CHAPTER 2

Administrative Law

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Learning Outcomes

After the completion of this chapter, the students will be able to:

- Interpret the meaning of administrative law
- Differentiate between Administrative law and Constitutional law
- State reasons for growth of administrative law as a separate discipline
- Explain and identify the types of administrative actions
- Critically evaluate the concept of rule of law
- Explain the Droit system

I. Background

History tells us that societies and civilizations can survive without science and technology but not without administration. Administrative Law aims to ensure that the policies, rules, regulations and legislations formulated for public good are not misused.

II. Administrative Law and Constitutional Law: Key Differences

Before the 21st century, Administrative Law was considered a part of Constitutional Law. However, there has been a clear distinction in the subject matter of their respective studies in recent times. Administrative law aims to keep a check on the actions of the Government when dealing with the procedures affecting the rights of citizens. On the other hand, Constitutional law clarifies the scope of rights and duties of citizens and the Government. For example, how elections are held, Parliament is formed, the powers of the Parliament and of the different branches of the State. These are essentially the key questions in the scheme of any democratic constitution. Whereas, when a Minister is finally appointed and his actions affect the general public good, then we can categorize the study of these actions as a core constituent of Administrative Law.

III. Reasons for Growth, Development and Study of Administrative Law

In the 21st century, developing countries like India expect a very proactive State for their own welfare. The welfare quotient in the administration cannot solely be vested in the legislature. This is impossible in practical terms as Governance as a whole will cease to function, if for all kinds of administrative actions, the sanction of the legislature is compulsorily required.

This need for delegation is often pointed out as the single most important factor which has led to the growth of Administrative Law. Moreover, if we were to examine the scheme of our Constitution, while defining 'State', Article 12 of the Constitution of India mentions 'any other authority'. Hence, 'any other authorities' includes authorities created by law, authorities which are agencies and instrumentalities of the State or authorities which are essentially discharging public functions which have an impact on the common people, are all part of the State.

For example, an NGO being funded by the Government- whose control vests with the Government- its functions are akin to the Government's functions; in this case such an NGO would be considered as 'State' for the purpose of Article 12 of the Constitution.

IV. Types of Administrative Action

Administrative action can be of four types:

Administrative Legislative Action

Wherein the administration puts on the hat of the legislature simply because it is not practically possible for any legislature in the world to legislate so perfectly that their laws are able to cover the possibility of all kinds of conflicts which can arise out of a decision even if the Members of Parliament sit for all days in a year. Administrative legislative action includes rule-making action as well as delegated legislation.

Quasi-judicial action or administrative adjudicatory action

In these cases, the administration performs functions which can be put under the judicial domain as there is some adjudication on legal rights of the individuals involved in the matter. Eg-Tribunals

Simply Administrative Action

Of all the actions undertaken by administrative authorities, other than the two types of actions mentioned above, the rest are called 'Administrative Actions' which essentially deal with execution of crucial administrative decisions. In administrative action, there is discretion to the administrative authority (that is,the authority has the right to exercise his/her own understanding and discretion in dealing with the matter).

Ministerial Action/Purely Administrative action

Actions which are copybook action and actions in which no discretion is vested with the authority (that is there is only one way of performing that action), such action will be called purely administrative action or ministerial action. For example, the statute which created a University mandates that the University open a bank account with a given Bank Y. This is a purely administrative action or a ministerial action as there is no scope of any discretion in its performance.

Hence, as is clear from the aforesaid classification, it would be wrong to say that Administrative Law deals only with the execution of policies or that it is only procedural in nature. In contemporary times, it can be called a full-fledged discipline which is very substantive in nature.

V. Fundamental Principle of Administrative Law: Rule of Law

It essentially deals with the doctrine of constitutional morality which states that even in doing something legal, an administrative action must always be fair and reasonable. For example, University guidelines read that you can appoint any person as the Professor of Law. No other qualification as such is laid down. University appoints a person who has no qualification of Law and has no teaching experience. Hence in this case, it is the principle of administrative morality which operates and vitiates the said appointment.

Rule of law is an essential tool to protect the freedom and dignity of individuals against organized powers. In the landmark ruling by the Supreme Court of India in Keshavananda Bharti v. State of Kerala, 'rule of law' was categorized as a 'basic structure' of the Constitution. Basic structure means those basic characters/attributes which are enshrined in the heart of the Constitution and which cannot be repealed/ replaced by any Parliament. Hence, it is a bundle of characteristics of the Constitution of India which can never lose their relevance and can never be derogated.

There was opposition to the doctrine in the days of monarchy as it limits the powers of the monarch or king to change laws and rules according to his own fancy. Hence, rule of law as a principle is essentially based only in democratic societies and is not a known feature of monarchies.

In a democratic society, fundamental principles of Administrative Law are: transparency or openness, the principle of participation, of impartiality and objectivity, reasoned decisions, legality, effective review of administrative rules and administrative decisions, accountability and non-arbitrariness. All these principles are broadly encompassed under the

1. Rule of law
2. Doctrine of separation of powers
3. Principles of natural justice.

Since we have dealt with Doctrine of separation of powers and principles of natural justice, here we will focus on Rule of Law. For recapitulation let's recall the two concepts;

Separation of power

'Separation of powers' was meant to create divisions within the Government setup to create better administration within the State.

Separation of powers refers to the division of a state's government into branches, each with separate, independent powers and responsibilities, so that the powers of one branch are not in conflict with those of the other branches. The typical division is into three branches: a legislature, an executive, and a judiciary, which is the triaspolitica model. It can be contrasted with the fusion of powers in parliamentary and semi-presidential systems, where the executive and legislative branches overlap.

The intention behind a system of separated powers is to prevent the concentration of power by providing for checks and balances. The separation of powers model is often imprecisely and metonymically used interchangeably with the triaspolitica principle. While the triaspolitica model is a common type of separation, there are governments that have more or fewer than three branches.

Principles of Natural Justice

Natural justice is an expression of English common law, and involves a procedural requirement of fairness. The principles of natural justice have great significance in the study of Administrative law. It is also known as substantial justice or fundamental justice or Universal justice or fair play in action. The principles of natural justice are not embodied rules and are not codified. They are judge made rules and are regarded as counterpart of the American procedural due process.

Mr. Justice Bhagwati called principles of natural justice as fair play in action. Article 14 and 21 of the Indian Constitution has strengthened the concept of natural justice.

Basis of the application of the principle of natural justice:

The principles of natural justice, originated from common law in England are based on two Latin maxims, (which were drawn from jus natural).

In simple words, English law recognizes two principles of natural justice as stated below-

1. NemoJudex in causasua or Nemodebetessejudex in propriacausa or Rule against bias (No man shall be a judge in his own cause).
2. Audi Alterampartem or the rule of fair hearing (hear the other side).

Rule against bias or bias of interest- the term bias means anything which tends to or may be regarded as tending to cause such a person to decide a case otherwise than on evidence must be held to be biased. In simple words, bias means deciding a case otherwise than on the principles of evidence.

This principle is based on the following rules

1. No one should be a judge in his own cause.
2. Justice should not only be done, but manifestly and undoubtedly be seen to be done.

The above rules make it clear that judiciary must be free from bias and should deliver pure and impartial justice. Judges must act judicially and decide the case without considering anything other than the principles of evidence.

Kinds of Bias: The rule against bias may be classified under the following three heads:

1. Pecuniary bias
2. Personal bias
3. Bias as to subject matter.

1. Pecuniary Bias

Pecuniary bias arises, when the adjudicator/ judge has monetary/ economic interest in the subject matter of the dispute/ case. The judge, while deciding a case should not have any pecuniary or economic interest. In other words, pecuniary interest in the subject matter of litigation disqualifies a person from acting as a judge.

2. Personal Bias

Personal bias arises from near and dear i.e. from friendship, relationship, business or professional association. Such relationship disqualifies a person from acting as a judge.

3. Bias as to subject matter (official bias)

Any interest or prejudice will disqualify a judge from hearing the case. When the adjudicator or the judge has general interest in the subject matter in dispute on account of his association with the administration or private body, he will be disqualified on the ground of bias if he has intimately identified himself with the issues in dispute. To disqualify on the ground there must be intimate and direct connection between the adjudicator and the issues in dispute.

2. Audi alterampartem or the rule of fair hearing (hear the other side)

The second fundamental principle of natural justice is audialterampartem or the rule of fair

hearing. It means no one shall be condemned unheard i.e. there must be fairness on the part of the deciding authority.

According to this principle, reasonable opportunity must be given to a person before taking any action against him. This rule insists that the affected person must be given an opportunity to produce evidence in support of his case. He should disclose the evidence to be utilized against him and should be given an opportunity to rebut the evidence produced by the other party.

Essentials of fair hearing

To constitute fair hearing, the following ingredients are to be satisfied-

1. Notice
2. Hearing

1. **Notice:** There is a duty on the part of the deciding authority to give notice to a person before taking any action against him. The notice must be reasonable and must contain the time, place, nature of hearing and other particulars.
2. **Hearing:** Fair hearing in its full sense means that a person against whom an order to his prejudice is passed should be informed of the charges against him, be given an opportunity to submit his explanation thereto, have a right to know the evidence both oral and documentary, by which the matter is proposed to be decided and to have the witnesses examined in his presence and have the right to cross examine them and to lead his own evidence both oral and documentary in his defence. It is a code of procedure, which has no definite content, but varies with the facts and circumstances of the case.

Ingredients of fair hearing: a hearing will be treated as fair hearing if the following conditions are satisfied:

1. Adjudicating authority receives all the relevant material produced by the individual
2. The adjudicating authority discloses to the individual concerned evidence or material which it wishes to use against him
3. The adjudicating authority provides the person concerned an opportunity to rebut the evidence or material which they said authority wants to use against him

Maneka Gandhi Vs Union of India-

In Maneka Gandhi's case, the petitioner's passport was confiscated by the Union Government under Section 10(3)(c) of the Passport Act, 1967. The provision under which impoundment took place authorizes the central government to carry out the same if it was necessary for the interest of the general public at large. But the government did not provide any reasons for carrying out the same.

The petitioner filed a writ petition under Article 32 of the Constitution which mentioned the following things:

1. Section 10(3)(c) of the Passport Act, 1967 was in violation with Article 14 of the Constitution for it vested excessive discretionary powers in the hand of the passport authority.
2. Section 10(3)(c) did not align with the principles of natural justice because it did not provide any space for allowing the passport holder to be heard.
3. There was a lack of reasonable procedure by Section 10(3)(c) which also led to the same contravening with Article 21 of the Constitution.

4. Section 10(3)(c) was also in violation with Article 19(1)(a) and(g).

The Supreme Court highlighted that the subject-matter of Article 21 of the Constitution does not promote unfair procedures to carry out the execution of the same and the principle of reasonability which is an essential requirement of equality as provided in Article 14 which is supposed to be adopted in context with Article 21 was violated. Therefore, along with the breach of the provided statutory provisions, there was also a contravention of the principles of natural justice as infused in the doctrine of Audi AlteramPartem commonly means that both sides should be heard. The court laid down certain aspects that need to be fulfilled before a person is said to be deprived of personal liberty guaranteed in Article 21 of the Constitution. They are:

1. Presence of a valid law.
2. The law must also consist of a procedure to carry it out.
3. The procedure must be fair, just and reasonable by nature.
4. The element of reasonability can be said to be satisfied if the requirements of Article 14 and Article 19 of the Constitution are aligned with.

The court did not generally quash the contravening grounds for then the administrative efficacy would have been hampered along with the necessity of the Passport Act. The court was with the observance that fair procedure cannot be ignored to maintain administrative efficiency rather it should strike a balance in order to provide equal importance to both. This led to the development of the concept of post-decisional hearing. Although in this case passport was returned to the petitioner on socio-economic grounds, in further cases that followed the Maneka Gandhi case, the concept of post decisional hearing was given preference. Article 14 and Article 21 of the Constitution are the two provisions that keep the principles of natural justice intact in the Indian Constitution. They also establish Dicey's concept of the rule of law.

Post decisional hearing

Post decisional hearing can be identified as a harmonizing tool to balance between administrative efficacy and fair procedures governing an individual. Post decisional hearing was not brought about to overpower pre-decisional hearing but to supplement the latter whenever the case demands. The usage of post-decisional hearing is restricted to exceptional usage only. Such exceptional grounds are likely to include deprivation of property, liberty, livelihood or any other public interest that any individual can demand and is relevant by nature.

The Maneka Gandhi case gave rise to the principle as the case was in conflict with statute and the principle of natural justice and it became relevant for the court to decide as to whom to prefer more. Although a prior hearing is always better than subsequent hearing, the latter is preferred over no hearing at all. The fact that supports post decisional hearing is the speedy disposal of cases and remedying of injustice. Post decisional hearing is, therefore, a demand when immediate decisions are to be taken in light of the public interest. In the case of post decisional hearing, an individual is provided with an opportunity to be heard after a decision has been adopted by the concerned authorities within a specific time frame.

The important feature that is required to be highlighted by this kind of hearing is that the decision taken by the concerned authorities are not permanent and final by nature rather, a tentative one for without the parties being heard, the final decision cannot be taken as it goes against the Principles of Natural Justice. As the conflict between pre-decisional hearing and that of post decisional hearing rises, the courts developed a test, which is divided into three parts to determine which is mandated when. They are:

1) The public interests that are involved need to be considered.

2) Association of the risks that are involved in allowing the adoption of pre-decisional hearing needs to be taken care of along with taking care of the values of the Constitution that are involved.

3) Government's administrative and economic implications.

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3. https://blog.ipleaders.in/post-decisional-hearing-development-maneka-gandhis-case

Did you know?

India's Vedas, Smritis and Upanishads are all texts which perpetuate the ideals of fair administration (dharma) and hence, rule of law.

VI. Droit System

Droit Administrative Law

Under the French system of administration of justice a landmark event occurred when Napoleon took over the power of administration and became the Consul General in the late eighteenth century. To exercise the judicial powers, there existed the King's court called Conseil Du Roi. This Court only played an advisory role to the King. Ordinary Courts on the other hand were much neglected and their salary was dependent on the fee collected.

As a competitor to the King's court, Ordinary Courts started developing an attitude of putting breaks on schemes and programmes of the Government. Hence, the reforms brought about by Napoleon had two objectives, namely to usher in as quickly as possible, socio-economic movements in the country and in this process, if there is any dispute between an individual and the Government departments, it should be decided as quickly as possible. Hence, the Court was disallowed from putting a spanner in the wheels of administration.

Likewise, the King's powers were also curtailed and the King's court was abolished. The new system evolved a paradigm shift from conventional judicial decision making. Special Courts had been established to expeditiously dispose the matter pending by this system. France had evolved a dual system of justice operating on the same land, governing the same set of people in the same constituency. While an all private parties' dispute found its way in the civil court, a dispute between a private individual and Government departments nearly always went to the administrative courts.

The highest administrative court was Counseil de' Etat. Initially, when this system was established, direct filing of cases was not allowed. The court could only entertain the petition when the Minister had forwarded the same to the court and the decision of the court could have only been of advisory value for the minister.

Although there have been theoretical objections to the Droit system, it is often considered far more efficient than its contemporary common law system.

Napoléon Bonaparte, (born August 15, 1769 —died May 5, 1821) was the French general, first consul, and emperor of the French and one of the most celebrated personages in the history of the West. He revolutionized military organization and training; sponsored the Napoleonic Code, the prototype of later civil-law codes; reorganized education; and established the long-lived Concordat with the papacy. Napoleon's many reforms left a lasting mark on the institutions of France and of much of western Europe. But his driving passion was the military expansion of French dominion, and he was almost unanimously revered during his lifetime and until the end of the Second Empire under his nephew Napoleon III as one of history's great heroes.