CHAPTER - II

Administrative Discretion and Concept of Judicial Review

2.1 Administrative Discretion

Discretion lies at the heart of administrative activity\(^1\). It means freedom to act at one’s own pleasure\(^2\). 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.\(^3\)

No modern government, however, can function without the grant of discretionary power to administrative authorities. Whether or not an action is required depends upon the happening of certain events or the arising of certain situations that cannot be anticipated. They have to be determined from time to time and the administrator has to respond by using the power (discretion) given to it. What is to be done if a riot breaks out? What is to be done if an essential commodity becomes scarce and suddenly goes out of market? Some actions depend upon an assessment of the situation by an administrative authority. Expressions such as 'if he is of the opinion', or 'if he is satisfied', or if he has reasonable grounds to believe' vest power in the authority to act on forming

\(^1\) 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/chambersstwentie00davia.

an opinion or being satisfied that the action is necessary. All such actions are discretionary. Where the State has to perform the regulatory function of ensuring that activities such as business, trade, industry or social service are conducted in public interest, the ambit of its discretionary power is bound to be large⁴.

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.⁵

It is felt that owing to the complexity of socio-economic conditions of modern life which the Administrative Process has to contend with, a government endowed with merely ministerial powers, without having any discretionary powers, will be far too inefficient, rigid, circumscribed, and unworkable. It will not be able to take quick decisions at critical times, and will be ineffective to deal with the modern complex socio-politico-economic problems of the society⁶.

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

⁵ Ibid.
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.

2.2 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.

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 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\textsuperscript{11}. In the case of \textit{Sharp v. Winfield}\textsuperscript{12}, Lord
Halsbury has mentioned about limitations that are inherent in the exercise of discretion in
the following words:

\ldots ‘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.\textsuperscript{13}

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
‘equitable’ etc are used. These are not words of compulsion. They are enabling words and
they only confer capacity, power of authority and imply discretion.\textsuperscript{14} The use of the
words ‘shall have power’ also connotes the same idea.\textsuperscript{15}

The main purpose of conferring discretionary power is anchored on the idea to
serve public interest by ensuring legal and regular exercise of powers with regard to cases
requiring flexibility by applying recognized legal principles to the decision making
process. The necessity of conferring discretionary power arise out of

(i) Policy dimensions,

\textsuperscript{11} T.N.Pandey, “Administrative Discretion and Judicial Review: Concept and Ideologies”, The Indian Journal of
\textsuperscript{12} (1891) AC 173.
\textsuperscript{13} Ibid.
\textsuperscript{15} Supra note 6.
(ii) Policy exceptions in individual cases
(iii) Limitation of legal Principles.

But, there is nothing like unfettered discretion. It is a prerequisite to the legal validity of a decision that the exercise of the discretion which leads to the decision is made by the person or body upon whom the discretion was conferred. The discretion cannot be delegated to an unauthorized third party or surrendered in the sense that the person given the discretion exercises it at someone else’s dictation. Discretion cannot be surrendered. Similarly, a true exercise of discretion requires that cases are not necessarily determined by reference to a fixed policy.\textsuperscript{16}

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\textsuperscript{17} 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.\ldots It may be practically convenient to say that discretion includes the case in which the ascertainment of fact is legitimately left to administrative determination.\textsuperscript{18}

Justice Coke, in \textit{Rooke’s case},\textsuperscript{19} 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,\textsuperscript{20} discretion implies power to make a choice between an alternative course of action or inaction. According to Lord Diplock,\textsuperscript{21} the very concept of administrative discretion involves a right to choose between more than

\begin{itemize}
\item \textsuperscript{17} Freund, \textit{Administrative Powers over Persons and Property}, (1928) 71.
\item \textsuperscript{18} Ibid.
\item \textsuperscript{19} (1598) 5 Co. Rep. 99b.
\item \textsuperscript{20} \textit{Supra} note, 10.
\item \textsuperscript{21} Secretary of State for Education and Science v. Metropolitan Borough Council Tameside, (1976) 3 All ER 665.
\end{itemize}
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 discretion to decide matters as per government policy and the need of fairness.\textsuperscript{22} Judicial review, thus, aims to protect citizens from abuse or misuse of power by any branch of the state.\textsuperscript{23}

2.3 Reasons for Conferring Discretion on Administrative Authorities

The need for “discretion” arises because of the necessity to individualize the exercise of power by the administration, i.e. the administration has to apply a vague or indefinite statutory provision from case to case. There are four good reasons for conferring discretion on administrative authorities\textsuperscript{24}:

(i) The present day problems which the administration is called upon to deal with are of complex and varying nature and it is difficult to comprehend them all within the scope of general rules.

(ii) Most of the problems are new, practically of the first impression. Lack of any previous experience to deal with them does not warrant the adoption of general rules.

(iii) It is not always possible to foresee each and every problem but when a problem arises it must in any case be solved by the administration in spite of the absence of specific rules applicable to the situation.


\textsuperscript{23} Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.

\textsuperscript{24} Supra note 6 at 426.
(iv) Circumstances differ from case to case so that applying one rule mechanically to all cases may itself result in injustice.\textsuperscript{25}

From the point of view of the individual, however, there are several disadvantages in the administration following the case to case approach as compared with the adoption of a general rules applicable to all similar cases.

\textit{Firstly}, whereas case to case decisions operates on the past facts, a general rule usually avoids retroactivity and operates in future so that one has prior notices of the rules and thus may regulate his conduct accordingly. In case to case approach, the individual may be caught by surprise and may not be able to adjust his affairs in the absence of his ability to foresee future administrative action.\textsuperscript{26}

\textit{Second}, the case to case approach involves the danger of discrimination amongst various individuals; there arises a possibility of not getting like treatment under like circumstances.\textsuperscript{27}

\textit{Thirdly}, the process is time consuming and involves decision in a multiplicity of cases. Also, there is danger of abuse of discretion by administrative officials. The broader the discretion, the greater the chances of its abuse. In the words of Justice Douglas of the U.S. Supreme Court\textsuperscript{28}:

Where discretion is absolute, man has always suffered ...Absolute discretion...is more destructive of freedom than any of man’s other inventions.

And also:

“Absolute discretion like corruption marks the beginning of the end of liberty”.\textsuperscript{29}

\textsuperscript{25} \textit{Ibid.}
\textsuperscript{26} \textit{Ibid.}
\textsuperscript{27} \textit{Ibid.}
\textsuperscript{29} \textit{New York v. United states}, 342US 882(1951)
It thus becomes necessary to devise ways and means to minimize the danger of absolute discretion. To achieve such an objective, a multipronged strategy has to be adopted. There are several possible ways in which this objective can be achieved.

Firstly, the law conferring discretion may itself seek to lay down the elements and standards which the authority has to apply in exercising its discretion and selecting a course of action. This means that the degree of discretion should be restricted by law itself as far as possible, or, in other words discretion should be properly “confined and structured.”

Secondly, when the legislature fails to lay down standard, the administration can seek to lay down standards by using its powers of delegated legislation. The power of delegated legislation can be used by the administration to lay down rules of conduct observable not only by people, but also by administration itself, in given situations.

Thirdly, on a lower plane, to some extent, administrative directions and norms of practice can be used, instead of the rules, for the purpose of achieving uniformity in discretionary decisions, but these should be resorted to only when the scheme is too much in an experimental stage and constant adjustments may have to be made for some time to come. Otherwise rules are preferable to directions as they can be enforced judicially.

2.4 Types of Administrative Discretion

The term discretion has at least five different uses in administrative law. 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

---

30 Supra note 8.
31 Ibid.
32 Supra note 6 at 426.
33 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.
only these three types of discretion are the core discretionary decisions reviewable. 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.

2.4.1 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 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.

34 “Core discretionary decision” refers to the central issue in the administrative determination involving the exercise of discretion.
35 Supra note 32 at 471.
36 Ibid.
37 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.
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 individuals decisions were frequently subjected to close judicial scrutiny.\(^{39}\) Judicial restraint then must be exercised with considerable flexibility.

### 2.4.2 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”\(^{40}\) 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.\(^{41}\)

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

\(^{39}\) 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."


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.42

2.4.3 Policymaking Discretion

The third use of the term discretion covers the authority to make "policy".43 Policymaking is considered particularly appropriate for administrative agencies.44 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 functions similar to those performed by the legislative body itself rather than expanding on the work of the legislative body.45 It directly involves two major principles of administrative law 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.46

2.5 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,

---

42 Supra note 32 at 480.
43 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).
44 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.
45 Levin, Identifying Questions of Law in Administrative Law, 74 Geo.L.J.1,22 (1985).
46 Ibid.
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.\(^{47}\) The Supreme Court in *U. P. State Road Transport Corp. v. Mohd. Ismail*,\(^ {48}\) 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 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.\(^ {49}\) 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.\(^ {50}\)

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

---

\(^ {47}\) *Supra* note 9 at 99.
\(^ {49}\) *East Suffolk Rivers Catchment Board v. Kent*, (1941) AC 74.
Administrative Discretion and Concept of Judicial Review

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.51

In *Clariant International Ltd v. Securities and Exchange Board of India*,52 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 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.*,53 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

53 AIR 2001 SC 2631.
further clarified that report of the inquiry commission is of a recommendatory nature\textsuperscript{54} and its finding are meant for the information of the government and not binding on the courts or the police.\textsuperscript{55}

2.6 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 fundamental right of equality and freedom, it is void and having no validity in the eyes of law.\textsuperscript{56}

In \textit{Southern Technologies Ltd. v. CIT},\textsuperscript{57} 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

\textsuperscript{57}(2010) 2 SCC 548, para 66: 2010 (1) JT 145.
reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Art. 14. This is the mandate of Art. 14 of the Constitution of India.

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. Only because a wide discretionary power 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. 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.
(ii) Discretionary power by itself is not violative if it is controlled and guided.
(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

---

58 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.
59 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.
by the constitution. Article 14 can be invoked only when both of these conditions are satisfied.\(^{64}\)

(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.\(^{65}\)

(v) Discretionary power to be reasonable must not to be unguided or uncontrolled.\(^{66}\)

(vi) Mere absence of judicial review does not make discretionary power unreasonable.\(^{67}\)

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 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.\(^{68}\) 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.\(^{69}\)

2.7 Concept of Judicial Review

Judicial review is defined as the process by which courts examine the actions of the three wings of the government i.e., legislative, executive, and administrative wings. It also determines whether such actions are consistent with the constitution of the country. It is “a procedure by which a Court can pronounce on an administrative action by a public body.”\(^{70}\) It may also be defined as a “court’s power to review the actions of other branches of government, especially the court’s power to invalidate legislative and

\(^{64}\) Panna Lal Bijnraj v. Union of India, AIR 1957 SC 397.


\(^{67}\) Khare v. State of Delhi, AIR 1950 SC 211.


\(^{69}\) Maneka Gandhi v. Union of India, AIR 1978 SC 597.

executive actions as being unconstitutional.  

Alexandra Bickel, an American Jurist observed:

Judicial review is a counter-majoritarian force in our system, since when the Supreme Court declares unconstitutional a legislative Act or the Act of an elected executive, it thus thwarts the will of the representatives of the people; it exercises control, not on behalf of the prevailing majority, but against it.

In other words, judicial power is the power of courts to administer justice in accordance with the law. Justice means many things; it is a single spectrum comprised to many colors, but its best definition, for our purposes is that provided by the Greek philosophers, including Plato and Aristotle. They thought-originally on grounds derived from religion-that each thing or person has its proper sphere to overstep which is unjust.

The purpose of judicial review is two-fold:

(i) The definition of principles to govern public administration by the Executive and
(ii) The safeguarding of individual interests against illegal or unreasonable administrative action, or from administrative action taken without following proper procedures.

In L. Chandra kumar v. Union of India, the Apex Court explained that the judicial review is the power of the Court to hold unconstitutional and hence unenforceable, any act of the State, legislative or executive, that if it finds it to be in conflict with the basic law, i.e., the Constitution. It is intended to be exercised in the large public interest and that it is not exercised for any collateral purpose. In State of West Bengal v. Committee of Protection of Democratic Rights, five judges Constitution

---

71 See Black’s Law Dictionary, VIII, 864.
75 (1997) 3 SCC 261.
76 AIR 2010 SC 1476.
Bench of the Apex Court ruled that judicial review, an integral part of basic structure, could not be curtailed by Act of Parliament.

The Scope of judicial review is limited to the legality of decision making power and legality of order *per se.* The parameter of scope of judicial review is limited to efficiency of decision making process and not the decision. The Court should not interfere with the administrative decision unless it is illogical or suffers from procedural impropriety or is shocking to the conscience of court. While appreciating the inherent limitation in exercise of the power of judicial review, the judicial quest has been to find and maintain a right and delicate balance between the administrative discretion and the need to remedy alleged unfairness in the exercise of such discretion.

In the era of new economic policy of liberalization, privatization, and globalization, the courts have been allowing wider flexibilities to the administration. They have generally exhibited a sense of self-restraint where judicially manageable standards do not exist for judicial intervention.

2.8 Abuse of Discretion

When discretionary power is conferred on an administrative authority, it must be exercised according to law. An abuse of discretion occurs when a decision is not an acceptable alternative. The decision may be unacceptable because it is logically unsound, because it is arbitrary and clearly not supported by the facts at hand, or because it is explicitly prohibited by a statute or Rule of Law. But as Markose says, “When the mode of exercising a valid power is improper or unreasonable, there is an abuse of the power”. Thus, “if a new and sharp axe presented by Father Washington (the legislature) to young George (the statutory authority) to cut timber from the father’s compound is

---

77 *Siemons Public Communication Pvt. Ltd. v. Union of India*, AIR 2009 SC 1204.
tried on the father’s favorite’s apple tree” an abuse of power is clearly committed. In Sanchit Bansal v. Joint Admission Board (JAB), it is held that an action is said to be arbitrary and capricious, where a person in authority does any action based on individual discretion by ignoring prescribed rules, procedure or law and the action or decision is founded on prejudice or preference rather than reason or fact. To be termed as arbitrary and capricious, the action must be illogical and whimsical, something without any reasonable explanation.

2.8.1 Mala Fide

It is said that if an authority vested with power has not exercised it properly, lawfully and in good faith, it would be said to have been exercised mala fide. In other words, where the actual purpose is different from that which is authorized by the law, and the discretionary power is used ostensibly for the authorized purpose, but in actuality for the unauthorized purpose, the power is supposedly exercised mala fide. This is also called the abuse of power.

The expression mala fide does not admit any precise and scientific definition. In its popular sense, mala fides means ill-will, dishonest intention or corrupt motive. De smith states that “in relation to the exercise of statutory powers it may be said to comprise dishonesty and malice. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directed affected by its exercise. A power is exercised fraudulently if its repository intends to achieve an object other than for which he believes the power to have been conferred.” This principle was developed by the Conseil d’Etat in France and is known as detournement de pouvoir.

---

85 Ibid.
87 Ibid.
Pratap Singh v. State of Punjab,\textsuperscript{89} is a clear case of mala fide exercise of power. In this case the appellant, a civil surgeon, was granted leave preparatory to retirement. When he proceeded on the leave, it was revoked and he was placed under suspension and disciplinary action was initiated 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 proceeding had been initiated against him at the instance of the Chief Minister to wreck personal vengeance on him as he had refused to yield to the illegal demands of the former. From the sequence of event, certain tape recordings of his talk with the Chief Minister and in the absence of an affidavit by the Chief Minister denying the allegations made against him, the Supreme Court concluded that the charge of mala fide exercise of power was proved and accordingly the court quashed the action taken against the appellant.

A similar case of mala fides occurred in Rowjee v. State of Andhra Pradesh,\textsuperscript{90} where the validity of a scheme nationalizing motor routes was in question. There was enough proof to conclude that the scheme was the outcome of the Chief Minister’s vengeance on his political opponents who were private operators on those routes. There was not even a rebuttal by an affidavit of the minister. The Court struck down the scheme as engineered by mala fides vengeance on the part of the Chief Minister. This led also to the resignation of the chief Minister.

Private grudge or vindictiveness should not be the basis of an order by an administrative order.\textsuperscript{91} Even use of power for an alien purpose other than the one for which the power is conferred is said to be mala fide use of power.\textsuperscript{92} While dealing with nature and mode of proof of mala fide action the burden is very heavy on the person who alleges it. Mala fides can be established by direct evidence or can be deduced as a reasonable and inescapable inference of proved acts. It must be discernible from the order

\textsuperscript{89} AIR 1964 SC 72.
\textsuperscript{90} AIR 1964 SC 962.
\textsuperscript{91} Ahmed Hussain v. State, AIR 1951 Nag 138.
\textsuperscript{92} Express Newspapers (p.) Ltd. v. Union of India, AIR 1986 SC 874.
impugned or must be shown from established surrounding factor which preceded the order. The allegations of mala fide are often more easily than proved. Very seriousness of such allegation demands proof of higher order of credibility.

**Types**- From the above definition, it can be classified into two types:

(i) Express Malice or “malice in fact” and
(ii) Implied or legal malice or “malice in Law”.

Mala fides violating proceedings may be factual or legal. Former is actuated by extraneous considerations whereas the latter arises where a public authority acts deliberately in defiance of law, may be, without malicious intention or improper motive. In other words, a plea of mala fides involves two questions; (i) whether there is a personal bias or oblique motive; and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of power.

### 2.8.1.1 Malice in Fact

When an administrative action is taken out of personal animosity, ill-will, vengeance or dishonest intention, the action necessarily requires to be struck down and quashed.

In *State of Haryana v. Bhajan Lal*, a complaint regarding corruption was filed against the former Chief Minister. The High court under Article 226 of the Constitution quashed the proceedings inter alia observing that they were initiated due to political vendetta and were tainted with personal mala fides. The Supreme Court quashed the order of the High Court.

---

2.8.1.2 Malice in Law

When an action is taken or power is exercised without just or reasonable cause or for purpose foreign to the statute, the exercise of power would be bad and the action ultra vires. The term ‘malice on fact’ would come within the purview of the said definition. Even however, in the absence of any malicious intention, the principle of malice in law can be invoked.\textsuperscript{98}

In a leading case of \textit{Barium Chemicals Ltd. v. Company Law Board}\textsuperscript{99}, the Supreme Court has rightly observed that though an order passed in exercise of powers under a statute cannot be challenged on the ground of propriety or sufficiency. It is liable to be quashed on the ground of mala fides, dishonestly or corrupt purpose. A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been conferred.

In well known case of \textit{Express Newspapers Pvt. Ltd. v. Union of India}\textsuperscript{100}, the petitioners challenged the Constitutional validity of a notice of re-entry upon forfeiture of lease granted by the Central Government and of threatened demolition of the express buildings at Bahadurshah Zafar Marg, New Delhi. It was contended that during the period of emergency the Indian Express had displayed exemplary courage in exposing the authoritarian trend of the government of the day. It was alleged that the notices were wholly mala fide, politically motivated and constituted an act of personal vendetta against the express group of newspapers in general, and Ram Nath Goenka, Chairman of the Board of Directors in Particular. The petition was allowed and the notice was quashed and set aside.

\textsuperscript{99} AIR 1967 SC 295.
\textsuperscript{100} (1986) 1 SCC 133.
2.8.1.3 Burden of Proof

The burden of establishing mala fides is on the person who alleges it. It is not the law that mala fides in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order.\(^{101}\)

Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man’s mind, for that is what the employee has to established in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting in the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. If bad faith would vitiate the order, the same can be deduced as a reasonable and inescapable inference from proved facts. It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleged it. The allegation demands proof of a high order of credibility.\(^{102}\)

2.8.2 Irrelevant Considerations

A discretionary power conferred on an administrative authority by a statute must be exercised on the considerations relevant to purpose for which it is conferred. Instead, if the authority takes into account wholly irrelevant or extraneous considerations the exercise of power by the authority will be ultra vires and the action bad. If the decision is influenced by extraneous considerations, which ought not to have been taken into account, it cannot stand and needs correction, no matter what the nature of statutory body or stature of the constitutional functionary, though it might have acted in good faith.\(^{103}\)

---

101 Indian Railway Construction Co. Ltd. v. Ajay Kumar, 2003 (2) RSJ 570 (S.C.).
102 Delhi Development Authority v. UEE Electricals Engineering (P)Ltd., AIR 2004 SC 2100.
Administrative Discretion and Concept of Judicial Review

It is well settled that exercise of administrative power will stand vitiated if the power is exercised on non-consideration or non-application of mind to relevant factors, and exercise of such power shall be regarded as manifestly erroneous.

In *Ram Manohar Lohia v. State of Bihar*, the petitioner was detained under Defence of India Rules, 1962 to prevent him from acting in a manner prejudicial to the maintenance of law and order, whereas detention was provided under the Rules to prevent subversion of public order. The Court quashed the order as, according to it, the two terms were not the same, the term “law and order” being wider than “public order.”

Similarly in *R. L. Arora v. State of U.P.*, under the provision of the Land Acquisition Act, 1894 the State Government was authorized to acquire land for a company if the Government was satisfied that ‘such acquisition is needed for the construction of a work and that such work is likely to prove useful to the public’. In this case, the land was acquired for a private company for the construction of a factory for manufacturing textile machinery. The Supreme Court, by majority, held that even though it was a matter of subjective satisfaction of the Government, since the sanction was given by the Government on irrelevant and extraneous considerations, it was invalid.

In *Rohtas Industries Ltd. v. Agrawal*, an order of investigation was issued against the petitioner company inter alia on the ground that there were a number of complaints of misconduct against one of the leading directors of the company in relation to other companies under his control. The Supreme Court quashed the order holding the ground irrelevant.

In *Barium Chemicals Ltd. v. Company Law Board*, the board ordered an investigation into the affairs of the company under s. 236 of the companies Act, 1956.

---

106 AIR 1966 SC 470.
107 AIR 1962 SC 764; 1962 Supp (2) SCR 149.
Under the section, the board can order investigation into the affairs of a company if, in the opinion of the board, there are circumstances suggesting (i) that the business of the company is being conducted with intent to defraud its creditors, or members, etc, (ii) that the persons concerned in the formation of the company or its management have been guilty of fraud, misfeasance or other misconduct towards the company or any of its members, (iii) that the members of the company have not given full information about the affairs of the company. The basis of the order of investigation in the Barium Case was that there had been delay and faulty planning of the project resulting in double expenditure and continuous losses to the company, that the value of its shares had gone down considerably and that some eminent persons had resigned from the board of directors.

The court, by a majority, quashed the order of the Government as these facts had no relevance to the question of fraud by the company. The two dissenting judges, however, thought that the circumstances were not extraneous to the grounds mentioned in the order. They raised the query whether it would be farfetched to say that these circumstances could reasonably suggest to the board that these happenings were not just pieces of careless conduct but were deliberate acts of omissions of the managing director of the company with the ulterior motive of earning profit for himself.

It is for the court to determine whether a ground is relevant or extraneous. In Appanna v. State of Karnataka, in selecting a site for constructing a water tank for providing irrigation facilities, the Government took into account the benefit to the Scheduled Castes and Tribes following there from. It was held that this was a relevant

---

110 There were four separate opinions in the case. The dissenting opinion was delivered by MUDHOLKAR, J., with whom SARKAR, C.J., agreed. HIDAYATULLAH, BACHAWAT AND SHELAT, JJ., delivered separate but concurring opinions. HIDAYATULLAH, J., stated that from the circumstances mentioned by the Government no inference as to fraud could be drawn and the action of the Government was in the nature of a fishing expedition. BACHAWAT, J., was of the opinion that the circumstances suggested by the Government could not reasonably suggest that the business of the company was being conducted to defraud persons. SHELAT, J., reached the conclusion that the circumstances were not relevant to the grounds mentioned in the Act.

consideration as Art.46 of the constitution enjoins the state to promote the economic interests of the weaker sections.112

2.8.3 Mixed Consideration

Sometimes, the order is not wholly based on extraneous or irrelevant considerations. It is based partly on relevant and existent considerations and partly on irrelevant or non-existent considerations. The attitude of the judiciary on this question does not depict a uniform approach in all types of cases. In some cases, it was held that the proceedings were vitiated,113 while in other cases, it was held that the proceedings were not held to be bad.114 It is submitted that the proper approach is to consider it in two different situations:

2.8.3.1 Conclusion Based on Subjective Satisfaction

Some matter requires purely subjective satisfaction: e.g. preventive detention cases, in these cases, the courts have taken a strict view and has held such an order invalid if based on any irrelevant grounds along with relevant grounds, arguing that it is difficult to say to what extent the bad grounds operated on the mind of the administrative authority and whether it would have passed the order only on the basis of the relevant and valid grounds. In Shibbanlal v. State of Uttar Pradesh,115 a person was detained on the two grounds: first that his activities were prejudicial to the maintenance of supplies necessary to the community, and second, that his activities were injurious to the maintenance of law and order.

The order of detention was revoked on the first ground as it was non-existent or irrelevant but it was continued on the second ground. The court quashed the detention

112 Also see Swastik Rubber Products Ltd. v. Poona Municipality, AIR 1981SC 2022 : (1981) 4 SCC 219, where in another context it was held that the municipality had taken into account relevant considerations in taking the action in question.
order as it was based on irrelevant along with relevant ground (i.e. based on mixed considerations). In *Dwarka Das v. State of J&K*, the Supreme Court has observed that if the power is conferred on a statutory authority to deprive the liberty of a person on its subjective satisfaction with reference to specified matters and the satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, the exercise of the power will be bad if some of the grounds are found to be non-existent or irrelevant. In the opinion of the court if some of the grounds are found to be non-existent or irrelevant, the court can't predict what the subjective satisfaction of the said authority would have been on the exclusion of those grounds or reasons. However, the court has made it clear that in applying this principle the court must be satisfied that the vague or irrelevant grounds are such if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. However in the case of preventive detention generally the courts have quashed the order of detention based on relevant as well as irrelevant grounds. But the cases may be found where the courts have upheld the order of detention valid even where it was based on mixed considerations.

### 2.8.3.2 Conclusion Based on Objective Fact

If the conclusion of the authority is based on objective facts and the action is based on relevant and irrelevant considerations the court may apply the objective standard and decide the validity or otherwise of the impugned action.

Thus, in *State of Orissa v. Bidyabhusan*, A was dismissed from service on certain charges. The High Court found that some of them were not proved and therefore, directed the Government to consider the case whether on the basis of remaining charges the punishment of dismissal was called for. On appeal, the Supreme Court reversed the judgment of the High Court and upheld the order of dismissal. According to the Supreme

---

116 AIR 1957SC 164.
Court, if the order could be supported on any of the grounds, it was not for the court to consider whether on that ground alone the punishment of dismissal can be sustained.

In *Pyare Lal Sharma v. J & K Industries Ltd.*,\(^{119}\) the service of the petitioner were terminated on two grounds: (i) unauthorized absence from duty and (ii) taking part in active politics. It was proved that no notice was issued to the delinquent regarding taking part in active politics. The Supreme Court, however, upheld the order by observing that ‘the order of termination can be supported on the ground of remaining unauthorized absent from duty’.

It is submitted that the aforesaid view is correct. The principle has been succinctly laid down by Shelat, J. in *Zora Singh v. J.M. Tandon*,\(^{120}\) wherein His lordship observed:

“The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective facts or evidence, but on subjective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior court to find out which of the reasons, relevant or irrelevant, valid, or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficult would not arise. If it is found that there was legal evidence before the tribunal even if some of it was irrelevant, a superior court would not interfere if the finding can be sustained on the rest of the evidence.”\(^{121}\)

2.8.4 **Leaving out Relevant Considerations**

Some time in exercising its discretionary power, an administrative authority ignores relevant considerations, and then its action will be invalid. An authority must take into account the considerations which a statute prescribes expressly or impliedly. In case,

---

\(^{120}\) (1971) 3 SCC 834: AIR 1971 SC 1537.
the statute does not prescribe any consideration 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.122

There was a time when it was difficult to establish that the authority had left out relevant considerations because of the absence of reasons. Till a few years back, therefore, not much case law had occurred under this head. This handicap has now been removed to some extent. With the Courts’ insistence on the supply of reasons by administrative authorities at least to them, and also their tendency to look into the Government record, this ground has become an important one. When the Statute itself lays down the factors or guidelines and the authority does not take them into account, the order will be clearly wrong.123

In Rampur Distillery Co. v. Company Law Board124, the Company Law Board refused to give its approval for renewing the managing agency of the company. The reason given by the Board for not giving its approval was that the Vivian Bose Commission had severely criticized the dealing of the Managing Director, Mr. Dalmia. The court conceded that the past conduct of the directors were a relevant consideration, but before taking a final decision, it would take into account their present activities also.

An important pronouncement came in the case of State of Rajasthan v. Union of India,125 where the court examined the needs for the norms in exercise of administrative discretion. The Union Home minister had written to the Chief Ministers of nine States including that of the petitioner that in view of the result of Union Parliamentary Elections in which the congress party led by Mrs. Indira Gandhi had lost majority in Lok Sabha they should tender resignation and face the electorate. If they did not do so the Government may advise the president of India to get the legislative

122 Supra note 6 at 681.
123 Bhopal Sugar Industries v. Union of India, AIR 1979MP 163; Sherwani Sugar Syndicate v. Union of India, AIR 1979 All 394.
125 AIR 1977 SC 1361.
assemblies dissolved under Article 356 of the Constitution. The chief Ministers of those States came to Supreme Court under Article 131 of the Constitution. Clause (5) of Article 356 of the constitution precluded any challenge “on any ground” against the proclamation under Article 356 whereby the presidential rule was sought to be imposed.

Bhagwati and Gupta\textsuperscript{126}, JJ., however, observed that

although the Court could not go into the correctness of the decision of the presidential order, if the satisfaction of the president was based on mala fides or wholly extraneous or irrelevant grounds, the courts would have jurisdiction to examine it because in that, that would be no satisfaction of the President.

Thus even an ouster clause in a law could not stop the court from enquiring into the exercise of administrative discretion. This case has thus widened the scope of judicial review of administrative discretion in India.

2.8.5 Improper Purpose: Collateral Purpose

Where a power granted for one purpose is exercised for a different purpose, the power is said to have not been validly exercised. The cases of exercise of discretionary power from purposes have increased in modern times because conferment of broad discretionary power has become usual tendency. The order based on improper purpose was quashed first in the cases concerning the exercise of powers of compulsory acquisition in England.\textsuperscript{127} Lord Crainworth in \textit{Gallaway v. London Corp.},\textsuperscript{128} observed:

where persons embarking in great undertaking, for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, the persons so authorized cannot be allowed to exercise the power conferred on them for any collateral object, that is for any collateral object, that is for any purpose except those for which the legislature has invested them with extraordinary

\textsuperscript{126} \textit{Ibid}
\textsuperscript{127} \textit{Supra} note 49 at 234-235.
\textsuperscript{128} 1866 LR HL 34 at 43.
power.........It has become a well settled head of enquiry that any company authorized by the legislation to take compulsorily the land of another for definite object will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from doing so.\textsuperscript{129}

So where a statutory power conferred on the authority must be exercised for that purpose alone and if it exercised for a different purpose, there is abuse of power by the authority and the action may be quashed. Improper purpose must be distinguished from mala fide exercise of power. In the latter, personal ill-will, malice or oblique motive is present, while in the former it may not be so, and the action of the authority may be bona fide and honest and yet, if it is contemplated by the relevant statute, it may be set aside. In \textit{Nalini Mohan v. District Magistrate},\textsuperscript{130} the relevant statute empowered the authority to rehabilitate the persons displaced from Pakistan as a result of communal violence. That power was exercised to accommodate a person who had come from Pakistan on medical leave. The order was set aside.

In \textit{Srilal Shaw v. State of West Bengal},\textsuperscript{131} a preventive detention order was issued against a person mainly on the ground that he had stolen railway property. He had documents in his possession to prove his bona fide and to prove that he had purchased the goods in the open market. A criminal case filed against him was dropped and the mentioned preventive detention was passed in its place. The order was held to be bad by the court.

\subsection*{2.8.6 Colourable Exercise of Power}

Colourable exercise means that under the “colour” or “guise” of power conferred for one purpose, the authority is seeking to achieve something else which is not authorized to do under the law in question. Viewed in this light, “colourable exercise of power” would not appear to be a distinct ground of judicial review of administrative action but would be covered by the grounds already noticed, viz., improper purpose or

\textsuperscript{129} \textit{Ibid.}
\textsuperscript{130} AIR 1951 Cal 346.
\textsuperscript{131} AIR 1975 SC 393, See also \textit{Mool chand v. State of West Bengal}, AIR 1974SC 2120.
irrelevant considerations. The same appears to be the conclusion when reference is made to cases where the ground of “colourable exercise of power” has been invoked. When exercise of power does not serve the purpose envisaged under the statute, it amounts to colourable exercise of power.132 Similarly, where the legislature enacts law on assumption that it has legislative power to legislate and ultimately it is found that it has no such power or competence, such enactment is called a “colourable legislation”.133

In the leading case of Somavanti v. State of Punjab,134 interpreting the provisions of the Land Acquisition Act, 1894, the Supreme Court observed:

if the purpose for which the land is being acquired by the state is within the legislative competence of the state, the declaration of the Government will be final, subject, however, to one exception. That exception is that if there is a colourable exercise of power the declaration will be open to challenge at the instance of the aggrieved party.

In Vora v. State of Maharashtra,135 the State Government requisitioned the flat of the petitioner, but in spite of repeated requests of the petitioner, it was not derequisitioned. Declaring the action bad the court observed that though the act of requisition was of a transitory Character, the Government in substance wanted the flat for permanent use, which would be a “fraud upon the statute”.

2.8.7 Reasonable Exercise of Power

A discretionery power conferred on an administrative authority is required to be exercised reasonably. Where the power is exercised unreasonably there is abuse of power and the action of the administrative power will be ultra vires. The word ‘reasonable’ has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know.136 Similarly, the term
‘Unreasonable’ means more than one thing. It may include many things, e.g., irrelevant extraneous consideration, improper purpose or mala fide etc. It is frequently used as a general description of things that must not be done.\textsuperscript{137}

In the leading case of Roberts \textit{v. Hopewood},\textsuperscript{138} the local authority was empowered to pay “such wages as it may think fit”. In exercise of this power, the wages were fixed at F4 per week to the lowest grade worker in 1921-22. The court ruled that though the discretion was conferred, it was not exercised reasonably and the action was bad. Lord Wrenbury observed:

A person in whom is vested discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so; he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably.\textsuperscript{139}

What is the standard of reasonableness? To what extent can the courts review administrative action which the statute requires to be based on reasonableness? In \textit{Sheonath v. Appellate Assistant Commissioner},\textsuperscript{140} the court stated that belief “must be that of an honest and reasonable person based upon reasonable grounds”. This formulation by itself does not seem to be of any help as this does not lay down any test of a “reasonable person”. As Lord Hailsham has said,

that two reasonable persons can come to the opposite conclusions on the same set of facts without being regarded as unreasonable.\textsuperscript{141}

Wade also says,

\begin{itemize}
\item \textsuperscript{137} \textit{Associated Provincial Picture Houses Ltd v. Wrenbury Corpn.}, (1948) 1 KB 223.
\item \textsuperscript{138} (1925) AC 578.
\item \textsuperscript{139} \textit{Ibid.}
\item \textsuperscript{140} AIR 1971 SC 2451.
\item \textsuperscript{141} \textit{In re W. (An infant)}, 1971 AC 682,700.
\end{itemize}
that the duty to act reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which parliament appointed to take the decision.\textsuperscript{142}

Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. It follows that the task of the courts is to see whether or not there exist some material for taking the action which is relevant and whether the authority has not left out relevant material.\textsuperscript{143}

In \textit{K. L. Trading Co. Ltd. v. State of Meghalaya},\textsuperscript{144} the Supreme Court observed that to attract judicial review of administrative action, the applicant must show that the administrative action suffers from vice of arbitrariness, unreasonableness and unfairness. Merely because the Court may feel that the administrative action is not justified on merit, can be no ground for interference. The court can only interfere when the process of making such decision is wrong or suffers from the vice of arbitrariness, unfairness and unreasonableness.

\textbf{2.8.8 Judicial Discretion}

Earlier, the courts have used a vague phrase “judicial discretion” to restrict the exercise of discretionary power by an authority. For instance, it was observed by the Supreme Court in \textit{Registrar, Trade Marks v. Ashok Chandra Rakhir}\textsuperscript{145} with reference to the power of the Registrar to register a trade mark that the exercise of the power conferred on the Registrar... always remained a matter of discretion to be exercised, not capriciously or arbitrarily but, according to sound principles laid down for the exercise of all judicial discretion.\textsuperscript{146}

Exercise of discretion must always be guided by standards or norms so that it does not degenerate into arbitrariness and operate unequally on persons similarly situated.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Supra} note 6 at 362.
\item \textit{Ibid}.
\item AIR 1996 Gauhati 17.
\item AIR 1955 SC 558: (1955) 2 SCR 252.
\item \textit{Ibid}
\end{enumerate}
\end{footnotesize}
Every form of arbitrariness whether it be executive waywardness or judicial adhocism I anathema in our constitutional scheme.\textsuperscript{147}

Judicial discretion cannot be guided by expediency. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. A discretion which encourages illegality and perpetuates an illegality cannot be exercised.\textsuperscript{148} The power to act at discretion is bound by rule of reason and law.\textsuperscript{149} The authority on which discretion is conferred must act in good faith and must have regard to all relevant considerations and must not be influenced by irrelevant considerations.\textsuperscript{150}

2.9 Failure to Exercise Discretion

Where discretion has been conferred on an authority, it is expected to exercise the same to the facts and circumstances of the case in hand. 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.\textsuperscript{151} The circumstances giving rise to such flaw are following:

2.9.1 Condition Precedent

At times the statute may lay down a condition precedent for the exercise of the discretion. If this condition is not satisfied, the administrative decision will be bad. Thus, “reason to believe” is a condition precedent. Similarly, where reasons are to be recorded by the authority for taking action, it is to be done before and not after taking the action.\textsuperscript{152} Where the law requires that an action can be initiated only for a definite matter of public importance, but this condition has not been satisfied, the action will be bad.\textsuperscript{153}
2.9.2 Acting Mechanically

An authority cannot be said to exercise statutory discretion when it passes an order mechanically and without applying its mind to the facts and circumstances of the case. This situation may happen either because the authority has taken one view of its power, or because of inertia or laziness, or because of its reliance on the subordinates.\textsuperscript{154}

The Estate Duty act, 1953 provides that the Central Government may on the application of the person accountable for estate duty accept any property passing on the death of the deceased in satisfaction of the estate duty. It was held in \textit{Assistant Collector of Estate Duty v, Prayag Das Agarwal}\textsuperscript{155} that while the government was not bound to accept any property offered, and its power to accept or not to accept the same was discretionary, the Government cannot act mechanically in refusing such a request by the person concerned and proceed on the assumption that “its discretion was unfettered”, and the “Government must consider the application on the merits and in the exercise of sound administrative judgment.”

In \textit{Merugu Satya Narayana v. State of A.P.},\textsuperscript{156} the affidavit in justification of detention was filed by the subordinates and not the detaining authority. The Court said that the subordinate authority “does not say how he came to know about the subjective satisfaction of the District Magistrate. He does not say that he has access to the file or he is making the affidavit on the basis of the record maintained by the District Magistrate”.\textsuperscript{157} The Court held that the detaining authority had acted mechanically and abdicated its power to the subordinates.

2.9.3 Abdication of Functions

An authority to whom discretion has been entrusted by a statute may leave it to be exercised by the subordinates without acting itself. An order made by a subordinate is not

\textsuperscript{154} Supra note 6 at 695.
\textsuperscript{156} AIR 1982SC 1543.
\textsuperscript{157} Id at 1547.
valid. A situation of “abdication of function” arose in Manik chandra v. State,\textsuperscript{158} where the scheme of nationalization of certain bus routes was published by the manager of the State Road Transport Corporation without the corporation itself considering the scheme, though the statute (Section 68-C of the Motor Vehicles Act, 1939) required that it was the corporation which was to consider the scheme. “Abdication of function” also arises when the authority relying on its subordinates acts mechanically on their recommendation.

2.9.4 Acting under Dictation

Sometimes, it so happen that an authority entrusted with discretion does not exercise the discretion but acts under a dictation by a superior authority. In law, such a situation amounts to non-exercise of its discretion by the authority and is bad. \textsuperscript{159} Although the authority purports to act on its own but in effect the power is exercised by another. The authority concerned does not apply its mind and take action on its own judgment, even though it was so intended by the statute. In other words, if the authority “hands over its discretion to another body it acts ultra vires”.\textsuperscript{160}

In Commissioner of Police v. Gordhabdas,\textsuperscript{161} under the city of Bombay Police Act, 1902, the Commissioner of Police granted license for the construction of a cinema theatre. But later on, he cancelled it at the direction of the State Government. The supreme Court set aside the order of cancellation of license as the Commissioner had acted merely as the agent of the Government.

Similarly, in Oriental Paper Mills v. Union of India,\textsuperscript{162} under the relevant statute, the Deputy Superintendent was empowered to levy excise. Instead of deciding it independently, the Deputy Superintendent ordered levy of excise in accordance with the directions issued by the Collector. The Supreme Court set aside the order passed by the Deputy Superintendent.

\textsuperscript{158} AIR 1993 Gau 1: also D. Satyanarayan v. State of Andhra Pradesh, AIR 1979 AP 259.
\textsuperscript{161} AIR 1952 SC 16: 1952 SCR 135.
In *Mansukhlal v. State of Gujarat*, the government did not grant sanction to prosecute appellant under the Prevention of Corruption Act. The complainant filed a petition in the High Court and the High Court ‘directed’ the authorities to grant sanction. The appellant was prosecuted and convicted. Setting aside the conviction, the Supreme Court observed that;

by issuing a direction to the Secretary to grant sanction, the High Court closed all other alternatives to the Secretary and compelled him to proceed only in one direction.164

The sanction was, therefore, illegal and conviction bad in law.

2.9.5 Imposing Fetters on the Exercise of Discretion

An authority entrusted with discretionary power must exercise the same after considering individual cases. Instead of doing that if the authority imposes fetters on its discretion by adopted fixed rules of policy to be applied in all cases coming before it, there is failure to exercise discretion on the part of that authority. What is expected of the authority is that it should consider each case on its merits and then decide it one way or the other. If it lays down a general rule to be applicable to each and every case, then it is preventing itself from exercising its mind according to the circumstances of each case and this amount to going against what the statute had intended the authority to do.165

In *Gell v. Taja Noora*, under the Bombay Police Act, 1863, the Commissioner of Police had discretion to refuse to grant a license for any land conveyance ‘which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public’. Instead of applying this discretionary power to individual cases, he issued a general order that any Victoria presented for license must be of a particular pattern. The High Court of Bombay held the order bad as the Commissioner had imposed fetters on his discretion by

---

165 *Supra* note 6 at 701.
166 ILR (1907) 27 Bom 307.
self imposed rules of policy and failed to consider in respect of each individual carriage whether or not it was fit for the conveyance of the public.

In *Nagraj v. Syndicate Bank*, the Ministry of Finance issued a direction to all banks to accept the punishment proposed by the Vigilance Commission against a delinquent officer. Holding the directive to be "wholly without jurisdiction" and "completely fettered", the Supreme Court held that the authorities have to exercise their judicial discretion having regard to the facts and circumstances of each case.

### 2.9.6 Non-application of Mind

Where an authority is given discretion, the said authority must exercise the same after applying its mind to the facts and circumstances of the case in hand. If this requirement is not satisfied, there is a clear case of non-application of mind on the part of the authority concerned. Such a situation may arise where the authority might be acting mechanically, without due care and caution or without a sense of responsibility in exercise of its discretion. In such types of cases there is failure to exercise discretion and the action is bad.

In *Emperor v. Sibnath Banerji*, an order of preventive detention was issued in a routine manner on the recommendation of police authorities and the Home Secretary had not applied his mind and satisfied himself that the impugned order was called for. The order of preventive detention was quashed on the ground of non-application of mind by the Home secretary. It was held that Home Secretary’s personal satisfaction was a condition precedent to the issue of detention order; otherwise it would be liable to be aside.

---

168 *Supra* note 81 at 250.
169 AIR 1945 PC 156.
2.9.7 Non-Compliance with Procedural Requirements

An exercise of discretionary power may be bad because the authority has not complied with the procedural requirements laid down in the statute, provided the court holds the procedure to be mandatory. It is for the court to decide whether a procedural requirement is mandatory or directory. Procedural provision even if uses ‘shall’ may be construed a directory if no prejudice is caused.170

However when the statute prescribes a procedure for exercise of power, the statutory authority must exercise its power in a manner prescribed or not at all.171 For example, a provision requiring the decision making body to consult another authority before arriving at a decision is usually considered mandatory. In Narayana v. State of Kerala,172 the provision in question authorized the State Government to revoke the license of licensee for supply of electric energy in public interest but after consulting the State Electricity Board. The Court ruled that consultation with the board was a condition precedent for exercise the power of revocation of license and was mandatory. Although the board’s opinion was not binding on the Government, nevertheless, consultation with it was an imperative condition for revoking the license.

Another case on a similar point is Naraindas v. State of Madhya Pradesh.173 The Government was authorized to prescribe text books for various courses in schools in consultation with the Board of Higher Education. The Government consulted the chairman but not the entire board. The government’s notification prescribing text books was accordingly held void.174 Procedural safeguards such as consultation imposed for persons affected by exercise of administrative power are generally mandatory.175

---

172 AIR 1974SC 175.