
ADMINISTRATIVE LAW

Democracy · Governance · Development · Justice

Concepts and practice: India, with the United Kingdom and the United States



VOLUME II

Parts V–VII · Chapters 16–28

Niten Chandra

Shalini Chandra

SCHEMA OF ADMINISTRATIVE LAW

From democratic purpose to accountability: the book on one page



The Schema shows how the Parts fit together: from the democratic purposes of government, through the law that creates and limits power, to the decisions of the administration, the tests of legality they must pass, and the parliamentary and judicial controls that secure accountability. The chapter numbers in each box show where each stage is treated.

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Administrative Law: Democracy · Governance · Development · Justice

In two volumes. This is Volume II: Parts V–VII, Chapters 16–28.

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To our parents

PREFACE

Every day, in offices across India, someone decides whether a licence will be granted, a pension paid, a contract awarded, a building demolished or a website blocked. Most of these decisions are never questioned. Some are, and a few travel all the way to the Supreme Court. Administrative law is the body of rules that governs every one of them: the rules that tell officials what they may do, how they must do it, and what follows when they get it wrong.

We came to this subject from two sides of the same courtroom. One of us, Niten Chandra, spent the years from 2020 to 2024 inside the Government's legal machinery: first in charge of the Central Agency Section of the Department of Legal Affairs, the office through which the Union of India conducts its cases in the Supreme Court, where more than thirty thousand cases passed through in two years; then as Law Secretary, where he saw the advice given before a decision is taken, the rules framed before a power is exercised and the Bills prepared before Parliament confers it; and as Secretary to the High Level Committee on Simultaneous Elections. The other, Shalini Chandra, has spent twenty years before the Supreme Court and the High Courts, as an Advocate-on-Record and as a mediator trained and certified by the Mediation and Conciliation Project Committee of the Supreme Court, acting for those who challenge the State's decisions, settling disputes with it, and taking on pro bono work for people who could not otherwise reach a court.

Seen from either side, each file tells the same story: a decision of the State, a citizen or a business that feels wronged by it, and a court or a mediator asking whether the decision was lawful, rational, proportionate and fairly made. Our experience taught us three lessons that shaped this book. The first is that most administrative action fails not for want of good faith but for want of good procedure: a hearing not given, a reason not recorded, a relevant consideration ignored, a power exercised by the wrong person or for the wrong purpose. The grounds of judicial review are, in practice, a checklist for good

administration, and the surest way to win a case is to decide well in the first place. The second is that many disputes with the State need not reach a court at all: a careful reply to a notice, a timely representation or a mediated settlement approved by the competent authority often does more for the citizen, and costs the public less, than a judgment years later. The third is that law is best learnt when it is seen at work. A principle understood in the abstract is easily forgotten; the same principle seen in a demolition notice, a Tribunal order or a licence condition stays with the reader.

The book therefore joins concept and practice. Each chapter explains a doctrine, traces its growth in India, the United Kingdom and the United States, examines the leading decisions of the three systems, and closes with a Summary for the Indian Practitioner that says what to check, what to argue and which remedy to choose. Boxes headed *On the Ground*, *A Practitioner's Checklist* and *From the Bar* work through problems as they arise in chambers, in government offices and at the mediation table. The Schema of Administrative Law, placed at the beginning and at the end of each volume, shows how the whole fits together: from the democratic purposes of government, through the law that creates power and the machinery that exercises it, to the tests of legality and the parliamentary and judicial controls that secure accountability.

The comparative method is deliberate. Indian administrative law grew from English roots, was shaped by a written Constitution with enforceable fundamental rights, and has since built doctrines of its own, from public interest litigation to the continuing mandamus. The last Part looks ahead, to competition and liberalisation, to global administrative law, and to a State that increasingly meets its citizens through a portal and decides through software. Whether the classic grounds of review, built for an official who applied a mind to a file, can govern an automated decision is one of the defining questions for the next generation of lawyers and administrators.

The book is written for students meeting the subject for the first time, for practitioners looking for the right argument, for officers who must take decisions that will stand scrutiny, and for every citizen who wants to understand why the State must act according to law. The law is stated as at 10 October 2026.

No book can take the place of the judgment, the statute and the rule. Its purpose is to make them intelligible and usable. If this book helps a student to see the shape of the subject, an advocate to frame a sharper argument, an officer to take a fairer decision, or the parties to a dispute with the State to settle it, it will have served its purpose.

Niten Chandra

Shalini Chandra

NOIDA, Uttar Pradesh 201301, India

October 2026

ABOUT THE AUTHORS

Niten Chandra

Former civil servant (IAS, 1990–2025) · Law Secretary, Government of India, 2022–2024

For more than four years, from 2020 to 2024, almost every legal question that troubled the Government of India reached, sooner or later, the desk of Niten Chandra. First as the officer in charge of the Union's litigation in the Supreme Court, and then as Law Secretary, he was the Government's principal legal adviser in the civil service: the officer to whom Ministries turned whenever the Constitution had to be interpreted, a treaty negotiated or a decision of the State defended in court.

Then a senior civil servant (IAS-1990), he came to the Department of Legal Affairs with three decades of administration behind him and a double training in economics and in law. He studied economics at St. Stephen's College, Delhi, where he took a B.A. (Honours), and at the Delhi School of Economics, where he took his M.A. with the gold medal. He later earned an LL.B. from Magadh University and a Ph.D. in Economics from Utkal University for a thesis on government budget outlays and outcomes and their macroeconomic effects. From April 2020 to May 2022 he was Additional Secretary in charge of the Central Agency Section, the office within the Supreme Court's precincts through which the Union of India, its Ministries and Departments, the National Capital Territory of Delhi and most Union Territories conduct their litigation in the Supreme Court. There he directed the Government's side of more than thirty thousand cases, working with the Attorney General, the Solicitor General and the Union's panel of Advocates-on-Record and counsel.

In May 2022 he became Law Secretary, and he held the post until 2024. On occasions when their own Secretaries were away, he also held additional charge of the Legislative Department, which drafts the Government's Bills, ordinances and subordinate legislation, and of the Department of Justice, which deals with the appointment of judges of the higher judiciary and the administration of justice. From July 2023

he again held charge of the Central Agency Section. As Law Secretary he exercised every function that the Government of India (Allocation of Business) Rules, 1961 entrust to the Department of Legal Affairs. He advised Ministries, Departments and Parliamentary Committees on contentious questions of law and on the interpretation of the Constitution and statutes, and oversaw the conduct of more than fifty thousand cases for the Union of India in the Supreme Court and the High Courts.

He authorised the officers who execute contracts and assurances of property on behalf of the President under Article 299(1) of the Constitution, and acted as arbitrator in disputes between public sector enterprises and departmental undertakings. He oversaw the making and enforcement of India's civil-law treaties with foreign countries and the administration of its bilateral investment treaties. He was responsible, too, for institutions at the centre of the justice system: the Law Commission of India, the Indian Legal Service, the legal profession under the Advocates Act, 1961, the notaries, and the Income-tax Appellate Tribunal, whose Members, like those of other Tribunals, he helped to select. By virtue of his office he also sat, *ex officio*, on three bodies whose work reaches well beyond Government: the Law Commission of India, which during his tenure submitted eight reports to the Government (Nos. 278 to 285), on subjects ranging from sedition and adverse possession to the online registration of FIRs and criminal defamation; the India International Arbitration Centre, New Delhi, an institution of national importance for institutional arbitration; and the Executive Committee of the Indian Law Institute, New Delhi, a deemed university devoted to legal research and teaching, where he also delivered lectures on law. Law reform, the resolution of commercial disputes and legal scholarship each find a place in this book.

Two assignments of those years carried him beyond the Department. In August 2022 he led the Indian delegation at the meeting of the India–UK Joint Consultative Committee on cooperation in law and justice in New Delhi, which he co-chaired with the Second Permanent Secretary of the United Kingdom's Ministry of Justice; the meeting took up commercial courts, arbitration, mediation, technology in the administration of justice and the enforcement of contracts. From

September 2023 he was Secretary to the High Level Committee on Simultaneous Elections chaired by Shri Ram Nath Kovind, former President of India. In 191 days the Committee heard political parties, former Chief Justices of India, former Chief Election Commissioners and the Law Commission, received more than twenty thousand responses from citizens and organisations, and on 14 March 2024 presented to the President a report running to 18,626 pages.

His tenure coincided with one of the most productive periods of law reform in independent India. He advised on or helped to frame more than two thousand legislative and policy measures: the seventy-five Bills that Parliament passed between 2022 and 2024, many more then in the pipeline, and the ordinances, rules, regulations and policies that give statutes their working form. Among the statutes he helped to shape are the Mediation Act, 2023; the amendment of 2022 that turned the New Delhi International Arbitration Centre into the India International Arbitration Centre; the Advocates (Amendment) Act, 2023; the Jan Vishwas (Amendment of Provisions) Act, 2023; the Digital Personal Data Protection Act, 2023; the Competition (Amendment) Act, 2023; the Telecommunications Act, 2023; and the Bharatiya Nagarik Suraksha Sanhita, 2023, with its companion codes, the Bharatiya Nyaya Sanhita and the Bharatiya Sakshya Adhiniyam.

He retired from the Indian Administrative Service in October 2025, after thirty-five years. This book distils that experience. He has framed the rules that administrators apply, advised on the decisions they take, and defended those decisions in court.

Shalini Chandra

*Advocate-on-Record, Supreme Court of India · Mediator trained and certified by the
Mediation and Conciliation Project Committee of the Supreme Court*

Shalini Chandra has practised law for twenty years. Enrolled with the Orissa State Bar Council in 2006 and now on the rolls of the Bar Council of Delhi, she qualified as an Advocate-on-Record of the Supreme Court of India in 2013. She has conducted more than five hundred cases before the Supreme Court, the High Court of Delhi, the Orissa High Court, the Central Administrative Tribunal and State Administrative Tribunals. Her practice lies at the centre of

administrative law: land acquisition, education regulation, service law, municipal and planning law, environmental and mining law, public contracts and arbitration, and constitutional and anti-corruption matters. She has represented the Delhi Development Authority, the Municipal Corporation of Delhi, the National Highways Authority of India, NBCC (India) Ltd and the National Council for Teacher Education, and earlier served as Advocate-on-Record for the State of Odisha and as panel counsel for the Union of India. The cases in which she has appeared range from *Vakil Prasad Singh v State of Bihar* (2009), on the right to a speedy trial, to recent decisions of the Supreme Court on land acquisition and on the regulation of teacher education.

She is a mediator trained and certified by the Mediation and Conciliation Project Committee (MCPC) of the Supreme Court of India, has mediated at the Supreme Court Mediation Centre since 2023, and has many successful mediations to her credit. She has sat as a sole arbitrator since 2014 and has acted as a court-appointed Local Commissioner and Receiver. From 2015 to 2019 she trained senior civil servants at the Gopabandhu Academy of Administration in Bhubaneswar in civil and criminal procedure, the right to information, the law on sexual harassment at the workplace and public-private partnerships. She studied English literature at Lady Shri Ram College and Miranda House in the University of Delhi and law at Magadh University, and she undertakes legal work pro bono. Her practice brings to this book the view from the other side of the courtroom: how an administrative decision looks to the person who must challenge it, which remedy will work, and how a dispute with the State can be resolved without a trial.

Together the authors bring two vantage points to the subject: the Government's law office, which drafts, advises on and defends administrative power, and the advocate and mediator who challenges that power and settles disputes with it. Between them they have seen administrative law from every side of the table.

HOW TO USE THIS BOOK

Two volumes

The book is published in two volumes. **Volume I** carries Parts I to IV (Chapters 1 to 15) on pages 1–758; **Volume II** carries Parts V to VII (Chapters 16 to 28) on pages 759–1378. The pages are numbered continuously across the two volumes, so that a page reference anywhere in the book points to one page only. Each volume carries the complete apparatus of the work: Preface, About the Authors, Contents, Table of Cases, Table of Statutes, the Lists of Tables, Figures, Boxes and Memory Aids, Abbreviations, the Schema, the Select Bibliography and the Index. In the Select Bibliography and the Index, pages are numbered B-1 and I-1 onwards in each volume, so that they do not interrupt the numbering of the text. Every chapter is preceded by a separator page that lists its sections.

The plan of the book

The twenty-eight chapters are arranged in seven Parts. Part I lays the foundations; Part II deals with delegated legislation; Part III with fair procedure and administrative adjudication; Part IV with judicial control; Part V with the liability, remedies and privileges of the State; Part VI with particular powers and the institutions of accountability; and Part VII with the new horizons of the subject. Each Part opens with a page that states the questions it answers. The **Schema of Administrative Law**, placed at the beginning and at the end of each volume, shows how the Parts fit together: from the democratic purposes of government, through the law that creates and limits power, to the decisions of the administration, the tests of legality they must pass, and the parliamentary and judicial controls that secure accountability.

Inside each chapter

Each chapter is divided into numbered sections (for example, §15.12 is section 12 of Chapter 15), and cross-references throughout the book use these numbers. Most chapters open with an illustration from

practice and a figure that maps the subject. Every chapter closes with three standard features, in the same order:

Summary for the Indian Practitioner. A numbered list of practical points: what to check in the record, which arguments are open, and which remedy to choose. It is designed to be read on its own before a hearing.

Memory Aids at a Glance. A table of the chapter's mnemonics with their expansions.

Pointwise Summary. The chapter in numbered propositions, for revision.

Figures, tables, boxes and memory aids

The book contains 196 figures, 239 tables, 69 boxes and 130 memory aids, each numbered by chapter and listed, with page numbers, after the Table of Statutes. Every table carries its number and title above it and its source below it. Figures map a subject, trace a timeline or show a procedure step by step. Tables compare doctrines, cases and jurisdictions. Boxes headed *On the Ground*, *A Practitioner's Checklist* or *From the Bar* work through a problem as a lawyer, an official or a mediator meets it. Figures, like tables, carry their sources below them. Memory aids compress lists that must be remembered: the grounds of review, the conditions of a remedy, the features of an institution.

Finding cases, statutes and subjects

The **Table of Cases** gathers all 1,642 decisions cited in the book, arranged by jurisdiction, with the pages on which each is cited in the text or the footnotes. The **Table of Statutes** does the same for the provisions of the Constitution, constitutional amendments, statutes, rules, orders and international instruments. The list of **Abbreviations** explains the law reports, courts, statutes and bodies referred to by their initials. The **Select Bibliography** at the end of the book lists the books, articles and official reports drawn upon, grouped by kind and arranged alphabetically. The **Index** lists subjects, institutions and doctrines, with the pages on which each is discussed.

Three ways through the book

For a first course in administrative law. Chapters 1 to 8 give the foundations, delegated legislation and natural justice; Chapters 12 to 15 cover judicial review; Chapters 16 and 17 cover liability and remedies. Add Chapter 25 on public interest litigation.

For the practitioner. Begin with Chapters 13 and 14 on writs and their grounds, Chapter 15 on discretion and Chapter 17 on ordinary remedies; then read the chapter on the field in hand: Tribunals (9 and 10), investigation (11), liability (16), privileges (18), licensing (19), the ombudsman and vigilance (22), public corporations (23), competition (26) or technology (28).

For the general reader. Chapters 1, 2 and 4 explain what administrative law is and why it grew; Chapter 25 shows how the courts opened their doors to public causes; Chapters 27 and 28 show how the subject now reaches beyond the State and into technology.

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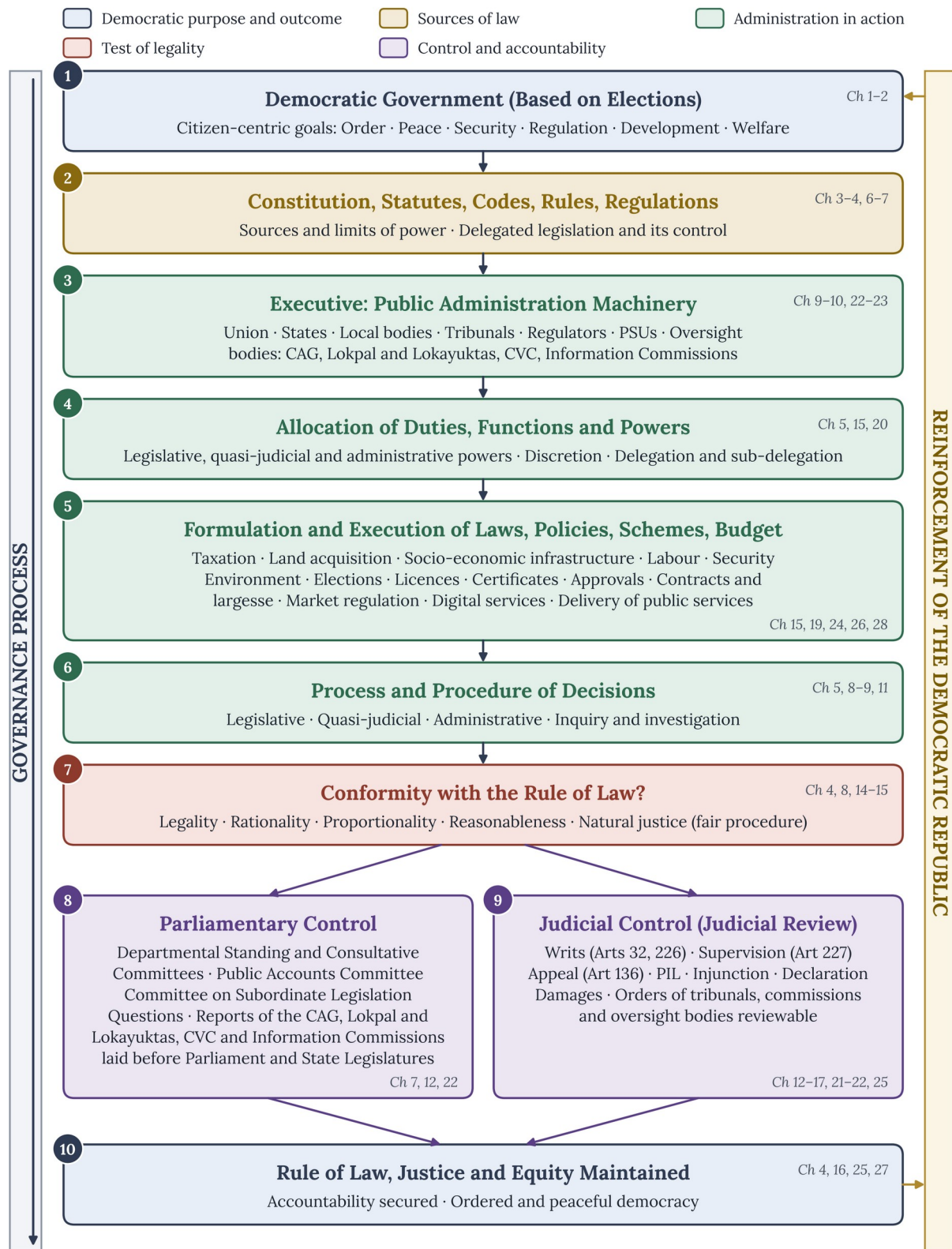
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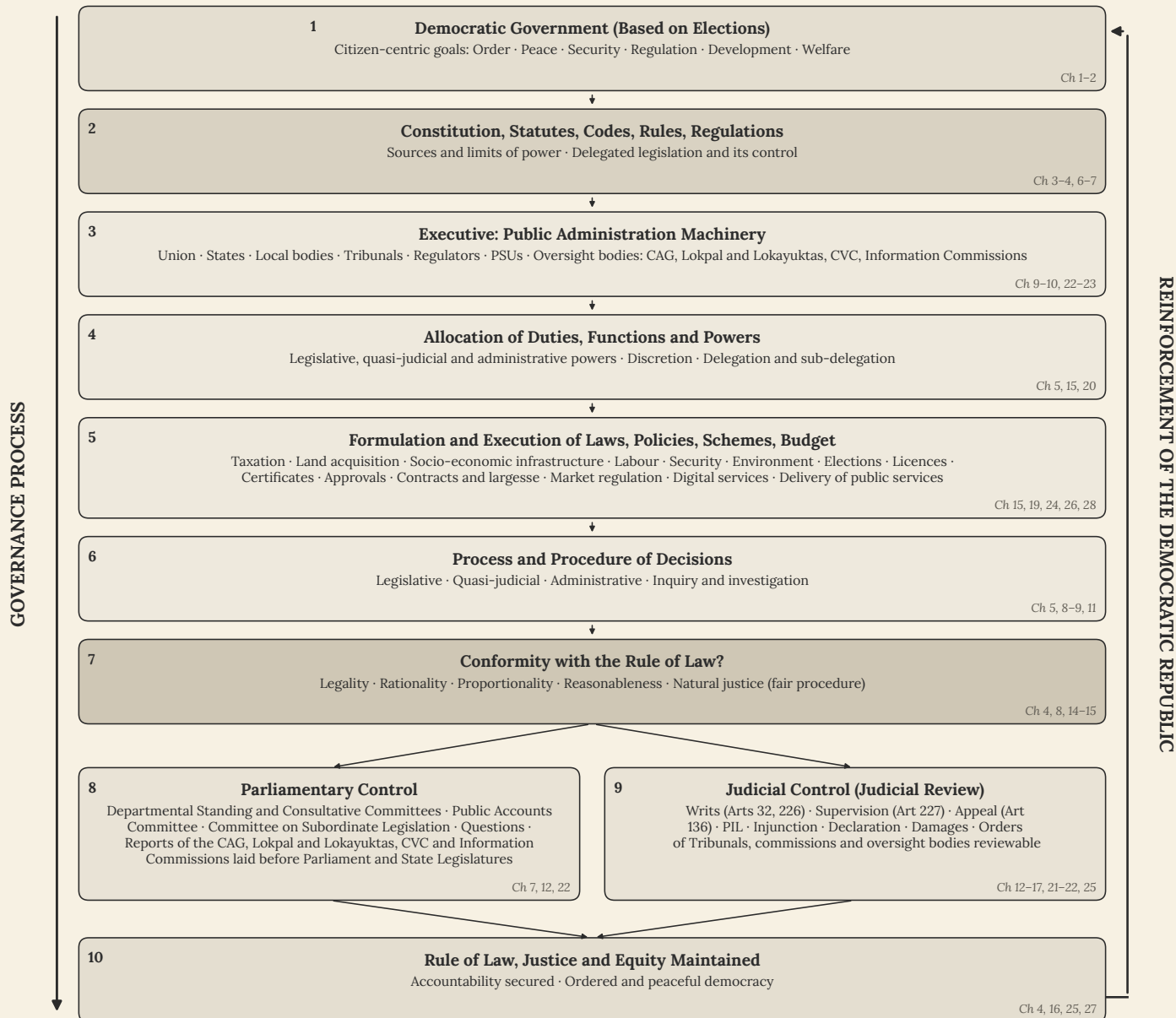
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SCHEMA OF ADMINISTRATIVE LAW



SCHEMA OF ADMINISTRATIVE LAW

From democratic purpose to accountability: the book on one page



The Schema shows how the Parts fit together: from the democratic purposes of government, through the law that creates and limits power, to the decisions of the administration, the tests of legality they must pass, and the parliamentary and judicial controls that secure accountability. The chapter numbers in each box show where each stage is treated.

Volume II · Part V: Liability, Remedies and Privileges of the State

CHAPTER 16

LIABILITY OF GOVERNMENT

Tort, Act of State, Contract and the Remedies against the State

In this chapter

- 16.1 Introduction
- 16.2 Foundations: Immunity, Vicarious Liability and Act of State
- 16.3 The English Law: from Crown Immunity to Ordinary Liability
- 16.4 The American Law: the Federal Tort Claims Act
- 16.5 Indian Law (I): Sovereign and Non-sovereign Functions
- 16.6 Indian Law (II): Writs and Damages for Government Torts
- 16.7 Strict and Absolute Liability of the State
- 16.8 Negligence of Public Authorities
- 16.9 Personal Liability of Public Servants
- 16.10 Wrongful Prosecution and Incarceration
- 16.11 Government Contracts: Formation and Effect
- 16.12 The State as Contractor: Articles 14 and 19(1)(g)
- 16.13 Promissory Estoppel, Legitimate Expectation and Statutory Discretion
- 16.14 Remedies against the Government: Suits and Writs
- 16.15 Comparative Perspectives, Reform and Conclusion

Summary for the Indian Practitioner · Memory Aids at a Glance · Pointwise Summary

CHAPTER 16

LIABILITY OF GOVERNMENT

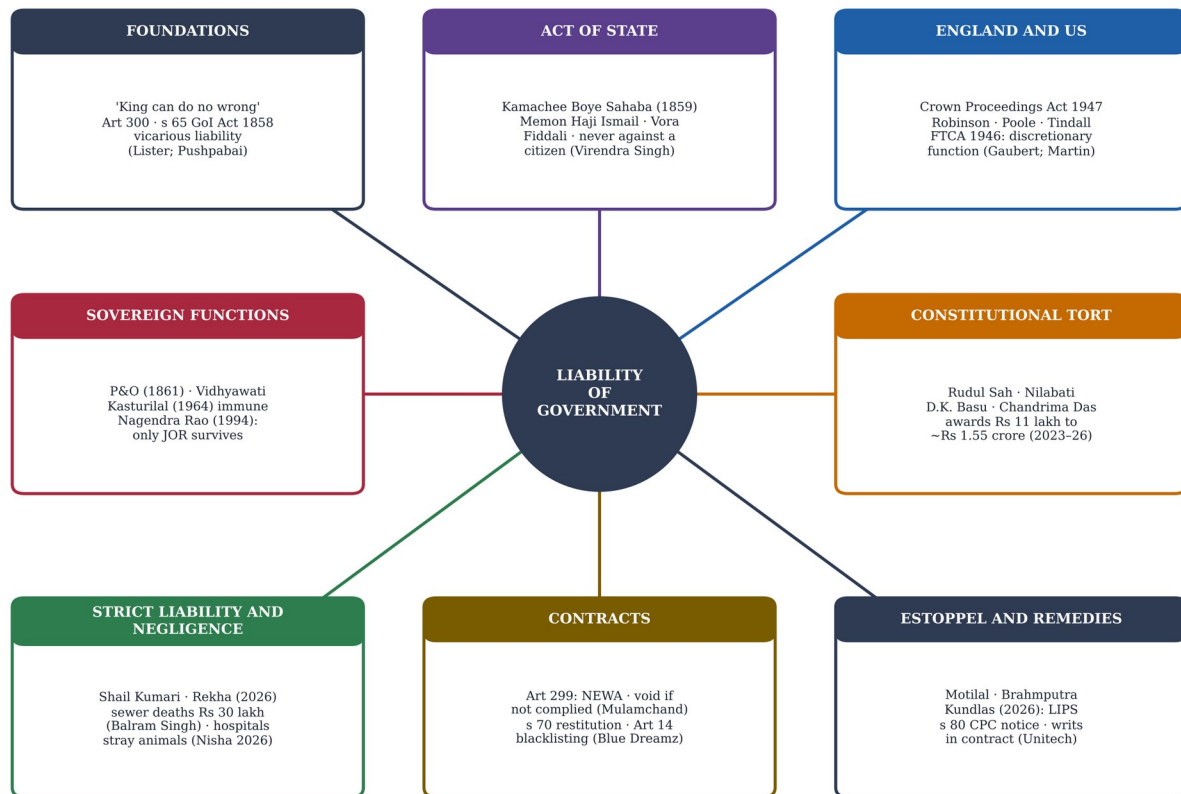
Tort, Act of State, Contract and the Remedies against the State

A Government jeep knocks down a pedestrian. Gold seized by the police is stolen from the police station. A soldier contracts HIV from a transfusion in a military hospital. A man is gravely injured by a stray bull on a municipal road, and a sanitation worker dies in a sewer he was sent into without protection. A contractor supplies coal to the Railways under an agreement that was never signed in the proper form, and a manufacturer builds a factory on the strength of an industrial policy that the Government then withdraws. In each case the question is the same: must the State pay? Judicial review can quash an unlawful decision, but it cannot restore a life, return stolen property or reimburse an investment. Liability in damages is the remedy that remains when review comes too late.

This chapter examines when the Government is liable for the wrongs of its servants and for its promises. It begins with the foundations: the old maxim that the King can do no wrong, the constitutional route by which Indian law answers it, the doctrine of vicarious liability, and the act of State, which marks the outer limit of liability. It then compares the English and American solutions before turning to Indian law: the distinction between sovereign and non-sovereign functions, the public-law remedy of compensation for the violation of fundamental rights, strict liability, negligence of public authorities, the personal liability of officers and compensation for wrongful prosecution. The second half deals with contract: the formation and effect of Government contracts under Article 299, the State as contractor

under Article 14, promissory estoppel and the fettering of statutory discretion, and the remedies, by suit and by writ, through which the Government is made to answer. Figure 16.1 maps the ground.

Liability of Government: A Mind Map



Liability looks back: it decides whether the harm done by the State falls on the victim or on the public

Figure 16.1: Liability of Government: a mind map

Source: Authors' illustration.

16.1 Introduction

Why liability matters. Every other form of control examined in this book looks forward. Parliament asks questions so that the administration will behave better; courts quash unlawful orders so that they will not be acted upon. Liability looks back. It asks who should bear a loss that has already happened. Where the Government is not liable, the loss falls on the individual who happened to be injured; where it is liable, the loss is spread across the taxpayers on whose behalf the Government acted. A modern State that runs hospitals, railways, electricity grids, prisons and police forces causes

harm on a large scale, and the rules of liability decide whether that harm is a cost of government or a misfortune of the citizen.

Two distinct questions. The first is liability in tort: whether the State must compensate a person injured by the wrongful act of a public servant. The second is liability in contract: whether, and on what conditions, the State is bound by agreements and promises made on its behalf. The two are governed by different rules, but they share a common problem. The State is not an ordinary defendant. It acts in the public interest, it exercises powers no private person has, and it cannot always be held to bargains that would fetter its future duties. The law has had to decide how far those differences justify treating it differently, and the answer has changed over time.

The Indian position in outline. Indian law has no statute on the liability of the State. Article 300 of the Constitution carries forward the liability that existed before 1950, and the courts have built the law on that foundation. In tort they have confined the old immunity for "sovereign" functions to a narrow core and created a public-law remedy of compensation for the violation of fundamental rights, to which immunity is no defence. In contract they have insisted on the formalities of Article 299 while allowing restitution where the State has taken a benefit, and have subjected the State as contractor to Article 14 and to the doctrine of promissory estoppel. The result is a body of law made almost entirely by judges.

16.2 Foundations: Immunity, Vicarious Liability and Act of State

(a) "The King Can Do No Wrong" and the Indian Constitutional Route

At common law the Crown could not be sued in tort. The maxim that "the King can do no wrong" meant both that the Sovereign was personally immune and that wrongful acts could not be attributed to the Crown at all; the servant who committed the wrong was personally liable, but his employer was not. Contractual claims could be pursued only by a petition of right, which required the fiat of the Crown. The immunity survived in England until 1947 (§16.3).

India took a different path from the start, because the Government of India was the successor of a trading corporation. The East India Company could sue and be sued like any other company, and when the Crown assumed the government of India in 1858, section 65 of the Government of India Act, 1858 provided that the Secretary of State in Council could be sued as the Company could have been. That liability was carried forward by section 32 of the Government of India Act, 1915 and section 176 of the Government of India Act, 1935, and then by Article 300(1) of the Constitution, under which the Government of India and the Government of a State "may sue or be sued ... in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted", subject to any law made by Parliament or the State legislature.

Three consequences follow. First, the extent of the State's liability today depends on the extent of the Company's liability before 1858, which is why a case decided in 1861 remains the starting point (§16.5). Secondly, Parliament may define the liability by law, but it has never done so. Thirdly, because the liability rests on a pre-Constitution foundation, it has been supplemented rather than replaced by the fundamental rights: where a fundamental right is violated, the courts have developed a separate public-law remedy in which the old immunities have no place (§16.6). The vesting provisions point the same way: under Articles 294 and 295 the Union and the States succeeded to the property, rights, liabilities and obligations of their predecessors, and under Article 298 their executive power extends to carrying on trade and making contracts.

(b) The Doctrine of Vicarious Liability

The State acts only through human agents. Its liability in tort is therefore, in almost every case, vicarious: it is liable for the wrongs of its servants because they are its servants, not because it is itself at fault. The doctrine rests on two maxims, *respondeat superior* (let the master answer) and *qui facit per alium facit per se* (he who acts through another acts himself), and on two requirements: a relationship of the right kind between the defendant and the

wrongdoer, and a sufficient connection between that relationship and the wrong.

The relationship. The classic relationship is employment. English law has extended it to relationships "akin to employment", holding a religious institute liable for abuse by brothers who were not its employees but were integrated into its mission,¹ and then drawn the limit: there is no vicarious liability for the torts of a genuinely independent contractor carrying on his own business.² For the State, the relationship is rarely in doubt: soldiers, police officers, doctors in public hospitals and drivers of official vehicles are its servants.

The connection. The wrong must be committed in the course of employment. The older test asked whether the act was an authorised act done in an unauthorised manner. The modern English test asks whether the wrong was so closely connected with the employment that it is fair and just to hold the employer liable, and on that basis a school was held liable for sexual abuse of boarders by the warden it employed to care for them.³ Indian law adopted the broader view of the course of employment in *Pushpabai Purshottam Udeshi v Ranjit Ginning & Pressing Co*, holding a company liable for an accident caused by its manager while giving a lift in the company's car in the course of his duties.⁴

Public bodies. A statutory public body is in the same position as a private employer. In *Mersey Docks and Harbour Board Trustees v Gibbs* the House of Lords held a public body managing docks liable for the negligence of its servants, rejecting the argument that a body performing public duties without profit was immune.⁵ The question for the State has never been whether vicarious liability applies in principle, but whether some of its functions are exempt from it. That is the question of sovereign immunity, examined in §16.5.

¹*Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56, [2013] 2 AC 1.

²*Barclays Bank plc v Various Claimants* [2020] UKSC 13, [2020] AC 973.

³*Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215.

⁴*Pushpabai Purshottam Udeshi v Ranjit Ginning & Pressing Co (P) Ltd* (1977) 2 SCC 745.

⁵*Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93.

(c) Act of State: the Outer Limit of Liability

The concept. An act of State is an act of the sovereign power, done in the exercise of that power and not under colour of any municipal law, which a municipal court will not examine. It is not a defence of justification; it is a plea that the court has no jurisdiction to inquire into the act at all. Its classic sphere is the conduct of foreign relations and the acquisition of territory. In the Madras High Court's formulation, later approved by the Supreme Court, "Acts thus done in the exercise of sovereign powers but which do not profess to be justified by municipal law are what we understand to be the acts of State".⁶ It must be distinguished from sovereign immunity in tort: an act of State is outside the jurisdiction of the courts altogether, whereas an act done under a statute, however sovereign its character, is done under municipal law and is justiciable.

England. In *Buron v Denman* a naval officer burned the barracoons of a Spanish slave-trader on the West African coast and freed the slaves; the Crown adopted his act, and the foreigner's action failed because a wrong done to an alien abroad and ratified by the Crown is an act of State.⁷ The plea is not available against the Crown's own subjects. In *Walker v Baird* a naval officer who seized a British subject's lobster factory in Newfoundland under an arrangement with France could not plead act of State against the owner,⁸ and in *Johnstone v Pedlar* the House of Lords held that it could not be pleaded against a friendly alien resident within the Crown's territory.⁹ In *Attorney-General v Nissan* it failed against a citizen of the United Kingdom and Colonies whose hotel in Cyprus had been occupied by British troops, although the Law Lords differed on whether it could ever be pleaded against a citizen abroad.¹⁰

The modern English law distinguishes two doctrines. "Crown act of State" is a narrow defence to a claim in tort: in *Rahmatullah (No 2) v Ministry of Defence*, the Supreme Court held that it barred claims arising from the detention of individuals by British forces in Iraq and

⁶*Secretary of State v Hari Bhanji* (1882) ILR 5 Mad 273, as quoted in *N. Nagendra Rao & Co v State of Andhra Pradesh* (1994) 6 SCC 205.

⁷*Buron v Denman* (1848) 2 Ex 167.

⁸*Walker v Baird* [1892] AC 491 (PC).

⁹*Johnstone v Pedlar* [1921] 2 AC 262 (HL).

¹⁰*Attorney-General v Nissan* [1970] AC 179 (HL).

Afghanistan, because the detentions were inherently governmental acts, done abroad, in the conduct of foreign relations and military operations, with the authority of the Crown.¹¹ The "foreign act of State" doctrine, under which English courts will not adjudicate on the sovereign acts of foreign States, was held on the same day not to bar claims of complicity in rendition and torture, because a public policy exception applies to grave violations of human rights.¹²

United States. American law uses the phrase mainly in the second sense: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."¹³ The doctrine barred a challenge to Cuba's expropriation of sugar in *Banco Nacional de Cuba v Sabbatino*,¹⁴ but it applies only where a court must declare invalid an official act of a foreign sovereign, not wherever foreign policy is embarrassed.¹⁵

India. The doctrine came to India with the annexations of the Company. In *Secretary of State in Council of India v Kamachee Boye Sahaba* the Privy Council held that the seizure of the property of the late Raja of Tanjore on the annexation of his territory was an act of State into which no municipal court could inquire.¹⁶ After Independence it arose from the integration of the princely States. In *State of Saurashtra v Memon Haji Ismail Haji* the Supreme Court held that the acquisition of Junagadh was an act of State, and that the inhabitants could enforce against the new sovereign only those rights it had chosen to recognise.¹⁷ An act of State is not confined to the moment of annexation; it may be spread over a period and continues until the new sovereign recognises the rights in question, expressly or impliedly.¹⁸ In *State of Gujarat v Vora Fiddali Badruddin Mithibarwala* a seven-judge Supreme Court Bench, by a majority of four to three, held that rights granted by the ruler of a merged State were not enforceable against the successor State unless recognised by the

¹¹*Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1, [2017] AC 649.

¹²*Belhaj v Straw* [2017] UKSC 3, [2017] AC 964.

¹³*Underhill v Hernandez*, 168 U.S. 250 (1897).

¹⁴*Banco Nacional de Cuba v Sabbatino*, 376 U.S. 398 (1964).

¹⁵*W.S. Kirkpatrick & Co v Environmental Tectonics Corp International*, 493 U.S. 400 (1990).

¹⁶*Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 7 Moo IA 476 (PC).

¹⁷*State of Saurashtra v Memon Haji Ismail Haji* AIR 1959 SC 1383 (decided 4 August 1959).

¹⁸*Promod Chandra Deb v State of Orissa* AIR 1962 SC 1288 (decided 16 October 1961).

appropriate Government, and that acquiescence by subordinate officers was not recognition.¹⁹

The constitutional limit. The plea cannot be raised against a citizen in respect of acts done after the Constitution. In *Virendra Singh v State of Uttar Pradesh* grants of land made by the rulers of merged States were revoked after 26 January 1950. The Supreme Court held that the grantees had become citizens and that the Constitution had recognised their rights; the State could not afterwards plead act of State against its own citizens to take those rights away.²⁰ Act of State therefore survives in Indian law only at the frontier of sovereignty: the acquisition of territory, and acts against aliens abroad. Within the territory of India, and against any person in it, the State must justify its acts under law, and the question becomes one of liability.

Box 16.1: Act of State in Three Systems

- **What it is.** An exercise of sovereign power, not under colour of municipal law, which the courts will not examine (*Hari Bhanji*).
- **England.** Available against aliens abroad (*Buron v Denman*); not against subjects (*Walker v Baird*) or resident friendly aliens (*Johnstone v Pedlar*). "Crown act of State" bars tort claims only for inherently governmental acts abroad in the conduct of foreign relations or military operations (*Rahmatullah* (No 2), 2017).
- **United States.** Principally a rule of judicial abstention from judging the acts of foreign sovereigns in their own territory (*Underhill*; *Sabbatino*), confined to cases where the validity of such an act must be decided (*Kirkpatrick*).
- **India.** Annexation and integration of territory (*Kamachee Boye Sahaba*; *Memon Haji Ismail*; *Vora Fiddali*); never against a citizen after the Constitution (*Virendra Singh*).

¹⁹*State of Gujarat v Vora Fiddali Badruddin Mithibarwala* AIR 1964 SC 1043 (decided 30 January 1964), per Hidayatullah J for the majority.

²⁰*Virendra Singh v State of Uttar Pradesh* AIR 1954 SC 447 (decided 29 April 1954), per Bose J.

The chapter continues

*Chapter 16, Liability of Government,
continues in the complete volume.*

Volume II · Part V: Liability, Remedies and Privileges of the State

CHAPTER 17

ORDINARY REMEDIES AGAINST THE ADMINISTRATION

Suits, Declaration, Injunction, Damages and Social Action

In this chapter

- 17.1 General
- 17.2 Jurisdiction of the Civil Courts and its Exclusion
- 17.3 Suits against the Government and Social Action for Public Duties
- 17.4 Declaration
- 17.5 Injunction
- 17.6 Action for Damages and Restitution
- 17.7 Statutory Appeals, Revisions and Administrative Review
- 17.8 Criminal Remedies against Public Servants
- 17.9 Consumer and Other Statutory Forums
- 17.10 Ordinary and Extraordinary Remedies: Choosing and Combining
- 17.11 Comparative Perspectives and Conclusion

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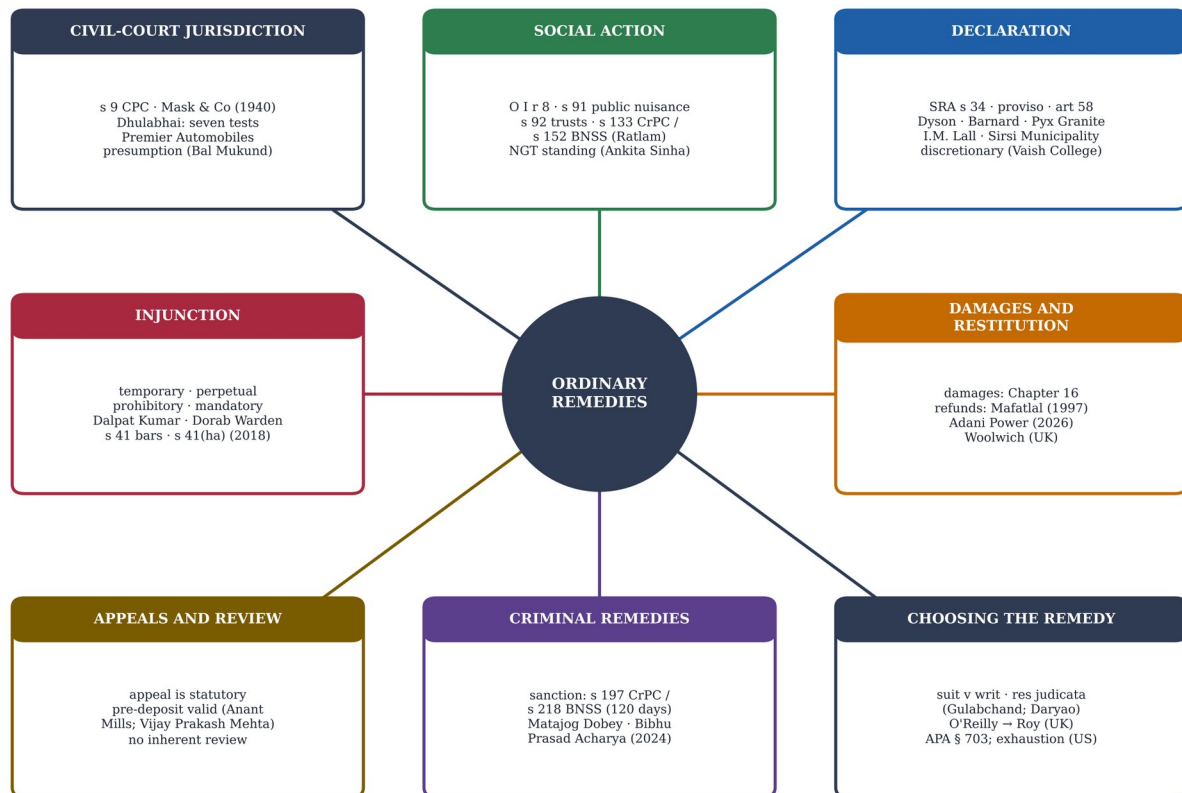
CHAPTER 17

ORDINARY REMEDIES AGAINST THE ADMINISTRATION

Suits, Declaration, Injunction, Damages and Social Action

A municipal corporation threatens to demolish a building it says is unauthorised. A public body dismisses an employee without the inquiry its regulations require. A tax authority collects a levy that a court later holds to have been unlawful. A town's open drains spill into the street outside a hospital. In each case the person affected may go to the High Court for a writ. But the writ is not the only road, and often not the best one. The ordinary courts, applying the ordinary law, can declare the citizen's rights, restrain the authority by injunction, order the return of money wrongly taken, award damages, and, through the criminal courts, compel a public body to abate a nuisance it has created. These are the ordinary remedies against the administration.

This chapter examines them. It begins with the jurisdiction of the civil courts and the statutes that try to exclude it. It then considers suits against the Government and the social action through which citizens enforce public duties; the declaration and the injunction, the two great remedies of the Specific Relief Act; damages and restitution; statutory appeals and administrative review; criminal remedies against public servants; and the consumer forums. It ends with the question that matters most in practice: how to choose between the ordinary remedies and the writ, and how they affect each other. Figure 17.1 maps the ground.

Ordinary Remedies against the Administration: A Mind Map

Ordinary only in name: where facts are disputed, they are often the only remedies that work

Figure 17.1: Ordinary remedies against the administration: a mind map

Source: Authors' illustration.

17.1 General

Ordinary and extraordinary remedies. The remedies examined in Chapters 13 and 14 are called extraordinary. They are granted by the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution, in a summary procedure, on affidavits, and at the court's discretion. The ordinary remedies are those available in the ordinary courts under the ordinary law: a civil suit under the Code of Civil Procedure, 1908 for a declaration, an injunction, damages or the recovery of money; an appeal or revision under the statute that governs the decision; a criminal complaint; or a claim before a statutory forum such as a consumer commission. The word "ordinary" describes the forum and the procedure, not the importance of the remedy.

Why the ordinary remedies matter. Three features make them indispensable. First, the civil court can try disputed facts: it hears oral evidence, permits cross-examination and finds facts, which a writ court deciding on affidavits will usually decline to do. Secondly, it can grant relief that the writ court grants reluctantly or not at all, such as damages for loss or the return of money, and it can bind private persons as well as public authorities. Thirdly, it is available to everyone, in every district, without the threshold questions of maintainability that surround the writ. The cost is time: a suit may take years where a writ petition takes months.

Dicey's legacy. The English idea of the rule of law, as Dicey stated it, rested on the proposition that officials are answerable for their acts in the ordinary courts, under the ordinary law, like any other person. The modern writ jurisdiction has overtaken much of that tradition, but it has not replaced it. The declaration and the injunction were the instruments through which English courts controlled the administration before the reforms of judicial review, and in India they remain the remedies of first resort wherever facts are disputed or a statute has given the citizen a right enforceable in the civil courts.

The place of this chapter. Several related remedies are treated elsewhere and only cross-referred to here: the notice required before suing the Government and the immunity of the President and Governors (Chapter 16, §16.14); damages in tort and contract (Chapter 16); public interest litigation (Chapter 25); and the rule that a writ will ordinarily not issue where an adequate alternative remedy exists (Chapter 13).

17.2 Jurisdiction of the Civil Courts and its Exclusion

(a) The General Rule

Section 9 of the Code of Civil Procedure gives the civil courts jurisdiction "to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred". A dispute with the administration about a person's rights is a suit of a civil nature, so the civil court has jurisdiction unless a statute takes it away. Many statutes try to do so. They declare that an order "shall be final",

that no civil court "shall entertain any suit" in respect of a matter, or that a special Tribunal shall decide a class of disputes. The courts have always read such provisions narrowly.

The classic statement. In *Secretary of State v Mask & Co* the Privy Council said: "It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."¹ On the facts the suit was held barred, but the dictum became the foundation of the Indian law. In England the same principle was put by Viscount Simonds: "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."²

(b) The Dhulabhai Propositions

In *Dhulabhai v State of Madhya Pradesh* a Constitution Bench, reviewing the earlier cases on suits for the refund of tax, laid down seven propositions that remain the governing statement of the law.³ They are set out in Table 17.1. Their effect can be stated simply. A finality clause excludes the civil court only where the statute provides an adequate remedy for doing what the civil court would do; even then, the civil court may intervene where the Act has not been complied with or the Tribunal has not followed fundamental judicial procedure; a challenge to the validity of the Act itself, or a claim for the refund of tax illegally collected where the Act provides no machinery, may be brought by suit; but questions of the correctness of an assessment are for the statutory authorities. "An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

¹*Secretary of State v Mask & Co* AIR 1940 PC 105; (1940) 67 IA 222, per Lord Thankerton, as quoted in *Dhulabhai v State of Madhya Pradesh* AIR 1969 SC 78.

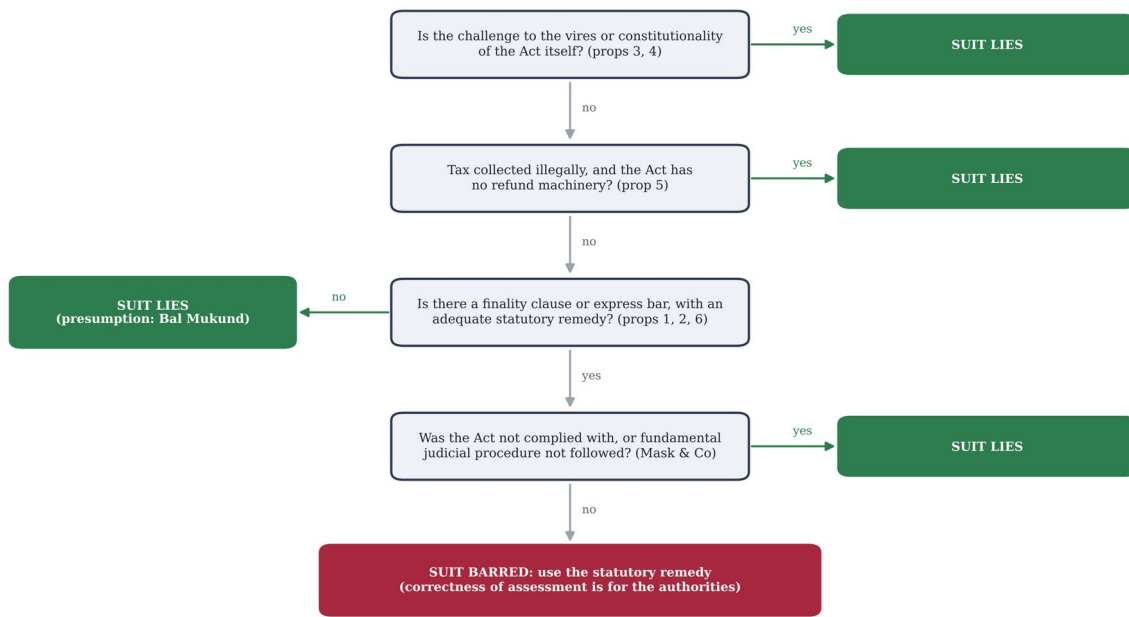
²*Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 (HL), per Viscount Simonds.

³*Dhulabhai v State of Madhya Pradesh* AIR 1969 SC 78 (decided 5 April 1968), per M. Hidayatullah CJ.

Table 17.1: The seven Dhulabhai propositions on exclusion of civil-court jurisdiction

No.	Proposition (summarised; propositions 1 and 7 in the Court's words)
1	"Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit"; but not where the Act is not complied with or fundamental judicial procedure is not followed
2	Where there is an express bar, the adequacy of the statutory remedies is relevant but not decisive; where there is no express bar, the scheme of the Act decides whether it creates a special right with its own remedy
3	A challenge to the provisions of the Act as ultra vires cannot be brought before the Tribunals constituted under it
4	Where a provision has been declared unconstitutional, or its constitutionality is challenged, a suit is open
5	Where the Act has no machinery for the refund of tax collected in excess of constitutional limits or illegally collected, a suit lies
6	Questions of the correctness of an assessment, apart from its constitutionality, are for the statutory authorities; no suit lies if their orders are final or a suit is expressly barred
7	"An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply"

Source: *Dhulabhai v State of Madhya Pradesh* AIR 1969 SC 78.

May the Civil Court Hear the Suit despite an Ouster Clause? (Dhulabhai, 1968)

Prop 7: "An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

Figure 17.2: May the civil court hear the suit despite an ouster clause?

Source: Authors' illustration.

(c) Special Rights and Special Remedies

Where a statute creates a new right or liability and provides its own forum for enforcing it, the remedy under the statute is exclusive. In *Premier Automobiles Ltd v Kamlekar Shantaram Wadke* the Court applied that principle to industrial disputes: "If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act"; but where the right arises under the general law, the civil court retains jurisdiction.⁴ The test is the source of the right, not the identity of the defendant. An employee of a statutory corporation who seeks to enforce rights under the Constitution or under statutory regulations may therefore sue in the civil court, and "When there is a doubt as to whether civil court has jurisdiction to try a suit or not, the courts shall raise a presumption that it has such jurisdiction."⁵

⁴*Premier Automobiles Ltd v Kamlekar Shantaram Wadke* (1976) 1 SCC 496 (decided 26 August 1975), per N.L. Untwalia J.

⁵*Rajasthan State Road Transport Corporation v Bal Mukund Bairwa* (2) (2009) 4 SCC 299 (decided 12 February 2009), per S.B. Sinha J.

Recent applications. The Supreme Court continues to confine statutory bars to their terms. In 2024 it held that a bar on civil suits in a land revenue law applied only where the revenue court could in fact decide the partition in question, leaving the civil court free to decide title and shares.⁶ In 2025 it held that the bar in section 34 of the SARFAESI Act extends only to matters the Debts Recovery Tribunal is empowered to decide, so that a suit to declare sale and mortgage deeds void still lies in the civil court.⁷

17.3 Suits against the Government and Social Action for Public Duties

(a) Suits against the Government and Public Officers

The procedural rules for suing the State are examined in Chapter 16, §16.14: the Union and the States sue and are sued in their own names under Article 300 and section 79 of the Code; two months' notice must be given under section 80, subject to leave for urgent relief and to the rule of substantial compliance; and the President and the Governors enjoy personal immunity under Article 361. One recent development completes the picture. The Supreme Court has insisted that public authorities answer section 80 notices seriously, holding that a court may draw an adverse inference where the Government ignores one, and it directed that its judgment be circulated to every High Court and Chief Secretary.¹ The notice is meant to produce a settlement, not a file note.

(b) Social Action for the Enforcement of Public Duties

Many administrative failures injure no one in particular but everyone in general: a blocked road, an open drain, an encroachment on a public park, a polluting factory licensed by a careless regulator. The ordinary law has long provided ways for members of the public to compel the performance of public duties in such cases, well before public interest litigation made the writ court their usual forum (Chapter 25). Three of these remedies are civil and one is criminal.

⁶*Abdul Rejak Laskar v Mafizur Rahman*, 2024 INSC 1023 (decided 20 December 2024), per J.B. Pardiwala J.

⁷*Central Bank of India v Prabha Jain*, 2025 INSC 95 (decided 9 January 2025).

¹*Yerikala Sunkalamma v State of Andhra Pradesh*, 2025 INSC 383 (decided 24 March 2025), per J.B. Pardiwala J.

Representative suits. Where numerous persons have the same interest in a suit, one or more of them may, with the permission of the court, sue on behalf of all, after notice to those interested; the decree binds them all.² Residents of a locality affected by an unlawful act of a municipality may sue in this way without each of them having to become a party.

Public nuisance suits. Section 91 of the Code provides that "In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,— (a) by the Advocate-General, or (b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act." The section preserves any right of suit that exists independently of it, so a person who suffers special damage may sue in his own right.³ Section 92 provides a parallel remedy, by the Advocate-General or two or more interested persons with leave, for breaches of public charitable and religious trusts; the Supreme Court has held in 2026 that the court may not grant interim orders while the application for leave under section 92 is pending.⁴

The magistrate's power over public nuisance. The most powerful of these remedies is criminal. Section 133 of the Code of Criminal Procedure, now section 152 of the Bharatiya Nagarik Suraksha Sanhita, 2023, empowers a District or Sub-divisional Magistrate, on a police report or other information, to make a conditional order requiring the removal of an unlawful obstruction or nuisance from a public place, the regulation of a trade injurious to health, or the repair of a dangerous structure, and to make the order absolute if the person fails to show cause. In *Municipal Council, Ratlam v Vardhichand* residents complained that the municipality had left open drains and pits of filth in their area. Krishna Iyer J framed the question: "The key question we have to answer is whether by affirmative action a court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis." The

²Code of Civil Procedure, 1908, Order I rule 8.

³Code of Civil Procedure, 1908, s 91(1), (2).

⁴*S. Panchalingu v Peoples Education Trust (R)*, 2026 INSC 1010 (decided 18 September 2026), para 60, per Manmohan J.

The chapter continues

*Chapter 17, Ordinary Remedies against the Administration,
continues in the complete volume.*

Volume II · Part V: Liability, Remedies and Privileges of the State

CHAPTER 18

PRIVILEGES AND IMMUNITIES OF THE GOVERNMENT

Statutes, Secrets, Estoppel, Waiver, Litigation, Taxes and Office-holders

In this chapter

- 18.1 General
- 18.2 Whether the State is Bound by a Statute
- 18.3 Privilege to Withhold Documents
- 18.4 National Security, Sealed Covers and Closed Material
- 18.5 Official Secrecy and the Right to Information
- 18.6 Estoppel against the Government
- 18.7 The Doctrine of Waiver
- 18.8 Procedural Privileges of the Government in Litigation
- 18.9 Priority of Government Dues
- 18.10 Immunity from Taxation
- 18.11 Immunities of Constitutional and Public Functionaries
- 18.12 Comparative Perspectives, Reform and Conclusion

Summary for the Indian Practitioner · Memory Aids at a Glance · Pointwise Summary

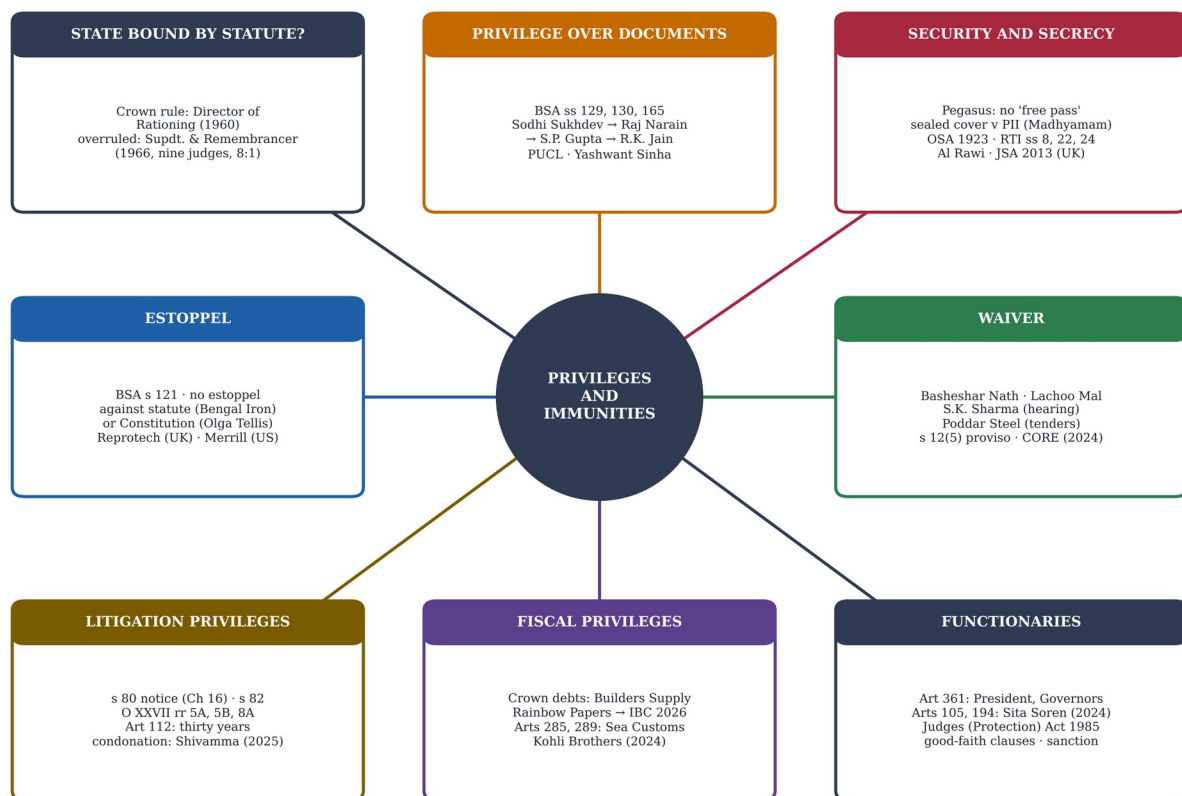
CHAPTER 18

PRIVILEGES AND IMMUNITIES OF THE GOVERNMENT

Statutes, Secrets, Estoppel, Waiver, Litigation, Taxes and Office-holders

A citizen sues a State corporation and asks for the file on which his dismissal was decided; the Government says the file is privileged. A dealer acts on a written clarification from the tax department; years later the department demands the tax the clarification said was not due. A company in insolvency owes money to its bank and to the State; the State claims to be paid first. A Governor is accused of a crime; the Constitution says no criminal proceedings may be instituted against him during his term. In each case the Government, or someone who holds office under it, claims to be treated differently from an ordinary litigant. This chapter asks when that claim is good.

The chapter begins with the general idea of privilege and immunity and with the old rule that the State is not bound by its own statutes. It then examines the privilege to withhold official documents, national security and the sealed cover, and official secrecy after the Right to Information Act. It turns next to two doctrines that work in the opposite direction, estoppel and waiver, which decide when the State, or the citizen, is held to its word. It ends with the procedural privileges of the Government in litigation, the priority of Government dues, immunity from taxation, and the immunities of the President, the Governors, legislators, judges and public servants. Figure 18.1 maps the ground.

Privileges and Immunities of the Government: A Mind Map

A republic keeps only those privileges that serve the public, not the government of the day

Figure 18.1: Privileges and immunities of the Government: a mind map

Source: Authors' illustration.

18.1 General

Privilege and immunity. The two words are often used together, but they describe different things. A *privilege* is an advantage the law gives the Government within a legal process: the right to withhold a document from evidence, a longer period of limitation, a notice before it is sued, priority in the payment of its debts. An *immunity* is an exemption from the process itself: from a tax, from suit, from criminal proceedings. The distinction matters because a privilege is usually decided by the court in the course of the case, while an immunity, where it exists, keeps the court out altogether.

Why the State has them. The English common law gave the Crown a long list of prerogatives, from the rule that the King could do no wrong to the rule that his debts came first. Some survived in India through Article 372, which continued "the law in force" before the Constitution.

Others were written into the Constitution and statute: Articles 285 and 289 on taxation, Article 361 on the President and the Governors, Articles 105 and 194 on legislators, the provisions of the Evidence Act on affairs of State, the Code of Civil Procedure on suits against the Government, and the Limitation Act on suits by it. The justifications offered are three: that the Government acts for the public and should not be hampered in doing so; that some information, if disclosed, would injure the public more than its withholding injures the litigant; and that public money and public office deserve protection from vexatious claims.

The test in a republic. None of these justifications applies to the Government as such. They apply only where the privilege or immunity serves the public interest, and the history traced in this chapter is largely the history of courts insisting on that distinction. The Crown's exemption from statutes has been rejected (§18.2); the privilege over documents has passed from the Minister to the court (§18.3); the sealed cover has given way to public interest immunity (§18.4); legislators have lost any immunity for bribery (§18.11). The question asked of every privilege is the same: whom does it serve?

What is treated elsewhere. Several related matters are examined in other chapters and are only cross-referred to here: the maxim that the King can do no wrong, sovereign immunity in tort and the Act of State (Chapter 16, §§16.2 and 16.5); promissory estoppel and legitimate expectation against the Government (Chapter 16, §16.13, and Chapter 13); the notice under section 80 of the Code of Civil Procedure (Chapter 16, §16.14); sealed covers as a question of natural justice (Chapter 8, §8.12.3); the right to know, the Right to Information Act and its amendment by the data protection law (Chapter 22, §22.9); and the bar on injunctions and the sanction needed to prosecute public servants (Chapter 17, §§17.5 and 17.8).

18.2 Whether the State is Bound by a Statute

(a) The English Rule

At common law the Crown is not bound by a statute unless the statute names it expressly or binds it by necessary implication. The rule began as a royal prerogative and survives as a rule of construction. The

United Kingdom Supreme Court restated it in 2017, in a case about whether the ban on smoking in enclosed public places applied to prisons: "The Crown is not bound by a statutory provision except by express words or necessary implication." The question is "whether, in the light of the words used, their context and the purpose of the legislation, Parliament must have meant the Crown to be bound."¹ The answer was no: the ban did not reach Crown premises such as prisons.

The rule protects only the Crown and those who act as its servants or agents. A public corporation with its own personality is not the Crown, and so does not share its immunities. In *BBC v Johns* the Court of Appeal held that the British Broadcasting Corporation was not an emanation of the Crown and could claim no Crown exemption from income tax.²

(b) India: the Rule Adopted and Rejected

Adoption. In *Director of Rationing and Distribution v Corporation of Calcutta* a Constitution Bench held, by a majority, that the English rule was part of the law in force in India and survived the Constitution: "The rule of interpretation of statutes that the State is not bound by a statute, unless it is so provided in express terms or by necessary implication, is still good law."³ The State was therefore held not bound by the requirement of a municipal licence.

Rejection. Six years later a Supreme Court Bench of nine judges overruled that decision, by eight to one. In *Superintendent and Remembrancer of Legal Affairs, West Bengal v Corporation of Calcutta* Subba Rao CJ examined the history and found that the English rule had never been settled law in India: "It is, therefore, clear that the said rule of construction was not accepted as a rule of construction throughout India and even in the Presidency towns it was not regarded as inflexible rule of construction." The Court also found that the rule produced anomalies, which mattered more in a republic whose Governments had become traders, employers and landlords. It therefore adopted the opposite presumption: "The normal

¹*R (Black) v Secretary of State for Justice* [2017] UKSC 81, paras 36(1) and 37, per Lady Hale P. The House of Lords had applied the same rule in *Lord Advocate v Dumbarton District Council* [1990] 2 AC 580.

²*BBC v Johns (Inspector of Taxes)* [1965] Ch 32 (CA).

³*Director of Rationing and Distribution v Corporation of Calcutta* AIR 1960 SC 1355; [1961] 1 SCR 158 (decided 16 August 1960), per B.P. Sinha CJ for the majority.

construction, namely, that the general Act applies to citizens as well as to State unless it expressly or by necessary implication exempts the State from its operation, steers clear of all the said anomalies."⁴ The State was held bound by the licensing requirement of section 218 of the Calcutta Municipal Act, 1951.

The present position. In India, therefore, the rule is the reverse of the English one. A general statute binds the Government unless it exempts the Government expressly or by necessary implication. The practical consequence is that an exemption must be found in the statute itself. Many statutes supply one, for example by excluding Government premises or Government servants, and Parliament remains free to do so; but the courts will not presume it. Where the State acts as a trader, an employer or the owner of property, it is subject to the same regulatory laws as anyone else unless the legislature has said otherwise.

Table 18.1: Is the State bound by a statute? Three positions

System	Rule	Leading authority
England and Wales	Crown not bound except by express words or necessary implication; the question is whether Parliament must have meant the Crown to be bound	<i>Lord Advocate v Dumbarton DC</i> (1990); <i>R (Black)</i> (2017)
India, 1960–1966	The English rule continued as law in force	<i>Director of Rationing</i> (1960), five judges
India, since 1966	A general Act binds the State unless it exempts the State expressly or by necessary implication	<i>Superintendent and Remembrancer</i> (1966), nine judges, 8:1
Public corporations	Not the Crown or the State for this purpose; bound like any other person	<i>BBC v Johns</i> (1965); see §18.10 on APSRTC

Source: Authors' compilation from the decisions cited.

⁴*Superintendent and Remembrancer of Legal Affairs, West Bengal v Corporation of Calcutta* AIR 1967 SC 997; [1967] 2 SCR 170 (decided 7 December 1966), per K. Subba Rao CJ; J.C. Shah J dissented.

18.3 Privilege to Withhold Documents

(a) The Statutory Provisions

The Indian law of official privilege rests on three provisions of the Indian Evidence Act, 1872, carried without change of substance into the Bharatiya Sakshya Adhiniyam, 2023. The first forbids evidence derived from unpublished official records relating to affairs of State "except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit". The second protects official communications: "No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure." The third requires a witness summoned to produce a document to bring it to court notwithstanding any objection, and provides that "The validity of any such objection shall be decided on by the Court"; the court may inspect the document "unless it refers to matters of State". The Adhiniyam adds a proviso that no court shall require any communication between the Ministers and the President of India to be produced before it.¹ Table 18.2 maps the old provisions to the new.

Table 18.2: Privilege and estoppel provisions: Evidence Act and Bharatiya Sakshya Adhiniyam

Evidence Act, 1872	BSA, 2023	Subject and change
s 115	s 121	Estoppel by declaration, act or omission; text unchanged (§18.6)
s 123	s 129	Evidence as to affairs of State; head of department's permission; unchanged
s 124	s 130	Official communications made in confidence; unchanged
s 162	s 165	Production of documents; court decides validity of objection; may inspect unless the document refers to matters of State. New proviso: no court may require communications between the Ministers and the President to be produced (cf. Art 74(2))

Source: Authors' compilation from the Acts.

¹Indian Evidence Act, 1872, ss 123, 124 and 162; Bharatiya Sakshya Adhiniyam, 2023, ss 129, 130 and 165 (in force from 1 July 2024).

Read literally, the first and third provisions point in different directions. One leaves permission to the head of the department "as he thinks fit"; the other gives the court the decision on the validity of the objection but forbids it to inspect a document that refers to matters of State. The Indian cases are the story of how that tension was resolved, and Figure 18.2 sets the Indian and English decisions side by side.

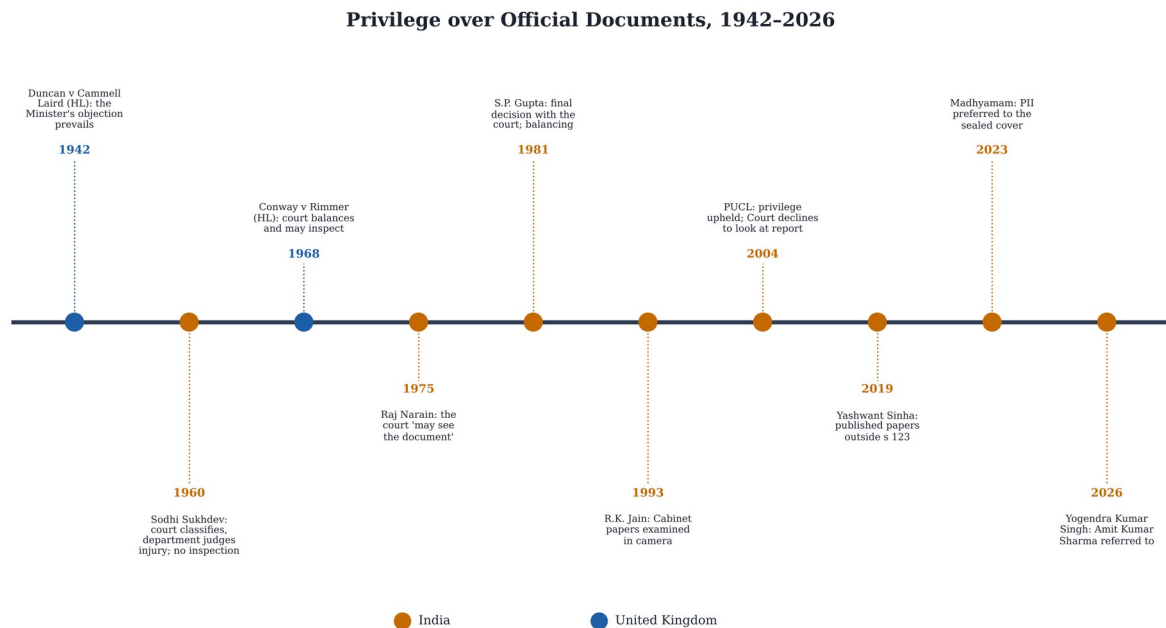


Figure 18.2: Privilege over official documents, 1942-2026

Source: Authors' illustration.

(b) England: from *Duncan* to *Conway* and Beyond

***Duncan v Cammell Laird*.** During the Second World War the House of Lords refused to order the production of the plans of a submarine that had sunk on trials, on the Minister's objection that disclosure would injure the public interest. Viscount Simon LC stated the principle broadly: "Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld." He added a limit that was later forgotten: "In a word, it is not enough that the minister or the department does not want to have the document produced."² In practice a Minister's objection in proper form was treated as conclusive, and for a quarter of a century it was used to withhold whole classes of routine documents.

²*Duncan v Cammell Laird & Co Ltd* [1942] AC 624 (HL), per Viscount Simon LC, as quoted in *State of Punjab v Sodhi Sukhdev Singh* AIR 1961 SC 493.

Conway v Rimmer. In 1968 the House of Lords took back the decision for the courts. A probationary police constable who had been prosecuted and acquitted sued for malicious prosecution and sought reports about him; the Home Secretary objected to their production as a class. Lord Reid proposed that the House should decide that "courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice."³ The court could inspect the documents privately and order their production if the balance came down that way. It did so in that case.

Burmah Oil, Air Canada and Wiley. The courts then extended their power to high-level papers. In *Burmah Oil Co Ltd v Bank of England* the House of Lords, Lord Wilberforce dissenting, held that even documents about the formation of Government economic policy could be inspected by the court, though after inspection it refused to order their disclosure.⁴ In *Air Canada v Secretary of State for Trade (No 2)* it set a threshold: a party seeking inspection must show that the documents are "very likely to contain material which would give substantial support to his contention on an issue which arises in the case"; that inspection might help the court find the truth is not enough.⁵ Finally, in *R v Chief Constable of the West Midlands Police, ex p Wiley*, it held that documents generated by police complaints investigations enjoy no class immunity, overruled the earlier decision that had given them one, and recognised that a Minister may decide that the public interest favours disclosure without making a claim at all.⁶

(c) India: Sodhi Sukhdev Singh

The first full statement of the Indian law came in *State of Punjab v Sodhi Sukhdev Singh*. A District and Sessions Judge of the former State of PEPSU, removed from service and later offered re-employment,

³*Conway v Rimmer* [1968] AC 910 (HL), per Lord Reid, as quoted in Law Commission of India, Report No 185: Review of the Indian Evidence Act, 1872 (2003).

⁴*Burmah Oil Co Ltd v Bank of England* [1980] AC 1090 (HL) (decided 1 November 1979).

⁵*Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 (HL), per Lord Fraser of Tullybelton.

⁶*R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274 (HL) (decided 14 July 1994), per Lord Woolf: "The Neilson case and the cases in which it was subsequently applied, should therefore be regarded as being wrongly decided."

The chapter continues

*Chapter 18, Privileges and Immunities of the Government,
continues in the complete volume.*

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Written by a former Law Secretary to the Government of India and an Advocate-on-Record of twenty years in the Supreme Court: the view from the desk where decisions are taken and from the Bar where they are tested.

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