RULE OF LAW REQUIRES EXPLICIT STATUTORY AUTHORIZATION FOR ADMINISTRATIVE ACTION

Muhammad Iqbal Khan

Law College, Gomal University, Dera Ismail Khan, NWFP, Pakistan

ABSTRACT

The Parliament, being a law and policymaking body, has delegated most of its powers to the administrative organ of the government for the implementation of policies it has enacted. Due to these extra Constitutional powers the administrative process has generated demands for judicial and other constraints so that the private rights of the citizens' could be protected from violation. In this article an attempt has been made to bring together the points through which the administrative activity could be confined within the statutory limits.

INTRODUCTION

In the administrative process, the executive has come to enjoy vast powers to regulate human activity. Though the extension of administrative activity has become inevitable because most of the complex socio-economic problems could be tackled best, from a practical point of view, through the administrative process rather than through the normal legislative or judicial process.

There is a constant conflict between the powers of the executive and the maintenance of rule of law. If the executive is allowed to enjoy these powers unchecked and uncontrolled, the result would certainly be of improper exercise of these powers. It is therefore, essential that when sweeping powers are conferred on administrative organ, an adequate control-mechanism should be evolved to ensure that officers do not use their power in an improper manner or for an unwarranted purpose (Jain, 1975).

Administration in the twentieth century, has taken an extra importance as government has enlarged the field of its regulatory powers over the affairs of private persons and their property. Due to its significance constitutional system of a country is not in a position to allow the administration a perfectly free hand in the discharge of its duties. That's why; Prettyman (1958) opposes the grant of any power to government's executive branch except those granted to it by law. He thinks that government departments are not like private firms or assembled stockholders of a corporation,

which can do much as they please in their own self-interest or in behalf of a cause. Government departments either carry out or interpret law. These are affirmative function, but they are limited by terms of affirmation. Executive powers exercised in the absence of a specific statutory authority are constitutionally volatile, says Cohn (2005).

The present day administrative process has generated demands for judicial and other external constraints due to some of its activities, in particular the rule-making and decision-making activities. These activities are considered as extra-constitutional development because the said activities violate constitutional principles of the separation of powers, non-delegation of legislative power, and the exercise of executive and judicial powers by the same administrative officials, as well as political values of accountability to electoral constraints, the rule of law and other limitation on governmental discretion are threatened by the existence of broad delegations. Another important point, which is also considered to be a cause for imposition of restraints on administrative actions, the inability of Parliament to control the implementation of the policies it has enacted, because Parliament gives no proper guidance to administrators and there are very few standards available by which agency implementation of policies can be evaluated (Follic, 1967).

Individual are so at the mercy of administrative officers, who have behind them the entire power of the state; some protection must be offered against the violation of private rights. Nearly all the expressions of the will of the state which are to be carried out in their details and executed by the administration cause a conflict at times between the conceptions by the administration of what the public welfare demands and the conception by the individual of the sphere of the private rights guaranteed to him by the law. If the officers of the administration have, in all such cases, uncontrolled discretion, it is to be feared that individual rights would be violated. The discretion of administrative officers cannot be taken away by legislation with causing their usefulness seriously to be impaired. Large discretion must be given to administrative officers by the legislative authority; however some means of controlling the administration

must be devised if private rights are to be guaranteed inviolate.

Healthy adaptation of the Rule-of-Law and principles of good administrative governance seemingly require explicit statutory authorization for administrative action. For the reasons mentioned above, Goodnow, (1905) suggests that it is desirable, indeed necessary, that there be formed methods of control over the action of the administration by means of which it will be possible to render that action efficient, and to force the administration to consider private rights to confirm to state will as that has been expressed by the legislature

Control Mechanism

The construction of a system through which the administrative activity could be controlled and the desired goals could be achieved, is as difficult as it is necessary. All the legal instruments should be utilized towards this end; however analogies from other branches of the law must be followed with caution, Goodnow (ibid) says, because each of these branches of the law has regard for only one interest. Administrative law endeavors to attain the State integrity and power, governmental efficiency, the maintenance of private rights and the attainment of good social conditions. In the formation of the control over the administration, therefore, regard must be had for the interests to be furthered by the administrative law.

In this regard Goodnow (1905) has pointed out three kinds of interest. The first of these interests is that of governmental efficiency. Some method of control must be devised by which harmony and uniformity of administrative action and administrative efficiency may be secured, as many cases may arise where the neglect of official will not cause a serious violation of private rights but will simply tend to impair governmental efficiency. This method of control should be so framed that it may be exercised by the organs of the government on their own motion and not simply at the instance of private person.

The second interest to be regarded is the preservation of individual rights guaranteed by the law of the land. Some method of control must be devised by which the officer may be prevented from encroaching upon this sphere. As this method of control is framed in the interest of the individual, it should be

possible for the individual to set it in motion by appealing to an impartial Body i.e. the court or tribunal, from those acts, which he believes violate the rights assured to him by law.

The third interest to be regarded by the administrative law is the social well being. The protection of this interest, also, needs a special method of control. The method should be so framed as to force the administrative officer in his action to keep before him always the fact that he himself is not a law. It should also be realized to the administration that one of the great reason of its existence is the promotion of the social well-being as expressed in the law. Such a method of control should be so organized as to allow that body which is most thoroughly representative of public opinion- that is the legislature- to step in and compel the administration to obey the law.

There are three distinct interests, which are sought to be sub served by the administrative law. There are, therefore, three methods of control, each of which aims primarily at the protection of one of these interests and is to be exercised by special governmental authority. These three methods may be called respectively the 'Administrative Control', the 'Judicial Control' and 'Legislative Control'.

Administrative Control: this method is exercised primarily in the interest of governmental efficiency, though it may be used additionally in the interest of the protection of private rights and promotion of the social well-being. Its main object is to obtain harmony and uniformity in administrative actions, efficiency in the administrative services, uprightness and competency in administrative officers. It is exercised, as its name implies, by the higher officers of the administration over the action of their subordinates.

Judicial Control: This method of control lies in the hands of judiciary and the courts exercise their power on the application of individuals. Though its main purpose is the protection of individual's rights, it may be used additionally in the interest of administrative efficiency. The method of executing the will of the State by judicial process is the result of an attempt to introduce into administrative matters the controversial system of procedure, which has been adopted universally in other civil and criminal proceedings. Its

main characteristic consists in the fact that the administration and the administrative officers are regarded as acting for one party in the controversy and the courts occupy the position of an arbitrator between the administration on one side and the individual upon the other**.**

The administrative discretion is the choice between two alternatives i.e. the interpretation of law and the implementation of law according to the prevailing circumstances. So when there is a conflict between the parent Act and the administrative rules, then it is the court to play a decisive role. In two cases before the US Supreme Court it was held that it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the court must decide on the operation of each, and the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty (Marbury v. Madison 5 U.S. 137, 1803; Fairbank v. United States 181 U.S. 283, 1901). So the primary object of this method is to subject the administrative authorities to judicial control while executing the will of the state.

We are well aware of the persisting view in respectable legal circles that the administration is to be held on the short leash of legal power by those who are its proper custodians – the judges (Arthurs, 1985). The courts are considered to be the most effective tool for confining the administrative discretion within the prescribed legal limits. If the courts are stopped from making necessary correction in the administrative actions then according to Hewart (1929), "Perhaps the greatest abuse, and the most likely to lead to arbitrary and unreasonable legislation, is the ousting of the jurisdiction of the courts"

Legislative Control: the legislature or one of its committees primarily and exclusively, exercises this control mechanism. The study of administrative law can be viewed as an analysis of the limits placed on the powers and actions of administrative agencies. These limits are imposed in many ways, however Gellhorn and Levin (1997) are of the firm belief that the legal and other methods of control should be supplemented or replaced by political

checks on agency decisions. Of course the courts can usually review administrative actions to ensure that ministers have not exceeded their powers, but this is little protection if those powers are granted in the widest term.

In all systems control of the administration by the legislature is important, because legislature is the sovereign power and second the legislature makes law, in the execution of which public administration finds its main functions. The legislature ought to maintain an oversight of such delegated powers as safeguard against misuse. It has the ultimate authority to alter the law and thus to control public administration by changing its scope and function (Gladden, 1957). In a decision the court in Scotland UK expressed the view that the proper place for questioning many aspects of ministerial action is in Parliament, not the courts (Edinburgh District Council v. Secretary of State for Scotland, 1985 STL 551).

The constitution cannot stand still as the country changes around it. A considerable delegation of power from Parliament to the government is inevitable and quite acceptable. Yet if we wish to retain a system in which the government does not simply have a free hand to do what it wants, without even having to justify itself publicly to the critical elements within Parliament, then, according to Colin (1987), some limits must be placed on this deluge of delegation. Parliament must assert itself as the proper forum for debate and decision on matters of policy, and must stop providing blank cheques for the government of the day.

Political necessity requires that there shall be harmony between the expression and execution of State will. Lack of such harmony will result in political paralysis. For a rule of conduct i.e. a concrete expression of the State will, practically amount to nothing if it is not executed.

The necessary harmony between the expression and execution of the State will can be obtained only by subordinating one of these functions to the other. Popular government requires that the execution of the State will shall be subjected to the control of the organ expressing the State will i.e. Parliament. For an effective executive authority can never be so representative of the people of a state as a body, which can effectively express their will.

Administration must, therefore, be subjected to the control of politics (Goodnow, 1905).

In all countries, the action of the executive is subject to the control of the legislature. In the first place, the legislature has power to lay down rule in accordance with which the executive and administrative authorities are to act. The legislature has been called the regulator of the administration (ibid). The legislature must necessarily determine in detail all the powers and duties of the administrators. In the United States, the legislature specifies in detail the powers to be exercised by the executive authorities and regulates the exercise of these powers in most particular.

Mahmood and Haider (1998, 1970B), while analyzing the control upon the abuse of administrative powers have, also, put forward some suggestions. They feel that there should be some effective means of control. As a whole, they have pointed out four methods for the control of public administration's power to legislate or to adjudicate. These are the following: Control by employees associations, Control by separate administrative tribunals, Control by legislation, and Control by judiciary.

The control by employ's association is in reality a method of self-regulation. Critics of this method assert that it has proved to be ineffective. Teamwork disappears, the tension increases in the department. Punishment given in this way impairs the employee's moral to such an extent that the remedy is worse than the disease. So this method does not seem to be feasible.

There is another mode of controlling the administrative discretion i.e. by Special administrative tribunals, which are led by administrative officials. Sometimes these officials apply their powers, not merely, beyond the terms of a statute but beyond any legitimate conception of their policy. On this occasion Haider (1970) has observed, "Where laws are administered by separate administrative tribunals without conscious attempt to work out a system of reasoned interpretation and application, the result may be quite unsatisfactory."

Regarding the control by legislation, the aforementioned authors have, also, showed dissatisfied with this kind of control. The history of legislative control has shown the influence of personal solicitation, lobbying and even corruption. The psychology of a

legislative assembly is to some extent the psychology of a crowd or mob. The characteristics phenomenon of a large body not so trained and without judicial habits approximates what the psychologists call mob mind.

Haider, (1970B) observed the poor and inadequate performance of the above methods of control, and hoped that the last method of control by law courts could be the effective and viable mean. Law combines the possibility of certainty and inflexibility. It provides for certainty through the training of judges in logical development and systematic exposition of authoritative grounds of decision. There are checks upon a judge. A judge is pressed to relate his action to certain known principles and standards. The judges stand for the law against pleasure, clamor and local confrontation. Law creates and maintains a sphere of security for individual in certain basic conditions of life.

There is no second opinion on the point that effective control is needed to prevent irresponsibility and to avoid the evils of bureaucracy. Gladden (1957) is of the view that the tasks of controlling administrative action should not be left entirely to the governmental authorities, in a democracy the people have a live interest in seeing that public administration is both responsible and efficient. A vigorous and well-informed public opinion is therefore most certainly an important factor in the control of public services.

Discussion

It is common experience, when the administrative machine is left uncontrolled there can be no hope of satisfaction to anyone in this respect, except those who are in themselves powerful by reasons of wealth or connection or other influence. But in a situation, where the system of proper check and balance is available, the bureaucracy would abstain from imposing officialdom on the citizen and would be delighted in the promotion of fundamental human freedom and will strive for the welfare of fellow citizens.

The citizens' of modern administrative state are so dependent upon the action of executive officers that it is of the utmost importance that their action shall be efficient and harmonious. The administrative officers attend to many things, which it is impossible for individual to attend to all. If they do not perform their duties, or perform them

unwisely or inefficiently, it will necessarily follow that these things will not be done at all or will be done in such a way that the result of administrative action will be of little value. Some means must be provided, which shall ensure harmony in administrative action, where uniformity of treatment of a given subject throughout the state is necessary.

The functionaries of the country get their powers from the Constitution and the laws; they are required to act clearly within the defined parameters of law. Their exercise of governmental power is a sacred trust and they are required to perform their duties as trustees. The Supreme Court in a case of Shaukat Ali v. Secretary, Industries (1995 MLD 123); held that whenever dealing with public at large, whether by way of giving jobs or entering into contracts or issuing quotas or license or granting State assistance, they (public administrators) are required to act reasonably, impartially, without any arbitrariness and within the defined sphere of their powers.

There are two fundamental ways in which government can exercise its authority. The first is a system of arbitrary rule, where the government decides how to act on an *ad hoc* basis, leaving decisions up to the whim of whatever official or officials happen to be in charge; the second way is to implement a system grounded in the rule of law, where legal rules are made in advance and published, binding both government and citizens and allowing the latter to know exactly what they have to do or not to do in order to avoid the coercive authority of the former.

CONCLUSION

In the modern state where so much power has been given to the administration, a neutral umpire is needed to watch the conflicting interests of the administration and the citizens. The law could best, play the role of a neutral umpire because the law would not just disqualify the unlawful exercise of power but will also compel the performance of legal duties which have been neglected.

The action of the administration should be, as far as possible, in harmony with the state will as expressed in the legislative enactments, because an unexecuted law is no law at all. The administrative activity should not only be in conformity with the letter of the law but should also be to its spirit. This

activity should promote the public welfare as conceived by the body of public representatives i.e. Parliament. Basic expectation in the rule of law society is that possessor of public power and authority must be able to publicly justify their actions as legally valid, socially wise and just.

REFERENCES

Arthurs HW (1985). *Without the Law; Administrative Justice and Legal Pluralism in Nineteenth Century England*. University of Toronto Press; pp. 89

Cohn Margit (2005). *Medieval Chains, Invisible Links: On Non-Statutory Powers of the Executive.* Oxford Journal of Legal Studies, Oxford University Press; pp. 97

Colin T Reid (1987). A Deluge of Delegation. New Law Journal, Vol 137 No 6315 Butterworth & Co (Publishers) London; pp. 682

Edinburgh District Council v. Secretary of State for Scotland, 1985 Scotland Law Times; pp. 551

Fairbank v. United States 181 U.S. 283, 1901

Follick Edwin Duane (1967). The Element of Discretion Inherent in administrative adjudication. A thesis for JD in Black Stone School of Law; pp. 58

Gellhorn Ernest and Ronald M Levin (1997). *Administrative Law and Process.* West Publication Co MN, USA; pp. 8

Gladden E N (1957). *The Essentials of Public Administration.* Staples Press London; pp. 88, 85

Goodnow Frank J (1905). *The Principles of the Administrative Law of United States*. G.P. Putnam's Son's NewYork; pp. 369, 370, 371-372, 7, 43

Haider SM (1970). French Administrative Law. PLD 1970 Journal; pp. 25-28

Haider SM (1970B). A Framework of Administrative Law For Pakistan. PLD 1970 Journal; pp. 98-103

Hewart Lord (1929). *The New Despotism.* Cosmopolitan Book Corporation, New York; pp. 86

Jain SN (1975). *A Survey of Research in Public Administration.* Vol 2 Allied Publishers New Delhi; pp. 321

Mahmood Ehthesham (1998). *Principles of Administrative Law.* Mansoor Book House Lahore; pp. 41

Marbury v. Madison 5 U.S. 137, 1803

Shaukat Ali v. Secretary, Industries, 1995 MLD 123