Administrative Discretion

Discretion lies at the heart of administrative activity. It means freedom to act at one’s own pleasure. It gives an authority to an individual to choose from various available options. While an individual exercise his discretion he does it according to his prudence. Therefore, if an individual chooses out of his own pleasure or authority or prudence his discretion can go to any limit. But when the word discretion is preceded by the word ‘administrative’ it’s meaning changes a lot. When it is ‘administrative discretion’ then the authority or an officer is supposed to exercise his judgments. Therefore, administrative discretion presumes that the authority or officer concerned shall act fair and judiciously and whatever his judgment is, that is based upon his impartial thinking.

Need of granting administrative discretion to government authorities

In modern time, no government can perform its function without the grant of discretionary power to administrative authorities. Under the modern political philosophy of a welfare state, there has been a tremendous state regulation over human affairs in all democracies. This philosophy has led to a great extension of government responsibility for providing social services. Also, the government has assumed much greater responsibility for the management of the economy. Thus, the State has enacted legislation for urban development, slum-development, planning, economic regulation etc. Public transport, health, electricity, coal mining have all been brought under state control, All this has necessitated conferment of broad discretionary powers on the government, its officials and instrumentalities.

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1 This Phrase is to be understood in a broad sense to include, where appropriate and even if not expressly stated, the process of making rules as well as decisions of individual application; and it is not restricted to purely ‘procedural’ issues.

2 Davidson, Thomas, Chambers Twentieth Century Dictionary of the English Language, (1903), available on archive.org/details/chambersstwentie00daviala.

Also, at times need is felt for technical or other expertise in regulating a particular activity and it is felt that expertise will develop on a case to case basis. To achieve these objectives viz., expedition, flexibility and expertise in administrative decision making, it is felt necessary that, to some extent, officials must be allowed some choice as to when, how, and whether they will act. The officials ought to be given some choice in the matter of deciding specific cases. The reason is that more often than not, nowadays the Administration is called upon to handle intricate problems involving investigation of facts, applying law to those facts, making of choices and exercising discretion before taking an action. It is, therefore, necessary to control “discretion” in some measure, to restrain it from turning into unrestricted absolutism. Thus, the court has developed the doctrine of “excessive delegation of discretion” by invoking certain fundamental rights. The doctrine envisages that conferral of too broad and uncanalised discretion on the administration is invalid. Discretionary power ought to be hedged by policy, standards, guidelines and procedural safeguards; otherwise the courts may declare the statutory provision conferring sweeping discretion as void.

Definition and Meaning of Administrative Discretion

The administrative discretion means power of being administratively discreet. It implies authority to do an act, or to decide a matter of discretion. The administrative authority vested with discretion is suffered with an option, and thus is free to act in its discretion. Legally he cannot be compelled to pass an order, if he is under no compelling duty to do so. He is free to act, if he deems necessary or if he is satisfied of the immediacy of the official action on his part. For what he does he is neither obliged to give reason, nor can be required to answer for it in a law court. His responsibility lies only to his superiors and the Government.

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In its ordinary meaning, the word ‘discretion’ signifies unrestrained exercise of choice or will; freedom to act according to one’s own judgment; unrestrained exercise of will; the liberty or power of acting without control other than one’s own judgment. But when applied to public functionaries, it means a power of right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their judgment and conscience of others. An administrative authority could be said to be vested with a discretion where the legislature empowers the authority to choose between two alternative courses of action\(^7\) without any objective standard, e.g., whether to act or not to act or when and how to act. If only one course can lawfully be adopted, the decision reached could not be the result of discretion, but the performance of duty. Situations for the exercise of discretion can arise where the end may be specified but choice may exist as to how the end should be reached. An authority may, thus, have discretion whether to exercise a power and discretion in the manner of exercise it. But there is no finality or absoluteness about these\(^8\). In the case of *Sharp v. Winfield*\(^9\), Lord Halsbury has mentioned about limitations that are inherent in the exercise of discretion in the following words:

…..‘Discretion’ means when it is said that something is to be done with the discretion of authorities that something is to be done according to the rules of reason and justice and not according to private opinion. It is not to be arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit which an honest man competent to the discharge of his office ought to confine himself.

It is not possible to prescribe any special phraseology for conferring discretionary powers on administrative officers or tribunals. Ordinarily, the words ‘may’, ‘it shall be lawful’, ‘adequate’, ‘advisable’, ‘appropriate’, ‘beneficial’, ‘expedient’, ‘sufficient’, ‘equitable’ etc are used. These are not words of compulsion. They are enabling words and

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9 (1891) AC 173.
they only confer capacity, power of authority and imply discretion.\(^{10}\) The use of the words ‘shall have power’ also connotes the same idea.\(^{11}\)

The definition of Administrative Discretion is given by many of the thinkers but there are few notable definitions. The definition of ‘administrative discretion’ given by Professor Freund\(^{12}\) as follow:

> When we speak of administrative discretion, we mean that a determination may be reached; in part at least, upon the basis of consideration not entirely susceptible of proof or disproof....It may be practically convenient to say that discretion includes the case in which the ascertainment of fact is legitimately left to administrative determination.

Justice Coke, in Rooke's case,\(^{13}\) proclaims “Discretion” as “it is a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colorable glosses and pretences, and not to do according to their will and private affection.”

In the words of Kenneth Culp Davis,\(^{14}\), discretion implies power to make a choice between an alternative course of action or inaction.

According to Lord Diplock,\(^{15}\) the very concept of administrative discretion involves a right to choose between more than one possible cause of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred.

From these definitions, it is clear that if complete freedom of action is given to the administration, it would lead to the exercise of powers in an arbitrary manner seriously threatening individual liberty. What is therefore, necessary is to control discretion in some measure, to restrain it from turning into unrestricted absolutism. The judicial quest in administrative matters is, thus, to strike the just balance between the administrative


\(^{13}\) (1598) 5 Co. Rep. 99b.

\(^{14}\) Supra note 7 at 4.

\(^{15}\) Secretary of State for Education and Science v. Metropolitan Borough Council Tameside, (1976) 3 All ER 665.
discretion to decide matters as per government policy and the need of fairness.\textsuperscript{16} Judicial review, thus, aims to protect citizens from abuse or misuse of power by any branch of the state.

**Types of Administrative Discretion**

The term discretion has at least five different uses in administrative law.\textsuperscript{17} Out of five, only the first three types of discretion-individualizing discretion, executing discretion and policymaking discretion are reviewable in the traditional sense. That is, in only these three types of discretion are the core discretionary decisions reviewable.\textsuperscript{18} Even as to these, the extent of review is limited by the applicable standards of review, almost invariably arbitrariness or abuse of discretion. These standards of review, however, seem to have different meaning as they apply to each of these three types of discretion.

The remaining two uses of the term discretion-unbridled and numinous do not permit judicial review of the core discretionary decisions. That does not mean, however, that a reviewing court has no function with respect to such decisions, rather, it means that the judicial functions must focus on factors other than the core discretionary decision itself.

**Individualizing Discretion**

The first, and perhaps the most pervasive, use of discretion in administrative law is the power to make individualizing decisions in administering a program made up of general rules-statutory, judicial, or administrative. Discretion, used in this way, refers to the discretionary decision maker’s authority to adjust applicable rules at the margin in the


\textsuperscript{17} This article identifies five discrete uses of discretion. The categories are not airtight, and the discretion at issue in individual cases will overlap. Nevertheless, the law will be improved if courts indicate which type of discretion they believe is under review. Charles H.Koch, "Judicial Review of Administrative Discretion" (1986), faculty publications, paper 624. http://scholarship.law.wm.edu/facpubs /624.

\textsuperscript{18} "core discretionary decision" refers to the central issue in the administrative determination involving the exercise of discretion.
order to improve a program’s ability to do individual justice. That is, even where the general rule mandates a result, the implementing decision maker has some power to modify that result in a specific application if doing so will better carry out the general spirit of the program. Such discretion incorporates flexibility and a sense of fairness; most consider it to be very positive features of the administrative process.

The benefits of individual discretion create a dilemma for administrative theory. The official is given freedom, not license. The main question is to what extent then should administrative officials be free, without judicial interference, to exercise individualizing discretion? The answer to this question is because administrative officials have no clear advantage in the exercise of individualizing discretion, judicial review is limited only by practical considerations such as administrative and judicial economy. Restrained judicial review protects courts from the burden of actively supervising the mass of individualizing decisions and protects the agencies, which would find it difficult to administer these programs if their individual’s decisions were frequently subjected to close judicial scrutiny. Judicial restraint then must be exercised with considerable flexibility.

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19 A classic example of this form of discretion is an equity court exercising its injunction powers. In that context, 'the discretion comes in the form of dispensation-the court is giving or is being asked to give dispensation from its own rules which otherwise dictate the issuance of the injunction.


21 Judge Friendly, for example, urged with respect to judicial review of individualizing discretion in the mass justice system: “Judicial review in the area of mass justice has largely been limited to questions of fair procedure, and there has been little attempt to obtain review for lack of substantial evidence or even for arbitrariness or capriciousness. Would that it may remain so! The spectacle of a new source of litigation of this magnitude is frightening....Surely this is an area where courts should exercise self-restraint; the agencies can promote this by fair procedures and adequate statements of reasons, remembering that one sufficiently outrageous example may burst the like.”
Executing Discretion

A Second use of the term discretion connotes a mandate to complete a task begun by the authorizing body. Typically, the term is used when congress has conveyed power to an agency through generalized, vague, or incomplete instructions. Statutory authorizations often contain standards such as “feasible” and “Public Interest.” Although these terms can invoke agency policymaking discretion, they more frequently demand a simple extension of legislative mandate to carry forward the work begin by the authorizing statute.

Whatever the source of executing discretion, the reviewing court has substantial authority over the exercise of such discretion. Although courts no longer seriously consider striking down executing discretion as an illegal delegation, the law may impose stricter scrutiny of the exercise of executing discretion than of the other types of discretion. In addition, when the agency is filling in gaps unintentionally left in the legislation, a reviewing court might properly scrutinize agency action even more closely than when congress clearly intended the agency to fill in the details.

Policymaking Discretion

The third use of the term discretion covers the authority to make “policy.” Policymaking is considered particularly appropriate for administrative agencies. It is often characterized as the zenith of administrative authority, the point at which courts have the least authority and agencies the most. When policymaking discretion is exercised by an agency, it appears similar to executive discretion and is performing

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24 Policy is an imprecise word. Policy includes those decisions that advance or protect some collective goal of the community as a whole (as opposed to those decisions that respect or secure some individual or group right). See Dworkin, Hard cases, 88 HARV.L.REV.1057,1058(1975).
25 Policymaking is the major work of government. While modern government is expected to provide individual dispute-resolution machinery, the fundamental purpose of government is to carry out general societal goals. As has often been observed, in our complicated society the legislative branch cannot perform all or perhaps even a major part of this function. See generally Mashaw, prodelegation: Why Administrator Should Make Political Decisions, 1 J.L.ECON. & ORG.81 (1985). Thus, agencies are often given major policymaking functions.
functions similar to those performed by the legislative body itself rather than expanding on the work of the legislative body.\textsuperscript{26} It directly involves two major principles of administrative law \textit{i.e.} Public interest and expertise. The broad goal of public interest is the administrative system’s effort to build quasi-democratic values into administrative decisions. The incorporations of expertise attempts to consciously shift the decision into the hands of a body specially designed for that purpose.

**Scope and Extent of Administrative Discretion**

The scope of administrative discretion should be spelled out from the statutory provisions and the purposes of the validly exercisable power under the given statute. The statutory authority even if widely worded, is not without certain qualifications and limitations imposed by judicial construction and interpretation of statutory provisions, rule of procedural and substantive ultra vires and prohibition against colorable use of power. It is limited by its own definition, and its scope can be ascertained only in the context of the state of affairs contemplated by the legislature. No administrative authority can fix the limits of its power. The scope and limits of the power can be ascertained only by judicial construction of the statutory provision.\textsuperscript{27} The Supreme Court in \textit{U. P. State Road Transport Corp. v. Mohd. Ismail},\textsuperscript{28} rightly observed that the discretion allowed by the statute to the holder of an office is intended to be exercised “according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.”

Discretionary power may be conferred generally or with a duty attached to the exercise of that power, where the power and duty to exercise it go together, the authority empowered is under a statutory liability to exercise its discretionary power and if it

\textsuperscript{26} Levin, \textit{Identifying Questions of Law in Administrative Law}, 74 Geo.L.J.1,22 (1985).
\textsuperscript{27} Supra note 6 at 99.
\textsuperscript{28} AIR 1991 SC 1999.
refused to do so, the court of law may compel its exercise. In England the refusal to exercise discretionary power, where it imposes a duty to exercise it, entails a liability to damages. But in India, no such law has developed till now, whereby the Government could be held liable for damages caused to any individual on account of refusal to perform it or performing it negligently. The court may compel the authority to exercise their discretion where they have been expressly invested with such power. If the authority concerned exercises his discretion honestly and in the spirit of the statute, no mandamus will be issued directing him to exercise his discretion in a particular way.

There is a distinction between refusal to exercise the discretion and the manner of its exercise. The question for determination may be, whether the authority is obligated to exercise its power, but the question as to how is to be determined is not open to judicial scrutiny. The Courts do not probe into the merits of a case. It is true that where the authority has not acted according to law, the courts would no doubt quash the administrative action but it could not direct the authority to act in a particular manner. Where the transport authority issued a permit for one year while the statute required renewals of the permit for a period between three to five years, but it could not specify the period itself, it is open to the Supreme Court to direct the authority to carry out the duty in accordance with law.

In Clariant International Ltd v. Securities and Exchange Board of India, the court held that Board having a discretionary jurisdiction must exercise the same strictly in accordance with law and judiciously. Such discretion must be a sound exercise in law. The discretionary jurisdiction, it is well known, although may be of wide amplitude as the expression “as it deems fit” has been used but in view of the fact that civil consequences would ensue by reason thereof, the same must be exercised is subject to appeal as also judicial review, and thus, must also answer the test of reasonableness. Moreover, the

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31 Union of India v. Indo-Afghan Agencies, AIR 1968 SC 718.
discretionary jurisdiction has to be exercised keeping in view the purpose for which it is conferred, the object sought to be achieved and the reasons for granting such wide discretion and must be exercised within the four corners of the statute and should be open, fair, honest and completely above board.

In *P. Janardhan Reddy v. State of M.P.*, the court held that appointment of an inquiry Commission is a matter falling within the discretion of the government. In this case A.P. Government appointed an inquiry Commission and the Commission of Inquiry Act, 1952, which empowers the government that it can appoint an inquiry commission if 'it is of opinion that it is necessary to do so' to make an inquiry into any definite matter of public importance. There was a serious matter of public importance which was giving rise to criticism from various quarters which called for a proper inquiry. The Court further clarified that report of the inquiry commission is of a recommendatory nature and its finding are meant for the information of the government and not binding on the courts or the police.

**Administrative Discretion and Fundamental Rights**

Administrative discretion is often challenged on the ground that it violates one or more of the fundamental rights guaranteed by part III of the constitution of India. Article 14 and 19 of the Constitution provides for equality before law and equal protection of laws and various freedoms such as: (i) freedom of speech and expression; (ii) freedom to assemble peacefully and without arms; (iii) freedom to form associations or unions; (iv) freedom to move freely throughout the territory of India; (v) freedom to reside and settle in any part of India; and (vi) freedom to practice any profession or to carry on any occupations, trade and business to all persons in India. If any administrative authority by exercising its discretionary power in an arbitrary manner takes away or violates this

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33 AIR 2001 SC 2631.
fundamental right of equality and freedom, it is void and having no validity in the eyes of law.\textsuperscript{36}

In \textit{Southern Technologies Ltd. v. CIT},\textsuperscript{37} the Supreme Court while dealing with constitutional validity of ss.36 (1) (vii-a) and 43-D of the Income Tax Act, 1961 held that in the context of Art. 14, the test to be applied is that of "rational/intelligible differentia" having nexus with the object sought to be achieved. At times, a statute may not itself make a classification, but may leave it to the executive to make the same for the purpose of applying the law then it may confer very broad discretion on the administration without specifying any norms or principles or policy to regulate its exercise. But administrative action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favoritisms or nepotism, in pursuit of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Art. 14.\textsuperscript{38} This is the mandate of Art. 14 of the Constitution of India.\textsuperscript{39}

It is true that the state or its tendering authority is bound to give effect to the essential conditions of eligibility stated in a tender document and is not entitled to waive such conditions but that does not take away its administrative discretion to cancel the entire tender process in public interest provided such action is not actuated with ulterior motive or is otherwise not vitiated by any vice of arbitrariness or irrationality or in violation of some statutory provision. It is always open to the State to give effect to new policy which is wished to pursue keeping in view overriding public interest and subject to the principles of Wednesbury reasonableness.\textsuperscript{40} Only because a wide discretionary power

\textsuperscript{38} Article 14: The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.
\textsuperscript{39} In Re Special Reference No 1 of 2012, (2012) 7 MLJ 532 (SC) : (2012) 10 SCC 1; Article 14: The state shall not deny to any person equality before the law or the equal protection of the law within the territory of India.
\textsuperscript{40} Shimmit Utsch India Private Limited v. West Bengal Transport Infrastructure Development Corporation Limited, (2010) 6 SCC 303, 329 (para 64).
has been conferred on the authorities, that by itself would not lead to a presumption that
the same is capable of misuse or on that count alone the provisions of Art. 14 of the
Constitution would be attracted.\(^{41}\) Thus, the courts through judicial review put a control
over the discretionary powers of administration. Some of the guidelines culled out from
various judicial decisions are:

(i) The absence of arbitrary power is an important element of rule of law. Discretion when
conferred upon executive authorities must be confined within clearly defined limits.\(^{42}\)

(ii) Discretionary power by itself is not violative if it is controlled and guided.\(^{43}\)

(iii) The discretion vested has to be looked into from two points of view, viz.,
(a) does it admit of the possibility of any real and substantial
discrimination, and (b) does it impinge on a fundamental right guaranteed
by the constitution. Article 14 can be invoked only when both of these
conditions are satisfied.\(^{44}\)

(iv) The bare possibility that the powers may be misused or abused cannot, per
se, induce the court to deny the existence of the powers.\(^{45}\)

(v) Discretionary power to be reasonable must not to be unguided or
uncontrolled.\(^{46}\)

(vi) Mere absence of judicial review does not make discretionary power
unreasonable.\(^{47}\)

There is a plethora of case law on the subject of exercise of discretion on matters
affecting fundamental rights. The basic and important aspects to be taken care of it in
such matters are that the exercise of discretion should not be arbitrary, authority
exercising the powers has applied its mind, the exercise of power is not mala fide and

\(^{42}\) Jai Singhani v. Union of India, AIR 1967 SC 1427/1434.
\(^{44}\) Panna Lal Binjraj v. Union of India, AIR 1957 SC 397.
\(^{47}\) Khare v. State of Delhi, AIR 1950 SC 211.
there is no abuse of the power conferred. Where statute confers discretionary power without imposing an obligation to state reasons, the statutory authority need not give any reasons for decision. However, if the discretion is to be exercised in the discharge of judicial or quasi-judicial functions, reasons must be given to make the order valid.

**Conclusion and Suggestion**

At the end, it is concluded that where discretion has been conferred on an authority, it is expected to exercise the same to the facts and circumstances of the case. If there is failure on the part of the administration to exercise discretion, the action or decision will be bad and the authority is deemed to have failed to exercise its discretion. Therefore it is suggested that;

(i) Discretionary powers should not be unguided and uncontrolled. It has to be limited by certain ways or methods so that they do not become unguided and in turn violate the actions of the administrative authority.

(ii) Administrative authorities should use discretionary powers in good faith and for a proper, intended and authorized purpose. They need to act in a reasonable and impartial manner.

(iii) Discretionary power should be used keeping in view the public interest and the welfare of the society.

(iv) It is of utmost importance that reasons should be given for discretionary administrative decisions especially where people’s lawful rights or interests are likely to be affected. For this administrative authorities should also have the duty to communicate their reasons to the individuals concerned.

(v) Judiciary has to evolve some principles, standards, guidelines and parameters so that discretionary powers conferred on the administration may not misuse.

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