Judicial Control over Administration and Protect the Citizen's Rights: An Analytical Overview

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Abstract: Public administration exercises a large volume of power to meet the citizens need in modern democratic welfare state. Today administration is not concerned with only pure administrative function but also involved with a large number of quasi-legislative and quasi-judicial functions. For this respect they have a number of chances to become arbitrary or master of the citizens. So it is very necessary to control them. The existing control systems are legislative, executive and judicial. This paper include only judicial control over administration. To analyse judicial control over administration to this paper firstly, I have been seeking to what extent administration exercise its power? What are the sources of its power? And what are the problems created by administration in exercising its power? Then I have try to seek what are the judicial remedies available against administration in USA, UK, and lastly in Bangladesh? In Bangladesh context I have also try to find out what are the limitations are exist? And recommends how to over come this problems. This paper is basically based on secondary sources of information, which include books, journals and research report.

Key words: Administration, Citizen's Rights, and Judicial Control.

To what extent power is exercised by the Administration?

In modern times the administrative process as a by product of intensive form of government cuts across the traditional forms of governmental powers and combines into one all the powers which were traditionally exercised by three different organs of the state.

In Halsbery's Laws of England also it is stated that howsoever the term the Executive' or 'the Administration' is employed, there is no implication that the functions of the executive are confined exclusively to those of an executive or administrative character. Today, the executive performs variegated functions, viz. to investigate, to prosecute, to prepare and to adopt schemes, to issue and cancel licences, etc. (administrative); to adjudicate on disputes, to impose fine and penalty, etc. (Judicial); to make rules, regulations and bye laws, to fix prices etc. (Legislative). Schwartz rightly states that rulemaking (quasi-legislative) and adjudication (quasi-judicial) have become the chief weapons in the administrative armoury (Takwani, 2001; 39).

Thus, Speaking generally, an administrative action can be classified into four categories;

(i) Rule - making action or quasi-legislative action;
(ii) Rule decision action or quasi-judicial action;
(iii) Rule-application action or administrative action; and
(iv) Ministerial action.

We can define the above forms of administrative action by the way: The legislative power as the power to create rights, powers, privileges or immunities and
their correlatives as well as status, not dependent upon any previous rights, duties etc. (or for the first time), that is apparently, the power of certain antecedent legal capacities and liabilities. Judicial power as the power to create some right or duty dependent upon a previous right or duty, that is apparently the power to create remedial legal capacities and liabilities. Administrative power is the power, which is concerned mostly with the management and execution of public affairs. And the Ministerial power is that power of the administration which is taken as a matter of duty imposed upon it by the law devoid of any discretion or judgment. Therefore a ministerial action involves the performance of a definite duty in respects of which there is no choice. Collection of revenue may be one such ministerial action.

The above functions or power exercised by the following four ways mainly:

i) Rule making or Quasi-legislative action is exercised by the power of delegated legislation.

ii) Rule decision or Quasi judicial action is exercised by the administrative adjudicating power.

iii) Rule application or pure administrative action is exercised by the discretion power.

iv) On the other hand ministerial power is one where law prescribes that the duty will be performed in certain and specific terms and leaves nothing to discretion (Jain and Jain, 1981; 273 & Obaidullah, 1999; 141).

**What is discretion and why?**

Discretion is very necessary to accomplish administrative power because administrative responsibility is also bound up with discretion. When an official has no power to choose among alternatives, he cannot be held personally responsible because he has exercised no freedom of choice (Pfiffner & Presthus, 1953; 523). Discretion mean choosing from amongst the various available alternatives but with reference to the rules of reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful, but legal and regular (Massay, 2001; 54).

In the context of welfare state exercise of administrative powers, more particularly, administrative discretion, constitute the lifeblood of the whole governmental, functions. Administrative power is what administrators think fit to do, it is administration own idea of expediency, and it is incapable of being declared wrong in law by any higher authority (Obaidullah, 1999; 148).

As government concern itself with the detailed ordering of the individuals in the society, with the supply of services, with control of industry, and with particular circumstances of children, of the aged, of the sick and of the unemployed, then a large amount of discretionary power becomes necessary (Griffith & Street, 1967; 19 & Obaidullah, 1999; 142). It is realized that a government having only ministerial duties with no discretionary functions, will be extremely rigid and unworkable and that, to some extent officials must be allowed a choice as to when, how and where to act. The reason for this attitude is that more often than not, the administration is required to handle intricate problems which require investigation of facts, making choices and exercise of discretion before deciding upon what action to be taken.
More often, the legislation is sketchily, leaving many gaps and conferring powers on the administration to act in a way it deems “necessary” or “reasonable” or “if it is satisfied” or “if it is of the opinion”. The need for discretion arises because of the necessity to individualise the exercise of powers by the administration, i.e. the administration has to apply vague or indefinite statutory provisions, from case to case (Jain and Jain, 1981; 273 & Obaidullah, 1999; 142).

What are the Sources of Administrative Power?

Since World War II, American administration has acquired increasing authority and power in the formulation and implement of public policy (Lutrin & Settle, 1980; 297). Administration derives its power from five major sources: 1) Public constituents and Interest group, 2) The legislature branch of government, 3) The executive branch of government, 4) The Expertise of its personnel, and 5) A massive, multilevel civil service system. (Some writers suggest, in addition, the strategic position of public administration and its discretionary powers in carrying out policy). These are not mutually exclusive categories; an administrative agency can use any combination of them to further its growth and goals. Moreover, sources of power vary from agency to agency and at different levels of government.

1) Constituency and interest group support: A government agency must have the support, or at least the acquiescence, of some constituency to become established and to service. The constituency may consist of the general public, of special interest groups, or of both. A public, constituency provides administration with power at any level of government as long as citizens demand an increasing number of services from government agencies. Discovery that use of the drug thalidomide by pregnant women can causes fetal deformities, for example, aroused a tremendous public outcry against the dangers of improperly tested drugs. While this event not only justified the existence of food and Drug Administration (FDA) but also helped it to obtain a large budget for drug testing, it is among the rare instances in which regulatory activity has gained widespread popular attention. More often, the public’s attitude toward individual government agencies is merely vague and apathetic.

Special interest groups, on the other hand are issue oriented, react selectively to government policy, and frequently have a far greater effect than the public utility commissions, for example, experience considerable pressure from local utility companies to set favourable rates. Independent agencies, such as the small Business Administration and Farm credit. Administration, perform services that benefit special interest groups and other governmental bureaus alive, Government corporations such as the Federal Home lone Bank Board title wise perform specific tasks that arouse support or opposition among as issue oriented segment of the business community.

The public can be a source of major support of opposition to almost any administrative organization or program. According to Philip Selznick, for example, in order to gain the seaport of Tennessee valley residents, without which its agricultural program would have been delayed or diminished in effectiveness the Tennessee valley Authority (TVA) was forced to modify program objectives that had elicited local opposition.

2) Legislative Support: Several competent writers have described how bureaucracy
obtains legislative support is its ratio of success in gaining desired budget allocations. An agency like the FBI, which is highly regarded by congress, is likely to receive necessary allocations of money, although high visibility is not required for agencies to enjoy congressional respect; the Treasury Department’s Bureau of Customs and Bureau of Public Debt both have strong congressional support.

For administrative agencies, some evidence of legislative support is to be found in the enabling law, the Legislative grants of power that serves at the same time as a controlling device. Control is exercised by the agency’s awareness that congress can withdraw legal or monetary support, delay funds or nomination approvals, or initial potentially embarrassing investigations of agency activities still strong. Support from appropriations committees helps to ensure an agency’s survival in the face opposition from other agencies, loss of constituency support or loss of support from other branches of government.

3) **Executive Support:** Concerned as they are with the control of resources, agencies within the executive branch generally possesses considerable power. The civil service commission controls personnel regulations. The General Services Administration constructs and operates the majority of government buildings. The office of management and Budget (OMB) not only controls major resources but has substantial power owing to the size and expertise of its staff. Reorganized from the Bureau of the Budget in 1970, the OMB serves as presidential aide in budget preparation and guardian of the federal budget. Its public administration specialists, lawyers, economists and political scientists act as presidential shock troops in modifying or eliminating federal programs. Because other executive agencies must clear their communications with congress through the OMB to assure their consistency with the president’s policy goals, these other agencies may be said to constitute the OMB’s constituency.

4) **Personnel Expertise:** Concentrated within in the administrative agencies of government is a vast reservoir of technical expertise that legislators and the president use for advice in making policy decisions. The experts who provide this advice acquire power in a number of ways.

    First, offering technical advice that makes the results of decisions more practicable, thereby reducing uncertainty about policy outcomes, places experts in a highly advantageous position. Although they are not automatically guaranteed ready access to centres of power and control, as a rule powerful decision makers want to know what they recommend in order to avoid making important decisions, however, providing or limiting access to this information can be used as an instrument of political pressure.

    Second, because experts know that disagreement among themselves and division or conflict within major department of government can greatly weaken their power they seek to consolidate their position by gaining professional consensus within their own ranks. To implement certain policies, coalitions are formed with experts in other government departments, and the informal but solid network of information exchange among them may have the effect of keeping outsiders firmly out. Key Nixon staff members, such as H. R. Haldeman and John Ehrlichman (respectively chief of staff and chief assistant to the president), Presidential counsel John Deau, and Attorney General John Mitcheel, constituted such a closely Kuit group that investigation of government expense by external
experts or groups would have been very costly and difficult to carry out.

Issue-oriented coalitions may not be permanent, in addition, any coalition may cause one department to become dependent on another. Nevertheless, a group of experts such as that reprinted by the Council of Economic Advisers, the Joint Chiefs of Staff, or the National Security Council finds the president relying increasingly on its advice. Relying on a committee of expert advisers affords the president greater sources of information and advice as well as a greater array of alternatives from which to choose. The president should not, however, allow any one adviser or group of advisers to exercise monopolistic influence over his decisions but must always keep them under control. As Watergate demonstrated, experts can be pre-empted by none experts who nevertheless almost totally control access to policy makers. Haldeman and Ehrlichman held enough administrative and political power within the Nixon white House to force professional consensus because experts depended upon them for assignments in conducting research and carrying out policy.

5) Civil Service Support: The pioneers of public administration believed that administrators should carry out policy but have no discretion to judge or act on their own. With the increase in governmental autonomy, expertise, and constituency support, however, bureaucratic discretion has now extended to deciding which new goals and policies should be formulated as well as carried out. The civil service system has supported this tendency by instituting better employee training for job qualification and promotion which has in turn affected employee attitudes and discretion.

Some agencies, such as the Army corps of Engineers and the central Intelligence Agency have long permitted considerable employee discretion on important policy matters, although congress can intervene when policy outcomes seem likely to elicit an unfavourable public response. Since 1964, for example, congress has required from the secretary of defence a thirty day notice on the phasing out of military installations. Other agencies can influence policy goods through their employee training programs. As Herbert Kaufman's study of the U.S. Forest Service indicates, the goals of this agency are carried out against a background of in-service training and manuals of such uniformity as to guarantee that agency politics will not be modified.

By allowing administrators to become entrenched in their positions, thereby protecting bureaucracy from radical change the civil service system provided another source of agency power. Because new officials all too often become dependent upon older, more experienced civil servants, ways must be found to override entrenched elements. For this reason may highly placed Republicans were recruited for federal service during the Eisenhower administration to curb the influence of Roosevelt and Truman administrators whose positions had been protected by the civil services (Freeman, 1952).

Studies on power structure by Robert Dahl and M. Kent Jennings show that bureaucracy exercise varying degrees of policy-making power in different cities. Although administrators are always present, their influence in most directly felt when policy makers depend upon them for expertise or when issue oriented problems arise. In the latter case, and especially when public employee labour disputes are involved, an entrenched administration can be a powerful force either for good or for ill.
The above sources of administrative power is available in USA and also in Bangladesh.

**What are the problems created by the administration?**

There are many ways in which administration can interfere with the liberty of people. Friedman cites three typical examples (Obaidullah, 1999). In the first place, the state interferes with the free and untrammelled conduct of individuals through a multitude of restrictive instruments. Second types of interference consist of orders for the compulsory acquisition of land. A third type of administrative interference is the fixing of minimum standards and inspections.

The problem of administrative discretion is complex. It is true that in any intensive form of government, the government cannot function without the exercise of some discretion by the officials. It is necessary not only for the individualization of the administrative power but also because it is humanly impossible to lay down a rule for every conceivable eventually in the complex art of modern government. But it is equally true that absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. Therefore, there has been a constant conflict between the claims of the administration to an absolute discretion and the claims of subjects to a reasonable exercise of it. Discretionary power by itself is not pure evil but gives much room for misuse (Massey, 2001). Therefore, remedy lies in tightening the procedure and not in abolishing the power itself.

Decision taken by the administration, in the context of America are to some undefined extent final. The courts have no concern with the conduct of government provided that it proceeds with in its legal powers. Any misuse of power within the law is a political matter, and for discussion in parliament or reference to the Ombudsman. The courts of law are not general courts of administrative justice. Hence, the greatest problems is the control of administrative discretion. Despite discretion has been described by enthusiastic administrators as the life blood of administrative process, it is viewed with less enthusiasm by the courts in all countries of the world which regard it as a virus which may infect the whole process (cooper, 1965; 32). The broader the discretion the greater the chance of its abuse. In the words of Justice of the U.S. Supreme Court "where discretion is absolute, man has always suffered ... Absolute discretion is more destructive of freedom than any of man's other investigations. And also, absolute discretion, like corruption, makes the beginning of the end of liberty (Obaidullah, 1999).

On the other hand there is no set pattern of conferring discretion on an administrative officer. Modern drafting technique uses the words, 'adequate', 'advisable', 'appropriate', 'beneficial', 'competent', 'convenient', 'detrimental', 'expedient', 'equitable', 'reputable', 'safe', 'sufficient', 'wholesome', 'deem fit', 'prejudicial to safety and security, 'satisfaction' 'belief' 'efficient', 'public purpose', etc. or their opposites. It is true that with the exercise of discretion on a case-to-case basis, these vague generalizations are reduced into more specific moulds, yet the margin of oscillation is never eliminated. Therefore, the need for judicial correction of unreasonable exercise of administrative discretion cannot be overemphasised.

Citizens also suffered in various ways by the administrator when they exercise
their power of delegated legislation. 1) The first charge against delegated legislation is that so wide a discretion given to the officials may lead to despotism and turn a democracy into an arbitrary rule. Some English and American Jurists are very much alarmed at the development of this new form of despotism. Lord Hewerd in his book entitled 'New Despotism' argued that the characteristics feature of the old time despotism was a combination of all powers executive, legislative and judicial, in the hands of the monarch. Constitutional government separated these powers into three distinct organs to safeguard the liberty of the individuals. Growth of delegated legislation and administrative adjudication has again combined the three powers into the hand of administration and thus a 'New Despotism' has come into being. Lord Heward, the chief Justice of England bitterly criticises that, "It is tolerably obvious that the system of delegation by parliament of power of legislation is within certain limits necessary, at least as regards matters of details because it is impossible, if only for want of time, for Parliament to deal adequately and detail with all matters calling or supposed to call for legislation."

2) The true constitutional problem presented by delegated legislation is not that it exists, but that its enormous growth has made it difficult for parliament to watch over it. "(Wade, 1971). Acts of parliament might be passed skeleton form, containing only the barest general principles and omitting certain matters of great importance. This practice was suggested be some to have assumed the character of a serious invasion of the sphere of parliament by the executive" and to endanger our civic and personal liberties. On the other hand there was inadequate scrutiny by parliament of the rules of regulations made. There is a danger that the servant may be transformed the master or create new despotism.

3) The advantages of flexibility in law may bring about instability and chaos by too frequent changes in rules. As a result the power might be so wide as to deprive the citizen of the protection of the courts from harsh or unreasonable action by the administration.

4) Another problem is some power were too loosely defined and the arrangements for publication of the rules may be inadequate and unsatisfactory with result that the average man may be ignorant of them. Even sometime full publicity and consultation with affected is not always practicable.

5) In the case of England the privileged position of the crown made the obtaining of redress difficult.

6) Rule making by administrative officers may overlook what is politically feasible. The official may not be able to see what the people will not want to have.

7) A great power rulemaking into the hands of officials may corrupt the administration and ultimately the whole society. Rule makers may be subjected to political pressure and turn the rules special or private instead of public purpose. Generally taxation power is also delegated: such a delegation undermines that famous principle -'No taxation without representation."

8) The criticism of the view that even if judicial remedies are available the citizens cannot expect a fair deal from the courts especially when they are pitched against the state. These laws are sometime applied with retrospective effect. This is rather unfair.
9) Finally delegation may result in excluding the control of the courts and thus depriving the citizens of the protection by the courts. Moreover even where the courts have the power to protect the citizen, he may find it difficulties and cost and delay involved.

On the other hand citizen also suffer in various ways. When the administration exercise their power of administrative adjudication by the administrative tribunals. Administrative adjudication means the determination of question of judicial nature by administrative departments of agencies. According to Dr. white it means, "the investigation and settling of a dispute involving a private party on the basis of law and facts by administrative agencies little issues arising in the course of their work, when legal rights are in question' (Sachdeva & Gupta, 1995). There are a lot of complaints made by people whose livelihoods were greatly affected by tribunal decisions. For instance it may be cited the following comments on rent tribunals which were made to the Franks committee by the justice for landladies Association (wade, 1971).

1) There is no appeal against the tribunal's decision. Tremendous power, which can ruin a person's life, has been put into the hands of three men. Yet there is no higher court in which their decisions can be tested.

2) The three on the bench of the tribunal need have no proper legal qualifications. A court of no appeal has been put into the hands of men who are generally neither qualified lawyers, magistrates nor judges.

3) There is no evidence on oath, and there fore there can be no proper cross-examination as in a court of law. Statements are made on both sides, but the time honoured method of getting to the truth cannot' be used.

4) Procedure is as the tribunal shall determine. No rules hearing witnesses may be heard or not heard at their pleases. Mr. Sachdevas Gupta (1995) has also identified some problems of administrative adjudication to their book "A simple study of Public Administration" which are below:

   i. Administrative adjudication does not inspire public confidence if the rules of procedure of administrative tribunals do not provide for the publicity of proceedings.

   ii. Oral hearing, lack of information and settled law of procedure, absence of publicity, secret proceedings all are not in consonance with the principles of fair and natural justice.

   iii. Another defect is the poor quality of investigation into questions of fact. To rely on unworn written statements unsupported by verbal testimony subject to no cross-examination is not a judicial way to reach true facts.

   iv. Combination of power to make rules, to investigate alleged violations there of, to prosecute offenders and to render decision, all in a single agency violets the spirit of the theory of separation of powers. Unless investigation and prosecuting functions are separated from quasi-judicial function, a fair hearing and decision are difficult to be obtained.
v. Under administrative adjudication there is no provision for independence review. The opportunity for adequate judicial review is restricted, this may result in miscarriage of justice.

vi. Tribunals are not manned by judicial luminaries. Hence they do not have the impartial control. They become the limbs of the execution and dance to its tune.

vii. It is connected that administrative law administered by their courts today is a need of confusion. It is neither written nor definite or known. Lastly these courts do not observes uniform procedures. It leads to inconvenient and arbitrary discussions.

It has been bitterly criticized by lord Heward in his book “The New Despotism”. He says, "It is the abuse of the system that calls for criticism and perhaps the greatest abuse and one most likely to lead to arbitrary and unreasonable legislation is the ousting of the jurisdiction of the courts.”

However, these defects are not such which may not be eliminated from the system of administrative adjudication. In the united states proper safeguards have been provided by the administrative procedure Act, 1946. The problem is to strike a balance between the requirements of individual liberty and rights and needs of cheapness, quickness and flexibility of administrative justice.

Judicial Control Over Administration: An Overview

Judicial review of administrative action is perhaps the most important development in the field of public Law in the second half of this century. Judicial review is a great weapon in the hands of judges. It comprises the power of a court to hold unconstitutional and unenforceable any law or order based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land (Takawani, 2001; 236).

By judicial control is meant the power of the courts to examine the Legality of the officials act and thereby to safeguard the fundamental and other essential rights of the citizens. The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion, which is correct in the eye of law. The role of judiciary in protecting the citizens against the excess of officials has become all the more important with the increase in the powers and discretion of the public officials in the modern welfare states. But the courts cannot interfere in the administrative activities of their own accord. They can intervene only when they are invited to do so by any person who feels that his right have been abrogated or are likely to be abrogated as a result of some action of the public official. Secondly, the courts cannot interfere in each and every administrative act, as too much of Judicial action may make the official too much conscious and very little of it may make them negligent of the rights of citizens. In the words of Mr. L.D. White, "At one extreme, the vigour of judicial control may paralyse effective administration, at the other the result may be offensive bureaucratic tyranny, exactly where the balance may be best struck is a major problem of judicial administrative relationship. Now we discuss the judicial control system in USA, U.K.
and then Bangladesh.

**Judicial Control of Administrative Action in USA**

In the United States there is in theory almost no limit upon the right of courts to review the decisions of administrative tribunals. Pfiffner & Presthus (1953) state their book "Public Administration in the Modern state" that the doctrin of constitutional supremacy is such that the judiciary can question almost every administrative act. They also discuss the whole process of judicial review of Administrative action in USA in this book.

I will try to discuss in briefly the process in this paper by the light of their discussion. In USA only infrequently do legislatures insulate administration against judicial review by including in statutes clauses designed to prevent review. Even if a state constitution attempted to set up an administrative commission whose acts were not subject to review by the state courts judicial review could be accomplished in the federal courts under the due process clause of the fourteenth Amendment. Speaking very generally and subject to many exceptions, the substance of the situation is,

1) that the courts may review to the extent they deem desirable,

2) that there is no method whereby one may know whether they will or will not review in individual cases and,

3) that administrative decisions are to some undefined extent final,

Now I will discuss the details of judicial review in USA.

**Finality of Administrative Decisions:** Although the Supreme Court has been content to permit a large degree of administrative finality in old and tested fields where accepted principles and techniques of regulation prevail, it maintains a watchful eye even on such venerable agencies as the Interstate commerce commission. For example in a session the court consistently upheld administrative determinations in the tried and tested area of railroad regulation. The court have, never the less been reluctant to relinquish their right to exercise a final scrutiny of administrative action.

The administrative procedure Act (1946) particularly has expanded the scope of judicial review. A complainant cannot ordinarily resort to the courts until he has exhausted all administrative remedies. This is quite properly so, because to have recourse to the courts for purposes of mere delay would soon deprived the administrative process of the dispatch which is one of its major virtue. Section 10 of the administrative procedure Act, however, has a provision for "interim relief" which apparently aims at undercutting this doctrine of the exhaustion of administrative remedies.

To avoid "irreparable harm" every reviewing court is authorized to issue all orders necessary to post pone the effective date of agency action or to preserve status or rights until conclusion of the review proceedings. This complicities the administrative process and places a new emphasis upon review by making it easier for individuals to go to the courts for declaratory judgments or order before exhausting the remedies available through administrative action.

**Questions of Law and Fact:** Courts have usually not examined questions of fact unless they also involved question of law or questions of constitutional or statutory authority. Under the provisions of the Johnson Act, for example, a federal district court is
denied the power to issue an injunction against a state administrative order when such an order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, (3) has been made after reasonable notice and hearing, and (4) where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state. This doctrine, as applied to judicial review of tax errors, where there has been a failure to resort to administrative remedies, has tended to expand the field of administrative finality.

As a general rule, courts have attempted to distinguish between questions of law and fact and have reviewed the former but not the latter. Dickinson's conclusion is still useful: "when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of 'fact'; and when otherwise disposed, they say that is a question of 'law'."

**Jurisdictional Facts:** The decision in a celebrated Supreme Court case (Crowell v. Benson, 285 U.S. 22; 1932) present the doctrine of "jurisdictional fact", also referred to as a basic or fundamental fact. For example, the federal statute gives the U.S. employees' compensation commission authority to make awards to certain persons coming under the statute. However, the relation of employer and employee must, among other things, exist before the commission has jurisdiction to make a award. Since the fact or the employer-employee relation is the one, which determines the jurisdiction, or power of the commission to act it is referred to as a jurisdictional fact, which presents a question of law.

In this case, the commission decided that such a relation existed, and made an award of compensation to the injured employee. The employer appealed, and Supreme Court held that the commission had no authority to make an award unless the injured party actually was an employee. Since that fact was a jurisdictional one, the commission should not be permitted to decide it for itself, for to do so would be to allow the commission to lift itself by its own bootstraps in deciding that it had jurisdiction. The court in deciding against the commission held that the person seeking the award was not in fact an employee and prevented enforcement of the award. In spite of the well reasoned and vigorous dissent of Justice Louis Brandis, the majority of the court held that the question of the existence of the jurisdictional fact must be determined by evidence presented in a court of law.

The practical result of the doctrine or jurisdictional fact is to permit a complete judicial re-examination, or trial de novo, of facts which otherwise would have been conclusively determined by the administrative agency. A decision of the Interstate commerce commission, made after a formal hearing and protected by procedural safeguards, should be considered differently from a decision of fact made by a meat inspector relative to summary destruction of food. In the former case, the doctrine of jurisdictional fact does not have the strong reasons for its application. Where a case can be tried again on new evidence before another tribunal and there delay the final settlement the result is to deprive the administrative agency appear ineffectual. Yet the Crowell v. Benson doctrine has never been specially abandoned by the Supreme Court, although subsequent decisions have restricted its scope.

**Other Factors Affecting Administrative Finality:** The adequacy of the administrative hearing sometimes determines whether the courts will review. Adequacy is tied up with
the question of whether the hearing satisfies due process. All though the courts will
normally refuse to interfere with immigration orders for deportation, they will set aside
orders based on an arbitrary hearing. The courts will review and hold void administrative
acts which are found in excess (ultravires) of the powers conferred by statute.

Probably the safest guide as to whether the courts will review is the nature of the subject
matter. In this respect it is necessary to distinguish between a legal right that is a
privilege, and a legal right that is not so clearly a privilege. In the former instance,
including mainly cases where an individual has sought some gratuity or benefit from the
government such as grants of public hand, the courts have been reluctant to review.
Similarly, the courts have refused to reverse Post office Department fraud orders,
because here also the government is performing a business service to individuals on
favourable terms. The courts are equally averse to reviewing cases involving a necessary
function of government, such as the collection of revenue, draft cases, civil service, and
cases involving military or naval regulations.

The Due Process Clauses: In cases involving the police power, or where
individual freedom is restricted in the interest of society as a whole, the situation is
different. Here the due process clause of the fourteenth Amendment frequently enters to
question or nullify the administrative acts of the states. Our courts sometimes interpret
due process to include matters of substantive law as well as procedure. It is under the
guise of due process that the courts sometimes express disapproval of new social and
economic concept by reading their own philosophy into a section of the constitution
originally designed to protect free Negro slaves. As noted earlier, the section of the
fourteenth Amendment, which says that no state shall “deprive any person of life, liberty,
or property, without due process of law”, has, been interpreted as a bar to arbitrary
government in general. Toward the end of the nineteenth century the Supreme Court
began to use this clause to nullify administrative acts and legislation which seemed to
them contrary to “good” social, economic, and political policy. Judicial review under this
clause has had a widespread effect on administrative practice and findings.8

Additional Avenues of Appeal: The are several ways whereby an administrative
action may be brought before a court for review. An aggrieved party may bring an action
for damages. Sometimes as in the case of the Interstate commerce commission, the
administrative agency must resort to the courts to enforce it orders. The so-called
extraordinary writs also serve to bring administrative acts before the regular courts.
These include certiorari, prohibition, mandamus, injunction, quo-warranto, and
habeas corpus. Then there are express statutory provisions for appeal, for instance, the
provision allowing appeal from the California Railroad commission direct to the state
supreme court. Another opportunity for judicial review occurs when an administrative
agency is permitted by statute to sue for the expense of executing an order after its
nonobservance. The question of the validity of the order may be raised in such a suit.

As indicated previously, under our system of law it is within the power of the
courts to review administrative acts to the extent that they deem desirable. There are no
ironclad rules, which will enable one to forecast with accuracy how far a court will
review in a given case. James M. Lendis would determine the basis of judicial review or
administrative finality upon such factors as competence and expertness. He would leave
question involving strictly legal interpretation to the courts, whereas matters of
technology would nest with administrative officials who are experts in that field. Difficulties have arisen in the past because the courts have been prove to discard their true competence and cloak themselves in an aura of expertness “in matters of industrial health, utility engineering, railroad management, even bread making.” The courts, according to Landis, should retreat from fields of expertness in which they have no claim to fitness and leave final determination of such problems to administrators.

In actual practice, however, considerable leeway is permitted administrative officers and tribunals in reaching final decisions on matters coming before them. As long as this situation exists, ordinary courts that can correct improper illegal or arbitrary administrative acts can handle infringements on the principle of the supremacy of law. At the present time, there may be a feeling on the part of those who desire more social justice that unsympathetic judges, have used review to thwart administrative regulation designed to act as an instrument of socialization. On the other hand, corporation lawyers can usually place an abiding trust in the safety of their cause before the courts as opposed to administrative commissions. The fact remains that the best solution is an arrangement by which both private interest and social justice will be reasonably well served. It appears now that events working to ward that end. The experience of the Supreme Court during the New Deal period suggests that judges educated in the principles of the common law may not be altogether impervious to social change.

Judicial Control of Administrative Action in UK

In UK the general theory of judicial control is correspondingly simple. It is commonly called the doctrine of ultra vires. Administrative power derives from statute. The statute gives power for certain purpose only, or subject to some special procedure, or with some other kind of limits. The limits are to be found not only in the statute itself, but in the general principles of construction which the courts apply, provided, of course, that the statute has not expressly or impliedly modified them for every statute is an act of sovereign legislation and can abrogate all principles of administrative law if parliament so wishes. But in practice all statutory powers have statutory limits; and where the expressed limits are indefinite, the courts are all the more inclined to find that limits are implied. The notion of unlimited power has no place in the system.

It then follows that any act outside the defined limits (ultravire) is an act unjustified by law, which can have no legal validity. The court will accordingly declare it to be quashed or to be a nullity. If it is also a wrongful act by the ordinary law (such as a trespass to person or property), damages may also be awarded; and in a suitable case the court may prohibit the wrongful act in advance. In granting these remedies the court is enforcing the rule of law, which requires that public authorities of all kinds should be able to show legal warrant for what they do, and that if legal warrant is lacking their action should be condemned. As a general rule the legality of their acts is always open to attract, and there is no resumption in their favour (Wade; 1971). The general ground of judicial control of UK is discussed below:

Doing the wrong things: This is the most obvious category of error, although the cases may involve difficult points of statutory construction. For instance, a local authority had power under the Housing Act 1936 to acquire land compulsorily for housing provided that it was not part of any ‘park, garden or pleasure ground’, and the owner of land affected by an order succeeded in invalidating it by showing that the land
was infact parkland, although the order had been confirmed by the minister of Health after a public inquiry. In such a case the court will quash the compulsory purchase order, which is tantamount to declaring that in law it is a nullity because of non-compliance with the Act.

**Acting in the wrong manner:** There have been many cases where the thing done is ostensibly within the statutory power, but, nevertheless, contravenes it because some false step is taken or some condition is ignored. Several different types of cases may be instanced like as:

**Breach of mandatory condition:** Very often the empowering statute will require some procedure to be followed. The court will then normally conclude that the power is to be exercised in accordance with that procedure but not otherwise, so that any departure from it will invalidate the action. For example, a local education authority was prohibited by injunction from proceeding with a scheme for comprehensive schools, since this involved ceasing to maintain some of their former schools and they had not first given public notice and opportunity for objection as required by the Education Act 1944. In another cases after receiving a report from an Agricultural land tribunal recommending that a farmer be disposed from 151 acres, the Minister of Agriculture made a dispossessions order covering 155 acres. This was held wholly invalid, since part of the land comprised in its had never been referred to the tribunal under the statutory procedure.

Normally the court requires every statutory condition to be properly fulfilled, since where the law requires such and such steps to be taken it is to be implied that the action is valid only if they are duly taken.

**The rule against negligence:** Powers must be exercised with reasonable care. A statutory power to do something is not a charter of exemption from all ordinary law, and in particular it does not justify negligence. In one case a local council built an air raid shelter in a road and left it until at night, so that a motorist collided with it and was injured. The council had power to build shelters on high ways but it was held that this did not alow it from the general duty of taking reasonable steps to make such erections as safe as possible (wade, 1971; 57). During the war, therefore, when normal street lighting was prohibited, the shelter should have been lit with small red lamps so as to make it as safe as conditions permitted. The shelter was, infact, provided with such lamps, but on the night in question no one had turned them on. The council were accordingly liable in damage. Lord Blackburn had said in an earlier case: … it is now thoroughly well established that no action will lie for doing that which the legislative has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing with the legislature has authorized, if it be done negligently.

**Other injurious act:** Just as power do not justify acts of negligence, So they do not justify other injuries such as nuisances, unless it seems that parliament must have intended to authorize them. Thus where power was given to build hospitals in London for the benefit of the poor, it was held not to authorize a small pox hospital in Hampstead where the hospital was a nuisance to the neighbour hood (wade, 1971).

Since the statutory power gave discretion as to the sites of the hospitals, it was presumed that parliament did not intend to permit the violation of private rights. There is therefore a presumption that discretionary power shall, if possible, be exercised to as to
respect the rights of other people.

**Breach of statutory duty:** Although as has been seen, there is no remedy for the non-performance of a duty. But this is not so, for the courts may interpret the statutory duties of public authorities as owed to the public generally, and not to particular persons.

**The rule against delegation:** There is a maxim delegates non protest delegare – the maxim perhaps justifies its existence by hinting that there is some judicial bias against allowing delegation (wade, 1971). The very object of conferring a power on a particular administrative authority is that the power must be exercised by that authority and cannot be sub-delegated to any other authority or official. Delegation may be the result of honest misapprehension by the authority concerned of the legal position. It sometimes arises out of desire to expedite official business. But still will be invaded if it is not legally permitted. For instance, under the defence regulations, the Minister of Agriculture delegated to War Agricultural Executive committees the power of directing, what crops farmers should grow. This delegation was expressly authorized by statute. But the Bedfordshire Committee, having resolved that a farmer should grow 8 acres of sugar beet left it to their executive officer to specify on which field it should be grown. This he had no power to do, for the power belonged only to the committee, and accordingly a prosecution for disobedience of the directions failed (wade, 1971).

**Surrender or abdication of discretion:** A kindred method of vitiating the exercise of a discretion is where the person entrusted with it, instead of delegating it, exercises it at the dictation of some other person. For although he is then acting himself, it is not his own discretion which governs the act, as the legislative intended that it should be. On this ground the court quashed a minister refusal of planning permission for gravel working on top class agricultural land, since the minister was acting on a rigid policy of refusing permission whenever the application was opposed by the Ministry of Agriculture. The wrong minister thus made the effective decision, and the right minister had never genuinely considered the case or exercised a proper discretion. The courts are distinctly strict in invaliding decisions made in such a manner.

**Fettering of powers by contract:** This branch of the doctrine of ultra vires may impinge on private law where the statutory discretion conflicts with the terms of a contract. Just as a statutory authority has no power to abdicate the discretion entrusted to it by contract. The leading case concerned the trustees of Ayr Harbour, Who had power under their Act to acquire land and build upon it. The House of Lords decided that the trustees had no power, on acquiring. Land, to undertake not to obstruct the former owner’s use of it for access to the harbour. This would have been to fetter the power of building on the land in the future, so that the trustees would have been able to prevent their successors from exercising the power to build which Act conferred for the public good (wade, 1971).

**Estoppel and consent:** The principle that statutory powers cannot be artificially fettered appears again in connection with estoppel. As a general rule, a man is estopped from denying facts, which he has caused some one to believe, are true, if reliance has been placed on the misrepresentation. He may not deny what he has asserted even though the assertion is
wrong. But a public authority cannot abdicate its duty to exercise an unhindered discretion on the true facts in the public interest. This may produce hard results. In one notable case an officer of a planning authority told a firm that if they bought certain property they would not need planning permission to use it as a builders yard since it had already been used for his purpose so that the purchaser would have the benefit of the existing use right.’ In fact this proved to be wrong information, and planning’s permission was subsequently refused. It was held that the planning authority were not estopped from relying on the true facts, and could enforce their refusal of permission.

For similar reasons a statutory authority cannot obtain power which does not belong to it merely because the parties consent. It a tenant successfully applies to a rent tribunal for a reduction of rent, but later discovers that the house was outside the tribunal’s jurisdiction, the tenant may treat the tribunal’s award as a nullity and pursue other remedies. Thus the question of jurisdiction is not res judicata between the parties, as it would be if determined by the High Court. ‘It is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.

Disregarded of natural justice: Failure to give proper hearing may also quite properly be regarded as one of the varieties of abuse of power. There are many where either common law or statute makes the exercise of a owner illegal if the person who will suffer has not first been fairly heard in his own defence. But this opens the whole subject of natural justice, which needs chapter to it. It is indeed, full of examples of the right thing being done in the wrong manner. But it also has wider aspects, and will be best treated independently.

The House of Lords decided the Hampstead case – This leading case in 1914. The Hampstead Borough council made a closing order against a house as being unfit for human habitation. The owner appealed, as the Act allowed, to the local Government Board, and the usual public local inquiry was held though the owner did not attend it. The appeal failed and the owner then took his case to the courts. He complained that the board had not given him a fair hearing on his appeal because he was not allowed to appear before the officer who actually decided the matter and because he was not allowed to see the report of the inspector who held the inquiry, which of course, was the principal document in the proceedings. These complaints succeeded in the court of Appeal but failed in the House of Lords.16

Motives reasonableness good faith: In all the law of judicial control perhaps the central topic is the question how far the courts will go in investigating the motives and merits of government action.

Abuse of power is not confined to cases where the wrong thing is done or the right thing is done by the wrong procedure: the right thing may be done by the right procedure, but on the wrong grounds. Connected with this is the question of reasonableness: can the law prevent powers being exercised unreasonably? Here the courts meet many difficult conundrums. The doctrines of law are once again, easy to state. The difficulty lies in applying them. One the other hand when the administrator act they must have motive in good faith or bonafide not malafide. If the it is clear that the
motive is not good or bad faith the decision will be quashed by the court.

In a leading case of 1948 an attack was made on conditions attached to a license for Sunday showings at a cinema. The cinematograph Act 1909 empowered the local council to Sunday opening of cinemas subject to such conditions as the authority think fit to impose’. A license was granted subject to the condition that no children under fifteen years of age should be admitted, whether accompanied by an adult or not. This total ban on children and indirectly (in effect) on parents was attacked as being unreasonable and therefore ultra vires.

Abuse of discretion: Abuse of discretion is also the ground of abuse of power or ultravires. It any administrative authority abuse the discretion to exercise their power the decision would be illegal or unreasonable. For example: The famous decision of the House of Lords in the Poplar case, In 920 the Poplar Borough council, wishing to set an example as model socialist employers, instituted a minimum weekly wage for all their employers of £ 4 for men and women alike. The minimum wage had previously been £ 3. 4s. For men and £ 2.9s. 9d For women. In 1921-2 there was a sharp fall in the cost of living and in ways but the minimum wage of £4 was left uncharged. The council’s statutory power was to pay their servants ‘such salaries and wages as [they] may think fit’. It would be difficult for Parliament to confer a wider discretion. But the House of Lords upheld a complaint that the weekly minimum of £4 was so excessive, in relation to the labour market, that it amounted to a gratuitous subsidy to the employees and contained and element, which was not ‘wages’ at all. The Legislature must have intended that in fixing wages the council should have regard to the labour market, By retying without regard to it, and for extraneous reasons which lord Atkinson described as ‘eccentric principles of socialistic philanthropy’ and ‘feminist ambition, The council had abused their powers.

Ulterior objects and mixed motives: Many cases raise the questions where an authority is motivated by a proper purpose in one, which came to the Privy council from New South Wales the city of Sydney had acted under’ a power to acquire land compulsorily for making streets and also for ‘carrying out improvements in or remodelling any portion of the city’. A landowner threatened with a compulsory purchase order succeeded in obtaining an injunction to prohibit it, since it appeared that the Municipal council had in fact no plan for improving or remodelling that part of city, but were merely trying to acquire as much as possible of an area which was due for a rise in site values owing to the extension of a street. The council was in fact making use of its power to carry out schemes of improvement for what was really quite a different purpose namely, the expropriation of the ‘betterment’, which the new street would create. This is a strict for word example, since the purposes of the statutory power were expressed, and the purposes of the council were manifestly different. It is comparable with the case mentioned below, where land was acquired ostensibly for a scheme of coast protection works but in fact for other purpose which were not authorized. Wade, 1971; 81).

Malice: Occasionally it is alleged that a public authority has with held some permission or done some other act out of mere malice or spite. This is hardly distinguishable from a charge of bad faith, for if malice were proved it would obviously show that the power was not exercised reasonably and in good faith, Thus where
building and drainage plans were rejected by a sanitary authority and they were alleged to have acted out of spite, because they had previously been litigation with the applicant it was held that his proper remedy was to apply for a mandamus ordering the sanitary authority to determine the application properly.\textsuperscript{19} Although in this cases a claim for damages failed, the Privy Council has since indicated that damages might be awarded for malicious refusal of a license, apparently on the ground that it might be an actionable breach of statutory duty.

**Jurisdictional questions:** It is sometimes said that the only logical way of escape from the problem of deciding whether any given question is jurisdictional’ is to be found in the ‘theory or jurisdiction’. According to this, an administrative authority or tribunal ought to have jurisdiction to determine conclusively elements in its final decision.\textsuperscript{20} Thus if a rent tribunal has power to fix the rents of furnished house must, if disputed, be decided by the tribunal before it can tell whether it has jurisdiction over the case. The decision on this point ought, it is argued, to be subject’ to no greater degree of control than the decision as to the proper rent, since the jurisdiction over the latter questions impliedly requires an equal jurisdiction over the former.

**Judicial Control of Administrative Action in Bangladesh**

**Constitutional Aspect:** The constitution of Bangladesh like USA and UK the doctrine of judicial review can be explained from different perspectives it attaches, particularly both from the viewpoint of constitutional law and administrative law.

**Firstly,** the strict of substantive meaning of judicial review has been ensured in articles 7.26 and 102(2) of the constitution of Bangladesh. Article 7 declares the core of constitutional supremacy. It says- “This constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is consistent with this constitution that other law shall, to the extent of the inconsistency, be void. “Though the provision of article 7 gives an umbrella-coverage of constitutional supremacy to the whole constitution, article 26 gives a double sanctity on the provision of fundamental rights. It says-

“26. (1) All existing law in consistent with the provisions of this part (Fundamental Right) shall, to the extent of such inconsistency, become void on the commencement of this constitution.

(2) The state shall not make any law inconsistent with any provisions of this part, any law so made, shall, to the extent of such inconsistency, be void (Halim, 1998).

Articles 7 and 26, therefore, give the substantive law of judicial review and article 102 (2) gives the implementing law of it, for it provides for the procedure how a law which is inconsistent with the provisions for the constitution can be declared unconstitutional by issuing prohibition, mandamus and certiorari (Halim, 1998, p. 71). That means a person complaining of abridgement of his rights could under clause (i) of Article 102 move the High Court Division for an appropriate writ to order, and, if successful, could be granted a declaration that the imputed provision of law is enforceable, and such consequential relief as the case demands. The combined effect of Articles 44(i) and 102(i) of the constitution is to make the guarantee of the constitutional rights a reality and not a mere expression of noble sentiments. (Obaidullah, 1999; 144).
Secondly, for the enforcement of fundamental right specific provisions have been inserted in the constitution. Part III of the constitution provides for 18 fundamental rights and under article 102 (i) the High Court Division of the Supreme Court can issue direction and orders for enforcement of these rights. It is pertinent to mention here that in Britain there is nothing as fundamental right because it has no written constitution. All rights are ordinary rights which are protected under statutory law and common law; not by any constitutional guarantee like Bangladesh.

However, the enforcement of fundamental rights in Bangladesh is not absolute. Under article 114 (B) of the constitution “while proclamation of emergency is in operation, nothing in articles 36, 37, 38, 39, 40 and 42 shall restrict the power of the state to make any law of take any executive action which the state would but for the provision contained in Part I of this constitution, be competent to make or to take, but any law so made shall, to the extent of the inconsistency, ceases to have effect as soon as the proclamation ceases to operate except in respect of things done before the law so ceases to have effect. And 141C(i) state that:

While a proclamation of Emergency is in operation, the president may [on the written advice of Prime Minister, by order] declare that the right to move any court for the enforcement of such rights conferred by Part III of this constitution as may be specified in the order, and all proceedings pending in any court for the enforcement the rights so specified shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order. An order made under this article may extend to the whole of Bangladesh and any part thereat (Obaidulhah, 1999, 145).

Thirdly, administrative actions may be reviewed under constitutional provisions. Because under article 102 (2) of the constitution the Supreme Court can examine the validity of actions performed by any public officials or bodies.

Fourthly, a large number of administrative actions are reviewed under statutory law. Because constitutional review of administrative actions under article 102(2) is possible only when “no other equally efficacious remedy is provided by law (statutory law).” Under various Acts of parliament higher courts i.e. the Supreme Court as well as lower courts and tribunals have power to review the administrative action (Halim, 1998; 72).

The courts suggested the doctrine that power exercised arbitrarily and capriciously amounted to denial of fundamental rights. A doctrine emerged from the pronouncement in sultan Ali Naghiana V. Mian Nur Hossain that when by law something is left to be done according to the discretion of the authority legally embowered u to do so,” such discretion must be exercised in the spirit of the statute. It may be assumed that no discretion vested in an executive officer is an absoute and arbitrary discretion. The High Court in Abdul Majid V. West Pakistan. 21 Suggested that “every administrative power … was always in the last resort subject to fundamental principles of fair play. Discretion vested in him for a public purpose must be exercised for the attainment of that purpose.” Even though there be no express words in the relevant legal provision to that effect, the discretion is always circumscribed by the scope and object of law that creates it and has, at the same time, to be exercised justly and fairly22 (Obaidullah, 1999; 145).
Just and fair procedure means adherence to the principles of Natural Justice and Due Process of law in the United Kingdom and United states respectively. The essence of natural justice is, no man should be judge in his own cause, and (b) no man should be condemned unheard. Due process of law in the American Constitution clearly states that “no man shall be deprived of his life, liberty and property without due process of law. And the Due Process of Law is in essence, adherence to the principles of adequate notice and hearing.

Fifthly, like in Britain judicial review of delegated law is possible in Bangladesh. It is a general rule that a delegated law must not be inconsistent with its parent law. If any delegated law is proved to be inconsistent with the parent act, the court can declare that delegated law illegal and ineffective.

Practice of Judicial Review by Supreme Court in Bangladesh: Article 94(i) of the constitution provides that there shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and High Court Division. According to Article 101 there are two sources of power and Jurisdiction of High Court Division the constitution and ordinary law. Hence the jurisdiction of the High Court Division may be divided into two categories – ordinary or general jurisdiction and constitutional jurisdiction.

Ordinary Jurisdiction of the HCD: Jurisdiction conferred on the HCD by ordinary law is its ordinary jurisdiction which may be of various ways like as : (i) Original jurisdiction, (ii) Appellate jurisdiction, (iii) Provisional jurisdiction and (iv) Reference jurisdiction. Our subject matter is control system of Supreme Court. So here we sketch the revision and reference jurisdiction. Provisional jurisdiction of HCD means the power whereby it examines the decisions of its subordinate courts, for example, section 115 of the CPC has conferred on the HCD the revision power. Reference jurisdiction Reference jurisdiction means the power whereby the HCD can give opinion and order on a case referred to it by any subordinate court. For example, section 113 of the CPC gives the HCD reference jurisdiction.

Constitutional Jurisdiction of the HCD: The constitution itself has conferred on the HCD the following three types of jurisdictions: A) writ jurisdiction; B) Jurisdictional as to superintendence and control over courts; and C) jurisdiction as to Transfer of cases.

Writ Jurisdiction: The constitution has conferred on the HCD original jurisdiction only in one case and that case is the field of writ matters. The basis of writ jurisdiction is Article 102 of the constitution. Writ jurisdiction means the power of jurisdiction of the HCD under the provisions of the constitution whereby it can enforce fundamental rights as guaranteed in part III of the constitution and can also exercise its power of judicial review.

Jurisdiction as to Superintendence and Control: Article 109 of the constitution says that the HCD shall have superintendence and control over all courts and tribunals subordinate to it. This power is also called the supervisory power of the HCD. So the condition for supervisory power is that the court or tribunal must be subordinate to the HCD. Now a question necessarily arises – when a court or tribunal is said to be subordinate to the HCD? To be subordinate to the HCD the court or tribunal must be
subject to its either appellate or revision jurisdiction. In other words, the courts and tribunals against whose decision either appeal or revision lay before the HCD are called subordinate courts and tribunals to the High Court Division.

**Nature of the Supervisory Power of the HCD:** The supervisory power of the HCD as conferred by Article 109 is a constitutional power. And this power of superintendence is in addition to the power conferred upon the HCD under section 115 of the C.P.C. and Cr. P.C. are only statutory supervisory powers whereas power under article 109 of the constitution is a constitutional supervisory power. Statutory supervisory power extends to judicial but not to administrative matters, while the constitutional supervisory power extends to both judicial and administrative matters. The statutory supervisory power covers only courts but article 109 covers court as well as tribunals subordinate to the HCD. The statutory power under article 109 cannot be curtailed except by an amendment to the constitution.

2. The supervisory power under article 109 is a discretionary power and so no litigant can invoke this power as of right.

3. Being a supervisory power the HCD can apply it Suo Motu; again it can be exercised on application by a party.

4. Under this supervisory power HCD can interfere in the functioning of subordinate courts or tribunal in the following circumstances (Halim; 1998; 325)
   i) Want or excess of jurisdiction.
   ii) Failure to exercise jurisdiction.
   iii) Violation of procedure or disregard of principles of natural justice.
   iv) Findings based or no materials, or order resulting in manifest injustice.

**Jurisdiction as to Transfer of Cases:** Under article 110 of the constitution the HCD may transfer a case form subordinate court to itself (Halim, 1998; 328). But condition is that the HCD is to be satisfied that

   i) a substantial question of law as to interpretation of the constitution is involved in the case; or
   ii) a point of general public importance is involved in the case.

If the HCD, on being so satisfied, draws a case from a subordinate court, it will take following three alternatives;

   i) It may dispose of the case itself; or
   ii) It may determine the question of law and return the case to the court from which it has been withdraw together with a copy of the judgment of the division on such question, and the court to which the case is so returned, on receipt thereof proceed to dispose of the case in conformity with such judgments; or
   iii) It may determine the question of law and transfer it to another subordinate court together with a copy of the judgment of the division on such question and the court to which the case is so transferred shall, on receipt thereof, proceed to dispose of the case in conformity with such judgment.
The power of transfer under article 110 is a discretionary power and so no litigant can invoke this power as of right. This power can be exercised Suo Motu by the HCD or it may be exercised on an application by party.

Or the subordinate court before which the case is pending may also refer the case to the HCD. It is to be mentioned here that the HCD has been given power of transfer of civil suits and criminal cases by the C.P.C. and Cr. P.C. under certain circumstances, But this latter power of transfer is a statutory power where as the power under article 110 is a constitutional power.

**Jurisdiction of the Appellate Division:** The Appellate Division of the Supreme Court has no original Jurisdiction. As like as the High Court Division the source of jurisdiction of the Appellate Division is also two (i) the constitution and (ii) ordinary law. But an ordinary law can give the Appellate Division only appellate jurisdiction as stated in Article 103 (4) of the constitution. The constitution itself has conferred on the Appellate Division the following four types of jurisdiction.

A. Appellate Jurisdiction;
B. Jurisdiction as to issue and execution of process;
C. Jurisdiction as to review; and
D. Advisory Jurisdiction.

Here, we discussed only jurisdiction as to review. Article 105 of the constitution empowers the Appellate Division to review its own judgment or order but this power is to be exercised -

i) Subject to the provision of an Act of parliament; and

ii) Subject to the rules made by the Appellate Division.

Accordingly, the Supreme Court of Bangladesh (Appellate Division) Rules were frame by the Appellate Division in 1988. (Halim 1998; 342) According to this Rules, the Appellate Division may either of its own motion or on the application of a party to a preceding, review its, own judgment or order in a civil proceeding on grounds similar to those mentioned in Order XLVII Rule 1 of the code of civil. Procedure and in a criminal proceeding on the ground of error apparent on the face of the record (Rule 1 of Order XXVI).

From the above discussion, we can summarise on judicial review of administrative action in Bangladesh by various aspects, the general grounds of judicial review are bellow:

**Lack of Jurisdiction:** Every officer has to act within limits of authority given to him and also within a specified geographical area. If he acts beyond his authority or out side the geographical limits of his powers, his act will be declared by the courts as ultravires and hence ineffective. As, for example, the minister had no power to revoke the license, he passed an order of revocation. The action was held ultra vires and without jurisdiction. Similarly, if the appropriate government has power to refer an “industrial disputes” to a tribunal for adjudication, it cannot refer a dispute which is not an industrial disputes. Again, if a taxing authority imposes tax on a commodity exempted under the Act, the action is without authority of law (Takwani, 2001; 255).
Exceeding jurisdiction: An administrative authority must exercise the power with in the limits of the statute and if it exceeds those limits, the action will be held ultravires. A court whether the authority acted within the limits of its power or exceeded it can always decide a question. For example, if an officer is empowered to grant a loan of Tk. 10,000 in his discretion for a particular purpose and if he grants a loan of Tk. 20,000 he exceeds his power (jurisdiction) and the entire order is ultravires and void on that ground.

In London country council V. Attorney General, the local authority was empowered to operate tramways. The local authority also carried on a bus service. An injunction against the operation of buses by the council was duly granted (Takwani, 2001; 255).

Irrelevant consideration: A power conferred on an administrative authority by a statute must be exercised on the considerations relevant to the purpose for which it is conferred. Instead, if the authority takes into account wholly irrelevant or extraneous considerations the exercise of power by the authority will be ultravires and the action bad. It is settled law that where a statute requires and authority to exercise power, such authority must be satisfied power, such authority must be satisfied about existence of the grounds mentioned in the statute. The courts are entitled to examine whether those ground existed when the action was taken. A person aggrieved by such action can question the legality of satisfaction by showing that it was based on irrelevant grounds. Thus, the existence of the circumstances is open to judicial review.

Error of law: A public servant may misinterpret the law and may impose upon the citizen’s duties and obligations which are not required by Law. A citizen who has suffered on account of this has the right to approach the court for damages.

Error of fact-finding: There may be cases in which the official has erred in discovering facts. He may wrongly interpret facts or ignore them and thus may act on wrong presumptions. This may affect a citizen adversely and so there may be ground for bringing a case in a court of law.

Abuse of authority: If a public official uses his authority vindictively to harm some person. The courts can intervene and punish him if he is found guilty of using his authority to take a personal revenge.

Error of authority: Above all, public officials have to act according to a certain procedure as laid down by laws and if they do not follow the prescribed procedure the court have a right to question the legality of their action, on appeal from the party affected. For example, law requires that an employee should be served with the notice of the charges before any action of suspending or dismissing him can be taken against him. Suppose the officer takes action against him without serving a proper notice, then his action shall be declared null and void by the court.

Sub-delegation: A discretionary power must, in general, be exercised only by the authority to which it has been committed. It is well known principle of law that when a power has been confined to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another.” The very object of
conferring a power on a particular administrative authority is that the power must be exercised by that authority and cannot be sub-delegated to any other authority or official. “Delegation may be the result of honest misimpression by the authority concerned of the legal position. It sometimes arises out of a desire to expedite official business. But still it will be invalid if it is not legally permitted.”

Non-observance of Natural Justice: By now, it is well-settled law that even if the exercise of power is purely administrative in nature, if it adversely affects any person, the principles of natural justice must be observed and the person concerned must be heard. Violation of the principles of natural justice makes the exercise of power ultravires and void. English law recognizes two principles of natural justice:

(a) Nemo debet esse judex in propria causa: No man shall be judge in his own cause, or the deciding authority must be impartial and without bias; and

(b) Audi alteram partem: Here the other side, or both the sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority. For example-

In Cooper V. Wandsworth Board of Works: The defendant Board had power to demolish any building without giving any opportunity of hearing if it was erected without prior permission. The Board demolished the house of the plaintiff under this provision. The action of the Board was not in violation of the statutory provision. The court held that the Board’s. Power was subject to the qualification that no man can be deprived of his property without having an opportunity of being heard.

Limitations of Judicial Control

The judicial remedies mentioned above under the ‘Rule of Law’ system provide an effective control against official excesses or abuse of power and in protecting the liberties and rights of the citizens. But judicial control has certain limitations. It the first place all administrative actions are not subject to judicial control. There are many kinds of administrative actions, which cannot be reviewed by the law courts. Then there is a tendency on the part of the legislature also to exclude by law certain administrative acts from the jurisdiction of the judiciary. For example, in India the administration of Evacuee Property act, 1950 vests final judicial powers in the Custodians and Custodian General of Evacuee Property and the law courts have no jurisdiction to interfere in the decision made under this Act.

Second, even in those administrative actions which are within its jurisdiction, the judiciary cannot by itself take cognisance of excesses on the part of officials. It can intervene only on the request of somebody who has been affected or is likely to be affected by an official action. Human nature being what it is, legalism is the last sphere in which it would like to enter. We are always reluctant to enter the precincts of judiciary and prefer to continue to put up with minor injustices of administration. That means that a negligible fraction of the cases of administrative excesses would come before the judiciary and that too after a person has already suffered.

Third, the judicial process is very slow and cumbersome. The courts follow certain set technical pattern of procedure beyond the comprehension of a layman and then the procedure is so lengthy that it cannot be known as to when the final judgment
shall be given. There have been instances when cases have been pending with the courts for years together. Sometimes the decision of the court comes when the damage has been done beyond repair: “Justice delayed is justice denied”. An aggrieved person cannot wait indefinitely to avail himself of the judicial remedy. The dilatory judicial procedure will not in any way console the sufferer or reconcile his afflicted mind. Tired of the delay he will lose hope and become a victim of bureaucracy.

**Fourth**, sometimes the remedies offered by the law courts are in adequate and ineffective. In many cases, especially relating to business activities, mere announcement of an administrative action or even a reminder concerning a proposed action may cause an injury to the individual against whom not even a suit can be filed in the law court.

**Fifth**, the government may deprive the person of the remedy granted to him by the court by changing the law or rules thereof. In a case the High Courts ordered that the petitioners be promoted to the senior posts of Professors class I and that direct selection for these posts contravenes the provision of the States Reorganisation act in as much as it changes the conditions of service of the petitioners to their disadvantages. The Government did promote the petitioners thereby giving effect to the judgement of the court. But after some time these posts were withdrawn on the ground of financial stringency and the persons were reverted to their substantive posts.

**Sixth**, judicial action is incredibly expensive and cannot therefore be taken advantage of by many people. Filing a suit means paying the court fee, fee of the lawyer engaged and cost of producing witnesses and undergoing all inconveniences which only those who can afford can bear. This keeps many people away from the court who prefer to suffer. On account of heavy cost and great inconvenience the judicial remedies are of little advantage.

**Last**, the highly technical nature of most of the administrative actions saps the force of judicial review. The judges are only legal experts and they may have little knowledge of the technicalities and complexities of administrative problems. Their legal bent of mind may hinder them in arriving at a right decision. They have to follow the prescribed procedures and observe some formalities. W. A. Robson writes, “The liability of the individual official for wrong doing committed in the course of his duty is essentially a relic from past centuries when government was in the hands of a few prominent, independent and substantial persons, so called Public Officers, who were in no way responsible to ministers or elected legislatures or councils. Such a doctrine is utterly unsuited to the Twentieth Century State, in which the Public Officer has been superseded by armies of anonymous and obscure civil servants acting directly under the orders of their superiors, who are ultimately responsible to an elected body. The exclusive liability of the individual officer is a doctrine typical of a highly individual Common Law. It is of decreasing value today, and is small recompense for an irresponsible state.” Besides, the judges have their own whims and prejudices. That is why the modern trend is towards the establishment of Administrative Tribunals, which consist of person’s expert in technical matters.

**Concluding Remarks**

From review of the details of judicial control and its limitation we can reach a conclusion. In conclusion we can say that the system of judicial control of administrative
power in USA & UK are different in some aspect but are similar in core areas of administration. On the other hand, in Bangladesh and Indian subcontinent follow the British system of judicial review process. But most of the developing countries like Bangladesh there are some limitations of judicial review, which we have already been discussed. Everybody knows that the role of judiciary in protecting the citizens against the excess of officials has become all the more important with the increase in the powers and discretion of the public officials in the modern welfare states. So we should overcome all the limitations of judicial control of the land. I have some specific recommendations to overcome the problems.

1. All the decisions taken by the administration have to be opportunity to judicial review.

2. All man should have equal opportunity to access the jurisdictions of judicial review.

3. Judiciary would be transparent and dynamic so that every case accomplished as soon as possible. In this case separate court would have established for separate types of cases.

4. The remedies offered by the law courts must be adequate and effective. And the recruitment of chief justice and other justices of Supreme Court must be fair, merit and seniority based.

5. The separation of judiciary from the executive must be implemented as soon as possible.

6. Judges would be trained for the highly technical nature of most of the administrative problems. Because the judges are only legal experts and they may have little knowledge of the technicalities and complexities of administrative problem.

7. Strengthen law enforcement mechanisms, including the role of the judiciary and provide witness protection programs.

Lastly, all would have adequate respect to the judiciary of the land. And government always would have politically neutral to the judicial system of our country. It is expected that the findings and recommendations of the study would be helpful for concerned organisations for creating awareness and undertaking active programs to protect the citizen’s rights against abuse of administrative power in Bangladesh.

End Notes:


24 Lord Heward of Bury, the New Despotism, p. 17 (1929).

24 Lord Heward of Bury: The New Despotism (1929).


24 B. Schwartz, Does the Ghost of Crowell V. Benson Still Walk? “98 University of Pensisyvania Law


White and Collins V. Minister of Health (1939), K.B. 838.

R.V Agriculture Land Tribunal (1967), W.L.R. 1311.

Geoff V. Proprietors of Bann Reservoir (1873) 3 App. Cas. 430 at 455.


Allingham V. Minister of Agriculture and Fisheries (1948), All E.R. 780.

Local Government Board V. Arlidge (1915), A.G. 120.


Davis V. Bromby Corporation [1908] 1 K.B. 170.

Dorothy Smith, Judicial Review of Administrative Action, 2nd ed, 96.


The Montgomery Flour & General Mills Ltd. V. Director Food Purchases, PLD 1957, Lahore, p. 914.

A.T. Mirdha V. State 25 DLR 335.


References:


5. Ibid., 335-344.


New York: Ronald Press Co.

11. Ibid.


14. Ibid.

15. Ibid.; 255.