A SECOND LOOK AT ADMINISTRATIVE LAW

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The administrative process is as old as government itself, but it was only recently that administrative law emerged as a separate branch of jurisprudence, finding its way into the digests and encyclopaedias under its own name. As Mr. Justice Arthur T. Vanderbilt once said, "practical" students, intent on pursuing the "bread and butter" subjects in private law, neglected the field of administrative law and could not foresee that this branch of law would become the outstanding legal development of the twentieth century.[1]

The social trends of the last 200 years have produced what is known as the service state and, along with it came administrative regulation. Today, the Philippines, like other countries, is extending its sphere of regulatory and service activities over a wider and wider area. Administrative agencies and tribunals to handle the details of these government undertakings are being created in increasing number. Students of law and public administration are now concerned with the question of how to harness the forces with which administrative law deals so that their necessary purposes can be accomplished within the framework of democratic government and by procedures consistent with principles of fairness and impartiality, thus avoiding the abuses of what has been termed the "new despotism" or the arbitrariness of an uncontrolled bureaucracy.[2]

Administrative Law Defined: — Goodnow, the "father of administrative law," considers administrative law as that part of the public law which fixes the organization and determines the competence of the administrative authorities and indicates to the individual remedies for the violation of his rights.[3] According to Pound, "in a narrower sense and as commonly used today, administrative law implies that branch of modern law under which the executive department of the government, acting in a quasi-legislative or quasi-judicial capacity, interferes with the conduct of the individual for the purpose of promoting the well-being of the community, as under laws regulating public utility corporations, business affected with a public interest, professions, trades and call-

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1 Bernard Schwartz, **French Administrative Law and the Common-Law World** (New York: New York University Press, 1954), p. xiii.

2 Milton M. Carrow, **The Background of Administrative Law** (Newark: Associated Lawyers Publishing Co., 1948), p. 15; John M. Pfiffner, "The Development of Administrative Regulation," **The Annals of the American Academy of Political and Social Science**, 221:7, May, 1948.

3 Frank J. Goodnow, **Comparative Administration Law** (New York: G. P. Putnam's Sons, 1893), Vol. I, pp. 8-9.

ings, rates and prices, laws for the protection of the public health and safety and the promotion of the public convenience and advantage.[4]

As administrative law gets accepted as a distinct branch of law and as the role of government in society changes with the years, the authorities on the subject, at least during the last decade or so, are agreed that administrative law should be understood in its narrow meaning. Also, more and more attention is being given to its procedural aspects than to any other.[5]

If the view is taken that administrative law includes substantive as well as procedural law, then administrative law includes the law that is *made by* the administrative authorities and the law that *controls* their powers and processes. The administrative law that governs the activities of administrative agencies is made by constituent or constitution-making authorities, by legislatures, by the courts, and by administrative superiors in giving directions to their subordinates. Administrative law *made by* administrative authorities includes various types of general regulations and particular determination.[6] If administrative law is more concerned with procedure than with subject-matter, then it deals more with the law governing the powers and processes of administrative agencies and less with the law *made by* them. But even if administrative law is procedural, the agency-made law cannot be totally excluded as administrative agencies sometimes make procedural determinations, by rule or order, and such procedures are as much the concern of administrative law as are the ones formulated by statute or as a result of judicial decisions.[7]

Administrative Agency Defined: — An administrative agency is an organ of government other than a court of law or a legislature which, through either adjudication or rule-making, affects the rights of private parties. The name by which the agency is designated does not matter. It may be called a commission, a board, a bureau, an office, a department, an authority, an administration, a division, or even a court. The Court of Industrial Relations, for example, is more an administrative board than a part of the integrated judicial system of the Philippines.[8] To the extent that the President exercises power of adjudication or rule-making, he is an administrative agency.[9] In most cases, administrative agencies are creatures of the legislature; in some instances, they are established by executive orders.

4 Roscoe Pound, American Administrative Law: Its Growth Procedure and Significance (Pittsburg: University of Pittsburg Press, 1942), p. 110.

5 See Kenneth C. Davis, Administrative Law (St. Paul, Minnesota: West Publishing Co., 1951); Maurice H. Merrill, Cases and Materials on Administrative Law (St. Paul Minn.: West Publishing Co., 1954); E. Blythe Stason, The Law of Administrative Tribunals (Chicago: Callaghan and Co., 1947); Walter Gellhorn, Administrative Law, Cases and Comments (Brooklyn: The Foundation Press, 1947).

6 James Hart, An Introduction to Administrative Law (New York: Appleton-Century-Crofts, Inc., 1950), pp. 8-9.

7 Carrow, op. cit., pp. 161-17.

8 Ang Tibal v. CIR, 69 Phil. 635 (1940).

9 Davis, op. cit., P. 1.

Any government agency with which private individuals deal affects the latter's interest, sometimes adversely. It is, therefore, a proper subject of administrative law. Heads of regular departments and bureaus have occasions to regulate business, industry, and the professions, and this was usually the case before the passage of the Constitution. Agencies, more commonly known as regulatory boards and commissions, were created at a rapid pace with the constitutional recognition of the active role of the state in regulating the economic life of the nation to promote the security and well being of the people.[10]

Prominent among the administrative agencies are the Public Service Commission, the Securities and Exchange Commission, the Workmen's Compensation Commission, the Wage Administration Service, the Central Bank, the Social Security Commission, legislative courts as the Court of Industrial Relations, the Court of Agrarian Relations and the Court of Tax Appeals. Other agencies are the Office of the Insurance Commissioner, the Patent Office, the Civil Aeronautics Administration, regular bureaus as the Bureau of Fisheries, the Bureau of Internal Revenue and the Bureau of Customs. There are boards of examiners responsible for regulating and controlling the practice of professions and vocations.

Divisions of Administrative Law: — The study of administrative law may be divided into three main parts, namely: (1) special problems arising out of the position of administrative agencies and tribunals of mingled powers in our constiutional system; (2) rules of procedure which govern the agencies in the transaction of business; and (3) judicial review of administrative action.

The first division involves the reconciliation of the exercise of the administrative agencies' mingled powers with the customary organization of government into legislative, executive and judicial departments, each wielding powers specially appropriate to it; problems relating to the delegation of legislative power; and problems relating to the standards which must be provided for the guidance of subordinate governmental bodies in the exercise of delegated power of any kind. The second division deals with problems arising out of constitutional provisions, particularly the fundamental notions of fairness required by due process of law, as well as out of statutory prescriptions. The third division is concerned with the methods by which judicial review of agency action may be obtained and the extent of such review, as a means of keeping the agencies within their constiutional and statutory jurisdiction and of insuring fairness and regularity to their procedures.[11]

10 Philippine Constitution, art. II, sec. 5: The promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State. Art. XIV, sec. 6: The State shall afford protection to labor, especially to working women and minor, and shall regulate the relations between landowner and tenant, and between labor and capital in industry and in agriculture. The State may provide for compulsory arbitration.

11 Merrill, op. cit., pp. 2-3; See also Davis, op. cit., p. 8

I. Administrative Law and the Constitution

Separation and Blending of Powers: — Separation of powers is primarily a political doctrine, not a technical rule of law. It cannot be applied in doctrinaire fashion. As Mr. Justice Holmes said in *Springer v. Govt. of the Philippine Islands:*

> It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.[12]

The blending of powers is seen in the modern administrative agency. As it often exercises legislative and judicial powers, it has been claimed sometimes that the fundamental structure of the administrative system is unconstitutional. The courts, however, have not held that the combination in a single agency of legislative, judicial and executive powers is unconstitutional.[13] It has been said that Montesquieu, when he wrote of the separation of powers doctrine in his *The Spirit of the Laws* in 1748, knew nothing of regulating airlines and television, railroads and securities exchanges, and that the solution to 20th century problems call for 20th century understanding.[14]

Delegation of Power: — Corollary to the separation of powers doctrine is the rule against the delegation of power. The rule is derived from the maxim *delegata potestas non potest delegari.* Originally a rule of agency, it has been elevated to the stature of a doctrine in constitutional law. The maxim has been traced to Sir Edward Coke who in turn relied on a text of Bracton printed in 1569. This text was later shown to have been a misprint; the correct one stated the rule to mean that delegations were entirely permissible.[15]

It is said that the rule is wholly judge-made, and is a misnomer.[16] For example, when the President changes the tariff rates to conform to new conditions, what is done is in substance a delegation of the legislative process.[17] Delegation by Congress has long been recognized as necessary in order that the execution of legislative power does not become a futility.[18] The non-delegation rule has become outmoded together with the laissez-faire conception of government.[19] Necessity is the primary reason for allowing delegation. The development of a new field, e.g., radio broadcasting which,

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12 277 U.S. 211 (1928).

13 Davis op. cit., p. 27; ames M. Beck, Our Wonderfuland of Bureaucracy (New York: The MacMillan Co., 1932), passim.

14 Davis, op. cit., pp. 30-31.

15 Patrick W. Duff and Horace E. Whiteside, "Delegata Protestas Non Protest Delegari: A Maxim of American Constitutional Law," 14 Cornell Law Quarterly 173 (1929).

16 Davis, op. cit., p. 48; Carrow, op. cit., p. 120.

17 Norwegian Nitrogen Products Co. v. United States, 288 U.S. 924 (1940).

18 120 Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

19 Edward S. Corwin, The Presidennt: Office and Powers (New York: New York University Press, 1948), pp. 121 et. seq.

without legislative intervention, would lead to chaos, impels the legislature to enact the regulatory measure. It is impractical for the legislature to prescribe in complete detail how the law should be applied. The more precise the regulatory code is, the greater becomes the hazard of arbitrariness because of the difficulty of foreseeing changes in conditions.[20]

Legislative Standards: — With the recognition that delegation of power is necessary if government is to perform its functions properly comes the awareness that such delegation should be prevented from running riot. The law giving delegated powers to administrative agencies are usually examined to determine whether or not the legislature has laid down a policy and a standard for the agency to follow and if the discretion granted to the agency has been canalized within banks that keep it from overflowing," to use the words of Mr. Justice Cardozo.[21]

To be adequate, a standard need not be spelled out in a particular part of the statute. It may be gathered from the context of the act as a whole and from its legislative history.[22] A standard need not be more definite than those required by an expert administrative body. What to others may appear to be an untrammelled delegation of discretionary authority leaving the door open to arbitrary judgment contains clear limitations to the expert, and, of course, he is to be governed by such limitations.[23]

It has been claimed that there is an aura of unreality in the talk about standards. Standards like "just and reasonable" and "public interest" and other broad and vague terms have been held as adequate. Because of history or context, such phrases may sometimes have considerable meaning; but other times they do not have.[24] Thus, in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program, it is not necessary that Congress supply administrative officials with a specific formula for their guidance.[25] In one case,[26] it was held that an administrative agency was entitled to its own notion of the "public" interest; the agency was released from the legislative standard and permitted to work out substitute standards. In a few cases,[27] delegations have been held valid even without the prescription of standards.

If there is an aura of artificiality in the language about standards, and if delegations even without standards have been upheld, the problem is what should be the limits to administrative action and how should those limits be found?

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20 Carrow, op. cit., p. 121.
21 Panama Refining Co., v. Ryan, 293 U. S. 388, 440 (138).
22 American Power & Light Co., v. SEC, 329 U.S. 90, 104 (1946).
23 Sunshine Anthracite Coal Co., v. Adkins, 310 U.S. 381 (1940)
24 Davis, op. cit., pp. 44-46.
25 Lichter v. United States, 334 U.S. 742 (1948).
26 Federal Power Commission v. Hope Natural Gas Co., (1944).
27 St. Louis I. M. & S. Ry. v. Taylor, supra; Intermountain Rate Cases, 234 U.S. 476 (1914); McKinley v. United States, 249 U.S. 397 (1919); Fahey v. Mallonee, 332 U.S. 245 (1945).

The starting point is probably the recognition that in the final analysis, the problem is one of determining what organs of government are best qualified to determine particular policies. But even that is gross over-simplification, for the question of delegating or not delegating is not one of dividing powers neatly once and for all between the legislative[®] and the administrative authorities. Whether powers are delegated or not, they are often exercised through cooperative arrangements in which many organs of government participate. Policies written into statutes usually emanate in part from the agency concerned, and when this is true, the delegation question is not simply whether the policies initiated by the agency should become effective with or without running the legislative gauntlet. And when power is delegated, no matter how complete the delegation may on its face seem to be, the legislative body still has an effective voice in its exercise.[28] As a matter of fact, the most effective method of expressing the legislative will may sometime be delegation with virtually no standards but with strong legislative influence upon policy creation after the delegation has been made. This influence could take the form of a requirement for periodic reports to Congress or the activities of investigating, appropriations and other legislative committees.

Administrative Rule-Making: — Allowing administrative agencies the power to make rules is not an abdication by Congress of its legislative power. What is delegated is not the power to determine what the law shall be or what acts are necessary to effectuate the law, but only the power to fill up the details within prescribed standards by the determination of facts or the enactment of rules and regulations.

Legislative and Interpretative Rules: Based on the *process* involved, the rule-making power may be classified as follows: (1) where the process consists of the discretionary elaboration of rules and regulations, i.e., legislative rules; (2) where the process consists of the interpretation of statutory provisions, i. e., interpretative rules; and (3) where the process consists of the *finding* of the existence of the conditions under which a contingent statute provides that its clauses shall become operative.[29]

Legislative rules can be issued only under express statutory delegation. They are valid if the proper procedure is followed and are within the statutory and constitutional authority of the administrative agency. When valid they are legally binding and have the force and effect of law in the sense that the governing statute provides sanctions for their violation.[30] The rules cannot read into the law additional requisites,[31] nor supply a defect in the law.[32]

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28 Davis, op. cit., pp. 54-56.

29 Hart, op. cit., p. 311.

30 Frederic P. Lee, "Legislative and Interpretive Regulations," Georgetown Law Review. 29:33 (1940). Leuterio v. Commissioner, G.R. No. L-9810, April 27, 1957.

31 Antiquera v. Sec. of the Interior, G.R. No. L-3318, May 2, 1952.

32 People v. Santos. 65 Phil. 808 (1936).

Interpretative rules are in theory but interpretations of the statute. They do not embody a new law and are valid only if the reviewing court finds the interpretation permissible and that there is no exercise of power not delegated.[33] An administrative agency must necessarily interpret the provisions of the governing statute before it can apply them to situations presented before it. The interpretations may be embodied in the generalized form of regulations or they may be confined to the case-by-case approach. But it is the statute and not the rules which remains as the sole criterion of what the law authorizes or compels and what it forbids.

The theory that interpretative rules do not embody new law is considered unreal as often administrative interpretations involve creation of new law on questions which the legislative body did not anticipate. It is general knowledge that the Supreme Court, in the name of statutory interpretation or construction, engages in what is called judicial legislation. The U.S. Supreme Court is more and more rejecting the theory.[34] A more accurate statement would be that legislative rules have the force of law and interpretative rules sometimes do.

Contingent Statute: — A contingent statute is one which provides controls but specifies that they are to go into effect only when the administrative authority concerned finds the existence of conditions defined in the statute. It is not self-executing and depends for its enforcement on the findings of an administrative official or agency. The statute must contain certain standards to guide the administrative authority, otherwise it is unconstitutional.

Two examples of contingent legislation are Act No. 3155 and Act No. 2868. The first prohibited the importation of any cattle from foreign countries and gave the Governor-General the discretion to raise such prohibition if the conditions of the country made this importation advisable or if the disease among foreign cattle had ceased to be a menace to agriculture and livestock.[35] The second authorized the Governor-General, with the consent of the Council of State, for any cause resulting in an extraordinary rise in the price of palay, rice or corn, to issue and promulgate temporary rules and emergency measures for carrying out the purpose of the Act. This Act, however, was held unconstitutional by the Supreme Court because of the absence of standards of legislative delegation.[36]

Penalty Regulations: — Administrative agencies cannot by rule declare an act criminal and penalize it without legislative sanction. Such power is not a "filling in of details" and, therefore, does not come under valid delegation. The creation of a crime is thus an exclusively legislative power, but Congress may, without violating the rule against delegation, provide for a limited administrative

33 284 Col. of Int. Rev. v. Villaflor, 69 Phil. 319 (1040).
34 Helvering v. R. J. Reynold Tobacco Co., 306 U.S. 110 (1939); Helvering v. Wilshire Oil Co., 308 U.S. 90 (1939); Textile Mills Securities Corp. v. Commision, 314 R.S. 326 (1941).
35 Cruz v. Youngberg, 56 Phil 234 (1931).
36 United States v. Ang Tang To, 43 Phil. 1 (1921).

discretion in the field of administrative penalty regulations. This is the holding in the celebrated case of *United States v. Grimaud.*[37]

The U. S. Supreme Court held:

> " . . . the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense. . . . A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary but by Congress. The statute, not the Secretary, fixes the penalty."

The law frowns upon administrative penalty regulations. From the standpoint of policy, however, something can be said in their favor. "The legislator may not desire to impose a blanket penalty for the violation of all rules. It may be more desirable to allow expert administrators to determine whether, in the light of their experience in enforcing a law, a sanction is necessary, rather than to enact at once arbitrarily or dispense with it altogether."[38]

Administrative Adjudications: — Just as administrative agencies have the power to issue rules and regulations, they have also the function, either principal or incidental to their main activities, of determining, by decision, the conflicting rights of various interests, or of seeing that private individuals or entities adhere to government policies. Administrative adjudication, then, is the determination of questions of a judicial or quasi-judicial nature by an administrative agency.

The disputes that are subject to administrative adjudication may be grouped under two broad categories. One involves controversies between private individuals in which the administrative agency serves as referee or umpire. The second class includes those between the government and private individuals. The disputes may either be one instituted by the government against a private party or by the private party against the government.

It is usual to associate administrative adjudication to formalized procedures where the agency acts like a court of law and decides cases in a somewhat judicial atmosphere. There is, however, a big volume of what is termed the "unjudicialized administrative process" that administrative agencies do in their day-to-day work. Informal adjudication, which forms the bulk of the work of most departments and agencies, consists in the disposition of particular cases instituted by complaints, applications, inspections or what not, without the conventionalized reception of testimony under oath, subject to cross-examination and transcribed in a record upon which the decision is based.[39] Conferences, informal hearings, and

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37 22 U.S. 506 (1911).

38 "Administrative Penalty Regulations," Columbia Law Review, 43:218 (1943).

39 Brooke W. Graves, Public Administration in 7 Democratic Society (Boston: DC. Health & Co., 1950), p. 674.

correspondence are some of the methods used in informal adjudication. Sometimes the law or public policy is better served by "round tables and unbuttoned vests" and not by "witness chairs and courtroom trappings." A writer once wrote:

> Let it not be assumed too easily that hearings are a significant protection against bureaucratic absolution. To a slothful administrator, a hearing precedent to regulation may be a God-given opportunity to avoid work and thought. He need only listen with impassively judicial countenance and then forget all he has heard. It is the conference with its give and take of ideas and information, with its possibilities of detailed exploration of minor points and hidden corners which stirs the mind to action. Moreover, there are demonstrably situations where hearings produce little if anything of value.[40]

II. Procedure In Administrative Law

Notice and Hearing in Administrative Rule-Making: — Rule-making must be preceded by notice and hearing if the statute so provides; otherwise, an administrative agency can proceed to promulgate its rules with its "administrative knowledge, good sense and responsibility to Congress" as the only safeguards to the interests that may be affected by the rules. The enactment of administrative rules may be patterned after the work of the legislature when it passes legislation without according procedural formalities to the interests concerned. Especially where a large number of persons are affected, courts have tended to uphold administrative regulations promulgated without being preceded by any hearing.[41] This rule, however, has been criticized by some writers as not conducive to democratic administrative procedures.[42] It is said that the legislature is different from an administrative agency. The former is a representative body directly responsible to the electorate. The legislative process includes steps which assure publicity and an opportunity for presenting diverse views on the subject under legislative consideration. Thus, before bills are enacted into laws, they are generally printed, read three times, debated publicly and voted on publicly by the two Houses. Then they have to be approved by the President or if he vetoes them, they require a two-thirds or three-fourths vote of each House to override the presidential veto.[43]

Administrative agencies, according to the critics, are much more isolated bodies. They are responsible only to the appointing officers and the establishment of democratic controls depends upon voluntary action by the agencies themselves or upon statutory provisionss. Rules, while they are not laws, have the force and effect of laws and means ought to be devised to get the consent of the governed in their promulgation. As an answer to the reason-

40 A. H. Feller, "Administrative Law Investigation Comes of Age," Columbia Law Review, 41:596 (1941).

41 Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915).

42 Carrow, op. cit., pp. 36-37; Freund, op. cit., pp. 220-221; U.S. Attorney General's Committee on Administrative Procedure, op. cit., pp. 101-102.

43 Philippine Constitution, art. VI, secs. 20-21.

ing in the *Bi-Metallic* case to the effect that when a rule is to apply to a large number of persons it is impracticable that everyone should be heard, it is claimed that such impracticability does not preclude the hearing of a duly qualified representative of the class affected.[44]

Where the statute provides for a hearing to precede rule-making, such hearing is taken to mean a *legislative* or a "public meeting" hearing more or less analogous to congressional committee hearings, rather than a strictly quasi-judicial trial.[45] Such hearing is usually either investigatory or designed to permit persons who may not have been reached before to come forward with evidence or opinions. The purpose is not to try a case but to enlighten the administrative agency and to protect private interest against uninformed and unwise action.[46]

Generally then, administrative rule-making does not require notice and hearing to precede it. But, while that is the law, the ends of democratic administration might be better served if as much participation of affected interests as possible under the circumstances is allowed. If there is no statutory requirement for notice and hearing, administrative discretion could open the various channels of communication with the interested parties and use all the avaiable procedures for getting their views on proposed rules. Securing compliance becomes an easy task when the parties from whom obedience is expected have a part in drafting the "rules of the game." Furthermore, while rules of doubtful validity could always be challenged in court, the delay, expense and cumbersomeness of judicial review make this remedy, especially for those groups with not enough strength and means, almost illusory. This results in a situation where possibly unreasonable and arbitrary rules become nonreviewable.

Notice and Hearing in Administrative Adjudication: — In administrative adjudication, notice and hearing are necessary when some constitutional right is claimed to be invaded. They may not be essential if no personal or property rights are involved. In the absence of an expressed or implied statutory provision therefor, notice and hearing are not necessary: (1) where the purpose of an administrative determination is to decide whether a right or privilege which an applicant does not possess shall be granted to him or withheld in the exercise of a discretion vested by statute, or (2) where the power exercised is essentially administrative or executive and not judicial or quasi-judicial.[47] It is difficult, however, if not impossible, to discriminate between judicial and administrative functions in a given case in a way which will be applicable to every case. It is the nature of the act performed, rather than the

44 "Noticeand Hearing in Class Suits in Administrative Proceedings," University of Pennsylvania Law Review, 81.808 (1941).

45 Louisville & N.R.R. v Garrett et al., 231 U.S. 298 (1913); Norwegian Nitrogen Products Co., v. United States, 288 U.S. 294 (1933); Assigned Car Cases, 274 U.S. 564 (1926); Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division.

46 U.S. Attorney General's Committee on Administrative Procedure, Administrative Procedures in Government Agencies (Washington, D.C.: Gov't Printing Office, 1941), p. 108.

47 42 Am. Jur. 474.

officer, board or body which performs it, which determines its character as judicial or otherwise.[48]

Actual notice of the contemplated proceeedings, whether acquired by accident or diligence, satisfies due process even if formal notice has been omitted. Actual notice, together with acquiescence by participation in the hearing, validates the administrative determination.

The right to a hearing may be waived and the failure of a party to request a hearing as provided by statute or by administrative regulations constitutes a waiver.[49] Legal hearing has been accorded when due notice has been given, but the interested party does not appear on advice of counsel.[50]

Freedom From Technical Rules of Evidence: — In connection with the reception and evaluation of evidence, it should be noted that an administrative agency serves a dual purpose: first, it must decide the case correctly as between the litigants before it, and second, it must also decide the case correctly so as to serve the public interest which it is charged with protecting. This second factor makes it necessary to keep open the channels for the reception of all relevant evidence which will contribute to an informed result.[51] Dean Wigmore had said that justice could be done without the orthodox rules of evidence. Most of the rules of evidence are merely rules of caution, i. e., they are based upon a possibility of error; so that the failure to observe them is perfectly consistent with a high probability of truth.[52]

The objectives which the administrative process is designed to promote — dispatch, elasticity and simplicity — would be difficult, if not impossible, to achieve if administrative agencies are held to these technical rules. Thus, mere admission of matters which would be deemed incompetent in judicial proceedings would not invalidate an administrative order.[53] This freedom from technical rules of evidence does not mean, however that administrative agencies can disregard certain cardinal rights as stated in the *Ang Tibay case*.[54]

Exclusionary Rules: — There is a growing tendency to discard the exclusionary rules not only in determining what evidence shall be admitted but also in determining what evidence may support a finding.[55] The thinking seems to be that the exclusion, under a technical rule as to competency, of logically probative evidence whose actual probative value could be appraised with reasonable accuracy by the tribunal, is far more likely to lead to the wrong

48 Ibid., pp. 367:368.
49 Direct Realty Co. v. Porter, 157 F. 2nnd 434 (C.C.A. 1946).
50 Ranke v. Michigan Corp. & Securities Commission, 317 Mich. 304 (1947)
51 U.S. Attorney General's Committee on Administrative Procedure, op. cit., p. 70.
52 John H. Wigmore, Wigmore's Code of Evidence (Boston: Little, Brown and Co., 1942), pp. 85-86.
53 United States v. Abilene & So. Rv. Co., 265 U.S. 274 (1924) ffl Ang Tibay v. CIR, supra.; Mojica v. Pub. Utility Co., 49 Phil 774; Cebu Transit Inc. v. Jereza, 58 Phil. 60 (1933).
54 Supra. See also Dimayuga, et al. v. Cebu Portland Cement Co., G. R. L-10218, May 27, 1957.

result than the admission of such evidence would be. Furthermore, evidence that would violate the technical exclusionary rules is sometimes particularly appropriate in a quasi-judicial hearing. Thus, on an application for a certificate of public convenience and necessity, it is often desirable to permit members of the public to express their views freely and those views are likely to be expressed largely in terms of opinions and conclusions. The weight to be accorded to such testimony can safely be left to the tribunal; the denial of such opportunity so to testify within reasonable limits, would seem too technical to the point of artificiality.[56]

This is not to say that the exclusionary rules of evidence have no place whatsoever in administrative hearings. Admission of all evidence that may be offered, however remote from the issues and however untrustworthy, would often mean not only delay but hearing records intolerably long and presenting in confused fashion the materials of decision. The element of rationality and stability in administrative adjudication is thus supplied by the exclusionary rules if applied not rigidly but with such modifications as the particular proceeding may reasonably require.[57]

There are signs of departure from the holding that mere uncorroborated hearsay is not substantial evidence. Thus, a wage order resting on statistical studies which were largely hearsay was upheld, but the authority of the case is weakened by the lack of objection to the admission of the evidence.[58] But in another case,[59] the denial of an award which was based on reports, answers to questionnaires, and letters not under oath was upheld by the court which said that "if it is the kind on which fairminded men are accustomed to rely in serious matters, it can support on administrative finding."[60] It has been claimed that the hearsay rule, as well as many generalization founded upon it, is deficient in leaving out of account what a court has called "persuasive hearsay."[61]

Substantial Evidence and Legal Residuum Rules: — As held in the *Ang Tibay* case, there must be something to support a decision; that *something* is evidence that is not "a mere scintilla" but "substantial;" substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Closely related to the substantial of evidence rule, which is a rule on the quantitative sufficiency of evidence, is the legal residuum rule which furnishes a standard to determine the *qualitative* sufficiency of evidence. The rule finds its classic interpretation in the case of *Carroll v. Knickerbocker Ice Co.*[62]

55 Davis, op. cit., p. 448.

56 Robert M. Benjamin, Administrative Adjudication in the State of New York (Albany: n.n., 1942), pp. 175-176.

57 Ibid., p. 178.

58 Opp Cotton Mills v. Administrator, 312 726 (1941).

59 Ellers v. Railroad Retirement, Board, 132 F (2nd) 036, (2nd Cir., 1943).

60 See also NLRB v. Southern Wood Preserving Co., 135 F. (2d) 606 (5th Cir., 1943); Union Drawn Steel Co. v. NLRB, 109 F. (2d) 587 (3d Cir., 1940); Y. Yung See v. United States, 92 F. (2d) 700 (9th Cir., 1937).

61 Phelps Dodge Refining Corp. v. FTC, 130 F .(2d) 303, (2d Cir., 1943).

62 218 N.Y. 435 (1916).

> "While the Commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure, and it may, in its discretion, accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim before an award is made. There must be in the record some evidence of a sound, competent, and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by the court."

The rule is considered logically unsound because:

> "It ignores the circumstance that the residuum of legal evidence which is required to support a finding may in fact have played little or no part in the actual decision. . . . that the decision may in fact have been based largely or wholly on other logically probative but technically incompetent evidence. To make the validity of the decision depend on the existence or nonexistence of some bit of competent evidence is to attribute to mere legal competency more weight, as an assurance of trustworthiness, than it deserves."[63]

Official Notice and Official Records: — Official notice has been customarily assumed as the administrative counterpart of judicial notice. It is, therefore, advanced that it should be governed by essentially the same principles as those governing judicial notice. But an administrative agency is less like a court than is usually supposed. To limit official notice to facts which are beyond the realm of dispute would virtually emasculate the administrative process. The tendency to apply the restrictions of judicial notice to the administrative process has had the unfortunate effect of weakening the protection of the public interest and dulling the edge of administrative initiative. The only limit on official notice should be the requirement of fair hearing, and the cardinal principle of fair hearing is neither that all facts should be in the record nor that all facts should be subject to cross-examination and rebuttal evidence but rather that parties should have opportunity to meet in the appropriate fashion any materials that influence decision.[64]

Related to official notice is the question of the use of official records as evidence. It has been asked: Where an administrative agency desires to use general papers in its files or records not compiled for use in the pending case but otherwise accumulated in the regular course of business, must the authors of the reports or computers of records be made available for cross-examination?

One case[65] provides the answer: Such data constitute ordinarily evidence sufficient to support an order, if they are duly made part of the record of the case in which the order is entered. In another case[66] it was held that incidental reference to a party's own reports, although not formally marked in evidence in the pro-

63 Benjamin, op. cit., p. 192.
64 Davis, op cit., pp. 479-480.
65 United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299 (1927).
66 Market St. R. Co. v. Railroad Com. of California, 324 U.S. 548 (1945).

ceedings, in the absence of any showing of error or prejudice, does not constitute a want of due process.

Cross-Examination: — There is a discernible trend away from the concept that cross-examination is a basic ingredient of a fair hearing. Gaining ground is the proposition that fairness involves knowing what is the case that has been made against one, together with an opportunity to meet the charge.[67] The best possible procedure, one which permits effective government while at the same time giving fair assurance against individual oppression or mistake, may vary with different circumstances. Considerations other than what is the most reliable evidence must be taken into account. Against the importance or unimportance of the subject matter should be matched, for example, the factor of economy. Thus, for determining small claims, the expense of travel and even of depositions may necessitate reliance on affidavits. But to base the revocation of a valuable license solely on an affidavit, when expense is the only reason for not producing the witnesses, might even be a denial of due process if the opportunity for cross-examination is crucial. "Sometimes precision is required; sometimes approximations are enough."[68]

Necessity of Findings and Supporting Evidence: — A decision of an administrative agency must have some evidence to support it which must form a part of the record of the case[69] or must consist of facts of which the agency can take official notice, otherwise the determination is not valid.[70] But there are some exceptions to the rule. Some findings rest on judgment or discretion or policy, which in turn rests on the kinds of facts that are not necessarily susceptible of proof. In an appropriate case, a finding based on "speculation and conjecture" made by a knowing and experienced administrative agency may be upheld even though it is not supported by particular evidence.[71]

Sometimes findings depend not on the evidence but on law. The Rules of Court, for example, contain provisions on conclusive and disputable presumptions,[72] and burden of proof.[73] In the case of the disputable presumption, a fact, though unsupported by evidence, is considered proved unless there is evidence to the contrary. If a party has the burden of proof in a litigation, his failure to prove his case results in a finding adverse to him, not based on evidence but on law.

Again, propositions of fact are often treated as rules of law. The same process of changing fact into law occurs in administrative adjudication. When an agency relies on such rules, findings are often upheld even though unsupported by evidence in the particular

67 Davis, op. cit., p. 474.
68 Ibid, p. 474.
69 United States v. Pierce Auto Lines, 327 U.S. 515 (1940).
70 Yangco v. Board of Pub. Utility Commissioners, 36 Phil. 116 (1917).
71 Market St. Ry. Co. v. Railroad Com., 324 U.S. 548 (1945).
72 Secs. 68 & 69.
73 Secs. 70 & 71.

record.[74] At other times, limitations of the human intellect or limitations on the magnitude of investigations that may be conducted in particular circumstances allow a relaxation of the finding-supported-by-evidence rule. Not all propositions of fact used in the administrative process are susceptible of proof with evidence, or developing the evidence would be inordinately expensive.[75]

"Prosecutor-judge" Combination: — One of the most serious criticisms against administrative adjudication has been that the agency in most cases acts both as prosecutor and judge at the same time. The prosecutor-judge combination, it is argued, not only creates the probability of unfairness but also presents the appearance of prejudgment or bias. It militates against parties feeling that they would be accorded fair treatment. The commingling of these functions, so the argument goes, denies fair procedure and due process.[76]

The approach has been in the light of judicial analogy. There are, however, requirements of administrative responsibility and efficiency which call for such combination of functions. The courts have held that constitutional due process is not violated by the combination.[77] Furthermore, the opposition to such combination is predicated on individual or personalized prosecuting and judging, not institutional action. For an individual to serve as both advocate and judge in the same case is obviously improper. In a large and complex organization, however, the question takes on a new light. It is not improper even in a criminal case for a large institution, the state, to prosecute through one officer, the fiscal or prosecuting attorney, and to decide through another, the judge.[78]

Administrative agencies have been established primarily to carry out a prescribed policy. The adjudication function is simply one of the several functions by which this policy is to be effected. Severing it and setting up a separate adjudicative body could lead to conflicting interpretation of policy and eventual stagnation. Consistency of policy and centering of responsibility is particularly important in the case of regulatory agencies.

III. Judicial Review

Judicial review of administrative action provides that useful brake against possible administrative arbitrariness or excess of power in derogation of private right. Equally important, however, from the point of view of public policy and public interest, is a healthy climate for the effective discharge of the obligations of administrative agencies. The judiciary is certainly aware of these two interests, often competing, and the balancing of these forces has provided substance to the kinds of relief from administrative determinations which are afforded by the courts.

74 Republic Aviation Corp. v. NLRB, 324 U.S. (1945).
75 Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944).
76 Carrow, op. cit., pp. 96-97.
77 Brinkley v. Reesig, F. (2d) (C.C.A. 10th, 1936).
78 Davis, op. cit., p. 390.

Law of Standing: Case or Controversy: — Not anyone who thinks that an administrative action is illegal and who is willing to spend for the cost of judicial review can have a standing to challenge the administrative determination. A person's concern for law enforcement is not enough; he must have a personal and substantial interest at stake. To have a "case" or "controversy," the parties' interests must be adverse and must have come into collision.[79] One alleging the interest of a taxpayer or who relies upon his interest as a consumer does not have the standing necessary to bring judicial review.[80] When the petitioners did not suffer any wrong under the law, there is no justifiable controversy.[81] A petition to declare a statute invalid must show direct injury to the petitioner.[82]

Law of Standing: Damnum Absque Injuria. — The damage caused to a person by government action may be very great, and yet he may still not have standing to challenge because the damage may be *damnum absque injuria,* i. e., damage not recognized as a basis for relief. One threatened with direct injury by government action may not challenge that action "unless the right invaded is a legal right — one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[83]

Finality of Administrative Action: — The principle of finality of administrative action may be considered in two senses; one, in relation to the doctrine of exhaustion of administrative remedies, and the other, in connection with conclusiveness of administrative determinations. As understood in the first sense, the principle connotes that generally only *final* administrative action may be reviewed by the courts. Courts should not concern themselves with preliminary or intermediate administrative action or with action which has not finally determined a legal right. To do so would afford opportunity for constant delays in the course of the administrative proceeding.[84] However, where a party will suffer great and obvious damage if an order, preliminary and not final, is carried out and there is no way to review the order, equity jurisdiction may be invoked in order to obtain judicial review.[85]

Finality in terms of conclusiveness of administrative action means that administrative judgments usually relating to findings of fact and direction are binding on the court and the latter will not review them. It was not the purpose of Congress to allow the

79 South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300 (1892).

80 Doremus v. Board of Education, 342 U.S. 429 (1952), City of Atlanta v. Ickes, 308 U.S. 517 (1939).

81 PACU v. Sec. of Education, G. R. L-5279, Oct. 31, 1955.

82 Juan Bautista v. Mpl. Council of Mandaluyong et al, G. R. L-7200, Feb. 11, 1956. See also Custodio v. Pres. of the Senate, G. R. L-117, Nov. 7, 1945; Manila Race Horse Trainers Ass'n v. De la Fuente, G. R. L-2047, Jan. 11, 1951.

83 Tennnessee Elec. Power Co. v Tennessee Calley Authority, 306 U.S. 118 (1937).

84 Rinehart J. Swenson, Federal Administrative Law (New York: Ronald Press Co., 1952), p. 281; FPC v. Metropolitan Edison Co., 304 U.S. 375 (1938).

85 42 Am. Jur. 574.

courts to administer the law, but simply to prevent an abuse of authority given under the law.[86]

Exhaustion of Administrative Remedies: — The relationship between the administrative agencies and the courts gives rise to the problem as to which body should first take cognizance of a case, and if it is the administrative agency, when a party may take his case to court. Three doctrines are pertinent, namely: exhaustion of administrative remedies, ripeness for review, and primary jurisdiction or prior resort.

The doctrine of exhaustion of administrative remedies is based on "the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[87] The rule requires pursuing the administrative remedies to their appropriate conclusion and of awaiting their final outcome before seeking judicial intervention. Mere *initiation* of the prescribed administrative procedures is not enough.[88] The courts sometimes relax the exhaustion rule in certain cases as (1) when pursuing administrative remedies will cause irreparable injury, (2) when administrative remedies are inadequate, or (3) when an agency's action is unconstitutional, or beyond its jurisdiction, or clearly illegal. These factors usually occur in combination with each other.[89]

Ripeness for Review: — Nothing substantial hinges on the difference in terminology between "exhaustion" and "ripeness." The latter, however, is concerned with the timing of the request for judicial review of administrative interpretations not embodied either in orders or in regulations. From decided cases, it would seem that when the interpretations are in effect orders, they become subject to judicial review under the ripeness doctrine.[90]

Primary Jurisdiction: — The doctrine of primary jurisdiction, also called at times the doctrine of preliminary resort, prior resort or exclusive administrative jurisdiction, should be distinguished from the exhaustion and ripeness doctrines. Primary jurisdiction has nothing to do with judicial review of administrative action; it comes into play when an administrative agency and a court of law, by some statutory arrangement, have concurrent jurisdiction, and the question arises which of the two should make the initial decision.[91]

Uniformity in the administration of regulatory laws and the availing of the benefits of administrative expertness are the overriding reasons for the doctrine of primary jurisdiction. Its ap-

86 Lo Po v. McCoy, 8 Phil. 343 (1907); Rafferty v. Judge, 7 Phil. 164 Ngo Ti v. Shuster, 7 Phil. 355 (1907); Ang Eng Chong v. Col. of Customs, 37 Phil. 468 (1918); Mindanao Bus Co. Employees Ass'n., 71 Phil. 168 (1940).

87 Myers v. Bethlehem Shipbuilding Corp., 303 U.S. (1938).

88 Aircraft & Diesel Equipment Corp. v. Hirsch, 311 U.S. 752 (1947).

89 Davis, op. cit., p. 621.

90 Shields v. Utah Idaho Central R.R., 305 U.S. 177 (1938); Roebester Tel. Corp. v. United States, 307 U.S. 125 (1939).

91 Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

plication has been limited to questions of fact and questions requiring the skills of administrative specialists, although it has expanded to certain questions of law, particularly those the answers to which are aided by or depend in a large degree upon technical knowledge.[92]

In the Philippines free play to the doctrine of primary jurisdiction seems still to be a hope. The Supreme Court had an excellent chance to apply it in *Phil. Ass'n of Free Labor Unions v. Tan*,[93] but it was a dissenting justice who, in effect, urged its application.

Methods of Judicial Review: — In the determination of how to get a review of administrative action, the first thing to do is to look to the governing statutes. These generally provide for the particular method of review of administrative determinations, which is ordinarily exclusive.[94] The right to appeal to the courts is not inherent but purely statutory. It is not a necessary element of due process.[95]

However, in the absence of any specified statutory procedure of appeal or review, judicial redress may be had through what are known as extraordinary remedies, so called because they are granted by the courts in their sound discretion and only when there is no other adequate remedy. In the Philippines these are called special civil actions.[96] In addition the special proceeding of habeas corpus[97] and the provisional remedy of injunction[98] are also available. Furthermore, the Civil Code of the Philippines makes provision for an action for damages against a government official or employee who fails, without just cause, to perform his official duty to the detriment of the party concerned.[99]

The very profusion of these modes of judicial review, with mostly Latin names, each to be resorted to under particular circumstances, seems to be an element of weakness rather than of strength in procedural administrative law. Actions have not been entertained by the court because of the wrong choice of method of judicial review. There are, of course, instances when the court, in order to do justice, looks beyond the form of the request for review into the merit of the case.

The purpose of procedural law is to facilitate decision on the merits of the case, and this purpose has added significance in administrative law. But, as a commentator[100] has observed, speaking of American administrative law, considered the parent of Philip-

92 Hart, op. cit., p. 720, citing Texas & Pacific Ry. Co. v. American Tie & Timber Co., 234 U.S. 138 (1914).
93 G. R. L-9115, Aug. 31, 1956, 52 O. G. 5836.
94 Sotto v. Com. on Elections, 76 Phil. 516 (1946).
95 Lamb v. Phipps, supra.; Mpl. Council of Lemery v. Prov. Board of Batangas, 56 Phil 260 (1931).
96 Rules of Court, Rule 66, declaratory relief; Rule 67, certiorari, prohibition and mandamus Rule 68, quo warranto.
97 Rules of Court, Rule 102.
98 Rules of Court, Rule 60.
99 Art. 27.
100 Davis, op. cit., p. 718.

pine administrative law, "no branch of administrative law is more seriously in need of reform than the law concerning methods of judicial review" which creates "treacherous procedural snares" and prevents or delays the decision of cases on their merits.

The cure offered is to establish a single form of proceeding for all reviews of administrative action, a "petition for review." The form of proceeding should be the same, whether the action is affirmative or negative, whether it is action, inaction or failure to act, whether it is in the form of an order, a rule or any other form, whether it is the product of adjudication, rule-making or any function, and whether it is deemed to be discretionary, nondiscretionary, ministerial, administrative, executive, judicial, legislative, unclassifiable, or mixed. The reviewing court should have power to affirm, set aside, or in an appropriate case to modify the administrative action, to remand to the agency for further proceedings, and to grant appropriate injunctive, mandatory or declaratory relief. When the administrative actions is based upon a formal record, review should be upon the record.[101]

Extent of Judicial Review: — A few general observations may be made here before discussing the extent or scope of judicial review.

There is, in the first place, the presumption of validity of administrative action. Unless contradicted and overcome by other evidence, official duty is presumed to have been regularly performed and the law has been obeyed.[102] The same rule of presumed regularity and validity of an act of the legislature until satisfactorily contradicted applies to administrative rules.[103] An administrative determination is *prima facie* correct, and the burden of proof to show error is on the attacker.[104] An administrative agency is presumed to have performed its functions in a conscientious manner and administrative determinations are legal and just.[105]

In the second place, there is the consideration of the relationship between the court and administrative agencies in the administration of justice. The latter is not absolutely subordinate to the former; rather, the two are more and more considered as having a coordinate responsibility in effecting public purposes. Instead of an antagonistically-inclined supervisory agency over administrative agencies, the court is regarded as a cooperating body engaged in somewhat different tasks of government.[106] "The Supreme Court is just one of the instrumentalities created by the Constitution in the service of the people."[107] The administrator and the judge are partners in the business of law enforcement. If this is so, then

101 Davis, op. cit., p. 794.
102 Rules of Court, Rule 123. (m) & (ee).
103 Pacific State Box & Basket Co. v. White, 296 U.S. 176 (1935).
104 Fleming v. Com. of Int. Revenue, 153 F. (2d) 301, (C.C.A. 5th. 1946).
105 Manila Elec. Co. v. Reyes, G.R. 41986, Dec. 22, 1934, 61 Phil. 1015; Lorenzo v. McCoy, 15 Phil. 560 (1910); Vlegleman & Co. v. Col. of Customs, 37 Phil. 10 (1917).
106 Carrow, op. cit., p. 163.
107 Mr. Justice Perfecto, concurring in Peralta v. Dir. of Prisons, 75 Phil. 285 (1945).

judicial review of administrative action must not be considered as a form of "control" but as a step in an integrated process of common achievement, the administration of justice.[108]

Furthermore, a "day in court" is not the only means of assuring that justice will be done. It has been recognized that due process of law is not necessarily judicial process. Because no appeal to the courts is provided does not mean that statute governing an administrative agency is invalid.[109]

Generally but not always, statutes creating administrative agencies provide that administrative findings of fact based on substantial evidence are conclusive upon the courts but that all questions of law are open to judicial review. For example, the Supreme Court is given jurisdiction to review any order, ruling or decision of the Public Service Commission and to modify or set aside such order, ruling or decision, when it clearly appears that there was no evidence before the Commission to support reasonably such order, ruling or decision, or that the same is contrary to law, or that it was without the jurisdiction of the Commission.[110] In the case of the Social Security Commission, however, its decision may be reviewed both upon the law and the facts by the Court of Appeals, not by the Supreme Court.[111] Also, while the original act creating the Securities and Exchange Commission provided that in the review by the Supreme Court of the Commission's orders, "the findings of the Commission as to the facts shall be conclusive,[112] the amendatory statute[113] significantly omits this sentence. The amendment would have the effect of superseding the provision of the Rules of Courts that "only questions of law . . . may be raised in a petition for review of an order or decision rendered by the Securities and Exchange Commission."[114]

Administrative Discretion: — Involved in the scope of judicial review is the matter of discretion granted administrative agencies in their determinations. Administrative discretion is beyond the reach of the reviewing court unless there is gross abuse, in which case it is subject to judicial correction. Such discretion, however, must be informed, not arbitrary if it has to be respected by the courts. If it is exercised capriciously or with manifest injustice, if discretion is abused, the courts will not hesitate to correct the administrative determination. If an administrative agency, stating the facts upon which it proposes to rest its decision, draws a conclusion from those facts legally impossible from any point of view, the drawing of such a conclusion is an arbitrary act, an abuse of discretion, and wholy without authority. Under such circumstances, the court has jurisdiction to review.[115]

108 Swenson, op. cit., p. 234.
109 United States v. Gomez Jesus, 31 Phil. 218 (1915); Aguilar v. Navarro, 53 Phil. 893 (1931).
110 Com. Act No. 146, sec. 35.
111 Rep. Act No. 1161, sec. 5 (c).
112 Com. Act No. 83, sec. 33.
113 Act No. 635, sec. 4
114 Rule 43, sec. 2.
115 Edwards v. McCoy, 22 Phil. 508 (1912).

It is difficult to make any generalization on the matter of judicial review of administrative action. Independent of any theories or principles, the scope of judicial review varies from case to case. Ultimately, whether or not administrative action is to be subject to judicial review, even when the statute explicitly provides that administrative action and findings shall be final and conclusive, depends upon the attitude of the court. There are inarticulate discretionary elements that influence judicial attitude, among them, the character of the administrative agency, the nature of the problems with which it deals, the nature and consequences of the administrative action, the confidence which the agency has won, the degree to which the review would interfere with the agency's functions or burden the court, the nature of the proceedings before the administrative agency, and similar factors.[116]

When judges have confidence in the agency's thoroughness and integrity, a strong case is required to move the judges to dig deeply into the problem, whether the problem is regarded as one of law or fact or discretion. But when the agency's work seems slipshod or responsive to ulterior influence, conscientious judges are likely, irrespective of formulas and theories, to do what is necessary to assure that justice is done.[117]

The value of judicial review lies in its power to restrain administrative arbitrariness and absolutism. It is rarely useful, however, because of the inherent nature of the judicial process, in compelling the effective enforcement of the law by the administrators. Such enforcement must depend on other controls — internally, on the sense of responsibility and devotion to the public interest of the administrators themselves, efficient organization, especially personnel; and externally, responsibility to the executive and legislative branches, pressure from affected groups, informed and constructive criticism, and an alert and vigilant public opinion. Furthermore, the financial cost of court action may be such that a party adversely affected by an administrative decision may not appeal anymore to the courts because of limited means. The slow, grinding judicial machinery can also discourage the seeking of judicial redress from administrative action.

IV. Conclusions

Democratic Administration: — In a democratic society, securing compliance to the law ultimately rests on consent. Coercion, while a standard instrument of administrative action, has at times limited usefulness. Thus consultation, information and adequate publicity aid very much towards obedience to administrative requirements.

Full and adequate publicity of the activities of the agencies should be made to enable those whose lives and fortunes are more

116 U.S. Attorney General's Committee on Administrative Procedure, op. cit., p. 91.
117 Davis, op. cit., pp. 905-906.

intimately affected to know what is happening in time to express themselves before action has taken final form. It often happens that persons affected by administrative rules and regulations have not been sufficiently informed as to what they provide. If these parties are expected to comply with these regulations, the agencies should make them easily accessible in printed form and should be given the widest possible publicity. To me, publication in the *Official Gazette* is not enough because the truth is very few, even among lawyers and other interested professionals, are able to read this government publication regularly.

It might be possible to create a clearing-house or coordinating office on regulatory administration. All agencies performing quasi-legislative and quasi-judicial functions may be required to file with this central office all their orders and decisions and rules and regulations except those relating to internal management. The central agency would then take care of publishing these administrative determinations and rules speedily in an official weekly or monthly *Administrative Reporter, Regulatory Register,* or whatever other title is suitable. Administrative rules should not be effective until so published or until after a period of time from such publication. The office may likewise compile now and then the various administrative regulations and publish a Code of Administrative Regulations containinng all the administrative rules in effect.

Procedural Reforms: — There should be a breaking away from too much formalism in administrative proceedings and the adoption of more informal procedures. Admittedly, a certain amount of formality cannot be avoided. Yet the formalistic approach is hardly appropriate to administrative ways. Its verbal flourishes impede ready comprehensiveness except perhaps by lawyers, and not all lawyers at that. What is worse, the formalistic approach produces an unintended tightness of prescription when operating experience in general dictates a considerable measure of leeway and flexibility.[118]

There should be a continuous and organized effort at improvement of administrative procedures. The coordinating agency mentioned above may add to its tasks the responsibility of holding regular conferences of the legal officers or counsel of the different departments and agencies involved in administrative activities, for the purpose of exchanging views and information on the problems of procedure in administrative law. Experiences could be mutually shared and out of the discussions might evolve better administrative procedures.

Each administrative agency has its own objectives. Some emphasize non-coercive means of securing compliance, others lean

118 Fritz Morstein-Marx, "The Lawyers' Role in Public Administration," Yale Law Journal, April, 1946, p. 500.

more on coercive techniques. Some rely heavily on adjudicative proceedings while others have more rule-making activities than adjudication. Thus, there is no standard or uniform procedure observed by the different agencies and it seems doubtful if any one procedural statute could take care of the individual differences. Nevertheless, all administrative agencies have to follow certain fundamental requirements, that of due process being one of them. It is perhaps possible to have a procedural statute encompassing all administrative agencies without hurting the much needed flexibility in administrative proceedings. The advantage of such a general procedural statute is that administrators, practitioners and other interested parties would be provided with a standard reference in judging the legality of administrative proceedings.

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