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The Law of Public Administration and Discretionary Powers: A Critically Appraisal to the Judicial Review

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ABSTRACT

In the recent developments related to the need of reforms in the personal laws and the directive of constitution to secure its through Uniform Civil Code (UCC). Abolishment of Triple Talaq have given Muslim Women a sense of security in the marriage which they never had before. UCC is basically an attempt to cut away any prejudices and discrimination against vulnerable groups in the society. In the recent times we have also seen the role played by the judiciary in abolishing law that are discriminative in nature and provides ground for injustice. Although there has been no solid step taken in this regard as of now. There have been unresolved debates related to freedom of religion and how with the UCC the freedom of religion is threatened. However Supreme Court in its recent observations have made it pretty clear that Uniform Civil do not violate 'Right to Religion'

Keywords: *Uniform Civil Code, Secularism, Personal laws.*

I. INTRODUCTION

The theory of separation of powers propounded by Montesquieu involves three organs namely: executive, legislature and judiciary. Executive plays important role in public administration. All the rules, regulations, laws and legislations framed by the legislature are indiscriminately implemented by the executive being the law enforcing agency in accordance with administrative law. However, principles of check & balance are observed by the judiciary in enforcement of legislations by the executive under delegated powers of legislature. The body of sub-legislation adjudication and procedure is known as administrative law and involves the following elements:

1. The constitutions, statutes, compacts, charters, ordinances, and resolutions, defining the powers and duties of administrative agencies.
2. The rules and regulations made by administrative agencies.

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3. The decisions, directives, and orders issued by administrative officers.
4. The investigations and hearings conducted by administrative officers.
5. The judicial decisions and precedents relating to all of the foregoing[2].

But, it is noticeable that industrialization, urbanization, economic depression and two World wars had great impact upon the role of public administration during past century.

II. ENGLISH TRADITIONS OF THE LIMITED EXECUTIVE

Generally, discretion plays vital role in public administration. But, discretion should be exercised judiciously and not arbitrarily. The administrative discretion involves the power of an officer to select among alternative courses of action in conformity the law, agency policy, and specific programme objectives, and his own dictates of conscience and judgment. The examination of Anglo-Saxon legal and political institutions reveals, such discretion has existed for centuries. Before Magna Carta no problem was involved, for the power of the king was almost unlimited. With the crumbling of feudalism, however, English constitutionalism became largely concerned with the struggle to limit the prerogative of the King. The dominant theme of the three hundred years of constitutional history became the transfer of power from a virtually absolute monarch to the rule of the law expressed through legislatures on the one hand and the Courts on the other. The barons who wrested Magna Carta from King John in 1215 demanded somewhat the same concessions embodied in the Bill of Rights signed by William and Mary over four centuries later. In each case, the idea of a contract was paramount (the Crown was exchanged for the acceptance of specific restrictions), and the supremacy of law was explicit. Parliament was to be called into session annually; no taxes were to be levied without its consent. Arbitrary imprisonment was prescribed, and no man was to be adjudged guilty of a crime without jury trial. Men were to be secure in their homes against arbitrary search and seizure. And most important for our purposes, officers of the king were to observe all the privileges and immunities guaranteed by established law[3].

III. SUPREMACY OF THE LAW

Public administration always maintains supremacy of law while it is run in accordance with administrative law. However, English Constitutionalism clearly expresses the American heritage in the supremacy of law concept. In practice this means that all executive officials from the President downward are subject to rules of law which guide and limit their discretion. Law in turn is expressed in statutes and constitutions, as interpreted and enforced by Courts.

[2] John M. Pfiffner and R. Vance Presthus; Ed: 3rd ; Pub. The Ronald Press Company, New York, Pp. 443-4
[3] Ibid

(In theory such laws are not subject to executive interpretation and discretion but are administered in conformance with the "letter of the law".) Such a neat separation, as we seen, is not possible in practice. And yet, broadly and generally, the separation of powers between executive, legislative, and judicial branches does exist to the extent that the major activity of each branch is restricted to its basic constitutional function[4].

Literally, the doctrine of supremacy of law is procedural due process. In the Fifth and fourteenth amendment to the United States Constitution, it is stated that persons shall not be deprived of life, liberty, or property without due process of law. This means that certain established procedures must be followed in applying the law in a particular instance. The rights of persons accused of crime, for example, illustrate procedural due process. Such individuals are guaranteed a fair trial before an impartial jury, representation by counsel, cross-examination of witnesses, and the like. Another star in our legal constellation is the independent judiciary. The prestige, independence, and impartiality of judges are carefully guarded by both law and custom. Contempt of Court citations for those attempting to influence or anticipate the judgment of the Court is one example. Life tenure and adequate pay to promote personal economic independence is another. Broadly speaking, the power of public opinion has supported judicial integrity; many Americans long believed, for example, in the sanctity of the Supreme Court as a body above politics[5].

This is relevant to mention here that administrative action is legitimate only when it adheres to the rule of law. It implies that administrators must be able to link directly their actions to grants of authority in statutes or the Constitution. But, the increasing intensified role of public administration in society has rather necessitated broad legislative grants of discretion to the bureaucracy. The result has been a seemingly perennial tension between the rule of law ideal and the modern administrative reality[6]. An administrative action must be in consonance with the sound judicial principles, statutory provisions and constitutional law otherwise, there is a chance of arbitrarily exercise of administrative power as per the theory of Montesquieu. The provision for judicial review is the essential part of the basic structure of the Indian Constitutional Law. Such type of administrative or executive action can be check & balance under articles 226/227 of the Constitution before the High Court or under article 32 of the Constitution before Supreme Court.

[4] Id. at p. 445
[5] Ibid
[6] Robert S. Kravchuk; Public Administration and Rule of Law; *Available at*: http://www.tandfonline.com/doi/abs/10.1080/01900699108524718 (Lastly visited on 8/10/2016)

IV. FORMULATION AND EXECUTION OF POLICY: ADMINISTRATIVE & DISCRETIONARY POWERS

This is worthy to be noted that the major function of the executive in India is the formulation of policy and its implementation and this task of the executive is facilitated by the parliamentary system of government which operates both at the Centre and the State. An essential characteristic of such a system is the close collaboration between the executive and the legislative organs because the executive depends for its existence on the majority support in the legislature. The principle has been enshrined in the Constitution of India in the proposition that the Council of Ministers shall be collectively responsible to the Lower House of the legislature. The executive organ can, therefore, count on the automatic support of the legislature in its policy-making and administrative efforts. An important point to note with respect to the functioning of the administrative organ in India is that it does not always need a statutory power to act and execute a policy. The Supreme Court has explained this point and illustrates as to how far powers of the executive can run without statutory authorization[7]. The Punjab Government initiated the policy of undertaking the business of publishing, printing and selling text books for use in aided schools of the State. Objection was taken to this activity of the government on two grounds, viz., (i) the State Govt. had no legislative authority or sanction to undertake the business envisaged; and (ii) it infringed the Fundamental Rights of the petitioner to carry on their business of publishing books for schools. On the first question, the Court held that the extent of the executive powers of the government corresponds with the legislative. Thus, a State Government's executive power extends to all matters which fall within the legislative sphere of the State and, similarly, the executive power of the Centre extends to the area of legislative power available to the Centre[8].

The Supreme Court has held:

" It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of government functions that remain after legislative and judicial functions are taken away… the executive government … can never go against the provisions of the Constitution or any law…but, as we have already started, it does not follow from this in order to enable the executive to function there must be

[7] Ram Jawaya V. State of Punjab A.I.R. 1955 SC 549
[8] M.P. Jain and (Late) S.N. Jain; Principles of Administrative Law; (1986); Ed: 4th ; Pub. Bombay N.M. Tripathi Pvt. Ltd. Pp. 317-8

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a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws"[9].

And Furthers held:

" The executive function comprises both the determination of policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State"[10].

The executive power is not, however, free from ultimate legislative control because of the responsibility of the Council of Ministers to the legislature. Also, if any activity needs expenditure of money, the same must be sanctioned by the legislature as no money can be withdrawn from the Consolidated Funds without an Appropriation Act. Further, if the government requires certain powers in addition to what they possess under ordinary law in order to carry on a particular activity, then specific legislation is necessary. If the becomes necessary to invade or encroach upon private rights in order to enable the government to carry on the activity in question, then a specific legislation sanctioning such a course would be needed. In the instant case, the Court held no legal right of the petitioners, much less a Fundamental Right, was being invaded by the government action as they could carry on their business of publishing and selling books without any restriction[11]. They had no legal right to have their books prescribed as text books in schools. This proposition was reiterated in the case of Naraindas V. State of M.P.[12] is in similar fact situation.

The case establishes the proposition that the executive can take administrative action without a specific statutory sanction over the entire area falling within legislative competence of the concerned legislature, if it does not infringe a legal right of any person. A government can, thus, engage in a trading activity, entire into a treaty with foreign countries[13], make appointment[14], make promotions to higher administrative posts[15],fix seniority[16], establish fair price shops[17], without there being specific legislation for the purpose. An executive action

[9] Ram Jawaya V. State of Punjab A.I.R. 1955 SC 555-56
[10] Ibid
[11] M.P. Jain and (Late) S.N. Jain; Principles of Administrative Law; (1986); Ed: 4th ; Pub. Bombay N.M. Tripathi Pvt. Ltd. P. 318
[12] A.I.R. 1974 SC 1232
[13] Maganbhai V. Union of India A.I.R 1969 SC 783; Union of India V. Munnull A.I.R. Cal. 615
[14] B.N. Nagarajan V. State of Mysore A.I.R. 1966 SC 1942
[15] Sant Ram V. State of Rajasthan A.I.R. 1967 SC 1910; S.L. Sachdev V. Union of India A.I.R. 1981 SC 411
[16] Accountant General V. Daraiswamy A.I.R. 1982 SC 783
[17] Sarkari Sasta Anaj Vikreta Sangh V. State of M.P. A.I.R. 1981 SC 2030

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which, however, operates to prejudicially affect the legal right of any person, e.g., personal liberty, must have the authority of law to support it[18]. It also needs to be emphasized that an authority cannot discharge a legislative or adjudicatory function without the authority of law; it can act so only in an administrative manner[19].

V. ADMINISTRATIVE PROCEEDINGS ANALOGIZED TO JUDICIAL CASES

The researcher scholar studying administrative law, generally, has knowledge and experience about the basic courses, e.g., Contracts, torts, business organizations. He is familiar with the concept of a judicial "case or controversy"[20] the legal terminology there used, and the procedures involved. He also knows that in the study of each new subject he was forced to familiarize himself with new ideas and terms. Administrative law is no different in these respects. However, because of its similarity to legal procedures and concepts, administrative law is even simpler to grasp than others courses. "We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the Courts were persuaded to engraft judicial limitations upon the administrative process,"[21] although the Supreme Court now recognizes that wholesale administrative absorption of judicial procedures is not alone unnecessary, constitutionally, but not feasible, practically. "Administrative agencies themselves have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation…. These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of Courts[22]. Therefore, with intention merely to point up certain parallel legal aspects in the study of this field of law and not to suggest that they do, or should, exist in the form here analysed[23].

Whereas administrative law is based on the concept of fair trial as such the Indian Court are also follows the trends of fair trial. Let us see "No man can be convict without being heard" or "No man can be Judge of his own case" both principles of natural justice are followed in administrative proceedings or in Courts procedure.

A series of recent cases of the United States Courts of Appeals evince an increasing judicial willingness to overturn decisions of administrative agencies on grounds seemingly unrelated

[18] State of M.P. V. Bharat Singh A.IR. 1967 SC 1170
[19] M.P. Jain and (Late) S.N. Jain; Principles of Administrative Law; (1986); Ed: 4th ; Pub. Bombay N.M. Tripathi Pvt. Ltd. P. 319
[20] Muskrat V. United States (1911) 219 U.S. 346, 55 L. Ed. 246, 31 S. Ct. 250
[21] Philadelphia Electric Co., V. P.S.C., (1934) 314 Pa. 207, 171 Atl. 690, 693
[22] F.C.C. V. Pottsville Broadcasting Co., (1940) 309 U.S. 134, 142-43, 84 L. Ed. 656, 60 S. Ct. 437
[23] Morris D. Forkosch; A Treatise on Administrative Law; (1956); Pub. The Bobbs-Merrill Company, INC.; & Indiana Polis; P. 13

to the substantive merits of the particular decision in question. The emphasis instead has been on altering, in certain situations, the methods by which the agencies make decisions. The federal courts have traditionally overseen the decisions of administrative agencies. However, the usual role has been for courts to intervene only infrequently and even then only for the purpose of reversing administrative determinations on their merits under the guise of settling questions of law. Recently, however, the courts, in the absence of statutory guidance, have been increasingly willing to assume a supervisory role over the process, as opposed to the product, of administrative decision making. As a key component of this supervision, the courts are insisting upon a shift in the power relationship among the parties involved in the administrative process[24]. This note will discuss: the judicial techniques for imposing changes in the agency's decision-making methodology; the effect of these changes upon the functioning of the administrative agency as a decision-making institution; and the probability that these developments will significantly change the overall substantive results of the administrative process[25].

The High Courts have same jurisdiction to look into the decision-making powers of Administrative Authority by way of judicial review. It can be exercised through Writ Petition, Sue Moto and PIL. Besides, Supreme Court & High Courts have laid down the sound judicial principles in various cases as guide lines to the administrative authorities in order to maintain the rule of law.

VI. THE ADMINISTRATIVE ACTIONS & DECISION-MAKINGS: A JUDICIAL REVIEW WITHIN CONSTITUTIONAL FRAMEWORK

The system of judicial review of administrative actions and decision-making powers has been derived from Roman Laws and the Administrative Law of United Kingdom. The Indian Courts have built up the advancement of the British and Germany's Administrative Law, where the provisions of are check & balance of administrative actions by Ombudsman. The Constitution of India assured greater protection of individual rights and afforded larger freedom to the Courts to look executive lapses. The judiciary showed a great promise in its Constitutional career in preserving the liberty and freedoms of the people in India. The Court is a bridge between the people and the executive. Citizen of our country has right to challenge the administrative action or decision-making by way of judicial review. The remedy is available

[24] Stanley Conrad Fickle; Recent Changes in the Scope of judicial Control Over Administrative Methods of Decision Making; *Available at*: http:// www.repository.law.indiana.edu/ilj/vol49/iss1/7 at P. 118-9 (Lastly visited on 9/10/2016)
[25] Ibid

under article 32 and 226 of the Constitution by way of file the Writ Petitions before the Supreme Court and High Court against the Constitutional validity of administrative actions to the aggrieved citizen of our country. The Supreme Court/High Court is empowered to issue appropriate directions, orders or Writs including Writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of fundamental rights of the aggrieved person guaranteed by Part III of the Constitution. By this article the Supreme Court has been instituted as a protector and guarantor of the fundamental right[26].

The article 226 (1) of the Constitution has empowered every High Court … to issue to any person or authority, including in appropriate cases to any Government directions orders or writs including (writs in the nature of habeas corpus, mandamus, prohibition, warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose). Therefore, under article 32 and 226 of the Constitution, the Courts have wide discretion in the matter of giving proper relief if warranted by the circumstances of the case. The Courts may not only issue a writ but also make any order, give any direction, as it may consider appropriate in the circumstances, to give proper relief to the petitioner. It can be grounds of declaration or injunctions as well, if that is proper relief. It would not throw out the petitioner simply on the grant that the proper writ or direction has to be prayed for[27].

The Supreme Court has held that the judicial review is an administrative action that the Courts would take fundamental principles underlying the prerogative writs. However, the comparative study of the English law and the Indian law that the scope of judicial review in India under Art. 32 and 226 is similar to that in England under the prerogative writs[28].

The article 32 of the Constitution can be invoked only when there is an administrative action in conflict with fundamental rights of the petitioner. The Court would confine itself to the question of infringement of fundamental rights and would not go into any other question. It cannot be invoked even if an administrative action is illegal unless petitioner's fundamental right is infringed. Thus a petition merely against an illegal collection of Income tax is not maintainable under article 32 for the protection against imposition and collection of taxes except by authority of law falling under article 265, (which is not a fundamental right)[29]. But where an illegally levied tax infringes a fundamental right, than the remedy under article 32 of the Constitution would be available[30].

[26] Romesh Thapper V. State of Madras A.I.R. 1950 SC 124
[27] Chiranjit Lal V. Union of India A.I.R. 1951 SC 41
[28] Basappa V. Nagappa A.I.R. 1954 SC 440
[29] Ram ji Lal V. I.T.O. A.I.R. 1951 SC 97
[30] State of Bombay V. United Motors A.I.R. 1953 SC

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The remedy provides under article 226 of the Constitution is purely discretionary relief and petitioner cannot be claimed as matter of right and High Court can decline to grant the relief if it is satisfied that the aggrieved party can have an adequate alternative relief[31]. This remedy cannot be claimed as a matter of right but the High Court must exercise its discretion on judicial consideration and on well establishes principles unless the High Court is satisfied that the normal statutory remedy is likely to be too dilatory or difficult to give reasonable and quick relief. The High Court should be careful and extremely circumspect in granting these reliefs, especially during the tendency of criminal investigations. But the rule that it may refuse to grant any writ where alternative remedy is available only a rule of discretion and not a rule of law[32], and instance are numerous where a writ had been issued in spite of the fact that the aggrieved party had other adequate legal remedy[33].

The article 226 of the Constitution serves as a big reservoir of judicial power to control administrative action and thousands of writ petitions are moved in the High Courts every year challenging this or that action of the administration. Being a Constitutional provision, the ambit of article 226 cannot be curtailed or whittled down by legislation and even if a statute were to declare an administrative action could still be invoked to challenge the same[34].

The Constitution (forty-second-amendment) Act 1976 added articles 323A and 323B to the Constitution which had authorised parliament to establish special Courts to perform substantial role of the High Courts. The Administrative Tribunals Act 1985 was passed by parliament for the cases of the government servants. The jurisdiction of High Court over these Tribunals under articles 226/227 had been taken away.

However, the Supreme Court has restored the power of the High Court under articles 226/227 of the Constitution by declaring articles 323A and 323B (3) (d) of the Constitution as unconstitutional, the Court held that the power of judicial review of the High Court under article under articles 226/227 of the Constitution is the basic feature of the Constitution which cannot be abridged or ousted[35].

The judicial control over administrative action is also exercised extensively by remanding the case to the administrative authority instead of merely quashing it as is done in India. Judicial Review of administrative or legislative action is a basic feature of the Constitution which

[31] Rashid Ahmad V. Income Tax Investigation Commission A.I.R. 1954 SC 207
[32] A.V. Venkateswaran V. R.C. Wadhwani A.I.R. 1961 SC 1506
[33] State of U.P. V. Mohammad Noor A.I.R. 1958 SC 86
[34] Sangram Singh V. Election Tribunal, Kota A.I.R. 1955 SC 425
[35] L. Chander Kumar V. Union of India (1997) 3 SCC 261

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cannot be taken away even by amending the Constitution.

Thus judicial review of administrative actions through writ is vital for safeguarding the civil liberties of the people, the progress of the nation, its unity and integrity, maintaining the rule of law and social equality. It depends upon the judiciary to a great extent, to judge on the basis of Constitution framework that how these principles are to be protected and promoted but it is noticeably that the Courts have done their job judiciously and similar has expressed by Allahabad High Court:

"A writ of mandamus is issued commanding the State of U.P. to take immediate steps to create separate permanent revenue judicial service cadre for performance of judicial functions in courts discharging judicial functions under the U.P.Zamindari Abolition & Land Reforms Act, 1950 as well as under the U.P. Consolidation of Holdings Act 1953 in the suits and other proceedings arising out of U.P.Z.A. &L.R.Act in which dispute of title or matter affecting the rights of a tenure holder in Bhumidhari land is involved for adjudication in suits first appeal and second appeal/revision as well as all proceedings arising from sections 9,11,12, 21(2) and 48 of U.P. Consolidation of Holdings Act for adjudication of dispute affecting the rights of tenure holder (Bhumidhari). The qualification and appointment of members of such service shall be at par with members of judicial service and shall be imparted judicial training consistent with the standard of training of members of State Judicial Service under the control of the High Court"[36].

VII. CONCLUSION

To wind up the above discussions in view of the series of case laws cited above it leads us to conclude, first of all, to establish a mechanism for check & balance of administrative actions and decision-making power. It can be scrutinize by way of judicial review. Because most of administrative authorities do not belongs to law background and not possess adequate knowledge of Constitutional Law or other statutory provisions; there is an apprehension of the violation of these laws, hence some kind of necessary training of these laws seems to be essential to the public administrative authority in order to protect of these laws and avoid the chance of huge writ petitions before High Courts by way of judicial review or PIL.

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[36]Chandra Bhan V. Deputy Director Consolidation and others; Civil Misc. Writ No. 53754/ 2002; *Available at:* http://elegalix.allahabadhighcourt.in/elegalix/WebShowJudgment.do?judgmentID=8205 (Lastly visited on 19/10/2010)