1

ADMINISTRATIVE LAW

*I P Massey**

I INTRODUCTION

ADMINISTRATIVE LAW seeks to regulate and control abuse of administrative power with a view to infuse fairness and accountability in the administrative process necessary for securing equity and inclusiveness in the domestic and world order. One of the greatest achievements of Indian judiciary has been conscious development towards a comprehensive system of administrative law as a fair policy-delivery mechanism. There now exist a variety of principles and rules for tackling the massive problems of arbitrariness and misuse of power by the administration. Today, wide variety of regulatory mechanism has been introduced following the liberalization of the economy. The courts have consistently tried to make this mechanism people-centric. In order to bring transparency and accountability in the administration, courts have expanded the grounds of judicial review to include illegality, irrationality, procedural impropriety and proportionality. Principles of natural justice have further been honed and refined to protect human rights. Need for a speaking order has been widely emphasized in administrative decision-making. Rules of *locus standi* have been liberalized in social action litigations. Judicial remedies have been enlarged to provide solutions against the misuse of administrative discretion. Time tested principle of governmental morality has been strengthened by firmly engrafting the principle of 'legitimate expectation' both procedural and substantive on administrative law. Courts have developed some of the finest principles of environmental and consumer jurisprudence. So far courts have been successful in handling the inevitable tension between the democratic right of the majority to rule and the socio-economic needs of the individuals and groups especially those who are deprived and disadvantaged.[1] In exercise of its powers of judicial review, the courts can now not only enforce constitutional boundaries but also enforce administrative action within such boundaries to meet the ends of justice. Eliminating, all no-go areas, the

* Presently Professor of Law and Dean, Faculty of Law, National Law University, Jodhpur.
The author gratefully acknowledges the assistance provided by Anuradha Nayak, Assistant Professor of Law, National Law University, Jodhpur, Rajasthan in the preparation of this survey.

1 See generally, Upendra Baxi, "Introduction" in I.P. Massey, *Administrative Law* XV (2007).

Supreme Court has emphasized that even the subjective satisfaction of the government is not beyond judicial scrutiny.

Though we have travelled a long way in maturing the system of administrative law, yet there are some concerns about its future growth. Courts have shrunken 'public space' by excluding a significant 'private space' from it which is of enormous social and economic consequences for the people.[2] Courts have virtually withdrawn from the areas of policy issues, concerns of the workforce, and the victims of development.[3] It is true that administrative law cannot be divorced from political, economic and social processes, yet people cannot be left at the mercy of self-correction of the market forces. This is the biggest challenge which the future growth of administrative law, domestic and global, faces. Behind every principle and rule of administrative law, the core question is: Whose interest it is serving? Unfortunately, recently the court's agenda and docket have been less equitable and inclusive. This may dilute the efficacy of administrative law as a constitutional imperative.

The year 2009 has been an uneventful year so far as the growth of administrative law is concerned. The apex court hardly got an opportunity to develop new principles and rules and remained content with applying existing ones to the new situations. This does not, however, in any way diminish its judicial role perception and performance in contemporary constitutional developments. The fact remains that though in any constitutional democracy primary control on government is by the people but experience has taught the necessity of an auxiliary precaution which can be none except judicial under the present circumstances. The judicial role, therefore, in the contemporary domestic and global scenario in developing a mature system of administrative law cannot be overemphasized.

II JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Focal point of administrative law is fairness and accountability in administrative process. Unfortunately, because all other mechanisms, statutory and administrative, have failed to deliver upto the expectations, it is natural that judicial review of administrative action plays a dominant role despite the fact that it involves considerable cost, time and effort. Inspite of its various limitations, internal and external, no human institution has done so much in dealing with the malignancy in the exercise of administrative powers as the judiciary has done in India. While, at all other levels of control, there appears to be a 'shadow boxing,' court's direction is firm and fixed. In the changed scenario of economic liberalization and globalization of economy, the court is emphasizing 'self-restraint' in order to provide necessary flexibilities to the administration to the extent of almost

2 *Zee Telefilms Ltd* v. *Union of India* (2005) 4 SCC 649.
3 *BALCO Employees Union* v. *Union of India* (2002) 2 SCC 333.

withdrawing from certain areas of policy formation. Overburdened, court's limited time is being consumed by incorporated India and middle classes to protect their rights and entitlements at the cost of large deprived and disadvantaged sections of India. Court's docket lacks equity and inclusiveness. In *Mohd. Abdul Kadir* v. *Director, General of Police*,[4] the apex court instead of giving relief to employees who were working for a long time on *ad hoc* basis without any salary increment, simply thought proper to bring this matter of public interest to the notice of the government. It is true that wisdom and advisability of administrative action is not open to challenge but 'fairness' should not become less conspicuous feature of Indian administrative law.

III ADMINISTRATIVE RULE-MAKING

With the growth of the administrative process due to the exigencies of the modern state, the administrative rule-making has assumed tremendous proportion and importance. In the present day context of free market economy, there has been a phenomenal growth of administrative regulatory agencies which has made outsourcing of law-making power to the administrative authorities a compulsive necessity. Therefore, bulk of the law by which people are governed today does not come from the legislature but from the chamber of the administrators. This is justified on grounds of expediency as there are obvious limits of parliamentary time and expertise. It is for this reason that the legislations enacted by the legislatures have become less detailed and more 'open textured.' This raises many questions of constitutional validity of these measures. The courts in India have developed a fine normative jurisprudence of delegated legislation. One such norm is that the administrative rules must not be *ultra vires* of the enabling Act. Applying this norm in *Corporation Bank* v. *Abharansala Bullian Merchants*,[5] the Supreme Court held that if the enabling Act provided for the refund of tax deposited in excess of demand, and the administrative rule made thereunder provides for 'no refund,' it would certainly be *ultra vires* the Act being beyond powers of the administrative authority. However, in case of conflict, both the rules and the Act must be interpreted in a harmonious way as administrative rules and regulations become part of the enabling Act.[6]

Again, for the reasons of expediency and time constraint, the administrative authority may further sub-delegate the rule-making power which has been delegated to it under the statute. This raises questions of validity of such sub-delegation. The courts are unanimous that sub-delegation of rule-making power is not valid unless authorized by the statute expressly

4 (2009) 6 SCC 611.
5 (2009) 1 SCC 540.
6 *U.P. Power Corporation* v. *NTPC* (2009) 6 SCC 239.

or by necessary implication. The administrative authority cannot further delegate even by making rule in exercise of its rule-making power if not authorized by the enabling statute. However, delegation of purely administrative part of rule-making can be safely delegated to any authority. Thus, in *M. Chandra* v. *Chennai Development Authority*,[7] the court held that asking the development authority to collect tax is not a delegation of rule-making power and hence valid. In this manner, the maxim '*delegatus non potest delegare'* which is not attracted in case of delegation of law-making power by the legislature certainly applies to the sub-delegation.

IV REQUIREMENTS OF NATURAL JUSTICE/FAIRNESS

In the absence of any statutory administrative procedure code laying down minimum procedural requirements, there exist a bewildering variety of administrative procedures. Sometimes, procedure is laid down in the law under which authority is created. At times, the authority is left free to develop its own procedure or follow the procedure of the civil courts. In the absence of any of these, the administrative authority is required to follow the principles of natural justice which require a minimum standard of fairness expected to vary widely according to the context and cannot be stretched too far in a ritualistic manner.[8] This makes the administrative procedure less overtly judicial in nature.

Empty formality rule

In order to provide administrative flexibility, the courts are applying this rule in situations where facts are admitted or the same are incontrovertible and hence no purpose will be served if principles of natural justice are applied in the case. Applying this principle in *Bihar State Electricity Board* v. *Pulak Enterprises*,[9] the apex court held that where fixing rate of surcharge is just arithmetical and based on a given formula, no purpose will be served by applying the rule of fair hearing. Even otherwise fixing of rates for general application is a legislative action where scope of judicial review is highly limited and therefore rule against arbitrariness as now emanating from article 14 (equality clause) of the Constitution is not attracted.

Off-the-record consultation

In order to avoid off-the-record consultations by administrative authorities in a manner that may prejudice the case of other party, it is imperative that administrative authorities exercising adjudicatory powers should not consult any person or party about any fact in issue without giving

7 (2009) 4 SCC 72.

8 *Bar Council of India* v. *High Court of Kerala* (2004) 6 SCC 311; *Escorts Farms Ltd* v. *Commissioner of Kumon Division* (2004) 4 SCC 281.

9 (2009) 5 SCC 643.

notice and opportunity to all persons to participate.[10] In England, this standard rule applies to all enquiries. In India, there is no law to eliminate the dangers inherent in off-the-record consultation by an administrative authority. Principles of natural justice only demand that the authority must not base its decision on any evidence which is not brought to the notice of the other party. Since in India, there is no statutory requirement for the preparation of a "record,' off-the-record consultation which may prejudice the mind of the authority is endemic. The apex court in *State of Kerala* v. *Zoom Developer*[11] rightly held that off-the-record advice or opinion which was taken into consideration by the state without bringing it to the notice of the other party and giving an opportunity to rebut violates the principle of fairness. This is a correct step in the right direction in the sense that the principle applies not only to authorities exercising quasi-judicial functions but to administrative functions also.

V CONTRACTUAL DISPUTES

Generally speaking, contractual disputes are not amenable to writ jurisdiction and must be decided by the civil courts in terms of the contract. However, where contractual dispute involves public law element, court may exercise writ jurisdiction. In *Food Corporation of India* v. *SEIL Ltd.*,[12] the court issued a writ for securing payment arbitrarily withheld for the supply of sugar made in terms of a statutory order under the Essential Commodities Act, 1955. However, in *Chaman Lal Singhal* v. *Haryana Development Authority*[13] the apex court was of the opinion that if allotment is cancelled and earnest money forfeited in terms of the contract because the contracting party did not perform his part under the contract, writ jurisdiction cannot be exercised because no question of public law is involved.

VI RULE OF NECESSITY

Statutory exception or necessity is a recognized exception to the rule against bias. If this exception is not allowed, there would be no other means of deciding that matter. However, necessity must be genuine and real which implies absence of any option.[14] Rule against bias creates real problem when relatives of constitutional functionaries appear before them for interview for public employment and who alone can make appointment. In a reference case, the Supreme Court opined that constitutional authorities like Members/

10 See the Administrative Procedure Act, 1946, s. 5(2).
11 (2009) 5 SCC 649.
12 (2008) 3 SCC 440.
13 (2009) 4 SCC 369.
14 *Om Prakash Mann* v. *Director of Education* (2006) 7 SCC 552; *Charan Lal Sahu* v. *Union of India* (1990) 1 SCC 613; *Sub-Committee on Judicial Accountability* v. *Union of India* (1991) 4 SCC 699.

Chairman of Public Service Commission will be covered within the 'Necessity Rule' as no one can be substituted in their place. It was on the basis of his principle alone that the Supreme Court held competent to decide the question in appeal whether they were subject to the Right to Information Act, 2005 regarding declaration of their assets. However, bias continues to be the most vexing problem in the area of public employment in India.

VII LEGITIMATE EXPECTATIONS

The protection of legitimate expectation is at the foundation of the constitutional principle of rule of law which requires fairness, regularity and predictability in dealings of the administrative authorities with the public. Administration should keep a policy, be bound by a promise and a past practice which may be substantive or procedural. The concept of rule of law also implies that people ought to be able to plan their lives, secure in the knowledge of the legal consequences of their actions. The doctrine also acts as protection against retroactive measures of the administration. However, the possibility of lettering administrative discretion by means of policy, promise and a practice continues to be the most vexing problem of judicial review in this area of public probity. Equally vexing is the problem of public functionaries (ministers) making popular promises for public consumption.[15] The apex court has held that legitimate expectation is not the same as anticipation and is different from desire and hope.[16] Legitimate expectation in order to deserve protection must be reasonable and must be such which could be sustained in the court in the face of change in policy.

In *Sethi Auto Service Station* v. *Delhi Development Authority*,[17] the apex court reiterated the principle that any person basing his claim on legitimate expectation has to satisfy the court that he relied on a clear representation made by an administrative body and that denial of expectation has worked to his detriment. Claim in this case related to allotment of land for relocation of petrol outlet. The Delhi Development Authority (DDA) had a policy for allotment of land for relocation of petrol outlets. Petitioner's claim had been approved by the technical committee but DDA rejected it as by that time a new policy had come into existence. The court opined that there was no clear representation from DDA which could be relied upon by the petitioner. No obligation was cast upon DDA to provide land for relocation of petrol outlets; it only laid down criteria for relocation, hence no legitimate expectation arose. Explaining the law further, the court

15 See *Arunachal Pradesh* v. *Nozone Law House* (2008) 5 SCC 609. The allegations were that the minister assured the respondent to purchase law books and gave green signal for printing. The court held that an oral expression of will cannot operate as a legitimate expectation or amount to promissory estoppel.

16 *Jatinder Kumar* v. *State of Haryana* (2008) 2 SCC 161.

17 (2009) 1 SCC 180.

emphasized that it cannot interfere if there is a change in policy of the administration, unless it amounts to an abuse of power. Although courts will ensure that discretionary powers are exercised to effectuate legislative and administrative policy, they would avoid interfering in policy matters. The Supreme Court made it explicit that the court can interfere only if change in policy is found to be arbitrary, unreasonable or in gross abuse of powers or is in violation of public interest. Therefore, legitimate expectation has no role to play where administrative action is in furtherance of a public policy or in public interest unless it amounts to an abuse of power.

VIII RATIONING THE JUDICIAL REVIEW

Public interest requires that legal validity of administrative decisions should not remain in doubt for a longer time than absolutely necessary. It is also not in the interest of the person affected by it. Bearing this in mind, the courts have developed the doctrine of laches for rationing their power of judicial review. In *Virendra Choudhry* v. *Bharat Petroleum Corporation*,[18] the Supreme Court did not allow a challenge to a grant of liquid petroleum gas (LPG) dealership to a rival in business after one and half years keeping in view the huge investment involved and employees appointed. Though the court's discretion in extending time limit for making a claim for judicial review continues to be applied with a certain amount of inconsistency, yet such flexible doctrine is certainly a constitutional imperative

Judicial review in policy matters

The concept of judicial review has been held to be the basic feature of the Indian Constitution.[19] However, courts in India do not ordinarily interfere where a question of legislative policy is involved.[20] The courts are not concerned with the wisdom or advisability of the legislation and if the same is within legislative competence, the court will uphold it irrespective of its own view.[21]

Nevertheless, exclusion of judicial review in policy matters is not total but restricted to situations where there is a violation of fundamental rights, violation of basic structure of the Constitution, or where policy is manifestly arbitrary. Administrative policy can further be scrutinized on the ground of violation of any statutory provision. Moving in the same direction, the

18 (2009) 1 SCC 297.

19 *S.R. Bommai* v. *Union of India* (1994) 3 SCC 1; *Kishore Kumar Tanna* v. *State of Gujarat* (2009) 1 GLR 683.

20 *Zee Telefilms Ltd.* v. *Union of India, supra* note 2; *BALCO Employees Union* v. *Union of India, supra* note 3.

21 *Karnataka Bank Ltd* v. *State of AP* (2008) 2 SCC 254.

Supreme Court in *Mohd. Abdul Kadir* v. *D.G. Police*[22] further held that though the court cannot make a policy, it nevertheless can bring to the notice of the government concerned issues involving public interest where promptness is warranted. In this case, the policy matter involved was the conversion of *ad hoc* employees working for a long time into permanent employees with advantage of annual increment. Though 'policy' is not a no-go area for the court, yet it acts with self-restraint and balances majoritarian impulse with individual right by applying 'proportionality principle.'

IX CONCLUSION

Judicial role perception and performance during the period under review pertaining to the development of an effective administrative law regime clearly demonstrates that within its own limitations, judiciary in India is earnestly trying to develop administrative law regime in order to ensure rule of law, fairness, equality, inclusiveness and accountability in the governance which are the hallmarks of the Constitution. This has kept alive the hope of people in the democratic governance of the country. However, court's withdrawal from growing private space, policy matters, workforce concerns, issues of development and environment, and justice, needs of disadvantaged and deprived sections of society are matters of concern. The fact remains that in a country like India where there is chaotic exercise of public power, lack of accountability, factionalism and low performance of administrative authorities, the task of development of a sound system of administrative law thought creative exercise of power of judicial review cannot remain on the margins even in the face of growing global capitalism. The courts are the trustees of the Constitution, hence progress towards a comprehensive system of administrative law can never be a small achievement of the constitutional judiciary in India.

22 (2009) 6 SCC 611.