is not available against the Crown. But in the subcontinent easy availability of *mandamus* restricts the use of injunction. The remedies of declaration and prerogative writs are also discussed in comparative details in the subcontinent *vis-a-vis*, UK. Special attention is paid to the liberalisation of the requirement of *locus standi* and public interest litigation in India. Flexibility of remedies is also emphasised and it is noted that while in

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32. A.I.R. 1970 S.C. 150.

33. *Supra* note 1 at 203.

34. See, *e.g.*, Mahendra P. Singh, *German Administrative Law in Common Law Perspective* 42 (1985).

35. *Supra* note 1 at 286.

36. *Id*, at 291.

37. *Id*. at 294.

38. *Id*. at 298.

Anglo-American law the remedies have not adjusted to the changing needs they have shown greater flexibility in the subcontinent.[39]

Two appendices at the end of the book which reproduce two major articles of the author - one on "Reliability of Official Acts and Advice" and the other on "Remedies in Administrative Law - An Evaluation of the Recent Reform" - add considerably to the value of the book in so far as they articulate the considered opinion of the author on these two major issues. The book ends with a comprehensive subject index which is of great help in locating minutest details discussed in the book.

Undoubtedly the book is unique in the comparative study of administrative law on the subcontinent *vis-a-vis* the law in UK and the USA. It is also unique in the sense that no other book has attempted such comprehensive and critical study of the administrative law in the three major countries on the subcontinent. Not only that even the books which are written in individual countries of the subcontinent, particularly in India some of which the reviewer has read, do not go so deep into the critical issues and examine them with such mastery and competence with which this book does. Of course several books on administrative law written in India are much more comprehensive and contain many more details but hardly anyone of them compares with the book under review as far as the analysis of difficult and controversial issues is concerned. The reviewer considers it as a masterpiece on comparative law as well as on the administrative law of Indian subcontinent.

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39. *Id.* at 362.

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