Judicial Approach in Holding an Authority as Quasi-Judicial

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The better part of the judicial valour involved in the correctional process of administrative action expresses itself in the judicial attitude in holding an authority as quasi-judicial or administrative. Though much of the importance of this distinction has faded in the years that have passed, the dichotomy still continues, its significance remains; for the characterisation of the administrative decision in question may still be relevant to the precise scope of the procedural rights to which the individual is entitled.1

The importance of the topic under discussion can be rightly understood only in the wider context of administrative activity in a modern rule-of-law society like ours. Therefore a brief outline of the modern concept of State and the contextual influences it exerts on the functions of administrative authorities and also on the judiciary may not be out of place here.

The concept of State has undergone drastic changes in recent years. As Justice Mathew2 has observed, “to-day State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed only as a service corporation”. The functions of State can no longer be confined to the preservation of public peace, the exaction of taxes, and the defence of its frontiers. In our constitutional context, it is now the function of the State to secure ‘Social, Economic and

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Political justice', to preserve 'liberty of thought, expression, belief, faith and worship', and to ensure 'equality of status and of opportunity'. The State is at present the 'biggest builder,' the 'biggest trader' and the 'biggest employer' in the country. This tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State has led to intense governmental activity in many ways. As a consequence of all this development there has been a vast expansion in the powers of the executive or rather the administrative wing of the government and also a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State powerholders. All this, in turn, renders it necessary to structure and restrict the powers of the executive government so as to prevent its arbitrary exercise, for, it is here Lord Acton's aphorism - power corrupts and absolute power corrupts absolutely - resounds in its full.

The position is the same in other parallel democracies as well. As Lord Diplock says, "It was the advent of the welfare State and of the planned society that led Great Britain to need stronger legal controls over government". In the same vein Justice Douglas said in America, "Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can be become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty".

It is obvious that wherever there is power, there are chances of its arbitrary exercise too. Thus we are faced with an inherent conflict between power and justice as an inevitable continuum in

our system. And it is equally obvious that it is one of the essential aspects of a 'rule-of-law society' that it seeks always to ensure that 'grants of power to the rulers are at the same time charters of accountability for the ruled'. It is the prime concern of administrative law, in this context, to evolve 'specific and concrete mechanisms of accountability so as to make the holder of public power adhere to law and justify the exercise of powers in terms of law, policy and constitutional values'.

It needs no arguing in India that it is the proper role of the judiciary to ensure these rule-of-law values in the field of administrative activity. The Indian Courts have rightly assumed the role of the protectors of these values and they have done so with an avowed consciousness of doing so. Thus said the Supreme Court: "A pragmatic approach to social justice compels us to interpret constitutional provisions . . . with a view to see that effective policing of the corridors of power is carried out by the court until other ombudsmen arrangements . . . emerge." 8

In this process of 'policing the corridors of power' the most effective as well as important devices adopted by the courts for the purposes happened to be the writs of certiorari and prohibition. 9 And the question whether these writs would issue in any particular case had come to be determined by reference to the character of the act or decision that was impugned, 10 for, it was generally assumed till recently that these writs could issue only to judicial or quasi-judicial acts and not to purely administrative acts.

Thus started the judicial attempt to identify the administrative functions which could be subjected to judicial correction through these writs. This identification of justiciable administrative actions has, in turn, led to the distinction and classifications of administrative acts as quasi-judicial and purely

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7. See the Introduction by Prof. Upendra Baxi to I. P. Massey, Administrative Law (1980).
9. de Smith, op. cit., at p. 381.
10. Id. at p. 383.
administrative, which has been marked at different times by different judicial tone and temper varying from a narrow conceptionalism to pragmatic realism or even to a spirit of activism, depending on the judicial approach in holding an authority as quasi-judicial.

A humble attempt is made in this paper to study this judicial approach through a brief survey of the decided cases of our Supreme Court in the last thirty years of its chequered history in this field of administrative law under the following four convenient heads viz:

(i) The period of judicial positivism,
(ii) The period of judicial ambivalence,
(iii) The period of judicial realism, and
(iv) The period of judicial activism.

(i) The period of judicial positivism

The decision of the Supreme Court in Bombay v. K. D. Advani can be the legitimate starting point of our discussion under this head. In Advani's case the Government of Bombay requisitioned the residential building of the petitioner, who were the refugees from Sind, without giving them any notice or opportunity of being heard and allotted that requisitioned flat to another person who was also only a refugee from Sind. The Government issued this order of requisition under Sec. 3 of the Bombay Land Acquisition Ordinance, 1947, which read as: "If in the opinion of the provincial government it is necessary or expedient to do so, the provincial government may by order in writing requisition any land for any public purpose".

Challenging the validity of the order, the petitioners prayed for a writ of certiorari. The High Court allowed the petition; but on appeal the Supreme Court allowed the appeal.

The Supreme Court by a majority of 3:2 held that under Section 3 the decisions of the Government both as to requisisi-

tion and as to whether the premises were required for a public purpose were matters of its opinion and not liable to be tested by any objective standard. Hence the making of the order was in no way quasi-judicial and therefore no writ of certiorari would lie to correct this order, which is purely administrative in nature.

In so deciding, the line of reasoning adopted by the Court can be summed up thus: A writ of certiorari would issue to the impugned order under Section 3 of the ordinance only if the said order was a judicial or quasi-judicial one. An action could be treated as quasi-judicial only if the authority taking the action was under a duty to act judicially. An authority could be held under a duty to act judicially only if the law under which the authority was making the decision itself specifically required a judicial approach. There was nothing in the present ordinance to show that under Section 3 the Government had to act judicially. In the absence of such a statutory requirement to act judicially, the impugned order could not be treated as a quasi-judicial one; but it could be treated only as an administrative order. And, therefore, a writ of certiorari would not lie against the impugned order.

The two major propositions which can be deduced from what we have seen above are (i) a writ of certiorari would issue only against an authority or an act of that authority which can be treated as quasi-judicial; and (ii) an authority or its action can be treated as quasi-judicial only if the law under which the authority is created and authorised to act itself imposes a duty to act judicially upon such authority.

Though both of these propositions have lost their ground,12 a little dilution of them would be helpful in exposing the real nature of judicial approach prevailed during this period.

The first proposition might have been based upon the ‘settled position’ with regard to the scope of the writ of certiorari at the time when the case was decided. Even so, the assumption on which the proposition is based is objectionable, for, the assumption being that it is always possible to have a

12. Since Binpani Dei (Infra, n. 34) and Kraipak, infra, n. 35.
precise definition of ‘quasi-judicial’ and it is easy to draw the demarcating line between a quasi-judicial act and an administrative act. Further it is this proposition which makes the evil consequences of the second proposition more vulnerable and disturbing, in view of the pertinent fact that certiorari and prohibition are the main judicial remedies in administrative law.\footnote{13}

The real blot on the development of this tender branch of administrative law in India has been cast by this second proposition in \textit{Advani’s} case. It manifests not only a rigid positivism and narrow conceptualism of the judicial attitude in holding an authority as quasi-judicial; but also is pregnant with faulty reasonings and irreconcilable inconsistencies at many points.

In laying down the second proposition the Court has set out first to define a judicial or ‘quasi-judicial act’ with reference to what May C. J. has stated in \textit{R. v. Dubblin Corporation} as, “...for the purpose of this question a judicial act seems to be an act done by a competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others”. And the Court has accepted this observation as “one of the best definitions of a judicial act as distinguished from an administrative act”.\footnote{14} After accepting this as the ‘best definition’ of a ‘judicial act’, how the court could declare that the impugned order under section 3 ‘contained no judicial elements in it’? Was not this order, requisitioning the flat of the respondent an act done by competent authority upon consideration of facts and circumstances, and imposing liability or affecting the rights of others? The fact that the impugned order cleanly and squarely comes within this ‘best definition’ of judicial act hardly needs any further argument. Still the court held quite an inconsistent view to this truism and held that the ‘order is in no way quasi-judicial’, but administrative in nature.

Then the Court proceeded further to justify its above view by relying upon the statement of Lord Atkin in \textit{R. v. The Electric-}

\footnote{13. de Smith, \textit{op. cit}, at p. 392.}
\footnote{15. \textit{Advani’s} case, A.I.R. 1950 S.C. 222, per Kania C.J., at p. 227.}
city Commissioner. Lord Atkin said: "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs". Based upon this observation, the Court said the emphasis is laid on the fact that the decision should be a judicial decision and the duty to act judicially is to be distinctly found in the Act establishing the body which makes the decision. It is true that the statement emphasises the judicial nature of the decision, but it never follows from the statement that the duty to act judicially is to be distinctly found in the statute as a super-added condition. It is respectfully submitted that, the statement of Lord Atkin is of no avail to support this positivistic view of the Court; and that there is a serious inconsistency between the authority relied upon by the Court and the proposition it deduced from that authority.

What Lord Atkin contemplated in his statement was, no doubt, a judicial or quasi-judicial decision which he himself had defined at the beginning of the statement. That is to say, "whenever any body of persons having legal authority to determine questions affecting the rights of subjects" makes any decision, such decision would clearly be a 'judicial act' according to its best definition by May C. J. Thus in making any such decision in the nature of a 'judicial act' it is irrational to insist that a duty to act judicially should be distinctly imposed by the statute as a super-added obligation on the body making the decision. It is quite strange to see how a 'judicial act' can be done without having a duty to act judicially. What actually the phrase 'having the duty to act judicially' in Lord Atkin's statement does is this: it makes explicit what is already implicit in the very nature of the decision contemplated in the statement. This simple truth and the plain meaning of the statement has been missed or rather been confused by an unwise reliance of the Court on Lord

Hewart’s gloss on the duty to act judicially - a distorted version of Lord Atkin’s statement and on the approval of this gloss in Nakkuda Ali’s case.

The further development of administrative law in India has been bedeviled for a considerable period by this positivistic proclamation of the Supreme Court on the duty to act judicially. In adopting such a dogmatic approach, the court was myopic as to its far-reaching impact upon the applicability of natural justice to administrative action affecting the rights of the individuals. The Court has overlooked the spirit and the rule-of-law values of our constitution and also the reasonable expectation of the citizens about the Supreme Court as the protector and guarantor of these rule-of-law values, especially in the context of the modern Welfare State. The ghost of positivism in Advani’s case was lurking in the judicial mind of the Supreme Court for more than one and a half decades, reflecting itself in a series of subsequent decisions.

In Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, the Supreme Court, in holding that the duty of deciding an appeal involves an obligation to decide it judicially, has only accepted and applied the tests laid down in Advani’s Case.

Again in Radheshyam Khare v. M. P. the Court held that an order under Section 53A of C.P. and Berar Municipalities Act, 1922 superceding the Municipal Committee was not quasi-judicial, but administrative in nature. As per the majority the order is not quasi-judicial, first, because the order is not passed in a lis before the authority; and secondly because in the absence of a lis the order cannot be quasi-judicial, for, section 53A did not expressly provide for a judicial approach.

20. [1951] A.C. 66; The House of Lords held in Ridge v. Baldwin, (Supra) that Nakkuda Ali’s Case was wrongly decided.
Similarly in Gullappalli's case\textsuperscript{23} and Nathubhai's case\textsuperscript{24} also, the Supreme Court has adopted the same approach and tests as had been laid down in Advani's case.

The matter has again come up before the Court in The Board of High School v. Ghanshyam\textsuperscript{25}, wherein the Court held that the disciplinary action taken by the Board against the respondent under the University Regulations was a quasi-judicial one. The decision was stated to be clearly based upon the principles laid down by Das J. in Advani's case. But the importance of this case lies in the fact that despite the unqualified acceptance of the Advani's dictum, we can see from the judgement some sort of a change in attitude and emphasis when compared to the decisions mentioned above. The Court observed in this case: "Now it may be mentioned that the statute is not likely to provide in so many words that the authority passing the order is required to act judicially, that can only be inferred from the express provisions of the statute..... The inference whether the authority acting under a statute, where it is silent, has the duty to act judicially will depend on the express provision of the statute read along with the nature of the rights affected, the manner of disposal provide, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute".\textsuperscript{26} This observation can hardly be reconciled with the tests laid down in Advani's case which insisted that the duty to act judicially should always be specifically imposed by the statute itself as a super-added obligation on the authority. As a matter of fact this observation is more akin to the spirit contained in the dissenting opinion of Subba Rao J. in Radhesyam's\textsuperscript{27} case rather than to the ratio in Advani's case. However, this inconsistency cannot be traced to the error


\textsuperscript{24} Shivji Nathubhai v. Union, AIR 1960 SC. 606.

\textsuperscript{25} A.I.R. 1962 S.C. 1110.

\textsuperscript{26} Id., at pp. 1113-1114.

\textsuperscript{27} A.I.R. 1959. S.C. 107 at. 134. Subba Rao. J. said "The duty to act judicially might not be conferred by a statute, but might be inferred from its provisions".
in the logical faculty of the judges; but it can be traced only to the fact that a judicial willingness to have a rethinking on its own rigid and positivistic approach was in the offering. This judicial willingness has, in turn, gradually led to a transitional period in judicial approach in holding an authority as quasi-judicial.

(ii) The Period of Judicial Ambivalence

With the obiter dicta of Gajendragadkar C. J. in Associated Cement Companies' v. P. M. Sharma\(^2\) came a new trend in judicial attitude toward the law on the duty to act judicially. In this case, though no question of certiorari or natural justice arose, the court referred to Advani's case and also to the House of Lords' decision in Ridge v. Baldwin\(^2\) and made an observation that much assistance could be derived from the judgement of Lord Reid in Ridge v. Baldwin on question of natural justice and on the duty to act judicially. It is through this observation of his Lordship, the Supreme Court has, for the first time, expressed openly and consciously its readiness to deviate from the Advani's dictum.

A repetition of this observation with approval can be seen in the subsequent decision of the court in Shri Bhagwan v. Ramachand\(^3\), wherein question of natural justice was directly in issue, and also in D. L. Board, Calcutta v. Jaffar Imam\(^4\) which also raised question of natural justice in connection with disciplinary proceedings under the Preventive Detention Act, 1950.

But in Sadhu Singh v. Delhi Administration\(^5\) the Supreme Court has made an attempt to go back to the era of positivism, in holding that there was nothing in the statute or the rules which required a judicial approach in reviewing the order of detention under Rule 30 A of the Defence of India Rules and therefore

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that no writ of certiorari would lie to correct that 'administrative' order. This decision was a retrograde step within this transitional period under discussion.

But the decision in Sadhu Singh's case was soon overruled by the Court in P. L. Lakhanpal v. Union. Though Baldwin's case was not specifically referred to in this case the Court has made the decision in line with the Associated Company's case which found a helpful source in Ridge v. Baldwin on question of natural justice.

So far so good. All these above mentioned decisions disclose a judicial willingness to reconsider the law on the duty to act judicially. But the fact remains that in none of these decisions the Supreme Court has neither attempted nor has it succeeded in systematically discussing or reconsidering or re-stating the law on the point. Throughout this transitional phase of judicial attitude we can see an ambivalent Supreme Court. In Associated Cement Company's case and other allied cases the Court did not refer to any of its earlier decisions on the point which had uniformly accepted Lord Hewart's gloss on Lord Atkin's statement and the statement in Nakkuda Ali's case as correct. But instead, the Court silently pointed to Ridge v. Baldwin, a decision which has categorically stated that Lord Hewart's gloss was only a misreading of Lord Atkin's statement and that Nakkude Ali's case was wrongly decided, as a source of much help and insight on questions of natural justice. It is this silence the Court observed as between Nakkunda Ali's case and Ridge v. Baldwin which is described here as the judicial ambivalence. Here also this ambivalent attitude cannot be traced to a lack of awareness as to the anomalous position in which the law has been left; but it can be traced only to a lack of confidence in making the right choice and in re-stating the law in its proper perspective. The anomaly caused by this ambivalence continued till the Supreme Court's decision in Karipak's case has put an end to it for ever.

33a. Supra n. 29.
33b. Supra n. 28.
(iii) The Period of Judicial Realism

The judicial ambivalence as to the right choice of law on the duty to act judicially has become almost to a vanishing point in *State of Orissa v. Dr. (Miss) Binapani Dei* 34 paving the way for a new era of judicial realism which found its full expression in *A. K. Kraipak v. Union*. 35 It is in *Binapani's* case that the Supreme Court has, for the first time, actually ‘derived much assistance from *Ridge v. Baldwin* on questions of natural justice’. Though, *Ridge v. Baldwin* is not expressly referred to - the objectionable aspect of the case - the ‘assistance’ derived from *Ridge v. Baldwin* is apparent on the face of the observaion of Shah J. in *Binapani's* case. In holding the impugned order, which re-fixed the age of the respondent, as invalid for the non-observance of the rules of natural justice, Shah J. observed: “It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed: It need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored, and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.” 36 Thus, obviously, the Supreme Court, deriving much assistance from *Ridge v. Baldwin*, has adopted a more flexible and realistic approach in holding an authority under a duty to act judicially and thereby under an obligation to observe the rules of natural justice. This judicial realism evinced by *Binapani's* case articulated and reinforced by the Supreme Court in its landmark decision in *A. K. Kraipak v. Union*, the Indian equilvalent of *Ridge v. Baldwin*.

*Kraipak's* case raised the question whether the power conferred on the selection Board for selecting officers to the Indian Forest

Service was quasi-judicial or administrative. Adopting a very realistic and functional approach, the Court said: "The dividing line between administrative power and quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is administrative power or quasi-judicial power one has to look to the nature of the power conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised." 37 Referring to the context of a modern Welfare State like ours, the Court further said: "The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously . . . . Therefore it is neither possible nor desirable to fix the limits of a quasi-judicial power". 38 The court also referred to Binapani’s case and reiterated the proposition that ‘if there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power’. Thus the Court has systematically re-stated the law on the duty to act judicially.

Another important dimension of Kraipak’s case lies in the two distinct vantage points from which the court has looked to the problem of holding an authority as quasi-judicial.

Looking at the question, first, from the standpoint of the availability of certiorari, Hegde J., for the Court said: "The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions . . . . we have reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially". 39 The Court thus enlarged the scope of certiorari to a

38. Id. at pp. 154-155.
39. Ibid.
considerable extent and rendered the conceptual classification of functions as administrative and quasi-judicial irrelevant for the purpose of determining whether certiorari would lie against an authority.

The second standpoint was the applicability of the principle of natural justice. The Court has, first, created an opportunity to discuss the problem from this angle by deliberately assuming that "the power exercised by the Selection Board was an administrative power" and then proceeded to test the validity of the selection on that basis. This assumption took the Court directly to the question whether the principles of natural justice would apply to administrative acts. And the Court held that 'even an administrative order which involves civil consequences must be made consistently with the rules of natural justice'.

Thus from the point of view of applicability of natural justice also the distinction between a quasi-judicial function and an administrative function became irrelevant after Kraipak's case. The rationale of discarding this distinction has been succinctly put by the Court thus: "The aim of the rules of natural justice is to secure justice or, to put it negatively, to prevent miscarriage of justice... If the purpose of the rules of natural justice is to prevent miscarriage of justice, one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries... Arriving at a just decision is the aim of both the enquiries. An unjust decision in an administrative enquiry may have more far-reaching effect than a decision in a quasi-judicial enquiry".

In Kraipak's case we see, thus, not only a complete transformation of judicial attitude in holding an authority as quasi-judicial, but also another dramatic shift in emphasis. That is to say, till Kraipak's case in judicial consideration of the availability of certiorari and of the applicability of natural justice the question used to be asked by the court was whether the authority in question was quasi-judicial. But the Kraipak's dictum that even an

40. Ibid.
41. Ibid.
administrative authority is amenable to certiorari and is under an obligation to observe natural justice has shifted the emphasis from the judicial enquiry whether the authority is under a duty to act judicially to the question whether the authority is under a duty to act at least fairly if not judicially. Thus with the Kraipak's case the concept of duty to act judicially has shifted into that of a duty to act fairly, a concept formulated and adopted by the court as an effective instrument to combat arbitrariness in administrative action.

The whole decision is marked with a touch of pragmatic realism and also at some places with a spirit of judicial activism. The subsequent decisions of the Supreme Court, following Kraipak's case, show that this spirit is still with court unabated, creating a new activistic era in judicial approach in this area of administrative law.

(iv) THE PERIOD OF JUDICIAL ACTIVISM

In the post Kraipak period the judicial attention is mainly concerned not with the problem of holding an authority as quasi-judicial but with the proper elucidation of the 'duty to act fairly' and of the requirements of fairness in action'. The distinctive feature of judicial process during this period, especially since Maneka Gandhi's case has been not that the court makes any substantial change in the law laid down in Kraipak's case, but that the court holds the mantle of Kraipak's case with an unprecedented spirit of judicial activism.

In Maneka Gandhi v. Union of India validity of an order passed by the Passport Authority impounding the passport of the petitioner without giving her any opportunity of being heard was in question. In dealing with this question the very approach adopted by the Court was significant. The court did not start with the enquiry whether the Passport Authority is a quasi-judicial or administrative body, but instead it started with the question

42. Id., at p. 156.
whether the authority in exercise of its powers to impound a passport is under an obligation to observe the rules of natural justice.

Nevertheless, the court considered the law on the duty to act judicially with reference to the leading decisions on the point and stated that ‘the net effect of these and other decisions’ was that ‘the duty to act judicially need not be super-added, but it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person affected’. Applying this test the court held that ‘the power conferred on the Passport Authority is quasi-judicial power. Still, the Court decried this approach as an orthodox view which prevailed prior to Kraipak’s case; and observed that the rules of natural justice would equally be applicable even if the power to impound a passport were regarded as administrative power.

For, Kraipak’s case has imposed a duty to act fairly on all administrative acts, provided the act involves any civil consequence to the person affected.

The ‘duty to act fairly’ means, according to the court, a duty to apply the rules of natural justice. But what is the scope and extent of this rules of natural justice to be applied by an administrative authority which is under a duty to act fairly? With a remarkable judicial craftsmanship Justice Bhagwati has formulated the test of “fair-play in action” as a satisfactory answer to this question. His Lordship observed: “Natural justice is a great humanising principle intended to invest law with fairness and to secure justice.... Thus the soul of natural justice is fair-play in action”. Further, expounding the expression ‘fair-play in action’, the Court laid down that in applying this test the right question to be asked is whether the procedure followed by the authority was fair in all the circumstances and fair-play in action

44. (1978) 1 S.C.C. 248.
46. Id., at p. 287.
47. Id., at p. 289.
49. Id. at p. 284-5.
required that a particular rule of natural justice should be applied”. “The enquiry must, therefore, always be”, the Court said, “does fairness in action demand that an opportunity to be heard should be given to the person affected”.\(^5\)

Thus duty to act fairly, in other words, means the duty to apply those rules of natural justice which fairness in action demands in a particular situation. And it is this duty that the Supreme Court has imposed on all administrative authorities, dealing with the rights of the subjects.

In *Mohinder Singh Gill v. Election Commissioner of India*\(^5\) the Supreme court has only added some additional dimensions to the fairness discipline as evolved by it through *Kraipak, Kesava Mills & Maneka Gandhi*. Reiterating the view that the fairness concept extends to both the fields of quasi-judicial and administrative acts, the Court observed through the eloquence of Justice Krishna Iyer: “After all administrative power in a democratic set up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access.”\(^5\) Perceiving the vital significance of this broad and activist statement, especially in the context of the present case in which speed and immediacy in administrative action was keenly competing with the duty to act fairly, the Court, in a passifying tone, explained the fairness concept further. The Court said: “For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a China shop, nor a bee in one’s bonnet. Its essence is good conscience in a given situation, nothing more - but nothing less.”\(^5\) The Court further observed that this principle is universal in application and the ‘exception’ to the rules of natural justice is a misnomer or rather is but a shorthand form of expressing the idea that in such an

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50. *Id.*, at p. 286.
52. *Id.*, at p. 434.
exclusionary case nothing unfair can be inferred by not affording an opportunity to present or meet a case.\textsuperscript{54}

In \textit{Swadeshi Cotton Mills v. Union of India}\textsuperscript{55} also the Supreme court has shown the same enthusiastic approach in holding an administrative authority under a duty to act fairly - the post \textit{Kraipak} version of a duty to act judicially. The court said that "the supposed distinction between quasi-judicial and administrative decisions which was perceptably mitigated in Dr. Binapani Dei's case was further rubbed out to a vanishing point in \textit{Kraipak}'s case", and held that 'irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial, a duty to act fairly, that is, in consonance with the fundamental principles of substantive justice is generally implied, because the presumption is that in a democratic polity wedded to the rule of law the state or the legislature does not intend that in the exercise of their statutory powers its functionaries should act unfairly or unjustly".\textsuperscript{56}

The Court, then, proceeded to give a very expansive meaning to the expression 'civil consequences'. The Court said: "Civil consequences undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation every thing that affects a citizen in his civil life inflicts a civil consequences".\textsuperscript{57} This creative definition of 'civil consequences', it is submitted, is bound to make the fairness discipline more vibrant and dynamic in its reach and depth in the field of administrative law, especially in the present day context as has been alluded to in the introduction.

All this would indicate an unabating spirit of judicial activism in holding the administrative authorities as accountable to the rule of law values in their dealings with the lives and liberties of the Indian people. This approach unfolded by the Supreme court is appreciable. The advance made in the law is tremendous

\textsuperscript{54} Ibid.
\textsuperscript{56} Id., at p. 684.
\textsuperscript{57} Id., at p. 688.
and salutary. Yet, a few words of caution seem to be a must, before concluding this discussion.

**CONCLUSION**

The brief sketch of the judicial process in this area of administrative law, as outlined above, undoubtedly shows the remarkable capacity of the Indian judiciary to synthesise and remould its own views to suit the changing needs of time. This synthetic process goes on gathering into itself new ideas, doctrines and standards as administrative exigencies and constitutional consciousness progress. It rightly laid down the test for holding an authority under a duty to act judicially and as quasi-judicial. Equally realistic is the proposition that whenever an administrative body is taking an action entailing an adverse civil consequence to a citizen, the analytical distinction between a quasi-judicial and administrative authority is immaterial for holding that administrative body under a duty to act fairly and thereby under an obligation to observe the rules of natural justice.

But it is to be remembered that this distinction has been discarded by the Court in *Kraipak's* case only as against the question of the applicability of the rules of natural justice to an administrative action. Therefore the broad statements as to this distinction only as a 'supposed distinction' which had been rubbed out to a vanishing point in *Kraipak's* case, without referring to the specific purpose for which the distinction is discarded should not lead to a wrong assumption that there is absolutely no distinction whatsoever between a quasi-judicial and administrative body or that the "supposed distinction" does not serve any meaningful purpose at all. Such an assumption would be wholly unwarranted and untenable. For, it is one thing to say that there is no distinction between the two authorities, and it is entirely a different thing to say that the distinction is not relevant for a particular purpose. The court in *Kraipak's* case said only the latter and not the former.

There is always an appreciable, though not precisely definable, difference between the doing of a purely administrative act

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and that of a quasi-judicial act. If an authority is clearly under a duty to act judicially by applying the realistic test in *Binapani* and *Kraipak*, necessarily that authority has to be held as quasi-judicial in nature, the implication of which would be that the authority is under a duty to observe all the well settled canons of natural justice in its proceedings. But, on the other hand, if the authority cannot be held under a duty to act judicially it can be held only as administrative in nature and therefore only under a duty to act fairly the implication of which would be that the authority has to observe only those rules of natural justice which fairness in action demands in the circumstances of a particular case and nothing more. The distinction between the duty to act judicially and duty to act fairly is well recognised in *re H. K. (An Infant)*, a case which has been relied upon by the Supreme Court consistently since *Kraipak’s* decision. In that case Lord Parker said:

".... Even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate.... let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly.... and to the limited extent that the circumstances of any particular case allow and within the legislative frame work under which the administrator is working, only to that limited extent do the so called rules of natural justice apply, which in a case such as this is merely a duty to act fairly".

This functional distinction between the duty to act judicially and duty to act fairly, which the Supreme Court still entertains, it is submitted, indirectly corresponds to the analytical distinction between a quasi-judicial and administrative authority. Though this analytical distinction is no more relevant for determining the question whether the rules of natural justice would apply at all to an administrative acion, the functional distinction between a duty to act judicially and duty to act fairly is still relevant in determining the precise scope of the applicable rules of natural justice in a particular situation, or in other words, in determining

60. *Id.*, at p. p. 630.
the precise scope of the procedural rights to which an affected individual is entitled.

Besides, this distinction is relevant for some other collateral purposes too. For instance, as to the question of absolute privilege, the protection of which can be claimed only for judicial or quasi-judicial proceedings this distinction is of vital importance. As Lord Esher M. R. Said in Royal Acquarium and Summer and Winter Garden Society v. Parkinson, an extra-judicial proceeding in order to attract absolute privilege must be a tribunal with attributes similar to those of a court of law, acting judicially in a manner similar to that which such courts act, and a purely administrative proceedings would not be an absolutely privileged occasion. This proposition has been accepted and acted upon by the Privy Council in O' Connor v. Waldron and also by the House of Lords in Trapp v. Mackie.

All this would show that the expression quasi-judicial is still having a definite scope in the field of administrative law and therefore it is neither possible nor desirable to write off this expression from the judicial vocabulary.

Again, when we turn to the operational phase of the fairness discipline, which the Supreme Court has evolved and imposed on the holders of public power as an effective check on the exercise of those powers, we can reasonably hold the view that the Supreme Court has achieved remarkable success in this valiant enterprise. Yet, when we look at the propositions that 'whenever an administrative action entails an adverse civil consequence to a person that authority is under a duty to act fairly and so is bound to observe those rules of natural justice, which fair-play in act demands; and that 'everything that affects a citizen in his civil life inflicts a civil consequence; one may justifyably wish that these propositions should not be pushed to their logical extremes by the Supreme Court. If it does so, the judicial activism which we have been praising so far would be slipping down to judicial adventurism which would be anathetic both to our

61. [1892] 1 QBD 431 CA.
63. [1979] 1 All E.R. 489.
judicial culture and constitutional philosophy. The real dangers inherent in encouraging such a climate of indiscriminate judicial activism have been cogently exposed by Prof. de Smith. He says: “The administrative process is not, and can not be, a succession of justiciable controversies. Public authorities are set up to govern and administer, and if their every act or decision were to be reviewable on unrestricted grounds by an independent judicial body the business of administration could be brought to a stand still”.

In the same vein says another scholar: “If due process is interpreted as a mechanical yardstick, unalterable regardless of time, place and circumstances it may make government unworkable... The Constitution does not require full judicialisation in every conceivable case”.

These juristic observations carry with them the message that the judiciary, especially in a developing country like ours, should not unduly extend the fairness discipline so as to bring within its purview matters that should properly be let to lie elsewhere.

It is to be remembered that all this is said not as a criticism, but only as a word of caution, for, the Supreme Court of India has time and again made it clear that the fairness discipline is not a dogmatic or inflexible doctrine, but it is only a flexible and pragmatic solution to the problem of combining efficiency in administration with fairness to individual. Also the Indian Supreme Court is conscious of the truism that “the glory of the law is not that sweeping rules are laid down but that it tailors principles to practical needs”.

Let this glory of the law flourish with the glory of the judicial culture which Supreme Court has evolved in all the years passed in this area of administrative law.

64. de Smith, Judicial Review of Administrative Action, (4th Edn.), p. 3