

DE JURE NEXUS LAW JOURNAL

Author:

Rahul Chachan

Amity Law School, Kolkata

4th Year, B.com; LL.B. (Hons.)**DISCRETION IN REFERENCE TO ADMINISTRATIVE LAW****INTRODUCTION**

As we all know the Governmental functions are mainly divided into 3 categories, namely Legislature, Judiciary and Executive. The 1st 2 categories generally do not encroach upon the 3rd category. The Administrative law has developed only in the 20th Century, before that there was only police state. Due to reasons like establishment of democratic countries, Industrialization, Increased population and increased literacy demand for welfare and social state increased and there was need of Administrative Law.

Administrators have the power of decision making by making law and innumerable rules under this. The law prescribes the procedures to be followed and guidelines to be respected in the exercise of discretion involving decision making. However due to the complexity of modern socio-economic conditions, the discretionary powers of the administrative authorities have increased enormously. The primary function of executive are execution of laws, evolving and implementing government policies, providing public health, safety and morality and standards of life in the nation. For the performance of these vast and large functions and for the best administration and to obtain the required goal they need powers. Such powers are delegated by parliament to administer.

Therefore, gradually vast powers are vested and accumulated in the hands of executive. It has become necessary to empower them with wide discretionary powers for the speedy and efficient administration. "Every rose has thorns", similarly these vast wide discretionary powers, which are vested in executive may be used for the public welfare and may be used for selfish needs of the executive. The powers are like that of a knife having edges on the two sides.

In public administration, administrative discretion refers to the flexible exercising of judgment and decision making allowed to public administrators. Regulatory agencies have the power to exercise this type of discretion in their day-to-day activities, and there have been cases where regulatory agencies have abused this power. Administrative law can help these agencies get on the path of following regulations, serve the public, and in turn, a reflection of the public's values and beliefs. There's a need for administrative discretion because the public's interest could be at risk if several agencies were not following laws and regulations.

Administrative discretion allows agencies to use professional expertise and judgment when making decision performing official duties, as opposed to only adhering to strict regulations or statuses. For example, a public official has administrative discretion when he or she has the freedom to make a choice among potential courses of action. The failure to exercise reasonable judgment or discretion is abuse of discretion.



DEFINATION OF ADMINISTRATIVE DISCRETION

Discretion may best be defined as the power to make a decision that cannot be determined to be right or wrong in any objective way. A university that interviews prospective students has the power to admit some applicants and reject some; an executive may choose a secretary out of afield of applicants the sovereign may pardon some convicts and not others. While one could disagree with any of these decisions, there is no body or person entitled as a general rule, to correct them and declare them wrong.

The grant of this discretion by the country's legislature is well intended and bona fide but still knowing the darker side of this power, the Judiciary of this country has been trying to circumvent its misuse and abuse. The judiciary, being the watch dog of our rights, has its control over this administrative power in two different stages. Firstly, when it is granted to the administrative authority by our legislature and secondly, when it is at the stage of being used by the administrative authorities.

The definition of Administrative Discretion is offered by many but there only few which are worth mentioning. Prof. Freund said that:

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

In Black Law's Dictionary, administrative discretion would be a public official's or agency's. power to exercise judgment in the discharge of its duties.

According to another thinker, Edward Coke, discretion would be **"...a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their will and private affection."**

ADMINISTRATIVE DISCRETION AND FUNDAMENTAL RIGHTS

In India the Constitution has guaranteed certain fundamental rights to the people. These rights lay down a limitation on the legislative and executive power of the government and they provide some wide dimensions of judicial control over administrative discretion. The courts can insist on certain procedural safeguards in the exercise of the discretionary powers by the administration under the umbrella of the fundamental rights. The courts have thus used the fundamental rights to control either bestowal of discretionary powers on the administration or manner of their exercise.

The fundamental rights thus provide basis to the judiciary in India to control administrative discretion to large extent. Problems arise mainly in connection with the adjudication of the validity of a law conferring discretion on the administration. For this purpose, the court look into substantive as well as procedural aspects of the law in question. 'Thus substantive part is examined to see whether the discretion conferred is within permissible limits, and the procedural part is examined to see whether there are necessary safeguards subject to which the discretion is to be exercised. The law can be declared unconstitutional if it is defiant in either of the cases.

UNDER ARTICLE 14 OF INDIAN CONSTITUTION

Article 14 guarantees to every person equality before law or equal protection of laws. It condemns discrimination; it forbids class legislation, but permits classification founded on intelligible differentia, having a rational relationship with the object sought to be achieved by the Act in question.

In a number of cases, the statute has been challenged on the ground that it conferred on an administrative authority wide discretionary powers of selecting persons or objects discriminately and therefore, it violated Article 14. The court in determining the question of validity of such statute will examine the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of selection or classification. The court will struck down the statute if it does not provide any guidance for the exercise of the discretion in the matter of selection or classification. The court will not tolerate the delegation of uncontrolled power in the hands of the executive to such an extent as to enable it to discriminate.

In *Chitrallekha v. State of Mysore*, the mode of selection of candidates for admission to the state medical colleges by interview and viva voce examination was challenged on the grounds that is enabled the Interview Board to act arbitrarily and to manipulate the results. It, therefore, contravened Article 14 of the constitution. The Supreme court rejected the contention and held that the Government had clearly laid down the policy and definite criteria in the matter of giving marks at the interview and it appointed competent men to make selection on that basis.

UNDER ARTICLE 19 OF INDIAN CONSTITUTION

Article 19 guarantees certain freedoms to the citizens of India, but they are not absolute. Reasonable restriction can be imposed on these freedoms under the authority of law. They cannot be contented merely on executive action. The reasonableness of the restrictions is open to judicial review. These freedoms can also be afflicted by administrative discretion.

In *Himmat Lal v. Police commissioner, Ahmedabad*, Rule of Section 33 of the Bombay Police Act, 1951 was struck down by the Court. Rule 7 provided that no public meeting shall be held on a public street unless a written permission has been obtained from an officer authorised by the Commissioner of Police. The rule did not provide consideration for the exercise of the power by the authorities nor did it provide the procedural safeguards against the misuse of the power. The court, therefore, struck down the Rule as it conferred arbitrary powers on the official concerned.

Thus, it is clear that the court will hardly favour the conferring of absolute discretionary powers on the executive authority in the absence of procedural safeguards to the affected parties.

UNDER ARTICLE 32(2) OF INDIAN CONSTITUTION

Article 31(2) of the Constitution provided for acquisition of private property by the Government under the authority of law. It laid down two conditions, subject to which the property could be requisitioned : (1) that the law provided for an amount (after 25th Amendment) to be given to the persons affected, which was non-justiciable; and (2) that the property was to be acquired for a public purpose.

The property under Article 31(2) could be acquired for a public purpose only. The Executive could be made the sole Judge to decide a public purpose. No doubt, the Government is in best position to judge as to whether a public purpose could be achieved by issuing an acquisition order, but it is a justiciable issue and the final decision is with the courts in this matter. In *West Bengal Settlement Kanungo Co-operative Credit Society Ltd vs Bela Banerjee*, the provision that a Government's declaration as to its necessity to acquire certain land for public purpose shall be conclusive evidence thereof was held to be void. The Supreme court observed that as Article 31(2) made the existence of a public purpose a necessary condition of acquisition, it is, therefore, necessary that the existence of such a purpose as a fact must be established objectively and the provision "relating to the conclusiveness of the declaration of the Government as to the nature of the purpose of the acquisition must be held unconstitutional".

JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION: GROUNDS OF NECESSITY

Judicial review is the soul of our constitution. It is the exercise of the court's inherent power to resolve whether an action is lawful or not. It holds the balance of power between individuals and the government. It legitimizes the application of administrative sanctions. In India, judicial review has a firm base. The framers of our constitution had not only believed in limited government was necessary for democracy but also enshrined the philosophy in the

constitution. It is a modus operandi for public accountability of the administrative process. In this process, it principally maneuvers as a check upon the administrative branch of the government and the agencies operating there under. The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion which is correct in the eye of law. The constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and the validity of legislation. It is the solemn duty of the judiciary under the constitution to keep different organs of the state within the limits of the power conferred upon them by the constitution by exercising power of judicial review. Thus, judicial review aims to protect citizens from abuse or misuse of power by any branch of the state.

DISCRETIONARY POWER AND JUDICIAL REVIEW

Discretionary powers conferred on the administration are of different types. They may range from simple ministerial functions like maintenance of birth and death register to powers which seriously affect the rights of an individual, e.g. acquisition of property, regulation of trade, industry of business, investigation, seizure, confiscation and destruction of property, detention of a person on subjective satisfaction of an executive authority and the like. Where the legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any court to contest that discretion.

This does not mean that there is no control over the discretion of the administration. The administration possesses vast discretionary power and if complete and absolute freedom is given to it, it will lead to arbitrary exercise of power. The wider the discretion the greater is the possibility of its abuse. All powers have legal limits. The wider the power, the greater the need for the restraint in its exercise. There must be control over discretionary powers of the administration so that there will be government of laws and not of men.

GROUND

In India, the Court will interfere with the discretionary powers exercised by the administration in the following circumstances:

- Failure to exercise discretion; or
- Excess or abuse of discretion.

FAILURE TO EXERCISE DISCRETION

The main object of conferring discretionary power on an administrative authority is that the authority itself must exercise the said power. If there is failure to exercise discretion on the

part of that authority the action will be bad. Such type of flaw may arise in the following circumstances:

Sub-delegation- Sub-delegation means transfer or transmission of power from superior to a subordinate authority. When administrative power is vested in an authority who on account of certain exigencies delegates the power to the exercised by any of his subordinates, it is known as Sub-delegation. The technique of sub-delegation is followed very wisely in modern administration. For example, under section 3 of the Essential Commodities Act, 1956 power is conferred on the Central Government which can delegate its power under Section 5 of the Act to its own officers, or to State Governments or to any other officers. The State Government may itself further sub-delegate these powers to its officers or authorities. Sometimes it becomes difficult to determine as to what degree below the power could be sub-delegated. In **Sahni Silk Mills v. ESI Corporation**, the Parent Act enables the corporation to delegate its power to recover damages to the Director General, who, however, in turn sub-delegated the said power to Regional Directors. Since there was no such provision permitting the Director General to sub-delegate his power, the action was held to be bad.

ABUSE OF ADMINISTRATIVE DISCRETION

When discretionary power is conferred on an administrative authority, it must be exercised according to law. When the mode of exercising a valid power is improper or unreasonable, there is an abuse of the power. There are several forms of abuse of discretion, e.g. the authority may exercise its power for a purpose different from the one which the power was conferred or for an improper purpose or acts in bad faith, takes into account irrelevant considerations and so on. Excess or abuse of discretion may be inferred from the following circumstances:

IMPROPER PURPOSE- A statutory power conferred on the authority must be exercised for that purpose alone and if it is exercised for a different purpose, there is abuse of the power by the authority and the action may be quashed. In this case, the action of the authority may be bona fide and honest and yet if it is not contemplated by the relevant statute, it may be set aside. A power used under the misapprehension that it was needed for effectuating a purpose, which is really outside the law or the proper scope of the power, could be said to be an exercise for an extraneous or collateral purpose. In **Hukum Chand v. Union of India**, the General Manager, Telephone Delhi, disconnected the petitioner's telephone under Rule 422 of the Telephone Rules. The ground for disconnecting the telephone was that it was being used for illegal satta purposes. The power of disconnecting the phone could be exercised only in the event of emergency. The court held that existence of emergency was a pre-requisite for the exercise of the power and the satisfaction should be that of the Divisional Engineer. He had to arrive at such satisfaction rationally on relevant material. The order of disconnection was quashed because it was made on a ground which was not relevant to Rule 422.

ABSENCE OF POWER- It is well settled that there can be no exercise of power unless such power exists in law. If the power does not exist, the purported exercise of power would be non-existent and void. Likewise, where the source of power exists, exercise of it is referable only to that source and not to some other source. But if a source of power exists,

mention of wrong provision or even omission to mention the provision containing such power will not invalidate such order. In **State of Gujarat v. Patel Raghav Nath**, the revisional authority exercising powers under The Land Revenue Code went into the question of title. The Supreme Court observed that when the title of the occupant was in dispute, the appropriate course would be to direct the parties to approach the civil court and not to decide the question.

COLOURABLE EXERCISE OF POWER- Where a power is exercised by the authority ostensibly for the purpose for which it was conferred, but in reality for some other purpose, it is called colourable exercise of power. Here, though the statute does not empower the authority to exercise the power in a particular manner, the authority exercises the power under the colour or guise of legality. In **Vora v. State of Maharashtra**, 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 transitory character, the Government in substance wanted the flat for permanent use, which would be a fraud upon the statute.

CONCLUSION

The importance of discretion has amplified day by day as the administration is requisite to apply unclear and indefinite statutory provisions, to individual case. Further, It is very difficult to understand the present day issues within the general rules of a broad nature. Many problems are new and beyond the range and experience of the administrator to be solved easily. Sometimes there is lack of specific rules and statutory provisions. Even then the administrator is expected to solve them in a rational manner, as any sensible man exercises his power in that similar case.

But the fact to fact approach is detrimental, as the administrator may not have a general rule or norm to be adopted. There is every danger of discrimination leading to abuse of power. Further it is a time overwhelming process to select the best lessons of action in each individual case. The official tries to defer any decision making if the case involves vested interests, so as to avoid any public controversy, his decision is likely to be in front. But it is a fact, that the administrative discretion individualize the exercise of public command, over private interests, permitting its adjustments to varying circumstances. The modern tendency is to somewhat standardize -administrative discretion leaving only a residual margin for adjustability, in the area of fact situations, in exacting case.

There are certain principles governing the exercise of discretionary power. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise in any meticulous manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it. It must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced away by

immaterial consideration, must not ask for purposes, alien to the letter and spirit of the legislation that gives it power to act, and must not act illogically and randomly.



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