

# SEPARATION OF POWERS AND CONTOURS OF JUDICIAL REVIEW

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## **Constitutional Scheme and Theory of Separation of Powers**

In ancient times all authority was vested in the King. The onward march to modern constitutional polities saw the diversification of the State's functions. It is now axiomatic that the three wings of the State perform different functions. This may be said to be conventional wisdom but like most conventional wisdom it is only partly true.

A few fundamentals on the subject may be stated. In a written Constitution, like ours, quasi-federal in character, the three wings of State are co equal and have coordinate powers with legislative powers distributed between the Centre and the States. This necessitates the existence of a tribunal- the Supreme Court- to maintain the checks and balances inbuilt in such a written Constitution. No wing or organ is even remotely supreme, all being creatures of the Constitution which envisages not only a democracy of men but also of institutions in which no institution is conferred with absolute authority or unlimited power. The three organs of State being coequal and coordinate would not be entitled to encroach upon the area, jurisdiction and powers distributed by the Constitution between them. As Durga Das Basu puts it the doctrine of separation of powers postulates that none of the three organs of Government can exercise any power which properly belongs to either of the other two.

But as laid down in *Ram Jawayya* (AIR 1955 SC 549), "The Indian Constitution has not recognized the doctrine of separation of powers in its absolute rigidity, but the functions of different branches of the Government have been sufficiently differentiated. One organ cannot assume functions that essentially belong to the other. Our Constitution though federal in structure is modeled on the British parliamentary system. The Council of Ministers consisting as it does of legislators is like the British Cabinet 'a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part'. The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both

legislative and executive functions.” In that sense there is more fusion and blending than separation of powers.

As Cardozo, J. said in *Panama Refining Co vs Ryan* [293 U.S.388,440 (1935)] the principle of separation of powers “ is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation, there must be elasticity of adjustment in response to the practical necessities of Government which cannot foresee today the developments of tomorrow in their nearly infinite variety.”

The separate institutions fashioned by the Constitution are intended to bring about a form of government that would ensure that democracy and liberty are not empty promises. The separation of powers serves the end of democracy by limiting the roles of several branches of government and protecting the citizens and the various parts of the State itself against encroachment from any source. The root idea of the Constitution is that man can be free because the State is not.

Constitution is about division, distribution and management of State power in such a manner that arbitrariness is prevented and accountability (to law) is established. The Constitution divides the powers among the three wings- legislature, executive and judiciary and there is also distribution of powers between the Centre and the States.

Unlike in the United States Constitution there is no rigid separation of powers in India. The US Constitution expressly vests the legislative, the executive and the judicial powers in the Congress, the President and the judiciary- the Supreme Court respectively - Arts I, II and III. In the Indian Constitution there is express vesting of only the executive power- of the Union in the President and of the State(s) in the Governor(s).

Art 50 of the Constitution, the Directive Principle which envisages separation of the judiciary from the executive speaks of separating the judiciary from the executive in the public services of the State. While there may be no strict, water-tight separation as between the legislature and the executive, the judiciary is separated from the other two.

Separation of powers also means that the different branches have mutual respect for one another. Arts 121, 122, 211, 212 expressly exemplify this in our constitutional scheme forbidding any discussion in Parliament/State legislatures regarding the conduct of judges of the superior judiciary in the exercise of their duties, except a discussion in Parliament on a motion for removal of a judge and barring judicial scrutiny of parliamentary/legislative proceedings on the ground of irregularity of procedure and no one exercising powers of regulating procedure or conduct of business or maintaining order shall be subject to the jurisdiction of any court regarding such exercise.

The principle of separation of powers is a principle of restraint which “has in it the precept, innate in the prudence of self preservation that discretion is the better part of valour.”[Julius Stone, *Social Dimensions of Law and Justice* (1966) p 688]

In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality Dicey in *The Law of the Constitution*(10th edn, 1959, pg 3) likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the other. This is as much a prescription for the future as it was for the past, a profound truth and equally relevant everywhere.

Today, in countries with a written Constitution and an entrenched, justiciable Bill of Rights, and all the more in a federal polity, what really obtains is a limited government, i.e., a government of enumerated powers with the judiciary constituted as the guardian of the Constitution and the arbiter of the functions of all organs of State as grantees under the Constitution. The Apex Court is the final interpreter of the Constitution and such interpretation is binding on all organs of the State. In India there are express constitutional provisions to that effect – Articles 141 and 144.

It is apt to advert to what the Constitution Bench of our Supreme Court said in *Sub Committee of Judicial Accountability v. Union of India* - AIR 1992 SC 320 (345) as regards this concept: “But where, as in this country and unlike in England, there is a written constitution which constitutes the fundamental and in that sense a ‘higher law’ and acts as a limitation upon the Legislature and other organs of the State as grantees under the Constitution, the usual incidents of parliamentary

sovereignty do not obtain and the concept is one of 'limited Government'. Judicial review is, indeed, an incident of and flows from this concept of the fundamental and the higher law being the touchstone of the limits of the powers of the various organs of the State which derive power and authority under Constitution and that the judicial wing is the interpreter of the Constitution, and, therefore, of the limits of authority of the different organs of the State. This doctrine is in one sense the doctrine of ultra vires in the constitutional law. In a federal set up the judiciary becomes the guardian of the Constitution. Indeed, in *A.K. Gopalan v. State of Madras*, 1950 SCR 88: (AIR 1950 SC 27) Article 13 itself was held to be ex abundante cautela and that even in its absence if any of the fundamental rights were infringed by any legislative enactment, the Court had always power to declare the enactment invalid. The interpretation of the Constitution as a legal instrument and its obligation is the function of the Courts. 'It is emphatically the province and duty of the judicial department to say what the law is'. *In Re: Special Reference Case* (1965) 1 SCR 413: (AIR 1965 SC 745 at p.762, paras 40-41) Gajendragadkar, C.J. said: '..... though our Legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution. In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign....' But it is the duty of this Court to interpret the Constitution for the meaning of which this Court is final arbiter".

It may be said that the concept of limited government and judicial review constitute the essence of our constitutional system and it involves three main elements: A written Constitution setting up and limiting the various organs of Government; the Constitution functioning as a superior law or standard by which the conduct of all organs of government is to be judged; a sanction by means of which any violation of the superior law by any of the organs of government may be prevented or restrained and, if necessary, annulled. This sanction, in the modern constitutional world, is 'judicial review' which means that a court of competent jurisdiction has the power to invalidate the act of any governmental agency, including the legislature on the ground that it is repugnant to the Constitution. As observed by the Supreme Court borrowing the language of Lord Steyn, judicial review is justified by a combination of "the principle of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review."

Whenever a Constitution is justiciable, i.e., enforceable in a court of law, the judiciary becomes the guardian of the Constitution. As Dicey says, “This system (referring to the American), which makes the judge the guardian of the Constitution, provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation”. The guardianship of the judiciary in enforcing the Constitution, expands when there is constitutional division of powers not only between the three branches – Executive, Legislature and Judiciary, but the State itself is divided into two units – national and state, with a consequential distribution of powers between the two units i.e., the Constitution is federal. The special functions of a federal judiciary are: maintaining the supremacy of the Constitution; determining controversies between parties to the Federation; securing uniformity in the interpretation and application of the Constitution as amongst the States. As the umpire or arbiter in the federal system, the judiciary’s function of acting as the guardian of the Constitution is known as judicial review. The power of judicial review to maintain the supremacy of the Constitution is vested generally in the highest federal court.

It has been unequivocally laid down by the Supreme Court that all organs of State are creatures of the Constitution from which alone they all derive their power and authority; no branch has powers unfettered and unrestricted by the Constitution; the Constitution has devised a structure of power relationship with checks and balances; it is for the Court to uphold the constitutional values and enforce the constitutional limitations. This captures the essence of the doctrine of separation of powers and its working in our constitutional scheme and that is to be overseen and guarded by the Court. “The concentration of powers in any one organ may, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we pledged.”

What emerges is that in a limited government under a written Constitution all organs of the State are creatures of the Constitution and have to act and function under the Constitution and in consonance therewith. What is, therefore, supreme is the Constitution and what obtains is Constitutional supremacy, the judiciary having the last word in the interpretation of the Constitution and constituted as its monitor, defender and protector. And what is the sanction to keep the judiciary also within the bounds of its powers? It is, in a large measure, the judges’ own sense of self restraint.

## Power of Courts to review legislative and executive action- Contours of Judicial Review

### Constitutional law- Administrative law-Relationship

Administrative Law has been characterized as the most outstanding legal development of the 20th century. Administrative Law can be broadly described as the law relating to control of governmental powers and actions and which seeks to adjust the relationship between public power and individual rights. Lord Diplock famously said that the development of Administrative law was the greatest achievement of his judicial lifetime (*R v IRC ex p. National Federation of Self-employed and Small Business Ltd.* [1982] AC 617,641).

There is a deep and close relationship between Constitutional Law and Administrative Law, both essentially deal with powers and functions of the State. Constitutional Law is basically concerned with the structures, organization, powers and functions of the three wings and their inter relationships as also the relationship between State and citizen. Administrative Law is concerned with the operation of the administration vis- a -vis the individuals. It is the branch of Public Law dealing with the actual operation of government, the administrative process. Some principles of Constitutional Law which impact on Administrative Law are the Rule of Law, separation of powers, classification of functions.

Administrative Law deals with the structure, powers and functions of the organs of administration; the limits of their powers; the methods and procedures followed by them in exercising their powers and functions; the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation. Its purpose is to discipline the exercise of power in the public domain. In that sense, the movement of administrative law has been from a culture of authority to a culture of justification. Some of the fundamental principles of administrative law are powers and jurisdiction of the authorities and their legal nature, jurisdiction over fact and law, discretionary power- its exercise and abuse, principles of natural justice, problems of invalidity, control over delegated legislation and administrative adjudication. The doctrine of ultra vires is in a sense the heart of Administrative Law. The basic premise is that an authority cannot act outside its power (ultra vires) or otherwise abuse that power. Another principle is that the authority should act reasonably.

Modern governments, especially in pluralistic welfare states, demand wide discretionary powers in numerous areas. The essence of administrative law is the recognition that all powers have legal limits which are to be enforced by courts whose function is to delineate those limits by striking the right balance between administrative efficiency and the legal protection of the rights of the citizens. This is done through the mechanism of judicial review.

### **Judicial Review- Concept and Range**

Judicial review, is in a sense, the very life breath of the Constitution of a vibrant, working constitutional democracy. It is that which provides sinews for enforcement of rights, protection of liberty and upholding the rule of law. Judicial review is the exercise of power by superior courts to test the legality of any governmental/ State action. It is the exertion of the Court's inherent power to determine whether an action is lawful or not and to grant appropriate relief. As Prof. Wade points out judicial review is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law.

“Judicial review has developed to the point where it is possible to say that no power- whether statutory or under the prerogative- is any longer inherently unreviewable. Courts are charged with the responsibility of adjudicating upon the manner of the exercise of public power, its scope and its substance. Even when discretionary powers are engaged they are not immune from judicial review.” – deSmith. “No power is inherently unreviewable and in a constitutional democracy wedded to the rule of law, unfettered and unreviewable discretion is a contradiction in terms.”- Wade. All this has been quoted with approval by the Supreme Court.

This is the position even in England without a written Constitution and Bill of Rights. The position is all the more reinforced in India. Judicial review which has its foundations essentially in Common Law is, in India, enshrined in the Constitution. Art 13 read with Arts 32,226,227 expressly confer that power.

It is universally recognized that the range of judicial review exercised by the superior Courts in India is perhaps the widest and most extensive known to the world of law. There is judicial review of –purely executive action, of statutory orders and statutory discretion, quasi judicial orders, subordinate legislation, plenary legislation and also constitutional amendment. There is also judicial review

of other constitutional functions like imposition of President's rule, emergency, removal of Governors, formation of government, appointment of Ministers and Judges, assent to bills, parliamentary proceedings. The range and intensity, standards and tests of judicial review of all these necessarily vary.

### **Grounds of Challenge to:**

- *Constitution Amendment*

A Constitution Amendment can be challenged on procedural grounds of non-compliance with Art 368, ie, not passed by the special majority provided in Art 368 or not ratified by the legislatures of the required number of States. The only substantive ground of challenge of a constitutional amendment is violation of the basic structure of the Constitution and this doctrine is confined only to challenge constitutional amendment and not any other law. This has been the consistent trend of Supreme Court decisions -reiterated by successive benches, except for some untenable drift which very casually stated that the basic structure doctrine will apply to invalidate ordinary legislation also. This was assumed to be a logical extension of the principle. That an ordinary law should pass the test of basic structure doctrine is non sequitur and mere ipse dixit. It is governed by, to use Palkhivala's language, 'what is lazily assumed or hastily glimpsed or piously hoped.' "The constitutional fascination for the basic structure doctrine cannot be made a Trojan horse to penetrate the entire legislative camp."

- *Plenary Law*

The grounds of challenge to plenary legislation are i)Lack of legislative competence-Docctrine of colourable legislation would come within this as it is essentially a question of power, ii) Violation of fundamental rights- Part III or any other constitutional requirement or limitation, like for eg. President's assent not obtained wherever required or there is repugnancy between two legislations.

An Ordinance is the same as a plenary law. The propriety of promulgating it is not for courts.

It has been the settled legal position that law cannot be questioned on the ground of arbitrariness or vagueness. Otherwise the court would be acting as a super legislature. Lord Devlin's statement that the British are as much desirous to be



governed by the judiciary as they are to be judged by the legislature/executive is profoundly true and holds good everywhere. However in some recent judgments like *Shayara Bano v Union of India* (2017) 9 SCC 1 and *Navtej Singh Johar v Union of India* 2018 SCC Online SC 1350 it is held that even a legislation may be assailed as being manifestly arbitrary. ‘Manifest arbitrariness’ is without any objective criteria and would itself be arbitrary. As Khanna, J. warned, much worse than executive arbitrariness is judicial arbitrariness. This ground of challenge would be an invitation to such arbitrariness which entails the risk of the process running haywire. Far from upholding the rule of law, it would in all likelihood erect a judge’s preferences and prejudices into constitutional principles and perhaps undermine the rule of law itself.

- *Subordinate Legislation*

A subordinate legislation is amenable to challenge on all grounds on which a plenary legislation can be assailed. Besides, it may be challenged for non-conformity with the parent statute under which it is made or any other plenary law. Excessive delegation would be another ground of challenge. It may also be challenged as being manifestly arbitrary and unreasonable – the principle in *Kruse vs Johnson* (1898) 2 QB 91 and *Indian Express Newspapers v Union of India*- AIR 1986 SC 515.

A subordinate legislation may be substantively ultra vires and /or procedurally ultra vires. Unconstitutionality is a species of the doctrine of ultra vires. It would be a case of substantive ultra vires if it transgresses the limits set by the parent statute, is repugnant to its other substantive provisions or its general purpose or is repugnant to any other plenary statute. The doctrine is to be reasonably applied. Whatever may be fairly regarded as incidental or ancillary to or consequential upon what the legislature authorized ought not, unless expressly prohibited, to be held by judicial construction to be ultra vires. It would suffer from the vice of procedural ultra vires if the procedure prescribed by statute like publication, consultation, laying or any condition precedent for enacting it or the manner of performance is not followed. Either form of ultra vires would render it a nullity.

Then there is the principle that while delegated legislation has come to stay the legislature cannot delegate its essential legislative function.

- *Administrative Action and Quasi-judicial Functions*

The grounds of challenge to an administrative or quasi judicial action are again substantive and procedural ultra vires. It is trite that all authorities have such powers and authority as are conferred on them by the constitution or the statute and they must act within the limits of such powers. Otherwise their actions would be ultra vires- outside their powers and hence invalid. It would be a case of substantive ultra vires if the authority acts outside or in excess of the authority conferred on it. The decision or action has also to be strictly in accordance with the procedure that may be prescribed by the statute clothing it with the power. If the authority does not act in conformity with such procedure, it would be a case of procedural ultra vires. Further if the authority does not act reasonably the order would be ultra vires.

### **Jurisdiction-Jurisdictional Facts**

It is when a certain state of facts exist that the authority or tribunal acquires jurisdiction. Such facts are called jurisdictional facts. The decision of the authority may be challenged on jurisdictional ground- absence of jurisdiction, exceeding jurisdiction, refusal to exercise jurisdiction or its erroneous exercise. The decision of any authority or tribunal may suffer from an error of fact or an error of law. There is also the concept of error in jurisdiction and error of jurisdiction. An error in jurisdiction is one when the authority has the power to decide the issue but decides it wrongly. That is susceptible to correction only in an appeal. When there is no power or jurisdiction to decide an issue but it is still decided it is an error of jurisdiction and it amenable to a collateral challenge. An error of law is an error of jurisdiction.

Jurisdiction, it has been said, is a verbal coat of many hues, it is a legal shelter. Prof. Gordon's observations are worthy of recall. "...A wrong decision must be just as binding as a correct one, for apart from infallibility being an unrealisable ideal, 'correctness' is often a matter of opinion. It would be unworkable to have the binding effect of a judgment depend on its agreement with facts in the absolute... Even infallibility will not protect it: it would need also the gift of prophecy to be safe from other court's fallibility." (D.M.Gordon, *The Relation of Facts to Jurisdiction* (1929) 45 LQR 459, 460-61).

Then there is the requirement that the authority not only acts within the confines of its powers and according to the procedure but that it should also act reasonably. If the action is unreasonable it would again be ultra vires. As Lord Bingham says in his eminently readable book *The Rule of Law*, “All officials at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers are conferred, without exceeding the limit of such powers and not unreasonably. This is indeed fundamental and lies at the very heart of the rule of law principle.”[Tom Bingham, *The Rule of Law*, Allen Lane (An Imprint of Penguin Books) 2010]

An authority vested with power and discretion must direct itself properly in law, take into consideration matters bound to be considered and exclude from consideration irrelevant matters. If it does not obey these rules it may be said to be acting unreasonably. This is the classic enunciation of *Wednesbury* unreasonableness and it is a standard test for reviewing actions of authorities vested with statutory power and discretion [see, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680]. Then we have Lord Diplock’s celebrated formulation of the principles of judicial review of administrative action in the *GCHQ* case.[*Council of Civil Services Union v Minister for the Civil Service* (1984) 3 All ER 935] They are illegality which is the main substantive areas of ultra vires, where the law is breached; irrationality which is succinctly referred to as *Wednesbury* unreasonableness, it applies to a decision which is so outrageous in its defiance of logic and procedural impropriety which is failure to follow the prescribed statutory procedure or rules of natural justice.

### **Unreasonableness-Review of Discretion**

Many statutes clothe an authority with discretionary powers. Discretion is of course judicious and not whimsical. Discretion really exists as Aharon Barak tells us only when there is a choice between more than one reasonable and legal alternative. Two reasonable persons can come to two opposite conclusions without either of them being unreasonable (per Lord Hailsham LC *In re: an infant* 1971 AC 682). The authority vested with discretion is expected to exercise the discretion judiciously. It should not abuse the discretion nor abdicate it. General rules or principles of policy should not disable exercise of genuine discretion in particular cases involving individual interests. Discretion cannot be fettered. To quote Lord

Bingham again “What matters is that decisions should be based on stated criteria and that they should be amenable to legal challenge, although a challenge is unlikely to succeed if the decision was one legally and reasonably open to the decision maker. The rule of law does not require that official or judicial decision makers should be deprived of all discretions, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered.”

### **Natural Justice**

Violation of the principles of natural justice is another ground to invalidate an administrative or quasi- judicial decision. The distinction between administration and quasi judicial decision has vanished since the decision in *A.K. Kraipak vs. Union of India* AIR 1970 SC 150. Natural justice has two main elements, one, the rule against bias – personal, official, departmental, pecuniary and the other, the right to fair hearing. The doctrine of necessity affords an exception to the rule against bias. The common law has abundant riches, said Lord Morris, [in *Wiseman v Borneman* 1971 ac 297,309] there may you find what Byles, J called the justice of the common law when he observed that if natural justice is not provided for in the legislation the justice of the common law will supply the omission of the legislature.[*Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180,194]

### **Other Grounds of Annulling an Order**

Fraud, it is said, unravels everything. It is a ground to annul an order. When power is exercised in breach of the law it is a fraud on power. Malice or malafides invalidates an order. There is the concept of malice in law and malice in fact. Malice in law is seeking to achieve something not permitted by the law even if it is done with the best of motives. Malice in fact is when power is exercised for an improper motive, when there is actual ill will, animosity. Non application of mind also vitiates an order and furnishes a ground to annul it. However, non application of mind or malice is not a ground to assail legislation. There is no transferred malice in the field of legislation. [*Nagaraj v State of A.P.* AIR 1985 SC 555]

Promissory estoppel and legitimate expectation are good grounds to assail an administrative order, but they do not avail against legislation.

It is also a requirement that the order should be reasoned. Reasons are like links in the chain. They become amenable to challenge.

Even where the formation of opinion is subjective, the existence of circumstances relevant to the inference as the sine quo non for action must be demonstrable. cf, *Barium Chemicals v The Company Law Board* AIR 1967 SC 295

All these principles play a vital role in administrative adjudication.

### **Effect of Non-compliance**

The question arises often as to how non-compliance with statutory requirements will affect the order. It is not quite safe to import the language of private law into public law. It may be difficult to characterise and fit any order in water tight compartments. The courts have to decide the legal consequence of non-compliance in the light of a concrete state of facts and a continuing chain of events. It is not so much a stark choice of alternatives, but rather a spectrum of possibilities in which one compartment gradually fades into another. [See: *London and Clydeside Estates vs. Aberdeen District Council* (1979) 3 All ER 876 referred to and quoted in *Pankaj Bhargava vs. Mohinder Nath* AIR 1991 SC 1233]. It is arguable that when an order encroaches fundamental rights without due process of law it is still born and liable to be ignored. [see: *Nawab Khan Abbas Khan v State of Gujarat* AIR 1974 SC 1471].

### **Some Constitutional Functions- Challenge**

Constitutional functions like imposition of President's rule, emergency, removal of Governors, grant of pardon are all based on Cabinet advice. The President/Governor is the sole judge of the sufficiency of facts and propriety of the action. Yet, while the advice is constitutionally immune from scrutiny, the material which formed the basis for such advice is open to examination- whether such material was relevant and was such that on its basis a reasonable man could have come to the conclusion. It is to be examined whether the facts were verified- whether it was bonafide. Governor's report and President's action is open to scrutiny. Legal malafides, irrationality, extraneous considerations are all grounds of challenge to a Presidential proclamation- though approved by Parliament- it is not legislative unlike an Ordinance (which is not susceptible to such challenge).

Doctrine of pleasure has also been hedged in by constitutional limitation. It is not a licence to act arbitrarily. Discretion conferred on a public authority in absolute and unfettered terms will necessarily have to be exercised reasonably and for public good. See *B.P.Singhal v Union of India* (2010) 6 SCC 331.

The distinction between the need for a cause vis-a-vis need to disclose the cause is important and has to be borne in mind. It is imperative that a valid cause must exist. Judicial scrutiny is for the limited purpose whether the reasons bear rational nexus to the action. Absence of reasons or bad reasons can destroy a possible nexus and vitiate the order on the ground of malafides. Thus the court will interfere for absence of reasons or irrelevant reasons or where the exercise of power is vitiated by self denial or wrong application of the full amplitude of power or the decision is arbitrary, discriminatory, malafide.

Power to admit new States into the Union (Art 2) is very wide and guided by political issues of considerable complexity which are not always judicially manageable; yet it is not unreviewable and immune from judicial scrutiny.

In spite of a finality clause, whether in a statute or the Constitution, conferring finality on an order and stating that it is not open to challenge, it is open to examine whether the impugned action is ultra vires for contravention of a mandatory provision of law conferring the power, is vitiated by malafides or is a colourable exercise of power based on irrelevant and extraneous considerations. A finality clause bars an appeal, but does not oust judicial review.

Legislative proceedings including exercise of privilege are not totally immune from judicial review. Immunity is restricted to what is said or done in a legislative body or committee thereof. Matters of procedural irregularity are to be kept distinguished from substantive illegality or unconstitutionality which is open to judicial review. The manner of exercise of privilege is also open to scrutiny. The scope of fundamental rights has been expanded over the years and all action including exercise of privilege should be tested on the anvil of all fundamental rights relevant in a given case. While the legislature is the best judge of its privileges, it is not the sole or exclusive judge of the existence, extent and manner of exercise. Judicial review is permissible on limited grounds such as jurisdictional error, violation of fundamental rights-Arts 14,19,21, arbitrariness, capriciousness,

malafides. In these matters the judiciary would generally show great deference and restraint.

Non-assent to Bills, it is submitted, is also justiciable even though it may be on limited grounds.

Government formation-choice and appointment of ministers as also appointment of judges is open to judicial review on the narrow ground of eligibility as contrasted with suitability – *Manoj Narula v Union of India* (2014) 9 SCC 1; *High Court of Madras v. R. Gandhi* (2014) 11 SCC 54.

### **Areas- Not Judicially Manageable**

Of course there are areas which the Court does not enter. There are matters which the Court does not take up because it is not equipped to deal with them-they do not have judicially manageable standards and do not admit of judicial review by their very nature- matters concerning foreign policy, relations with other countries, defence policy, power to enter into treaties with foreign powers, issues relating to war and peace.

### **Standards and Tests of Adjudicating Legality**

Different standards and tests are applied in adjudging the legality of different actions. The range, intensity and depth of judicial review is also different. The different contexts in which reasonableness operates as a test of validity must be kept distinguished. The standards of ‘reasonableness’ and ‘the reasonable man’ in the law of torts is ultimately the court itself. Again the constitutional standards of reasonableness of the restrictions on fundamental rights are those of the court itself, the court of judicial review is the arbiter. But in Administrative law, the test of reasonableness is the standard indicated by a true construction of the statute which distinguishes between what the statutory authority may or may not be authorized to do, it distinguishes between the proper use and the improper abuse of power. It is not the court’s own standard of reasonableness as it might conceive in a given situation. That is the essence of the test of *Wednesbury* unreasonableness.[cf *G.B.Mahajan v Jalgaon Municipal Council* AIR 1991 SC 1153]

The *Wednesbury* test applies in the context of administrative law review of executive action. It is inappropriate and inadequate in testing the validity of any action in the constitutional context. The test of constitutional review of reasonableness is more stringent. What is constitutionally unreasonable will be unreasonable in the Administrative law sense also.

Proportionality is a more exacting and intrusive test and it is inherent to some extent in other grounds of judicial review like perversity. It is necessarily a part of constitutional unreasonableness where human rights and fundamental freedoms are engaged. Some actions are vulnerable to judicial interference on grounds both of unreasonableness and proportionality. For instance, revocation of trader's licence is assailable on both grounds. Equally assailable is penalty of life imprisonment for an ordinary traffic offence. These could be challenged as being grossly disproportionate and also as so outrageous in its defiance of logic- *Wednesbury* unreasonable. But in a challenge to the execution of a project, location of a market, bus stand, etc. no proportionality is involved. The only test is: it is so unreasonable that no person properly directing himself in law will decide in such manner.

### **Judicial Review of Decisions also**

Judicial review is about decisions too, not only the decision making process. It is loosely stated and chanted as an incantation that judicial review is concerned not with the decision but with the decision making process. The statement is to be appreciated in its setting and context. Both cases: *Chief Constable of North Wales Police v Evans* (1982) 3 All ER 141 and *G.B. Mahajan v Jalgaon Municipal Council* (AIR 1991 SC 1153) where this proposition was first stated are purely administrative law cases, did not touch fundamental rights. Testing the reasonableness of restrictions (Art 19) or testing a law or the validity of a constitutional amendment is not a matter of process, but of substance. In those areas the court evaluates and reviews the decision, not the decision making process. While in judicial review generally it is an objective assessment, in the narrow area of testing the reasonableness of restrictions on fundamental rights the court enters the arena of merits and there is a subjective element. But it may be said to be a subjective assessment by prescribed objective standards.



## **Judicial Review and Appeal**

Judicial review is to test the legality of an action and keep public authorities within the limits of their power. Power is indeed a function, its exercise is really performance of official duty. For, all power is a trust. The question is whether the impugned action is lawful or unlawful; there is no examination of merits, the issue is not whether the action is right or wrong. The difference between judicial review in administrative law and constitutional law is one of degree. The difference between judicial review and appeal is one of kind. An appeal is a creature of statute- the appellate power being circumscribed by the statutory provisions conferring the power. "Where a question arises as to the scope of an appellate jurisdiction, the statute by which the jurisdiction is conferred must ordinarily be the Court's first port of call; and will very often be the last." [*Huang v Secretary of State for the Home Deptt.* (2005) 3 All ER 435(CA)]. In exercising appellate power the court concerned with the merits- whether the decision is right or wrong. The court independently examines the matter and comes to its conclusion often times substituting its views for those of the authorities or the court appealed from. The distinctions are well known and real though the exercise of both the powers may sometimes yield the same result.

## **Nuances**

Judicial response to different fact situations varies and it is an accepted fact of constitutional interpretation that the content of justiciability changes according to how the judges' value preferences respond to the multi dimensional problems of the day. An awareness of history is an integral part of those preferences. Thus the evaluation of diverse, sometimes elusive factors, inevitably brings into the judicial verdict the judge's own values and preferences. In that sense to a limited extent the difference of kind between judicial review and appeal may imperceptibly collapse. The simple truth is that the jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind. But as Mathew, J pointed out they are not too elusive for judicial perception; great judges are those who are most capable of discerning which of the gradations make genuine difference.

It is important to bear in mind that unconstitutionality and not unwisdom is the narrow area of judicial review. For the removal of unwise laws appeal lies to the ballot box and the process of democratic government. Any doubt regarding the validity of a law must be resolved in favour of its constitutionality. The limited task of the Court is to interpret the Constitution as it is, not to venture starry eyed proposal for reform. What the Constitution should contain is not for the Courts to decide that is a question of high policy and the Courts are concerned with interpretation of laws, not with the wisdom of policy underlying them. A commitment to the legalities of law and their enforcement for public good is to be realized. The court must always be careful in maintaining the right balance between the different wings of Government. Mistrust of Government is violative of comity between instrumentalities. Courts must be tempered by the thought that while compromise on principle is unprincipled, applied Administrative Law in modern complexities of government must be realistic. There must be a sensible approximation, there must be elasticity of judgment in response to the practical necessities of government which cannot foresee today the developments of tomorrow in their nearly infinite variety.

Judicial humility and deference are as much necessary and important concomitants of constitutionalism as the robust exercise of judicial power. Constitutional adjudication and the exercise of the power of judicial review is a delicate task requiring balancing of different principles and values calling for vision and statesmanship, something which requires a measure of activism and a measure of self restraint. Judicial power also has its limitations, it is not a panacea for the ills of society and the failure of the other branches of government. The attitude of judicial humility and restraint is not an abdication of the judicial function; it is a due observance of its limits. Losing sight of this profound truth may be dangerous and an invitation to judicial despotism.

### **Equipment**

Durga Das Basu in his Tagore Law Lectures-*Limited Government and Judicial Review* observed that one cannot but emphasise the importance of the composition of Courts and of proper personnel for the success of judicial review. When judges are required to pull the constitutional strings the preparation and equipment for that wide ranging task was very eloquently explained by Learned Hand, “ I venture to

believe that it is important to a judge called upon to pass on a question of constitutional law, to have a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton with Macchiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with books that have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can nearly pour everything he will. Men do not gather figs or thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.”[*The Spirit of Liberty*, p 81]

If there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review which is unquestionably part of the basic structure of the Constitution.

More than sixty years ago Lord MacDermott in his Hamlyn Lectures of 1957[*Protection from Power under English Law*, Stevens & Sons, London (1957)] spoke of law as a protection from power. In these decades that have gone by Administrative Law has grown by leaps and bounds, its tools have been innovated, sharpened and refined. It effectively serves as a shield against the onslaughts of power of different genres.