

CHAPTER-II

ANATOMY OF ADMINISTRATIVE ACTION

A. Introduction

The basic and traditional functions of the state are those of securing the community against external aggression and internal strife and of keeping itself going out of taxation. In addition, the modern state has during the last century, coincident with the extension of franchise and the rise of modern political parties acquired many more functions. These may be broadly put into two categories,¹ the regulatory and the service providing. Amongst the former are control of use of land, of various industrial processes, of commercial activity such as insurance, of public health, of road traffic etc. Amongst the later are the provisions of physical services such as roads, railways, gas, electricity, telephones and water; and provisions of other services such as education, the health services, the social services, social insurance, social training services and advisory services of various kinds. In addition, it is generally agreed that some degree of management of the economy is a necessary activity of the modern state which therefore has to concern itself with such matters as the level of unemployment, prices, wages etc. These modern functions of the state are of course in addition to the traditional functions referred to and these have themselves multiplied in size and greatly broadened in scope.

Administrative law is to do with the public authorities. Their functions are varied and the law concerning them is extensive. Administrative law is concerned with the ways the powers are acquired, where public authorities get their powers from and what is the nature of those powers. Is the exercise of power subject to any

¹ Friedmann, *The Rule of Law and the Welfare State*, suggested five functions viz., the state as protector, provider, entrepreneur, economic controller and arbitor.

particular procedure, is it to be exercised in any particular form? If yes, what is the effect of failing to do so? How can we ensure that powers are used only for the purpose for which they were given and that they are used energetically and efficiently? The rôle of the courts in providing, as an independent system, some check on the exercise of public powers is very much the concern of administrative law; and it may be looked as an instrument of control of administrative action is one of the contents of administrative law. But administrative action is of different kinds and no proper treatment is possible without classifying the acts of administrative authorities under several heads.

As administrative law is to do with government and public administration, it must be seen against the background or in the setting of our constitutional arrangements and principles. This brief consideration starts with the 'Doctrine of the Separation of Powers'. This is particularly associated with the name of Montesquieu who in his *l' Esprit des Loïs* (1748) argued that in every government there are three sorts of powers, the legislative the executive (or administrative); and the judicial; and that to ensure the liberty of the subject they ought to be in the hands of separate institutions for 'there would be an end of everything where the same man or body to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.'

In India, on a casual glance at the provisions of the constitution, one may be inclined to say that the doctrine of separation of power is accepted. The Supreme Court has also expressed the opinion that the doctrine of separation of powers has

been accepted in the constitution of India.² But, if we study the constitutional provisions carefully, it is clear that the doctrine of separation of powers has not been accepted in its strict sense. There is no provision in the Constitution itself regarding the division of functions of the government and the exercise thereof. Thus, the doctrine of separation of powers is not accepted fully in the Constitution, and we agree with the following observations of Mukherjea J. in the *Ram Jawaya v. State of Punjab*;³

The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts and branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another⁴.

Thus, according to the Indian Constitution, there are three organs of the Government; (1) Legislature; (2) Executive; and (3) Judiciary. These three organs essentially perform three classes of governmental functions viz (i) legislative; (ii) executive or administrative; and (iii) judicial. The function of the legislature is to enact the law; the executive is to administer the law and the judiciary is to interpret the law and to declare what the law is. Even if it is not so easy to draw a theoretical line between them to isolate one concept from the other, or in many cases to distinguish between them in practice.

² See *Golak Nath v. State of Punjab*, AIR 1967 SC 1693; *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

³ AIR 1955 SC 549.

⁴ Id. at 556; see also *State of Kerala v. Lakshmikutty*, AIR 1987 SC 331; at 347; *Asif Hameed v. State of Kerala*, AIR 1973 SC 1461; *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

The committee on Minister's Power⁵ tried to clarify the distinction between the administrative and judicial by saying that an administrative decision is wholly within the complete consideration of public policy. A true 'judicial decision on the other hand, presupposes an existing dispute between two or more parties which dispute is disposed of by a finding on any facts in dispute "and an application of the law of the land to the facts as found". The essential distinction in the committee's view was, therefore, that between law and policy : a true judicial decision involving no policy consideration; and a true administrative decision no judicial element. The validity of this distinction has been challenged, professor Robson has argued that the judicial is fundamentally indistinguishable from the administrative in view of the element of discretion involved in both, "Judicial administrative ...is merely a specialised form of general administration which has acquired an air of detachment"⁶ on the other hand D.M. Gordon⁷ sees the essential difference to be between the judicial on the one hand and the legislative and the administrative on the other, in that the former applies a pre-existing objective standard laid down by the law, whereas legislative and administrative decisions are based, not on legal rights, but on policy and expediency. And a body which makes law according to its own will is a legislative body.

It would be wrong however, to give the impression that the Committee on Ministers' power suggested that the classification was a rigid one. Thus, it wrote,

It is indeed difficult in theory and impossible in practice to draw a precise dividing line between the legislative on the one hand and the purely

⁵ Otherwise known as the Donoughmore Committee which reported in 1932.

⁶ Justice and Administrative Law (3rd Edn.) pp. 14 & 433.

⁷ Administrative Tribunals and the Courts, 49 Q.L. R. 94.

administrative on the other".....(There is an inseparable mingling.....of the theoretically separate functions of legislation and justice..... In practical politics an academic attempt to draw the theoretical line may be contrary to common sense."⁸

The idea of the quasi-judicial should also be noted. The committee defined this as "Only an administrative decision some stage or element of which possesses judicial characteristics."⁹ This need to resort to the qua reinforces the view that a precise distinction between the three kinds of powers is difficult in theory and impossible in practice. Nevertheless we shall come across many situations where the classification of power may have important consequences.

During the present few decades there has been a vital change in the functions of the state and the distinction between legislative and administrative; or between administrative and judicial has become blurred, thus, administrative is the meeting point of three types of governmental functions.

The supreme Court of India, in *Jayanathal Amritlal v. F. N. Rana*¹⁰ has also observed that it cannot be assumed that the legislative functions are exclusively performed by the legislature, the executive functions by the executive and judicial functions by the judiciary. According to A. T. Markose.¹¹ Administration exercises a variety of powers, administrative action may therefore, be legislative or judicial or neither i.e. it could be a discretionary no judicial order or merely a ministerial act. The administration in modern state cannot

⁸ Cmd. 4060 pp. 19 & 39(note 129) quoted by David Foulkes, Introduction to Administrative Law (1976) p. 5.

⁹ Cmd. 4060 p. 81, Ibid.

¹⁰ AIR 1964 SC 648.

¹¹ Markose A. T., Administrative Law in India (1961), p. 289.

be run on dogmatic turpitude functions. It is no more to say that the administration does not decide on it does not legislate.

In Halsbury's Laws of England¹² also it is stated that however the term 'the executive' or 'administration' is employed, there is no implication that the functions of the executive are confined exclusively to those of an executive or administrative character. To-day, the executive performs variegated functions viz. to investigate, to prosecute, to prepare and to adopt schemes, to issue and cancel licences etc. (administrative); to make rules, regulations and by laws, to fix prices etc. (legislative); to adjudicate on disputes, to impose fine and penalty etc. (judicial).

In Modern Times, various functions are performed by the administration, so the administrative process cuts across the traditional classification of governmental powers due to the by product of intensive form of government and combines into one all the powers which were traditionally exercised by three different organs of the state i.e. the legislature, executive and the judiciary.

This begs the question 'what is executive power'. Simple as it appears, but the Supreme Court did not find it to be so when it had to analyse the executive functions, in *Ram Jawaya v. State of Punjab*.¹³ It was once thought that the function of the executive was simply to execute the laws. But with the advent of the 'welfare state' and the growth of industrialization with its concomitant problems, the state has ceased to be a mere 'police state' and the functions of executive has ceased to be merely the carrying out of the laws made by legislature. The executive has to initiate policy and it is open to the executive to undertake measure in various spheres either without legislation or in advance of legislative sanction. The

¹² Halsbury's Law of England, 4th Edn. (1973) vol. 1, p. 20.

¹³ Supra note 3.

executive function has thus come to be the residuary function of the state.

It is clear that a very wide area of activities is comprised within the sphere of 'administrative action' and that even an administrative authority is an authority which is other than the courts or the legislatures of the country, the residuary functions of the administration may themselves partake of the legislative or the judicial quality.¹⁴

A question which arises for our consideration is whether the functions performed by the executive authorities are purely administrative, quasi judicial or quasi-legislative in character. The answer is very difficult, as there is no precise, perfect and scientific test to distinguish these functions from one another. A further difficulty arises in a case in which a single proceeding may at times combine various aspects of the three functions. The courts have not been able to formulate any definite test for the purpose of making such classification. The meanings attributed by the courts to the terms 'judicial', 'quasi judicial' and 'administrative' for administrative law purposes have been inconsistent. Lawyers are, of course quite familiar with the notion that a legal term may convey a range of meaning and that within that range the meaning appropriate for the resolution of a particular dispute may well depend upon the context in which the term has to be applied. Thus, such classification is essential and inevitable as many consequences flow from it, e.g. if the executive authority exercises judicial or quasi-judicial functions it must follow the principles of natural justice and is amenable to the writ of certiorari or prohibition,¹⁵ but if it is an administrative,

¹⁴ Basu D.D., Administrative Law, (1998) p. 6.

¹⁵ Express News Paper (p) Ltd v. Union of India, AIR 1958 SC 578.

legislative or quasi legislative function, this is not so.¹⁶ If the action of the executive authority is legislative in character, the requirement of publication, laying on the table etc. should be complied with but it is not necessary in the case of a pure administrative action. It is therefore to determine what type of function the administrative authority performs.

B. Classification of Administrative Action.

Administrative action is a comprehensive term and defies exact definition. In modern times the administrative process as a by product of intensive form of government cuts across the traditional classification of governmental powers and combines into one all the powers which were traditionally exercised by three different organs of the State.

The administration, is the meeting point of the three types of governmental functions, namely legislative, judicial and administrative. Usually, the executive performs the residue of all those functions which are not vested in the other two branches of the government i.e. the legislature and the judiciary.¹⁷ In the administrative process, all the three functions, which are traditionally vested in the three different organs of government are telescoped into one single authority.¹⁸

Classification of administrative action for the purpose of determining the procedure to be followed or the remedy available may not be necessary in view of the fact that a good deal of rigidity in this regard has disappeared. Certiorari was available only against judicial bodies and therefore, it was necessary to determine the nature of an administrative authority and its function. Rules of

¹⁶ Union of India v. Cynamide India Ltd, AIR 1987 SC 1802 at 1896.

¹⁷ Jayantilal Amratlal v. F. N. Rana, AIR 1964 SC 648 at 655.

¹⁸ Schwartz, Administrative Law (1976) p. 31.

natural justice were attracted only to quasi-judicial authorities and therefore dichotomy between quasi-judicial and administrative developed. But these constraints now have disappeared and therefore these discussions have become less relevant.¹⁹ Classification even now may be necessary for determining the scope of judicial review and ground on which an administrative action can be challenged. Judicial review of legislative action is much more restricted than that of other administrative actions, for example, legislative action cannot be challenged on the ground that the subordinate legislation has not been made after giving a hearing to those whose interests are likely to be prejudiced by rules, regulations etc. Similarly, mandamus cannot be issued to compel the executive to perform its legislative function in fact, no mandamus can issued in respect of legislative function.

There is a general agreement among the writers or administrative law lawyers that any attempt of classifying administrative action on any conceptual basis is not only impossible but also futile. However, the fiction of 'quasi' has accordingly been invented to distinguish these acts of the administrative authorities from the acts of the legislature and the judiciary. Thus, 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.²⁰ Even then a student of administrative law is compelled to delve into the field of classification because the present day law especially relating to judicial review freely employs conceptual classification of administrative action. Thus, speaking generally, an administrative action, can be classified into three categories:

1. Quasi-legislative action or rule-making action;

¹⁹ Sathe S.P., Administrative Law (1991) p. 126.

²⁰ Federal Trade Commission v. Ruberoid Co. (1952) 343 US 470/488.

2. Quasi-judicial action or Rule-decision action; and
3. Purely Administrative action or Rule application action.

1. Quasi-legislative action.

legislature is the law-making organ of any State. In some written constitution like the American and Australian Constitutions,²¹ the law-making power is expressly vested in the legislature. However, in the Indian Constitution though this power is not so expressly vested in the legislature, yet the combined effect of Articles 107 to 111 and 196 to 201 is that the law-making power can be exercised for the union by parliament and for the states by the respective state legislature. It is the intention of the constitution makers that this law-making power must be exercised by those bodies alone in whom this power is vested.²²

But in the Twentieth Century today these legislative bodies cannot give that quality and quantity of laws which are required for the efficient functioning of a modern intensive form of government. Therefore, the delegation of law-making power to the administration is a compulsive necessity. When any administrative authority exercises the law-making power delegated to it by the legislature, it is known the rule-making action of the administration or quasi-legislative action. When an instrument of a legislative nature is made by an authority in exercise of power delegated or conferred by the legislature it is called 'subordinate legislation'²³ it is subordinate in the sense that the powers of the authority which makes it are limited by the statute which conferred the power and, consequently it is valid only in so far as it keeps within those limits, whereas a law made by legislature is not limited by any law made by any other

²¹ Art. 1 of the American Constitution ; and Sec. 1 of the Australian Constitution.

²² In re Delhi Law Act Case, AIR 1951 SC 332.

²³ Halsbury, 4th Edn. Vol. 44, paras 981.

body, except where there is a written constitution imposing limitations upon the legislature as in India. The makers of subordinate legislation, in other words, may be its immediate authority, but its ultimate authority is a superior legislature which conferred the power to make the legislation.

Quasi-legislative is the function of subordinate legislation or that of making rules, regulations and other statutory instruments to fill in the details of legislative enactments in order to make the execution of the laws possible.²⁴

Quasi legislative action of the administration partakes the characteristics which a normal legislative action possesses. Such characteristics may be generality, prospectivity and behaviour which bases action on policy consideration and gives a right or a disability. These characteristics are not without exception. In some cases, administrative rule-making action may be particularized retroactive and based on evidence. According to Chinnappa Reddy, J. a legislative action has four characteristics: (i) Generality; (ii) prospectivity; (iii) public interest; and (iv) right and obligations flow from it.²⁵

It is on the basis of these characteristics that one can differentiate between quasi-legislative and quasi-judicial action. A quasi-judicial action in contradiction to a quasi-legislative action is particularly based on the facts of the case and declares a pre-existing right. However, in certain situations, like wage or rate fixing, it is not capable of easy differentiation. In *Express Newspaper v. Union of India*,²⁶ The supreme court left the question open as to whether the function of the wage Commission under the working

²⁴ Supra note 17 at 655.

²⁵ *Union of India v. Cynamide India Ltd.* supra note 15.

²⁶ AIR 1958 SC 578.

Journalists' (Conditions of Service) Act, 1956 is quasi-legislative function or quasi-judicial function. However, the delegation to the government of power to fix the price of levy sugar was held to be quasi-legislative functions.²⁷ From this it appears that the distinction between legislative and administrative function is difficult in theory and impossible in practice. According to Wade :

"They are easy enough to distinguish at the extremities of the spectrum : an Act of Parliament is legislative and a deportation order is administrative. But in between is a wide area where either label can be used according to taste, for example, where Ministers make orders affecting large number of people."²⁸

In the same manner, the committee on Ministers' Powers which was appointed in England in 1928 distinguished between administrative and quasi-legislative action on the ground that where the former is a process of performing particular acts or of making decision involving the application of general rules to particular cases, the latter is the process of formulating a general rule of conduct without reference to particular cases and usually for future operation.²⁹

It is, no doubt, true that any attempt to draw a distinct line between legislative and administrative function is difficult in theory and impossible in practice. Though difficult, it is necessary that the line must be drawn as different legal rights and consequences may ensue³⁰ as Schwartz³¹ said, "If a particular function is termed 'legislative' or 'rule-making' rather than judicial or 'adjudication', it may have substantial effects upon the parties concerned. If the

²⁷ Sita Ram Sugar Co. Ltd. v. Union of India (1990) 3 SCC 233; See also Sri Malaprabha Coop. Sugar Factory Ltd. v. Union of India, (1994)1 SCC 648.

²⁸ Wade, H.R.A., Administrative Law, 6th Edn. P. 848.

²⁹ Cmd, 406 20(1948).

³⁰ Union of India v. Cynamide India Ltd., AIR 1987 SC 180 at 1806.

³¹ Administrative law (1976) pp. 143-44.

function is treated as legislative in nature, there is no right to a notice and hearing unless a statute expressly requires them.³² In the leading case of *Bates v. Lord Hailsham*³³ Megarry, J³⁴ has observed that "the rules of natural justice do not run in the sphere of legislation, primary or delegated." Wade³⁵ has also said, "there is no right to be heard before the making of legislation, whether primary or delegated unless it is provided by statute"³⁶

Though the rules of natural justice do not apply to legislative action yet reasonableness and fair play in action must be observed as Article 14 of the Constitution equally applies to legislative actions.³⁷ Quasi-legislative actions are controlled by Parliament and the courts.

2. Quasi Judicial Action.

Today the bulk of the decisions which affect a private individual come not from courts but from administrative agencies exercising adjudicatory powers. The reason seems to be that since administrative decision making is also a byproduct of the intensive form of government, the traditional judicial system cannot give to the people that quantity and quality of justice which is required in a welfare State.

In some jurisdictions the term 'quasi-judicial' is used to denote administrative, adjudicatory or decision-making process. But because the term 'quasi-judicial' is vague and difficult to define, it is falling in disuse. Therefore, the use of this term is being carefully avoided.

³² Supra note 30.

³³ (1972)3 All ER 1019.

³⁴ Id. at pp. 1023-24.

³⁵ Administrative Law (1988) p. 573.

³⁶ *Sundrajias Kanyalal Bhatija v. Collector, Thane*, AIR 1990 SC 261.

³⁷ Supra note 27.

Administrative decision-making may be defined as a power to perform acts administrative in character, but requiring incidentally some characteristics of judicial traditions. On the basis of this definition, the following functions of the administration have been held to be quasi-judicial functions :-

1. Disciplinary proceedings against students.³⁸
2. Disciplinary proceedings against an employee for misconduct.³⁹
3. Confiscation of goods under the Sea Customs Act, 1878.⁴⁰
4. Cancellation, suspension, revocation or refusal to renew licence or permit by licensing authority.⁴¹
5. Determination of citizenship.⁴²
6. Determination of statutory disputes.⁴³
7. Power to continue the detention or seizure of goods beyond a particular period.⁴⁴
8. Refusal to grant 'no objection certificate' under the Bombay Cinemas (Regulations) act, 1953.⁴⁵
9. Forfeiture of pensions and gratuity.⁴⁶
10. Authority granting or refusing permission for retrenchment.⁴⁷
11. Grant of permit by Regional Transport Authority.⁴⁸

Attributes of administrative decision-making action or quasi-judicial action and the distinction between judicial, and administrative action.

³⁸ Bhagwan v. Ramchand, AIR 1965 SC 1767.

³⁹ Ccutta Dock labour Board v. Jaffar Imam, AIR 1966 SC 282.

⁴⁰ East India Commercial Co, v. Collector of Customs, AIR 1962 SC 1893.

⁴¹ Fedco Ltd. v. Bilgrami, AIR 1960 SC 415; Raman and Raman v. State of madras, AIR 1956 SC 463 : Natraja Mudaliar v. State Transport Authority, (1978)4 SCC 290.

⁴² Ayubkhan v. Commr, AIR 1965 SC 1623.

⁴³ C.S.T. v. Super Cotton works, (1989)1 SCC 643.

⁴⁴ Lakhanpal v. Union of India, AIR 1967 SC 1507; Asstt. Collector of Customs v. Bibhuti Bhushan, (1989)3 SCC 202.

⁴⁵ State of Gujarat v. Krishna Cinema, (1970)2 SCC 744.

⁴⁶ State of Punjab v. Iqbal Singh, (1976)2 SCC 1.

⁴⁷ Workmen v. Meenakshi Mills, (1922)3 SCC 336.

⁴⁸ Mitlesh Garg v. Union of India, (1992)1 SCC 168.

The Donoughmore committee on Minister's powers (1932) analysed the characteristics of a 'true judicial decision' and summed up the attributes, the presence or absence of which stamped a decision as administrative decision-making or quasi-judicial action. The Committee was of the view that a true judicial decision presupposes a lis between two or more parties and then involves four requisites :-

- (1) Presentation of the case.
- (2) Ascertainment of questions of fact by means of evidence given by the parties.
- (3) Ascertainment of questions of law on the basis of submission of legal arguments.
- (4) A decision which disposes of the whole matter by applying the law to the facts.

A quasi-judicial decision involves the first two determinants, may or may not involve the third but never involves the fourth determinant, because the place of the fourth determinant is in fact taken by administrative action, the character of which is determined by the minister's free choice involving expediency, discretion and policy considerations.

Decisions which are administrative stand on a wholly different footing from quasi-judicial as well as from judicial decisions. In the case of administrative decisions, there is no legal obligation to consider and weigh submission and arguments, or to collect any evidence, or to solve any issue. The grounds upon which the action is taken and the procedure for taking the action are left entirely to the discretion of the authority.

This approach of the Committee seems fallacious because the judges cannot be regarded as mere norm-producing slot machines, they do take into consideration policy, socio-economic and political

philosophy, expediency and exercise discretion while deciding a case. In the Twentieth Century, it is admitted at all hands that the judiciary is like any other branch of the government because litigation like legislation and administration is a stage in the accommodation of interests. On the other hand in certain areas of administrative adjudication, like tax, the administration applies law to the facts in the same manner as sometimes the judges do. Therefore, it is wrong to suggest that any admixture of policy in the policy in the virgin purity of a judicial determination immediately reduces it to the rank of quasi-judicial decision.

As the English 'law and policy' determinant is devoid of sufficient classification, in the same manner the American 'position-of-the-judge' approach is not without exception. In the American approach, a court is where a judge sits as arbiter-impartial and with no interest in the suit between the two parties. The institution and presentation are the responsibilities of the parties. In an administrative decision, on the other hand, the judge is rarely one who is disinterested in the case and sits detached like a judge. One may be tempted to argue and rightly so, that this classification matrix would also fail in the case of independent tribunals where the presiding officer does sit in judge like detachment.

Therefore, only that classification determinant can be reasonable which is institutional rather than functional. There are administrative agencies exercising adjudatory powers which are as full courts : it is only the will of the legislature that these are not classified as courts.

However, it does not mean that because purple is the confused mixture of red and blue, so there is no distinction between

red and blue.⁴⁹ Administrative decision making action is not required to follow the elaborate judicial procedure it is sufficient if, in the absence of any statutory requirement, the action is rendered by following the minimum procedure of natural justice.

There was a time when the view prevailed that the rules of natural justice have application to a quasi-judicial proceeding as distinguished from an administrative proceeding. The distinguishing feature of a quasi-judicial proceeding in this behalf is that the authority concerned is required by law under which it is functioning to act judicially. Duty to act judicially was spelt out in *Rex v. Electricity Commissioner*⁵⁰ by Lord Atkins thus :

"Where ever any body of persons having legal authority to determine questions affecting the rights of the subjects, and having the duty to act judicially, acts in excess of its legal authority, they are subject to the controlling jurisdiction of the King's Bench Division."

Lord Hewart C.J., in *Rex v. Legislative Committee of the Church Assembly*⁵¹ read this observation of Lord Atkin to mean that the duty to act judicially should be an additional requirement existing independently of the authority to determine questions affecting the right of the subject's something super added to it. This gloss placed by Lord Hewart, C.J. on the dictum of Lord Atkins, to use the words of Krishna Iyer, . bedevilled the law for a considerable time and stultified the growth of the doctrine of natural justice. Therefore, the court held that the duty to act judicially need to be superadded and it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person affected.⁵²

⁴⁹ Wade H.W.R., 10 comb. Law J. 216.

⁵⁰ (1924)1 KB 171.

⁵¹ (1928)1 KB 411.

⁵² *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

The court was constrained in every case that came up before it to make a search for the duty to act judicially, sometimes from tenuous material and sometimes the service of the statute and this led to oversubtlety and over-refinement resulting in confusion and uncertainty in the law.⁵³

In India the judicial search for the duty to act judicially was sometimes made within the corners of the statute⁵⁴ under which the authority exercised power, and sometimes in the tenuous material, remote and extraneous, such as, *lis inter partis* including proposition and opposition.⁵⁵ Implications arising from the nature of the functions and the rights affected thereby.⁵⁶

This doctrinal approach of the Courts in India and England not only made the law confused and uncertain but also eluded justice in many cases.

However, in England, a turning point came with *Ridge v. Baldwin*,⁵⁷ when Lord Reid pointed out that the gloss of Lord Hewart was based on misunderstanding of the observations of Lord Atkin. Lord Reid observed : "If Lord Hewart meant that it is never enough that a body has a duty to determine what the rights of the individual should be, but that there must always be something more to impose on it a duty to act judicially, then that appears to me impossible to reconcile with the earlier authorities."⁵⁸ Lord Reid held that the duty to act judicially must arise from the very nature of the function intended to be performed and it need not be shown to be superadded. Krishna Iyer, J. quoted Prof. Clark from his article on

⁵³ Ibid.

⁵⁴ *Province of Bombay v. Khusaldas Advani*, AIR 1950 SC 222.

⁵⁵ *G. Nageswara Rao v. A.P. S.R.T.C.*, AIR 1959 SC 308.

⁵⁶ *Babul Chandra v. Chief Justice, H.C. Patna*, AIR 1954 SC 524; *Rampur Distillery v. Company Board*, AIR 1970 SC 1789; *Indian Sugar & Refineries Ltd. v. Amaravathi Service Co-operative society*, AIR 1976 SC 775.

⁵⁷ (1964) AC 40.

⁵⁸ Wade, *Administrative Law* 6th Edn. P. 848.

'Natural Justice, substance and Shadow'⁵⁹, who is of the view that the observation of Lord Reid has restored light to an area 'benighted by the narrow conceptualism of the previous decade.'

This development of law is traceable in India also where the Supreme Court even earlier than *Ridge v. Baldwin*⁶⁰ was of the view that if there is power to decide and determine to the prejudice of a person, the duty to act judicially is implicit in the exercise of power.⁶¹ In fact, the foundation of applying natural justice and administrative actions had been laid in the dissent of Justice Subba Rao in *Radheyshyam Kare v. State of M.P.*,⁶² is significant to note when he held that "In competency carries a stigma with it and what is more derogatory to the reputation of the members of the Committee than to be stigmatized as incompetent to discharge their statutory duties? Would it be reasonable to assume that public men in a democratic country are allowed to be condemned unheard?" This dissent became strikingly pronounced in *A.K. Kraipak v. Union of India*.⁶³ In this case the Supreme court held that though the action of making selection for government service is administrative, yet the selection committee is under a duty to act judicially. The Court observed that the dividing line between an administrative power and quasi-judicial power is quite thin and being gradually obliterated.⁶⁴ In *D.K. Yadav v. J.M.A. Industries Ltd.*⁶⁵ the Supreme Court further observed that the distinction between quasi-judicial and administrative action which had become thin is now totally eclipsed and obliterated. Proceeding a step further the Supreme Court clearly held in *CB Boarding and*

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Ibid.

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Supra note 38.

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Board of High School v. Ghanshyam, AIR 1962 SC 1110.

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AIR 1959 SC 107.

63

(1969)2 SCC 262; AIR 1970 SC 150.

64

Ibid.

65

(1993)3 SCC 259.

Lodging House v. State of Mysore⁶⁶ that it is not necessary to classify an action of the administrative authority as quasi-judicial or administrative because the administrative authority is bound to follow the principles of natural justice in any case. In this case, the question was whether the power to fix a minimum wage under the Minimum Wages Act is quasi-judicial or administrative.⁶⁷

3. Purely Administrative Action

At the very outset, it has been pointed out that the expression 'administrative act or function' is a comprehensive expression, comprising three different categories namely, quasi-legislative, quasi-judicial and purely administrative. The expression as used in this work, therefore refer to those acts or functions of administrative authorities which are neither legislative nor adjudicative in character.

In *Ram Jawaya v. State of Punjab*⁶⁸, speaking for the Supreme Court, Mukherjea C.J. observed that

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinary the executive power connotes the residue of governmental functions that remains after legislative and judicial functions are taken away"⁶⁹

Thus, administrative functions are those functions which are neither legislative nor judicial in character. But a general distinction is made in quasi-legislative, quasi-judicial and purely administrative actions as certain legal consequences flow from this distinction.

While a quasi legislative act done by the administration consists in making rules regulations by laws and the like having general application which simulate a statute made by the legislature

⁶⁶ (1969)3 SCC 84; AIR 1970 SC 2042.

⁶⁷ See also *D.F.O. South Kheri v. Ram Sanahi* (1971)3 SCC 864; AIR 1973 SC 205.

⁶⁸ AIR 1955 SC 549.

⁶⁹ *Id.* at 555.

itself, a purely administrative act is concerned with the treatment of a particular situation. Thus, a distinction often made between legislative and administrative acts is that a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined but it includes the adoption of a policy, the making and issue of a specific directions, and the application of a general rule to a particular case in accordance with the requirements of policy of expediency or administrative practice. The following legal consequences flow from this distinction:⁷⁰

- a) In certain circumstances an order has to be published as a statutory instrument if it is of a legislative nature but not if it is of an executive (i.e. administrative) character. But this test adopted for discriminating between the legislative and executive often appear to be pragmatic (is it in the public interest that this order should be published?) rather than conceptual.
- b) It has generally been assumed that the courts will not award certiorari to quash a legislative order. Now that the courts no longer insist upon the need to characterize administrative decisions reviewable by certiorari as judicial in nature, it would perhaps be surprising, if they were to exclude from reach of the remedy administrative decisions of a legislative nature.
- c) Courts may declare administrative act to be invalid for manifest unreasonableness, but it is not so clear that they have jurisdiction to hold a statutory instrument to be invalid for unreasonableness per se. However bye laws, a form of delegated legislation, have always been reviewable for manifest unreasonableness.
- d) Authority to sub delegate legislative powers will be held to be implied only in the most exceptional circumstances. The courts

⁷⁰De Smith, *Judicial Review of Administrative Actions* (1980) p. 71.

are somewhat less reluctant to read into a grant of administrative authority to sub-delegate. It is, therefore, necessary to determine what type of functions the administrative authority performs.

- e) The duty to give reason for their decision does not extend to decisions in connection with the orders or schemes of a legislative and not of an executive character.

Though the distinction between quasi-judicial and administrative action has become blurred, yet it does not mean that there is no distinction between the two. If two persons are wearing a similar coat, it does not mean that there is no difference between them. The difference between quasi-judicial and administrative action may not be of much practical consequence today but it may still be relevant in determining the measure of natural justice applicable in a given situation.

In *A.K. Kraipak v. Union*,⁷¹ the Court was of the view that in order to determine whether the action of the administrative authority is quasi-judicial or administrative, one has to see the nature of power conferred, to whom power is given, the framework within which power is conferred, and the consequences. In *State of AP. V. S.M.K. Parasurama Gurukul*,⁷² replying to the question whether the power of the government to appoint trustees under Section 15 of the A.P. Charitable and Hindu Religious Institutions and Endowments act, 1966 is quasi-judicial or administrative, the court held the function as administrative and laid down that if there is lis between the parties, and the opinion is to be formed on objective satisfaction, the action is quasi-judicial, otherwise administrative. In the same manner in *G.G. Patel v. Gulam Abbas*⁷³, the Court came to the

⁷¹ (1969)2 SCC 262; AIR 1970 SC 150.

⁷² (1973)2 SCC 232; AIR 1973 SC 2237.

⁷³ (1977)3 SCC 179; AIR 1977 SC 1019.

conclusion that since there is nothing in the Act to show that the collector has to act judicially or in conformity with the recognised judicial norms and as there is also nothing requiring the Collector to determine question affecting the right of any party, the function of the Collector in giving or withholding permission of transfer of land to a non-agriculturist under Section 63(11) of the Bombay Tenancy and Agricultural lands Act, 1947 is administrative. The Delhi High Court applying the same parameters held that the function of the Company Law Board granting authority to shareholders to file a petition in the High Court is an administrative and not a quasi-judicial function.⁷⁴ Moving forward in the same direction the Supreme Court further held that the function of the Government under Sections 10, 12(5) and 11-A to make or refuse a reference to the Industrial Tribunal⁷⁵ and the power to grant or refuse a licence⁷⁶ are administrative in nature.

Therefore, administrative action is the residuary action which is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. It does not decide a right though it may affect a right. However, it does not mean that the principles of natural justice can be ignored completely when the authority is exercising "administrative powers". Unless the statute provides otherwise, a minimum of principles of natural justice must always be observed depending on the fact situation of each case.

The new judicial trend is to insist that even if an authority is not acting in a quasi-judicial capacity, it still must act fairly. The

⁷⁴ Krishna Tiles & Potteries (P) Ltd. v. Company Law Board, ILR (1979)1 Del. 435.

⁷⁵ Ram Avtar Sharma v. Union of India, (1985)3 SCC 189; AIR 1985 SC 915.

⁷⁶ State of U.P. v. Raja Ram Jaiswal, (1985)3 SCC 131; AIR 1985 SC 1108.

courts have propounded the proposition that whether the function being discharged by the administration may be regarded as 'quasi-judicial' or 'administrative', it must nevertheless be discharged with fairness.⁷⁷ The courts are increasingly shedding the use of the terms 'quasi-judicial' and 'natural justice' and instead adopting the concept of fairness. The advantage of the new judicial trend is that procedural fairness can be imposed on all decision-making bodies without having to characterise their functions as quasi-judicial. Fairness or fair play has thus become the norm rather than an exception, in administrative process at the present day. In *Maneka Gandhi v. Union of India*,⁷⁸ Bhagwati, J., has emphasized that natural justice is great "humanising principle" intended to invent law with fairness and to secure justice and, over the years, it has grown into a widely pervasive rule affecting large areas of administration. The soul of natural justice is "fair play in action" and that is why it has received the widest recognition throughout the democratic world. This being the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial and an administrative function for this purpose. The aim of both administrative inquiry and quasi-judicial inquiry is to arrive at a just decision and "if a rule of natural justice is calculated to secure justice, or, to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. The concept of fairness has become a much more widely applicable procedural requirement. However, in spite of great expansion in the

⁷⁷ See *Infant K(H)*, (1967)1 All E.R. 226. Sachs, L.J., in Pergamon Press, (1970)3 All E.R. 535, 54142, stated : ".....it isnot necessary to label the proceeding 'judicial'; 'quasi-judicial'; 'administrative'; 'investigatory'; it is the characteristics of the proceedings that matter not the precise compartments into which they fall...."

⁷⁸ AIR 1978 SC 597 at 626.

range of the administration where fair procedure is applied, the two concepts-quasi-judicial and natural justice-occur quite often in judicial opinions. For certain purposes the concept of quasi-judicial is still relevant. It therefore seems that the two concepts, "fairness" and "quasi-judicial" would continue to hold the field. It is also possible to argue on the basis of case law, that whereas those acting in a quasi-judicial manner have to observe the principles of natural justice those acting administratively have only to act fairly. Such a view distinguishing between administrative and quasi-judicial will retain the distinction between fairness and natural justice. Such a distinction may be justified on the ground that certain bodies for example tribunals have to follow more formal procedures, than a purely administrative body.

No exhaustive list of such actions may be drawn; however, a few may be noted for the sake of clarity:

- (1) Issuing directions to subordinate officers not having the force of law;⁷⁹
- (2) Making a reference to a tribunal for adjudication under the Industrial Disputes act.⁸⁰
- (3) Interment, externment and deportation.⁸¹
- (4) Granting or withholding sanction to file a suit under Section 55(2) of the Muslim Wakf Act, 1954.⁸²
- (5) Granting or withholding sanction by the Advocate General under Section 92 of the Civil Procedure Code;⁸³
- (6) Fact-finding action.⁸⁴

⁷⁹ Nagarajan v. State of Mysore, AIR 1966 SC 1942.

⁸⁰ State of Madras v. C.P. Sarathy, AIR 1953 SC 53.

⁸¹ Gopalan v. State of Madras, AIR 1950 SC 27.

⁸² Abdul Kasim v. Mohd. Dawood, AIR 1961 Mad. 244.

⁸³ A.K. Bhaskar v. Advocate-General, AIR 1962 Ker. 90.

⁸⁴ Narayanlal v. Mistry, AIR 1961 SC 29.

- (7) Requisition, acquisition and allotment.⁸⁵
- (8) Entering names in the surveillance register of the police.⁸⁶
- (9) Power of the Chancellor under the U.P. State Universities Act, 1973 to take decision on the recommendation of the Selection Committee in case of disagreement of the Executive Council with such recommendation.⁸⁷
- (10) Functions of a selection Committee.⁸⁸
- (11) Decision to extend time for anti-dumping investigation.⁸⁹

Administrative action may be statutory, having the force of law, or non-statutory, devoid of such legal force. The bulk of the administrative action is statutory because a statute or the Constitution gives it a legal force but in some cases it may be non-statutory, such as issuing directions to subordinates not having the force of law, but its violation may be visited with disciplinary action.⁹⁰ Though by and large administrative action is discretionary and is based on subjective satisfaction, however, the administrative authority must act fairly, impartially and reasonably.

C. Administrative Instructions

The technique of issuing instructions is an integral part of modern administrative process. In addition to rules and other forms of delegated legislation, the administration issues directions or instructions. Administrative authorities churn out instructions through letters, circulars, orders, memoranda, pamphlets, public notices,

⁸⁵ Province of Bombay v. Khushaldas Advani, AIR 1950 SC 222.

⁸⁶ Malak Singh v. State of Punjab, AIR 1981 SC 760.

⁸⁷ Neelima Mishra v. Harinder Kaur, (1990)2 SCC 746.

⁸⁸ National Institute of Mental health and Neuro-Sciences v. K. Kalyana Raman, 1992 Supp(2) SCC 481.

⁸⁹ Designated Authority (Anti-Dumping Directorate) Ministry of Commerce v. Haldor Topsoe A/s. (2000)6 SCC 626.

⁹⁰ Raman and Raman v. State of Madras, AIR 1959 SC 694; See generally A.K. Kraipak v. Union of India, AIR 1970 SC 150; (1969)2 SCC 262.

press notes etc. At times, instructions may even be published in the government gazette.

Instructions are issued for a variety of purpose. Mostly, the purpose of directions or instructions is to inform the people of the policy decisions which the government takes from time to time in various areas and which may affect the public. Instructions are issued to lay down procedures for various purposes to be followed by the administration or public. They are also used to fill in the gaps in the area of wide discretionary powers conferred on administration. In certain situations, administration may prefer to use instructions rather than rule. A department may be faced with a new problem for which no past experience is available to it and may for the time being have to experiment with the method of trial and error until some stable norms are evolved which may be capable of being laid down in the form of rules. Until a particular problem has been worked out for a sufficient period, norms and standards may have to be kept in somewhat flexible and in such a situation, directions rather than rules may be more expedient from administrative point of view. Instructions may also be used when the factors for operation of the administration are fluid and subject to rapid changes. Instructions provide the administration with a certain degree of flexibility as it does not have to follow the formalities involved in rule-making e.g. publication in gazette, laying before parliament etc.

The executive power includes both the determination of policy as well as carrying it into execution. Thus the power to issue instructions flow from the general executive power of the administration.

Administrative instructions may be specific or general and directory or mandatory. What kind of instruction it depends largely on the provisions of the statute which authorises the administrative

agency to issue instructions. The instructions which are generally issued not under any statutory authority but under the general power of administration are considered as directory and hence are unenforceable, not having the force of law. In *Fernandez v. State of Mysore*,⁹¹ the court held the Mysore P.W.D. Code of Instructions as not having the force of law because this is issued under no statutory authority but in exercise of general administrative power. However, though the violations of such instructions may not be enforceable in a court of law, yet their violation may expose the officer concerned to disciplinary action. The determination of statutory or non-statutory source of administrative direction is a complex question.⁹²

Even in those situations where administrative instructions have a statutory source, their binding character depends on multiple factors. In *Raman and Raman v. State of Madras*⁹³, the supreme court came to the conclusion that the administrative instructions, despite their issuance under section 43-A of the Motor Vehicles Act, 1939, do not have the force of Law. However, another decision of the Supreme Court in *Jagjit Singh v. State of Punjab*⁹⁴ sets the pace in a new direction. In this case, the State Government requested the Punjab Public Service Commission to select and recommend six candidates for filling six vacancies in the Punjab Civil Services (Executive Branch). A competitive examination was held and the appellant, who was a member of Scheduled Caste, secured third position among the Scheduled Caste candidates. Since only 20 per cent of the reserved quota was available, the first two successful candidates were issued appointment letters. Later on, one of the

⁹¹ AIR 1959 SC 1753.

⁹² I.N. Saksena v. State of M.P. AIR 1967 SC 1264; *Kumari Regina v. A.H.E. School*, (1972)4 SCC 188; AIR 1971 SC 1920.

⁹³ AIR 1959 SC 694.

⁹⁴ (1978)2 SCC 196.

candidate was selected in I.A.S. and he resigned. Since the appellant was next in merit on the selection list, he applied to the government for appointment in the vacancy. This claim was based on the State Government's instructions contained in a circular. The claim was rejected by the government and a petition filed in the High Court was dismissed. The Supreme Court, allowing the appeal, held that the government instructions not only deprecate the existing practice of including the resultant vacancy in the normal pool but go on to lay down in unmistakable terms that if the services of a government servant belonging to SC or ST are terminated, the resulting vacancy should not be included in the normal pool but should be filled up on an adhoc basis from the candidates belonging to those categories. In the face of these clear instructions, nothing contrary from the State Government can be accepted. The thrust of the case is that if the administrative instructions do not run counter to the statutory rules, they are binding and their violation can be enjoined through a court of law. Undoubtedly, the government in exercise of its executive authority cannot supersede a statutory rule or regulation but it can certainly effectuate the purpose of regulation by supplementing it.⁹⁵

The law relating to the statutory status and the enforceability of administrative instructions or directions is in a highly nebulous state because the approach of the courts has so far been residual and variegated. Judicial meanderings in this area of high legal visibility is scathing. The following decisions of the Supreme Court clearly depict court legerdemain. In *V. T. Khazode v. Reserve Bank of India*,⁹⁶ the question before the court was whether the staff regulations issued by the Reserve Bank of India fixing the basis of

⁹⁵ *Gurdial Singh v. State of Punjab*, (1979)2 SCC 368; AIR 1979 SC 1622.

⁹⁶ (1982)2 SCC 7; AIR 1982 SC 917.

seniority of its employees could be modified by a mere circular issued by it later on. The Court reiterated the well-settled proposition that administrative instructions, which by their very nature do not have statutory force, cannot modify statutory rules and regulations, and held that since the staff regulations were not issued under Section 58 of the Reserve Bank of India Act, 1934 they were not rules but merely administrative directions which could be amended by any administrative circular.

However, a different position was taken by the Court in *Amitabh Shirivastava v. State of M.P.*⁹⁷ where the court allowed the enforceability of administrative instructions even in view of the fact that they modified statutory rules. In the instant case, the state Government had prescribed certain qualifying marks by statutory rules for admission to medical colleges in the state. The petitioner did not qualify for admission on the basis of these rules. Subsequently, the qualifying percentage of marks was lowered by an executive order, on the basis of which the petitioner became eligible for admission. The Supreme Court allowed admission to the petitioner by enforcing an administrative instruction as against the rules. The only justification which the court found for its ruling appears to be that the government did not object to the enforceability of an administrative direction at the instance of an individual. However, in decisions the Supreme Court held that exclusive instructions can supplement a statute or cover areas to which the statute does not extend. But they cannot run contrary to statutory provisions or whittle down their effect.⁹⁸

⁹⁷ (1982)1 SCC 514 ; AIR 1982 SC 827.

⁹⁸ *State of M.P. v. G.S. Dall and Flour Mills*, 1992 Supp. (1) SCC 150; *C.L. Verma v. State of M.P.* 1989 Supp (2) SCC 437.

Bishamber Dayal Chandra Mohan v. State of U.P.⁹⁹ is yet another case in the series which involved the question whether the fundamental rights could be curtailed by an administrative instruction. In the instant case the State of Uttar Pradesh had issued the U.P. Foodgrain Dealers (Licensing and Restriction of Hoarding) Order, 1976 under the Essential Commodities Act, 1955 which provided for the licensing of trade in foodgrains; The U.P. Foodgrains (procurement and Regulation of Trade) Order, 1978 further provided for the permitted stock quantity and search and seizure. It may be noted that none of these orders provided for any restriction on the intra-state or inter-state movement of foodgrains. However, by a tele printer message sent by the Secretary to the government to the regional food controllers inter-district movement of foodgrains was prohibited except with the permission of the competent authority. Wheat belonging to various petitioners was seized which was being transported in violation of this teleprinter message. This case involved a constitutional question whether the instructions conveyed through the teleprinter had the force of law, the court started evaluating the reasonableness of these restrictions on the exercise of fundamental right contained in Article 19(1) (g) and 301. It is well established that the state cannot interfere with the free exercise of the fundamental right of the people without the authority of law. In this situation neither the Act nor the two orders contained anything which authorised the government to impose restrictions on the free movement of foodgrains. Instead of facing legal problem squarely with the intention of developing substantive

⁹⁹ (1982)1 SCC 39; AIR 1982 SC 33.

parameters of law, the court evaded the whole issue saying, "their remedy lies in a suit for damages for wrongful seizure"¹⁰⁰

The administrative direction issued by a body incorporated under a statute are certainly not laws, no matter if these are issued under statutory provisions. At best these may be compared with the articles of association of a company which have no force of law.¹⁰¹

Even if administrative instructions have no force of law but if these are consistently followed for a long time government cannot depart from it at its own sweet will without rational justification because this would be a clear violation of Article 14 and 16 of the Constitution¹⁰²

However, no specific instructions can be issued to authority exercising quasi-judicial power or any other statutory power, laying down the manner in which this power is to be exercised. It has always been considered as an interference in the independent exercise of power by the agency and also is against the principles of administrative due process.¹⁰³

If administrative instructions are intended to make a representation to the people then anyone who acts on the representation can hold the agency bound by it on the ground of equitable estoppel.¹⁰⁴

Even if the administrative instruction is binding, the effect of its non-compliance on the legality of the decision would depend on the fact situation. Therefore, administrative instruction to obtain prior permission of government for making an award under the Land

¹⁰⁰ Jain S.N., Legal Status of Administrative Directions – Three Recent Cases add to the Confusion, 24 JILI 126 (1982).

¹⁰¹ Co-operative Bank v. Industrial Tribunal, AIR 1970 SC 245; (1969)2 SCC 43.

¹⁰² Amarjit singh v. State of Punjab, (1975)3 SCC 503.

¹⁰³ Rajagopala Naidu v. State Transport Appellate Tribunal, AIR 1964 SC 1573; Sri Rama Vilas Service v. Road Traffic Board, AIR 1948 Mad. 400.

¹⁰⁴ Union of India v. Anglo-Afghan Agencies Ltd., AIR 1968, S.C. 718 : See Jain S. & M. P., Principles of Administrative Law (1973) pp. 494-505.

Acquisition Act if the value exceeds Rs. 20,000 per acre though binding but held that violation thereof does not constitute an infirmity in the acquisition of land itself.¹⁰⁵

In *Union of India v. Charanjit S. Gill*¹⁰⁶ summarized the law thus :

1. Note and administrative instructions issued in the absence of any statutory authority has no force of law, nor can supplement any provision of law, Act, or rule and regulation.
2. By Administrative Instructions government has power to fill up gaps in the rules if the rules are silent on the subject and are not inconsistent with the existing rules.
3. If administrative instructions are not referable to any statutory authority they cannot have the effect of taking away rights vested in the person governed by the Act.

The present law regarding directions is in an unsatisfactory condition. There appears to be no stable principle to distinguish "directions" from "rules". Further, the law regarding enforceability of directions is in a confused state. While, generally speaking, directions are non-enforceable, a number of exceptions have come to be grafted on this principle. It is difficult in the present state of law to be definitive whether a particular direction will be held by the courts to be binding or not. There is a good deal of adhocism in judicial approach in this area as courts deal with each case on its merits. The area of "directions" is open to judicial legislation and is still in an evolutionary stage.

By and large, direction operate in an area which the courts regard as suited for administrative regulation rather than legislative regulation. That is why, most of the cases pertaining to directions

¹⁰⁵ Collector, Ongole v. Narra Venketeshwarlu, (1996)7 SCC 150.

¹⁰⁶ (2000)5 SCC 742.

arise in the area of service matters. This is an area where government can not administratively and making of rules is not compulsory.

Directions are issued under government's administrative powers, and not under its legislative powers. The extent of administrative powers of a modern government is not capable of any precise definition¹⁰⁷ and so the area of issuing directions is also correspondingly large.

While issuing of directions is an essential and normal administrative technique in the modern times, and administration today can not perhaps do without resorting to this technique, the weakness and limitation of the system from the point of view of the administration should not be minimized: One through directions any constitutional fundamental or legal right of an individual cannot be curtailed. A benefit conferred on an individual by a statutory provision can not be diluted by a direction.

Two, direction cannot be used to control the discretion of quasi-judicial bodies.

Three, there are limits to which directions can interfere with the exercise of discretion conferred on an authority through law.¹⁰⁸

For validity of a law conferring wide discretion on administrative authorities vis-à-vis Article 19 can be considered only with reference to a provision having statutory force and not directions.

All the same the position of an individual vis-à-vis directions is no less inconvenient and confusing :-

¹⁰⁷ See Ram Jawaya v. State of Punjab, AIR 1955 SC 549.

¹⁰⁸ See Manalal Jain v. State of Assam, AIR 1962 SC 368;

First in many situations it is difficult for an individual to ascertain the true character of notice published in the official gazette. As has been seen above, judicial pronouncements on the subject are not always consistent. At times an individual may be at a loss to know whether a public notice constitutes a rule or a direction.

Second, by and large, directions have been held to be unenforceable. To some extent, this principle serves to protect individual's right from being affected by the issue of directions. But, at times, directions may confer some benefits, privileges and concessions on individuals or impose some obligations on the administration, and this also the affected individual cannot enforce against the administration. From every point of view, rules give a better safeguard to individual's rights than directions. The Lok Sabha committee on Subordinate legislation has, at times emphasised that certain administrative directions ought to be substituted by rules.¹⁰⁹ But it does not appear to be feasible to eliminate directions completely in favour of rules because of the exigencies of modern administration. It is, therefore, becomes essential to adopt some safeguards in this area, somewhat on the same lines as advocated in the area of rule making. First, an indication should be given whether a press note or public notice is a direction or a rule. This will go a long way avoiding confusion in this area. Second, all directions should be published in some convenient and easily accessible form, so that an individual may know the departmental position on various matters affecting him, and so he can represent his case better and more effectively before the concerned authorities, he can organise his own affairs in the light of the directions. Further publicity would also act as a restraint on the

¹⁰⁹ Twentieth Report (V. L.S.)10 (1976).

capriciousness of individual officials. Though, even a published direction may be legally disregarded by the administration, it would do so only for a good reason, otherwise it might subject itself to adverse public criticism.

Last, but not of the least importance, is the need to transform directions into rules when norms laid down in the directions have been stabilized and have ceased to be of transitory significance. The department concerned should constantly endeavour to formalise directions, at least such of them as have stood the test of time, into rules which are more stable enforceable against the administration, and provide a better security to the individual and hence are preferable from an individual's point of view.

D. REVIEW

The functions of public authorities may be broadly classified as (i) legislative; (ii) administrative (or executive); and (iii) judicial. However, in India where there is a written constitution, the classification raises constitutional issues connected with the doctrine of Separation of Powers. In such a context conceptual analysis of particular power is very important. This doctrine emphasises that the function of legislature is to enact the law; the executive is to administer the law and the judiciary is to interpret the law and to declare what the law is.

But in modern times the administrative process as a byproduct of intensive form of government cuts across the traditional classification and combines into one, all the powers which were traditionally exercised by three different organs of the State. Thus, the administration, is the meeting point of the three types of governmental functions namely legislative, judicial and administrative. Usually, the executive performs the residue of all those functions which are not vested in the other two branches of

the government, i.e. the legislature and the judiciary. Therefore, there is a general agreement among the writers on administrative law that any attempt of classifying administrative functions on any conceptual basis is not only impossible but also futile. Even an administrative lawyer has at times to classify action by the administration into "administrative", "Legislative", "judicial" or "quasi-judicial." The fiction of 'quasi' has accordingly been invented to distinguish these acts of the administrative authorities from the acts of the legislature and the judiciary.

Although thoughtful scholars decry such a conceptual classification of functions as it is at times too difficult or artificial, and although some attempts have lately been made to reduce the need for, and reliance on, such a classification (especially between administrative and quasi-judicial). The evolution of the concept of 'fairness' or 'fair play' in administrative action has discarded the distinction between quasi-judicial and administrative. But the fact remains that in the present state of administrative law, it is not possible to do away completely with this exercise of labeling a function as administrative, legislative or quasi-judicial. For example, distinguishing between administrative, quasi-judicial and legislative functions assumes significance inter alia because of the following reasons :

- (i) publications : Usually, legislative orders are required to be published in the official gazette but not those of an administrative nature which refer to a particular individual and which need to be served only on the individual concerned. In this respect, a reference to the Essential commodities Act, 1955 may be instructive. Under sec. 3, the central government may by 'order' regulate several things-movement of essential commodities, their prices, distribution, etc. under this provision

the administration can make orders of legislative as well as administrative nature. This becomes clear from sec. 3 (5), which lays down that an order of a 'general nature' or one affecting 'a class of persons' has to be notified in the official gazette, but an order directing to a "specified" individual needs only be served on him without being published in the gazette.

- (ii) Procedures to be followed by the administration : For instance, in the case of adjudication, the administration must follow principles of natural justice even though the statute under which the action is being taken is silent on the point, while in the case of legislation only such norms of procedure need be followed as are stipulated in the relevant statute.¹¹⁰
- (iii) Grounds of judicial review : For example, mala fides may be pleaded as a ground for challenging an administrative action, but it is extremely unlikely that such a challenge may prevail in the case of delegated legislation.
- (iv) Difference between legislative and non-legislative functions also may become meaningful when questions of sub-delegation of powers arise.

Thus classification is necessary for determining the scope of judicial review and ground on which an administrative action can be challenged. However, judicial review of legislative action is much more restricted than that of other administrative actions. For example, legislative action cannot be challenged on the ground that the subordinate legislation has not been made after giving a hearing to those whose interests are likely to be prejudiced by rules, regulations etc. Similarly mandamus cannot be issued to compel the

¹¹⁰ Tulsipur Sugar Co. v. The Notified Area Committee, Tulsipur, AIR 1980 SC 883.

executive to perform its legislative function, in fact, no mandamus can be issued in respect of legislative function.

Even the concept of 'fairness' has not made the task of the courts easier, though it has done away with the requirement of labelling. The courts have still to decide whether particular administrative proceeding is of the type where the concept of fairness is to be applicable and, if so, what exactly fairness requires in that context. In other words, the courts have to decide whether the proceedings are such that the basic components of natural justice are to be applied, or it is "fairness" which is to be applied, and if so, to determine its contents in the situation in hand, or the administrative action is such that it does not call for either the applicability of natural justice or fair procedure.

Judicial acts may be identified by reference to their formal, procedural or substantial characteristics or by a combination of any of them. An act may be judicial because it declares and interprets pre-existing rights or because it changes these rights provided that the power to change them is not unfettered. A duty to act judicially in conformity with natural justice may be inferred from the *impact* of an administrative act or decision on individual rights. Although sometimes used in a narrow sense, the term 'judicial' in cases involving review by certiorari and prohibition has generally been used in a very wide sense and now seems to have been dropped altogether as a requirement for the availability of these remedies. In natural justice cases, variation in linguistic usage have been particularly spectacular and frequently puzzling, but it is generally more profitable to concentrate on what the court has done than on what it has said. In cases where the absolute privilege accorded to judicial proceedings has been claimed in respect of proceedings before statutory tribunals, the courts have fairly consistently given a

narrow interpretation to the term 'judicial'. Where the meaning of judicial has been brought into issue for other purposes (e.g. tort liability and collateral impeachment) the judgement have been singularly deficient in conceptual analysis but it would seem that judicial acts are to be understood as including certain discretionary functions that would have been called administrative. At this point terminological and conceptual problems may, appear to be overwhelming. However, we shall see that to an increasing extent courts exercising powers of judicial review in administrative law are abandoning servitude of their own concepts and asserting mastery over them.