

ADMINISTRATIVE LAW

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2018 -19 Onwards	Core 8 : Administrative Law	III	18MPA31C

UNIT – I: Introduction Meaning,

Nature and scope of Administrative Law – Historical Growth and Development of Administrative Law – Rule of Law – Droit Administratif – Constitutional Law and Administrative Law.

UNIT – II: Government and Administrative Law

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UNIT – III: Delegated Legislation

Legislature and Administrative Law -Delegated Legislation – Control over Delegated Legislation.

UNIT – IV: Judiciary and Administrative Law

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UNIT – V: Control over Administration

Government Control Over Public Undertakings – Legislative control over Public Undertakings – Statutory Inquiries – Statutory and other Remedies – Judicial Review of Administrative Action – Ombudsman, Lokpal – Lokayukta.

Reference Books

1. Durga Doss Basu, Administrative Law, Prentice Hall of India (p) Ltd New Delhi, 1986.
2. Kesari, U.P.D., Lecturers on Administrative Law,
- 3.C.K. Takwani, Lectures on Administrative Law, EBC Publishers, Noida. 2014

ADMINISTRATIVE LAW

DEGREE: II MA

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UNIT – II

GOVERNMENT AND ADMINISTRATIVE LAW

Government, Governing, and Governance:

Government: the office, authority or function of governing. Governing: having control or rule over oneself. Governance: the activity of governing. Accordingly, governance is a set of decisions and processes made to reflect social expectations through the management or leadership of the government (by extension, under liberal democratic ideals, the will of ‘the people’ as they rule themselves). There are many issues implicit in this set of relationships whose core revolves around the notion of citizenship as this defines the body politic over which claims of self-rule apply.

In the most general sense we have the difference between a liberal democratic view that the government (state) serves citizens who have a natural claim on services as a benefit and right of citizenship on the one hand, and on the other the counter enlightenment view often associated with fascism: that the citizen must serve the state and has no rights other than those granted by the state. In what may be called the American model citizenship is a broadly endowed set of rights representing potential claims for benefits, as defined by the state.

The result is that in the USA what constitutes a valid claim of citizens is contested, and then the question of who qualifies to have claims met is debated. This offers us an opportunity to understand a number of pressing issues hotly contested: what is the proper role of government, who should have the right to make claims, how exclusionary or inclusionary we should be as a society, how are rights defined and defended, to name but a few.

The current socio-political manifestation of these issues is struggles over immigration policy (and the recent reactionary policies passed in Arizona), the Tea Party Movement (if such a thing exists – perhaps more properly, a right-wing populism mixed with aggressive libertarian views), the ongoing debates over health care reform, and election finance reform (the last speaking to the issue of whose voice is loudest, and by implication who is a citizen protected by these generic rights imparted in the American model). Add to this mix the BP ecological, social and political disaster in the Gulf of Mexico and oddly we have an opportunity to critically reflect on government and governing.

Let us consider these separately. A recent US Supreme Court ruling found that corporations have the same legal rights as other ‘individuals’, and campaign finance laws designed to limit spending by corporations violated the free speech rights of those corporations. A long tradition of trying to keep the level of resources from becoming the defining factor in local

and national elections was suddenly turned on its head, and politicians most willing to align with corporate interests rather than those of their constituents now have an advantage.

Laws in many states in the USA allow candidates to forego raising funds privately and instead use public funds to campaign for office. If candidates who opt out raise excessive dollars (defined in many ways) those getting public funds can receive additional dollars to create a more even playing field. But recent legal challenges working through the courts argue that by providing additional public support these laws have a limiting and chilling effect on the 'free speech' of those raising funds privately.

Not only can corporations now flood the political landscape with funds to support politicians favorable to corporate interests, but now it seems the US Supreme Court may rule it is 'unfair' to provide additional public funds when some candidates raise even more money from private (corporate?) sources.

The recent passage of the Arizona law that allows police to demand the presentation of documents proving someone is a citizen of this country (when properly provoked by, say, the color of one's skin or other outward appearances suggesting non-legal immigrant status) has prompted many states around the country to consider the passage of similar state laws. The argument in defense of this action appears as some version of the premise that undocumented (illegal) immigrants create problems by

- a) taking jobs citizens would otherwise have,
- b) drain local resources by using up public services or crowding hospitals, or
- c) contribute to violent crime in the community. In the end the common mantra is that the Federal Government is not dealing with the problem and so states have to step into the breach to stem this flood.

Never mind that for each point

- a) jobs held by these migrants are otherwise not filled,
- b) undocumented immigrants tend to stay away from public services for fear of being 'caught', and use them only in the most extreme instances,
- c) crime rates and statistics do not support the claims of rising crime due to these undocumented workers.

These laws proposed are little more than an extension of racial profiling to the extreme, and the disregard for rights is being extended (or at least laws are now being proposed) that will deny birth certificates to children born in this country to undocumented workers on the assumption that without a legal proof of birth one cannot claim the citizenship rights of children (and perhaps delay the deportation of non-citizen parents).

Healthcare reform legislation is little more than a boon to insurance companies who now will have new customers – with the added insult that the fine for an individual not having insurance as much as the greater of \$750 or 2 percent of income while insurers who refuse to provide insurance might be fined only a fraction of that amount. Yet, even this paean to the bottom line of insurance companies (our new citizens!) seems to be too much government involvement for those who identify as Tea Party activists.

The irony (perhaps more a tragedy of political ignorance) is that their zeal for lower taxes and no government involvement in their lives ignores the fact that for the vast majority of them taxes actually decreased, and major government entitlements like unemployment insurance, social security and Medicare sustain these anti-government protestors.

No one in the crowd seems to appreciate the irony of slogans that demand the government stop meddling in citizen affairs and keep its hands off Medicare! Citizenship, it would seem, does not warrant any claim that government provide collective goods even as the very notion of citizenship rights is hotly defended in the assault on immigrants crossing the border for menial work at pathetic pay (of course, we do not really worry about those graduate students overstaying their visas to work as professionals – unless they are Muslim or from ‘enemy’ countries!).

The Tea Party apparently stands for, if nothing else, a demand that governance disappear along with government – though the recent pronouncements of Rand Paul clearly demonstrate that this political ‘movement’ is defined more by what it is against than what it is for, and even on that level there is scant agreement over what they are against (isolationism clashes with military adventurism, social conservatism on issues like abortion clashes with true libertarian ideals of no restraints, and some even want to end all entitlement programs which many want to preserve – like Medicare!).

The recent and ongoing disaster commonly called the ‘BP Oil Leak’ brings all this together. By the time this issue is printed (November 2010) we may be experiencing a full blown ecological disaster with destroyed shorelines, habitats, fishing grounds and the like that will have altered the entire political economy of the inner Gulf Coast region. Furthermore, if ocean currents and projections are even marginally correct the world’s third largest coral reef off the Florida coast will have been severely stressed if not destroyed, tourism in Florida will have been trampled and the major economies, livelihoods, and future of the coastal residents of the five states bordering on the Gulf of Mexico as well as into the Atlantic will be in shambles.

This is based on the current spill into the Gulf (underestimated as it may be) and on the expectation that the flow of oil will stop soon. The tragic ironies are two: the total amount of oil we might have gotten from the well is a fraction of the daily US oil consumption; and Florida, a state which has waged a decades-long struggle to resist off-shore drilling while Louisiana embraced it, will nonetheless be significantly impacted. There are no political boundaries to ecological disasters.

Governance in this oil disaster is effectively non-existent. The major blame is being tossed about like the proverbial hot potato from one corporation to another and two of these players (BP and Trans Ocean) are not even US corporations but no doubt get all the rights and privileges given to them by the US Supreme Court as corporations doing business in the USA. Our government fulminates (perhaps not as thunderously as we would like – that may yet come) and sends the Department of Justice to investigate.

Governing manifests itself ineffectively, as we learn day by day, and increasingly after the fact, BP routinely subverts, misleads, or inaccurately responds to government regulations designed to protect the public good. Indeed, recent data revealed BP to be in violation of safety standards many times more often than the other oil companies being monitored. Politicians long the recipient of oil industry largesse continue, in the face of contradictory evidence, to minimize the disaster, trivialize the concerns, and even go so far as encourage more off-shore drilling (lest we forget, our ‘change’ president did authorize more off-shore drilling just weeks prior to this disaster).

We, as citizens, are assured that the government is acting on our behalf and that BP will be

held responsible for all costs. The wonder is that no one seems to concern themselves with the legal maneuvering of companies like Johns Manville that effectively left all product liability claims (then due to asbestos) behind through bankruptcy proceedings. Wall Street is already calculating how to partition BP into 'good' and 'bad' entities, the former retaining all that is of value while the latter holding all the liabilities from this disaster. And the US Congress stalls as it ponders the wisdom of removing absurd liability caps of \$75 million to cover the costs and consequences of this disaster.

We may well ask: are we governing? Does a government exist that represents all of its citizens? Have things changed so much that we do not even concern ourselves with any semblance of legitimacy – perhaps settling that old debate over whether or not the state is relatively autonomous from capital? We are left to ponder whether or not our definition of 'citizen' is too broad, and whether there are effectively two classes of citizens: those who manage to get government support when no competing claims are presented, and those whose wealth and corporate ties ensure that governments act on a narrow definition of 'the public' as it governs.

This issue provides a conversation between Tamara Nopper (2010), whose article on Korean immigrant entrepreneurs appears early this year, Pyong Gap Min and Kyeyoung Park over the issues raised. The current debates around immigrants, their roles and the barriers they face make this exchange an important one. The remainder of this issue contains articles by Raewyn Connell on managers and intellectual work in a neoliberal world, Richard Sullivan about the opportunities and constraints of labor organizing and its movement building potential, and Peter Kennedy who questions the premise that the knowledge economy represents a significant shift in capitalist production, and the way labor power continues to be exploited under what he calls late capitalism.

Government and Administrative Law:

The emergence of the social welfare has affected the democracies very profoundly. It has led to state activism. There has occurred a phenomenal increase in the area of state operation; it has taken over a number of functions, which were previously left to private enterprise. The state today pervades every aspect of human life. The functions of a modern state may broadly be placed into five categories, viz, the state as:-

- protector,
- provider,
- entrepreneur,
- economic controller and
- arbiter.

Administration is the all-pervading feature of life today. The province of administration is wide and embrace following things within its ambit:-

It makes policies,

- It provides leadership to the legislature,
- It executes and administers the law and
- It takes manifold decisions.
- It exercises today not only the traditional functions of administration, but other varied types of functions as well.
- It exercises legislative power and issues a plethora of rules, bye- laws and orders of a

general nature.

The advantage of the administrative process is that it could evolve new techniques, processes and instrumentalities, acquire expertise and specialization, to meet and handle new complex problems of modern society. Administration has become a highly complicated job needing a good deal of technical knowledge, expertise and know-how. Continuous experimentation and adjustment of detail has become an essential requisite of modern administration. If a certain rule is found to be unsuitable in practice, a new rule incorporating the lessons learned from experience has to be supplied.

The Administration can change an unsuitable rule without much delay. Even if it is dealing with a problem case by case (as does a court), it could change its approach according to the exigency of the situation and the demands of justice. Such a flexibility of approach is not possible in the case of the legislative or the judicial process. Administration has assumed such an extensive, sprawling and varied character, that it is not now easy to define the term “administration” or to evolve a general norm to identify an administrative body.

It does not suffice to say that an administrative body is one, which administers, for the administration does not only put the law into effect, but does much more; it legislates and adjudicates. At times, administration is explained in a negative manner by saying that what does not fall within the purview of the legislature or the judiciary is administration.

In such a context, a study of administrative law becomes of great significance. The increase in administrative functions has created a vast new complex of relations between the administration and the citizen. The modern administration impinges more and more on the individual; it has assumed a tremendous capacity to affect the rights and liberties of the people. There is not a moment of a person’s existence when he is not in contact with the administration in one-way or the other. This circumstance has posed certain basic and critical questions for us to consider:

- Does arming the administration with more and more powers keep in view the interests of the individual?
- Are adequate precautions being taken to ensure that the administrative agencies follow in discharging their functions such procedures as are reasonable, consistent with the rule of law, democratic values and natural justice?
- Has adequate control mechanism been developed so as to ensure that the administrative powers are kept within the bounds of law, and that it would not act as a power drunk creature, but would act only after informing its own mind, weighing carefully the various issues involved and balancing the individual’s interest against the needs of social control?

It has increasingly become important to control the administration, consistent with the efficiency, in such a way that it does not interfere with impunity with the rights of the individual. Between individual liberty and government, there is an age-old conflict the need for constantly adjusting the relationship between the government and the governed so that a proper balance may be evolved between private interest and public interest. It is the demand of prudence that when sweeping powers are conferred on administrative organs, effective control- mechanism be also evolved so as ensure that the officers do not use their powers in an undue manner or for an unwarranted purpose.

It is the task of administrative law to ensure that the governmental functions are exercised according to law, on proper legal principles and according to rules of reason and justice fairness to the individual concerned is also a value to be achieved along with efficient administration.

A democracy will be no better than a mere façade if the rights of the people are infringed with impunity without proper redressed mechanism. This makes the study of administrative law important in every country. For India, however, it is of special significance because of the proclaimed objectives of the Indian polity to build up a socialistic pattern of society. This has generated administrative process, and hence administrative law, on a large scale.

Administration in India is bound to multiply further and at a quick pace. If exercised properly, the vast powers of the administration may lead to the welfare state; but, if abused, they may lead to administrative despotism and a totalitarian state. A careful and systematic study and development of administrative law becomes a desideratum as administrative law is an instrument of control of the exercise of administrative powers.

Administrative Law is, in fact, the body of those which rules regulate and control the administration. Administrative Law is that branch of law that is concerned with the composition of power, duties, rights and liabilities of the various organs of the Government that are engaged in public administration. Under it, we study all those rules laws and procedures that are helpful in properly regulating and controlling the administrative machinery.

There is a great divergence of opinion regarding the definition/conception of administrative law. The reason being that there has been tremendous increase in administrative process and it is impossible to attempt any precise definition of administrative law, which can cover the entire range of administrative process.

The administrative law has come to stay because it provides an instrument of control of the exercise of administrative powers. The administrative law has to seek balance between the individual right and public needs. As we know in the society there exists conflict between power and justice wherever there is power, there exist probabilities of excesses in exercise of the power. One way is to do nothing about this and let the celebrated Kautilyan Matsanayaya (big fish eating little fish) prevail.

The other way is to try and combat this. Administrative law identifies the excesses of power and endeavors to combat there. The learned Author, Upender Baxi, while commenting on the administrative law has rightly observed in. (The Myth and reality of the Indian administrative law, Introduction by Upendra Baxi in administrative law ed. by I.P. Massey 2001 at XVIII) “to understand the stuff of which administrative law is made one has to understand relevant domains of substantive law to which courts apply the more general principles of legality and fairness.

In this way a thorough study of administrative law is in effect, a study of the Indian legal system a whole. More importantly, it is study of the pathology of power in a developing society.” Growth in science and technology and modernization has resulted in great structural changes accompanied with increase in the aspirations of people as to quality of life. We know socio-eco-politico and multi dimensional problems which people face due to technological development cannot solved except by the growth of administration and the law regulating

administration.

No doubt the principles evolved by the court for the purpose of controlling the misuse of governmental of power is satisfactory. Yet it is said that the administrative law in India is an instrument in the hands of middle class Indians to combat administrative authoritarianism through the instrumentality of the court and there is need to make administrative law a shield for the majority of Indians living in rural area and people under poverty line.

Executive and Administrative law:

The executive branch is one of the three branches of government, which are central to the institutional design of a constitution. The allocation of powers and the interrelation between the three branches of government—the executive, the legislature, and the judiciary—are key elements of such a structure. Beyond the broad and general distinction that the legislature makes the laws and approves the budget, the executive implements the laws, and the judiciary adjudicates on laws, many questions need to be addressed and answered in order to design the appropriate balance between the three.

The extent to which these branches should be separated from one another and the different degrees of reciprocal checks and controls between them are a source of constant debate in the process of drafting a new constitution or reforming an existing one. Thus, the design of the executive branch cannot be discussed in clinical isolation, but requires an understanding of the governmental structure within which it operates. Before addressing design options for the executive in more detail, a brief overview of the interrelation of the three branches seems helpful.

In particular, the institutional balance between the executive and the legislative branches of government offers a variety of different arrangements and design options. People who study and debate constitutions often sort the wide array of systems into three categories: the presidential system, the parliamentary system, and, in between the two, with characteristics of both, the mixed systems. The elementary difference between the presidential and parliamentary system is that in a presidential system the legislature and the head of government are both directly elected for a fixed term, whereas in a parliamentary system only Parliament is directly elected, and the head of government is selected or elected by Parliament and requires its constant support.

Other distinctions between systems can be made, but opinions vary as to whether these distinctions support the classification of a given system as presidential, parliamentary, or semi-presidential.

SYSTEMS OF GOVERNMENT AND THE IMPACT:

One central issue in democratic constitution building and constitutional design is the framing of the state structure. Generally, constitutions do not expressly declare that they have adopted a presidential, parliamentary or mixed system. Instead, each constitution designs its own specific and context-related balance between the two branches of government, and political scientists then categorize them as following a specific model design. Since different scholars rely on different parameters to define those models, a number of countries are categorized differently by different authors.

This vagueness makes it very difficult, if not impossible, to argue reliably the potential strengths and weaknesses of one system.¹ Acknowledging this caveat, the following paragraphs briefly introduce the systems and give a general overview. Those characteristics that are commonly acknowledged as a generally accepted parameter to describe a specific system of government are indicated in bold type in boxes 1–3. Criteria that are often referred to by some observers but which others regard as irrelevant are also added though they are not considered defining elements of the respective governmental system.

The key characteristic of the presidential system is that the executive and legislature are separate agents of the electorate, and their origin and survival are thus separated (which creates the possibility of an impasse between the two without a constitutionally available device to break the impasse).

The President is both the head of state and the head of government. – The President is elected by popular vote (or by an intermediate institution that carries out the popular preferences). – The President's term of office is fixed (there is no vote of no confidence). S/he is neither politically accountable to the legislature nor dependent on his/her party's support to stay in office.

Generally, the Cabinet derives its authority exclusively from the President. – Often, the President has some political impact in the process of law-making.

A parliamentary system: The key criterion is the fusion of powers: the executive is hierarchically subordinated to the legislature, thus its origin and survival depend on the legislature. – The head of government is elected by the legislature. – The head of government is accountable to Parliament (through a vote of no confidence) and dependent on his/her party's support. – Generally, the head of state (often a monarch or ceremonial President) is not the same person as the head of government.

Characteristics of a mixed system of government: The key characteristic of a mixed system is a dual executive. It combines a transactional relationship between the executive and the legislature with a hierarchical one. – The President, who serves as the head of state, is elected by popular vote. – Neither the President nor the legislature is in full control of selecting/ appointing and removing the Prime Minister. – The Prime Minister as the head of government is accountable to Parliament (through a vote of no confidence). – Generally, the President possesses quite considerable executive powers.

Potential strengths and challenges of different systems of government: Constitution builders are expected to design a constitution that provides peace, stability, reconciliation and (often) a democratic transition as well as capable governments that are effective and do not abuse their powers. The quest for the appropriate system of government is thus often accompanied by evaluating the relative merits and consequences of the respective systems of government to reach those ends. Indeed, a vast literature exists that explores the strengths and challenges of each system. Table 1 illustrates the strengths that are commonly attributed to the respective systems of government and the challenges associated with each.

Executive System: Reading the relevant textbooks, the executive is one of three potential branches of government, traditionally with a distinct objective—to enforce or implement the law as drafted by the legislature and interpreted by the judiciary. Practically, the executive can play a uniquely powerful role and is often viewed as the natural leader or ruler of a

country, personifying the country's image nationally and globally. Unsurprisingly, then, the election of the head of the executive branch is an important event that can sow great disharmony, particularly in societies emerging from conflict with pronounced ethnic identification.

An election separates winners and losers, and the losers justifiably may fear that the new leader may deal preferentially with his or her supporters at the expense of the opposition or even anyone not deemed an ally. Indeed, many internal conflicts start or re-emerge as part of a struggle about keeping, aggregating and/ or extending executive power, be it within or beyond the constitutional framework.

However, the process of drafting a constitution is not a purely academic exercise in which actors seek the best technical solution available for their country. The drafters of constitutions and negotiators are also political actors/parties aiming to translate their own political agendas into the text of the constitution. Thus, constitutional design often represents a compromise between various actors with different interests and expectations.

Several post-conflict stakeholders, including spoilers and perpetrators of violence, will demand accommodation. Thus, constitution builders may not be able to achieve the best technical constitution possible but may succeed by securing the best constitutional compromise available. As a consequence, constitutional designs will differ depending on whether a strong executive is present and influences the course of a constitutional process.

By offering constitutional options in a comparative, structured and coherent manner, this chapter attempts to help the relevant actors to translate their agendas into a constitutional format as well as to facilitate the accommodation of various competing interests towards a viable constitutional compromise. The chapter focuses mainly on constitutional options to de-concentrate executive powers.

Without ignoring the potential benefits of a strong national executive in specific cases, the chapter presumes that many violent conflicts are at least in part caused or sustained by an overly centralized executive, concentrating powers on a few and marginalizing many. The bottom line of de-concentrating executive powers is to allow more actors to be involved in decision-making processes, be it within the executive or as part of a system of institutional checks and balances vis-à-vis other branches of government.

Including more players in running the executive or checking its powers, at the same time, creates more potential veto players, delaying decision-making processes. Thus a careful balance needs to be found between an inclusive and an effective executive design.

With regard to the first part, again two different aspects of institutional design are highlighted: the institutional design within the executive, and between the executive and other branches of government. The institutional design within the executive comes in two different dimensions: horizontal and vertical. The horizontal dimension explores options for de-concentrating the executive structure at the national level, be it through the formation of a collegial presidency (more than one person is involved in running presidential affairs), a dual executive (President and Prime Minister) or the regulation of presidential term limits.

The vertical dimension addresses the allocation of executive powers at various levels of government through different forms of decentralization. Next to the constitutional design

within the executive, the institutional relationships between the branches of government are of great importance. Different systems of government have different impacts on the executive in an overall setting of the separation of powers and checks and balances. In addition, more specific institutional design options offer various opportunities to check the performance of the executive and different degrees to which this can be done.

The specific powers assigned to the chief executive determine the degree of substantive concentration of executive powers. One might draw a distinction between those powers that traditionally rest with the executive—such as declaring a state of emergency, granting pardons or an amnesty, or declaring war—and those tasks traditionally under the authority of the legislature, but with executive involvement. Among the chief executive's legislative powers might be the authority to veto bills approved by the legislature, enact legislation by decree, take executive initiative in some policy matters, call referendums or plebiscites, and shape the budget.

There is an enormous literature on hypotheses and predictions about the implications and consequences of specific forms of constitutional design for political behaviour, public policy, political stability and social cohesion, and so on. But reality proves that there are very few clearly established generalizations in this area. As stated by one author, the world of constitutional predictions is littered with failed predictions and unanticipated consequences.

This is because there are so many different variables—political, economic and social—that intervene between the wording of a constitutional text and its impact or effect. Acknowledging these dynamics, the chapter presents a comparative analysis of a range of constitutional options as drafted and promulgated around the globe without attempting to explain the historical pedigree of particular provisions in any particular national context, since the same norm, when applied to different contexts, can yield different results; similarly, competing norms can produce identical effects.

‘The music of the law changes, so to speak, when the musical instruments and the players are no longer the same.’ Damaška, Mirjan (Sterling Professor of Law, Yale University), ‘The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments’, Because no two constitutions are identical, lessons from one may apply differently in another context, to another people, or against another cultural background. Some institutional arrangements that work very well in one set of social conditions may be useless or even destructive in other. Constitutions can lay down the rules and principles, but by themselves these rules and principles will not change society.

For instance, the Constitution of Thailand assigns the King a predominately ceremonial role, yet the Thai people nevertheless afford him great adoration and respect, which in turn bestow upon the King significant informal powers to direct the political affairs of the country. Likewise, implicit legal or political conventions in other countries, which may be imperceptible to outsiders, may distribute power extra-constitutionally. Although neither provided for nor supported in the constitution, these conventions can shape and structure political actions.

This is especially apparent in some Commonwealth countries: the greatest political and constitutional crisis in Australia—‘the Dismissal’—did not exactly constitute an unconstitutional act, but rather reached that status by aggregating several acts that, while technically constitutional, opposed longstanding Australian conventions.

Governmental systems may shape the structure of executive power in a distinct manner, but can only indicate the power dynamics derived from the actual context. A President endowed with strong constitutional powers may nonetheless be weak in the face of a highly fragmented political party system and an unreliable base of support in the legislature. Similarly, a President with fairly weak constitutional powers may appear to dominate the policymaking process if his or her party controls a majority of seats in the legislature and is highly disciplined.

On the other side, even in parliamentary systems in which the legislative majority selects the Prime Minister, political parties fighting parliamentary elections often link the campaign to the personality and character of their leaders rather than to particular programs. When announcing electoral results, the media crown an individual ‘winner’. Individual actors also matter if it comes to the actual power design, as the example of Russia underlines (see above).

Considering the interplay of factors that determine the actual impact of constitutional provisions, one can hardly predict the effect of those provisions without intimate knowledge of a specific context. Abstract theorizing as to which model might fit best is doomed to failure without a careful understanding of both the context from which a particular provision is taken and the context in which a particular provision will apply.

Therefore, while the discussion below should facilitate the understanding of constitutional design for the executive, this chapter does not endeavor to provide specific case studies or advice, but rather recommends that we look deeper into the specific context once a constitutional option from a specific country has *prima facie* been identified as helpful.

DESIGN FOR A CENTRALIZED EXECUTIVE IN A DEMOCRATIC SETTING:

In a centralized executive, power is concentrated in one individual at the national level, representing both the government and the country. Politically, the authority of the head of the executive will not originate in the legislature, which may not dismiss him/her by a vote of no confidence. He or she, moreover, has full control over the Cabinet. Except at periodic elections, therefore, the head of the executive branch is largely free from political oversight and has only limited exposure to questioning by the legislature.

These characteristics are often reflected in the institutional design of a presidential system. However, centralized executives are not only found in countries with a presidential system. In part, this is due to the fact that not only institutional design matters, but also the strength and structure of the political party system or the authoritarian character of the government. In part, various institutional structures in parliamentary systems may also have an impact on centralizing executive power.

One aspect, for example, is how far the prime minister in a parliamentary system has full and exclusive control over the Cabinet. Thus, although the core element of a parliamentary system is the government’s political dependence on the legislature, it makes a considerable difference whether the individual composition of the Cabinet is the sole responsibility of the Prime Minister. Next to the institutional structure, the tasks assigned to the chief executive contribute to the actual concentration of executive authority: the extent to which s/he is involved in declaring a state of emergency (and the increasing executive powers that come

along with it), granting pardon or amnesty, or declaring war and so on are indicators of the strength of the executive branch, as is the chief executive's impact on the law-making process.

A strong executive is not destructive by nature. It might provide stability and hold together a country in which there are many divisive forces (see for example the case of Brazil). It may also strengthen the executive to ensure that policies are consistent and facilitate long-term planning. In the United States of America (USA), for instance, some of the challenges currently facing President Barack Obama's administration regarding implementing the reform agendas promised in the electoral campaign are due to the legislature being opposed.

This example highlights the challenge facing an executive that needs to accommodate veto players from other branches of government. The main challenge for strong executive design is to prevent its structure facilitating a shift to autocracy and undemocratic rule. Managing autocratic tendencies becomes an even greater challenge if executive power is largely free from legal oversight and/or there is too close a link between the supreme judges and the executive because appointment procedures are predominately in the hands of the latter.

The Egyptian Constitution and its development over the last 40 years highlight the challenges of an overly centralized executive. It allowed an autocratic system to grow in the first place, which then was further strengthened by executive-driven constitutional amendments that redefined the institutional imbalance later on. In its 2007 version, the Constitution of Egypt not only centralized executive power in the President with no term limits (although formally it qualified as a semi-presidential system);

It also authorized him/her to dissolve the legislatures if deemed necessary, and to appoint some members in the first legislative assembly and quite a few in the second chamber (one-third of them), and gave him/her strong legislative veto powers and far-reaching authorities under the label of the 'fight against terrorism', next to being the supreme commander of the armed forces and the supreme chief of the police. Constitutional reforms in countries with similar structures might want to focus on ways and means to de-concentrate executive powers.

Options for institutional de-concentration within the executive: Drafters can seek a dispersal of executive powers within the executive by two different means:

- (a) Horizontally, by instituting a collegial executive or a dual executive,
- (b) Vertically by adding additional levels of government.

A collegial executive: A collegial executive comprises various actors in the institution of the head of state/ chief executive. Collegial executives can take several forms. Following a peace protocol signed in 2004, Sudan established a fairly loose form consisting of a President, a First Vice-President and a Vice-President with a clear hierarchy. Before the independence of South Sudan in July 2011, the President of Sudan served as the single head of state, but several decisions required consultation within the presidency or even the consent of the First Vice-President.

While the President appointed both subsidiary positions, one had to hail from 'northern' Sudan, and the other from 'southern' Sudan (now independent South Sudan). Moreover, the First Vice-President could not come from the same region as the President. The first vice-

president did not hold office at the will of the President, rather the Constitution predetermined their length of service by other means.

A dual executive: Horizontal dispersal also can occur by establishing a dual executive composed of a head of state and a head of government. ‘Dual executives’ in the literal sense have a long tradition and are widespread. For example, in many countries, the head of government manages the government’s affairs and sets policy, while the head of state, often a President or a monarch, holds a ceremonial position with little political authority (the head of state ‘reigns’, the head of government ‘rules’).

Over the last two decades, a more evenly matched dual executive, a system often referred to as semi-presidentialism, has become more common. A dual executive in a semi-presidential system divides the executive into two independently legitimized and constitutionally distinct institutions: an indirectly selected head of government, the Prime Minister, subject to majority support in the legislature, and a popularly elected head of state, the President. The precise balance of authority between the two heads of the executive can vary widely.

Depending on the power balance, some models of a dual executive resemble rather a presidential system, others rather a parliamentary system. For example, in Egypt, the Constitution of 2007 defined the government as the supreme executive and administrative organ of the state with a Prime Minister at the top.

Presidential term limits: One might also consider the dimension of time as an important factor in deconcentrating executive power from an individual person by constitutionally regulating the chief executive’s term of office. Although term limits, on the surface, restrict the full democratic choice of the people as to whom they want to have in office, they are one of the most important devices that support democratic transformation and strength in electoral authoritarian regimes or infant democracies.

Or, as two authors put it, ‘the combination of term limits and regular elections has displaced the coup d’état as the primary mode of regime change and leadership succession in contemporary Africa’.¹¹ Notably, neither Tunisia nor Egypt had term limits enshrined in the constitution.

Distributing executive powers to various levels of government through decentralization: Models of a collegial or a dual executive offer opportunities to distribute the highest executive powers at the national level of government between more than one person, either by their making decisions together or by assigning different executive powers to different persons. In addition or alternatively, executive powers can also be distributed in a vertical manner by allocating executive powers to different levels of government. Creating executive elements at different levels of government (regions, provinces, villages etc.) is another way to involve and include more stakeholders in the executive.

By delegating/devolving particular competences to a lower level of administration/government, responsibility and substantive powers seep down from the national executive. For example, the US Constitution allocates the making of much of the penal law to the subunits (states). Thus the governors of states must answer requests for pardons, including those of capital offenders in those states where capital punishment exists.

Without legally eliminating the President’s right to pardon, which still reaches offenders in

cases of national crimes, this devolution of powers in the United States has contributed to the dispersal of presidential power.

De-concentration, delegation and devolution: the distinctions:

De-concentration occurs when the central government disperses responsibility for implementing a policy to its field offices. This transfer alters the spatial and geographic distribution of authority, but responsibility and power remain at the center, and the transfer does not transfer actual authority to lower levels of government and thus does not create additional levels of government (see figure 8). Delegation requires the central government to refer decision-making and administrative responsibilities for various public functions to another level of government.

Delegation features a principal–agent relationship, with the central government acting as principal and the local institution acting as agent. The degree of supervision varies and might include substantial central control, permitting little discretion at the lower level. Conversely, at the same time as enforcing adherence to formal guidelines, the central government might fully allocate the administration and implementation of policy to the subunits.

Institutional checks on the executive: Another way to control executive powers is by designing a system of checks by and dependencies on the other branches of government. As highlighted at the beginning of the chapter, two institutional designs are particularly adept at checking executive power: a parliamentary system and the dual executive in a so-called semi-presidential system. To maintain political authority and thus power in both, the executive cannot alienate the legislature.

In parliamentary systems, executive authority:

- (a) arises from the legislature and
- (b) is subject to a legislative vote of no confidence that can bring down the government.

These dynamics create a hierarchical relationship between the branches of government in the legislature’s favor. The power of the executive might be even further controlled if the legislature also has a direct impact on the composition of the Cabinet. A dual executive in a semi-presidential system literally divides the executive into two independently legitimized and constitutionally distinct institutions: an indirectly selected head of government, the Prime Minister, subject to majority support in the legislature, and a popularly elected head of state, the President.

Designing the executive’s substantive powers:

In addition to the disaggregation of executive powers through institutional design, as discussed above, the drafters of constitutions might also want to control executive powers through the involvement of other actors in a decision-making process. Two options are worth considering: first, the involvement of other actors in decision-making processes traditionally under executive control; and, second, the limitation of executive influence in the substantive domains of other branches of government.

Limiting the executive’s impact in law-making activities:

Traditionally, the authority to draft law rests with the legislature, not the executive. The executive may aggregate power to block, check or influence central activities of other branches of government, such as law-making. Moderating the degree to which the executive can influence the law-making process is thus another consideration when designing executive

power. Two different kinds of executive involvement in lawmaking activities can be distinguished:

- (a) the power of the executive to legislate by decree, and
- (b) the involvement of the executive in the legislative law-making process itself.

GOVERNMENT LIABILITY

Liability:

A liability is something a person or company owes, usually a sum of money. Liabilities are settled over time through the transfer of economic benefits including money, goods, or services. Recorded on the right side of the balance sheet, liabilities include loans, accounts payable, mortgages, deferred revenues, bonds, warranties, and accrued expenses.

In general, a liability is an obligation between one party and another not yet completed or paid for. In the world of accounting, a financial liability is also an obligation but is more defined by previous business transactions, events, sales, exchange of assets or services, or anything that would provide economic benefit at a later date. Liabilities are usually considered short term (expected to be concluded in 12 months or less) or long term (12 months or greater).

Liabilities are also known as current or non-current depending on the context. They can include a future service owed to others; short- or long-term borrowing from banks, individuals, or other entities; or a previous transaction that has created an unsettled obligation. The most common liabilities are usually the largest like accounts payable and bonds payable. Most companies will have these two line items on their balance sheet, as they are part of ongoing current and long-term operations.

Liabilities Explained:

Liabilities are a vital aspect of a company because they are used to finance operations and pay for large expansions. They can also make transactions between businesses more efficient. For example, in most cases, if a wine supplier sells a case of wine to a restaurant, it does not demand payment when it delivers the goods. Rather, it invoices the restaurant for the purchase to streamline the dropoff and make paying easier for the restaurant.

The outstanding money that the restaurant owes to its wine supplier is considered a liability. In contrast, the wine supplier considers the money it is owed to be an asset.

TORTIOUS LIABILITY OF GOVERNMENT

- It is well established principle of law of torts that the master is vicariously liable for the torts of his servants if the alleged tortious act is done in the course of his employment.
- State being legal entity acting through its servants.
- Tortious Liability determines the extent of liability of State for the torts committed by its servants.

- This principle is based on the Latin maxims – ‘Qui facit per alium facit per se’ and ‘Respondeat superior’.
- Considering the nature of widening functions of state, determining the extent of tortious liability of state for its servants is a complex problem especially in developing countries.
- In India, this liability is governed by the principles of public law inherited from British Common Law and the provisions of the Constitution.

POSITION UNDER ENGLISH LAW

- In the United Kingdom, for many years, the Crown could not be sued in tort for wrongs committed by its servants in the course of employment because of the acceptance of the maxim "the king can do no wrong".
- *Tobin v. R* (1863) 14 CBNS 505, observed that “If the Crown were liable in tort, the principle (king can do no wrong) would have seemed meaningless.”
- This immunity in tort was not extended to its servants. The state officials were personally liable for their wrongs committed without any legal authority.
- However, with the increased governmental functions the immunity of Crown in tortious liability proved to be incompatible with the demands of justice. It was impossible to recover damages from Government servants personally because the latter might not be in a position to pay compensation.
- Consequently, the Crown Proceedings Act, 1947 was passed abolishing the general immunity conferred on Crown and making the Crown freely suable in torts.
- Under the Crown Proceedings Act, the extent of the liability of the Crown is the same as that of a private person of full age and capacity. It leaves untouched the personal liability of the Crown servants except in certain cases concerning armed forces.
- The principle evolved by the law is that where a servant of the Crown commits a tort in the course of his employment, the servant and the Crown are jointly and severally liable.
- The extent of vicarious liability imposed by the law is not absolute because of the exemption clauses. Accordingly judicial functions, execution of judicial process, post office, armed forces etc. are exempted from the purview of the law.

POSITION IN INDIA

- Prior to the Commencement of the Constitution
- In *John Stuart’s Case*, 1775, it was held for the first time that Governor-General in Council had no immunity from Court’s jurisdiction in cases involving the dismissal of Government Servants.
- In *Moodaly v. The East India Company*, 1775, the Privy Council expressed the opinion that Common law doctrine of sovereign immunity was not applicable to India.
- Sec. 58 of the Act of 1858 for the first time spelt out tortious liability of State in Statutory terms. It provided that Secretary of State may sue or be sued. This provision has remained in Statute Book in subsequent Government of India Acts of 1915 and 1935.
- Sec. 58 of the Act of 1858, reads as - "The Secretary of State in Council may sue and be sued as well in India as in England in the name of the Secretary of State in Council as a body corporate and all persons and bodies politic shall and may have and take the same suits remedies and proceedings legal and equitable against the Secretary of State in Council of India as they could have done against the said company, and the

property and effects hereby vested in Her Majesty for the purposes of the Government of India acquired for the said purpose shall be subject and liable to the same judgments and executions as those vested in the said Company would have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company".

SOVEREIGN AND NON-SOVEREIGN FUNCTIONS

- In *P. and O. Steam Navigation Co. v. Secy. of State for India* [(1861) 5 Bom HC Report, Appendix 'A'] the Supreme Court allowed an action against the Secretary of State for the negligent act of the government workers. In this case, the workers employed by the Kidder pore Dockyard, which was a government dock, were carrying iron bars across a public way passing through the port, which bars they dropped on the road. The noise so created scared the horses of the carriage in which the plaintiff was sitting and he sustained injuries.
- It was held that the East India Company had been invested with sovereign functions but this did not make it a sovereign authority. It may be noted that after 1833, the East India Company was acting in a dual capacity exercising commercial functions as also the sovereign powers with respect to the newly-acquired territories as trustees of the Crown.
- While clarifying the use of the terms 'sovereign' and 'non-sovereign' function, Sir Barnes Peacock, C.J. in this judgement said: "It is clear that the East India Company would not have liable for any act of any of its naval officers in seizing as prize property of a subject, under the supposition that it was the property of an enemy, nor for any act done by a military or naval officer, or by any soldier or sailor whilst engaged in military or naval duty, nor for any acts of any of its officers or servants in the exercise of judicial functions."
- In the *P & O* case, the Court made a distinction between sovereign and non-sovereign functions as the basis of liability. If the function is one that can be carried on by a private individual without delegation of sovereign powers it is a non-sovereign function and liability can be imposed on the Government. On the other hand if sovereign power or delegation of such power is essential for the carrying out of the act in question, the function is "sovereign" and no liability can be imposed. This test formed the basis for determining the liability of the Union of India or the States for the tortious acts of its employees in later years.

SOVEREIGN AND NON-SOVEREIGN FUNCTIONS

- This test is so broad that it confers wide discretion on the judge to characterize a function as sovereign or non-sovereign according to his will and pleasure. If he is inclined to do justice to individuals he may interpret the term "non-sovereign function" widely and make the State liable. On the contrary, if he is biased in favour of the State he may give a liberal interpretation to the term "sovereign function" and save the Government from liability.
- In *Nobin Chunder Day v. Secretary of State*, (ILR 1 Cal. 11) the plaintiff was the highest bidder for the licences for sale of ganja and bidi. The plaintiff paid the requisite money. Subsequently, the excise authority refused to give licences to the plaintiff. But the Court refused to enforce the claim against the Government holding that the act of the authorities in refusing licence to the plaintiff related to the imposition and collection of excise duties which are part of the sovereign functions of

the State.

- In *Secretary of State v. Cockraft* (AIR 1915 Mad. 993) maintenance of military road was interpreted as one of the sovereign functions of the Government to evade liability arising out of injuries sustained as a result of allowing a heap of gravel to remain on the road.
- In *Secretary of State v. Nagarao Limbaji* (AIR 1943 Nag. 287) the plaintiff lost the phalange of his finger due to the explosion of an ignition set lying near the area which was used as a practice bombing ground by the military authorities. The court interpreted bombing practice as a sovereign function to immune the State from liability.

AFTER THE COMMENCEMENT OF THE CONSTITUTION

- Article 294 and Article 300 of Indian Constitution provides for express and implied provisions regarding tortious liability of State and suit against it.
- Article 294 (b) of the Constitution of India provides that the liability of Union Government or State Government may arise out of any contract or otherwise. The word "otherwise" includes various liabilities including tortious liability also.
- Article 300 of the Constitution of India provides that State can sue or be sued as juristic personality. The first part of the Article 300 deals with the nomenclature of the parties to a suit or proceeding, that is Union of India and State Government but the second part defines the extent of liability by the use of words 'in the like cases'.

VIDHYAWATI TO KASTURILAL

- In *State of Rajasthan v. Vidhyawati* (AIR 1962 SC 933), the Supreme Court of India held the State vicariously liable for the tort committed by its servants. A driver of the government jeep, while driving back from the workshop, knocked down a person on the footpath, resulting in his death. A suit by the widow of the deceased for compensation was decreed by the trial judge against the driver but not against the State. High Court decreed the suit against the State also. State of Rajasthan filed appeal before the Supreme Court and argued that the State was not liable for tortious acts of its employees for in similar circumstances the East India Company would not have been liable, as the jeep was maintained in the exercise of sovereign powers and not as a part of the commercial activity of the state. Dismissing the appeal Supreme Court held that the immunity rule of the Crown in England cannot be applied in India and held the state of Rajasthan vicariously liable .
- In *Vidhyawati*, more importantly, the distinction between sovereign and non-sovereign functions for the purpose of determining the State liability was not recognized, and the only immunity which the state could have claimed was 'acts of state'. The Court further held that there can be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and wholly dissociated from the exercise of sovereign powers as any other employer. Sovereign functions were specified as defence act of State and other like operatives. It was thus made clear that ambit of Article 300 included tortious liability of State and its scope is not limited to suit or right to one in respect of contractual liability only.

VIDHYAWATI TO KASTURILAL

- Unfortunately, the development of law in this area suffered a setback only three years later, in *Kasturi Lal v. State of U.P.* (AIR 1965 SC 1039).
- In this case, the plaintiff was going to Meerut to sell gold and silver. When he was passing through the city, he was taken into custody by three policemen. All the gold and silver was taken into custody and he was put in the lock-up. On his release his gold was not returned, though silver was immediately returned. The gold had been misappropriated by the Head Constable who fled to Pakistan. Kasturi Lal filed a suit against the government of Uttar Pradesh for the return of the gold or value. There was a clear finding on record of gross negligence on the part of the police authorities in the matter of safe custody of the gold.
- However, the Supreme Court reintroduced the ambiguous distinction of sovereign and non-sovereign functions holding that the State is not liable because the functions of arrest and seizure of the property are sovereign functions. The court further held that if the act is sovereign, no act of negligence on part of the employees of the State would render the State liable. **LATER DEVELOPMENTS** • In *State of Gujarat v Memon Mahomed Haji Masan* (AIR 1967 SC 1885), Custom authorities seized goods of Respondent under the Customs Act, 1962 alleging that they were smuggled goods. Supreme Court set aside the order of confiscation and held that the government being in a position of Bailee was bound to return the goods.
- In *Shyam Sunder v. State of Rajasthan* (AIR 1974 SC 890), government employee travelling in a government vehicle used for famine relief work lost his life due to negligence of the driver of the vehicle. Supreme Court while rejecting the appeal held that “it is not possible to say that famine relief work is a sovereign function of a state as it has been traditionally understood. It is a work which can be and is being undertaken by private individual.”
- In *N. Nagendra Rao v State of A.P.* (AIR 1994 SC 2663), the Supreme Court held that “in welfare state functions of State are not only defence or administration of Justice or maintaining law and order which are sovereign functions of State, but its functions intend to regulate and control activities of people in almost every sphere: educational, commercial, social, economic, political or even marital, and the demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. The water tight compartmentation of sovereign and non-sovereign functions was held not to be sound and against modern jurisprudential thinking.”

LATER DEVELOPMENTS

- In *Andhra Pradesh v. K. Padma Rani* (AIR 1976 AP 122) the High Court discovered a way out to escape from the sovereign and non-sovereign dichotomy in determining the vicarious liability of the State and held that ‘the construction of the project is an undertaking or activity entered into by the Government in pursuit of its welfare ideal and as such is not an activity in which the exercise of sovereign power is involved’.
- In *Kerala v.K. Cheru Babu* (AIR 1978 Ker. 43) the Kerala High Court gave a liberal interpretation to vicarious liability of the State. Plaintiff, a college Student, was knocked down by a jeep car belonging to the Government of Kerala. The jeep was escorting the Advisor to the Governor, after attending a college function. As a result of the injury the plaintiff was seriously injured and sustained multiple fractures. The Kerala High Court held the State liable as the private visit did not entail performance

of any sovereign function.

- In *Indian Insurance Company Association Pool v. Radhabai*, (AIR 1976 MP 164) a motor vehicle belonging to the State of Madhya Pradesh and allocated to the primary health centre, was being used for bringing some ailing children from another village to the centre. On the way, due to the negligence of the driver, there was an accident and one person was killed. The State argued that, as the accident happened in the execution of a sovereign function of the State, it could not be held liable. The Court rejected the contention saying that the medical relief work undertaken by the State through the primary health centre could not be regarded as a 'sovereign function in the traditional sense'.

TORTIOUS LIABILITY AND ARTICLE 21

- The Union and State governments would be liable for tortious acts committed by their employees in the course of employment for violation of Article 21. The Supreme Court awarded monetary compensation in a large number of cases.
- In *Khatris v. State of Bihar* (AIR 1981 SC 928), (*Bhagalpur Blinding Case*), it was alleged that police had blinded certain prisoners and the state was liable to pay them compensation. Providing a new dimension of the right to life and personal liberty, the Supreme Court held that, the state is liable to pay compensation for acts of its servants outside the scope of their power and authority affecting life or personal liberty of a person and thus infringing Art. 21.
- In *Rudul Shah v. State of Bihar* (AIR 1983 SC 1086), the Supreme Court awarded damages of Rs. 35,000 against the state as the petitioner was kept in jail for 14 years after his release by a Session's court. The Court held that "the right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the state as a shield."
- In *Sebastian M. Hongray v. Union of India* (AIR 1984 SC 1026), the Supreme Court by a writ of Habeas Corpus asked the Government of India to produce two persons before it who were taken to military camp by the jawans of the army. The Government expressed its inability to do so. Keeping in view the torture, agony and mental oppression undergone by the wives of the said persons, instead of imposing a fine on the Government for civil contempt of court, the Supreme Court awarded a compensation of Rs. One Lac each to the aforesaid women.
- In *Bhim Singh v. State of J.K.* (1985 4 SCC 677), an MLA was illegally arrested and prevented from attending assembly session. The Supreme Court awarded the compensation of Rs. 50,000 to the petitioner.

TORTIOUS LIABILITY AND ARTICLE 21

- In *Nilabati Behra v. State of Orissa* (AIR 1993 SC 1960) the Supreme Court held that violation of fundamental right under Article 21 is public law wrong to which doctrine of sovereign immunity has no application.
- In *Mahavir Singh v. State of Rajasthan* (1987 2 SCC 342), the Supreme Court granted rupees one lakh for the custodial death of a young boy who had been arrested for theft.
- In *SAHELI, A Women's Resource Centre v. Commr. Of Police* (1990 1 SCC 422), the Supreme Court quoted with approval its decision in *Vidhyawati Case* and held that the State is responsible for the tortious acts of its servant committed within the

scope of his employment like any other employer. It further stated that the doctrine of sovereign immunity, is of feudalistic origin, and cannot be applied in a democratic country like India. In this case, a women's organization known as SAHELI had filed a writ against the government for compensation on behalf of two poor women who had been mercilessly beaten by the landlord in collusion with the police. The Court not only awarded Rs. 75,000/- as compensation but also opined that amount can be recovered from the police officers responsible for the tort. Therefore, the classification of governmental functions into sovereign and non-sovereign for the purpose of determining governmental liability in tort is no longer a valid classification.

- In *Chairman Railway Board v. Chandrima Das* (2000 2 SCC 465), court held that, Union of India, which runs the Railways as a commercial activity, would be vicariously liable to pay a compensation to the victim of the rape when a woman, even though a foreign national, is gang-raped by railway employees in Railway's Yatri Niwas

CONCLUDING REMARKS

- The question of the scope of the immunity of the Government for the tortious acts of its servants was considered by the Law Commission of India in its First Report (Liability of State in Tort). The Commission recommended the relaxation of the rule of governmental immunity and doing away with the distinction between sovereign and non-sovereign functions.
- The Government (Liability in Tort) Bill, drafted on the lines of Law Commission's Recommendation, was first introduced in Parliament in 1965. It was reintroduced in 1967. Further, Joint select Committee of Parliament suggested some modifications in the Bill in 1969. But the bill has not been enacted into law so far.
- In the absence of any legislation, the Indian Judiciary itself has taken up the responsibility of widening the area of tortious liability of State with the adaptation of various principles and the Human Rights Jurisprudence.

CLASSIFICATION OF ADMINISTRATIVE ACTIONS:

In the 21st century various functions are performed by administrative entities so much so that the administrative process cuts across the traditional bounds of classification and combines into one the powers exercised by all the organs, i.e. legislature, executive, judiciary. It's evident that a wide variety of activities fall within the sphere of 'administrative action' and that even administrative authority doesn't restrict to courts and legislative bodies of the country. Residuary functions of administrative bodies may themselves partake themselves of the legislative or judicial quality.

- I. The consideration that arises is whether the function performed by executive authorities is purely administrative, quasi-judicial or quasi-legislative in nature, since there's no precise or scientific test to distinguish one from another. Classification is essential and inevitable as many consequences flow from it, e.g. if an executive authority exercises judicial or quasi-judicial functions it must conform with the principles of natural justice or amenable to certiorari or prohibition.
- II. But if it's an administrative, legislative or quasi-legislative function, that's not the case.
- III. It is therefore imperative to determine what type of function the administrative

authority performs.

Classification of Administrative Action

Classification of administrative action is necessary to determine the scope of effect of judicial and legislative powers on administrative actions, such as judicial review of administrative actions is less restricted as compared to legislative action; mandamus cannot be issued against an executive body with respect to its legislative actions, etc. The general sentiment amongst legal writers and lawyers is that any attempt made at classifying administrative law is not merely impossible but also redundant. Even a student of administrative law is made to delve into this classification since there is a complex amalgamation of the three wings of the government and projection of one wing on another.

Broadly speaking, administrative action can be classified into three groups:

1. Quasi-legislative or rule-making action
2. Quasi-judicial action or rule-decision action
3. Purely administrative action or rule application action

Let's understand this classification in detail:

Quasi-legislative action:

Legislature is the law-making branch of the State. Unlike constitutions like the Australian Constitution and American Constitutions, wherein this power has been explicitly demarcated, the Indian Constitution doesn't have express provisions for the same. Though the intention of the Constitution makers remains that legislative powers should be exercised by those in whom it's vested, the same cannot be fructified in lieu of the efficient working of the intensive form of the modern government.

Therefore delegation of powers to administrative bodies is a necessity. When any administrative body exercises the law-making power delegated to it, it's known as rule-making action or quasi-legislative action. When an instrument of a legislative nature is made by way of delegated powers, it's called subordinate legislation, being subordinate in the sense that the powers of the authority are limited by the statute which conferred these powers.

Quasi-legislative action is the function of subordinate legislation – making rules, regulations and other statutory instruments to fill in the details of legislative enactments in order to make the execution of laws possible. It imbibes in itself the characteristics which a normal legislation possesses.

According to Chinnappa Reddy, J. a legislative action has four features: 1. Generality; 2. Prospectivity; 3. Public interest; 4. rights and obligations flowing from it.^[ix] These features

help distinguish quasi-legislative actions from quasi-judicial action. However, this even in certain cases is not easy differentiation. In *Express New Paper v UOI*, the Supreme Court kept question whether the function of Wage Commission under the Journalists (Condition of Service) Act, 1956 is quasi-legislative or quasi-judicial was left open. However the power to fix the price of sugar was held to be quasi-legislative. Therefore it can be understood that the task of differentiating between legislative and administrative action is difficult and theory and impossible in practice.

If a particular function is termed 'rule-making' instead of 'judicial' it can have substantial effects upon the parties concerned. There is no right of being heard before the making of a legislation, whether primary or delegated unless provided by the statute itself. But since these actions are controlled by Parliament and the courts, Art 14 equally applies to these actions as well.

Quasi-judicial action:

Majority of decisions which affect individuals and private bodies come not from administrative agencies. Since administrative decision making is a by-product of intensive form of government, the traditional judicial system falls short in giving quantitative and qualitative judgments required in a welfare state.

Some jurisdictions use the term 'quasi-judicial' to describe administrative, adjudicatory or decision –making process. However since the term quasi-judicial is somewhat vague, it's difficult to define and thereby falling to disuse. Administrative decision making may be defined as a power to perform acts administrative in nature but requiring some judicial characteristics.

On the basis of this various administrative functions have been held to be quasi-judicial by various courts:

1. Disciplinary actions against students.
2. Disciplinary proceedings against an employee for misconduct.
3. Confiscation under the Sea Customs Act, 1878.
4. Cancellation, suspension, revocation or refusal to renew license or permit.
5. Determination of citizenship.
6. Deciding statutory disputes.
7. Power to continue detention of seized goods beyond a certain period.

8. Refusal to grant NOC under Bombay Cinemas (Regulations) Act, 1953.
9. Forfeiture of pensions and gratuity.
10. Granting or refusing permission for retrenchment.
11. Grant of permit by regional transport committee.

Donoughmore Committee on Minister's Powers (1932) had attempted to analyse the attributes of a true administrative action. The Committee was of the view that a true judicial decision presupposes a lis between two or more parties and then involves:

1. Presentation of the case.
2. Ascertainment of evidence.
3. Submission of legal arguments.
4. Decision which disposes of the whole matter by applying law and analyzing evidence of the case.

A quasi-judicial action involves the first two elements, may involve the third but never the fourth. Decisions which are administrative stand on a wholly different footing from quasi-judicial and judicial decisions since in case of administrative actions there is no legal obligation to consider and weigh submission or collect evidence or pass judgment. The entire discretion is left to the administrative authority. However this approach of the committee seems problematic because judges can't be regarded merely as norm-producing machines.

Also in certain areas of administrative adjudication, such as tax, administration applies facts and laws similar to a judge. Hence it's wrong to relegate a mixture of administration to the virgin purity of judicial pronouncement to a quasi-judicial position. Also this classification will fail in the case of independent tribunals.

The distinguishing feature of a quasi-judicial proceeding is that the authority concerned is required by law to act judicially. In India judicial search for the duty to act judicially was made within the statute under which the authority exercises powers, sometimes in extraneous and remote material and the implications arising thereof. This doctrinal approach of both Indian and English Courts caused confusion and eluded justice in several cases.

Finally to prevent this, the foundation for application of principles of natural justice was laid down by Subba Rao, J.'s dissent in *Radheshyam Kare v State of MP*[xxix]. He wrote that incompetency carries with it a stigma and what is more derogatory than being stigmatized as incompetent to do their duty. It's not reasonable to assume that officials in a democratic country are allowed to be punished without being given a chance to be heard. This dissent became strikingly pronounced in *A.K. Kraipak v. Union of India*[xxx].

Herein 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. Going a step further the Supreme Court clearly held in *CB Boarding and Lodging House v State of Mysore* 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.

Purely Administrative Action:

The expression administrative act is a comprehensive expression, comprising of three categories namely, quasi-legislative, quasi-judicial and purely administrative. In *Ram Jawaya v State of Punjab*^[xxxiii] Mukherjee, CJ. observed that an exhaustive definition of executive function can't be devised. Ordinarily, executive power refers to the residue of governmental functions that remain after legislative and judicial functions are taken away. Thus administrative functions are those which are neither legislative nor judicial. A quasi-legislative act consists of making rules, regulations and the like, while a purely administrative act is concerned with the treatment of a particular situation.

Therefore a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act includes the adoption of a policy, the making and issue of 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.

Accordingly:

1. 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.
2. 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.
3. 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.
4. Authority to sub delegate legislative powers will be held to be implied only in the most exceptional circumstances. The courts 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.

5. 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.

An administrative action is the residuary action which is neither legislative nor judicial. 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. 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 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. 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 characterize their functions as quasi-judicial.

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, to prevent miscarriage of justice, it’s 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 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.

A few actions can be noted for the sake of clarity:

1. Issuing directions to subordinate officers not having the force of law.
2. Making a reference to a tribunal for adjudication under the Industrial Disputes act.
3. Interment and deportation.
4. Granting or withholding sanction to file a suit under Section 55(2) of the Muslim Wakf Act, 1954.
5. Granting or withholding sanction by the Advocate General under Section 92 of the Civil Procedure Code.

6. Fact-finding action.

7. Requisition, acquisition and allotment.

8. Entering names in the surveillance register of the police.

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.

10. Functions of a selection Committee.

11. Decision to extend time for anti-dumping investigation.

Administrative action can be statutory having the force of law or non statutory which are devoid of such 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 subordinate, but its violation may be visited with disciplinary action. Though by and large administrative action is discretionary and is based on subjective satisfaction, however, the administrative authority must act fairly, impartially and reasonably.

There is a general consensus amongst writers and lawyers alike that any attempt at classifying administrative functions on any conceptual basis is redundant. But sometimes even an administrative lawyer has to classify action into administrative, legislative, judicial and quasi-judicial. The fiction of quasi has been conveniently created to distinguish acts of the three organs. Although scholars decry such dichotomy as too artificial and superficial, such classifications are necessary especially between purely administrative and quasi-judicial.

Also the concept of fair-play in administrative actions has discarded the distinction between the two, the fact still remains that in the present state of administrative law requires labelling of the functions and actions.

ADMINISTRATIVE DISCRETION:

In public administration, administrative discretion refers to the flexible exercising of judgment and decision making allowed to public administrators. Regulatory agencies have the power to exercise this type of discretion in their day-to-day activities, and there have been cases where regulatory agencies have abused this power. Administrative law can help these agencies get on the path of following regulations, serve the public, and in turn, a reflection of the public's values and beliefs.

There is a need for administrative law because the interest of public could be at risk if various agencies were not following laws and regulations. Administrative law is important because without it, it could lead to arbitrary and unreasonable use of such discretion, which may lead

to destruction of basic principles of administrative law. Although this type of discretion isn't laid out in the job-description of a bureaucrat/public servant, it is necessary because citizens use these bureaucratic institutions every day; such as the D.M.V., public schooling, and numerous others. Street-level bureaucrats have to deal with the provision of service as well as translating vaguely worded mandates into specific cohesive and comprehensive language to organize protocol.

Administrative discretion allows agencies to use professional expertise and judgment when making decisions or performing official duties, as opposed to only adhering to strict regulations or statuses. For example, a public official has administrative discretion when he or she has the freedom to make a choice among potential courses of action. The failure to exercise reasonable judgment or discretion is abuse of discretion.

"I think that in our system of government, where law ends, tyranny need not begin. Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness." - Kenneth Culp Davis.

The idea of administrative discretion dates back as far as the time of widely known Greek philosopher Socrates in his quest to lay the foundation for philosophical ethics. Socrates determined a general ranking of "universal morals" in order to piece together certain criterion that could test what course of action to take in any immediate situation. He assigned value orders as well as certain "means to ends" that would determine alternatives for ethical philosophical generalization. In doing so, Socrates was creating the first type of basis for administrative discretion.

When Andrew Jackson took office in 1829, the country was going through radical changes—the scale of government grew extensively which caused the need for an increase in the administrative activity. Jackson brought the bureaucratization of administration. He appointed his close friends to office to work in administered processes. This was known as the "spoils system", in which was a system was in place where presidential administrations had the power of hiring or firing federal workers; this brought a constant change in demands and routines for personnel.

Of his additions to the administrative discretion and of bureaucracy as we know it today, one in particular, the creation of The Patent Reform Act of 1836 brought about the creation of new offices and adjudicatory administrative boards. Although, perhaps unknowingly, Jackson brought a new age to administrative discretion. Another president who has come in contact with administrative discretion is Madison. Known as Madison's Managers, drafted in 1787, some argue that early public administration literature had it right.

After Jackson, many presidents followed suit of his example—appointing members to administrative processes. In some cases, officials appointed by the presidents abused their powers in administration. There were attempts to control administrative discretion throughout the 19th century, but those attempts overall, failed. Political appointees believed they indeed

were law themselves—Jesse Hoyt and his successor Samuel Swartwout for example, notoriously did not comply with the rule to return funds they had collected on behalf of the Federal Government. However, within the 20th century, substantial changes occurred that better formed the concept of administrative discretion as we know it today.

Franklin Roosevelt's New Deal brought much needed relief to the public by implementing welfare programs in a dire time of crisis. There was a type of bureaucratic "sprawl": this era saw the creation of numerous agencies and boards. The birth of such a large bureaucracy, not only helped in aiding the public, but Roosevelt's programs also answered important question of who would be part of the bureaucracy and govern future welfare programs. The New Deal emphasized the importance of administrative discretion in government and their processes by expanding the staff of the White House and creating new managerial techniques for the executive.

The Administrative Procedure Act of 1946 was created to govern the internal procedures of administrative agencies and how those agencies interact with the public. The act came about after the Attorney General appointed a committee to investigate the need for procedural reform. The notion of the time (not too far off-base of popular public notion today) was that various agencies were created by Congress over a long period of time in a piece-mail, haphazard manner.

The view was that there was no uniformity in the chaotic bodies to administer anything. The 1946 act places policies on agencies' rule-making, adjudications, and licensing behavior. The intention was to make sure that the public is protected and safe, with secured proper entitlements.

Goldberg v. Kelly—In this 1970 case, City officials were administrating and terminating public assistance benefits under the federally assisted program of Aid to Families with Dependent Children (AFDC) and/or under New York State's Home Relief Program in New York City. The problem arose as residents receiving financial aid claimed that the New York City officials overseeing and administering these programs terminated their aid without notifying them or holding a hearing.

Recipients alleged that this was unconstitutional on the Administration's part because it denying them due process of law guaranteed under the Due Process Clause in the Fourteenth Amendment (Case Briefs). In this case, Administrative Discretion resulted in individualized parameters of what was deemed necessary to convey a termination of aid, instead of a federal standard. The Holding of Chief Justice Warren Burger and the court sided with the appellants' view: a full hearing of evidence is required before a recipient can be denied/deprived of certain types of government benefits. In other words, a recipient must receive some sort of notice should their aid be changed/terminated; whether in writing or orally.

Industrial Union Department v. American Petroleum Institute - In this 1980, Under the Occupational Safety and Health Act of 1970 (or OSHA), The Secretary of Labor was required to explicitly state exposure risks/limits at the lowest level of carcinogens that won't

impair viability of the industries regulated. However, this failed to happen. The Secretary did not say or record anywhere that exposure to the substance benzene at 10 ppm (parts per million) would cause leukemia and exposure to 1 ppm would not (Oyez cases).

The holding of the Supreme Court, under Justice Warren Burger, concluded that there was a statute for a requirement of significant risk, and the Secretary and agency had failed to uphold the statute of workers' health at risks. In this case, Administrative Discretion under the Secretary of Labor had not understood the "extent feasible" .

Citizens To Preserve Overton Park, Inc. v Volpe - In this 1971 case, in Memphis, Tennessee, a group of citizens claimed that The Secretary of Transportation made the decision to have construction of a highway where Overton Park was located and violated statutes enacted by the congress.^[11] The court holding under justice Burger upheld the "feasible and prudent" clause: wherein an alternative exists to circumvent building the proposed highway through the park. Furthermore, the Secretary's decision to use federal money for the highway did not comply with the Department of Transportation Act of 1966.

The IRS Tea Party Controversy: The IRS must exercise discretion in administering the tax law. The IRS oversees a vast system that affects nearly everyone. Since the law is complex and often difficult to interpret, the IRS must draw fine lines in order to properly interpret, apply, and enforce the law. The IRS claims it gave extra scrutiny to Tea Party-affiliated groups based solely on the name and goals of the groups. The IRS asked those groups invasive questions that were not normally asked of other groups: about their donor lists, affiliations and contacts with the media.

Administrative Discretion in Criminal Law Enforcement - When a government official of law enforcement uses their own sense of ethical discretion such as not to or to invoke in criminal process. There are two major situational motivations of police discretion; whether police response is internally invoked or citizen initiated and whether it is a law enforcement of order maintenance situation. The two situational motivations combine to create four types of discretionary situations for law enforcement officials. The four different situations are proactive and reactive law enforcement and proactive and reactive order maintenance.

Modern day administrative discretion

In today's administrative discretion, some issues affect the way organizations function and the way the public feels towards administrations/agencies as a whole. In this way public administrators are seen as "moral agents"; they are given the task to exercise discretion, and reflect the society's values. In theory, the public expects administrators to be the exemplary role models of society and follow laws and regulations.

In reality, some do not think the administrators play fair and the public feels distrusts towards them. In a poll done by Gallup.com, the public showed an increase in the mistrust in government. People were asked if corruption was widespread throughout the government. The results recorded from 2006 to 2013 rose significantly; from 56% to 79%.^[16] The public

may know little to nothing about the administration or their responsibilities, yet approval is very low.

Some attribute this mistrust to a lack of transparency, where corruption can occur.^[3] The lack of transparency can mean that an administration is not completely honest, secretly keeping hidden agendas: withholding information from public view. It can also simply mean that the administration does not attempt to make their information easy to access or understand for the public (regulatory).

Administrative discretion is need and inclusive growth is the purpose. It must be the slogan and aim of every country. Administrative discretion can become curse for the country if it transform in arbitrariness. Administrative discretion is useless if it unsuccessful to get the inclusive growth. Mostly countries had adopted the concept of welfare state. To fulfill this purpose administration had required for some discretion. Administrative discretion is a means to get the aim of welfare state. India also had adopted the welfare concept. So the power of administrative discretion had also conferred for administrative officers.

Administrative discretion was given to get the inclusive growth. I want to say through my paper that administrative discretion and inclusive growth both are going to parallel in India. There are many problems in its way e.i. corruption, misbehavior, negligence and arbitrariness. Professor Dicey thought that administrative discretion is against Equality, and it becomes the cause of arbitrariness, discrimination and unjust so the purpose of inclusive growth may be fail. Most of countries in the world have adopted social welfare concept after removing the concept of laissez faire concept. With this effect lot of discretion conferred for the administration.

State made lot of laws to get the aim of the social welfare, under those laws lot of discretionary powers were given to administrative authorities. And provide most of opportunities to perform their duties. Many time administrations feel specific knowledge and instant decision power to perform their duty. So it is necessary that the right to take instant decision must be conferred to administrative authorities. After this they can do their work according to circumstances and they can take decisions also. In the real meaning all discretionary powers are given with this intention, no law can be absolute. Nature is dynamic so circumstances also changeable. Law cannot change easily as circumstances.

Therefore law cannot control this dynamic society. Whenever these administrative problems will rise, Legislative said that they do not know when and how it will rise. Legislative is unable to provide any help against this critical situation, but administration can solve this problem for this purpose legislative conferred the power of discretion. We cannot fulfill the aim of social welfare state without discretionary powers of administrative authorities. Inclusive growth and discretion both are mandatory for every country. India is also following this concept.

We had provided maximum discretion to administrative authorities when they will perform their duty in respect of inclusive growth. Discretion can convert in to arbitrariness so we had imposed a lot of restriction on them. Whenever they will use these powers they will follow those rules also. They will perform their duty within the limits which was imposed by the legislative body. When legislative conferred these powers to administrative authorities they have to maintain the provision to control them also.

There are two types of control (Judicial and None Judicial) over the administrative

authorities. All acts of administrative authorities will come under the power of judicial review. Court can check all administrative works on the certain grounds. Court has also a limited power to control administrative actions. When any matter rise, which cannot be checked by the court it can be checked by the administrative authorities.

MEANING AND DEFINITION OF ADMINISTRATIVE DISCRETION:

The word administrative discretion denotes two words administrative and discretion. It means discretion which is used by administration in their functions. Firstly we will discuss on discretion than we will point out on the administrative discretion. Discretion means decision power. In other words the power to do something according their mind and wisdom. Every person has discretion regarding their property he can donate, transfer and sale. It is his discretion if wants that his property should go for his heredities he can write a will. If he do not want to give his property to his heredities he can sale it.

No one can interfere in his discretion. Individual discretion is different with administrative discretion. In individual discretion there is no any restriction. But administrative discretion means they have discretion within the given options.

They are not free to take the decision as an individual; they can take decision only within the limits which is provided by legislative. Even court also exercises the power of discretion, when they punish to someone. Discretion means choose an option from the given options on the basis of reason and argument it must not be based on individual will. Lord Cock, —discretion is a science to understand the difference between truth - untruth, right – wrong and reasonable & unreasonable.

They must not do their work under the influence of personal interest and to fulfill own will. Mr. Justice Frankfurter said, —Discretion without a criterion of its exercise is authorization of arbitrariness. It means discretion is choosing one option from amongst alternatives. These alternatives must be based on reasons and justice not according to personal will. This exercise must not be capricious, blurred and bizarre; it must be legal and regular.

Historical Background- Administrative discretion is also known as, Public Interest, Public purpose, Fair, Fit, Prejudicial to public safety and security, Satisfaction, Belief, Efficient, Expedient, Proper, sufficient, and their opposites. Administrative discretion is a big problem from the beginning time. It has proved that any welfare government cannot do their work without discretionary powers of administrative authorities. It is not compulsory only to improve the powers of administrative discretion.

But it is compulsory because no one know about future so any certain law may not enact for the future. But it is also truth that an absolute discretion may become a cruel owner. Lord Aitkin, —according to English jurisprudence any member of executive may not interfere with the property and liberty without this condition that he will also express the legality of his act before the court. Administrative actions are either ministerial or discretionary. A ministerial action is one where the authorities have a duty to do a thing in a particular way.

Such actions, however, are exceptional. In most administrative actions, the administrative authorities have the power either to act or not to act or to act in one way or the other. This power- to act or not to act or to act in one way or the other – is called discretionary power.

Discretion is the power to decide or act according to one's judgment³. Whenever the word —may use by legislation before explain the administrative powers. The word may indicate discretionary powers. In other words we can say freedom of authority. Professor Dicey criticized it he thought that discretion is the source of inequality, discrimination and arbitrary action. It is a clear cut violation of rule of law.

With the effect of socio- economic typical problems which rise suddenly, it is faced by administration. So the scope of ministerial powers is shrinking and the scope of discretionary powers is increased. It has been experienced that a government which has only ministerial powers are rigid and dormant. So administrative officers have required the power to choose, which powers, how and when they will exercise their powers. Main reason is behind these problems; administrative authorities have faced such tough problems e.i. investigation of facts and choose the facts.

Therefore the modern concept is this; lots of discretionary powers are conferred to administration. It is mentioned in a statute that government may form rules to fulfill the object of respective act, when they have need. With the effect of this the discretionary power to make rules and choose the time and place to enforce those rules is conferred to government by the legislative. Legislative do not direct that which rules will make.

Reasons behind the Development of Discretionary Powers: There are many reasons behind the development of the power of administrative discretion. Some reasons are given below-

- 1- In present time administration face difficult and different- different problems which cannot solved by a single rule.
- 2- Most of those problems are new and rise first time, so a general rule cannot apply against those problems because they don't have sufficient experience.
- 3- It is not possible always anticipate to all problems, but when these problems rise and cannot be solved according to circumstances than administrative authorities must be solved it.
- 4- Every problem is based on a different circumstance, if we will apply a rule to all it can be cause of injustice.

Administrative authorities can exercise their powers according to their wisdom and circumstances. They can make and exercise various rules to solve the problem which are rise suddenly. But when administration will solved every problem and exercise different – different rules in those problems. It may become the reason of many difficulties, some are given below—

- 1- No one may know which rule will be exercised in his matter.
- 2- It will be the clear cut violation of article- 14, Right to Equality, because in every matter of same nature will be deal with different rules.
- 3- It may be possible that administrative discretion can be misused by administrative authorities.

On the bases of above discussion administrative authorities must be preferred a general rule. Where it will possible administrative authorities must be exercised equality in their works. If it will not maintain it may not only become cause of administrative violence bit also it will be fail to maintain public trust. When Administration should be exercised administrative discretion they have to care, which rules has been exercised in similar matters otherwise it will be discrimination and create many obstacles in the way of inclusive growth.

Administrative Discretion in Indian System:

India has also adopted the concept of welfare state so it was necessary conferred the discretionary powers to administration because it was only one body which can do all works to get the aim of welfare concept. After adopting this concept government participated and interfered in all work which was done by public. Now state thinks about the development of both public and state. Before it state was think about only state and do the ministerial functions. It did not have any interest public matters. Now the state starts to think about public and their facilities, so state imposed the burden of all responsibilities on the administration.

But without discretionary power it was not possible. Administrative officers felt the need the power to take instant decision. Without it they are unable to do something. So state conferred discretionary powers to them. No modern government, however, can function without the grant of discretionary power to administrative authorities. Whether or not an action is required depends upon the happening of certain events or the arising of certain situations that cannot be anticipated. They have to be determined from time to time and the administrator has to respond by using the power given to her.

What is to be done if a riot breaks out? What is to be done if an essential commodity becomes scarce and suddenly goes out of market? Some actions depend upon an assessment of the situation by administrative authorities. Expressions such as if he is of the opinion or if he is satisfied or if he has reasonable grounds to believe vest power in the authority to act on framing an opinion or being satisfied that the action is necessary. All such actions are discretionary.

Supreme Court had held that in the respect of discretionary power given under statute to administration. It is expected that the use of discretionary powers would be based on fair, Just and reasonableness, it must not be based on individual interest or will. It must not be doubtful, arbitrary and imaginary. It must be under within the limits, which is expected with a genuine person.

Administrative Discretion and Indian Constitution:

Any statute cannot be challenged on the ground of alleged mala fide intentions or mysterious motive, if it is enacted by competent legislature. If any statute confers discretion to the executive, it must impose some limitations for the exercise their discretion. There are so provisions in our constitution which refer discretion. President of India is the supreme of Executive. He exercised much discretionary power. He can impose national emergency if he is satisfied that any condition has been rise under article 352. He has power to enact and enforce ordinance.

He can dissolve to lok sabha, when not any party is in majority. He has discretion whose will call to form the government. He has also the power to grant pardon or remission of sentence to person convicted of offences by court of law under article 72 and 161. He can also presidential rule on a state under article 356. But all these power are under some restrictions. These are not arbitrary nature. Even judiciary has also exercised some discretion, when judges punished to guilty person they have discretion where it is mentioned imprisonment or fine or both, they can convict with any sanction.

Administrative Discretion and Fundamental Rights

Fundamental rights control the executive and legislative powers of the government. And it has also the control over the administrative discretion. No Law may provide administrative finality, because court has jurisdiction to check the administrative discretion. If discretion is against fundamental rights it must be void and declared unconstitutional by the court. Court will focus on some protective principles when it may be necessary during exercise discretionary power in respect of fundamental rights.

Discretion can be controlled in a limited jurisdiction with the effect of Fundamental rights. Court has also time to time discuss on the legality of such laws, which provide discretionary power. To fulfill this object court see the summary and making procedure of such law. If court finds these laws against constitution, it will be declared unconstitutional. Administration cannot violate article 14 & 19 when they will exercise discretionary powers.

Controls over the Administrative Discretion

It has universally admitted that discretionary powers have become the need of the day. Now a question is raised that how it can be control. Because it can be violate of fundamental rights of public. It can be control with two types first judicial and other one is none judicial. Two procedure can be make against administration departmental (administrative) and judicial if they violated fundamental rights and misused their discretion. There are so many ways to control it. We must incorporate such rules which will be mandatory to that authority who will exercise discretion.

Discretion must be limited and systematic. If legislative is failed to maintain such norms in that statute to control discretion, those norms must be incorporated by administration with the help of delegated legislation. It must be control in proper way. It can be control with judicial and other authorities, e.i. C.B.I., C.V.C. and Lokpal. Judicial control is more effective. Judicial control can protect to citizens from arbitrariness and exploitation. Now lots of principles have been developed to control discretion by the court.

Judiciary must concentrate on two points first it should be direct to legislative that they do not confer wide and unlimited discretion to executive and other is that every discretionary act must be come under the power of judicial review. It can be determined that every administrative authority did their work according to law and within the limits of their jurisdiction. Judiciary plays a good role to control it.

JUDICIAL CONTROL OVER ADMINISTRATIVE DISCRETIONARY POWERS

England- parliament is sovereign in England so no statute can be checked by judiciary on any ground. Court does not have the power of judicial review against any statute. But court can control administrative discretion on certain grounds, e.i. ultra- vires and abuse of discretion.

U. S. A. - - U.S.A. is also followed the concept of judicial review as India. Both of countries are implement similar rule judiciary cannot imposed their personal view instead of discretion.

It must be control, for the proper implementation of Rule of Law. Administrative discretion must be exercised according to Rule of Law not rule of individual. If absolutely freedom to exercise their work is conferred to administration, it can be dictator. So it is necessary to control administrative discretion.

Limits of administrative discretion- Court may control it on certain grounds. No any discretion can be absolute. There are some restrictions on it, and some of those are given blow.

1- Discretion must be used by respective authority which was authorized for it, and with similar motive.

2- Delegates cannot delegate his powers to other person it means sub delegation is unconstitutional. When it is not mentioned in parent act. Unless it is mentioned in that act, under which these powers are provide.

3- Any authorized person cannot be made incompetent himself with the use of permanent rules. It means no one can be waived their liabilities.

4- It must be used for the public welfare. It must not ultra- vires. If any procedure is given, it must be followed. If procedure is not mentioned then a reasonable process must be follow. If administrative authorities are failed, court can declare unconstitutional their work.

5- When it will exercise officer must be used his mind, he should not behave like a machine.

6- Discretion must be used in the respect of relevant considerations.

7- Discretion must be revoked on the ground of mala-fide intention. Court may check administrative authorities on above grounds. It means discretion has not finality. It can be controlled by court.

Administrative Discretion and Role of Judiciary

Now these days court has developed lot of new principles to control the discretion. These grounds are success to control discretion. These principles are Doctrine of ultra-vires, abuse of administrative discretion, improper purpose, irrelevant consideration, malice, unreasonableness, violation of procedure, arbitrary use of discretion and administrative discretion. In the case of Ram Manohar Lohia v. State of Bihar, 6 under the defence of India rules, the authority was empowered to detain a person to prevent sub version of Public order. The petitioner was detained with the view to prevent him from acting in a manner prejudicial to the maintenance of Law and order. The court set aside order of detention.

Suggestions and Conclusion:

Administrative discretion must be conferred but it must be limited. And some restriction must be imposed. It means a procedure should be established for the administration. So I want to point out some suggestions, which are given blow-

1 - Without discretion administrative officers cannot get the success in their aim. They cannot achieve welfare concept so it is necessity that state should confer discretion, but it must not access.

2- When state provide discretion some rules (restrictions) should be imposed at that time. These restrictions must be followed during excising the discretion.

3- The wordings of the act must be doubtless and clear, under which discretion is conferred.

4- Legislative should establish a procedure to administrative officers, they must follow it during exercise their discretion. If they are failed to follow it. They must be punished.

5- If any person is injured with discretion, remedy must be provided to him.

6- Discretion must comes under the jurisdiction of judicial review not only certain grounds

e.i. mala-fide intention, arbitrariness, discrimination and irrelevant consideration, but on reasonable grounds also. Because day by day new problems are rising.

After above discussion I want to say that discretion must be conferred with some limits. Without discretion administration cannot run smoothly in a welfare state. It is a necessary element in exercise of powers. But limits and standard are also required to be established. Without limits and restrictions administrative discretion becomes absolute. Aristotle has rightly that power corrupts and absolute power corrupts absolutely. Discretion develop creativeness in government.

Discretion must be in all administrative actions but at the same time it is necessary to impound arrangement and check discretion to uphold the principle of rule of law in administration least cases of injustice go unheeded and scot-free. Although it is true that discretion is necessary to running the administration but absolute discretion cannot be granted. If discretion is without restrictions then there will be dictatorial rule and rule of will vanish from the country. Without discretion no policy can be carried out in the country. If absolute discretion is conferred, democratic norms will not realized.

Administrative Law and Privileges.:

Privileges And Immunities In Suits of The State

Every problem has its own remedy. For the purpose of actions of the administration, these remedies help in preventing the recurrence the extraordinary legal remedies that is available to the individual against the illegal of an illegality. However, they do not provide full redress to the aggrieved individual. Private citizens access to the ordinary courts and the ordinary legal remedies may be qualified by the existence of certain privileges and immunities enjoyed by the state.

These privileges immunities though justified in the days in which they originated, are hardly justified in a democratic society. However, the state does enjoy and it may be necessary for it to enjoy certain privileges and immunities. Administrative law is engaged in the process of redefining such privileges and immunities with a view to reconciling them with the needs of modern times.

The Constitution clearly says that the executive power of the Union and of each state extends to 'the carrying on for any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose'. The Constitution therefore, provides that a Government may sue or may be sued by its name. Similar provisions to be found in the Code of Civil Procedure. The above provisions do not, however, enlarge or restrict the extent of State liability; they merely provide the method of redress. The extent of liability will be discussed separately.

Privileges and Immunities of the Administration in Suits

The various privileges available to the Government under various statutes are as follows:

I. Immunities from the operation of the statute

In England the rule is that its own laws do not bind the Crown unless by express provision or by necessary implication they are made binding on it. Thus in England the statutes are not binding on the crown unless by express provision or by necessary implication, they are made binding thereon. Its basis is the maxim “ the King can do on wrong. This rule was followed even in India till 1967. In India the present position is that the statute binds the State or Government unless expressly or by necessary implication it has exempted or excluded from its operation. In case the State has been exempted from the operation of the statute expressly, there is no difficulty in ascertaining whether the statute is binding on the State or not but it becomes a difficult issue in case where the State is exempted from the operation of the statute by necessary implication. However, where the statute provides for criminal prosecution involving imprisonment, the statute is deemed to be excluded from the operation of the statute necessary implication.

II. Privileges and Immunities under the Civil Procedure Code, 1908.

Section 80 (1) provides that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered in the manner provided in the section. The section is mandatory and admits of no exception. Thus, the requirement of notice is mandatory. However, it is to be noted that if a public officer acts without jurisdiction, the requirement of notice is not mandatory. Its object appears to provide the Government or the public officer an opportunity to consider the legal position thereon and settle the claim without litigation.

The Government may waive the requirement of notice; the waiver may be express or implied.

The requirement of notice causes much inconvenience to the litigants especially when they seek immediate relief against the Government.

To minimize the hardships to the litigants a new Clause (20) was inserted in Section 80 of the C.P.C by the Civil Procedure Code Amendment Act, 1970. The clause provides that the Court may grant leave to a person to file a suit against the Government or a public officer without serving the two-month's notice in case where relief claimed is immediate and urgent. Before granting this exemption the Court is required to satisfy itself about the immediate and urgent need.

It is to be noted that S.80 of the C.P.C does not apply to a suit against a statutory Corporation. Consequently in case the suit is filed against the statutory Corporation. Consequently, such notice is not required to be given in cases the suit is filed against statutory Corporation.

Section 80 does not apply with respect to a claim against the Government before the claim Tribunal under the Motor Vehicle Act.

Section 80 of the C.P.C. does not apply to a writ petition against the Government or a public officer, the requirement of notice as provided under Section 80 of the C.P.C is not required to be complied with Section 82 of the C.P.C. also provides privilege to the Government. According to this section where in a suit by or against the Government or the public officer, a time shall be specified in the decree within which shall be satisfied and if the decree is not satisfied within the time so

specified and within three months from the date of the decree. Where no time is so specified, the Court shall report the case for the orders of the Government. Thus a decree against the Government or a public officer is not executable immediately. The Court is required to specify the time within which the decree has to be satisfied and where no such time has been specified, three months from the date of the decree will be taken to be the time within which it is to be satisfied. If the decree is not satisfied within such time limit the Court shall report the case for the orders of the Government.

III. Privileges under the Evidence Act (Privileges to withhold documents)

In England the Crown enjoys the privilege to withhold from producing a document before the Court in case the disclosure thereof is likely to jeopardize the public interest. In *Duncon v. Cammel Laird Co. Ltd.* The Court held that the Crown is the sole judge to decide whether a document is a privileged one and the court cannot review the decision of the Crown. However, this decision has been overruled in the case of *Conway v. Rimmer*. In this case the Court has held that it is not an absolute privilege of the Crown to decide whether a document is a privileged one. The court can see it and decide whether it is a privileged one or not.

In India Section 123 provides that no one shall be permitted to give any evidence derived from unpublished official records relating to any affair of State except with the permission of the officer at the Head thinks fit. Only those records relating to the affairs of the State are privileged, the disclosure of which would cause injury to the public interest. To claim this immunity the document must relate to affairs of state and disclosure thereof must be against interest of the State or public service and interest.

The section is based on the principle that the disclosure of the document in question would cause injury to the public interest And that in case of conflict between the public interest and the private interest, the private interest must yield to the public interest.

The Court has power to decide as to whether such communication has been made to the officer in official confidence. For the application of Section 124 the communication is required to have made to a public officer in official confidence and the public officer must consider that the disclosure of the communication will cause injury to the public interest.

According to Section 162 a witness summoned to provide a document shall, if it is in his possession or power, bring it to the Court, not with outstanding any objection which there may be to its production or to its admissibility. The Court shall decide on the validity of any such objection. The court, if it sees fit, may inspect the document, unless it refers to the matters of State or take other evidence to enable it to determine on its admissibility. If for such purpose it is necessary to cause any document to be translated the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the direction, he shall be held to have committed an offence under Section 166 of the Indian Penal Code.

Sections 162 apply not only to the official documents but also to the private documents.

It is for the Court to decide as to whether a document is or is not a record relating to the affairs of the State. For this purpose the Court can take evidence and may inspect

the document itself.

In *State of Punjab v. Sodhi Sukdev Singh*, court had the opportunity of discussing the extent of government privilege to withhold documents where twin claims of governmental confidentiality and individual justice compete for recognition.

The court was very alive to the constraints of this privilege on private defense, therefore Gajendragadkar, J. delivering the majority judgment cautioned that care has to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provision of Section 123. In order to guard against the possible misuse of the privilege, the court also developed certain norms.

First, the claim of privilege should be in the form of an affidavit, which must be signed by the Minister concerned, or the Secretary of the Department. Second, the affidavit must indicate within permissible limits the reasons why the disclosure would result in public injury, and that the document in question has been carefully read and considered and the authority is fully convinced that its disclosure would injure public interest. Third, if the affidavit is found unsatisfactory, the court may summon the authority for cross-examination.

Working the formulations still further, the court in *Amar Chand v. Union of India*, disallowed the privilege where there was evidence to show that the authority did not apply its mind to the question of injury to the public interest which would be caused by the disclosure of the document. In *Indira Nehru Gandhi v. Raj Narain*, the Court compelled the production of Blue Books of the policy and disallowed the claims of privilege. In *State of Orissa v. Jagannath Jena*, the Supreme Court again disallowed the privilege on the ground that the public interest aspect had not been clearly brought out in the affidavit.

In this case, the plaintiff wanted to see endorsement on a file by the Deputy Chief Minister and the I. G. of Police.

The law on Government privileges took a new turn in *S.P. Gupta v. Union of India*, The question in the present case was whether the correspondence between the Law Minister and these Chief Justices ought to be produced in the Supreme Court, so, as to enable the court to judge the question of validity of the non-continuance of an Additional Judge in the Delhi High Court. The government opposed the production of these reports on the ground that their disclosure would injure public interest under Section 123 of the Indian Evidence act. But the Supreme Court ruled otherwise. The case is a definite evidence of court's attempt to promote the ideal of open Government in India.

Justice Bhagwati took some such view in the above case when he expressed his faith in the ideal of an open Government. Merely secrecy of the Government is not a vital public interest so as to prevail over the most imperative demands of justice.

In giving a new orientation to the statutory provision in question, Bhagwati, J. emphasized, "Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their Government is doing." He observed: "The citizen's right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic state. And this is why the demand for openness in the Government is increasingly growing in

different parts of the world.”

He further pointed out that if the process and functioning of Government are kept shrouded in secrecy and hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority.

The decision has opened a new dimension of judicial control over the exercise of privileges under Sections 123 by the executive. The Court now has assumed the power of inspection of documents in camera and if it finds that its disclosure would harm the public interest, the claim for non-disclosure might be upheld. If the disclosure, to the mind of the Court, does not harm the public interest, its disclosure would be ordered.

Period of Limitation for Suit Against Government
Article 149 of the First Schedule of the Limitation Act of 1890 prescribed a longer period of limitation for suits by or on behalf of the State. The Act of 1963 contains a similar provision under Article 112. The Article applies to the Central Government and all the State Governments including the Government of the State of Jammu and Kashmir. This longer limitation period was based on the common law maxim *nulla tempus occurit rein*, that is, no time affects the Crown.

The longer period of limitation, however, does not apply to appeals and applications by Government.

Under Section 5 of the Limitation Act, it is provided that an appeal or application may be admitted after the expiry of the period of limitation if the court is satisfied that there was sufficient cause for the delay. It was held that the government was not entitled to any special consideration in the matter of condonation of delay.

IV. Immunity from Promissory Estoppel

Estoppel is a rule whereby a party is precluded from denying the existence of some state of facts, which he had previously asserted and on which the other party has relied or is entitled to rely on. Courts, on the principle of equity, to avoid injustice, have evolved the doctrine of promissory estoppels.

The doctrine of promissory estoppel or equitable estoppel is firmly established in administrative law. The doctrine represents a principle evolved by equity to avoid injustice. Application of the doctrine against government is well established particularly where it is necessary to prevent manifest injustice to any individual.

The doctrine of promissory estoppel against the Government also in exercise of its Government, public or executive functions, where it is necessary to prevent fraud or manifest injustice. The doctrine within the aforesaid limitations cannot be defeated on the plea of the executive necessity or freedom of future executive action.

The doctrine cannot, however, be pressed into aid to compel the Government or the public authority “to carry out a representation or promise.

a) which is contrary of law; or

b) which is outside the authority or power of the Officer of the Government or of the public authority to make.”

It is to be noted that Estoppel cannot be pleaded against a minor or against statute.

Estoppel does not lie against the Government on the representation or Statement of facts under Section 115 if it is against the statute or Act of the Legislature but it may be applied in irregular act. The liability of the Government has been extended by the doctrine of Promissory Estoppel.

V. Doctrine of Promissory Estoppel

Doctrine of Promissory Estoppel is often applied to make the Government liable for its promises and stopped from going back from the promise made by it. According to this doctrine where a person by words or conduct and the other person acts on such promise changes his position to his detriment, the person who gives such promise or assurance cannot be allowed to revert or deviate from the promise.

Privileges And Immunities of Government In Legal Proceeding Under Administrative Law

Immunity from Estoppel:

The sanctity of promises in our society lies in the societal and moral conventions that allow a promissory to be treated as bound to his promise. This moral convention is usually reflected in law by the enforcement of promises that are given in return of other promises or consideration, compelling the promissory to perform his end of the promise or pay expectation damages. In order to maintain this, there are yet more moral rules which govern promises, statements and agreements. These are embodied in the concept of estoppel which may be invoked in case of a breach in contract or against the government. The expression Estoppel is derived from the French word Estoup which means, Shut the mouth.

When a person tells us something, we generally hear him. If he says something different or contradicting, we would not hear any more and contradict such statement. Otherwise, we shall comply with it. . E.g. A, intentionally and falsely tells B that, he is the owner of certain land and induces him (B) to purchase and pay for it. Later, A happens to become the owner of the said land. Then A cannot set aside the sale on the ground that he did not have title at the time of the contract for sale. In other words, A cannot estop B for execution of the contract of sale. When a person by declaration (act or omission) makes/induces another to believe a thing, he cannot deny its truth subsequently.

The other person cannot be estopped from proceeding upon such declaration. Estoppel is a rule of evidence, by which a person is not allowed to plead the contrary of a fact or state of things, which he has formally asserted as existing. Section 115 of the Evidence Act {1} embodies the principle of Estoppel. It runs as follows. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief; neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Basis, object and underlying principle:

The principle of estoppel is based on the principle of equity and good conscience. The object of the principle of estoppel is to prevent fraud and to manifest good faith amongst the parties. This principle is enshrined in the maxim "Allegans Contraria Non Est Audiendus". It means, a man alleging contradictory facts ought not to be heard.

The administrative authority is vested with large discretionary powers. As a result the Government may make some prior pronouncement of its policies or it may give some advice or promise to an individual. The question here is whether the Government is bound by those pronouncements or promises.

In other words whether the rule of estoppel is applicable to the government or not?

Estoppel means that a party is prevented from denying the existence of some facts, which he had previously admitted and on which the other party had relief or entitled to rely. In India the courts are reluctant to apply the rule of estoppel against the Government, formerly.

There are so many cases to assert the above point. In *Sankaranarayan v. Kerala*, {2} The Supreme Court refused to apply the principle of promissory estoppel. The Government extended the age of retirement on the basis of an agreement between the Government and the employees. But again the retirement age was lowered through another ordinance. Held that the power under Art. 309 cannot be curtailed by applying the principle of estoppel.

The doctrine of promissory estoppel is a doctrine of equitable adjustment. It is in place to ensure that no party to an agreement suffers any detriment while attempting to perform the act that would serve as consideration for a unilateral promise by another party. However, this doctrine can only be applied when certain conditions are fulfilled:

Firstly, the party seeking to impose the estoppel must have altered his position.

Secondly, the other party must not have given reasonable notice or reasonable opportunity to the party to resume his position.

Finally, the party must be unable to resume his original position.

If the above three conditions are fulfilled, then the doctrine of promissory estoppel is applicable. The doctrine of promissory estoppel is necessary to place checks on the arbitrary powers of the State and this doctrine is one that would certainly serve that purpose by protecting the freedom to contract of citizens. In recent times, there is emphasis on government promises, especially in the realm of contract law and business transactions. It follows that an ordinary citizen who invests his assets based on the government promise only to find that the government does not abide by its promise must be afforded protection.