Donoughmore Committee: A Cutting Edge in Administrative Law

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A B S T R A C T

The Administrative process which subsists in the present scenario was not a sudden creation. *Rome was not built in a day.* Likewise, the present day administrative process had gone through the whirlpool of tremendous changes that was comprised of ups and downs to acquire it s present day form. Undoubtedly, a major league of the credit in this regard is owed to none other than the country of United Kingdom.In Britain, we can see that there were quite a couple of Committees that had aided and assisted in the making of the current day administrative process. Of the various committees appointed in this regard in Britain, two of them occupy the prominent and prior positions. The first one is the Donoughmore Committee and the second one is the Franks Committee. This submission hinges on the Donoughmore Committee.

Keywords: Donoughmore Committee, Administrative law, administrative process, New Despotism, Rule of Law, Tribunals, Delegated Legislation, Henry VIII Clause, Separation of Powers, Judicial Control

1. Introduction

The Administrative process which subsists in the present scenario was not a sudden creation. *Rome was not built in a day.* Likewise, the present day administrative process had gone through the whirlpool of tremendous changes that was comprised of ups and downs to acquire it s present day form. Undoubtedly, a major league of the credit in this regard is owed to none other than the country of United Kingdom.In Britain, we can see that there were quite a couple of Committees that had aided and assisted in the making of the current day administrative process. Of the various committees appointed in this regard in Britain, two of them occupy the prominent and prior positions. The first one is the Donoughmore Committee and the second one is the Franks Committee. This submission hinges on the Donoughmore Committee. The Donoughmore Committee was given such a name as the aforementioned Committee was under the chairmanship of the Earl of Donoughmore. The trigger for the formation of the Donoughmore Committee was the book of New Despotism published by Lord Hewart the severely criticized the then procedure and mechanisms adopted by the Executive during that period. This submission shall scrutinize the clarion call for the Donoughmore Committee, the various issues enquired into, reforms and recommendations put forth and also the aftermath along with a few case law that proves the importance of the Committee even in the present scenario is covered in this submission.

2. New Despotism

New Despotism is the famous book written by Lord Hewart, the disciple of Prod. A. V. Dicey during the year 1929. In this work, Lord Hewart severely criticized Sub Delegation. During that period, the Departments rarely published any reports of their proceedings or reasons for their decisions. Thus the outcome was that the proceedings were secret. Even the interested parties could not learn what happened or what the Department is likely to do in future when a similar situation further arises. In short, neither of the parties concerned could believe he or she had justice in their case. This led to the people

losing their faith in the prevailing system.[1] Law was there to protect individual rights in cases brought before Court.Introduction of statutory schemes which allowed the determination of outcomes outside of the normal Courts, threated the fundamental concept of Rule of Law. [2] Lord Hewart also stated that with the introduction of the Tribunals, the routine decision making of the officialdom was placed beyond judicial oversight except when a dispute arose over how a body interpreted the law. He also accentuated on the misuse of powers by Executive. Predictably the result was the setting up of a committee to investigate his various allegations of a *„bureaucratic conspiracy".*[3]

3. Donoughmore Committee

The Donoughmore Committee was appointed on 30th October 1929. The aforesaid committee was comprised of the ablest Parliamentarians, lawyers and civil servants of the day. The team took evidence from every conceivable source that could possibly assist.[4]

As stated earlier, the book New Despotism was the clarion call for the formation of the Donoughmore Committee. Considering the same, the team viewed NEW DESPOTISM as a warning against real dangers. It was also intended to appease the complaints about democracy. The committee had also covered ministerial powers of delegated legislation & of judicial or quasi-judicial decisions.[5]

Paraphrasing the verbatim, the Donoughmore Committee was appointed.

"to consider the powers exercised by or under the direction of Donough (or by persons or bodies appointed specially by) Ministers of the Crown by way of

(a) *delegated legislation and*

(b) *judicial or quasi-judicial decision,*

and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law."[6]

4. Rule of Law

The jotting down of Rule of Law by the Donoughmore Committee also becomes pertinent. The Rule of Law is a recognized principle of the English Constitution, a conventional obligation. But it is a term open to variety interpretations.[7] In line with New Despotism, the Committee was to consider whether the Executive had improperly compromised the sovereignty of the Parliament or by passed the judiciary & hence undermined the Rule of Law through the proliferation of Tribunals.[8]
sovereignty of the Parliament or by passed the judiciary & hence undermined the Rule of Law through the proliferation of Tribunals.[9]

5. Tribunals

Tribunals and inquiries were also an inevitable part of the Committee's Report. The Committee's conclusion on the whole matter was that there was nothing radically wrong about the then existing practice of Parliament in permitting the exercise of judicial and quasi-judicial powers by Ministers [a reference to public enquiries] and of judicial powers by Ministerial tribunals[10]
The Committee opined that the Tribunals, as a feature of UK legal system were there to stay as a necessary component of the 20th Century administrative state. But however, we can see that only very few positive recommendations were made in the report of the Committee germane to the necessity of Tribunals in the Country. So far as tribunals were concerned, the Committee endorsed their use in principle.[11]

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[1] *Id*
[2] PAULCRAIG, ADMINISTRATIVE LAW (6th ed.2008)
[3] C. K. TAKWANI, LECTURES ON ADMINISTRATIVE LAW (4th ed.2010)
[4] Glenn W. Ackerley, *Reflections on the Evolution of Fairness in Public Procurement*, 188-233 CCCL JOURNAL 2010
[5] S. A. De Smith, *Judicial Control of Administrative Action in India and Pakistan by M.A. Fazal,* The International and Comparative Law Quarterly, Vol.19, No.1, 170-171(Jan.1970)
[6] C. K. TAKWANI, LECTURES ON ADMINISTRATIVE LAW (4th ed.2010)
[7] Alpheus Thomas Mason, *Understanding the Warren Court: Judicial Self Restraint and Judicial Duty,* Political Science Quarterly 532(December 1966)
[8] *Id*
[9] *Id*
[10] PAULCRAIG, ADMINISTRATIVE LAW (6th ed.2008)
[11] Donoughmore, 1932, p. 115

6. Recommendations

Pertaining to the facet of Tribunals, the Donoughmore Committee put forth the following recommendations:

- Donoughmore had used the term 'ministerial tribunals', and had regarded them as part of the machinery of administration.
- There should always be a presumption in favour of using the ordinary courts rather than tribunals to adjudicate on administrative disputes.[12]
- The Lord Chancellor (then, and until recently, the minister responsible for judicial appointments) should be consulted by ministers about tribunal membership.
- There should be a right of appeal from tribunals to the High Court on points of law.
- And there were various other procedural recommendations, e.g. about the desirability of tribunals giving reasons for their decisions.[13]

7. Two Major Reforms Suggested

The major league of the suggested reforms on Tribunals is two in number. They are enlisted as given below:

- Tribunals should disclose reasons
- Inspectors report should be published[14]

8. Criticism

Administrative It is now time to view the critical angle on the aforementioned topic. The Donoughmore report served its main purpose which i s nothing other than to take the heat out of a rather synthetic controversy without unduly offending a top judge.But however, its substantive proposals made little or no impact.

Further, it is also evincible that the committee rejected a proposal by Professor William Robson for a separate administrative court. It was an icon of development that was destined to wait for another seventy years to come to fulfilment.

Moreover, towards the end of his judicial career, Lord Hewart apparently changed his mind, particularly with regard to his former hostil ity towards delegated legislation, and confessed that he regretted ever having written.[15]

9. Legislative & Executive Activity

The next points discussed by the Donoughmore Committee is with regard to the Legislative activity and the Executive activity. According to the Committee, the word 'legislation' has grammatically two meanings. The first meaning indicates the operation or function of legislating. The second meaning cover the laws which result therefrom.

The Committee had also made a distinction between legislative activity and executive activity. Legislative action was defined by the Committee as the process by which general rules of conduct are laid down, without reference to individuals or particular cases. According to the Committee, Executive action was regarded as the application of those general rules to particular cases.

10. Delegated Legislation

Next is the most important set of facets of the Committee's points of discussion. It hinges on delegated legislation. The very first tasks for the Committee were to investigate the necessity of delegated legislation, and provide some answers to its critics. With the ability to implement its chosen policies into law without having to resort to Parliament, there is a genuine danger that delegated legislation will make serious inroads into personal rights in the interests of the policy being promoted.Legislative powers are freely delegated by Parliament without the members of the two Houses fully reali sing what is being done as scrutinized by the Committe.[16]

However, where the legislation must deal with rapidly changing or uncertain situations the delegation of legislative power is generally considered to be both legitimate and desirable.Half of the report of the Donoughmore Committee is dedicated to examining the safeguards around delegated legislation.[17]

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[12] C. K. THAKKER, ADMINISTRATIVE LAW (2nd ed.2012)

[13] *Id*

[14] *Id*

[15] *The New Despotism* (Jackson, 1959, p. 216)

[16] S. A. De Smith, *Judicial Control of Administrative Action in India and Pakistan by M.A. Fazal,* The International and Comparative Law Quarterly, Vol.19, No.1, 170-171(Jan.1970)

11. Factors Justifying Delegated Legislation

The Donoughmore Committee put forward a bunch of factors and reasons justifying delegated legislation. They can be summarized as follows:

- The pressures on Parliament's time.
- Much modern legislation is highly technical and thus outside the competence of Parliament to discuss effectively.
- The implementation of an overarching administrative regime must usually accompany technical reforms. It is usually impossible to foresee all the contingencies which might arise in these cases. Delegated legislation allows necessary changes to be made more simple.
- Delegated legislation brings with it the advantage of flexibility & adjustments can be made without recourse to Parliament.
- Delegated legislation afforded an opportunity to experiment.
- In an emergency situation such as war or natural disaster, regulations may be needed to deal effectively and expeditiously with the crisis.
- The Committee recognizes the extreme convenience of provisions of this kind from the point of view of those charged with the duty of bringing into effective operation a far-reaching measure of reform
- Delegated legislation is a political instrument which must occasionally be used
- But the Committee recommended that they should never be used except for the sole purpose of bring an Act into operation and should be subject to a time limit of one year from the passing of the Act.

12. Guidelines

Let us now have a glimpse at the guidelines that were put forth by the Committee germane to the aspect of delegated legislation. The guidelines moulded by the Committee are jotted down herein as fllows:

- Parliament must provide guidelines for scrutinizing the works of the delegatee to whom the power to legislate is delegated
- The limits of legislation must be precisely defined in clear language
- The Parliament must set up standing committees charged with the duty to scrutinize the work of the delegatee
- Henry VIII Clause must be avoided
- If not *servant will turn to be the master*

13. Henry Viii Clause

Henry VIII clauses indicates those clauses where power is given to a minister to amend or repeal primary legislation without needing to look to Parliament. This was indeed another important point on which the Donoughmore Committee was entrusted to enquire into and suggest reforms and recommendations.

The Henry VIII Clause was criticized by the Committee on the ground that it is inconsistent with the principles of Parliamentary Government. The subordinate law making authority should be given power by the superior law making authority to amend the statute passed by the superior authority. The Committee elucidated that the clause provides a temptation to the Executive to be slipshod in preparing bills. Hence, the Committee felt that such a power might be unscrupulously used by the Executive.

According to the Committee, the use of the Henry VIII Clause should be for the sole purpose of bringing an Act into operation and that too only when demonstrating essential & only for a period of one year from passing Act.

14. Three Main Defects Identified by The Committee

The major defects identified by the Committee were three in number. The three major defects underlined were as follows:

- The inadequate provision made for publication and control of subordinate delegation
- The lacuna in the law caused by the inability of a subject sue the Crown in tort
- The extent to which the control and supervision of administrative decisions were passing out of the hands of the courts and were being entrusted by Parliament to specialist tribunals and enquiries

15. Recommendations

Pertaining to the subsistence of the Henry VIII Clause and in tune with delegated legislation, the following recommendations were made by the Committee:

[17] C. K. TAKWANI, LECTURES ON ADMINISTRATIVE LAW (4th ed.2010)

- Adopting common categories for delegated legislation and putting in a systematic framework for their operation
- All delegated legislation should have clearly defined limits in the bill
- Henry VIII clauses should be abandoned in all but the most exceptional cases
- All Henry VIII clauses to expire a year after enactment and to be explicitly and solely for the purpose of putting the Act into operation
- Delegated legislation that is not justiciable should be abandoned in all but the most exceptional cases
- Any delegated legislation that is not justiciable must explicitly state so and must have a three to six month period where it can be challenged (emergency legislation excepted)
- If it is not stated that the delegated legislation is non-justiciable, then the language in the bill should not even suggest that it is.
- The Rules Publication Act 1898 should be amended to ensure: a) all exceptions to regulations being laid before Parliament should be removed; b) all rulemaking bodies making provisional regulations should have to lay them before Parliament; c) Section 3 should apply to provisional regulations; d) Any regulation coming into operation should be published; e) the Documentary Evidence Acts should apply to all registered statutory rules and orders
- No law should provide an exception to this
- Consultations should take place on delegated legislation wherever practical
- Explanatory notes should explain delegated legislation where possible
- The default procedure for all regulations should be the negative procedure (Parliament doesn't vote for them, but can vote against them) except where Parliament wants the affirmative procedure (Parliament votes for them)
- Standing Orders of both Houses should require explanatory notes to draw attention to any delegated powers in bills and explain how they would be used and any safeguards that exist
- A committee of each House should be set up to report on all acts with delegated powers after first reading to ensure they have adequate safeguards and comply with the guidelines set out, and to report on all delegated legislation laid before Parliament
- All delegated legislation should be drafted by legal experts, perhaps parliamentary counsel[18]

16. Outcome

What happened as a result of all these investigations and recommendations of the Donoughmore Committee? Of course, yes, that is the crucial question to be answered at this juncture. Let us glance at the answer.
The House of Commons came to have a Committee on Statutory instruments in 1944. Followed by this, in the year 1946, Statutory Instruments Act came into effect to control sub-ordinate legislation. This was trailed in 1947 wherein the Parliament enacted the Crown Proceedings Act with a view to liberalise the subsisting law relating to the civil proceedings initiated against the Crown. [19]

17. Judicial Control

Though short, the recommendations of the Donoughmore Committee on judicial control is also significant and the same is too mil to be ignored. The Committee however, did not discuss the scope of judicial control. On the other hand, the committee had indeed called for vigilant observance of the principles of natural justice. But again, to point out a lacunae, it is evident that the Committee did not consider how it should be applied into the practical scenario when it comes to various matters.[20]

18. Separation of Powers

The view of the Donoughmore Committee on the nature of the separation of powers in U.K. is often cited wherever there is a mention of the nature of polity and power that prevails in Britain is being discussed. According to the Committee, in British Constitution there is no such thing as the absolute separation of the legislative, the executive and the judicial powers.[21]

19. Regulation, Rules & Orders

A distinction between the terms such as 'regulation,' 'rules' and orders was also engraved by the Donoughmore Committee. The Committee

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[18] PAULCRAIG, ADMINISTRATIVE LAW (6th ed.2008)
[19] PAULCRAIG, ADMINISTRATIVE LAW (6th ed.2008)
[20]Glenn W. Ackerley, *Reflections on the Evolution of Fairness in Public Procurement*, 188-233 CCCL JOURNAL 2010
[21] S. A. De Smith, *Judicial Control of Administrative Action in India and Pakistan by M.A. Fazal,* The International and Comparative Law Quarterly, Vol.19, No.1, 170-171(Jan.1970)

recommended that the expressions regulation, rule and order should not be used indiscriminately. According to the conclusions arrived at by the Committee, the term Rule should be confined to provisions about procedure. When it comes to order, it is used only for executive acts and legal decisions. However, when it comes to the practical sphere, it is crystal clear that the meaning is honoured only in times of any breach.

20. Limited Ouster Clause

An Ouster Clause is nothing but a Clause in a piece of legislation by a legislative authority to exclude judicial review of acts and decisions of the Executive by stripping Courts of their supervisory judicial function. The views and the recommendation in this regard by the Committee also mandates a mention.

Lord Radcliffe, in the *East Elloe Case*[22] observed six weeks period suggested wais 'pitifully inadequate.' Hence, the real question is that in case of time limited ouster clauses, should be – whether the time limit is reasonable or unreasonable.

To oust the said issues, the Committee recommended in time limited ouster clauses should be for a period of at least three months and preferably six months.

21. Recent Caselaw

The Singapore High Court decision in 2012 in the case of *Mohammad Faisal Bin Sabtu*v. *Public Prosecutor*[23]while sustaining conviction on a drug matter, the Court elucidated the importance of the observance of the natural justice as elaborated in the Donoughmore Committee.

Further, in the 2015 Australian High Court decision in *ADCO Constructions* v. *Goudappel*[24], the importance of abandoning a Henry VIII Clause or any clause in the nature of the same was elaborated by rendering the extracts from the wordings of the Donoughmore Committee on Henry VIII Clause Recommendations.

Coming to Indian Courts, in the year 2012, the Supreme Court in *Namit Sharma* v. *Union of India,*[25] in a case on Right to Information had also elucidated the importance of Donoughmore Committee recommendations in the administrative process.

To quote finally, the Madras High Court in 2015, in its verdict of *Vyline Glass Works Ltd.* v. *Assistant Commissioner of Wealth Tax*[26] adhering to the recommendations of the Donoughmore Committee explicated that it is necessary to provide reason in any decision, whether i t be judicial or quasi judicial.

22. Conclusions

The Report of the Donoughmore Committee was submitted after 54 meetings of which oral evidence was amassed in 22. The warnings of the critics were described to be useful for investigation but no grounds for public alarms if right precautions are taken. Certain parts of Constitutional machinery needs improvement but there is nothing is wrong in the directions of development

The report of that Committee is generally regarded as the starting place for those concerned with modern regulations jurispru dence. It was also the First attempt made in Britain at systematization of Administrative Law. Completely agreeing to Cecil Carr, I would say the edifice of the committee was anchored in the words of him which is as follows:

"The question posed for the Committee was whether Britain had gone off the Dicey standard and if so what was the quickest way back."[27]

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[22][1950]AC at 769

[23] [2012] SGHC 163

[24] [2014]HCA 18

[25] (2013)1 SCC 745

[26] (2015)281 CTR (Mad) 317

[27]*CECIL CARR (English Administrative Law (1941)*