

# The Relationship between Constitutional Law and Administrative Law: An Indian Perspective

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Administrative law, an area of the law that gained early sophistication in France, was until well into this century largely unrecognised in the United States. Then, almost overnight, what Felix Frankfurter termed "this illegitimate exotic" overwhelmed the profession "which for years had been told of its steady advance by the lonely watchers in the tower".<sup>1</sup> Since the 1920s the subject has expanded relentlessly, rapidly adapting, both in principle and in case-law, to new demands and pressures. In the United Kingdom, the subject languished for much longer. In the past three or four decades, however, English administrative law has undergone a revolution and the academic and professional literature is now considerable.<sup>2</sup> Yet, even though English administrative lawyers can now look their American counterparts in the eye, comparisons are not easy and there are important differences of approach and terminology for obvious reasons. There is no supreme written constitution in the United Kingdom, and Dicey's doctrine of the sovereignty of Parliament is still internally regarded as pre-eminent. Therefore, the eclipsing impact of the constitutional law on administrative law becomes obvious.

The prime objective of this article thus is to draw the relationship of administrative law with constitutional law. The doctrines in constitutional law abundantly influenced the administrative law principles and have left a grave impact on the relative ability of the three branches of Government to influence agency change. This article begins to articulate the contextual and doctrinal links that exist between administrative law and constitutional law and in doing so carves out those concomitant points where both the branches of law follow a similar trajectory towards an identical horizon.

[A] Constitutional law viewed through administrative eyes

The impact of constitutional law upon administrative law in England is meagre and blurred because the English Constitution is unwritten and, as Dicey elaborates it,<sup>3</sup> the rules which in other countries form part of a constitutional code are, in England, the result of the ordinary law of the land. In the result whatever control the administrative authorities can be subjected to must be deduced from the ordinary law, as contained in statutes and judicial decisions. But, in countries having written constitution, there is an additional source of control over administrative action, and that is the written constitution which imposes limitations upon all organs of the body politic.<sup>4</sup> In these countries the sources and modes of exercising judicial control over the administrative agencies are twofold, constitutional and non constitutional. It is for this reason that while at the very outset every author endeavours to distinguish the scope of administrative law from that of constitutional law, they can never afford to forget to mention that in a country having written constitution with judicial review, it is not possible to separate the two into watertight compartments.

The reason being that the written constitution, being the organic law, not only sets up but also imposes limitations upon the powers of all the organs of the State, legislative, executive or judicial, and if any of these limitations be transgressed by any of these organs, the act so done will be unconstitutional and invalid. So far as the acts of the executive or the administration is concerned, this is secured in India in various ways. The legislative acts of the administration i.e. statutory instruments (or subordinate legislation) are expressly brought within the fold of Article 13 of the Constitution, by defining "law" as including "order, bye-law, rule, regulation, notification" having the force of law. A delegated legislation can therefore be challenged as invalid not only on the ground of being ultra vires the statute which confers power to make it (as in all common law countries), but also on the additional ground that it contravenes any of the fundamental rights guaranteed by Part III of the Constitution.<sup>5</sup>

A non-legislative and a purely administrative action having no statutory basis will be void if it contravenes any of those fundamental rights which constitute limitations against any State action. Thus a non-statutory administrative act may be void if it offends Article 14, guaranteeing equal protection<sup>6</sup>; Article 297 or Article 30 "guaranteeing minority rights; Article 19 "guaranteeing freedom of speech, association, etc.<sup>8</sup>; and Article 16 "guaranteeing equality of opportunity in employment.<sup>9</sup> Thus the court would strike down any administrative instruction or policy, notwithstanding its temporary nature, if it operates as discriminatory, so as to violate fundamental right under Article 14 of the person or persons discriminated against.<sup>10-11</sup> Non-statutory administrative action will also be void if it seeks to affect a fundamental law by non-statutory action where the Constitution provides that it can be done only by making a law e.g. (a) Article 1912; (b) Article 2113; and (c) Article 300-A14.

An administrative act, whether statutory or non-statutory, will be void if it is in contravention of any of the mandatory and justiciable provisions of the Constitution, falling even outside the realm of fundamental rights like Articles 26515, 30116, 31117 and 31418. In cases of statutory administrative actions, there is an additional constitutional ground upon which its validity may be challenged, namely, that the statute, under which the administrative order has been made, is itself unconstitutional.<sup>19</sup> Where the impugned order is quasi-judicial, similarly, it may be challenged on the grounds, inter alia, "that the order is unconstitutional;<sup>20</sup>

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- that the law under which the order has been made is itself unconstitutional.<sup>21</sup> Constitutional law thus advances itself into the judicial review chapter in administrative law in a country like the USA or India. The courts in these countries have to secure that the administration is carried on not only subject to the rule of law but also subject to the Constitution.<sup>22</sup> While an attack upon the constitutionality of a statute appertains to constitutional law, the constitutionality of an administrative action properly belongs to administrative law; but the provisions of the same Constitution constitute a touchstone in both the spheres.

The object of both the common law doctrine of rule of law or supremacy of law and a written constitution is the same, namely, the control of arbitrary power and while the rule of law insists that "the agencies of the Government are no more free than the private individual to act according to their own arbitrary will or whim but must conform to legal rules developed and applied by the courts".<sup>23</sup> The business of the written constitution is to embody these standards in the form of constitutional guarantees and limitations and it is the duty of the courts to protect the individual from an invasion of these guarantees not only by the departments of the Government but also by all administrative agencies, big or small.<sup>24</sup>

#### [B] Administrative growth in constitutional matrix

Administrative law is a by-product of intensive form of Government. During the last century, the role of Government has changed in almost every country of the world; from laissez faire to paternalism and from paternalism to maternalism. Today the expectation from the Government is not only that it will protect its people from external aggression and internal disturbance, but also that it will take care of its citizens from the cradle to the grave. Therefore, the development of administrative process and the administrative law has become the cornerstone of modern political philosophy.

Today there is a demand by the people that the Government must solve their problems rather than merely define their rights. The rights are elaborately defined in the Constitution but the policies to protect these rights are formulated by the Government (the executive) and implemented by the administrative agents of the State. There thus arises a direct nexus between the constitutional law and administrative law where the former acts as a source from which the rights of the individuals flow and the latter implements its policies accordingly mandated to preserve the sanctity of those rights.

It is felt that the right of equality in the American Constitution will be a sterile right if the black is the first to lose his job and the last to be re employed. In the same manner the equality clause in the Indian Constitution would become meaningless unless the Government comes forward to actively help the weaker sections of society to bring about equality in fact. This implies the growth of administrative law and process under the aegis of welfare philosophy embodied in the constitutional law. The constitutional law being the prior in origin to administrative law, therefore, manifests the phenomenon of absorption spectrum, from the former into the latter, of certain substantive characteristics, endorsing thereby a class of blood relationship between the two imperative branches of law.

#### [C] The genus-species relationship

Administrative law has been defined as the law relating to administration. It determines the organisation, powers and duties of administrative authorities.<sup>25</sup> This definition does not make any attempt to distinguish administrative law from constitutional law. Further, this definition is too wide, for the law which determines the powers of administrative authorities, may also deal with the substantive aspects of such powers. It may deal with matters such as public health, housing, town and country planning, etc. These matters are not included within the scope of administrative law. Administrative law, however, tends to deal with these matters for the Constitution has embodied the principle of a welfare State and the State, only through administrative laws, can execute and implement these rules veraciously in the society. Prof. Sathe thus explicitly notes in his book Administrative Law that:

“Administrative law is a part of constitutional law and all concerns of administrative law are also concerns of constitutional law.”<sup>26</sup>

An inference can therefore be drawn that constitutional law has a wide arena of jurisdiction, with administrative law capturing a substantive part. In other words, constitutional law can be termed as the genus of which substantive portion of administrative law is the species.

#### [D] The identical mandate "Protection against abuse"

With the shift from laissez faire to welfare philosophy the State was confronted with numerous functions. The State has not confined its scope to the traditional and minimum functions of defence and administration of justice, but has adopted a positive policy and consequently welfare State has undertaken to perform varied functions.<sup>27</sup> This resulted in the rise of administrative authorities which act as the State instrumentalities to implement welfare policies of the Government in conformity with constitutional norms. Also, the distance of legislature from the masses led to the development of administrative law since the rules formulated by the legislature were not informed of accurate social dynamics and therefore brought inconvenience to the citizens. Administrative laws and rules with its functional approach and pragmatism thus emerged to protect the citizens from becoming victims of ill-framed laws and arbitrary State action. According to Wade, the primary purpose of administrative law is "to keep the powers of Government within their legal bounds, so as to protect the citizen against their abuse"<sup>28</sup>. (emphasis supplied). Similarly and importantly, the mandate of constitutional law too inclines towards the interests of the civilians. The constitutional law aims to protect the citizens from arbitrary State action or any other fundamental rights violation. The Constitution of India in Part III provides a vibrant list of fundamental rights and facilitates the remedy against violation under Articles 32 and 226/227. The overlap of this very

goal, which signifies the protection of citizens from violation of their cherished rights, running parallel through the domains of both the laws establish a never-ending virtuous relationship between the two concepts.

#### [E] Constitutional determination of the scope of administrative function

The Indian Constitution is unanimously and rightly termed as the "grund norm" as regards domestic legislations. The metaphor, however, is not used out of context and there lies a simultaneous series of relevant reasons behind the statement. The Constitution circumscribes the powers of the legislature and executive and limits their authority in various ways.<sup>29</sup> It distributes the governmental powers between the Centre and the States. It guarantees the fundamental rights to the individuals and forbids the State from abridging them by either legislative or executive action. It is the function of the courts to interpret the Constitution and declare the acts of legislature as well as executive as unconstitutional if they contravene the provisions of the Constitution. However, it operates also against the legislature insofar as they cannot make a law which delegates essential legislative powers or which vests unbridled discretionary powers in the executive hands so as to make its arbitrary exercise possible. The validity of an executive act is seen with reference to the power given to it by the legislature. The Constitution has, however, in turn laid down the framework defining the extent of laws made by Parliament and the State Legislatures.<sup>30</sup> Constitutional law therefore enjoys the status of the prime moderator monitoring legislative actions and in turn installs a yardstick upon the extent of the rules made by the executive while acting in the capacity of a "delegate". It can be inferred unequivocally that constitutional law plays the pivotal role of the principal channel from where flow the guidelines determining the scope of administrative action thereby establishing a unique relationship between the two distinct but intimate arenas of law.

#### [F] The principles of natural justice as constitutional parameters

The principles of natural justice act as a touchstone to administrative adjudication. Fair hearing is the most fundamental principle of administration of justice. Although the law of evidence and procedural laws<sup>31</sup> ensure it and statutes also provide for it, the principles of natural justice, which include the essentials of a fair hearing are invoked wherever there are gaps in the statutory law. The decision in A.R. Antulay case<sup>32</sup> where one Bench of the Supreme Court decided the case without affording to the accused an opportunity of being heard, is an authority for the proposition that even a decision of the Supreme Court could be impugned on the ground of its alleged inconsistency with the fundamental rights guaranteed by Part III of the Constitution.

Constitutionally, the observance of the rules of natural justice may be one of the criteria of reasonableness of restrictions upon any of the rights guaranteed by Article 19 of the Constitution.<sup>33</sup> If the discretion is conferred on an administrative authority, the fact that such an authority is not required to observe the rules of natural justice persuades the courts to hold that such discretion could be exercised arbitrarily and therefore in violation of Article 14 or Article 19 of the Constitution.<sup>34</sup> The courts have held that absolute discretion without any guidelines for its exercise and without having to follow the rules of natural justice imposed unreasonable restrictions upon the fundamental rights guaranteed by that article.<sup>35</sup> In *Workmen v. Meenakshi Mills Ltd.*<sup>36</sup> the Supreme Court upheld Section 25-N of the Industrial Disputes Act, 1947 which gave power to the Government to permit retrenchment of workers in an industrial establishment. This section, before its amendment, vested such powers in a Labour Court but the amendment gave that power to the Government. The Supreme Court held that the Government was bound to exercise such power quasi-judicially. Such an obligation to act quasi-judicially saved the vesting of such power in the Government from being unconstitutional on the ground of its alleged violation of the fundamental right to carry on any trade or business guaranteed by Article 19(1)(g) of the Constitution.

The administrative heritage clause "fairness" was also utilised to process the constitutional divine premise "procedure established by law". The Supreme Court has given liberal construction to the words "procedure established by law" contained in Article 21 of the Constitution in *Maneka Gandhi v. Union of India*<sup>37a</sup> and now it means processual fairness. The Supreme Court has held that long detention as an undertrial prisoner<sup>38</sup>, or denial of legal aid<sup>39</sup>, torture of prison inmate<sup>40</sup>, or handcuffing of an accused except in unusual situations<sup>41</sup>, are against the procedure established by law. Thus we witness the role of rules of natural justice as important parameters of the fairness of the procedure. Therefore, the rules of mandatory application in administrative adjudication importantly act as a touchstone to the constitutional cases liberalising the interpretation of Part III clauses thereby establishing a firm relationship between administrative principles and constitutional requirements.

#### [G] Constitution constituting administrative agencies

Besides the contribution towards the growth of administrative process, which is possible through legislation and executive actions, the Constitution itself provides for the establishment of some administrative agencies to regulate a particular field e.g. Article 263, creation of Inter-State Council; Article 280, Finance Commission; Article 261, Inter-State Water Dispute Authority; Article 315, Public

Service Commissions; and Article 324, Election Commission. The Constitution is thus the begetter of these important administrative agencies which perform effectual administrative functions in vivid imperative fields of governance in the nation. It is very interesting to note that the constitution constructors, while establishing administrative bodies, have used the words in a lavish fashion and have elaborately laid down guidelines in connection with their functions and structure, etc. For instance, the whole of Chapter II of Part XIV of the Constitution is devoted to the Public Service Commissions of the Union and the States. The Constitution inherits comprehensive provisions dealing with the establishment, the

functions and the expenses of Public Service Commissions including exact guidelines in the matters pertaining to appointment and term of office of members including their removal and suspension. Apart from deciding the structure of this administrative body, the Constitution governs its regulation by making the body accountable to the administrative head i.e. the President of India by way of a provision making submission of annual reports mandatory. Similarly, the Constitution through Article 324 establishes the Election Commission and elaborates upon its functions and constitution including the appointment and removal of the Chief Election Commissioner, other Election Commissioners and Regional Commissioners. While these bodies are established by the Constitution, they perform functions fairly administrative in nature. This distinctly depicts the weighty interference of constitutional law into administrative environs and establishes a striking relation between these laws.

#### [H] Constitutional impact on administrative adjudication

In order to provide speedy and inexpensive justice to employees aggrieved by administrative decisions, the Government set up the Central Administrative Tribunal (CAT) in 1985, which now deals with all cases relating to service matters which were previously dealt with by courts up to and including the High Courts. Establishment of the Central Administrative Tribunal under the Administrative Tribunals Act, 1985 (hereinafter also referred to as 'the Act') is one of the important steps taken in the direction of development of administrative law in India.<sup>42</sup> This Act while stimulating the development of administrative law, drew its legitimacy and substance from the constitutional law and was passed by Parliament in pursuance of Article 323-A of the Constitution. This article, is considered to be one of the plus points<sup>43</sup> of the Forty-second Amendment<sup>44</sup> and that is why even one of the critics of the Forty-second Amendment, Dr. Rajeev Dhavan, said something positive about the new tribunal system, envisaged under Article 323-A. He observed:

'The Forty-second Amendment envisaged a tribunal structure and limited review powers by the High Courts. In the long run, this could mean a streamlined system of tribunal justice under the superintendence of the Supreme Court. Properly worked out such a system is not a bad one. It would be both an Indian and a common law adaptation of the French system of *droit administratif*.'<sup>45</sup>

Indeed, the Administrative Tribunals are welcomed with a great applause and are performing supplementary function to the High Courts with 17 regular Benches of CAT functioning in various parts of the country, including its principal Bench in Delhi.

#### Conclusions

Although the relationship between constitutional law and administrative law is not very emboldened to be seen with naked eyes but the fact remains that concomitant points are neither so blurred that one has to look through the cervices of the texts with a magnifier to locate the relationship. The aforementioned veracities and illustrations provide a cogent evidence to establish an essential relationship between the fundamentals of both the concepts. If doubts still persist, the very fact that each author, without the exception of a single, tends to differentiate between the two branches of law commands the hypothecation of a huge overlap.

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According to Maitland<sup>46</sup>, while constitutional law deals with structure and the broader rules which regulate the functions, the details of the functions are left to the administrative law. According to Philips, 'Constitutional law is concerned with the organisations and functions of the Government at rest while administrative law is concerned with that organisation and those functions in motion.'<sup>47</sup> The Australian jurists note that the dividing line between constitutional law and administrative law is a matter of convenience because every student of administrative law has to study some constitutional law.<sup>47</sup> Finally, Keith pragmatically remarks, 'It is logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial.'<sup>48</sup>

(emphasis supplied)The separate existence of administrative law is at no point of time disputed; however, if one draws two circles of the two branches of law, at a certain place they will overlap depicting their stern relationship and this area may be termed as watershed in administrative law. In India, in the watershed one can include the whole control mechanism provided in the Constitution for the control of administrative authorities i.e. Articles 32, 136, 226, 227 300 and 311. It may include the directives to the State under Part IV. It may also include the study of those administrative agencies which are provided for by the Constitution itself under Articles 261, 263, 280, 315, 323-A and 324. It may further include the study of constitutional limitations on delegation of powers to the administrative authorities and also those provisions of the Constitution which place fetters on administrative action i.e. fundamental rights.

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