RECURRING ISSUES IN DECISION-MAKING UNDER INDIAN ADMINISTRATIVE LAW

Syed Mujtaba Athar, PhD Research Scholar, Faculty of Law, Jamia Millia Islamia, New Delhi.

ABSTRACT

Administrative law governs the power exercised by executive officers. The subject covers constitutional law and legislation controlling government agencies. It is also applicable to the study of political science, public policy, and a variety of other disciplines. In India, judicial rulings have also been a significant source of administrative law. One of the intrinsic part of the administrative legal regime is that the authorities and government agencies have to make decision. This decisions are both concerning day-to-day administration and management of the agencies as well as policy decisions having larger implications. Therefore, it is pertinent to analyse the means and methods employed by the government agencies in decision-making. This article looks into the recurring issues in the process of decision-making by government entities and the permissible considerations employed in the decisions having policy implications. The paper concludes that it is essential power of the government agencies to be able and willing to make decisions. The regulating and judicial review of decision-making should be based on constitutional ethos, balancing the right of public and flexibility accorded to the agency in making decision necessary to discharge their duties.

1. Introduction

Administrative law governs the use of power by executive officials, especially those of ostensibly independent bodies.[1] It consists of constitutional law, statutory law, including ordinances, administrative instructions, announcements, and circulars, and common law concepts that predate statute law.[2] In India, judicial rulings have also been a significant source of administrative law. Administrative law permeates the Indian legal system, from the smallest local fight over whether a municipality can chop down a potentially harmful tree to the largest national debate over whether the Central Environmental Protection Agency should control greenhouse gas emissions.[3] Administrative law is applicable to several fields of the law, as well as political science, public policy, and countless other disciplines. Administrative law includes an incredible variety of topics. Administrative law covers constitutional law topics such as separation of powers and procedural fairness; statutes governing agencies in diverse areas such as environmental law, labour law, occupational safety, and motor vehicle safety; the structure and operations of the various agencies; procedural requirements for adjudication and rulemaking; enforcement discretion; methods of enforcement; government tort liability; and freedom of information.[4]

The sources of executive authority, the constitutional constraints on that power, the procedural requirements for the use of executive power, and the availability and breadth of judicial review of executive action are often the focal points of administrative law studies.[5] By analysing government structure and executive conduct through the lenses of the public interest and public choice theories of regulation, it is possible to get a more comprehensive knowledge of administrative law. These two ideas provide two distinct views from which to comprehend Administrative Law. The public interest theory analyses administrative law in light of the government's public policy objectives. Public choice theory analyses administrative law in light of the political context and administrative system reality.

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[1] R Tripathi, "Concept of Global Administrative Law: An Overview" *India Quarterly*.
[2] D. Y. Chandrachud, "Constitutional and Administrative Law in India*," 36 *International Journal of Legal Information* 332–7 (2008).
[3] Werner Scholtz, "Different countries, one environment: a critical Southern discourse on the common but differentiated responsibilities principle," 33 *South African Yearbook of International Law* 113–36 (2008).
[4] Bernard Schwartz and New York University. Institute of Comparative Law., *French Administrative Law and the Common-Law World*, 1 online resource (xxii, 367 pages) vols. (New York University Press, New York, 1954).
[5] Anupama Roy and Michael Becker, *Dimensions of Constitutional Democracy: India and Germany*, 1 online resource (238 pages) vols. (Springer, Singapore, 2020), at p. ix.

In a welfare state, administrative law has expansive boundaries. Even a cursory examination of the broad concepts of administrative law in India is arduous.[6] This is not just due to the fact that the law is evolving via a succession of ad hoc judicial solutions to the difficulties of organising and limiting administrative authority and discretion.[7] What makes the task really challenging is that the effort to rein in abuses of power and discretion in India extends beyond immediate results and general legal doctrine trends. It rather encompasses the responsibility of instilling the bearers of public power and authority with a sense of legitimacy and justice through insisting on accountability. Unless they are helped by an overarching political system that maximises the value of accountability, it is questionable whether courts anywhere have been effective in fostering a culture of legality in the use of public authority.[8] In India, where the occasional emergence of a strong leader overshadows the stability within its own party and of the multi-party system in general, the failure to create appropriate mechanisms—such as an ombudsman or a system of tribunals—has exposed the courts to the burden, not only of rectifying everyday excesses of administrative power, but also of creating and sustaining a culture of legality and fair play in the use of public power.[9] Understanding whether this may ever occur via the legal process is just as crucial as understanding how power abuses are sometimes combated through judicial scrutiny. Traditional administrative law literature focuses nearly exclusively on the second component. In an overview of administrative law changes in India, this article seeks to examine both of these features.

2. General Issues in Administrative Decision-making

Almost all administrative decision conflicts include the recurrence of certain difficulties. First, it is essential to determine the source of agency authority, which is often the enabling legislation. This act will outline the parameters of the delegation of authority by the legislature to the agency, as well as the explicit and implicit constraints on that authority.[10] This involves the identification of agency procedural authority, such as whether the agency has the capacity to participate in rulemaking, if it has the power to adjudicate, and whether it has the power to

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[6] B. B. (Bankey Bihari). Misra and Indian Institute of Public Administration., *The Administrative History of India, 1834-1947; General Administration* (Oxford University Press, London, 1970).
[7] CA Whytock, "Domestic Courts and Global Governance," 84 *Tulane Law Review* 67–83 (2009).
[8] Anupama Roy and Michael Becker, *Dimensions of Constitutional Democracy: India and Germany*, 1 online resource (238 pages) vols. (Springer, Singapore, 2020), at p. 26.
[9] Chuks Okpaluba and Mtendeweka Mhango, "Between separation of powers and justiciability: Rationalising the Constitutional Court's judgement in the Gauteng E-tolling litigation in South Africa," 21 *Law, Democracy & Development* 1–24 (2017).
[10] Robert French, "Judge bridlegoose, randomness and rationality in administrative decision-making," 43 *Monash University Law Review* 591–604 (2017).

collect information via delegation or inspections. Second, beyond the source of power, the agency's enabling legislation and other laws will include substantive criteria that the agency must adhere to while using its delegated authority.[11] During judicial review, the courts demand that agencies adhere to the substantive criteria imposed by the governing legislation. Thirdly, the parent laws, other statutes, and the Constitution outline the processes that agencies must adhere to while exercising their assigned authority. Fourth, the legislation, including enabling acts, include provisions that control judicial review, such as the standard of review, the conditions under which review is accessible, and the individuals who may seek review and at what stage of administrative processes. Lastly, the rule of law and separation of powers provisions of the Constitution may restrict the capacity of parliament to build the agency in creative ways. These constitutional restrictions result from particular sections of the Constitution and ideas drawn from the general principle of separation of powers and rule of law.

Procedure is fundamental to administrative law. Procedure requirements are derived from the Constitution, administrative common law, the agency's particular statute, and other statutes that impose obligations on administrative agencies, such as the Environmental (Protection) Act of 1986, which mandates that agencies prepare environmental impact assessments in certain circumstances.[12] The availability of judicial review is regulated by the constitutional mandate and the agency's specific legislation, therefore it is crucial to be aware of when review is accessible and what acts are reviewable. Constitutional notions such as rule of law, separation of powers, fairness, standards of natural justice, reasonable expectation, and administrative common law may also affect the availability of judicial review.

The scope of judicial review is determined by the Constitution and the agency's specific legislation, i.e., the applicable standard.[13] The breadth of judicial review determines the level of deference accorded to the agency's judgement by the reviewing court. Statutes, court precedent, and the U.S. Constitution may restrict the enforcement authority of an agency. Private parties may seek to compel agencies to undertake enforcement proceedings, or they may attempt to enforce regulatory standards independently of official participation.

[11] Margaret Allars, "Administrative Law, Government Contracts and the Level Playing Field," 12 *University of New South Wales Law Journal, The* 114–52 (1990).
[12] Werner Scholtz, "Different countries, one environment: a critical Southern discourse on the common but differentiated responsibilities principle," 33 *South African Yearbook of International Law* 113–36 (2008).
[13] Matthew Groves, "Interpreters and fairness in administrative hearings," 40 *Melbourne University Law Review* 506–46 (2016).

This article examines advanced and specialised concerns in agency decision-making and their enforcement under judicial scrutiny. It focuses on how administrative law promotes reasoned decision-making by including Environmental Impact Assessment and cost-benefit analysis into the decision-making process.[14] There is also a need to examine agency estoppel and the question of agency non-acquiescence, i.e., circumstances in which an agency refuses to comply with a lower court's ruling until the Supreme Court has definitively decided the matter.

The aim in administrative law is for agencies to engage in reasoned decision-making, i.e., decision-making that is based on their knowledge and free from undue political interference. Statutorily relevant issues are the only ones that agencies should evaluate. Cost-benefit analysis has been highlighted as a good method to enhance agency policymaking and limit the possibility of arbitrary agency action, but courts will not compel agencies to utilise it unless controlling legislation expressly demand it. In addition, agencies are obliged by Government Orders (G.O.) to undertake cost-benefit evaluations of their regulations where such studies are permissible by law.

Impact evaluations are another common tool for enhancing agency policymaking, primarily because they require agencies to evaluate crucial implications of their regulations that they would not have otherwise explored. The most well-known type of impact assessment in India is the environmental impact assessment (EIA), which is required by the Environmental (Protection) Act, 1986.[15] However, agencies have been required to prepare impact assessments on a wide range of economic, social, and governmental effects of their regulations. Ordinarily, authorities are not required to alter their activities based on the results of an environmental impact assessment.[16] EIA rather guarantees that agencies and the public are informed of the repercussions of agency action, which may give political ammunition to individuals who oppose agency action on pertinent reasons.

Administrative agencies must adhere to norms of consistency and clarity set by courts performing judicial review in the field of rational decision-making.[17] In accordance with the clarity criterion, agencies may only operate under sufficiently clear regulations in certain

[14] Ritu Paliwal, “EIA practice in India and its evaluation using SWOT analysis,” 26 *Environmental Impact Assessment Review* 492–510 (2006).
[15] . The other main laws in this regard are the Indian Wildlife (Protection) Act (1972), the Water Act (1974), the Air (Prevention and Control of Pollution) Act (1981), and the Biological Diversity Act (2002).
[16] Will Banham and Douglas Brew, “A review of the development of environmental impact assessment in India,” 11 *Project Appraisal* 195–202 (1996).
[17] R Tripathi, “Concept of Global Administrative Law: An Overview” *India Quarterly*.

instances. Related to this criterion is the idea that, during judicial review, agency action is reviewed based only on the considerations actually relied upon by the agency. The criterion for consistency stipulates that authorities must handle similar circumstances similarly, unless they express a new rule and provide an explanation for the difference. In some situations, this may need that an agency articulate a guiding concept against which the consistency of its individual acts may be determined.[18] A similar notion states that agencies must obey their own rules; but, courts may not enforce internal agency regulations that are not designed to serve the public.

Agencies are not estopped by the behaviour or incorrect assertions of agency personnel, particularly where the use of money is involved. The government may nevertheless require adherence to the right regulation if an official offers incorrect guidance. Typically, the government is not subject to non-mutual collateral estoppel, which allows it to relitigate a lost issue against a third party. In a similar vein, agencies may occasionally refuse to comply with unfavourable court judgments, particularly if the subject is still pending in the higher court where the agency activity is taking place.[19] Intra-circuit non-acquiescence, in which an agency clings to its rule even in a jurisdiction that rejected the agency's perspective, is likely unjustified and against the rule of law.

3. Reasoned Decision-making

Given that administrative law, upon closer inspection, is seen to be the antithesis of the arbitrary and capricious norm, In administrative law, the ideal situation is for agency policymaking to be the product of reasoned decision-making, which may be defined as the application of agency knowledge to the variables that are made relevant by the governing legislation, which might include laws and regulations.[20] The typical give and take of the political process, the ever-shifting nature of the environment, and the varying points of view held by diverse players, such as Parliament and the Council of Ministers, often cause agency policy making to go off course from its ideal form. This section will discuss and expand on that ideal as well as the challenges that have emerged in relation to it.

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[18] Matthew Groves and Greg (Law teacher) Weeks, *Legitimate Expectations in the Common Law World* (Hart Publishing, Oxford ;, 2017).

[19] Margaret Allars, "Administrative Law, Government Contracts and the Level Playing Field," 12 *University of New South Wales Law Journal, The* 114–52 (1990).

[20] O. Chinnappa Reddy, *The Court and the Constitution of India: Summits and Shallows* (Oxford University Press, New Delhi, 2008).

4. Permissible consideration in Agency Policymaking

The formulation of agency policy ought to be the result of the application of agency knowledge to the governing legislation. The relevant laws, such as the parent legislation of the agency and other generally applicable statutes such as those of the EPA, are the basic sources from which the primary matters that agencies are entitled to take into consideration are drawn.[21] It is also normally allowed for agencies to take into consideration the opinions of the council of ministers and the union ministry that is in charge of the corresponding portfolio, although this is only allowed insofar as the opinions are compatible with the laws that regulate the agency.[22] According to the standard principles of judicial review, administrative agencies are obligated to take into account the considerations declared pertinent by legislation and should avoid taking into account any extraneous elements that are not made relevant by statute.[23]

Recent events have contributed to the strengthening of the restriction against agencies taking into consideration considerations that, although they may be acceptable, are not anticipated by the legislation that control the situation. The Supreme Court's decision in *Pahwa Plastics Pvt. Ltd v. Dastak NGO*,[24] supports the notion that agencies should make policy by applying their expertise to the factors made statutorily relevant. It held that where the adverse consequences of denial of ex post facto approval outweigh the consequences of regularization of operations by grant of ex post facto approval, and the establishment concerned otherwise conforms to the requisite pollution norms, ex post facto approval should be given in accordance with law, in strict conformity with the applicable Rules, Regulations and/or Notifications.

The Court rejected authority's consideration of factors that had long been thought appropriate for agencies to take into account, such as scientific uncertainty other views on the best way to proceed in an area with environmental implications. That decision reviewed the Environment Protection Agency's decision not to engage in rulemaking, not the substance of a final rule, but it still appears to have implications for judicial review of agency policymaking generally.[25]

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[21] Dean R Knight, "A Murky Methodology: Standards of Review in Administrative Law," 6 *New Zealand Journal of Public and International Law* 117–60 (2008).
[22] Robert French, "Judge bridlegoose, randomness and rationality in administrative decision-making," 43 *Monash University Law Review* 591–604 (2017).
[23] Anupama Roy and Michael Becker, *Dimensions of Constitutional Democracy: India and Germany*, 1 online resource (238 pages) vols. (Springer, Singapore, 2020).
[24] 2022 LiveLaw (SC) 318
[25] Herbert A. Simon, "Administrative Decision Making," 25 *Public Administration Review* 31–7 (1965).

The formulation of agency policies should result from the application of agency knowledge to governing legislation.[26] The key factors that agencies may consider are obtained from relevant legislation, such as the agency's organic statute and other generally applicable acts such as the EPA. In general, agencies may also consider the opinions of the council of ministers and the union ministry responsible for the particular portfolio, but only to the extent that these opinions are compatible with controlling legislation.[27] Under usual standards of judicial review, agencies are obligated to examine just the reasons declared relevant by legislation and should not consider irrelevant extraneous considerations. The jurisprudence developed through these judicial reviews have strengthened the restrictions against government agencies considering elements that, although reasonable, are not authorised by applicable legislation[28].

4. (a) Clarity and consistency

In some instances, courts have placed clarity and consistency requirements on agencies. Briefly put, agencies are often compelled to act according to clearly defined substantive criteria, and they are frequently held to a reasonably strong responsibility to handle similar situations similarly unless they publicly repudiate the substantive norm determining earlier judgments. These criteria should be understood in connection with the constitutional standards for judicial review. In brief, in certain instances it has been determined that agency conduct that looks incongruous with earlier judgments or that does not follow a discernible criteria violates the constitution's arbitrary and capricious standard of scrutiny. There is considerable normative appeal to the concept that the government should follow reasonably clear norms in some cases, particularly where major private interests are at risk, such as immigration status or the right to reside in public housing. Rules limit the likelihood of corruption and mistake and establish a baseline for agency or judicial examination. However, restrictive regulations restrict the flexibility of authorities to adapt their activities to the exigencies or equity of a specific instance.

It is often argued that agencies must be consistent, which entails that they must handle similar instances similarly.[29] As a consequence, authorities must provide an explanation when they

[26] Bernard Schwartz and New York University. Institute of Comparative Law., *French Administrative Law and the Common-Law World*, 1 online resource (xxii, 367 pages) vols. (New York University Press, New York, 1954).
[27] Dean R Knight, "A Murky Methodology: Standards of Review in Administrative Law," 6 *New Zealand Journal of Public and International Law* 117–60 (2008).
[28] Tom Ginsburg, et al., *Administrative Law and Governance in Asia: Comparative Perspectives* (Routledge, London , 2009).
[29] Shyam Prakash Pandey, "DIMENSIONS OF JUDICIAL REVIEW IN INDIA: AN EVALUATION" *Asian Journal of Advances in Research* 25–32 (2020).

handle situations that seem to be similar differently. Agencies are permitted to adjust their rules so that subsequent cases are handled differently from earlier ones, but they must explain any policy changes and the new policies must be compatible with controlling legislation and acceptable under the appropriate standard of judicial review.

This alleged need to handle similar cases similarly and dissimilar instances differently conflicts with the general rejection of discriminatory enforcement claims. In accusations of discriminatory enforcement, the subject of an agency's enforcement action asserts that others, often rivals, are infringing the same provision and that the agency should not be permitted to enforce an order against it unless it likewise issues an order against the other offenders. These claims often include rivals since the subject of the enforcement action asserts that if they must comply with an order while their competitors do not, they would be at a competitive disadvantage. The Supreme Court has not been receptive to charges of discriminatory enforcement, stating that enforcement agencies have broad latitude to pick their targets without a "manifest abuse of discretion" This rationale undermines the claim that there is an universal commitment to handle similar circumstances similarly that is enforceable.[30]

Agencies run the greatest danger of behaving inconsistently in adjudication when each case is reviewed independently and there is no guiding legislative norm. It is paradoxically more difficult to discover discrepancy when there is no pre-existing rule and merely agency views in the form of court opinions backing past orders, as opposed to when the agency is functioning under a pre-existing legislative norm.[31] There are examples, however, in which courts have held that agency adjudicatory decision-making is void for inconsistency with prior adjudicatory action. For example, see *Avinash Nagra* v. *Navodaya Vidyalaya Samiti*[32]. In this case, when a Navodaya Vidyalaya teacher was terminated for gross moral turpitude without a comprehensive hearing as required by the CCA, the court upheld the dismissal on the grounds that justice cannot be made unproductive. While the courts have been observant of the authorities and government agencies exercising their mandate in letter and spirit, the Supreme Court has cautioned the adjudicatory authorities in determining questions as to decision-making by the government agencies. In a similar effort to move an adjudicatory agency toward uniformity, the Supreme Court has denied adjudicatory bodies such as the National Green

[30] Santanu Sabhapandit, "The public-private distinction in judicial review: a comparative analysis of India and England," 20 *Oxford University Commonwealth Law Journal* 261–88 (2020).
[31] Soli J. Sorabjee, "Introduction to Judicial Review in India," 4 *Judicial Review* 126–9 (1999).
[32] (1997) 2 SCC 534

Tribunal (NGT) the same legal reasoning latitude as courts adopting the common law technique. The case of *State of Uttar Pradesh* v. *Uday Education and Welfare Trust*[33], is a very interesting decision regarding consistency in adjudicatory agency decision-making. The case concerned a challenge to the government of Uttar Pradesh's notification for the establishment of wood-based enterprises. The Supreme Court reminded the tribunal that it is probable that the petitioners are acting on behalf of established wood-based enterprises that want to prevent competition and continue to acquire raw materials at a lower price. It advised the tribunal that when the qualifications and credibility of a petitioner approaching the NGT are substantially questioned, they cannot be disregarded. Before a litigant is permitted to knock on the doors of justice and seek orders with far-reaching consequences, such as affecting the employment of thousands of people, halting investment in the state, and jeopardising the interests of farmers, the credentials and veracity of the applicants must be examined, and the decision of the governmental agency must not be overturned without due regard for clarity and consistency.

4. (b) Agencies Must Follow Their Own Rules

Another fundamental concept of administrative law decision-making is that the state and its agencies must follow their own regulations.[34] The rule holds preeminence. The rights are based on the agency's norms, which are supported by the constitution. The Supreme Court ruled that Rule of law is the foundation of the Constitution and hence cannot be altered under Act 368.[35] In India, the English idea of Royal prerogative does not apply. Therefore, when the Director of Rations was prosecuted by the Corporation of Calcutta for not obtaining a license for warehousing, etc., he was punished. Before the Supreme Court was the issue of whether or not the state was obligated by its legislation. Initially, the court ruled that the State was not obligated by legislation.[36] However, subsequently, the decision was over-ruled by the Supreme Court in *Superintendent of Legal Affairs, West Bengal* v. *Corporation of Calcutta,*[37] and the state along with its agency is held to be bound by its statute.

5. Conclusion

In accordance with the legislation under which they operate, agencies' decision-making should

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[34] Dean R Knight, "A Murky Methodology: Standards of Review in Administrative Law," 6 *New Zealand Journal of Public and International Law* 117–60 (2008).

[35] Soli J. Sorabjee, "Introduction to Judicial Review in India," 4 *Judicial Review* 126–9 (1999).

[36] Director of Ration v. The Corporation of Calcutta, 1961 SCR (1) 158

[37] 1967 SCR (2) 170

be the result of the agencies' own rules, regulation and expertise. Agencies may consider the advice of the Union Ministry and the Council of Ministers. However, the decision-making of the agency must be based on meeting the objectives in good faith, while adhering to its rules. Also, it is important that the regulatory bodies must make well-informed decisions after carefully evaluating all relevant information and the law. They must also be consistent, which means they must apply the same standard to similar situations.

It's important to keep the Constitution's judicial review standards in mind when trying to make sense of these prerequisites. Judges and courts may decide how to handle similar instances, but they must explain any discrepancies. Also, as has been argued in this article, agencies are permitted to alter their rules to handle new cases differently from old ones, albeit they are required to justify the shift. The ground rule must be clarity, consistency and rule-based order. Any deviation and non-compliance must be taken as exception and subject to judicial review.