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JUDICIAL ACTIVISM AND ADMINISTRATIVE ACTIONS

- *Sahil Rao*[1]

ABSTRACT

Administrative law in the present day is one of the most important parts of the laws dealing with society and the government. The existence of this law is proof that day by day the interaction between people and government or state is increasing. The administrative law acts as a safety measure against arbitrariness. Amongst the tools that administrative law has to counter the problems of arbitrariness is judicial activism. In India, the courts have been the custodian of fundamental rights. The emergence of the concept of judicial review is the result of the same. Judicial activism is not a new concept for the world but India has seen sudden changes in the recent past. This paper is focused on the development of judicial activism with respect to administrative law in India and how is it used in India to stop arbitrariness.

Key Words: Administrative Law, India, Judicial Activism

INTRODUCTION

Administrative law in the modern world is the result of the fast-growing socio-economic functioning of the states and the increased influence of the government. It has become a necessity in the modern developed society. It is so because the relationship that exists between the administrative authorities and the people is becoming complex day by day. Administrative law is the answer to the necessity of regulating the complex relations that exists between society and administrative bodies.

In the primitive society, the functions that a state would perform were limited to basic tasks. They were usually about protecting the society from outer forces, implying taxes, and maintaining law and order in their territory. But as time changed, so did the role of the state. In the present time, a state performs the task of what one calls a welfare state. The welfare states

[1] Student, LLM, MNLU (Aurangabad)

work on various aspects of society. Education, healthcare, environment protection, municipal and sanitation task, financing, and protection of human rights are some of these tasks. There is no field in the present time that is not being influenced by government policies. This growth and evolution of the role of society have resulted in the change of administration. It has bought us to the door of the era of administrative laws. One cannot deny that the administrative law is not only the result of evolution; it is essential to present-day society. But as soon as the government's involvement increases, so does the chance of arbitrariness in the society. One needs to control the power that the administrative bodies command. This can be done by using various sources of control.

One such control is judicial control. The result of this judicial control is the evolution of judicial activism. It acts as the major protector of the rights of the people. The courts and the judiciary have the power of judicial review which helps a citizen to challenge any decision or administrative action.

REVIEW OF THE LITERATURE

M.P Jain, "Principles of Administrative law", is one of the leading books on administrative law in India. M.P. Jain has become one of the most renowned legal authors and has authored multiple books on the topic. His book covers all the topics that one might need to study in India with regard to administrative law.

David Stott, "Principles of Administrative law", is deputy head of the Anglia Law School. His book provides a complete view of the British system of administrative law. The book covers all the major cases related to administrative law in the UK. If one is reading the Indian legal system, it is not possible to study it without relating to the British legal system as it was the source of the modern-day legal system.

Himanshu Morwal, and Tarusha Mathur, "Evolution of Judicial Activism in India", is a research paper by the Manipal university students. They have deeply covered the evolution of the legal system relating to judicial activism in modern India. It covers all the aspects of judicial activism and judicial review from time to time. They have also covered how do the Indian courts respond to PILs.

Cass R. Sunstein, "In defense of the Hard Look: Judicial Activism and Administrative law", is a research paper written by a Harvard University professor. He highlights the concept of judicial

activism and traces its history. He also covered the relationship between judicial activism and the growth of Administrative law.

STATEMENT OF PROBLEM

In present-day society, the overuse of administrative bodies has caused decentralization. But the decentralization and use of administrative bodies cause a major clash between rights and administrative action. It is a topic of much research as to what is the solution to this problem and what we can do to solve it.

HYPOTHESIS

The Indian courts have evolved a very brilliant idea of judicial activism after getting inspired by the US courts. This whole concept of judicial activism and review is the safety valve for us from the arbitrariness that may happen due to absolute power that one may have given to the administrative bodies.

OBJECTIVE

The administrative body is in present-day society one of the most important parts of the government. They have now become an indispensable part of modern governments. The increase of delegation has become a major way of easing and decentralizing the tasks of the government. But they might lead to arbitrariness. The objective of this paper is to study how judicial activism can act as the answer to these problems.

RESEARCH METHODOLOGY

This research is doctrinal research. The main source of information is secondary in nature. The study is not empirical in nature. Cases decided by the Courts, books, scholarly articles, magazines, and newspaper articles are relied upon to develop and examine the judicial approach with regard to anti-terror laws in India.

ADMINISTRATIVE LAW: A BRIEF INTRODUCTION

Administrative law is one of the most important and latest developments of law in the twentieth century[2]. It is the branch of law that is focused on dealing with the relationship that exists between a citizen of the state and the power of the states. It is often said that every government has three parts, executive, judiciary, and legislative. All of these parts have their definite sets of jobs to do. Then there is the administrative. The administrative works in the day-to-day implementation of public policy and public programs. It functions in all the areas of government that deal with public programs. As society is developing, the functions and dependence on administrative law are increasing multifold. At this time, a question arises that how can we keep a check on this growth of administration? Over-dependence or giving them way too much power may lead to arbitrariness. The response to this question and the problem of arbitrariness was the evolution of the concept of administrative law.

The administrative law deals with judicial control of government and administrative powers. There have been various attempts at making the definition of administrative law. Ivor Jennings defined administrative law in his book "The law and the constitution" in 1959. He defined administrative law as the law which deals with administrative authorities. Another scholar K.C. Davis defined administrative law as, "Administrative law as the law concerns the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action."[3]

Wade in his work 'Administrative law' in the year 1967 made one of the most important and appropriate attempts at defining administrative law. In his opinion, any attempt at making one correct definition of administrative law was not easy and it would be filled with difficulties. He then gave his definition. He first talked about how the power and authorities of the state are classified as legislative, administrative, and judicial. In such conditions, the law will be dealing with the administrative authorities.

The administrative law is limited to the powers and procedures of administrative agencies and authorities.

WHAT IS JUDICIAL ACTIVISM?

[2] Vanderbilt's Introduction to Schwartz, French Administrative Law and the Common Law World,xiii (1954)

[3] Shikhar Shrivastava, "*The Meaning, Scope, Definition and Significance of Administrative Law*", Law times journal (December 3,2019), https://lawtimesjournal.in/the-meaning-scope-definition-and-significance-of-administrative-law/

Judicial activism as a concept is not very old. It was first coined in the year 1947 by Arthur Schlesinger Jr[4]. One of the most used dictionaries in law i.e., Black Law Dictionary defines judicial activism as "philosophy of judicial decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions"[5]. It can also be defined as "Judicial Activism is broadly defined as the assumption of an active role on the part of the judiciary."[6]

One of the most eminent jurists of India, prof. Upendra Baxi talked about judicial activism in his work in 1985. He defined it as a way of using the power of the judiciary "which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes."[7]

In layman's language, it can be said that there is a mechanism in the constitution that talks about curing the defects of the executive using the constitution. Or we can define it as the power of the court to maintain a check on the laws and actions of the executive and legislature. The courts often help in improving the legal system of the nation by the use of their powers. Judicial activism or judicial review is not an ordinary power. Rather, it is a very special power that our constitution has given to the courts. Once, the ex-prime minister, Dr. Manmohan commented about the judicial review. He said that when the nation was not having satisfaction from the functioning of the executive and legislature, it was the judiciary that acted as the custodians and watchdogs[8].

The first landmark case which talked about judicial activism was Madbury v. Madison[9]. This was the first case where the US judiciary took an active step relating to judicial activism. It was justice Marshall who gave this judgment. Justice Marshall observed that a law repugnant to the constitution is void. It can be said that this case lays down the principle of judicial review of

[4] Arthur SchlesingerJr- "*The Supreme Court: 1947*", Forbes Magazine, 1947

[5] Himanshu Morwal and Tarusha Mathur, "*Evolution of Judicial Activism in India*", International Journal of Law and Humanities (Vol. 3 Issue 3; 1211)

[6] ChaterjiSusanta, "'For Public Administration' Is judicial activism really deterrent to legislative anarchy and executive tyranny? ", The Administrator, Vol XLII, April-June 1997, p9, at p1

[7] Upendra Baxi, Courage Craft and Contention -The Indian Supreme Court in the Eighties (Bombay: 1985) P.10

[8] R Shunmugasundaram, "*Judicial activism and overreach in India*",

[9] Marbury v. Madison 5 U.S (1 Cranch) 137 (1803)

activism for the first time in the United States of America. Another example of judicial review in the United States can be said to have happened in the case of Brown v. Board of Education[10].

NEED FOR THE JUDICIAL ACTIVISM

It is often said that "power corrupts and absolute corrupts absolutely". Similarly, if we give absolute power to the administration regarding any policy or law then the abuse of power may happen. Considering in view that in the present time, the power that the executive is giving to the administration there may be a chance of abuse of power. The effectiveness of the quality of administration law depends on the remedy and its effectiveness that they provide to the aggrieved individual. The system may collapse or become lawless and arbitrary if there is a weak remedial and redressal system. In the eye of scholar Wade; "...isa fundamental mechanism for keeping authorities within their due bounds…"[11].The definition is enough to teach one what judicial activism is all about. In administrative law, we can easily use the system to suppress the people's voices and do whatever the administration wants to do. But the judiciary is the only hope for people when the other parts of the government have turned away from them. We might enter the situation of chaos and arbitrariness and would have no idea about the same.

PREREQUISITES TO JUDICIAL REVIEW

In the present time, it is not the source that determines the ability of the court to review the decision-making of the executive. It is the nature of power that determines the same[12]. There are three conditions where the grounds of judicial review or justice activism can be undertaken. These are

1. Substantive ultra vires

2. Procedural ultra vires

3. abuse of power or arbitrariness

[10] Brown v. Board of Education 347 U.S. 483 (1954)

[11] "*Judicial Review- Scope, Ambit, Dimensions*", National Judicial Academy, https://nja.gov.in/Concluded_Programmes/2018-19/P1110_PPTs/13.Sunday%20Club%20talk%20(Judicial%20Review).pdf

[12] David Scott and Alexandra Felix, "*Principles of Administrative law*", Cavendish Publishing Limited, 1997

Ultra vires means anything that is beyond the powers. Whenever a task is given to the administration, there arises a need to check that they are working within the limit or extent to the powers that they have been assigned. Their power might have been abused and over-exercised. But without the presence of any check on the administration, things can easily go out of the hands. Usually, the restrictions on the administration's power are recorded by the same instrument which gives it the power. These restrictions may be procedural or may be substantive. But there are some times that the statute which confers the powers doesn't talk about the restrictions. Here the job the court gets difficult and now they will impose the limits on the powers of the administration. This is done by the courts using the principles of reasonableness and fairness.

Every administrative body has some essence or purpose for its formation. For example; a power given to the administration to look into the operation of trains will not give them the power to look into the operations of the tram or buses. If they take any action in the operation of the tram or buses, these decisions will be beyond their essence. These decisions are simply what one says 'doing the wrong thing'. These decisions would be ultra vires. This is in short, the concept of substantive ultra vires.

There may be a situation when the administration's decision is fulfilling its object or within the essence of the power. But they might not be fulfilling or correctly following the procedure established by law. In this case, their decisions will be open to challenge. Doing the right but in the wrong way is still wrong. This is how one can easily define what procedural ultra viresare. Even though it is not necessary that the statute that created the administrative body would be prescribing a specific method. In such a case, the decisions of the administrative need to satisfy the very famous rules of the law i.e., Rules of Natural Justice. The decision made must ensure fairness in following the procedures.

As time has passed, the court has developed a principle to prevent the abuse of power by the administrative decision-maker. The decision made by the administrative body might have been made by following the right process and maybe doing the correct thing. But there may be ulterior reasons which might have influenced the decision or they might have failed to consider relevant considerations. If this is the case then the decision-maker can be said to have acted in a manner that will be considered as an abuse of power. The administrator may have acted in a way that no reasonable person would have followed. This would render the decision ultra vires. This

principle is often called the Wednesbury principle of unreasonableness[13]. While giving the judgment, Lord Greene MR laid down three considerations or important points that one must remember. These were:

- that the courts would be only dealing with the executive action and not dealing with any judicial act.
- that the conditions under which the administration has taken the decision should be within the discretion of the local authority or administration without any limitation.

The statute that gave power to the administrative or local authority was not giving any chance of filing an appeal.

Any presence of malice or bad faith would also make the decision made by the ultra vires. But in recent times, the court has faced a problem. This is the problem that the doctrine of Ultra vires is found to be inadequate. Now there is the concept of judicial review is the ground of irrationality. The problem had increased way more when we are talking about the non-statutory body.

JUDICIAL CONTROL IN INDIA

Scope

In India, there exists a number of ways to take the judicial review. This can be done by the use of writs, appeals, reference to courts, injunctions, declarations, or any other judicial remedy given by the law.

The constitution of India gives ways to deal with judicial control or judicial review of administrative law. The writs can be used by the citizens in Supreme courts and High Courts by the use of articles 32 and 226[14] of the constitution[15]. Article 227 of the Indian constitution gives the power to the High court regarding the supervision of the tribunals and other adjudicatory bodies which fall within the territory of the High court. There is also a separate provision for appeal in front of the Supreme Court against the decision which has been given by the tribunal or has been made under article 136 of the constitution of India.

[13] Associated Provincial Picture Houses v Wednesbury Corporation (1948)
[14] Article 226, Indian Constitution 1950
[15] Article 32, Indian Constitution 1950

One of the best points in the Indian Administrative law is the existence of the constitutionally guaranteed mechanism of judicial control against the administrative action. The Indian administrative system is supervisory and not corrective in nature. The main pillars of judicial review in administrative law are articles 32 and 226. But when we talk about the concept of Judicial activism, we are talking about a wider concept. Judicial activism will be including all the methods through which an individual can seek relief against decisions of the administration.

In a very important case of the UK, the court while talking about the scope of judicial review of the decision of the house of lords said that the decision won't be available to challenge if it was not justiciable[16]. The concept of judicial review in cases of foreign relations was first talked about in the case of R. (Abbasi) v. Secy. Of State for the Foreign and Commonwealth office and Secy. of State of the Home Department[17].

When we talk about the same in the Indian context, the main article or the source of the power is Article 226 of the Constitution of India. Thought the impact and the extent of the judicial review in 226 would vary from case to case, from order to order, and by the nature of the order. The power of judicial review is not something that was given to the courts to act as a supervisor. The court under whose bench the petition or challenge has been filed does not sit in over the decisions of the administrative bodies[18]. The petition that is to be filed should have been allowed on only a few grounds that have already been defined earlier. The order that is to be challenged should not have been made by the administration while it was using the discretion that has been vested into it. To do the same, the aggrieved person would have to show that the discretion that was used by the administration was in itself not legal or was beyond the ambit of the administrative body. The supervisory jurisdiction or duties which have been given to the court just to look upon the functioning of the tribunal so that their decisions don't do miscarriage of injustice. The courts cannot be asked to take on the duties of the government or to perform its duties[19].

The judicial activism in administrative law is the result of the evolution of the remedy system. In India, we can clarify the remedies under three heads. These heads are the:

- Constitutional

[16]6 1985 AC 374: (1984) 3 All ER 935: (1984) 3 WLR 1174 (HL), 4
[17]2000 EWCA Civ 6-11-2002
[18] MP Jain, "*Administrative law*", Lexis Nexis,7th edition, 2011
[19]State of U.P. v. Johri Mal, (2004) 4 SCC 714

- Statutory
- Ordinary or equitable

CONSTITUTIONAL REMEDIES

The Indian constitution is the grundnorm in Indian law. All the other legislations derive their power from the constitution. The question that what law is, answered by the constitution in article 13. Clause 1 of the article talks about the pre-independence and post-independence laws. It talks about their validity in the territory of India immediately before the commencement of the constitution of India. The article also clearly states that any law which will violate the fundamental rights given by the constitution will be void to such an extent[20]. Then comes one of the most important clauses of the article. Clause 3 of the Indian constitution talks about what will be considered as law in the post constitution times. It states that the law of the law will include "Ordinance, order, bye-law, rule, regulation, notification, custom"[21]. If we see the wordings of clause 3, then the rules or notifications of the administrative bodies will also fall under the definition of law. And hence they will also have to abide by the rules and guidelines of article 13 and the constitution of India.

The constitution by the use of article 245 makes it clear for the nation that the legislative powers of both union and the state governments are subject to the rules and provisions of the Indian constitution.

These articles are the basic principles on which the doctrine of ultra vires is based in the Indian context. The Supreme Court has in its previous judgment has held that while delegating its powers, the legislature needs to lay down the policy and guidelines regarding the extent of the power of the administrative body. The guidelines and policies must lay down the essentials for performing and fulfilling the legislative functions. Any delegation that happens without the above said things will be excessive delegations and will be not allowed by the courts.

The judicial review will not only be limited to legislative acts but will also cover the executive and administrative acts. One must understand that judicial review is not like an appeal. It does not arise out of a decision. Rather, it is the review of how a decision was made.

[20] Article 13(2), Indian Constitution, 1950
[21] Article 13(3), Indian Constitution,1950

The Supreme court has in its judgment laid down that the court should use restraint while hearing matters which may amount to judicial review of administrative actions. It should deal with the legality of the action. The concerns that the Supreme Court might deal with in the cases are:

Checking the extent of the powers of the decision-making authority,

Checking for an error of law.

Check whether a breach of the rule of natural justice has happened or not.

Test of reasonability in the decision-making power.

Abuse of power has occurred or not.

ARTICLE 32 AND 226: SCOPE AND IMPLICATIONS

Any right which has been laid down without any remedy is of no use. There should always be a remedy for any possible breach of fundamental rights. As stated in the paper earlier that any legislation or administrative action which violates the Part III of the Indian constitution will be invalid and hence bound to be removed. This is a fundamental right of every right. But this right would be of no use if there is no remedy for the situation where this section might be violated. The remedy for this right is Article 32. Article 32 majorly deals with the writ jurisdiction of the Supreme court. The same power but with a wider approach or scope has been given to the High court's by the use of 226. The article's second clause empowers the Supreme Court to issue any of the 5 writs from time to time in cases as it deems fit. These writs are the Habeas corpus, Mandamus, quo warranto, and certiorari. The Supreme Court is called the 'protector of fundamental rights. This was held in the case of Romesh Thappar[22].

Both, the high court's and the supreme court have similar duties when we talk about articles 32 and 226. But a major question that arises from time to time is that whether the aggrieved person can go to the Supreme Court directly or should they visit the high court first. The situation here is a little dubious and it is difficult to ascertain the same. The answer to the question is filled with some concurring and some opposing judgments. Till the year 1987, people used to directly go to the supreme court but it was the case of Kanubhai Brahmbhatt[23] where this changed. The case

[22] Romesh Thappar v. State of Madras, AIR 1950 SC 124

[23] KanubhaiBrahmbhatt v. State Of Gujarat, 1987 AIR 1159

was heard by the High court as there were huge backlogs of cases in the Supreme Court. Though the ambit of the application under article 226 is very wide, it cannot be used in certain cases. These situations are:

The petition is not allowed because of the res judicata.

If the aggrieved person has another remedy available to them and they have not used the remedy before going to the high court. One must have exhausted all remedies available to them before they approach the high court.

If the petition filed talks about a conflict of facts. The parties must sort the facts first. The same has been said by the Supreme Court in the case of Ujjam bai[24].

If there has been an inordinate delay in filing the case in front of the appropriate court. The case file must be within the limitation period.

These two articles might be looking similar but are very different from each other. Article 32 allows writs only if any breach of fundamental right has happened. But this is not the case under article 226.

One may ask that what is the relationship between administrative law and article 32? One of the most notable aspects of article 32 is that it can be used against administrative action. It can be invoked if there exists any conflict between the fundamental rights and the administrative action. If there is no conflict with the fundamental rights then article 32 will not be used. And here comes the use of article 226. Article 226 is not limited to just using it for protecting the rights and can be invoked or used for a wider set of purposes. This is a major benefit that citizens have of article 226 over article 32.

For example, when a tax is being illegally levied upon, it will not be challenged under Article 32 if the fundamental right of the public or one person is not violated. Even though there exists a provision for the protection of the public from the arbitrary imposition of taxes under article 265 of the Indian constitution. The aggrieved person would be free to challenge such imposition of taxes via the 226 in their respective High court.

[24]Smt. Ujjam Bai vs State of Uttar Pradesh, 1962 AIR 1621

But as soon as the illegal levied tax infringes the fundamental rights of any Indian, then the remedy of article 32 will be available to them. An example of the same is the case of Tata Iron Steel Co. v. S.R. Sarkar[25].

FINALITY CLAUSE AND HOW DOES IT WORK?

The finality clause can be added to any section in the statute which will impose a bar to the jurisdiction of the ordinary courts. This can be seen in the statutes when there exists a finality clause that asks the people to use the tribunals and not the ordinary courts. It must be noted that the finality clause is not absolute. It is of no use in certain cases. These cases are:

The case filed is related to the constitutionality of the statute. No bar can be imposed on the jurisdiction of the court to check whether a statute is constitutional or not. If the clause is written in the statute, it will have no impact on the people.

The finality clause cannot stop one from filing a petition challenging the ultra vires actions of the administrative bodies. If any action taken by the administrative body is not within their powers, then the finality clause cannot protect the actions.

Jurisdictional error: If there is an administrative action that has been challenged on the ground that there is some jurisdictional error or the lack of jurisdiction, then there will not be any effect of the finality clause on the case. The lack of jurisdiction may occur where the authority assumes the jurisdiction but that jurisdiction never belonged to that authority. The lack of proper jurisdiction may arise if there is no proper constitution of jurisdiction.

If the action of the administration is in violation of the principles of natural justice and someone challenges the same, then there is no use of the finality clause. The finality clause cannot stop one from challenging the action because the action is violating the principles of natural justice.

The finality clause cannot stop one from challenging the administrative action if the action is violating the provisions of the statute. The statute from which the authority derives the power lays down certain principles or guidelines that they need to follow. If these guidelines are violated, then there exists the right to challenge the administrative action.

[25]AIR 1961 SC 65

CONCLUSION

Administrative actions are the major part of the functioning of the present-day government system. One cannot deny the importance these bodies have in present-day society. Another aspect of this development means that they now have a huge amount of power under them. This increase in power doesn't reach arbitrariness is ensured by the use of the judiciary. Judicial activism is the tool that Indians have now to challenge the administrative actions if they think that the article violates fundamental rights. They have two different sources to ensure this. This is done by the use of articles 32 and 226 of the Indian constitution. With time, even the concept of judicial activism has evolved a lot. It has its benefits and demerits. On one hand, it acts as the savior of rights but at the same time, it becomes the hurdle in the development of the legislation. Now and then administrative actions are challenged, mostly without any basis. This creates a hindrance to the functioning of the government. It is the little price that one has to pay to ensure the safety of the rights of society.