
Judiciary: A Ladder between Inevitable Administrative Discretion and Good Governance.

Srishti Vaishnav* & Karn Marwaha**

* University Five Year Law College, University of Rajasthan,

** Student, Gujarat National Law University, Gandhinagar,

ABSTRACT

During the absolute British rule in India, from the early 19th century until the year of India's independence, India was a Police State where the main focus was only maintenance of law and order. After British rule, India witnessed a transition from being a Police State to a Welfare State. It adopted a positive policy and as a welfare state targeted to perform varied functions. This led to a huge leap in governmental functions as now, social and economic well being of citizens is also within the domain of government itself. It is for this very reason that it has become necessary to delegate some powers to the Executive authorities so that they can plugged in the loop holes in the law left by the Legislature. It is established that discretionary powers are inevitable for good governance, but absence of statutory rules regarding use of such powers have led to the situation where it has been misused by the administrative authorities. In absence of any statutory guidelines against this abuse, the courts have stepped in to check it and established various controls over discretionary action through judicial review. It is for this very reason balance between both the agencies is needed for instance, the court should not look into the merits of the decision given by administrative authorities. It can only interfere if the decision is so unreasonable that no reasonable man could have ever come to it. The major challenge here is, deciding what is unreasonable and what is not as sometimes there is only a thin line difference between right and wrong.

Key Words: *Discretion, Abuse, Separation of Powers, Rule of Law*

INTRODUCTION

For smooth functioning, the Legislature, the Judiciary and the Executive have been the three pillars set up by the mandate of the Constitution. To achieve the objectives of a welfare state it is necessary that all three of them must work in tandem. In Judiciary, the inadequacy to deal with all types of disputes and pendency in disposal of cases has led to the emergence of various administrative tribunals for interpreting laws. Similarly, the Legislature has neither time nor technique to lay down detailed laws i.e. rules and procedure on every subject. It is for this very reason that it has become necessary to delegate some powers to the Executive authorities so that they can fill the gaps in law left by the Legislature on case to case basis as per their discretion. Freedom to exercise discretion means conferring wide power on administrative authorities to choose from various alternatives in a particular situation. Discretion may best be defined as the power to make a decision that cannot be determined to be right or wrong in any objective way. This discretion so conferred is called Administrative Discretion. It is true that in any intensive form of government, the government cannot

function without the exercise of some discretion by the officials and it is evident that most of the activities are being left for the administrative authorities. Administrative discretion is in fact a pillar on which functioning of administrative authorities are based. Therefore, Administrative Discretion is an essential part of the rule making process of the executive authorities or we can say it is there for the accomplishment of rule of law policy but it is equally true that absence of statutory guidelines regarding its use may lead to arbitrary and unreasonable use of such discretion thereby causing violation of administrative discretion which led to destruction of basic principles of administrative law i.e. rule of law and separation of power. This violation includes failure to use discretion or excess/abuse of discretion by administrative authorities. The Abuse of Administrative Discretion can take various forms for instance, acting on mala fide grounds or without jurisdiction, ignoring relevant considerations and considering irrelevant ones, non observance of natural justice, arbitrary use of power granted by law or any other unreasonableness. Each of these grounds would be dealt with in detail in this project. Purpose of this project is to deal with the concept of discretion i.e. how it has come into picture, how far it is necessary in smooth functioning of authorities, to demonstrate the various forms which could be considered as abuse of discretionary power and role of courts i.e. how far courts have considered the power within the prescribed ambit or we could say how far court is willing to accept or tolerate it.

The project shall also be dealing with the role that courts have played in maintaining the proper balance between authorized power and discretion which is absolute in nature. Courts have evolved various tools to control such arbitrarily exercising of powers by the authority.

Courts have played pivotal role and ensures that the use discretion is not arbitrary and unreasonable and it should work for the objects for which they have been adopted. Further, the courts have employed the English rule of Proportionality to ensure that the response of the authority to actions by individuals is proportional and not grossly unjust. But, the interference of court is still on limited grounds only as it still respects the decision making process of administrative authorities. The only role of court is to check that such decisions are fair, in conformity with natural justice and establishing the principles of rule of law and separation of power. This tends to balance the freedom given to administrative authorities to decide matters by using best of their judgment and the overarching judicial control. This balance makes all the difference: on the one side lies unfettered power and on the other, judicial supremacy. Middle ground is perhaps the best place to be, so that the aim for which such discretionary powers have been granted to the authorities could be sustained, which will definitely bring public benefits at large.

DISCRETION

Discretion is the power which is usually given by the statute itself to the administrative authority so that administrative authority could have a choice among the competitive consideration. A discretionary power empowers the administrative authorities with vast range of authorities to perform.

Their power serve on the one hand the purpose of simple ministerial tasks like maintenance of birth and death register and on the other hand those which seriously affect the rights of an individual, e.g. acquisition of property, regulation of trade, industry or business, inquiry, seizer, confiscation and destruction of property.ⁱ

The term discretion itself implies vigilance, care, caution and circumspection. When the legislature confers discretion on a court of law or on an administrative authority, it also imposes responsibility that such discretion is exercised honestly, properly and reasonablyⁱⁱ

Prof. Freundⁱⁱⁱ has given a very good analysis of administrative discretion. He says “When we speak of administrative discretion, we mean that a determination must be reached, in part at least, upon the basis of consideration not entirely susceptible of proof or disproof”

In Oxford Dictionary of law, administrative powers have been defined as “the discretionary powers of an executive nature that are conferred by the legislature on government, ministers, public and local authorities and other bodies and persons for the purpose of giving detailed effect to the policy intended by the legislature itself.”

Administrative actions are either ministerial or discretionary. A ministerial action is one where the authority has a duty to do thing in a particular way. Such actions are, however exceptional. In most of the administrative actions, the administrative authority has the power either to act or not to act in one way or the other. This power to act or not to act or to act in one way or other is called discretionary power. Where a statute uses the word ‘may’ before describing the power, for example, ‘the collector may confiscate goods’ or the commissioner of police ‘may detain a person’ the word ‘may’ indicates the freedom of authority either to act or not to act or to act in a one way or other.^{iv}

All powers have legal limits. There must be control over discretionary power of the administration so that there will be ‘government of laws and not of men’. It is not only the power but the duties of the court to see that the discretionary power conferred on administration may not be abused.^v

ABUSE OF DISCRETION

An authority is said to have abused its discretion when it exercises its power in bad faith or for an improper purpose or leaves out a relevant consideration or on extraneous consideration, or does not exercise the power by itself but of the instance and discretion of someone else.

These various forms of abuse of discretion may even overlap in certain situations. Take the example of the black teacher, who was dismissed because she had black face. In one sense, it is taking into account irrelevant or extraneous considerations. In one sense it is unreasonable. In another sense, it is improper exercise of power and might be described as being done in bad faith. All these things ‘overlap to a very great extent’ and ‘run into one another.’

6.1 Forms of Abuse

Mala fides

Mala fides or bad faith means dishonest intention or corrupt motive. It also covers the cases where the authority concerned is motivated by personal spite, vengeance and animosity towards those who are directly affected by its exercise.^{vi} Although it may be difficult to determine whether or not the authority has abused its powers in a particular case because of the broad terms in which the statute in question may have conferred power on it, the administration action may, nevertheless, be declared bad if the motivation behind the action is not honest.

Mala fides by definition implies something done in bad faith, with a deliberate and fraudulent motive and dishonest intention. Indian Law had interpreted it both widely as well as narrowly. Earlier it was believed that there was no element of moral turpitude involved in mala fide action and all that was required was the deviation from the provisions of the statute and acting in a way, foreign to its purpose.

Fundamental to the legitimacy of public decision making is the principle that official decisions should not be infected with improper motives such as fraud or dishonestly, malice or personal self interest. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.^{vii}

In *Pratap Singh v. State of Punjab*^{viii}, the Supreme Court used the phrase “mala fides” for initiating administrative action against an individual “for satisfying a private or personal grudge of the authority.” In this case, the appellant, a civil surgeon in the employment of the state government, was initially granted leave preparatory to retirement, but, subsequently, it was revoked, and he was placed under suspension and disciplinary action was started against him on the charge that he had accepted a bribe of Rs. 16/- from some patient prior to going on leave. The appellant alleged that the disciplinary action against him had been initiated at the instance of the Chief Minister to wreak personal vengeance on him as he had refused to yield to the illegal demands of the Chief Minister and members of his family. The Supreme Court accepted the contention, held the exercise of power to be mala fide and quashed the order.

Improper purpose

If a statute confers power for one purpose, its use for a different purpose will not be regarded as a valid exercise of the powers and the same may be quashed.^{ix} The cases of exercise of discretionary power from improper purposes have increased in modern times because broad discretionary power has been given to administrative authorities. Where the power is exercised for a purpose different from that specified in provisions of the statute, the court will declare the exercise of the power as ultra vires. Where the land is acquired by Municipal Corporation ostensibly for a public purpose but in fact to enable another body to acquire it through the medium of corporation for some other purpose, the acquisition order would be quashed by the court. Similarly, where Municipal Corporation refused to approve the construction of buildings with a view to pressurizing the petitioner to provide drainage for the adjoining building, and where the construction scheme of the petitioner does not contravene.^x However, courts can limit this seemingly unfettered power by checking the original intent of the statute in vesting the discretionary power. The motive behind an administrative action should be in line with the statutory objective.^{xi}

This check is different from mala fides as here, there is no underlying element of malice, caprice or animosity. This has been elucidated in *S.R. Venkatraman v. Union of India*^{xii} wherein under a statute; a public servant could be retired in public interest by taking assent from the President. In the instant case, the Appellant was compulsorily retired on her attaining the age of 50 years. She alleged that there was non-application of mind and that her retirement was carried out for extraneous reasons, outside the scope of the statute. This was established from the fact that there was nothing in her service record to justify premature retirement. The court further held that in such a case where discretionary power is used for an unauthorized purpose, the element of good faith or bad faith is irrelevant.

Irrelevant consideration

A discretionary power must be exercised on relevant and not on irrelevant or extraneous considerations. It means that power must be exercised taking into account the considerations mentioned in the statute. If the statute mentions no such considerations, then the power is to be exercised on considerations relevant to the purpose for which it is conferred. Where the authority concerned attends to or take into account circumstances, events, or matter wholly irrelevant or extraneous to those mentioned in the statute, the administrative action will be quashed by the court.^{xiii} If the authority pays attention to, or takes into account wholly irrelevant circumstances, events or matters then the administrative action is ultra vires and will be quashed. Thus where an administrative order is passed on formal considerations which are extraneous, it will quashed. The exercise of discretionary power should not be influenced by considerations that cannot be lawfully taken into account. The determination of the considerations that whether consideration is relevant or irrelevant is wholly based on the provisions of the statute.

When the discretionary power has been influenced by considerations that cannot lawfully be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised.^{xiv}

Although discretion allows an authority to choose between alternative actions but this discretion can only be exercise on relevant and proper grounds. All discretionary powers must be in conformance to the considerations laid down in the statute. Placing reliance on irrelevant grounds will vitiate the administrative action. The court has some freedom in reviewing administrative action in this regard. When considerations are laid down in the statute, the court can check for conformance with the provisions of the statute. In case no considerations are delineated, the court can look into the purposes and aim of the statute to fix consideration and place fetters on the discretion allowed.

The decision of the House of the Lords in *Padfield v. Minister of Agriculture*^{xv}, lays down the parameters of judicial control of administrative discretion in England. In this case under the statutory milk-marketing scheme, the prices paid to milk producers in different areas are fixed by the Milk Marketing Board which consists of representatives of the producers. The producers near the area of London complained that though they were in proximity of the London market, yet the price paid did not reflect the higher value of their milk, and requested the minister to refer the matter to the Statutory Committee for Complaints. To direct or not to direct a complaint to the committee was the sole discretion of the minister. The minister in exercise of his unfettered discretion refused to direct the complaint. One of the reasons given by the ministry was that minister would be in a difficult political position if, despite the committee's acceptance of the complaint, the minister should take no action. The House of Lords held that the minister's reasons were unsatisfactory and his decision was unreasonable. The purpose of the Act was that every genuine complaint must be forwarded to the committee and anything contrary to this would frustrate that purpose

In *Ram Manohar Lohia v. Bihar*^{xvi}, the petitioner was detained under the Defence of India Rules, 1962 to prevent him from acting in a manner prejudicial to the maintenance of "law and order", whereas the rules permitted detention to prevent subversion of "public order". The court struck down the order as, in its opinion, the two concepts were not the same, "law and order" being wider than "public order".

In *Barium Chemicals Ltd. v. Company Law Board*^{xvii}, this case shows a definite orientation in the judicial behavior for an effective control of administrative discretion in India. In this case Company Law Board exercising its power under section 237 of the Companies Act 1956 ordered an investigation into the affairs of Barium Chemicals Ltd. The basis of the exercise of discretion for ordering investigation was that due to faulty planning the company incurred a loss, as a result of which the value of the shares had fallen and many eminent persons had resigned from the Board of Directors. The court quashed the order of the Board on ground that the basis of the exercise of discretion is extraneous to the factors mentioned in section 237.

In *Rampur Distillery Co. Ltd. v. Company Law Board*^{xviii}, the Company Law Board exercising wide discretionary power under Section 326 of the Companies Act, 1956 in the matter of renewal of a managing agency refused approval for the renewal to the managing agents of the Rampur Distillery. The reason given by the Board for its action related to the past conduct of the managing agent. The Vivian Bose Enquiry Commission had found these managing agents guilty of gross misconduct during the year 1946-47 in relation to other companies. The Supreme Court, though it did not find any fault in taking into consideration the past conduct, held the order bad, because the Board did not take into consideration the present acts which were very relevant factors in judging suitability. Leaving out relevant consideration

While exercising its discretionary power, if an administrative authority ignores relevant considerations, its decision will be invalid. An authority must take into account the considerations which have been laid down by the statute either expressly or impliedly. In case the statute does not prescribe any considerations but confers power in a general way, the court may still imply some relevant considerations for the exercise of the power and quash an order because the concerned authority did not take these into account. Unless detailed reasons are given from which it can be inferred that the authority took action after ignoring material considerations it is hard to have the action quashed on this basis.

In *Shanmugam v. S.K.V.S. (P) Ltd.*^{xix}, a regional transport authority called for applications for the grant of stage of carriage permit for a certain route. Under the statute, the authority had broad powers to grant the permits in public interest, but the government attempted to control the discretion of the authority by prescribing a marking system under which marks were allotted to different applicants on the basis of viable unit, workshop, residence (branch office) on the route, experience and special circumstances. In the instant case, the branch office on the route, which the petitioner had, was ignored on the ground that he had branches elsewhere. It was held that the authority had ignored a relevant consideration. It was an untenable position to take that even if the applicant had a well-equipped branch on the route concerned; it would be ignored if the applicant “has some other branch somewhere unconnected with that route”.

Mixed considerations

Judiciary on the question of exceed consideration have adopted different approaches, for instance, in Preventive detention cases, court held that mixed consideration i.e. if the decision is based on both relevant and irrelevant consideration, same will be held illegal.

In *Shibbanlal v. State of Uttar Pradesh*^{xx}, the petitioner was detained on two grounds: first, that his activities were prejudicial to the maintenance of supplies essential to the community,

and second, that his activities were injurious to the maintenance of public order. Later the government revoked his detention on the first ground as either it was unsubstantial or non-existent but continued it on the second. The court quashed the original detention order. Unreasonable exercise of discretion

Even though authority has followed the law and acted on relevant consideration, it could lead to unreasonable exercise of discretion. It could be done through giving weight to other factors which are in conflict with some constitutional provisions.

Associated Provincial Picture Houses Ltd. v Wednesbury Corporation^{xxi} is an English law case that sets out the standard of unreasonableness of public-body decisions that would make them liable to be quashed on judicial review, known as wednesbury unreasonableness. The court gave three conditions on which it would intervene to correct a bad administrative decision, including on grounds of its unreasonableness

In 1947 Associated Provincial Picture Houses was granted a licence by the Wednesbury Corporation in Staffordshire to operate a cinema on condition that no children under 15 were admitted on Sundays. Associated Provincial Picture Houses sought a declaration that such a condition was unacceptable and outside the power of the Corporation to impose.

The court held that it could not intervene to overturn the decision of the defendant simply because the court disagreed with it. To have the right to intervene, the court would have to conclude that: In making the decision, the defendant took into account factors that ought not to have been taken into account, or The defendant failed to take into account factors that ought to have been taken into account, or The decision was so unreasonable that no reasonable authority would ever consider imposing it. The court held that the decision did not fall into any of these categories and the claim failed. As Lord Greene, M. R. said (at 229)

“ It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.”

In R.D. Shetty v. International Airport Authority^{xxii}, The tenders for running a restaurant were invited by Airport Authority from 'registered second class hoteliers'. It was clearly stipulated that acceptance of tender would rest with the Airport Director who can reject or accept any tender without assigning any reason. The highest tender was accepted but the tenderer was not an hotelier at all. A writ petition was filed by a person who was himself neither a tenderer nor an hotelier. His grievance was that he was in the same position as the successful tenderer because if an essential condition could be ignored in the tender case why not in the petition.

The SC accepted the plea of locus standi in challenging the administrative action J. Bhagwati held. :

- (1) Exercise of discretion is an inseparable part of sound administration.
- (2) It is well settled rule of act law that an executive authority must be rigorously held to the standard by which it professes its action to be judged.
- (3) It is indeed unthinkable that in a democracy government by the rule of the executive government or any of its officers should possess arbitrary powers over the interest of an individual. Every action of the govt. must be influenced with reasons and should be free from arbitrariness.
- (4) The govt. cannot be permitted to say that it will give jobs or enter into contract only in favor of those having gray hair or belonging to a particular party. Exercise of discretion must not be arbitrary, fanciful and influenced by extraneous considerations. In matters of discretion the choice must be dictated by public interest and must not be unprincipled or unreasonable.

CONCLUSION

The concept of Administrative Discretion is necessary as well as an essential part of the rule making process of the administrative authorities. It empowers them to make rules and regulations that the Legislature fails to do for a number of reasons out which the major ones are lack of time and technique, which clearly establishes that administrative discretion directly affects the functioning of the organs positively. Administrative Discretion is in fact the essence of working of administrative authorities. Discretion means power but we should not forget that power comes with several duties, which needs to be fulfilled otherwise that power leads to arbitrariness. Outcome of this project clearly shows that on one hand giving discretionary powers are inevitable i.e. without which proper functioning could not be guaranteed but on the other hand it also show that power could not be exercised upon whims and fancies of administrative authorities. The abuse of administrative discretion leads to arbitrariness which is detrimental to the interest of public at large. Here, it is important to state that the main principle on which the Administrative Law is based is Separation of Power and Rule of Law and no discretionary power should be used in a way which outweighs or is detrimental to this basic principle of Administrative Law. To prevent and check the abuse of administrative discretion, the role of Judiciary is truly commendable. It ensures that the Administrative Discretion remains the integral part of rule making process but also prevents its arbitrary and unreasonable use. But it is to be kept in mind that an action of any authority cannot be held to be unreasonable merely because the courts think it is unreasonable.

It should be understood that courts and administrative authorities, both consists of human agencies and therefore, both of them, even after being reasonable on their parts may come to opposite conclusion on the same set of facts. It is for this very reason balance between both the agencies is needed for instance, the court cannot sit in appeal over the decision of administrative authorities. It can only interfere if the decision is so unreasonable that no reasonable man could have ever come to it. The major challenge here is, deciding what is unreasonable and what is not as sometimes there is only a thin line difference between right and wrong or in this case reasonable and unreasonable. The deciding factor here is society and the impact of such decision on society. The decision is unreasonable if it is perverse or there is no justification to explain such conclusion. It applies to a decision which defies logic

or is against moral standards thereby making the decision so outrageous that no sensible person who had applied his mind to the question to be decided could have arrived at it. Therefore, the Judiciary, the Legislature and the Executive all are required to work in semblance by creating such balance that none of their domain appears to be encroached and nor any of them fails or exceeds the working sphere assigned to them. A middle path is needed.

ENDNOTES:

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- ⁱⁱ De Smith, Judicial Review of Administrative Action (1995) at p. 296
- ⁱⁱⁱ Freund-Administrative power over persons and property, p. 71 (1928).
- ^{iv} Sathe, SP, Administrative law, 385 (7th ed., Lexis Nexis Butterworths Wadhwa)
- ^v Wade & Forsyth, Administrative Law (2005) at p. 343
- ^{vi} Dr. Kesari, U.P.D, Administrative law, 267 (19th edition, 2012, central law publications)
- ^{vii} De smiths, Judicial Review, 266, (6th edition, 2007, Sweet & Maxwell Limited.)
- ^{viii} Pratap Singh v. State of Punjab, AIR 1964 SC 72
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- ^{xvi} Ram Manohar Lohia v. Bihar , AIR 1966 SC 470
- ^{xvii} Barium Chemicals Ltd. v. [Company Law](#) Board, 1966 SCR 311
- ^{xviii} Rampur Distillery Co. Ltd. v. [Company Law](#) Board, AIR 1977 SC 183
- ^{xix} Shanmugam v. S.K.V.S. (P) Ltd , AIR 1963 SC 1626
- ^{xx} Shibbanlal v. State of Uttar Pradesh, AIR 1954 SC 179
- ^{xxi} Associated Provincial Picture Houses Ltd. v Wednesbury Corporation, [1948] 1 KB 223
- ^{xxii} R.D. Shetty v. International Airport Authority, 1979 (3) SCC 488

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 - viii Ranjit Singh v. Union of India, AIR 1981 SC 461
 - ix S.R. Venkataraman v. Union of India, 1979 SCR (2) 202
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