ADMINISTRATIVE AGENCY AND STATUTORY INTERPRETATION: A COMPARATIVE ANALYSIS

BY

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I. INTRODUCTION

Can an administrative body interpret statutes? In modern times, given the complexity of society, governance requires several statutes that are specialized on various specific issues. Often the interpretation of these statutes, especially on relatively trivial issues, cannot be handled by the judiciary alone. In such cases, administrative agencies authorized under these statutes are required to interpret various ambiguous terms in order to ensure the enforcement of the statute.

Since statutory interpretation is '*unavoidably an act of creating meaning*', [2]there has understandably been a heated debate on who has the ultimate authority to determine the meaning of a statute. Thus, underlying the debate on statutory interpretation by an administrative agency is the issue of delegation of power and authority to an agency to administer a statute and at a more fundamental level, the debate highlights the issues of the legitimacy of the administrative state as well as the theory of separation of powers.[3]

In this paper, the author argues that agency-interpretation of statutes is based on the theoretical understanding of the powers of the judiciary and the executive in a democratic polity. The paper presents a comparative analysis of the techniques of administrative interpretation, as well as the subsequent judicial review in the United States and India. Through this analysis, the author presents a conceptual clarity of agency statutory interpretation in a larger context of the jurisprudence of statutory interpretation and political theory.

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[2]Diver C, 'Statutory Interpretation in the Administrative State', *University of Pennsylvania Law Review*, Vol. 133, pp. 549-599.

[3]*See* Bulman-Pozen J., 'Federalism as a Safegaurd of the Seperation of Powers', *Columbia Law Review*, Vol. 112, 2012.

II. THEORY OF AGENCY STATUTORY INTERPRETATION

Entrusting judicial functions of any kind to administrative bodies, which are considered a universally '*suspect class*',[4] is an uncomfortable position for many. No doubt, the act of statutory interpretation by an administrative body is necessitated by the need for expedient action, as well as for the practical application of technical provisions of a statute at a ground-level,[5] however, the question of an agency interpreting statutes appears to be an obfuscation of judicial powers with administrative ones, thereby leading to the genuine threat of an administrative body wielding excessive power, and a violation of the separation of powers.

Spicer and Terry identify two concerns with respect to statutory interpretation by administrative bodies –first, the character of the agency's statute(s) and the extent to which it confers discretionary authority to the administrative body; second, the manner of the actual exercise of this discretionary authority.[6]The pertinent question is –how does one balance powers in a democratic setup where administrative agencies must perform the judicial task of interpreting statutes? One answer to this problem is the theory of judicial deference –in case of an agency statute that is ambiguous, with an unascertainable legislative history and intent, the interpretation offered by the agency is given primacy. This argument assumes that agency officials are, on account of their expertise and knowledge, more capable than judges in interpreting statutes concerning the specific field they specialize in.[7]Judicial deference to the interpretation of an administrative agency has unsettled several theorists, besides creating a fear of possible exercise of unbridled power conferred upon the administrative agency. One line of argument states that the very assumption that administrative officials possess such knowledge, as is envisaged by the theory of judicial deference, is a flawed perception of realities, given the practical situation where the hired administrative staff may not be well-equipped to interpret statutes in an intricate and reasoned manner. Peter Strauss describes scepticism of a different nature – that while considering bureaucratic officials and members of the executive, politics is suspected by both the public and the judiciary.[8]John Hart Ely describes how

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[4]D.M Wagner, '*Gonzales v. Oregon*: The Assisted Suicide of *Chevron* Deference', *Michigan State Law Review*, Vol. 435, 2007, pp. 435-450.

[5]. FarinaC, 'Statutory Interpretation and the Balance of Power in the Administrative State', *Columbia Law Review,* Vol. 89, No 3, (April 1989), pp. 452-528.

[6]Spicer M. and. TerryL, 'Administrative Interpretation of Statutes: A Constitutional View on the "New World Order" of Public Administration', *Public Administration Review*, Vol. 56, 1996, pp. 38-47.

[7]*supra* Farina.

[8]StraussP.L, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch', *Columbia Law Review,* Vol. 84, (April 1984), pp. 573 – 669.

administrative interpretation encourages legislators to avoid making difficult policy decisions and instead provides generalizations, leaving the intricacies to ground-level officials.[9]Most attacks at judicial deference appear to be a manifestations of the distrust towards a system that appears to threaten the traditional, strict division of powers.

At this juncture, it is important to note that the problem of defining the extent to which agencies are allowed to interpret statutes reflects another theoretical concern at a different level. A popular theoretical assumption is that judicial interpretation is the best (and perhaps the only) manner in which statutes can be interpreted, and that the rules of statutory interpretation followed by the judiciary is the only precise means of accurately determining the meaning of a statute. The latter view is myopic in the sense that it ignores a growing field of legisprudence[10] and administrative law[11], where several authors have argued that judicial interpretation must give primacy to the processes of the making and execution of law (instead of a singular focus on the canons of interpretation). The former view, however, requires a deeper analysis. The assumption that judiciary is the primary (or only) institution competent to interpret statutes is based on an extremely rigid view of the theory of separation of powers. Indeed, a significant problem with the Montesquieuan separation of powers is that complete separation of powers is neither possible nor desirable.[12] In particular, overlaps of judicial and administrative functions are inevitable in cases of administrative bodies that are empowered to administer a statute, since the expertise and knowledge of the administrative officials is vital in understanding the intricacies of a statute dedicated to a particular administrative field. As Gaus noted early in 1936, in a state which the power of the government is intertwined with industry, commerce, finance and similar concerns, the traditional restraints on the discretion of an administrator are inadequate.[13] The solution to this problem lies in Donald Kettl's postulation of *'blended accountability'*, which holds that the danger of tyranny or injustice lies when administrative bodies have unchecked power, and not '*blended power*'.[14] This solution is widely accepted today as a constitutional requirement in democracies, even by

[9]*supra* Ely.

[10]. Eskridge Wand. FrickeyP, 'Statutory Interpretation as Practical Reasoning', *Standard University Law Review*, Vol. 42, 1990, pp. 321-384.

[11]W.D Kmiec, 'Judicial Deference to Executive Agencies and the Decline of the Non-delegation Doctrine', Vol. 2, 1988, pp. 269-299.

[12]*supra*Strauss.

[13]. Gaus, J. WhiteD and DimockM.E,*The Frontiers of Public Administration*, Russell & Russell, Chicago,1967, p. 26.

[14]. KettlD, 'Administrative Accountability and the Rule of Law', *Political Science and Politics*, Vol. 42, 2008, pp. 11 – 17.

scholars who propound a rigid view of the doctrine of separation of powers.[15] Administrative interpretation also best serves the widely accepted method of interpretation – namely, the public values approach - [16] in that an administrative body can best amalgamate technical provisions with public values since it directly interacts with the public.

It is apparent from this theoretical analysis that there are two reasonable views of the deference argument – one which distrusts any power of interpretation given to agencies, and another which calls for the acceptance of this interpretation as long as it is within reasonable confines and is constantly checked.[17] The conflict between the two sides cannot be easily ~~resolves~~ resolved– administrative agencies (that directly communicate with the public) often combine multiple tools of action in order to execute policies in public interest,[18] thus necessitating a different nature of interpretation for the relevant statutes; on the other hand, interpretation by a non-judicial body goes against the grain of established canons of interpretation that have been revered in the legal tradition.[19] As Selznick explains, the question is this- if the administration and the judiciary hold distinctively different practices, traditions and rules, how can one reconcile with different meanings accorded to the same statute?[20]

III. ANALYZING CHEVRON

Chevron U.S.A v. *Natural Resources Defence Council*[21] is arguably the most cited case in modern public law.[22] The case brought to light a heated debate within jurisprudence regarding the extent of powers of the administrative institutions.

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[15]*supra* Spicer and Terry.

[16]*supra* Eskridge and Frickey.

[17]. MurphyR, 'Judicial Deference, Agency Commitment and the Force of Law', *Ohio State Law Journal*, Vol. 66, 2005, pp. 1013-1018.

[18]SalamonM., *The Tools of Government: A Public Management Handbook for the Era of Third-Party Government*, Oxford University Press, New York, 2002, p. 490.

[19]*supra* Kmiec.

[20]. SelznickP, *Leadership in Administration: A Sociological Interpretation*, University of California Press, Berkeley, 1984, p. 332.

[21]Chevron U.S.A v. Natural Resources Defence Council, 467 U.S. 837 (1984).

[22]CriddleE., '*Chevron's* Consensus',*Boston University Law Review*, Vol.. 88, 2008, pp. 1271-1278.

Thomas Merill describes what existed prior to Chevron as a '*multiple factors regime*'[23] of deference. For several courts, the simple solution to this conundrum was to emphasize that the ultimate purpose of statutory interpretation is to discover the intent of the legislature.[24] This was in conformity with the belief that administrative agencies are creatures of the legislature,[25] and are therefore bound to discharge regulatory duties, as envisaged by the legislature and apparent in the statute. The underlying assumption was that the legislative intent is apparent from the statute – meaning that several courts that propounded this argument also believed in a plain meaning approach of statutory interpretation.[26] It goes without saying that the plain meaning rule was riddled with difficulties.[27]

A more popular strategy of handling agency interpretations during the pre-*Chevron* period was outlined in *Skidmore* v. *Swift and Co.*[28], which established that the deference of agency interpretation depended upon the thoroughness of the judgment, the validity of the reasoning employed and consistency with earlier pronouncements, among other unspecified factors. This scheme allowed a heightened scrutiny of administrative actions by adding more considerations to the vague *Skidmore* standard. For instance, courts refused deference to an agency's decision in areas which were not necessarily technical and were within the enterprise of the court.[29]*General Electric* v. *Gilbert*[30] established that the judiciary owed no deference to an agency as per the Skidmore standard when its decision flatly contradicted its own earlier position. The *Skidmore* standard, however, did not provide a consistent standard for judicial review. A case contrary to *Gilbert* was *NAACP* v. *FCC*,[31] where the court established that as long as the agency established that it was aware of the fact that its decision is in contradiction with its earlier position and provided reasoned justifications for the change; and as long as the new policy was permissible within law, the judiciary owed deference to the agency decision.

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[23]. MerrillT. W, 'Judicial Deference to Executive Precedent', *Yale Law Journal*, Vol. 101, No. 5 (Mar., 1992), pp. 972–75.

[24]Fresh Coat, Inc. v. K-2, Inc., 318 S.W.3d 893, 901.

[25]Tex. Nat. Res. Conserv. Comm'n v. Lakeshore Util. Co., 164 S.W.3d 368, 377.

[26]First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 631.

[27]*supra* Eskridge and Frickey.

[28]Skidmore v. Swift and Co., 3 23 U.S. 134 (1944).

[29] Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325, 1330 (11th Cir. 1983).

[30] General Electric v. Gilbert, 429 U.S. 125 (1976)

[31] NAACP v. FCC, 682 F. 2d 993, 998 (1982)

It must be noted that the non- delegation doctrine was never popular within the judiciary.[32] In fact, this delegation of power has been viewed by U.S courts as not only unavoidable (in order to avoid legislative oversight), but also necessary for effectively achieving legislative purpose.[33] There was no doubt, however, that the federal courts were assumed to be the principal authorities on the matter of statutory interpretation.[34]

The facts in the case of *Chevron* were as follows – Before 1981, the Environmental Protection Agency (hereinafter, 'the EPA') defined *'stationary source'* (of air pollution) under the Clean Air Act as any pollutant-emitting device in a plant. A plant having ten such devices was required to apply for a permit in order to modify any existing device or add a new one. This *'pipe-by-pipe definition'* was favoured during the Carter Administration. In 1981 (during the Reagan Administration), the EPA decided to alter this definition in such a manner that, so far as the total emission from a plant was the same, the plant owner could add any new device/modify an existing one. This implied that the term *'source'* now referred to a plant instead of any particular device. The latter definition catered to the pro-business agenda of the Reagan Administration as it was less demanding on industries. The National Resources Defence Council was understandably displeased, as the former definition provided a stricter standard and thus catered to environmental interests. The question before the Chevron Court was whether this definition frustrated the purpose of the Clean Air Act. Justice Stevens famously propounded a two-step test in order to analyze the agency's interpretation of the statute:

- If the Congress has unambiguously stated its intent in the statute, it was the duty of the agency to give effect to the same.
- If however, the court determines that no precise answer is found in the statute, then it cannot impose its own interpretation – rather the question for the court will be whether the agency's answer is based on a permissible construction of the statute or not.

Justice Stevens contended that if the Congress had explicitly left a gap in the statute, it implied a delegation of authority to the agency, thus, agency interpretations were to be given controlling weight unless they were arbitrary or clearly contrary to the intent of the statute.

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[32] *supra* Kmiec.

[33] R.R. *Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992).

[34]. Pierce, JrR. L.,Reconciling Chevron and Stare Decisis',*Georgetown Law Journal*, Vol. 85, 1997, pp. 2225

The significance of this decision is that courts found it more difficult to overturn policy choices in the form of interpretations by statutory agencies.[35] The immediate advantage of this decision was that it was in conformity with the demands of the changing social, political and economic circumstances (post the New Deal) for more autonomous, specialized and expedient administrative agencies. Besides, the *Chevron* decision answered the immediate concern of the decision of the EPA that was unarguably motivated by a change of political heads. There are mixed views, however, on whether this was a desirable decision or not in the long run. Many commentators, for instance, believe that the doctrine shifted the power of saying *'what the law is'* from the judicial department to administrative agencies – in effect, classifying Chevron as '*a counter-Marbury'*.[36]

It is true that *Chevron* provided a simple, formal rule for reviewing courts to adhere to. However, the rule propounded by the *Court in Chevron* was on statutory silence rather than ambiguity– which was essentially a legislative function rather than an interpretative function.[37] Moreover, *Chevron* did not answer accurately as to which methods or modes the statutory interpretation was to be conducted in –for instance, the textualist or plain meaning approach, as well as the intentionalist approach of interpretation are possible within the realm of the Chevron doctrine; however, these approaches are left to the choice of the agency, which causes a major problem of ill-informed interpretation.

Consequently, courts began to settle the ambiguity of the *Chevron* doctrine by adding their own explanations. In *Rust* v. *Sullivan*,[38] the court relied on *Chevron* – however, it noted that the primary reason for agency deference in that case was because it had provided a reasonable analysis despite the sharp break from its earlier positions – effectively reverting back to the *Skidmore* strategy.

To resolve the ambiguous nature of *Chevron*, the judiciary later added to the *Chevron* doctrine '*Step Zero'*– to determine whether the *Chevron* standard applies or not. The major case that brought about this change was *United States* v. *Mead Corporation*,[39] where the court held that if the agency had stated its interpretation authoritatively (for instance, with the intent of according a precedential value to its decision within the agency), the court may grant the interpretation controlling weight

[35]StarrK., 'Judicial Review in the Post Chevron Era', *Yale Journal on Regulation*, Vol. 3, 1986, pp. 283-309.

[36]. SunsteinC. R, 'Law and Administration after Chevron', *Columbia Law Review*, Vol. 90, 1990, pp. 2071-2075.

[37]*supra* Pierce.

[38]Rust v. Sullivan, 500 U.S. 173 (1991).

[39]United States v. Mead Corp., 533 U.S. 218 (2001).

so far as the interpretation is reasonable. *Mead,* along with subsequent cases, in effect overturns *Chevron's* presumption that the interpretation of ambiguities could be delegated to agencies.

The post-*Chevron* period, hence, has been a continuous and unsettled debate over the issue of agency interpretation and judicial deference. It must be noted that the most significant contribution of *Chevron* is the increased awareness of clash between the judiciary and bureaucracy over issues of decision-making authority. It also highlights the necessity of balancing rule-making powers among unelected representatives. This awareness is, in part, the reason why the courts fluctuate in standards of agency deference on an issue that has no fixed consensus. The positive outcome, however, is that a form of conscious dialogue actively takes place in reviewing the powers of both the administrative agency and the judiciary.

IV. THE INDIAN SCENARIO: A LACK OF THEORY?

The understanding of statutory interpretation by administrative agencies in India is unique in the sense that there seems to be very little debate on the role of statutory interpretation. A major part of the debate is dedicated to the understanding of administrative action and natural justice. To that effect, a plethora of judgments (the most significant ones being landmark judgments such as *A.K Kraipak* v. *Union of India*[40] and *Bina Pani* v. *State of Orissa*)[41] have already established that even administrative proceedings are to follow the rules of natural justice. The mere articulation of rules of natural justice by most of these cases itself requires a determination or interpretation on part of the administrative agencies as to the proper course of action along procedurally fair lines, which would be sufficient to ensure that the administrative decisions are just and fair.

However, in reality, the correct application of these rules, more often than not, is a question that is frequently determined by courts of justice which are asked to review administrative actions.[42] In that sense, the fact that several judgments assert that the administrative body has to act *'judicially'* merely refers to the application of the principles of natural justice or passing a reasoned order in its executive capacities. The question of the ambiguity of a statute is also focussed on the determination of the powers granted. Several decisions (including *A.K Kraipak* v.*Union of India, In Re Delhi Laws Case* and *Sandhi Mamad Kala* v. *State of Gujarat*)[43] have held that in case there is an

[40]A. K Kraipak v. Union of India,AIR 1970 SC 150.

[41]Bina Pani v. State of Orissa, AIR 1967 SC 1269.

[42]In Re Delhi Laws Case, AIR 1951 SC 332.

[43]Sandhi Mamad Kala v. State of Gujarat, (1973) 14 GLR 384.

ambiguity regarding a statute or regarding the nature of power that the administrative agency can exercise, the court must analyze, among other things,the nature of powers delegated to the body as well as the consequences of the exercise of such power. It is therefore apparent that the question is not dedicated to statutory interpretation by administrative bodies, as much as it is focussed on the extent to which any power can be delegated to such an institution in the first place.

The best indication given by the judiciary in case of administrative deference is in the area of interpretation of taxing statutes. Cases such as *Shenbaga Nadar* v. *State of Madras*,[44] *G. Ramaswamy* v. *State of Andhra Pradesh*[45] and *Jagdamba Industries* v. *The State of Madhya Pradesh*,[46] concede that administrative authorities are capable of rendering a reasoned interpretation of taxing statutes – this interpretation, however, is to be considered an admissible and significant aid for interpretation by the court, rather than a finality of interpretation itself.

Another pertinent question that arises relates to the situations in the case of administrative tribunals with quasi-judicial powers, The Supreme Court case of *T. Sudhakar Prasad* v. *Government of Andhra Pradesh*[47] expounded that the decisions of administrative tribunals are appealable to the Supreme Court under Article 136 of the Constitution of India, the reason being that as a body with judicial character, it is only logical to incorporate it within the scheme of the courts of justice. This was a position that arose out of *L. Chandra Kumar* v. *Union of India*,[48] a case where the exclusion of jurisdiction of the High Courts and Supreme Court (under Article 323A/323B of the Constitution of India) was unconstitutional simply due to the scepticism of entrusting an administrative tribunal with the finality of a decision. The former case was a compromise to the position of the latter. While not denying the importance of administrative tribunals, it was hesitant to do away with the power of review of the higher courts of justice.

Minerva Mills v. *Union of India*[49] and *K.K Dutta* v. *Union of India*[50] similarly contended that the exclusion of the jurisdiction of the High Court is not necessarily *ultra vires*, since the Supreme Court still retained powers of judicial review. This appears to be a reasoned and rational position. However, both cases agree that the rationale behind this is not the concept of judicial deference

[44]Shenbaga Nadar v. State of Madras, [1973] 31 STC 81.

[45]G. Ramaswamy v. State of Andhra Pradesh, [1973] 32 STC 309.

[46]Jagdamba Industries v. The State of Madhya Pradesh, [1988] 69 STC 1.

[47]T. Sudhakar Prasad v. Government of Andhra Pradesh, Civil Appeal No. 5089-90 of 1998.

[48]L. Chandra Kumar v. Union of India, AIR 1997 SC 1125.

[49]Minerva Mills v. Union of India, AIR 1980 SC 1789.

[50]K.K Dutta v. Union of India, [1980] 3 SCR 811.

to an administrative decision, but the idea that an administrative tribunal is merely an additional forum (rather than a specialized quasi-judicial body), designed to lessen the burden of cases on the ordinary courts of justice. In effect, judicial review of administrative tribunals ensures that courts have the power to overrule any decision of the tribunal. The decision of an administrative tribunal, therefore, becomes equivalent to the decision of a lower court, and is subject to the judicial determination of the higher court.

The implication of this is that all acts of interpretation, including those which could possibly be delegated to an administrative agency, are more often than not entrusted to the Indian judiciary alone. The negative consequences of such a set-up is the overburdening of the judiciary, not only in terms of the increased task of interpreting every statute, but also due to the increased number of cases where the courts will have to necessarily review the decision of an administrative body. The increased powers and burden on the judiciary also means that little deference is given to the decision of a specialized administrative institution –thereby, disrespecting the rule of separation of powers and causing an unnecessary imbalance of powers and duties of the judiciary. This is not the exclusive problem of administrative bodies alone – for instance, in the case of arbitration (an exercise with the sole purpose of settling matters outside the judiciary), almost all questions, ranging from trivial inquiries of facts to pertinent questions of law, ironically takes the parties to an arbitration proceeding to the court on a frequent basis. The overall impact of this inherent mistrust towards the statutory interpretation of an administrative agency is a serious imbalance of powers concentrating towards the judiciary in a democratic political setup.

V. CONCLUSION

The study of agency statutory interpretation is intertwined with the political and constitutional philosophy espoused by a State. The debate in the United States among jurists has developed an active dialogue on issues of statutory interpretation and separation of powers. Although, there appears to be no fixed standard for administrative agency, the theoretical consensus is that an administrative interpretation holds considerable weight, given the practical inputs which such an interpretation has, on account of being directly concerned by stakeholders.

In case of India, however, one cannot help but notice the lack of any deference to an administrative agency. The question of interpretation of a statute by an administrative body does not seem to arise, since the judiciary inherently believes that the task of adjudicating in all aspects is a judicial function alone. This is a major factor behind the high incidence of cases regarding administrative institutions before the court. Reviewing every administrative decision inevitably makes the

judiciary itself overburdened and ineffective. In other words, the doctrine of separation of powers seems to find little respect in the Indian political setup.

From the point of view of statutory interpretation, both systems are flawed while the judicial deference in the United States allows for a situation where the canons of interpretation can be easily misunderstood by the administrative agencies, the administrative deference in India ensures that absolutely no practical suggestions can be contributed by an agency through statutory interpretation. At the same time, both systems have positive points, in that while the former allows for flexibility, the latter has a definitive control over any administrative misuse of powers. The case of administrative agency and statutory interpretation, therefore, has no settled position, but, as stated, is dependent entirely upon the constant interaction of legal and political theories within a State.