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The Transcend of Administrative Constitutionalism

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ABSTRACT

The mere existence of the constitutional text does not mean the nations have implied inculcated the constitutional principles. The idea of constitutionalism is considered to be the spirit of abiding by the constitutional text of a particular country and limiting the powers of the governmental body to reduce any form of arbitrary act of power. Constitutionalism could also signify many different things. In the broadest sense, it can be described as "A body of thoughts, attitudes, and behavioral patterns that elaborate the idea that the power of government stems from and is constrained by a corpus of fundamental law." This principle or doctrine of constitutionalism has been integrated into different other ideas and sectors of a democratic country. In the United States of America , the last decade witnessed an ample number of scholarly texts regarding the concept of administrative constitutionalism. Similarly in India the concept has been in emergence through the idea of administrative adjudication.

In order to govern in line with constitutional rules and norms, administrative agencies must shape, develop, and enforce such rules and norms. This process is referred to as administrative constitutionalism.Even though the supreme law of the country that is the constitution explicitly guarantees the decision making power in the country to the judiciary, the idea of administrative agencies decision making power in constitutional matters to be considered and bought under the ambit of constitutionality is a discussion amongst scholars. This paper will analyze the transcend of administrative constitutionalism into the two greatest constitutions of the world, and how a balance can be established between judicial decision making and administrative decision making.

Keywords: *Administrative Constitutionalism, Constitution, Congress.*

I. INTRODUCTION

Anyone who wants to ensure that courts review the constitutionality of agency action must make an argument for theories that are rooted in twentieth-century administrative law and judicial practices rather than nineteenth-century constitutional evolution, according to the burgeoning

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history of administrative constitutionalism.[2]In the United States over the past decades history has shown that Administrative constitutionalism encompasses only those instances in which an agency has the final say or interprets the Constitution in a way that sets it against the courts or Congress.[3] Thus the clear outline of administrative constitutionalism today had been evolving since the early 19th century under the earlier constitutional countries. according to the evolution of agency decision-making, anyone who wants to ensure that courts evaluate the constitutionality of agency action must look to ideas that are grounded in twentieth-century administrative law and judicial practices, not nineteenth-century practise, The result therefore, is that administrative constitutionalism may still be the most frequent form of constitutional governance, but it has grown, paradoxically, more suspect even as it has also become far more dependent on and deferential to judicial interpretations.[4]

II. POSITION IN UNITED STATES OF AMERICA

In the United States, agencies typically had unrestricted discretion when implementing programmes that were constitutionally difficult, resolving structural constitutional issues, and determining what the Constitution's rights-bearing clauses actually meant. With regard to a civil rights law, Courts in the early part of the twentieth century tended to defer to agencies implementing and interpreting statutes. This deference arose from a general belief about the separation of the administration of law from politics, reinforced by the image of unelected and expert bureaucrats controlling agency actions.[5]When federal and state administrative rules governing movies, customs, and the mails directly interfered with the First Amendment right to freedom of speech, Schiller found that courts deferred. According to Schiller, judges relied on administrators to "balance the constitutional factors at stake with other public policy problems" because they had "confidence in expertise."[6] The Court deferred as long as the agency acted within the bounds of the power given to it by Congress, regardless of the relationship between the agency's behavior and the Constitution.

But this deference towards administrative constitutionalism declined after the Second World War. As people became aware of the growing influence that interest groups were having on

[2] Sophia Z. Lee, Our Administered Constitution: Administrative Constitutionalism from The Founding to the Present, 167 U. PA. L. REV. 1699 (2019) page 1706
[3] *Id*.
[4] *Id.*
[5] See Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 MICH. L. REv. 47, 53 (2006)
[6] Reuel E. Schiller, Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment, 86 VA. L. REv. 1, 3-4 (2000)

agency decision-making, their confidence in agency expertise decreased. At a time when judges were asserting their supreme authority to interpret the meaning of the Constitution's provisions on rights and liberties with increasing vigor, The Court's reliance on agency knowledge was waning, and it was less willing to see the legal system from a political standpoint was growing. This all started with the revelation in United States v. Carolene Products Co.[7] When legislation looked to fall within "a specific ban of the first ten amendments," the Court's plurality indicated in that decision, there would be a narrow presumption of validity[8]

Favoring a liberal Equal Employment Opportunity Commission ("EEOC")[8] interpretation, which is a rare case. The EEOC interpreted the Age Discrimination in Employment Act ("ADEA") to prohibit employment practices that disproportionately disadvantage older workers, even if those practices were not discriminatory in nature. As Justice Scalia noted, the Court ought to have accepted the agency's reading of the murky text under the prevailing doctrinal paradigm.[9] But Justice Scalia was not supported by the other conservative judges on this notion of interpretation put forth by him. Doctrine of Separation of powers is a well established concept under the Constitution of the United States, and over the years the judicial body of the country as demonstrated in the case of Smith v. Jackson[10] where the Court gradually assumed supreme power over the Constitution's meaning while the judicial confidence in administrative expertise decreased. These changes coincided with a change in judicial deference toward administrative constitutionalism and opposition to it.

Even though the Courts of the United States at many points have shown resistance towards administrative constitutionalism yet, under the Commerce Clause, so long as there is some under-determined relationship between the activity regulated by the statute and interstate commerce, the statute is a valid exercise of congressional authority.[11] Since statutes are often ambiguous due to lack of congressional foresight or unwillingness to address politically delicate issues, agencies implementing statutes often have to interpret them[12]. It is well evident that he Court has pushed back on a few agency interpretations seen as infringing on state

[7] 304 U.S. 144, 152 n.4 (1938).
[8] *Id.*
[9] Smith, 544 U.S. at 243 (Scalia, J., concurring) (explaining in light of the Chevron doctrine, "[t]his is an absolutely classic case for deference to agency interpretation"). The prohibitory text of the ADEA refers to those employer actions that "adversely affect [a person's] status as an employee." 29 U.S.C. § 623(a)(2) (2012).
[10] 544 U.S. 228, 125 S. Ct. 1536 (2005)
[11] Bertrall L. II Ross, Embracing Administrative Constitutionalism, 95 B.U. L. REV. 519 (2015) Page 528. Also see Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) ("The legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract."" (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)
[12] See William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REv.1479, 1480 (1987)

authority[13]However, the Court traditionally has a lower propensity to view agency interpretations of laws covering matters of health, safety, and the environment as instances of constitutionalism. However, a different picture emerges when it comes to congressional enforcement of constitutional rights provisions, such as those found in the Thirteenth, Fourteenth, and Fifteenth Amendments. These changes frequently lack specificity, but courts have established strong doctrines to interpret them.[14]

When Congress passes laws enforcing these amendments, the judicial standards created for them are in the background. Additionally, when interpreting confusing laws passed under the authority of Congress to enforce them, agencies are compelled to reach conclusions about the meaning of the laws that are directly related to judicial conflicts over the meaning of the Constitution. Thus the American understanding on administrative constitutionalism has been well identified and it has been limited with interference of the Judiciary.

III. POSITION IN INDIA

India since its independence and establishment of one of the longest written constitutions and being the largest democracy country in the world, considers the judiciary as the sole protector of the constitution. From the late 19th century it is true that different bodies and tribunals have been set up for administrative adjudication, yet an explicit discussion or transcend into administrative constitutionalism have not been witnessed in India. The Supreme Court and the High Courts of the country through various legal precedents have controlled and limited the power of the administrative adjudicating bodies, so that they do not step into the realm of constitutional issues.

Prof Dimock defines Administrative Adjudication as the process by which administrative agencies settle issues arising in the course of their work when legal rights are in question. The Indian Constitution explicitly states that Part XIV-A, which contained Articles 323A[15] and 323B[16] allowing for the establishment of tribunals handling administrative matters and other topics, was added to the Constitution with the passage of the 42nd Amendment. Tribunals must be established and structured in accordance with these provisions of the Constitution so as to

[13]. See Rapanos v. United States, 547 U.S. 715, 731-38 (2006); Solid Waste Agency of N. Cook County. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001).

[14] See Bertrall L. II Ross, Embracing Administrative Constitutionalism, 95 B.U. L. REV. 519 (2015) Page 528. Also refer, See, e.g., Bertrall L. Ross II, Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics, 101 CALIF. L. REv. 1565, 1582-89, 1592-1608, 1616-33 (2013) (describing the Court's extensive equal protection jurisprudence over the past half century)

[15] Article 323A of the Indian Constitution, that dealt with Administrative Tribunals

[16] Article 323B of the Indian Constitution that dealt with tribunals for other matters

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guarantee that they do not jeopardize the guarantee of the independence of the judiciary provided for in the Constitution, which acts as its cornerstone. But further down the lane The Supreme Court of India reached varied judgments on the tribunal's jurisdictional authority established by Articles 323A and 323B. The Supreme Court invalidated clauses 2(d) of Article 323A and 3(d) of Article 323B on the grounds that they disregarded the Supreme Court's and the High Courts' respective jurisdictions under Articles 226 and 32.[17]

Legislations are also in existence in India for the proper functioning of the administrative tribunals in the country. The constitutionality of these tribunals or administrative adjudicating authorities or bodies have always been questioned and checked by various legal precedents. In the case of S.P Sampath Kumar v. Union Of India [18]The Supreme court questioned the constitutionality of the Administrative Tribunal Act of 1985, The Act's constitutionality was confirmed by a five-judge court panel with the exception of Section 6(1). (c). The court determined that even while this Act disallowed the High Courts' use of judicial review in situations involving public employees, the idea of judicial review had not been completely eliminated. The Supreme Court's authority under Articles 32 and 136 is still preserved and not affected by this Act. As a result, there is still a judicial review authority that can consider cases of unfairness. Only if a substitute effective institutional mechanism or authority is supplied can the judicial review, which is an integral feature of the Indian Constitution, be removed from a particular sector.[19] The Act's Section 6 (1)(c), however, was declared unconstitutional since it allowed the Government unrestricted authority to name the Chairman, Vice-Chairman, and other tribunal members.

Similarly in another case The court continued by stating that because the Constitution grants both courts and tribunals the ability to carry out judicial duties, it cannot be assumed that establishing tribunals and delegating judicial authority infringes on the rule of law, the separation of powers, or the independence of the judiciary per se. The most important factor is whether the tribunals as they have been established uphold and respect the concepts of the rule of law, the separation of powers, and judicial independence. Judicial review of the NCLT and NCLAT constitutions is necessary so that the court can examine the circumstances, determine whether these principles have been violated by this tribunalization, and take action to defend them.[20]

[17] L.Chandra Kumar v. Union Of India, AIR 1997 SC 1125
[18] 1987 SCR (3) 233 1987
[19] *Id.*
[20] Union of India v. R. Gandhi, President, Madras Bar Association

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India has not explicitly discussed the idea of administrative constitutionalism, Yet Indian Constitution embodies the idea of tribunalization for faster decision making. But irrespective of decision making power or any other authority it keeps the check and balance on the administrative bodies by limiting any action by these administrative bodies that would be unconstitutional. These checks and balances are done by the judiciary through judicial review which are evident through the legal precedents set by the judicial courts of the country.

IV. CONCLUSION

Constitutionalism is to uplift the spirit of the constitution of the land and limit the powers of the executive or government. Administrative constitutionalism, even though it upholds this spirit of abiding by the constitutional principle, excessive decision making power to agencies is indirectly excessive power in the hands of the government or non government agencies or the executives.

In bridging the gap between administrative and ordinary law constitutional law, administrative constitutionalism is not alone. Recent constitutional literature has emphasized the constitutional role performed by ordinary law and the crucial significance of political endeavors to build constitutional meaning to our constitutional system..[21] It is indeed important to segregate the decision making power between administrative agencies or bodies and judiciary. While In United States the existence of administrative agencies and its authority over constitutional issues is ambiguous in nature, India explicitly through its very own constitution and legal precedents have identified the boundaries between judicial as well as administrative decision making. The idea of balancing decision making power between the agencies and Courts is another issue that has to be discussed at a greater level. It is a necessity or the need of the hour to accurately and explicitly understand and divide the ambit of administrative constitutionalism.

Judiciary is the constitutional body that is entitled with the power to make decisions in a country regarding constitutional matters. In this 21st century constitutions have been evolved and amended numerous times. Supreme Court's of the USA, India and UK have seen the constitution has evolved over the times, and many at times have accepted the need of more decision making bodies for certain matters to reduce the burden of the judiciary. Yet the conundrum of the Courts of these countries showing resistance over the idea of administrative

[21] For descriptions of constitutional construction, see JACK M. B ALKIN , LIVING ORIGINALISM 3–6, 69–73 (2011) and Keith E. Whittington, Constructing a New American Constitution, 27 CONST . COMMENT . 119, 120–25 (2010) [hereinafter Whittington, Constructing], and see generally KEITH E. WHITTINGTON , CONSTITUTIONAL CONSTRUCTION : DIVIDED POWER AND CONSTITUTIONAL MEANING (1999)].

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constitutionalism was a question that has been in discussion. It is necessary to identify and analyze the fact that the constitution of a country cannot be considered as a mere law book of the land, it is a sovereign text that upholds the democratic principle and other characteristics of a free state. Delegation of deciding on the conflicts regarding the key issues of a country's constitution through the idea of administrative constitutionalism would weaken the constitution per se, which would lead to tyranny and despotism in the country.

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