DROIT ADMINISTRATIF: ADOPTION IN INDIA, UK, USA & FRANCE

Nimisha Jha*

Abstract

The French system of Administrative law of establishing a different set of courts for dealing with the cases related to maladministration or lack thereof has been an area of debate and discussion for past two centuries. This system is legally called the Droit Administratif. It has evolved with the evolution of administrative law in France. Dicey had criticised the French system of administrative law as being against the principles of Rule of Law and hence most of the common law countries in principle did not follow the French principle. But with changing times, even UK has adopted this effective system for smooth and quick dispensation of justice by establishing Tribunals and various quasi judicial specialised bodies. Common law countries like India have seen a huge surge in Tribunalisation of justice which has come with its fair share of criticism. Even countries like USA have begun appreciating the effective French system of Administration of Justice and established tribunals in the wake of it. There can be witnessed an evolution, dilution and adoption of both the system of Droit Adminitratif and system of dispensation of justice under Common Law. The paper tries to trace out this evolution of both the systems by comparing the French system with India, UK and USA.

Keywords: Administrative Law, Droit Administratif, Common Law, India, Tribunals, evolution, USA, UK, Rule of Law.

PREFERRED CITATION

- Nimisha Jha, Droit administratif: adoption in India, UK, USA & France, *The Lex-Warrier: Online Law Journal* (2018) 7, pp. 316 – 337, ISSN (O): 2319-8338

* Advocate, High Court of Madhya Pradesh.

A detailed analysis of the Adoption of the French System of administration in India and A comparison with UK, USA and France

INTRODUCTION

Administrative law (or regulatory law) is the body of law that arises from the activities of administrative agencies of government, which is distinguished from private law, which originates from the activities of private individuals, corporations, and non-governmental entities. Government agency action can include rulemaking, adjudication, or the enforcement of a specific regulatory agenda. Administrative law is considered a branch of public law. As a body of law, administrative law deals with the decision-making of administrative units of government (including tribunals, boards, and commissions) that are part of a national regulatory scheme in such areas as international trade, manufacturing, the environment, taxation, broadcasting, immigration, and transport[1].

As governments grew in size and power, there came the necessity of developing a framework of laws governing the administration of the public to keep order, ensure efficiency, preserve the economy, and to maintain a control over a burgeoning bureaucracy. As a framework which uses constitutional, judicial and political powers, administrative law expanded greatly during the twentieth century, as legislative bodies world-wide created more governmental agencies to regulate the increasingly complex social, economic, and political spheres of human interaction and to enhance the development of individuals, families, and communities[2].

Most countries that follow the principles of common law have developed procedures for judicial review that limit the reviewability of decisions made by administrative law bodies. Often these procedures are coupled with legislation or other common law doctrines that establish standards for proper rulemaking. Administrative law may also apply to review of decisions of so-called quasi-public bodies, such as non-profit corporations, disciplinary boards, and other decision-making bodies that affect the legal rights of members of a particular group or entity[3].

While administrative decision-making bodies are often controlled by larger governmental units, their decisions could be reviewed by a court of general jurisdiction under some principle of judicial review based upon due process (United States) or fundamental justice (Canada). Judicial review of administrative decision, it must be noted, is

1 http://www.newworldencyclopedia.org/entry/Administrative_law (last visited on 03/08/2014 at 20:09)

2 http://www.newworldencyclopedia.org/entry/Administrative_law (last visited on 03/08/2014 at 20:09)

3 *Ibid.*

different from an appeal. When sitting in review of a decision, the Court will only look at the method in which the decision was arrived at, whereas in appeal the correctness of the decision itself will be under question.

This difference is vital in appreciating administrative law in common law countries.

The scope of judicial review may be limited to certain questions of fairness, or whether the administrative action is *ultra vires*. In terms of ultra vires actions in the broad sense, a reviewing court may set aside an administrative decision if it is patently unreasonable (under Canadian law), *Wednesbury* unreasonable (under British law), or arbitrary and capricious (under U.S. Administrative Procedure Act and New York State law). Administrative law, as laid down by the Supreme Court of India, has also recognized two more grounds of judicial review which were recognized but not applied by English Courts viz. legitimate expectation and proportionality. The powers to review administrative decisions are usually established by statute, but were originally developed from the royal prerogative writs of English law, such as the writ of mandamus and the writ of certiorari. In certain Common Law jurisdictions, such as India or Pakistan, the power to pass such writs is a constitutionally guaranteed power. This power is seen as fundamental to the power of judicial review and an aspect of the independent judiciary[4].

The existence in France of a body of administrative law (le *droit administratif*), separate and distinct from the civil law, dealing, in the main, with the competence of the administrative authorities and regulating their relations with one another and with private individuals, together with a separate and distinct body of tribunals charged with deciding controversies between the administration and private persons and of resolving conflicts of competence between the administrative and the civil courts, distinguishes fundamentally the administrative and legal system of France from that of Anglo-Saxon countries. In these latter countries there are, to be sure, well settled rules of law and practice regarding the competence of the administrative authorities, the relations between them and private individuals and as to the responsibility of the State and its agents for injuries to private persons, but they do not constitute in their ensemble a separate and distinct body of law as the French droit *administratif* does[5].

Dicey goes to the length of asserting that the French *droit administratif* and the very principles on which it rests are quite unknown to English and American judges and lawyers. He does not, of course, deny the existence in America and England of

[4] *Id.*

[5] James W. Garner; *French Administrative Law*: The Yale Law Journal, Vol. 33, No. 6 (Apr., 1924), pp. 597-627 (http://www.jstor.org/stable/787920) (last visited on 03/08/2014 at 15:40)

administrative law but rather the French conception of it as a body of "official" law, entirely distinct and separate from the rest of the public law, based on different principles from those which determine the relations between private individuals, and applied by a special class of tribunals distinct from the ordinary civil courts[6].

It may be added that there are in both England and the United States various claims courts, commissions, boards and departments which exercise quasi-judicial powers and which frequently decide controversies between private individuals and the government, settle claims, award compensation for damages, determine disputes relative to the powers and duties of local authorities and the like. These bodies bear some resemblance to the French administrative courts as regards the nature of their jurisdiction, their organization, their methods of procedure and in being what Dicey calls "extraordinary official" courts for the administration of "official" law. It is not entirely correct therefore to say that the French notion of administrative law is alien to the spirit and traditions of American and English institutions and to English and American practice[7].

Another striking difference between the French *droit administratif* and the administrative law of Anglo-Saxon countries, so far as there is any, is that the former is almost entirely jurisprudential (to employ a French term); that is to say, it is case law. It is largely the work of the council of state (the supreme administrative court of France), of the tribunal of conflicts (a special tribunal for deciding conflicts of competence between the civil and administrative courts) and to some extent of the court of cassation (the supreme judicial court of France). In this respect it bears a striking resemblance to the common law of England and the United States. Even those who like Dicey have criticized the French system of administrative law as fundamentally wrong have expressed their admiration for the skill and ingenuity which the council of state, in particular, has shown in building up from year to year a vast system of jurisprudence' and in devising new remedies for the protection of private individuals against the arbitrary and illegal conduct of the administrative authorities. He even admits that the system has certain merits which Englishmen do not always recognize[8].

A somewhat extensive study of the jurisprudence of the council of state that the system of administrative law which has been slowly built up, in the main, by its decisions deserves more admiration than has ever been bestowed upon it by English and American jurists, not merely because it is in itself a monument of judicial construction but because of its extremely progressive and

[6] *Ibid.*
[7] *Id.*
[8] *Id.*

liberal character. It can now be said without possibility of contradiction that there is no other country where the rights of private individuals are so well protected against the arbitrariness, the abuses and the illegal conduct of the administrative authorities and where they are so sure of receiving reparation for injuries sustained on account of such conduct. This is virtually the unanimous opinion of French jurists and writers on administrative law and it is entirely justified. The council of state, which has come to be regarded as the principal guardian and-protector of the rights and liberties of the people against a bureaucratic and highly centralized administration, occupies a place in the public esteem and confidence of the French which is higher even than that which the Supreme Court of the United States enjoys among the American people. It enjoys greater public confidence than the court of cassation or the inferior judicial courts because it has shown more solicitude for upholding the rights of individuals in their controversies with the government[9], its decisions are more often based upon equity, its jurisprudence has been more liberal and progressive especially in devising remedies for the protection of the individual against illegal or arbitrary administrative conduct and because recourse to it is simpler and less expensive. For these reasons whenever the individual has a choice he will usually bring his action before the council of state rather than before a civil court[10].

LEGAL STATUS

Dicey emphasizes the fact that in these latter countries public officials from the highest to the lowest are subject to the same law which governs private individuals that is the "ordinary law of the land"; that they are subject to the same responsibility as are private individuals, for the injuries which their official or unofficial acts may cause to others and that this responsibility is enforceable in the ordinary civil or criminal courts by a suit against the official committing the wrong. In the main this is a true statement but it is not entirely so[11].

But in the more than half a century which has elapsed since that was written, these concepts have undergone a change which affected even that author himself and it is now

[9] It is necessary to remark in this connection that the administrative courts do not have jurisdiction over all controversies between the administration and private individuals; that is, not all of the *contentieux adnministratif* has been reserved to them. A good part of it in fact is exercised by the judicial courts. The separation between "administration" and "justice," although a fundamental principle of French law, is not therefore complete. Thus the judicial courts have jurisdiction of controversies in cases of damages resulting from the personal fault of the administrative agent, cases of expropriation, acts relating to the management of the public domain, the application of police ordinances and those relative to the *petite voirie*, claims against the postal administration, compensation for damages sustained by certain State employees on account of labour accidents, etc. Formerly also when the distinction between so-called "acts of authority" or "acts of gestion" was maintained, the judicial courts had jurisdiction over claims for reparation growing out of acts of the former class.

[10] *Id.*

[11] *Id.*

generally recognized that not only Continental nations but Britain and the United States have an administrative law[12].

DROIT ADMINISTRATIF: A SYSTEM OF ADMINISTRATIVE ADJUDICATION

The medieval *curia regis* (or *aula regia*) of continental Europe seems to have been, like many other institutions of that period, a survival, or at least an imitation, of a Roman model. In Spain it lasted down to modern times and, besides advisory and judicial, "had administrative, functions".

In France, *Droit administration* can be defined as a body of rules which determine the organisation and the duties of public administration and which regulate the relations of the administration with the citizens of the state[13].

Droit administrative is associated with the name of Napoleon Bonaparte. Before the Revolution in 1789, there was a constant see-saw struggle for power going on in the French politics between the traditional Bonapartists (who supported the executive power even in the judicial matters) and reformist parliamentarians (who supported the jurisdiction of ordinary courts)[14].

In France the *Conseil du Roi* was, originally, "but a reduced form of the first Capetictns' *curia regis* which soon differentiated into three branches, the *Conseil proper, Le Chambre des Enquetes*, or Court of Finance, and the *Parlernent* or Judicial Court. In 1302, the States General were summoned for the first time and *Le Chambre des Enquetes* proceeded to make preliminary examination of appeals. The former met, for the last time before the Revolution, in 1614.

In the 16th Century all French tribunals were being overshadowed by the growing jurisdiction of the *Conseil du Roi*. It claimed cognizance of all manner of cases in which the government was interested, and assumed power to withdraw cases, when it pleased, from the ordinary courts. But the growing power of the *Conseil du Roi* did not pass wholly unchallenged.

At the end of the 16th century and the beginning of the 17th, keen conflicts of jurisdiction arose, not unlike the contemporary English conflicts between the common law courts on the one side and the Chancery Court of Requests and Council of Wales, on the other. In the 17th century, too, under Louis XIV and Richelieu, the *Conseil du Roi* emerged as the *Conseil Privte* in contra-distinction to the *Conseil Commun*. It had, along with other jurisdiction that of a superior administrative court-"over appeals from the orders of intendants for redress

[12] C. Sumner Lobingier; *Administrative Law and Droit Administratif*: A Comparative Study with an Instructive Model (http://www.jstor.org/stable/3309336) (last visited on 03/08/2014 at 17:12)

[13] I.P. Messy: *Administrative Law*, 7th ed., 2008, Eastern Book Co., (Lucknow)

[14] *Ibid.*

against the acts of the state or acts of grace emanating from the chancellery (ennoblement, legitimation, patents of offices, etc.)".

In I789, on the eve of the Revolution, the States General were again convoked and on June I7 of that year, declared themselves the National Assembly. Its attitude toward the regular courts was one of suspicious hostility and among its first acts was a prohibition of their interference with administration[15].

After the Revolution in 1789 a major breakthrough was made in this deadlock. The first step taken by the revolutionists was to curtail the power of the executive which was done on the theory of separation of powers by the famous 16-24 August, 1790 Law. *Counseil du Roi* was abolished and the king's powers were curtailed. Napoleon, who became the first Consul, favoured freedom for administration and also favoured reforms. He wanted an institution to give relief to the people against the excesses of the administration. Therefore, in 1799 *Counseil d'Etat* was established.

The main aim of the institution was to resolve difficulties which might arise in the course of administration. In the beginning it was not an independent court but an appendage of the executive. Its main task was to advise the minister with whom the complaint was to be lodged. In fact the minister was the judge, and the *Counseil d'Etat* administered only advisory justice. It did not have public sessions. It had no power to pronounce judgments. It represented the government's point of view. It was this aspect of the *Counseil d'Etat* which was against Dicey's concept of rule of law.

In 1872, its formal power to give judgment was established. The *Arrets* (executive Law) Blanco, February 8, 1873 finally laid down and settled that in all matters involving administration, the jurisdiction of *Counseil d'Etat* would be final. It laid down, among other things, the principle that questions of administrative liability would be within the jurisdiction of administrative courts and that the liability was subject to special rules different from those of *Droit Civil*. In 1889, it started receiving direct complaints from the citizens and not through ministers.

Droit administrative does not represent the principles and rules laid down by the French Parliament; it consists of rules developed by the judges of the administrative courts.

Droit Administratif, therefore, includes three series of rules[16]:

1. **Rules dealing with administrative authorities and officials:** These

[15] C. Sumner Lobingier: *Administrative Law and Droit Administratif: A Comparative Study with an Instructive Model*; University of Pennsylvania Law Review and American Law Register, Vol. 91, No. 1(Aug., 1942), pp. 36-58

[16] I.P. Messy: *Administrative Law*, 7th ed., 2008, Eastern Book Co., (Lucknow)

relate to appointment, dismissal, status, salary and duties, etc.

2. **Rules dealing with the operation of public services to meet the needs of citizens:** These services may be operated either wholly by public officials or under their supervision or they may assist private agencies to provide public utility services.
3. **Rules dealing with administrative adjudication:** If any injury is done to a private citizen by the administration, the matter would be decided by the administrative courts. *Counseil d'Etat* is the highest administrative court. This system of administrative adjudication developed in France due to historical reasons in order to avoid encroachment by the courts on the powers of administrative authorities and prevent intrusion by the judges in the business of administration[17].

In case of conflict between the ordinary courts and the administrative courts regarding jurisdiction, the matter is decided by the Tribunal des Conflicts. This tribunal consists of an equal number of ordinary and administrative judges and is presided over by the minister of justice[18].

There is no Code of *Droit Administratif* like the Code Civil. The *Counseil d'Etat* has developed and elaborated the doctrines on its own. This has been done neither to justify the arbitrary powers of the administrative officials nor to narrow the field of citizens' liberty but to help citizens against the excesses of the administration. Sometimes these new doctrines created by the *Conseil d'Etat* have been adopted in the Civil Code through Parliament[19].

CHARACTERSTICS OF *DROIT ADMINISTRATIF*[20]:

1. Matters concerning the state and administrative litigation are decided by the administrative courts and not by the ordinary courts of the land.
2. In deciding matters concerning the State and administrative litigation, special rules as developed by the administrative courts are applied.
3. Conflict of jurisdiction between ordinary courts and administrative courts are decides by the agency known as *Tribunal des Conflits*.
4. It protects the government officials from the control of ordinary courts.
5. *Counseil d'Etat* which is the supreme administrative court is not a priori invention but is the product of historical process with deep roots. It is not merely an adjudicatory body

[17] *Ibid.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

but is also a consultative body. In 1979, it considered 147 draft laws which were placed before the Parliament in 1980 and also considered 489 draft decrees[21].

ADOPTION AND WORKING OF *DROIT ADMINISTRATIF* IN COMMON LAW COUNTRIES[22]

Generally speaking, most countries that follow the principles of common law have developed procedures for judicial review that limit the reviewability of decisions made by administrative law bodies. Often these procedures are coupled with legislation or other common law doctrines that establish standards for proper rulemaking.

Administrative law may also apply to review of decisions of so-called quasi-public bodies, such as non-profit corporations, disciplinary boards, and other decision-making bodies that affect the legal rights of members of a particular group or entity.

While administrative decision-making bodies are often controlled by larger governmental units, their decisions

could be reviewed by a court of general jurisdiction under some principle of judicial review based upon due process (United States) or fundamental justice (Canada). Judicial review of administrative decision, it must be noted, is different from an appeal. When sitting in review of a decision, the Court will only look at the method in which the decision was arrived at, whereas in appeal the correctness of the decision itself will be under question.

This difference is vital in appreciating administrative law in common law countries.

The scope of judicial review may be limited to certain questions of fairness, or whether the administrative action is *ultra vires*. In terms of ultra vires actions in the broad sense, a reviewing court may set aside an administrative decision if it is patently unreasonable (under Canadian law), *Wednesbury* unreasonable (under British law), or arbitrary and capricious (under U.S. Administrative Procedure Act and New York State law). Administrative law, as laid down by the Supreme Court of India, has also recognized two more grounds of judicial review which were recognized but not applied by English Courts viz. legitimate expectation and proportionality.

The powers to review administrative decisions are usually established by statute, but were originally developed from the royal prerogative writs of English law, such as the writ of mandamus and the writ of certiorari. In certain Common Law jurisdictions, such as India or Pakistan, the power to pass such

[21] Benard Ducamin: *Role of Counseil d'Etat in Drafting Legislation,* translated by William Dale, International and Comparative Law Quarterly, Vol. 30, Part 4, Oct. 1981, p.882

[22] http://www.newworldencyclopedia.org/entry/Administrative_law (last visited on 03/08/2014 at 20:09)

writs is a constitutionally guaranteed power. This power is seen as fundamental to the power of judicial review and an aspect of the independent judiciary.

Australia:

Australia possesses well-developed ombudsman systems, and Freedom of Information laws, both influenced by comparable overseas developments. Its notice and comment requirements for the making of delegated legislation has parallels to the United States. Australia's borrowings from overseas are still largely shaped by its evolution within a system of parliamentary democracy that loosely follows a Westminster system of responsibility and accountability.

Canada:

Canadian administrative law is the body of law in Canada addressing the actions and operations of governments and governmental agencies. That is, the law concerns the manner in which courts can review the decisions of administrative decision-makers (ADM) such as a board, tribunal, commission, agency or minister. The body of law is concerned primarily with issues of substantive review (the determination and application of a standard of review) and with issues of procedural fairness (the enforcement of participatory rights).

India:

Indian law refers to the system of law which operates in India. It is largely based on English common law because of the long period of British colonial influence during the British Raj period. Much of contemporary Indian law shows substantial European and American influence. Various acts and ordinances first introduced by the British are still in effect in modified form today. During the drafting of the Indian Constitution, laws from Ireland, the

United States, Britain, and France were all synthesized to get a refined set of Indian laws as it currently stands. Indian laws also adhere to the United Nations guidelines on human rights law and environmental law. Certain international trade laws, such as those on intellectual property, are also enforced in India.

USA:

The actions of executive agencies independent agencies are the main focus of American administrative law. In response to the rapid creation of new independent agencies in the early twentieth century, Congress enacted the Administrative Procedure Act (APA) in 1946. Many of the independent agencies operate as miniature versions of the tripartite federal government, with the authority to "legislate" (through rulemaking; see Federal Register and Code of Federal Regulations), "adjudicate" (through administrative hearings), and to "execute" administrative goals (through agency

enforcement personnel). Because the United States Constitution sets no limits on this tripartite authority of administrative agencies, Congress enacted the APA to establish fair administrative law procedures to comply with the requirements of Constitutional due process.

ADOPTION AND WORKING OF *DROIT ADMINISTRATIF* IN CIVIL LAW COUNTRIES[23]

Unlike most Common-law jurisdictions, the majority of civil law jurisdictions have specialized courts or sections to deal with administrative cases which, as a rule, will apply procedural rules specifically designed for such cases and different from that applied in private-law proceedings, such as contract or tort claims.

France:

The basis of French civil law was formed from the Code Civil or Code Napoleon which incorporated some of the freedoms gained by the people because of the French Revolution. Moreover, Napoleon introduced administrative law codes which fostered efficient governments and created public order.

Most claims against the national or local governments are handled by administrative courts, which use the *Conseil d'État* as a court of last resort. This court acts as an arm of the French national government and is the supreme court for administrative justice as well as assisting the executive with legal advice.

Germany:

In Germany, the highest administrative court for most matters is the federal administrative court *Bundesverwaltungsgericht.* There are federal courts with special jurisdiction in the fields of social security law *(Bundessozialgericht)* and tax law *(Bundesfinanzhof).* Public law *(Öffentliches Recht)* rules the relations between a citizen or private person and an official entity or between two official entities. For example, a law which determines taxes is always part of the public law, just like the relations between a public authority of the Federation (Bund) and a public authority of a state (Land).

Public law is normally based on the so-called *Über-Unterordnungs-Verhältnis* ("superiority inferiority relationship"). That means that a public authority may define what is to be done, without the consent of the citizen. (Thus, for example, if the authority orders a citizen to pay taxes, the citizen has to pay, even without an agreement.) In return, the authority has to abide by the law and may only order, if empowered by a law.

The Netherlands:

In the Netherlands, administrative law provisions are usually contained in separate laws. There is however a single General

[23] *Ibid.*

Administrative Law Act (*Algemene Wet Bestuursrecht* or AWB) that applies both to the making of administrative decisions and the judicial review of these decisions in courts. On the basis of the AWB, citizens can oppose a decision *(besluit)* made by a public body *(bestuursorgaan)* within the administration and apply for judicial review in courts if unsuccessful.

Unlike France or Germany, there are no special administrative courts of first instance in the Netherlands, but regular courts have an administrative "sector" which specializes in administrative appeals. The courts of appeal in administrative cases however are specialized depending on the case, but most administrative appeals end up in the Judicial Section of the Council of State (Raad van State).

ADOPTION AND WORKING OF *DROIT ADMINISTRATIF* IN FRANCE[24]

French administrative law or *droit administrative* is a branch of law which deals with the powers and duties of various administrative agencies and officials. According to Dicey[25], *droit administratif* is that portion of French law which determines:

1. Position and liabilities of state officials
2. Rights and liabilities of private individuals in their dealings with the officials as representatives of the state.
3. Procedure by which these rights and duties are enforced.

According to him, this system is based on two principles, namely:

1. An individual in his dealings with the State does not, according to the French legal system, stand on the same footing as that on which he stands in dealing with his neighbour.
2. The government and its officials are independent of and free from jurisdiction of the ordinary civil courts.

From the above two principles, the following consequences ensue:

1. The relation of the government and its officials towards private citizens must be regulated by a body of rules which may differ considerably from the laws which govern the relation of one private person to another.
2. The ordinary courts which determine disputes between private individuals have no jurisdiction to decide disputes between private individuals have no jurisdiction to decide disputes between private individual

[24] C.K. Takwani: *Lectures on Administrative Law*, 4th ed., 2008; Eastern Book Co., (Lucknow) p.11-12

[25] *Law of the Constitution* (1915) at p.330

and the state but they are determined by administrative courts.

3. In case of conflict of jurisdiction between the two sets of courts, the said dispute will be decided by the said administrative court.
4. *Droit administrative* has a tendency to protect from the supervision or control of the ordinary law courts any servant of the state who is guilty of an act, however illegal, whilst acting bona fide in obedience to the orders of his superiors and in discharge of his official duties.

Dicey did not favour *droit administrative*. According to him, the object of two sets of courts and two types of laws is to protect the government officials from the consequences of their acts. According to him, there was no rule of law in France. In view of that there was:

1. Supremacy of law,
2. Equality before the law,

There was much more effective control over administrative action in England than in France.

However, Dicey was not right in drawing certain inferences. As a matter of fact, *Counseil d'Etat* afforded much more protection to the aggrieved parties in France than the regular courts could afford to such persons in England. The popular conception that in France, the state officials in their official dealings with private citizens are above the law, or are a law unto them, is erroneous. The official transgressing the bounds of law or acting contrary to the rules of natural justice in his dealings with the citizen is subject to a greater and more effective control in France than in some Anglo-Saxon countries.

Again, the doctrine of sovereign immunity which shows the backwardness of Anglo-American law is absent in the French system. A close analysis suggests that sovereignty and responsibility are mutually exclusive notions. Admission to full state liability to the subject in France is the miraculous change in the law affected by the jurisprudence evolved by the *Counseil d'Etat*. No statute stated it, only the judge did declare it in a series of decisions of *Counseil d'Etat*. No law in France has yet decreed the liability of the French state. But the law is there in flesh and blood flowing from the decision of *Counseil d'Etat*.

ADOPTION AND WORKING OF DROIT ADMINISTRATIF IN UK[26]

In England, by and large, the existence of administrative law as a separate branch of law was not accepted until the advent of the 2oth century. In 1885, Dicey rejected the concept, altogether. In his famous thesis on rule of law, he observed that there was no administrative law in England. He had

[26] *Ibid.* p. 8-11

pronounced to Robson: "In England, we know nothing of administrative law and we wish to know nothing about it."[27]

But while saying so he ignored the existence of administrative discretion and administrative justice which were current even in his days. In a large number of statutes discretionary powers were conferred on the executive authorities and administrative tribunals which should not be called into question by the ordinary courts of law. But he disregarded them altogether. It appears that his contemporary Maitland was quite conscious of the true position and he observed in 1887: "If you take up a modern volume of the reports of the Queen's Bench Division, you will find that about half of these cases reported have to do with rules of administrative law." He added; "We are becoming a much governed nation, governed by all manners of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes."[28]

But as Taylor stated; "Until August 1914, a sensible law abiding Englishman could pass through his life and hardly notice the existence of the state beyond the post office and the policeman."[29]

In *Ridge v Baldwin*[30] Lord Reid also said;"We do not have a developed system of administrative law- perhaps because until fairly recently we did not need it."

In 1914, however, Dicey changed his views. In the last edition of his famous book 'Law and the Constitution', published in 1915, he admitted that during the last thirty years, due to increase of duties and authority of English officials, some elements of droit had entered into England. But even then, he did not concede that there was administrative law in England.

However, after two decisions of the House of Lords in *Board of Education v Rice*[31] and *Local Government Board v Alridge*[32], in his article 'The Development of Administrative Law in England'[33] he observed: "Legislation had conferred a considerable amount of quasi-judicial authority on the administration which was a considerable step towards the introduction of administrative law in England."

According to Friedmann[34], unfortunately, Dicey misunderstood the scope and ambit of administrative law. He thought administrative law to be inconsistent with the maintenance of the rule of law. Hence, while studying the rule of law, he excluded

[27] Robson, *Administrative law in England* at pp. 85-86
[28] Maitland, *Constitutional history of England* (1955) at p. 501
[29] *English History* (1914-15) at p.1
[30] (1963) 2 All ER 66 at p.76
[31] 1911 AC 179
[32] 1915 AC 120
[33] (1915) 31 LQR 148
[34] *American Administrative law* (1962) at p.21

altogether administrative law and a special system of administrative courts.

As observed by Griffith and Street[35], the study of administrative law had to suffer a lot because of Dicey's conservative approach. Of course, in due course, scholars made conscious efforts to now the real position. But even to them, the study of administrative law was restricted only to two aspects, viz. delegated legislation and administrative adjudication.

Even in 1935, Lord Hewart, Chief Justice of England described the term 'Administrative law' as 'continental jargon'.

In 1929, the Committee on Minister's Powers headed by Lord Donoughmore was appointed by the British government to examine the problems of delegated legislation and the judicial and quasi-judicial powers exercised by the officers appointed by the ministers and to suggest effective steps and suitable safeguards to ensure the supremacy of the rule of law.

In 1932, the Donoughmore Committee submitted its report and made certain recommendations with regard to better publication and control of subordinate legislation, which were accepted by Parliament with the passage of the Statutory Instruments Act, 1946.

In 1947, the Crown Proceedings Act was passes by the British Parliament which made the government liable to pay damages in cases of tortuous and contractual liability of the Crown. Thus, the abandonment of the doctrine; "The king can do no wrong" considerably expanded the scope of administrative law in England.

In 1958, the Tribunals and Inquiries Act was passed for the purpose of better control and supervision of administrative decisions, and the decisions of the administrative authorities and tribunals were made subject to appeal and supervisory jurisdiction of the regular courts of law.

In the twentieth century, social and economic policies of the government had significant impact on private rights, housing, employment, planning, education, health and several other matters. Neither the legislation could resolve those problems nor could 'Crown's Courts' provide effective remedies to the aggrieved parties. That had resulted in increase of delegated legislation as also tribunalisation.

In *Breen v Amalgamated Engg. Union*[36], Lord Denning proclaimed; "It may truly now be said that we have developed system of administrative law."

Lord Diplock[37] went a step further and stated that recent development in England

[35] *Principles of Administrative Law* (1963) at p.3
[36] (1971) 1 All ER at p. 1153
[37] IRC v National Federation of Self Employed, 1982 AC 167 at p.641

provided a system of administrative law which in substance nearly as comprehensive in its scope as *droit administratif* in France.

Some British scholars advocated in favour of *droit administratif* and suggested to import that concept and *Counseil d'Etat* of French legal system to England, though others did not favour the idea.

ADOPTION AND WORKING OF *DROIT ADMINISTRATIF* IN USA[38]

Administrative law was in existence in America in the 18th century, when the first federal administrative law was embodied in the statute in 1789, but it grew rapidly with the passing of the Inter-State Commerce Act, 1877.

In 1893, Frank Goodnow published a book on 'Comparative Administrative law' and in 1905, another book on 'Principles of Administrative law of the United States' was published.

In 1911, Ernst Freund's 'Casebook on Administrative law' was published.

The bench and the bar also took interest in the study of administrative law.

In his address to the American Bar Association in 1946, President Elihu Root warned the country by saying: "There is one special field of law, development of which has manifestly become inevitable. We are entering upon the creation of a body of administrative law, quite different in its machinery, its remedies and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts....If we are to continue a government of limited powers, these agencies of regulation must themselves be regulated..."

Unfortunately, this advice of a wise counsel was ignored by the leaders of the Bar. The powers of the administrative bodies continued to increase day by day and they became a 'Fourth Branch' of the government.

After the New Deal, it was felt necessary to take effective steps in this field. A special committee was appointed in 1933 which called for greater judicial control over administrative agencies. After the report of the Roscoe Pound Committee in 1938 and Attorney General's Committee in 1939, the Administrative Procedure Act, 1946 was passed which contained many provisions relating to the judicial control over administrative actions.

ADOPTION AND WORKING OF *DROIT ADMINISTRATIF* IN INDIA[39]

Administrative law was in existence in India even in ancient times. Under the Mauryas and Guptas, several centuries before Christ, there was well organised and centralised

[38] C.K. Takwani: *Lectures on Administrative Law*, 4th ed., 2008; Eastern Book Co., (Lucknow) p. 11

[39] *Ibid.*

administration in India. The rule of Dharma was observed by the kings and administrators and nobody claimed any exemption from it. The basic principles of natural justice and fair play were followed by the kings and officers as the administration could be run only on those principles accepted by Dharma, which was even wider word than 'Rule of Law' or 'Due process of Law'. Yet, there was no administrative law in existence in the modern sense.

With the establishment of the East India Company and the advent of the British Rule in India, the powers of the government had increased. Many Acts, statutes and legislations were passed by the British government, regulating public safety, health, morality, transport and labour relations. The practice of granting administrative license began with the State Carriage Act, 1861. The first public corporation was established under the Bombay Port Trust Act, 1879. Delegated legislation was accepted by the Northern India Canal and Drainage Act, 1873 and the Opium Act, 1878. Proper and effective steps were taken to regulate the trade and traffic in explosives by the Indian Explosives Act, 1884.

In many statutes, provisions were made regarding holding of permits and licenses and for the settlement of disputes by the administrative authorities and tribunals.

In the twentieth century, social and economic policies of the government had significant impact on private rights of citizens; e.g. housing, employment, planning, education, health, service, pension, manufacture of goods, etc. Traditional legislative and judicial system could not effectively solve these problems. It resulted into increase in delegated legislation as well as tribunalisation. Administrative law thus became a living subject.

During the Second World War, the executive powers tremendously increased. The Defence of India Act, 1939 and the Rules made there under conferred ample powers on the executive to interfere with life, liberty and property of an individual with little or no judicial control over them. In addition to this, the government issued many orders and ordinances covering several matters by way of administrative instructions.

Since Independence, the activities and the functions of the government have further increased. Under the Industrial Disputes Act, 1947, the Minimum Wages Act, 1948, the Factories Act, 1948 and the Employees' State Insurance Act, 1948, important social security measures have been taken for those employed in industries.

The philosophy of a welfare state has been specifically embodied in the Constitution of India. In the constitution itself provisions are made to secure to all citizens social, economic and political justice, equality of status and opportunity. The ownership and control of material resources of the society

should be so distributed as best to sub serve the common good. The operation of the economic system should not result in the concentration of wealth and means of production. For the implementation of all these objects the State is given power to impose reasonable restrictions even on the Fundamental Rights guaranteed by the Constitution. In fact, to secure these objects, several steps have been taken by Parliament by passing many Acts.

Markose studied the reported cases of the Supreme Court of three years (1953, 1954 and 1955) and found that about half of these cases dealt with matters of administrative law. [40]

Even while interpreting all these Acts and the provisions of the Constitution, the judiciary started taking into consideration the objects and ideals of social welfare.

Thus, in *Vellukunnel v Reserve Bank of India*[41], the Supreme Court held that under the Banking Companies Act, 1949, the RBI was the sole judge to decide whether the affairs of a banking company were being conducted in a manner prejudicial to the depositors' interest and the Court had no option but to pass an order of winding up as prayed for by the RBI.

Again, in *State of A.P. v C.V. Rao*[42], dealing with a departmental inquiry, the Supreme Court held that the jurisdiction to issue a writ of certiorari under Article 226 is supervisory n nature, it is not an appellate court and if there is some evidence on record on which the tribunal had passed the order, the said findings cannot be challenged on the ground that the evidence for the same is insufficient or inadequate. The adequacy or sufficiency of evidence is within the exclusive jurisdiction of the tribunal.

In *M.P. Srivastava v Suresh Singh*[43], the Supreme Court observed that in matters relating to questions regarding adequacy or sufficiency of training, the expert opinion if the Public Service Commission would be generally accepted by the court.

In *State of Gujarat v M.I. Haider Bux Imam Razvi*[44], the Supreme Court held that under the provisions of the Land Acquisition Act, 1894, ordinarily, the government is the best authority to decide whether a particular purpose is a public purpose and whether the land can be acquired for that purpose or not.

Similarly, in *Maharashtra State Board of S.H.S.E. v Paritosh Bhupesh Kumar Sheth*[45], also, the Supreme Court held that "the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical

[40] *Administrative Law in India* (1961) at p.257
[41] AIR 1962 SC 1371
[42] AIR 1975 SC 2151
[43] AIR 1976 SC 1404
[44] AIR 1977 SC 594
[45] AIR 1984 SC 1543 at p. 1559

expertise and rich experience of actual day to day working of educational institutions and the departments controlling them."

In *Javed Rasool Bhat v State of J&K*[46], the Supreme Court observed that a member of the selection committee can ask even irrelevant questions to explore the candidates' capacity to detect irrelevancies.

In *Raja Ram Pal v Hon'ble Speaker, Lok Sabha*[47], the Supreme Court held that if an MP is found guilty by the House of improper conduct and is expelled, a court of law would not interfere with such an action.

Thus, on the one hand, the activities and powers of the government and administrative authorities have increased and on the other hand, there is a greater need for the enforcement of the rule of law and judicial review over these powers, so that the citizens should be free to enjoy the liberty guaranteed to them by the Constitution. Provisions are, therefore, made in several statutes giving right to appeal, revision, etc. and at the same time extraordinary remedies are available under Articles 32, 136, 226 and 227 of the Constitution of India. The principle of judicial review is held to be a part 'basic structure' of our Constitution. And if the rules, regulations and orders passed by these authorities are not within their powers, they can be declared ultra vires, unconstitutional, illegal or void.

COMPARATIVE ANALYSIS ON THE WORKING OF *DROIT ADMINISTRATIF* IN INDIA: NEED FOR REFORM

The Law Commission of India constituted in 1955 observed, "The vast amount of Legislation which has been enacted by the Union and the States, a great deal of which impinges in a variety of ways on our lives and occupations. Much of it also confers large powers on the executive. The greater, therefore, is the need of ceaseless enforcement of the rule of law, so that the executive may not, in a belief in its monopoly of wisdom in its zeal for administrative efficiency, overstep the bounds of its power and spread its tentacles into the domains where the citizens should be free to enjoy the liberty guaranteed to him by the constitution."

From the above citation it can be said that the since the independence till today very less efforts have been made to evolve a mechanism to regulate the functions of administrative authorities so as to make them in consonance with constitutional freedom guaranteed to each individual. Without some kind of power to control administrative authorities there is a danger that they may commit excesses and degenerate into arbitrary bodies.

[46] AIR 1984 SC 873 at p. 877

[47] (2007) 3 SCC 184

There has not been so far much conscious effort on the part of Government and Parliament in this Country to develop a viable system of administrative law drawing a balance between personal rights and freedoms, on the one hand, and administrative needs and exigencies of a developing social welfare state, on the other.

In England and USA, such attempts have been made from time to time, but in India attempts in this direction are, by and large, lacking so far and, therefore, a huge burden has been cast on the judiciary to give shape to the principles by which administrative functioning and behaviour can be regulated keeping in view the twin objectives mentioned above. Since independence it has become necessary to re-condition and develop the principles of administrative law, so as to meet the needs of a democratic them with the demands made on a country to develop fast in the socio-economic sphere.

Since commencement of the constitution the most commonly used technique to bring an administrative action within the cognizance of the courts has been the writ system (Art. 32 &

226). Innumerable cases have taken place in this area and hundreds of cases continue to be filed against the administration every year for seeking its redress. The writ jurisdiction conferred on the High Court's by Art. 226 can be invoked to enforce not only fundamental rights but a non-fundamental right as well. The High Courts and Supreme Court steep in to correct the error where the rules framed under the governing law do not conform to the law or the action of the administrator is not in accordance with the administrative rules or are against the fundamental axiom of justice and fair play.

However remedy is available at the disposal of the court of law. No fixed, codified laws are been framed to decide the dispute between individual and public official.

The courts have also, however, evolved self imposed restrictions. Matters which effect policy and require technical expertise, the High court would leave such matters for decision to those qualified to redress this issue.

CONCLUSION AND RECOMMENDATIONS

The Government of India are contemplating to set up administrative tribunals on the French Model for disposal of cases relating to fiscal and labour laws.

France has developed a system of administrative tribunals distinct from the ordinary courts which have no jurisdiction on the administration. *Droit administratif* is the name given to the Administrative Law prevailing in France. In this system the judicial power is kept separate from administrative power. A person seeking any redress against the administration has to go to an administrative court and not to an

ordinary court. Thus the system of *droit administrative* in France has resulted in non-interference by the Courts in the working of administrative authorities[48].

The *Conseil d'Etat* has been characterized as the 'bulwark of civil liberties' and also the 'guardian of administrative morality'. The system has come to be regarded as providing as effective protection to individual rights against the despotism of public administration. The judges of *Conseil d'Etat* possess a high degree of administrative expertise and so they are better able to control the administration than the ordinary courts where the judges are generalists and lack expertise in the administrative action is peripheral and lacks depth[49].

The most outstanding contribution made by France to legal science has been separate system of administrative jurisdiction and administrative law created by *Conseil d'Etat*.

It is true that the establishment of an institution similar to *Conseil d'Etat* in France may not be quite suited to the conditions in India. However it is necessary to develop administrative courts on the lines of the French *Conseil d'Etat* would be necessary because that will serve as counterpoise to the arbitrary action of the administration.

The creation of separate hierarchy of administrative courts brings about a clear division between the spheres of civil and administrative law. There are separate law reports in both the branches of law. In India there is expansion of the public sector and the State is assuming increasing control over the life of the community. There is a move for building as equalitarian society. In this context, it is desirable that India should develop a well ordered system of administrative law which may be able to absorb the new relations of public into this legal system.

The Indian administrative law while basically common law oriented as the Administration is subject to judicial control, has also imbibed some features of *droit administratif* as is evident from the increasing tribunalisation of the decision making process.

There is a great need for an institution, independent of the executive, to supplement the system of judicial control over administrative action in view of the limitation of judicial review so as to reduce the sense of grievance presently nursed by the people against the administration.

In the long run, however, it is necessary to improve the tribunal system in India so that tribunal can provide an effective review-mechanism of administrative decisions. To

[48] Dr. J.J.R. Upadhyaya: *Administrative Law*, 7th ed. , 2011; Central Law Agency, (Allahabad) at p.14

[49] M.P. Jain & SN Jain: *Principles of Administrative Law*, 6th ed. Reprint, 2010; Lexis Nexis Butterworths Wadhwa, (Nagpur) at p. 27

the extent, the need to resort to the Lokpal would be reduced. Also it has been it has been the experience of the ombudsman in other countries that many grievances against the administration are arises because of the failure of the administration to give reasons for the decisions taken by it and that if reasons are given as a matter of course then the number of complaints may be reduced. It will be a great advantage to the individual affected by an administration, were to disclose to him the reasons for acting in the way it is acting. He can then decide whether he should challenge the action or not in a court of law.

Many challenges to administrative action are made at present because the individual affected, being ignorant of the reasons, does not know whether the action suffers from some flaw or not.

In the area of quasi judicial adjudication, an obligation to make speaking order has come to be imposed on the concerned bodies. A similar development is a desideratum in the area of administrative powers. The *Conseil d'Etat* in France has gone far in the direction of requiring administrative decisions to contain reasons[50].

Therefore, if the administration in India were made to adopt the practice of furnishing reasons for its decision to a person feeling aggrieved by it, then the number of complaints flowing to the ombudsman may be reduced and become manageable.

In any case, there is a great need to supplement the existing mechanism to supervise administration in India, and the experiment of the ombudsman is worth a trial. It is bound to result in the improvement of administrative individuals dealing with the administration.

[50] http://www.lawyersclubindia.com/articles/Administrative-law-in-India-In-need-of-reformation-4657.asp (last visited on 03/08/2014 at 13:09)