

Q3. Answer the following :

- a) "The success and effectiveness of public administration depends essentially on the ability impartiality and honesty of the bureaucrats. As such the responsibility of selecting such type of persons for administrative jobs should be vested on an independent and neutral Public Service Commission"- comment and enumerate the functions of UPSC with emphasis on the importance of the advisory power of UPSC. (25m)

Understanding: The statement above opines about independency and autonomy of UPSC, thus this question first expects to comment about the autonomy of UPSC.

(i) Autonomy of UPSC (10m)

Composition establishment: According to **Act 315** of the constitution of India there shall be a permanent Union Public Service Commission for appointment to the various posts of the central government services. Likewise as **Act 318** of the constitution of India also stated that the Union Public Service Commission will be constituted with a chairman and a fixed number of members; the number of such members and the terms and conditions of their service are to be determined by the President of India. The President, as such, appoints the Chairman and other members of the commission for a period of six years.

Functional autonomy: It is interesting to note that according to Act 317 of the constitution of India, the period of service of the chairman and other members of the Union Public Service Commission is not determined by the pleasure of the executive department of the government of India and as such, they cannot be removed from their positions quite easily.

As per **Art 317(1)** only the President of India can remove these members from their offices under the special charge of corruption and dishonest behaviour by a special measure. The system is, when a special charge against any member of the Union Public Service Commission is made before the President of India about corruption and dishonesty the latter directs the Supreme Court of India to make enquiry on it and the Supreme Court after making the inquiry submits its report to him. If the alleged charge is proved against the member or even the chairman of the commission the President can remove him from his office. **Art. 317(2)** also says that if a member is found insolvent or mentally and physically unfit then also the President can remove him from the post of membership.

Other restrictions to ensure autonomy : The constitution of India has also adopted certain measures to ensure the neutrality and impartiality of the U.P.S.C. The Chairman of the Union Public Service Commission has not been allowed to take any office of profit under the central or any of the state governments after his retirement from service as chairman. Moreover, before the expiry of their term of service the executive cannot remove the Chairman or any of the members of the commission from their service. They can be removed only through the means stipulated in the constitution. Apart from this once these members are appointed the terms and conditions of their services cannot be changed. **Art. 322** declares that the salaries and allowances of these members including the chairman will be considered as expenditure charged upon the

consolidated fund of India, which means that their salaries and allowances are not subjected to the approval of the Parliament.

Precautionary Measures in Indian Constitution

In order to prevent the ministers from taking any undue advantages or using the U.P.S.C. for their own personal and party interests, the constitution had taken two precautionary measures.

- First, the government must consult with the Union Public Service Commission regarding the appointment of its employees and the other matters relating to their interest and
- Secondly, if the recommendation or advice of the Union Public Service Commission is not accepted the government is to explain the reason of such non-acceptance to the parliament.

Without the recommendation of the Union Public Service Commission the Government of India can appoint temporarily some employees but such employee cannot be appointed for more than a year. If such employee is to be appointed for more than a year the approval of the U.P.S.C. must have to be taken.

Moreover, if the government does not take the recommendation or advice of the U.P.S.C. or refuse or neglect it, the reasons for it are to be reported to the Parliament.

(ii) Functions of Union Public Service Commission(71/2 m)

Art. 320 of the constitution of India have categorically enumerated the functions of the Union Public Service Commission.

The **first function** of Union Public Service Commission is to recommend for appointment in administrative services the meritorious and prospective young men and women after selecting them through All India competitive examinations.

Secondly, if two or more state governments so request the U.P.S.C. *to assists them in framing and operating schemes of joint recruitment for any service for which candidates possessing special qualification are required.*

Thirdly, it advises the President in specified matters.

1. *"all matters relating to methods of recruitment to civil services and for civil posts;*
2. *the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from the service to another and on the suitability of candidates for such appointments promotions or transfer;*
3. *all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matter;*
4. *any claim in respect of a person who is serving or has served under the govt. of India in a civil capacity, that any cost incurred by him in defending, legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the consolidated fund of India;*
5. *any claim for the award of a pension in respect of injuries sustained by a person while serving under the government of India in a civil capacity and any question as to the amount of such award;*
6. *any other matter which may be referred to it by the President for advice."*

It is usually obligatory for the Government of India to consult the Union public Service Commission in respect of all the above matters. However, the President has the power to make regulations, specifying the matters in which, either generally or in particular circumstances the commission may not be consulted. Under the Union Public Service Commission (exemption from consultation) regulations framed by the President in 1958, it is not obligatory for the President to consult the U.P.S.C. in some cases.

ADDITIONAL INFORMATION – NOT PART OF SOLUTION.

For Information the cases are as follows:

1. Posts in respect of which the authority of appointment, has specifically been conferred by the constitution in the President,
2. Chairman of members of any Board, Tribunal Commission, Committee or any other similar authority, created under a statute or under the authority of a resolution of either Houses of the Parliament or by a resolution of the government of India for conducting an enquiry into any matter or advising the government of specified matters.
3. Heads of diplomatic, consular and other similar Indian Missions in other countries,
4. Personal staff attached to the holders of the posts mentioned in categories mentioned above,
5. Posts in the Secretariat of the Lok Sabha and Rajya Sabha,
6. All technical and administrative posts in or under the Atomic Energy Commission,
7. Judicial Commissioners and Additional Judicial Commissioners, District Judges and Additional District Judges of the Union Territories and the subordinate Judges and Munsifs in the Union Territories of Manipur, Tripura and Himachal Pradesh,
8. All class HI and class IV posts,
9. Posts concerned with the administration of North-East Frontier Agency and
10. any service or post in respect of which the commission has agreed that it is not necessary for it to be consulted.

The temporary and officiating appointments can also be made without consulting the U.P.S.C. provided the incumbent is not likely to hold the post for more than a year. But intimation has to be sent to the commission regarding such appointment as soon as the posts are filled. Similarly there is no need to make any reference to the commission regarding the reservation of posts in favour of backward classes, Scheduled Castes, Schedule Tribes.

- a) A common tendency in modern democracies is to confer discretionary power on the government or administrative officers. The power is usually couched in very broad phraseology and gives a large area of choice to the administrator concerned to apply the law to actual factual situations. This creates the danger of official arbitrariness which is subversive of the doctrine of equality. To mitigate this danger, the courts have invoked Art. 14 (20m)

In order to ensure that discretion is properly exercised, it is necessary that the statute in question lays down some norms or principles according to which the administrator has to exercise the discretion. Many a time the statutes do not do this and leave the administrator free to exercise his power according to his judgment. This creates the danger of official arbitrariness which is subversive of the doctrine of equality. To mitigate this danger, the courts have invoked Art. 14.

ESSENTIALS: This principle manifests itself in the form of the following propositions:

- (1) A law conferring unguided and unrestricted power on an authority is bad for arbitrary power is discriminatory.
- (2) Art. 14 illegalises discrimination in the actual exercise of any discretionary power.
- (3) Art. 14 strikes at arbitrariness in administrative action and ensures fairless and equality of treatment.

FIRST ELEMENT : CONFERRING ABSOLUTE DISCRETION:

The Court can veto any conferment of discretionary power on an authority if it is too broad, sweeping or uncanalised.

Govt. of Andhra Pradesh v. P. Laxmi Devi, (2008) 4 SCC 720 : AIR 2008 SC 1640

The court has reiterated the principle that mere likelihood of abuse of discretionary power conferred under statute would not render the statutory provision unconstitutional.

SECOND ELEMENT: ADMINISTRATIVE DISCRIMINATION: The first proposition discussed above envisages that where a statute is discriminatory either because it does not make a reasonable classification, or confers unregulated discretion on the executive, the statute itself is void under Art. 14.

CLASSIC CASE OF *YickWo v. Hopkins* 118, U.S. 356

The classic case on the point is *YickWo v. Hopkins*, an American case. By an ordinance, the City of San Francisco made it unlawful to carry on a laundry, without the consent of the board of supervisors, except in a brick or stone building. In administering the ordinance, 200 Chinese launderers were denied permission, even though they complied with every requisite, while 80 non-Chinese under similar circumstances had been permitted. *Lumsden Club v. State of Punjab*, AIR 1957 Punj. 20

The Excise Commissioner banned the sale of liquor at the Lumsden Club but not at other clubs which were in similar position. The order was quashed as there was unjust discrimination. There could be a situation where discretion though conferred subject to a standard or policy, may be exercised in disregard of the policy. If so, it can be challenged under Art. 14.

THIRD ELEMENT: ARBITRARY STATE ACTION : Art. 14 out-laws arbitrary administrative action. When there is arbitrariness in state action, Art. 14 springs into action and the courts strike down such action. Arbitrary state action infringes Art. 14. A very fascinating aspect of Art. 14 which the courts in India have developed over time is that Art. 14 embodies “a guarantee against arbitrariness” on the part of the Administration.

As the Supreme Court has observed in *Royappa*: “from a positivistic point of view, equality is antithetic to arbitrariness.” Any action that is arbitrary must necessarily involve the negation of equality. Abuse of power is hit by Art. 14. The authority endowed with a power must free itself from political interference. The new orientation being given to Art. 14 by the courts has been explained by BHAGWATI, J., in *Bachan Singh v. State of Punjab*. Rule of law which permeates the entire fabric of the Indian Constitution excludes arbitrariness.

“Wherever we find arbitrariness or unreasonableness there is denial of rule of law.” Art. 14 enacts primarily a guarantee against arbitrariness and inhibits state action, whether legislative or executive, which suffers from the view of arbitrariness. “Every state action must be non-arbitrary and reasonable. Otherwise, the Court would strike it down as invalid.”

(a) RIGHT OF HEARING

In some cases, the Courts have insisted, with a view to control arbitrary action on the part of the administration, that the person adversely affected by administrative action be given the right of being heard before the Administration passes an order against him. It is believed that such a procedural safeguard may minimise the chance of the Administration passing an arbitrary order. Thus, the Supreme Court has extracted from Art. 14 the principle that natural justice is an integral part of administrative process.

Art. 14 guarantees a right of hearing to the person adversely affected by an administrative order. As the Supreme Court has observed in the case noted below, “The *audi alteram partem* rule, in essence, enforces the equality clause in Art. 14 and it is applicable not only to *quasi*-judicial bodies but also to administrative orders adversely affecting the party in question unless the rule has been excluded by the Act in question.” *Maneka Gandhi* is an authority for the proposition that the principles of natural justice are an integral part of the guarantee of equality assured by Art. 14.

(b) JUDICIAL DISCRETION:

Discretion vested in a judicial officer exercisable on the facts and circumstances of each particular case may not amount to a denial of equal protection unless “there is shown to be present in it an element of intentional and purposeful discrimination.”

1. *Budhan v. State of Bihar*, AIR 1955 SC 191 : (1955) 1 SCR 1045. The discretion of judicial officers is not arbitrary as the law provides for revision by superior courts of orders passed by subordinate courts
2. *Jagmohan Singh v. State of Uttar Pradesh*, AIR 1973 SC 947 : (1973) 1 SCC 20. The discretion given to the judge to sentence an accused convicted of murder either to death or to imprisonment for life is not invalid under Art. 14. The judge has to balance all the aggravating and mitigating circumstances of the case and record his reasons in writing for awarding lesser punishment.

GRANT OF BENEFITS BY THE STATE : A welfare state has wide power to regulate and dispense leases, licenses, contracts, etc. The modern state is a source of great wealth and, therefore, questions often arise whether it is bound by any norm in dispensing its largess. In India, it is now well established that in dispensing its largess, the state is expected not to act as a private individual but should act in conformity with certain healthy standards and norms.

Erusian Equipment and Chemicals Ltd. v. State of West Bengal, AIR 1975 SC 266 : (1975) 1 SCC 70. "The state need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure."

Asiatic Labour Corp. v. Union of India, AIR 1983 Guj.86; *Durga Associates, Raipur v. State of U.P.*, AIR 1982 All 490.

Every action of the government must be informed with reason and should be free from arbitrariness because government is always a government.

Centre for Public Interest Litigation v. Union of India, (2000) 8 SCC 606 : AIR 2001 SC 80. Award of contract by the Government of India to a private party for development of medium size oil fields was challenged through a public interest litigation on the ground of non-application of mind. But the Court rejected the contention because on facts the contention was not substantiated. The Court also ruled that whether the oilfield was to be developed by the Oil and Natural Gas Commission on a stand alone basis was a matter of policy and the Court would not interfere with the same. If the Court is satisfied that there have been "unreasonableness, *mala fide*, collateral considerations" in awarding a contract then the Court can quash the award of contract. As to the agreed price for purchase of oil extracted from the oil field in question, the Court said that this was a highly "technical and complex" problem and the Court was not qualified to probe into this matter

e) "The contribution of Rs.1 from the public exchequer cannot be dubbed as illusory so as to invalidate the acquisition". Critically analyse the concept of eminent domain.

A. ORIGIN :

- The expression "eminent domain seems to have been first used in 1625 by the international jurist Hugo Grotius in his work 'De Jure Belii ac Pacis', now it is accepted principle of constitutional law in almost all important countries
- The Government 's sovereign authority to seize private property for public use must be subjected to payment of just compensation originated at English common law and appeared in America as early as the seventeenth century

B. MEANING:

- Doctrine of 'Eminent domain' means the supreme power of the king or the government under which property of any person can be taken over in the interest of general public.
- Eminent Domain is power of the sovereign to acquire property of an individual for public use without the necessity of his consent.
- It is based on two maxims namely *salus populi supreme lex esto* which means that the welfare of the people is the paramount law and *necessitas publica major est than privata*, which means that public necessity is greater than the private necessity

C. INDIA : .

- The power of the State to take private property for public use and consequent right of the owner to compensate now emerge from the constitution of India.
- In entry 42 list III of seventh schedule under Indian Constitution, both union and States government are empowered to enact laws relating to acquisition of property.
- The use of eminent domain power for land acquisition is also justified when the public purpose in question can be served by only a specific piece of land, which has no substitute.

D. CASE LAWS:

In *Chiranjit Lal v. Union of India*, Supreme Court held that the eminent domain is the inherent right in every sovereign State to take and appropriate the private property belonging to an individual for public purpose. The State under its police power also regulates the use and enjoyment of private property. The police power can, however, be distinguished from eminent

domain power. While under police power, State merely regulates the use and enjoyment of property; under the eminent domain, State can take the property from the owner for public use

The Supreme Court *in Sooraram Reddy v. Collector, Ranga Reddy District*, has articulated the following grounds for review of this power: (i) malafide exercise of power; (ii) a public purpose that is only apparently a public purpose but in reality a private purpose or collateral purpose; (iii) an acquisition without following the procedure under the Act; (iv) when the acquisition is unreasonable or irrational; (v) when the acquisition is not a public purpose at all and the fraud on the statute is apparent.

E. Eminent Domain and the Land Acquisition Act

One of the most significant statute concerned with the exercise of the right of eminent domain in India was the Land Acquisition Act, 1894.

Land Acquisition Act, 1894 :Under the 1894 statute there were broadly two forms of recognised expropriation:

one, acquisition for public purpose for governmental use, and two, forced transfer of land from private individuals to corporations for the latter's commercial use. In the case of acquisitions intended to benefit companies, a special procedure was prescribed in Part VII of the Land Acquisition Act, which incorporated additional safeguards to ensure that governments don't abuse their avowed power of eminent domain.

F. Property rights and the state

- Earlier Right to Property is a Fundamental Right under the list of freedoms = Article 19(1)(f) + Article 31, which provided that state can acquire properties of individual for the public purpose by paying compensation to the landowner, provided such acquisition was backed by suitable legislation.
- In 1978, Parliament enacted the 44th amendment to the Constitution = deleted Article 19(1)(f) and Article 31, and made the right to property to a mere non-fundamental status. Why ? Government need to carry upon land reforms to set right the inequalities among the farmers.
- But did it achieve the real purpose of deleting FR? No. By citing "public purpose"= both the Union and the various State governments have routinely acquired land for the benefit of private industry or rich, often at grave costs incurred by small farmers.

G. The latitude of 'public purpose':

CONCEPT OF EMINENT DOMAIN : State , for PUBLIC PURPOSE, can acquire private properties by paying nominal compensation.

Preposterous Judgements of SC :

- ✓ **"the contribution of Rs.1 from the public exchequer cannot be dubbed as illusory so as to invalidate the acquisition" / Even 1 rupees is good as compensation for the landowner. You cannot challenge it.**¹**Manubhai Jehtalal Patel V. State of Gujarat.**
- ✓ **Acquiring Land for Diamond Industry/ park is not bad; as it would generate a "good deal of foreign exchange" and would create "employment potential".**
PRATIBHA NEMA & ORS V. STATE OF M.P. & ORS
- ✓

But this time, SC HELD THAT = the government's acquisition of land in singur for the purported use by Tata Motors Limited to construct a car factory, they held, was in violation of the procedural mandates of the Land Acquisition Act, 1894.**Kedar Nath Yadav v. State of West Bengal.**

¹"the contribution of Rs.1 from the public exchequer cannot be dubbed as illusory so as to invalidate the acquisition".

Justice Gowda's ruling, Government attempt amounts to **colourable exercise of power**. "Such an acquisition, if allowed to sustain," he wrote, "would lead to the attempt to justify any and every acquisition of land of the most vulnerable sections of the society in the name of 'public purpose' to promote socio-economic development."

GOOD THING :Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013 (LARR Act) = repeals the 1894 ACT. To whittle down this new legislation,

Tamil Nadu, Rajasthan and Gujarat, among others = legislating a new law = permit takings even in the absence of a direct public purpose.

In other States such as Telangana, plans to delete requirement of consent when acquiring property for private companies so long as the acquisition is for a public purpose.

CONCLUSION : After all, in every state where a right to property is considered sacrosanct, those classes of people without property have little to benefit from. But what we have today in India is a selective preservation of property rights, where the least advantaged amongst us also bears the greatest burden in terms of relinquishing ownership of land. No reasonable theory of justice can validate this terrifying anomaly.