Administrative law in India –
The fire fighting and the fire watching functions

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Public anger, anxiety and helplessness over the multitude and magnitude of corruption in India have transformed into huge support for Anna Hazare's crusade against corruption. There is now a renewed focus on the corruption, abuse of power, maladministration, delay, inaction, oppression, discrimination and discourtesy by government staff. The object of this paper is to examine the adequacy of administrative law in India.

'Law and order state' or laissez faire state is now history. State has shunned its minimal role philosophy and has adorned welfarism. Ensuring a just socio-economic order has become the primary concern of the state. State functions have increased and the governmental authorities have swelled in number. In this change over India is no exception. Welfare philosophy is embraced by our Constitution.¹ The Constitution envisages the establishment of a welfare state at the federal level and at the state level. In a welfare state the primary duty of the government is to secure the welfare of the people.²

Administrative law and its functions

Intensive form of government is necessary for development but authoritarianism would result unless the administrative powers are channelized to realize welfarism. A powerful administrative law alone can ensure transparency and accountability of the government. Wade said –The powerful engines of authority must be prevented from running amok.³ The central purpose of administrative law is promotion of good administration⁴. Principles of administrative law emerge and develop whenever and wherever

@ Expressions borrowed from Harlow and Rawlings, infra
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81
any person becomes a victim of the arbitrary exercise of public power. Administrative law empowers the people by providing them access to remedies against the misuse or abuse of power by the authorities.

I P Massey believes that administrative law is the dharma which conduces to the stability and growth of the society and the maintenance of a just social order and welfare of mankind by reconciling power with liberty. Administrative law is that body of reasonable limitations and affirmative action parameters which are developed and operationalized by the legislature and the courts to maintain and sustain rule of law. To Upendra Baxi administrative law is the study of the pathology of power; it protects the little man from the arbitrary exercise of public power.

There are two theories on the functions of administrative law:

The ‘red light theory’ focuses on judicial review and therefore on judicial control of administrative authorities – fire fighting

The ‘green light theory’ focuses on legislative measures to ensure efficiency and fairness in administrative action – fire watching

The twin functions of administrative law may be said to be prevention of governmental excesses and promotion of good governance. Administrative systems have aspects of both the theories. There can be neither exclusion of courts nor exclusion of legislatures. Bound by duty to secure public welfare, both have definite roles. As Harlow and Rawlings have put it, the reality lies in a middle path, in an ‘amber light theory’.

Judicial Control in India

Judicial Control mechanism is provided in the Constitution. PART-III - Fundamental Rights place fetters on administrative action. Supreme Court and High Courts are empowered to check on the legislation and administration. Articles 13, 32, 136, 226, 227, 300,
311 are noteworthy in this regard. Delegated legislation, Administrative action, exercise of discretion, adjudication by administrative authorities and tribunals are all subject to judicial review on various parameters. Judicial review has been held to be a basic feature of our Constitution. Administrative law in India has been largely judicial law. The judiciary has applied several doctrines, rules and principles which today form part of Indian Administrative law and stand as reminders of best practices in administration. The following few may be noted-

Rule of Law – law is above state; state is equally bound by statutes

Rule of reasonable hearing – notice shall be sent, charges informed and the other side shall be heard before decision making

Post decisional hearing – if it is impractical or imprudent to hear before, hearing shall be post decision

Rule against bias – objectivity is a must; prejudice will vitiate the decision

Rule against excessive delegation of legislative powers/Rule against abdication - essential legislative powers cannot be delegated

Principle of reasonableness – oppression is forbidden; irrelevant considerations ought to be ignored; relevant considerations ought to be taken into account

Doctrine of legitimate expectation – legitimate expectations arising out of long standing established practice shall not be overturned

Doctrine of promissory estoppel – representations promises have to be adhered to when citizens have acted upon those to their detriment

Doctrine of proportionality – disciplinary action shall be proportionate to the wrong
No evidence rule – no decision without evidence shall sustain; there shall be sufficient evidence

Doctrine of sovereign immunity – except in primary sovereign functions state is liable for wrongs of its employees

Doctrine of ultra vires – only things permitted can be done; forbidden things cannot be done. Acts beyond jurisdiction have zero legal effect

Rule against unjust enrichment – government shall also compensate for value received under a contract void for violation of constitutional requirements

Rule of locus standi – a pro bono public shall have standing in a court to challenge government lawlessness and secure rule of law

Doctrine of public accountability - the public officer and government are liable to compensate for every abuse of power resulting in injury to an individual

Rule of public interest privilege – State Privilege to withhold information in courts on the ground of public interest is substantially curtailed in the light of citizen’s right to information

Rule against non-application of mind – active involvement taking into account the relevant considerations is obligatory for legitimate exercise of discretion

Rule against colourable exercise of power – disguised, covert, indirect transgression of power is as illegal as direct and overt transgression; what cannot be done directly cannot be done indirectly

Judicial control in India has grown tremendously. But there are certain difficulties in over-emphasising the effectiveness of judicial control. Courts are not accessible to all except the upper middle class. There is a lot of delay and expense involved. PIL & Legal Aid cannot help much. Prevention of Corruption Act lacks effective implementation. Damage prevention is better than damage control.
Promotion of good governance

It might be difficult to provide food and clothing to the people but why should it be difficult to give the people a pure Government - free from corruption, bribery, nepotism and favouritism- Dr Babasaheb Ambedkar 12

In India, the political processes to introduce adequate laws and law reforms in order to promote transparency and accountability are painfully lacking. Little efforts are seen in guiding rule-making, administrative adjudication and exercise of discretion. The grievances redressal mechanism has not been strengthened. Legislative and administrative inertia has already taken its toll. People at their wits end have risen to support civil societies and have approached courts with PILs.

Right to Information - Supreme Court of India recognised Right to Information.13 With great pressure from civil society, the Right to Information Act 2005 was enacted. Judicial recognition of the right would have been of no assistance if every person had to approach the High Court or Supreme Court for information. RTI Act 2005 establishes the frame work to realise this right to information. Every public authority (Central or State) is bound to designate a Public Information Officer and an Appellate Information officer and give information on request to citizens. The Act provides for two appeals: I Appeal – Appellate Information officer in the Public Authority and II Appeal – Information Commission (state\central). Supreme Court & High Courts have review power over the decisions of the commissions under the Constitution of India.

The Act contains adequate grounds to refuse information.14 Example- security of the nation, investigation into crimes, intellectual property and privacy of individuals. RTI has brought about a great change not only in the awareness levels of Indian citizens but also in the manner of functioning of the public
authorities. Honest public servants are also supported by RTI against unwarranted pressures. But the recent amendment to exclude CBI, NIA and National Intelligence Grid from the purview of RTI is dampening spirits and needs immediate rectification. For exemption from RTI, nature of information may be the criteria and not the public authority. The grounds for refusing information under the Act are fairly and safely adequate.

**Protection of whistle blowers - U.N Convention against Corruption 2003, endorses protection for 'Whistle Blowers.'**

Activists and persons in employment with Government who seek to expose corruption and abuse of power risk their jobs, families and lives. India is under threat of losing honest officers like Satyendra Dubey.

The draft Lokpal Bill 2010 is aimed at providing effective protection to whistle blowers also. The Bill defines a whistle blower as any person who faces threat of (1) professional harm, including but not limited to illegitimate transfers, denial of promotions, denial of appropriate perks, departmental proceedings, discrimination or (2) physical harm or (3) is actually subjected to such harm, because of either making a complaint to Lokpal under this Act or for filing an application under Right to Information Act. The definition should include any complainant/petitioner under any law (not only the Lokpal Act) against public servants which includes ministers and MP's and MLAs. It shall also include witnesses, victims, investigating and decision making authorities in such matters. There is an urgent need for protection of whistle blowers.

**Lokpal & grievances redressal - Lokpal is the Indian ombudsman. Sweden was the first country to have an ombudsman to hear citizens' grievances in 1809. The English Parliamentary Commissioner was established in 1967 and the mechanism spread to other countries also.**
NATURE OF OFFICE

(1) Agent of Parliament
(2) Independent/ non-partisan
(3) Receives & investigates into complaints against administrative authorities.
(4) Informal proceedings
(5) Advisory/recommendatory function – suggests action/ remedy
(6) Not empowered to quash/ annul administrative decision or to order remedies.
(7) Entitled to access to all documents
(8) Reports to Parliament

Complaints against corruption, delay, maladministration, inaction, oppression, discrimination, discourtesy etc. are generally made with the ombudsman. The effectiveness of the office springs from adverse media publicity & discussions & condemnation in Parliament. However the office can be named and modelled as per the requirements of the country.

OMBUDSMANIC INSTITUTIONS IN INDIA

In 1959 C.D. Deshmukh, chairman of a commission of enquiry to examine the administrative set up formally proposed Ombudsman as a solution for nepotism, high handedness & other omissions & commissions of the administrative authorities to help the public with data, facts, figures & evidence. 17 August 1962 All India Law Conference urged the setup of ombudsman. In 1966 Interim Report of Administrative Reforms Commission there was a definite suggestion as to ombudsman for India. On this basis the first Lokpal and Lokayukta Bill 1968 was introduced in Lok Sabha but not passed. Subsequent attempts were made in – 1971, 1977, 1985, 1989, 1996, 1998, 2001, 2005 and 2008. The 2010 bill has
Anti-corruption law - Recently severe punishments like death penalty and life imprisonment for corruption are being advocated. Certainty of punishments is equally important along with severity. We need to inquire into why the criminal justice system & even the special anti-graft laws are unable to deliver. If right thinking people should continue to have faith in rule of law speedy trial and special courts are urgently called for.

It is shameful that till now we have no law providing for forfeiting the properties acquired by public officers by corrupt & illegal means. In 1996 the Supreme Court pointed out that such a law is a crying necessity. In 2002 the National Commission to Review the Working of the Constitution also called for such a law.

Conclusion
In India there is a serious dearth of legislative & administrative measures to promote good governance. If welfare is not realised administrative explosion would be tyranny in disguise. The administration ought to be safeguarded against moral deficit and performance deficit. Strong public opinion should be created and the political parties should be forced to push through significant law reforms. Every public organisation shall be brought under RTI. Law to protect whistle blowers should be enacted. Law providing for an effective Lokpal at the Centre and all States in India shall be enacted. Public Services Bill shall be enacted. Prevention of Corruption Act should be amended to forfeit properties acquired by graft. Proper procedures, systems & time frame for every Governmental action shall be codified and widely publicized. Dr Rajendra Prasad at the concluding session of the Constituent Assembly had cautioned: "...If the people who are elected are men of character and integrity, they would be able to make the best even of a defective Constitution... India needs today nothing more than a set of honest men who will have the interest of the country before them." Ethics & values shall form an important component of all education.
undergone discussions and the two versions – janlokpal bill and the government will hopefully be tabled in the houses of Parliament in a few months.

Commissions like the NHRC and NCW are ombudsmanic in nature. Several states have established lokpal institutions but no uniform pattern is found. S C has expressed faith in lokayukta in ensuring unpolluted administration and exposing maladministration.¹⁸

**Code of ethics for public servants** - In 2007 a Bill on fundamental values & code of ethics of public services, proper development of public services for promotion of good governance & better delivery – THE PUBLIC SERVICES BILL 2007 was made but not passed. It is pertinent to note – Section 6 Values of Public Services

a) patriotism and upholding national pride
b) allegiance to the Constitution and the law of the nation
c) objectivity, impartiality, honesty, diligence, courtesy and transparency
d) maintain absolute integrity

Section 9 on Public Services Code requires, inter alia, avoidance of misuse of official position or information and requires using public moneys with utmost care and economy. One wonders why it should take so long to enact such important codes.

**Codes to guide administrative procedures** - Administrative Procedures should be guided & governed by proper codes. Time frame for each action should be fixed. Administrative delays should be addressed. Time frame for disposal of applications is a must to ensure against delays, inactions and corruption. Re-engineering of the governmental processes & systems ensuring transparency & accountability is required. ¹⁹ After 60 years of adopting this Constitution we have not even laid down the time frame for deciding on the petitions for pardon under Article 72! Neither have we identified unpardonable offences!
References

1. See, Preamble and Directive Principles – Part IV
4. Beatson, Mathews and Elliott’s Administrative Law, Oxford 2005 p1
7. Supra n.5, p1
10. For a criticism on judicial law making vis-à-vis administration, see Upendra Baxi, Supra n.8
12. Writings and Speeches of Dr.Ambedkar, Part 3, Volume 17, Govt. of Maharashtra, 2003 p.459
14. Sections 8 and 9
15. Articles 32, 33
16. Section 2(15)
19. See, Ashvini Kulkarni, Governance Comes Before a Lokpal, Indian Express, 13th April 2011