JUDICIAL REVIEW: A COMPARATIVE ANALYSIS

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INTRODUCTION

Separation of power is an ever evolving doctrine which in its strict sense divide the functioning of a State in three organs. However, with time on departure from the old known traditional sense of the doctrine, a degree of overlap in working of the three organs has become an inherent feature of the doctrine. With the growing complexities of working mechanism of a State’s function such an overlap is not only inevitable but also desirable. One such instance of convergence is judicial review. Essence of judicial review becomes much more crucial when it comes to review of administrative actions in a State. Mechanism of administration, be it ministerial or entirely discretionary, gives the branch varied degree of autonomy to make decisions that effect public at large. Such being the scope of administrative functions, it becomes essential to have system at place that would prevent it from going rogue. Judicial review in working of administrative actions is now a recognized feature in almost all the States, however the degree and working of such judicial review might vary.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN AUSTRALIA AND INDIA

Marbury v Madison, in the USA was the first case that led to the introduction of Judicial review where it was held ‘it is emphatically the province and duty of the judicial department to say what the law is’ necessitates that a court, in circumstances of controversy, fix by judicial determination of fact and law the legal boundaries of the authority delegated to or conferred on a repository of administrative power.’ Australian courts have time and again put reliance on the holding of Marbury and is said to be an authoritative justification of review of legislative or administrative actions by the judiciary and is kept at a pedestal where it is the duty of judiciary to tell what the law actually is. Australian Constitution which is said to have commonality with the US

2 5 US 87, 111 (1803).
Constitution, has adhered to constitutional and non-constitutional review to be part of one expression where it is the court’s duty to patrol the law. 3 Australian judicial review of administrative actions is different from most of the other States, in the sense that Australia has a codified system at place. It was the perceived insufficiency of common law principles that led to enforcement of two acts namely, judicial review under the Administrative Decisions (Judicial Review) Act 1977 and review on merits by the Administrative Appeals Tribunal (AAT) under the Administrative Appeals Tribunal Act 1975.4 One of the key feature of this development was the obligation on part of the authority with decision making power to furnish reasoning for its findings which curbed the foiling of review of decisions due to the refusal to give reasons.

It is the section 3(1) of the Judicial Review Act that gives the judiciary power to review executive actions and states that, “decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of discretion or not), other than a decision by Governor-General.”5 Where on one had the section is said to be of wide import, it has been held that “decision” means the final ultimate ruling and excludes any interim holding.6 Also, in Moss v Brown, it has been asserted that the section not only encompass pure administrative actions but also actions of legislative or judicial character.7 The central scheme of the act is that it enumerates grounds that attracts judicial review of the administrative actions.

In India, also the indefinite powers with the administration has called for judicial review to be an important tool to keep a check on such powers. However, there is no codification of the grounds or a set mechanism at place that allows for judicial review of the administrative actions. It is the common law principles and grounds that are often followed by the courts. Also, it is an accepted position where judiciary is not allowed to usurp the powers and decisions of the executive, giving regard to the doctrine of separation of power, however, it still acts as watchdog, guarding the lines and preventing them from being crossed by the executive. Thus, the Indian system calls for

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5 The Administrative Decisions (Judicial Review) Act 59 of 1977 (Cwth) s 3(1)
6 "Riodan v Parole Board of the Australian Capital Territory (1981) 34 ALR 322 at 331 per Lockhart J.
reconciliation of unfettered powers of executive on one hand and doctrine of separation of power where each organ needs to respect the functioning of the other\(^8\). India also follows some standards which resemble the statutory provisions of Australia, however it is the scope of these standards that largely vary.

1. Improper exercise of power

The Judicial Review Act makes improper exercise of power one of the grounds for review and also expands it by embodying nine specific grounds under section 5(2) of the act. In India also these grounds are largely recognized, however, there scope might vary.

Irrelevant considerations, ulterior purpose and bad faith

This includes the analysis considerations taken by the decision maker while deciding on a particular issue and attracts judicial review under circumstances when the said considerations are either irrelevant or there is a failure to take relevant consideration into account. However, the statute has placed a cap on this ground where a decision can be contested on basis of irrelevant considerations only under the circumstances when the authority was bound to refer it. \(^9\) However, the Indian courts follow much broader principle where no such limitation is posed.

When the power to take decision is exercised for purpose other than for which it is conferred.\(^10\) In Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board, where acquisition of land was under the question, it was held by the court that it will be said to be an ulterior purpose, only if there was no acquisition of land if that ulterior purpose didn’t exist.\(^11\) Where the view taken by court is said to be in consonance with the practice followed in common law. The Indian courts also recognize this ground in form of colorable purpose. In case of D.C. Wadhwa v. State of Bihar, the order of State of Bihar was struck down on account of being colourable.\(^12\)

The ground of male fides or bad faith\(^13\), is either use as a residuary ground or in place or conjunction of irrelevant considerations and ulterior purposes in Australia. Also, very few cases

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\(^8\) Singh, Vaishali. “JUDICIARY AND THE EXECUTIVE ACTIONS: JUDICIAL REVIEW IN COMPARITIVE PERSPECTIVES.” *Journal on Contemporary Issues of Law*, vol. 3, no. 6

\(^9\) Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363 at 375 per Deane J.

\(^10\) The Administrative Decisions (Judicial Review) Act 59 of 1977 s 5 (2) (c).

\(^11\) Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board (1982) 41 ALR 467 at 468-469.

\(^12\) (1987) 1 SCC 378

\(^13\) The Administrative Decisions (Judicial Review) Act 59 of 1977 s 5
have been reported where Australian judicial system had invalidated an administrative action solely on the ground of mala fide and hence it is regarded as a tricky ground. Indian courts in contrast follow a much clearer picture where distinction is made between malice in law and in fact.

**Fettering discretionary powers**

In Australia, his ground is attracted when a third party enforces it decision on the primary decision making body. Under this provision it is necessary to be proved real imposition of decision on the decision making body.\(^\text{14}\) However, Indian courts follow much broader concept where dictation is not an absolute ground and it can be shown that dictation was nothing but an advice and the final decision was of the primary authority and also includes sub-delegation as one of the ground, requiring the party on whom the power has been conferred to exercise it, on the basis of trust placed in the skills of that person\(^\text{15}\). Also, under the Indian law posing of artificial fetters on the power is one of the grounds. However, such grounds do not find their place in the Australian statute and it is only limited to absolute rule of dictation by the third party.

**Unreasonableness**

The Australian courts follow the provision that “not every reasonable exercise of judgement is right, and not every mistaken exercise of judgement is unreasonable.”\(^\text{16}\) The courts require unreasonableness to be extraordinarily overwhelming. In contrast, although the Indian courts require the exercise of power to be capriciously unreasonable, the place more importance to degree of unreasonableness and have identified public interest and convenience to be one of the exceptions to the said ground\(^\text{17}\).

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2. Procedural Impropriety

When it comes to procedural requirements, Indian courts have a definite system and approach in place. They often distinguish between mandatory and directory procedures when it comes to invalidation of an executive decision. However, the Australian Courts according to the provision embodies under section 5(1)(b) of the Judicial Review Act makes no such distinction.

3. Natural Justice

There are well recognized doctrines of natural justice that require strict adherence to in the absence of which Judicial review is attracted in the Indian Courts. These are absence of bias and audi alteam partem. However, the position under Australian courts is in a perplexed state\textsuperscript{18}. The courts often show contradictory approaches ranging from rigid to a very flexible and liberal approach\textsuperscript{19}.

4. Proportionality and Legitimate Expectation

These new grounds for judicial review although recognized in both the jurisdictions, have a limited and identical scope. Both jurisdictions have proportionality as one of the grounds of judicial review but is used in restrictive way and only in consonance with the wednesbury principle of unreasonableness. Proportionality means that the action of the decision maker should be in inclination with the result desired to be obtained\textsuperscript{20}. In Minister for Resources v Dover Fisheries Pvt. Ltd, it was held that principle of proportionality can be adopted but only as an adjunct to principle of unreasonableness.\textsuperscript{21} Australian courts have now twisted the terminology and refer it as test of reasonable proportionality.\textsuperscript{22} In Indian courts also the ground of proportionality as viewed in UK and EU jurisdiction has made its way only in terms of phraseology and in reality it is used only in a restrictive scope within the lights of test of reasonableness.\textsuperscript{23}

Scope of legitimate expectation is also narrow in both the jurisdictions as compared to Cougland’s approach in UK.\textsuperscript{24} In Australia, the open ended language of the statute may provide a scope to

\textsuperscript{18} Salemi v. Minister for Immigration and Ethnic Affairs (No. 2) (1977) 14 A.L.R.
\textsuperscript{21} (1993) FCA 522
\textsuperscript{22} (2005) FCAFC 189
\textsuperscript{24} Ex parte Coughlan [2001] QB 213
encompass the doctrine of legitimate expectation in theory but Australian courts have often shown reluctance to do so. However both Indian and Australian courts have limited the scope of legitimate expectation procedural aspect where individuals are given expectation with regard to a particular procedure and in no way extend to policies or guidelines, often known as substantive legitimate expectation.

CONCLUSION
Although the significance of judicial review of administrative actions has been recognized in both the jurisdiction, the scope of the exercise of power varies by a considerable degree. Australia on one hand has a statute with enumerated grounds that is said to define a definite scope, preventing the courts from swaying and ensuring that the power of review is exercised in the four corners of the statute. India on the other hand follow the common law principles and judiciary decide the cases on the fact to fact basis. Where a statute like that in Australia seems like an ideal option, Australian courts have often experienced it to be rigid and encountered the difficulty in application of provisions as the statute does not in its true sense encompass all the common law principles. Non application of mind, reading a 'may' provision to be 'must' under the circumstances when power is coupled with duty are few of the such grounds. Even if the grounds that are embodied in the statute have much limited scope as compared to the principled followed by Indian courts. Fetterson the discretion, irrelevant considerations have drastically limited scope. Also the AAT Act allows the tribunal to go in merits of the administrative decisions and is still facing a dilemma as to whether to follow strict adversarial court model thus hampering the efficiency.

While Indian courts have an autonomy and Australian courts are tangled in the inadequate language of the Statute, it can be asserted that Indian courts are at a better position due to greater degree of flexibility within their reach. Judicial review is a powerful weapon and its significance in contemporary world cannot be denied when it comes to the scrutiny of executive actions by the

26 Groves, Mathew. “SUBSTANTIVE LEGITIMATE EXPECTATIONS IN AUSTRALIAN ADMINISTRATIVE LAW.” Melbourne University Law Review, vol. 32
judiciary. Different States however follow different procedure of this scrutiny. Neither the principles which encompass high risk of getting swayed nor the statute with an inadequate language can be said to be a perfect icon, each of the model having their own limitations, however, that cannot lead to overshadowing of required need of judicial review for administrative actions.