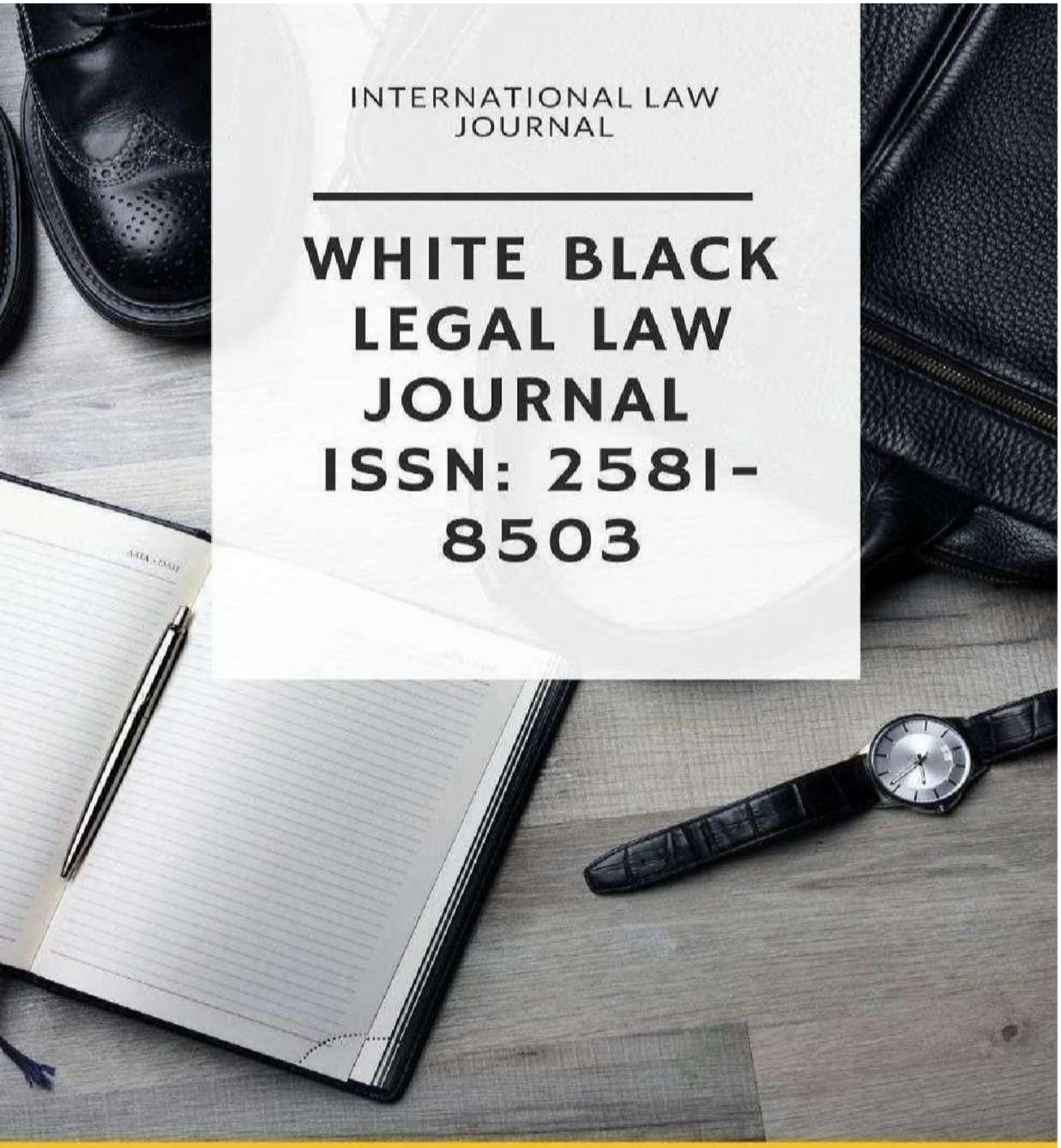

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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A COMPARATIVE ANALYSIS OF ADVANCEMENT IN ADMINISTRATIVE LAW WITH RESPECT TO U.S.A, U.K. AND INDIA

AUTHORED BY - AYUSHI MISHRA & HARSHA SINGH

Abstract

Nothing is stagnant and changes as time passes. Society also changes and for satisfying the changing socio-economic need of the society our administrative law is also evolving. The most notable development of modern state accounts to the radical growth of administrative law which took place in 20th century. The administrative Law existed since the society came into existence in one or the other way and in India it stood as dharma. It has benefitted the society securing the justice in the society. A country's development depends on the strength of its administration. The administrative law of each country has its own attributes, thus we have made a comparative analysis of the administrative law of developed country like USA and U.K. making it facile to understand the loopholes in our law and the way through which it could be ameliorated. Our comprehensive work, on such vibrant topic, envisages taking an account of evolution in the field. It seeks to illuminate both the historical legacies and present day political and economic realities that continue to shape administrative law as we proceed to the 21st century.

Our efforts are necessarily preliminary and are by no means exhaustive. Nevertheless, we aim to capture the complexity of the field and to distill key elements for comparative study.

Keywords: Administrative Law, comparative analysis, administration, Society, growth

A Comparative Analysis Of Advancement In Administrative Law With Respect To U.S.A, U.K. And India

Change is the principle of universe and things change with the passage of time. We are living in dynamic world, a world of new moral principles but obsolete legal institutions. One of the most important developments of modern state is the rapid growth of administrative law due to increase in power of government or administrative agency. Our legal system is also acting on the same path and has been slowly adapting the changes to meet the new demands of administrative law.

Administrative law evolved as the most significant branch of public law laying emphasis on the need of formulating comprehensive control mechanism for the myriad governmental power. For establishing better understanding on the concept of administrative law it is mandatory to know "What Is Administrative Law?"

Since administrative law is a developing law so it is difficult to arrive at an agreed definition because various scholars are likely to look at the subject from the aspect of particular problem for the time being. It can be defined with reference to other branches of law. On this notion Administrative law can be defined as the branch of public administration as well as has relation with constitutional law, which is legal framework structure for the resolution of dispute between the citizens at one side and state and public authority on the other.

According to the historical view it is believed that "the procedural (adjective) branch precedes the substantive, in juridical evolution." and that the rules are good to administrative system and also that the procedural machinery and the rules governing it, are the first to appear. So great is the ascendency of the Law of Actions in the infancy of Courts of Justice that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.[1] Whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source.[2] The earliest administrative procedure was an inquest or inquisition - a term which has come, in modem times, to have a sinister meaning.[3] Although Administrative law is a new concept pertaining to the prevalent laws and statues but is an age

[1] Maine, Early Law and Custom 389 (1891).
[2] Holms, Common Law (1938) 253.
[3] "Even to this day the word 'inquisitorial' bears the burden of historical unpopularity." Jenxs, A Short History of English Law 48 (5th Ed., 1938).

old concept i.e. has its existence in the society since ancient times. It is an outstanding legal concept of 20th century but has evolved much before 20th century as the part of public administration in every country in one form or another.

Our administrative law is closely tied with the growth of modern state and aptly rooted in historical accounts traced by last two centuries. Reason for such a growth can be accredited to the advent of welfare state concept ranging from social changes as a result of increasing demand of people for the protection unauthorized encroachment of their rights by the administrative agencies, inadequacy of judicial system, urbanization and industrialization. As society is prone to various changes on social, economic and political demands and for accomplishing those demands our administrative law will evolve with new trend in future.

Tracing back to the history countries like U.K., U.S.A. and India the evolution of administrative law had a vibrant impact subject to the development taking place in these countries. As a phenomenon in British, the evolution of administrative law has been intimately tied to the increasing "specificity and subjectivity" of public administrative power since the end of the eighteenth century[4]. In North America, "administrative power" and "administrative law" emerged in tandem over the course of the nineteenth century, although at clearly different paces.[5] While in India, although there was the concept of Dharma but there wasn't any apt structure, regulation, competency, discipline and "rule bound body" for the same. Traditional Indian laws prioritized the executive rights of the agents of monarch and lacked the eminence of individual's right (public and private). It comes after the invasion of Britishers when they formulated various laws regarding administration. However, with its eventual contact with the West, East Asian law, through a process of copying (what organizational theorists call isomorphism), began to mimic these basic features of a modern administrative law regime.

Owing to quite different institutional and conceptual starting points, the results of administrative law process often differed as well. Evolution of administrative law in these three countries can be studied in different aspects as mentioned below:

[4] Bernardo Sordi, "Revolution, Rechtsstaat, and the Rule of Law: Historical Reflections on the Emergence of Administrative Law in Europe" in Rose-Ackerman &Lindseth

[5] See e.g. Jerry Mashaw, "Explaining Administrative Law: Reflections on Federal Administrative Law in Nineteenth Century America" in Rose-Ackerman &Lindseth.

Bureaucracy model

Referring to the bureaucracy model the emergent unit of public servants in Europe, the United States and elsewhere did not necessarily conform to the Weberian ideal type of bureaucracy.[6] As the weberian model of bureaucracy given by Max Weber idealizes five basic approaches for implementation of the same they are structure, specialization, predictability and stability and rationality. In pertinence to Europe there was no such thing as absolute separation of powers at executive, legislative and judicial ground as in practice it is inevitable that they overlap. Over the course of the nineteenth century, what united the more bureaucratic forms of administrative power on the European continent with their relatively less bureaucratized counterparts in Britain, North American and India was the increasing importance of positive law – legislation – in framing the limits of public authority.[7] And as legislatures increasingly democratized, the burden on state increases as a result of which the interposing in the societal affair also increased.

Constitutional mechanism for administrative law

With regard to present situation, administrative law has been shaped by different constitutional structure of various countries for instance: parliamentary, presidential, unitary or federal, democratic, tripartite etc.

For establishing the link between the administrative law and constitution in various countries two approaches are present[8]:

1. Political economy
2. Positive political theory (PPT)

The constitution of the country is the principal source in determining the type and climate of administrative law. In a country like England the whole of administrative law being treated as branch of constitutional law is said to have evolved directly from the constitutional principal of rule of law and does not determine the balance of power between state and citizen. There is no written and any guaranteed rights yet the doctrine of natural justice and rule of law which

[6] Nicholas Parrillo, "Testing Weber: Compensation for Public Services, Bureaucratization, and the Development of Positive Law in the United States" in Rose-Ackerman &Lindseth

[7] See e.g. Charles Tilly, Contention and Democracy in Europe, 1650-2000 (New York: Cambridge University Press, 2003) at 213-217 for "A Rough Map of European Democratization" over the nineteenth and twentieth centuries

[8] Susan rose- Ackerman, peter l. lindseth, comparative administrative law; outlining the field of study, 2010 28 Windsor yearbook of access to justice vol. 28 2

have become the part of its constitution has supplied the omission by providing the mechanism for controlling the entire administrative process.

Unlike explicitly normative working constitutional law and political theory, PPT attempts to model state behavior in terms of the self–interest of the actors involved.[9]

America's PPT provides that parliamentary form of government has less interference of judiciary than presidential system. The PPT model facilitates the legislature the power to assigning task to judiciary to keep check on the executive. While in parliamentary system like that of U.K. the legislature presides with the power to make law according to political collision resulting in the minimal interference of judiciary in the law making. Either legislative dominance has its own limitation or there are other factors which are averting the government from constraining the courts. The courts themselves seem to be independent actors at least insofar as they assert jurisdiction and oversee the executive. If judges believe that executive discretion needs to be controlled and if the Legislature is doing little, they may step in by granting standing to public interest plaintiffs and limit executive power.[10]

In India also the constitution permits the right to override the principle of natural justice i.e. It means that it can cut down right to legal representation and right to be heard etc. if things fit so the constitutional provisions are super eminent for curbing the problem of administrative law. The American administrative law is poised on the pillar of due process of law which emphasize that no person shall be deprived of life, liberty or property without due process of law.

Administrative Autonomy:

Administrative autonomy referred as neutral body of professionals with their technical knowledge, competency and a political considerations gives decision. They can also be termed as administrative agencies or expert agencies. These agencies are independent of political influences and concern with the welfare of general public and civil society groups.

America, for example, has a particularly vexed history because of a lack of clarity about the

[9] For a collection of articles that apply the approach to administrative law see Susan Rose-Ackerman, ed., Economics of Administrative Law (Cheltenham UK: Edward Elgar, 2007).
[10] Tom Zwart, "Overseeing the Executive: Is the Legislature Reclaiming Lost Territory from the Courts?" in Rose-Ackerman &Lindseth.

place of such agencies in the structure of government. In US, independent regulatory commissions attempt to address democratic concern by building in partisan balance[11]. The UK has, in contrast, given independent agencies a clearer and more well-articulated position in their governmental structures.[12] While in India, also position has been given to administrative agencies in the structure of government and is independent. Most agency statutes set up a multi–member governing board and require that no more than a bare majority can be from a single political party instead of requiring technocratic expertise or professional credentials,. For example; in a seven–member board, no more than four can have the same party affiliation. As with the US judiciary, the appointment process is highly political, but with fixed, staggered terms and party balance, agencies can, in principle, respond to changing conditions as their membership changes gradually over time.[13]

Policy Making and administrative procedure:

The subject countries have adopted different ways of policy making and process. The executive policy making in democracies raises the issue of public legitimacy, which acts as focal points for policy making above subjective economies. Taking the example of USA, the APA (administrative procedure Act) guides the issuance of rule making process, wherein the administrative agencies are required to provide notice, hold hearings and give valid reason with regard to issuance of rule. At last this is followed by the judicial review and finally commencing the rule which makes it more transparent. In UK, and India, the administrative law is judge-made law with no administrative process (procedure to be followed by administrative agencies) because it depends upon organization, power and duties which limits the scope of judicial review and moribund the transparency.

Administrative Legal Action:

There is the famous adage in the French administrative law-'jugerl'administration, c'est encore administrer'-"to judge the administration is still to administer." It acknowledges the problem in the separating the process of judicial control from the underneath process of administration. Judicial control, exercised by tribunal or court will always shape regulation in myriad of ways.

[11] Susan rose- Ackerman, peter l. lindseth, comparative administrative law; outlining the field of study, 2010 28 Windsor yearbook of access to justice vol. 28 2 supra note 8
[12] Lorne Sossin, "The Puzzle of Administrative Independence and Parliamentary Democracy in the Common Law World: A Canadian Perspective" in Rose-Ackerman &Lindseth.
[13] Susan Rose-Ackerman* Peter L. Lindseth, supra note 8

This adage moreover underlines that administrative judges are attached to the executive body, so these judges exclusively hear the administrative challenges only. "Administrative justice progressively became both and extremely powerful judge and an institutions at least as independent as its judicial counterparts.[14]" The tension between justice and administration- between the policy derogative of the state persuading regulatory programs on the one hand and the demand of justice on the other hand is a key concern.

If we talk about the comparative analysis on the aspect of administrative litigation of these three- subject country we can say that in America the administrative law is based on "appellate review" model that was inspired by the relationship between appellate and trial courts in civil litigation[15] and focuses on merit review means review should be done by considering all the facts (the challenged action is not merely legal but correct and preferable.") While in British, where there is a distinction between tribunal "appeal" (on law and fact) and judicial review (on law alone). U.K. judges unhesitatingly substitute their judgment for that of administrator. If we talk about India then administrative law is very much similar to that in the U.S. here also merit review is applicable. In India Administrative law emphasizes on the way and means to keep the diverse power of administrative authorities under judicial control and provide for the safeguard against "new despotism" (arbitrary power)which was defined by Lord Hewart.

Hence, even after various differences the administrative law of these countries works on same general principle. For strengthening this researcher would like to cite case law:
In the words of Hegde, J.-"The requirement of acting judicially in essence is nothing but to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision.[16]"
In this connection another English case in re H. K. {an Infant)[17] is worth noting where was observed that even though an administrative authority is not acting judicially, it ought to act fairly (i.e. observe fair procedure).

[14] Jean Massot, "The Powers and Duties of the French Administrative Judge" in Rose-Ackerman &Lindseth
[15] Thomas W. Merrill, "The Origins of American-Style Judicial Review" in Rose-Ackerman &Lindseth
[16] A.K. Kraipak V Union Of India AIR 1970 SC 150
[17] [1967] 2 W.L.R. 962

Recommendations:

Indian administrative law is based on sound principle with the objective to keep check on the capricious act of administrative agencies but at the same time it lacks on certain foots which can affects the efficacy of administrative law. Researcher would like to suggest some recommendations for combating the problem of administrative law through which the growth of country can be achieved.

1. **Codification should be done**: In U.S.A., according to the APA, 1946 judiciary form an integral part in the procedure of law making in the form of judicial review but in India administrative law is unwritten and un-codified judge-made law and there is no statutory force behind it. As there is no apt law for administration so it is recommended that it should be bring in a codified form which can ensure the complete growth of administrative law and makes the function of administrative courts in deciding the cases. Written form of administrative law can give it recognition. Once it became codified it shouldn't be rigid and susceptible changes according to society should be accepted.
2. **Effective policy formulation and implementation should be done**: policy formulation and implementation by administrative agencies should be proper and for the welfare of the public at large. They should follow the general principle in administration of justice. Implementation is important factor because a magnificent policy can be failed if it lacked effective implementation. For example: economic policy like on privatization if framed by NitiAyog then condition of the poor section of society should also considered.
3. **Administrative tribunals shall be given independency**: like French administrative tribunals self regulates the administrative spheres and are independent as its judicial counterparts. Our Indian administrative tribunals should also be independent. So that it can independently hears the challenges to the administrative action and deals with it.
4. **Bureaucracy shall be efficient**: bureaucracy is the spine of administrative law and plays very important role in administration. But in Indian administrative Law bureaucracy lacks standard of integrity, efficiency and speed in implementation. So these evil of bureaucracy should be removed and efficient bureaucratic procedure should be adopted.
5. **Administrative agencies should be less politicized**: our Indian administrative agencies are much politicized and political parties become member of various

commissions so this create barrier in the administration of justice to the general public. So, administrative agencies shall consist of members who have technical knowledge on particular area and professional in that.

6. **Transparency**: transparency is very important for achieving the objective of administrative law. But unlike USA, India's administrative law has no statutory act for the same so the procedure which is adopted by administrative agencies in imparting administrative order has no check as of giving reason, proper hearing etc.

Comparison Chart:

Sl. No.	Element of Comparison	India	U.K.	U.S.A.
1.	Type of constitution	Written and blend of rigidity and flexibility	Unwritten and flexible	Written and rigid
2.	Nature of state	Federal system with Unitary bias	Unitary and Monarchy	Federal and Republic
3.	Type of government	Parliamentary	Parliamentary	Presidential
4.	Type of legislature	Bicameral (Parliament, Rajya Sabha And Lok Sabha)	Bicameral (house of lord and house of commons)	Bicameral (congress-senate and house of Representative)
5.	Bureaucracy Model	Weberian	Weberian	Weberian
6.	Political rights of administrative agents	Restricted	Restricted at higher level and permitted at lower level	Restricted
7.	Basis of administrative unit	Ministry	Ministry	Executive Department
9.	Administrative order	Liberal	Liberal	Liberal
10.	Judicial review	Present	Absent	Present
11.	Transparency In policy formulation	Limited	Limited	Excessive
12.	Administrative Independency	Present	Present	Absent

13.	**Judicial control**	Present	Limited	Excessive
14.	**Administrative procedure**	No procedure	No procedure	Administrative procedure Act, 1946

Conclusion:

Administrative law exists at the interface between the state and society – between civil servants and state institutions, on the other hand, and citizens, business firms, organized groups, and non– citizens. Administrative law is one of the "institutions" of modern government, in the sense that economists and political scientists often use that term. As it is a prehistoric concept and was developing in different country in one form or another yet it achieved the importance in 20thcentury in the form of administrative law. Since then it is evolving and growing. Comparative study of evolution of administrative law in India, U.K. and U.S.A. reflects innumerable differences yet embedded on the same general principle. Recent developments in the field of administrative law have strained another familiar distinction, between justice and administration. For example; if any policy interferes with human rights, then it must be designed in the least restrictive way. As a result, administrative tribunals have begun to impose standards on government policymaking, at least when human rights are at stake.

With the above discussion on this vibrant topic we can say that administrative law is not conclusive and will evolve as our society will change