

Administrative discretion

Rakesh Chandra

Department of Law, Lucknow University, New Campus, Jankipuram, Lucknow, Uttar Pradesh, India

Abstract

The latter parts of the nineteenth century witnessed the birth of Industrial Revolution in England which brought about sea change in the philosophy of governance, changing it from *laissez faire* to *welfare state*. Now, the government is responsible for the welfare of the people in complete sense. As a consequence, the normal functions of the government have increased manifold. In order to fulfil this need, laws, rules and regulations are needed. Lawmakers enact appropriate laws and the administrative machinery further make rules and regulations justifying the needs of the people's welfare. Therefore, we have got plethora of rules and regulations and wide powers for the administrative authorities. However, this power has to be exercised with alacrity and even a slight misuse of this power will adversely affect the people's welfare. This paper deals with the various aspects of the administrative discretion which is a must for effective implementation of the philosophy of welfare state.

Keywords: administrative discretion, failure to exercise administrative discretion, power coupled with duty

Introduction

The latter part of the nineteenth century, particularly after the Industrial Revolution in England, brought into wake many a revolutionary changes into the functioning of the Government and the style of Governance. That process is continuing since then. In the present times, the traditional theory of "*laissez faire*" has been given up and the old "*police state*" has now become a "*welfare state*", and because of this radical change in the philosophy of the role to be played by the state, its functions have expanded. Today it exercises not only sovereign functions, but, as a progressive democratic state, it also seeks to ensure social security and social welfare for the common masses. It regulates industrial relations, exercises control over production, initiates enterprises. In a nutshell, because of this philosophy, governmental functions have increased manifold. As a consequence, the administrative authorities have acquired vast discretionary powers and generally, exercise of those powers are left to the subjective satisfaction of the administration without laying down the statutory guidelines or imposing conditions. The administration administers law enacted by the legislature and thus, performs executive functions; it also enacts legislation when the legislature powers are delegated to it by the legislative and it also interprets law through administrative tribunals. Thus, practically there is concentration of all powers in the hands of the administration- legislative, executive and judicial.

Administrative Discretion: Meaning

"Discretion" is the power to decide or act according to one's judgment. In *Rooke's Case* ^[1], Coke J., said, "... For

discretion is 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 wills and private affections."

In *R.Vs. Wilkes* ^[2], Lord Mansfield said, "*Discretion when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour, It must not be arbitrary, vague, and fanciful, but legal and regular"*.

In *Roberts Vs. Hopwood* ^[3], Lord Wrenbury said, "*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 the use of his reason, ascertain and follow the course which reason dictates."*

Lord Comden L.C.J., in *Hindson and Kersy*,^[4] said "*The discretion of a Judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In the best it is often time caprice, in the worst it is every vice, folly, and passion to which human nature is liable."*

In the leading case of *Susannah Sharp Vs. Wakefield* ^[5], Lord Halsbury stated:

"Discretion" means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion.....according to law and not humour. It is to be,

¹ ((1598) 5 CO99b, as cited by Wade & Forsyth in Administrative Law, 9th Edition, 2005, p-351, cited in M.P. Jain & S.N. Jain, "Principles of Administrative Law", Vol. I, 7th Edition, Lexis Nexis, Gurgaon, Haryana, 2013, p. 993.

² (1770) 98 ER 327, cited in M.P. Jain & S.N. Jain, "Principles of Administrative Law" Vol. I, 7th Edition, Lexis Nexis, Gurgaon, Haryana, 2013, p. 993.

³ 1925 AC 578, Ibid.

⁴ (1680) 8 How St. Tr. 57, as cited in Reliance Airport Authority of India, (2006) 10SCC1, 32 (Para 32), Ibid p. 994.

⁵ 1891 AC 173, 179: (1886-1890), All ER Rep 651 (HL), cited in C.K. Thakkar, "Administrative Law", 2nd Edition, Eastern Book Company, Lucknow, 2012, p. 704.

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....."

Perhaps the definition of "Administrative discretion" is given by Prof. Freund^[6] in the following words:

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

Thus, in short, here the decision is taken by the authority not only on the basis of the evidence but also in accordance with policy or expediency and in exercise of discretionary powers conferred on that authority.

Nature of Discretionary Powers

A significant phenomenon discernible in the present day administrative process in modern democracies is the conferral of large discretionary powers on the Administration to make decisions from case to case. Acquisition of more and more discretionary powers by the Administration is a demonstrable modern trend today. Every statute which is enacted by the Legislature confers some elements of discretion on the Administration. Discretionary powers are also conferred through Delegated Legislation. The main reason for vesting large discretionary powers in the government and its officials is the increasing state regulation of human affairs. Literally there are ten of thousand of discretionary powers to be found in the statutes and the delegated legislation. Discretionary power may be vested in the government, a Minister, an official or an instrumentality, constituted to discharge some function of the State. There seems to be no identifiable principle to determine who should be the donee of a discretion in a particular situation. Perhaps, administrative expediency is the only test for the purpose. When discretion is vested in a Minister or a high official, he has to delegate the power to some official in a lower category, because it will be practically impossible for the Minister or the high official to take each and every decision by himself. Some discretionary powers may have far-reaching consequences as they can apply to large number of people in the community. The exercise of some discretionary powers may have profound economic consequences.

A discretionary power is a power exercisable in its discretion by the concerned authority. An official in whom discretionary power is vested has, to a greater or lesser extent, a range of options at his disposal and he exercises a measure of personal judgment in making the choice. "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction."^[7]

Thus, an official in whom a discretion is vested has power to make choices between various courses of action; even if he has to achieve a specific end he has a choice as to how that end may be reached. The essence of discretion is choice.

The discretion is always coupled with a duty; it cannot be used to circumvent the obligation cast under the law or contract governing the parties^[8]. Legal discretion which is conferred on the executive or the judiciary is only sustainable in law if there is any indication, either through law or precedent, as to the scope of the discretion and the manner of its exercise^[9]. A discretionary power is not necessarily a discriminatory power and that abuse of such power is not to be easily assumed^[10].

The discretionary nature of power is denoted by the use of such expression as "necessary", "reasonable", "if it is satisfied," "if it is of the opinion" etc.

Discretion is conferred in the area of rule-making or delegated legislation as well. For example, when a statute authorises the government to make rules which it thinks expedient or necessary to carry-out the purposes of the Act, in effect, it confers a broad discretion on the government to decide what rules to make. The legislature hardly gives any guidance to the government as to what sort of rules to make under a specific statute. The government thus enjoys a wide choice as to what rules to make subject to the *doctrine of ultra Vires*.

In some cases, the concerned authority may have to follow some procedure while exercising its discretionary power under some statute. For example, an adjudicatory body has to follow natural justice before making a decision, a non-adjudicatory body may have to consult some prescribed bodies before reaching a decision in a specific case.

Ministerial Functions

As contrasted with the concept of discretionary power, there is the concept of ministerial power in which the law prescribes the function to be performed by the concerned authority in somewhat definite and specific terms, leaving no choice to it and leaving nothing to its discretion or judgment. Such a function involves no investigation into disputed facts; the law imposes a simple and definite duty on the authority concerned which acts in strict obedience to the provisions of law and it can act only in one particular manner, in a given fact situation. In *Kavita Vs. State of Maharashtra*^[11], it was held that the task of referring the question of detention of a person to an advisory board under the COFEPOSA is a mechanical or ministerial act, involving no exercise of discretion, though the government has full liberty to revoke the order of detention at that stage, or at any other stage. In modern times, the range of ministerial functions is comparatively much smaller while that of

⁶ Administrative Powers over Persons and Property Cited in C.K. Thakker "Administrative Law", 2nd Edition, Eastern Book Company, Lucknow, 2012, p. 705

⁷ Davis, Discretionary Justice: A Preliminary Enquiry, 4 (1969), cited in M.P. Jain & S.N. Jain, Principles of Administrative Law, 7th Edition Vol. I. Lexis Nexis, Gurgaon, Haryana, 2013, p. 996.

⁸ Siddeshwar Sahkari Karkhana Ltd. Vs. CIT (2004) 12 SCC, Ibid, p. 997.

⁹ Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra, (2009) 6 SCC 948, 543-44 (para -110) Ibid, p. 996

¹⁰ Tika Ram Vs. State of U.P., (2009) 10 SCC 689, 743-44 (para-112), Ibid, p. 997.

¹¹ AIR 1981 SC 1641, Cited in M.P. Jain & S.N. Jain, "Principles of Administrative Law" 999, 7th edition, Vol. 1 (2013), Lexis Nexis, Gurgaon, Haryana, 2013,

discretionary functions much larger. Discretion in the Administration is the all-pervading phenomenon of the modern age.

Fundamental Rights and Administrative Discretion

As has been pointed-out above, there is a demonstrable trend at present in all democratic countries to leave a large amount of discretion in the hands of authorities-legislation conferring powers on the Administration is usually drafted in broad and general terms. This leaves the administrator free to exercise his power according to his own judgment. Such a development is disquieting because broad powers present possibilities of being misused and exercised in an arbitrary and discriminatory manner. It thus becomes necessary to devise proper safeguards to neutralise such an eventuality so that injustice is not done to any person. The statute conferring discretionary power hardly even creates any control mechanism to oversee the exercise of power by the concerned administrator. Therefore, the courts have to play a major role in the process of controlling the functioning of the Administration. In this connection, some Fundamental Rights guaranteed by the Indian Constitution through Articles 12 to 35 play a significant role.

In England, due to the operation of the doctrine of sovereignty of Parliament, court do not review legislation, and hence they do not control the quantum of discretion bestowed on the Administration by Parliament. As a law passed by Parliament is valid in all circumstances, it may confer absolute discretion on the Administration, without prescribing any conditions to regulate, or imposing safeguards, procedural or substantive, to regulate its exercise. The Administration may be constituted into a final judge to decide when and how to exercise its power and take action. What the courts can do there is to control, to some extent, the exercise of discretion by the Administration on such grounds as *Ultra vires*, *mala fides*, etc. As against this, the position in India is somewhat different. The Fundamental Rights guaranteed by the Constitution to the people constitute a limitation on the legislative and executive powers of the government, and, consequently, constitute an additional dimension of control over administrative discretion. The courts in India, besides controlling the exercise of administrative discretion on practically similar grounds as in England, also use certain Fundamental Rights, e.g., Arts. 14, 19 and 21, to control discretionary powers of authorities at two levels, viz.:

1. At the stage of conferral of discretion, by examining the law in question and declaring it unconstitutional if it seeks to confer too broad discretion on the Administration without laying down any principle or policy to regulate its exercise. Fundamental Rights in India thus afford a basis to the courts to control the bestowal of discretion, to some extent, by testing the law in question on touchstone of Fundamental Rights. For such an evaluation, the courts take into account both the procedural and substantive aspects of the law in question. The substantive part is examined to see whether the discretion conferred is within permissible limits; the procedural part is examined to see whether

there are necessary safeguards, subject to which the discretion is exercised. The courts may at times imply some standards or safeguards into the law, or read it down or give it a restrictive interpretation in order to uphold its validity.

2. At the stage of the application of the law and the use of its discretion by the Administration in a specific factual situation, by examining the administrative action with a view to seeing whether it conforms with the requirements of the Fundamental Right in question. Arbitrary discretionary action is invalid. The situation here is that the law conferring discretion is valid but the action taken by the concerned authority may not be. The courts thus control the actual exercise of discretion by an authority on the touchstone of the Fundamental Rights. No law in India can clothe administrative discretion with complete finality, for the courts can always examine the ambit, and even its exercise, from the point of view of its conformity with the Fundamental Rights. The Fundamental Rights thus afford a basis to the Judiciary to control administrative discretion to some extent.

Doctrine of Excessive Delegation of Discretion

The courts have generally attempted to control the delegation of legislative power on the Administration through the doctrine of 'excessive delegation of discretion' by involving 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/or procedural safeguards, otherwise the courts may declare the statutory provision conferring sweeping discretion as void. Comparatively speaking, the courts have shown greater deference to laws conferring power of delegated legislation than to the laws conferring discretion. In the former case, often the courts have been satisfied with vague or broad statements of policy and have even upheld statutes when the policy was not apparent. But the courts have adopted somewhat more critical attitude while scrutinising statutory provisions conferring discretion with reference to Fundamental Rights. The reason is that delegated legislation being a power to make orders of general applicability presents less chance of administrative arbitrariness than administrative discretion which is applied to individual cases. In *Shiv Nandan Paswan Vs. State of Bihar* ^[12], Bhagwati, J., has spoken of the doctrine as follows:

"It is significant to note that the entire development of administrative law is characterised by a consistent series of decisions controlling and structuring the discretion conferred on the State and its officers. The law always frowns on uncanalised and unfettered discretion on any instrumentality of the State and it is the glory of administrative law that such discretion has been through judicial decisions structured and regulated."

¹² AIR 1987, SC 877, 895, cited in M.P. Jain & S.N. Jain Principles of Administrative Law" 7th Edition, Vol. I, Lexis Nexis, Gurgaon, Haryana, 2013, p. 1011.

One great advantage of having a statement of a standard or policy in the statute is to enable the courts to assess whether a specific administrative action is in conformity with this standard or policy.

This purpose can be achieved effectively only if the court insist that the legislature expresses its policy or standard clearly and in such terms as would help the courts to keep the exercise of discretion within the four corners of the legislative policy.

It may not be out of place to mention here that in the Fundamental Rights there exists a source of judicial power which, if fully exploited, can go a long way in mitigating the dangers of too much administrative discretion- a development, which is causing a good deal of anxiety to thinking people in many democratic countries. Fundamental Rights are real and not notional; they are substantial and not fictional, and they should be treated by the courts as such. In a welfare state, a balance has to be drawn between public power and individual freedom, and it is for the courts to ensure that this balance is not tilted too much in favour of the Administration as against the individual.

Notable instances: Administrative Discretion and Art. 14

i) State of West Bengal Vs. Anwar Ali Sarkar ^[13]

In this case, in order to speed up trial for certain offences, Section 5 (1) of the West Bengal Special Courts Act, 1950 conferred discretion on the State Government to refer any offence for trial by the special court. Since the procedure before the special court was stringent in comparison with that for normal trials, the respondents asserted its unconstitutionality on the ground that it violates the equality clause in Art. 14. The court held the law invalid on the ground that the use of vague expressions like "*speedier trial*," confers a wide discretion on the government and can be a basis of unreasonable classification.

ii) State of Punjab Vs. Khanchand ^[14]

In this case, the truck of Khan Chand was registered by the District Magistrate, Rohtak for famine relief work. He challenged the constitutionality of the East Punjab Requisition of Movable Property Act, 1947, under which the action was taken, on the ground that it violates of provisions of Article 14 of the constitution. The Court, upholding the Contention, held that the Act confers wide discretionary powers upon authorities by not laying down the guidelines for requisitioning movable property. Even the words "Public Purpose" are not used. Therefore, arbitrariness and power to discriminate are writ large on the face of the Act and fall within the mischief which Article 14 seeks to prevent. It would be wrong to assume an element of judicial arrogance in the judicial behaviour striking down the statute.

¹³ AIR 1952 SC 75, cited in I.P. Massey, "Administrative Law" 8th edition, Eastern Book Company, Lucknow, 2012, p. 65.

¹⁴ AIR 1974 SC 543, Ibid.

iii) Manohar Lal Vs. State of Maharashtra ^[15]

In this case and many others, signs of judicial humility or withdrawal in judicial behaviour on account of administrative convenience are strikingly visible. In this case, section 187-A of the Sea Customs Acts 1878 gave wide discretionary power to the authorities to either refer a case of smuggled goods to a magistrate or to look into the matter themselves. The Court upheld the constitutionality of the statute on the ground that as this discretion is to be exercised by senior officers, that will stand as a guarantee against its misuse: This kind of judicial behaviour aimed at preserving wide discretionary powers may ultimately end up in destroying it.

iv) Monarch Infrastructure (P) Ltd. Vs. Ulhasnagar Municipal Corporation ^[16]

In this case, Municipal corporation had invited tenders for appointment of agents for the collection of octroi. However, one of the eligibility conditions was deleted after the expiry of time for submission of tenders but before opening thereof. Thereafter, tender was awarded to one who did not fulfil the deleted condition. The Supreme Court held award of tender arbitrary and discriminatory.

Notable instances: administrative discretion and Article 19

Article 19 contains six freedoms. These freedoms are not absolute and are subject to reasonable restrictions. The Courts have always taken the view that the vesting of wide discretionary power in the administrative authorities to curtail these freedoms is immeasurable and hence unconstitutional.

i) Himmat Lal K. Shah Vs. Commissioner of Police ^[17]

Rule 7 under section 44 of the Bombay Police Act, 1951 gave unguided discretionary power to the Police Commissioner to grant or refuse permission for any public meeting to be held on a public street. The Supreme Court struck down Rule 7 as being an unreasonable restriction on the exercise of a fundamental right.

ii) State of Madras Vs. V.G. Row ^[18]

Criminal Law Amendment Act, 1908 as amended by Madras Act, 1950 gave wide discretionary power to the State Government to declare any association as unlawful. The Court struck down section 15 (2) (b) as being unconstitutional because it allows the administrative authority to exercise this discretion on subjective satisfaction without permitting the grounds to be judicially tested.

iii) State of M.P. Vs. Bharat Singh ^[19]

The M.P. Public Security Act, 1959 invested the District

¹⁵ AIR 1952 SC 75, cited in I.P. Massey, "Administrative Law" 8th edition, Eastern Book Company, Lucknow, 2012, p. 65.

¹⁶ Ibid

¹⁷ AIR 1973 SC 87, Cited in I.P. Massey, "Administrative Law", 8th edition, Eastern Book Company, Lucknow, 2012, p. 66.

¹⁸ AIR 1952 SC 196, Ibid, p. 67

¹⁹ AIR 1967 SC 1170, Cited in I.P. Massey, Administrative Law, 8th edition, 2012, p. 67.

Magistrate or the State Government with wide discretion, uncircumscribed by procedural safeguards, to intern a person from any area and to intern him in any specified place if his activities were prejudicial to the security of state or maintenance of public order. The Supreme Court held the relevant provision unconstitutional on the ground that it invests the government with such wide discretion without procedural safeguards that a person could even be interned in a place which could render him a destitute without any means of livelihood.

iv) Harakchand Ratanchand Banthia Vs. Union of India ^[20]

The Gold Control Act, 1968 invested administrative authority with blanket discretionary power to grant or refuse licence to any dealer in gold ornaments. Though the Act had provided that such power was to be exercised with reference to the number of existing dealers, anticipated demand, suitability of the applicant and public interest, the court struck down the law on the ground that such vague expression may result in the arbitrary exercise of power.

v) State of Maharashtra Vs. Kamal S. Durgule ^[21]

In this case the legislature had given the power to the competent authority to declare a land vacant and then to acquire it. The power had been given without laying-down any guidelines for the exercise of this discretion, and no provision had been made of any notice and hearing to the owner. Quashing Section 3 (1) and 4 (1) of the Land Acquisition Act, 1894, the Supreme Court held that because law confers arbitrary powers on the government, hence it violates Article 14 of the constitution. The Court further observed that the fact that the exercise of this power has been given to officers of high echelon makes no difference to the position and is not a palliative to the prejudice which is inherent in the situation.

Judicial Review of Administrative Discretion:

According to Black's Law Dictionary, "Judicial Review" may be defined as a "Court's power to review the actions of other branches of government, especially the courts' power to invalidate legislative and executive actions as being unconstitutional. "

Judicial review is a great weapon in the hands of Judges. It comprises the power of a court to hold unconstitutional and unenforceable any law or order based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land ^[22].

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.

In *Secy. of State for Education and Science Vs. Metropolitan Borough of Tameside* ^[23], Lord Diplock said:

"The very concept of administrative discretion involves a right to choose between more than one possible cause of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred."

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 births and deaths register to powers which seriously affect the rights of an individual, e.g. acquisition of property, regulation of trade, industry or business, investigation, seizure, confiscation and destruction of property, detention of a person on subjective satisfaction of an executive authority and the like.

As a general rule, it is accepted that courts have no power to interfere with the actions taken by administrative authorities in exercise of discretionary powers. In *Small Vs. Moss* ^[24], the U.S. Supreme Court observed, "Into that field (of administrative discretion) the courts may not enter."

In India also, the same principle is accepted and in a number of cases, the Supreme Court has held that courts have no power to interfere with the orders passed by the administrative authorities in exercise of discretionary powers ^[25].

This does not, however, mean that there is no control over the discretion of the administration. As indicated above, the administration possesses vast discretionary powers and if complete and absolute freedom is given to it, it will lead to arbitrary exercise of power. It is not only the power but the duty of the Courts to see that discretionary powers conferred on the administration may not be abused and the administration should exercise them properly, responsibly and with a view to doing what is best in the public interest. As early as in 1647, in the case of *City of London Vs. Estwick Style*, it was laid-down by the King's Bench.

"Whosoever a Commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law, and that this court hath power to redress things otherwise done by them." ^[26] There is nothing like unfettered discretion immune from judicial review. In India, Where in a written Constitution the power of judicial review has been accepted as the "heart and core" of it and which is treated as the "basic and essential feature of the constitution" and "the safest possible safeguards" against abuse of power by any administrative authority, the judiciary can not be deprived of the said power ^[27].

Grounds

While exercising power of judicial review, the court does

²⁰ Ibid

²¹ Ibid

²² Henry Abraham cited in L. Chandra Kumar Vs. Union of India, (1997) 3SCC261, cited in C.K. Takwani, "Lectures on Administrative Law", Fifth Edition, Eastern Book Company, Lucknow, 2014, p. 283.

²³ (1976) 3 WLR 641; (1976) 3 All ER 665, Ibid, p. 285.

²⁴ (1938) 279 NY 288, Cited in C.K. Takwani, "Lectures on Administrative Law", Fifth Edition, Eastern Book Company, Lucknow, 2014, p. 291.

²⁵ A.K. Gopalan Vs. State of Madras, AIR 1950 SC 27, Ibid, p. 292.

²⁶ Style 42: 82 ER 515, Ibid.

²⁷ Ibid, p. 293.

not exercise appellate powers. In India, the courts will interfere with the discretionary power exercised by the administration in the following circumstances:

1. Failure to exercise discretion.
2. Excess or abuse of discretion.

1. 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 *inter alia* the following circumstances;

1. Sub-delegation;
2. Imposing fetters on discretions;
3. Acting under dictation;
4. Non-Application of mind;
5. Power coupled with duty.

1) Sub-delegation

The very object of conferring a power on a particular administrative authority is that the power must be exercised by that authority and cannot be sub-delegated to any other authority or official. In Pradyat Kumar Bose Vs. Chief Justice of Calcutta High Court ^[28], however, the enquiry against the Registrar of the High Court was made by a puisne Judge of the Court. After considering the report and giving show-cause notice, he was dismissed by the Chief Justice. The Supreme Court held that it was not a case of delegation of power by the Chief Justice but merely of employing a competent officer to assist the Chief Justice.

Proper test whether sub-delegation is legal or not is to decide whether the final decision rests with the authority on whom power is conferred by the Act. If such decision is taken by that authority, the decision is valid, otherwise it would be invalid and unlawful.

2) Imposing fetters on Discretion

The underlying object of the doctrine is that the authority must consider the facts of each case, apply its mind and decide the same. If any general rule is pronounced, which will be applied to all cases, there is no question of considering the facts of an individual case at all and exercising discretion by the authority. In Kesavan Vs. State of Kerela ^[29] The relevant rule provided that no school-leaving certificate would be granted to any person unless he had completed 15 years of age: The director was, however, empowered to grant exemption from this rule in deserving cases under certain circumstances. But the Director had made an inevitable rule of not granting exemption unless the deficiency in age was less than two years. The court held that the rule of policy was contrary to law.

3) Acting under dictation

Sometimes, an authority entrusted with a power does not

exercise that power but acts under the dictation of a superior authority. Here, the authority invested with the power purports to act on its own judgment, even though it was not so intended by the statute. In law, this amounts to non-exercise of power by the authority and the action is bad.

In Commissioner of Police Vs. Gordhandas Bhanji, ^[30] under the City of Bombay Police Act, 1902, the Commissioner of Police granted licence 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 licence as the Commissioner had acted merely as the agent of the government.

4) Non-Application of Mind

When a discretionary power is conferred on an authority, the said authority must exercise that power after applying its mind to the facts and circumstances of the case in hand. If this condition is not satisfied, there is clear non-application of mind on the part of the authority concerned.

Thus, in *Emperor Vs. Sibnath Bannerji* ^[31], an order of preventive detention was quashed as it had been issued in a routine manner on the recommendation of police authorities and the Home Secretary himself had not applied his mind and satisfied himself that the impugned order was called for or not. In *Swaran Singh Vs. State of U.P.*, ^[32] a member of legislative Assembly was convicted for an offence of murder. Within less than two years, however, he was released as the Governor granted the remission. The son of the deceased challenged the action *inter alia* on the ground that there was non-application of mind by the Governor to several relevant facts and materials. The Supreme Court set-aside the order of the Governor observing that he was deprived of the opportunity to exercise power in a fair and just manner since he was not posted with material facts.

5) Power Coupled with Duty

Several statutes confer power on administrative authorities and officers to be exercised by them in their discretion. The power is in permissive language such as "it may be lawful," "it shall be lawful", "it may be permissible", etc. The question is whether it is open to the authorities to exercise or not to exercise the power at their sweet wills. De Smith ^[33] states, "Discretionary powers are frequently coupled with duties." In the words of lord Blackburn, "enabling words were always compulsory where the words were to effectuate a legal right". In the leading case of Municipal Council, Ratlam Vs. Vardichan, ^[34], some residents of Ratlam Municipality moved the sub-divisional Magistrate under

²⁸ AIR 1956 SC 285, cited in C.K. Takwani, "Lectures on Administrative Law", Fifth Edition, Eastern Book, Company, Lucknow, 2014, p. 296.

²⁹ AIR 1961 Ker 23, cited in C.K. Takwani, "Lectures on Administrative Law", Fifth Edition, Eastern Book Company, Lucknow, 2014, p. 297.

³⁰ AIR 1952 SC 16, cited in C.K. Takwani, "Lectures on Administrative Law", Fifth Edition, Eastern Book Company, Lucknow, Eastern Book Company, Lucknow, 2014, p. 302.

³¹ AIR 1945 PC 156, Cited in C.K. Takwani, Lectures on Administrative Law, Fifth Edition, 2014 p. 302.

³² AIR 1998 SC 2026, cited in C.K. Takwani, Lectures on Administrative Law, Fifth Edition, 2014. p. 304

³³ Judicial Review of Administrative Action (1995) 300, Ibid, p. 304.

³⁴ AIR 1980 SC 1622, Cited in C.K. Takwani, Lectures on Administrative Law, Fifth edition, 2014, p. 306

Section 133 Cr.p.c. for abatement of nuisance by directing the Municipality to construct drain pipes with flow of water to wash away the filth and stop the stench. The Magistrate found the facts proved and issued necessary directions. Holding the provision as obligatory, Krishna Iyer J. observed:

"Judicial discretion when facts for its exercise are present, has a mandatory import..... This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding."

Excess or Abuse of Discretion:

When discretionary power is conferred on an administrative authority, it must be exercised according to law. But as Markose^[35] says, "when the mode of exercising a valid power is improper or unreasonable, there is an abuse of power."

Excess or abuse of discretion may be inferred from the following circumstances:

1. Acting without Jurisdiction;
2. Exceeding Jurisdiction;
3. Arbitrary action;
4. Irrelevant considerations;
5. Leaving out relevant consideration;
6. Mixed considerations;
7. Mala fide.
8. Collateral purpose; Improper object;
9. Colourable exercise of power;
10. Colourable legislation: Fraud on Constitution;
11. Non-observance of Natural Justice;
12. Doctrine of Proportionality;
13. Doctrine of Legitimate expectation;
14. Unreasonableness.

A detailed consideration of each ground has been given below:-

1) Acting Without Jurisdiction:

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^[36]. In *Govt of A.P. Vs. M.T. Khan*^[37], two convicts by competent courts of the state of Madhya Pradesh and Maharashtra were transferred to the State of Andhra Pradesh. The Governor of Andhra Pradesh granted remission to them. The action was held in excess of jurisdiction since the Andhra Pradesh Government was not an "appropriate Government."

2) Exceeding Jurisdiction

An administrative authority must exercise the power within the limits of the statute and if it exceeds those limits, the action will be held *ultra vires*. A question

whether the authority acted within the limits of its power or exceeded can always be decided by a court.

For example, if an officer is empowered to grant a loan of Rs. 10,000 in his discretion for a particular purpose and if he grants a loan of Rs. 20,000, he exceeds his power or exceeded can always be decided by a court.

3) Arbitrary Action

If the action complained of is arbitrary, discriminatory, irrational, unreasonable or perverse, it can be set aside in exercise of power of judicial review. In *Ranjit Thakur Vs. Union of India*^[38], conviction and sentence of rigorous imprisonment for one year added with dismissal from service for disobeying an order of a superior military officer to eat food was held grossly disproportionate and arbitrary.

4) Irrelevant Considerations

A power conferred on an administrative authority by a statute must be exercised on the considerations relevant to the 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. In *Ram Manohar Lohia Vs. State of Bihar*^[39], under the relevant rules, the authority was empowered to detain a person to prevent subversion of "Public Order". The petitioner was detained with a view to prevent him from acting in a manner prejudicial to the maintenance of "law and order". The Supreme Court set-aside the order of detention. According to the court, the term "*law and order*" was wider than the term "*public order*".

5) Leaving out relevant Consideration

An administrative authority cannot take into account irrelevant or extraneous considerations. Similarly, if the authority fails to take into account relevant considerations, then also, the exercise of power would be bad. In *Rampur Distillery Co. Ltd. Vs. Company Law Board*^[40], 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 criticised the dealings 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 should take into account their present activities also.

6) Mixed Consideration

Sometimes, a peculiar situation arises. Here the order is not wholly based on extraneous or irrelevant considerations. It is based partly on relevant and existent consideration and partly on irrelevant or non-existent considerations. There is no uniformity in judicial pronouncements on this point. It may be considered in two different situations:

³⁵ Judicial Control of Administrative Action in India (1956) 417 Ibid, p. 307.

³⁶ Union of India Vs. TulsiRam Patel, AIR 1985 SC 1416 cited in C.K. Takwani, "Lectures on Administrative Law", fifth Edition, Eastern Book Company, Lucknow, 2014, p. 308.

³⁷ AIR 2004 SC 428, Ibid, p. 309.

³⁸ AIR 1987 SC 2386, Cited in C.K. Takwani, "Lectures on Administrative Law", Fifth Edition, Eastern Book Company, Lucknow, 2014, p. 310.

³⁹ AIR 1966 SC 740, Ibid, p. 311.

⁴⁰ AIR 1970 SC 1789, cited in C.K. Takwani, "Lectures on Administrative Law", Fifth Edition, Eastern Book Company, Lucknow, 2014, p. 18.

- a) Conclusion based on subjective satisfaction,
- b) Conclusion based on objective facts.

a) Conclusions based on subjective satisfaction

If the matter requires purely subjective satisfaction, e.g. detention matters, a strict view is called for, and if the order of detention is based on relevant and irrelevant considerations, it has to be quashed.

b) Conclusion based on objective facts

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. In *Zora Singh Vs. J.M. Tandon* ^[41], there was an order made by the Chief Settlement Commissioner for allotment of land was challenged by the opposite party. It was contended that some reasons recorded by the Commissioner were irrelevant and extraneous and the order was bad.

Dismissing the Appeal and negating the contention, the Court observed that even if some reasons recorded in support of the order were irrelevant, if other reasons were proper or relevant, the order would be valid.

7) Mala Fide

Though precise and scientific definition of the expression *mala fide* is not possible, it means ill-will, dishonest intention or corrupt motive. From the above definition, it can be said that malice is of two types:

- a) Express malice or malice in fact, and
- b) Implied or legal malice or malice in law.

a) Malice in fact

When an administrative action is taken out of personal animosity, ill-will, vengeance or dishonest intention, there is "*malice in fact*" and the action necessarily requires to be struck down and quashed. In *E.P. Royappa Vs. State of Tamil Nadu* ^[42], a member of Indian Administrative Service was appointed Chief Secretary to government. The government shifted him to a newly created temporary post of Officer on Special Duty. The petitioner challenged the action as *mala fide* and malicious on the part of the Chief Minister, Governor and Cabinet Ministers. Observing that the allegations of *mala fide* levelled by the petitioner against the Chief Minister were "baseless", the Supreme Court dismissed the petition.

b) Malice in Law

"Malice in law" is different from "malice in fact" and may be assumed from the doing of a wrongful act intentionally without just cause or excuse, or for want of case.

8) Collateral purpose: Improper Object

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 power by the authority and the action may be quashed. In *Nalini Mohan Vs. District Magistrate*, ^[43] the relevant statute empowered that 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.

9) 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. This is also known as fraudulent exercise of power. The doctrine is based on the principle that an administrative authority cannot exercise power for a purpose not warranted by law.

10) Colourable legislation: Fraud on Constitution

Colourable legislation or fraud on constitution means that the legislature is really not competent to enact such law under the scheme of the Constitution. As explained by *Gajendragadkar J.* (as he then was), the doctrine of colourable legislation really postulates that legislation attempts to do indirectly what it cannot do directly.

11) Non- Observance of natural justice

It is well-settled law that even if the exercise of power is purely administrative in nature, if it adversely affects any person, the principles of natural justice must be observed and the person concerned must be heard. Violation of the principles of natural justice makes the exercise of power *ultra vires* and void.

12) Unreasonableness

A discretionary power conferred on an administrative authority must be exercised by that authority reasonably. If the power is exercised unreasonably, there is an abuse of power and the action of the authority will be *ultra vires*.

13) Doctrine of Proportionality

With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, unreasonable or irrational, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power is the doctrine of proportionality. The doctrine ordains that administrative measures must not be more drastic than is necessary for attaining the desired result. If an action taken by an authority is grossly disproportionate, the said decision is

⁴¹ AIR 1971 SC 1537, Cited in C.K. Takwani, "Lectures on Administrative Law", Fifth Edition, Eastern Book Company, Lucknow, 2014, p. 321.

⁴² AIR. 1974 SC 555, Cited in C.K. Takwani, "Lectures on Administrative Law", Fifth Edition, Eastern Book Company, Lucknow, 2014, p. 321.

⁴³ AIR 1951 Cal 346, Cited in C.K. Takwani, "Lectures on Administrative Law", Fifth Edition, Eastern Book Company, Lucknow, 2014, p. 326.

not immune from judicial scrutiny. This doctrine operates both in procedural and substantive matters ^[44].

The doctrine of proportionality, as a part of judicial review ensures that a decision otherwise within the province of administrative authority must not be arbitrary, irrational or unreasonable.

14) Doctrine of Legitimate Expectations

The doctrine of "*legitimate expectations*" has been recently recognised in the English as well as in the Indian legal system. It is the latest concept fashioned by the courts for the review of administrative action. The doctrine has an important place in the development of law of judicial review.

A Person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. Principles of natural justice will apply in cases where there is some right which is likely to be affected by an act of administration. This doctrine has been developed both in the context of reasonableness and in the context of natural justice. The doctrine of legitimate expectation is well established and operated in the domain of public law. Being less than an enforceable right, it does not apply to private law. The concept of legitimate expectation made its first appearance in *Schmidt Vs. Secretary of State for Home Affairs* ^[45], wherein it was held that an alien who was granted leave to enter the U.K. for a limited period had legitimate expectation of being allowed to stay for the permitted period. The doctrine was reiterated when alien students were refused extension of their permits as an act of policy by the Home Secretary. The Court of Appeal held that though the students had no right for extension, revocation of permits would be contrary to "*legitimate expectation.*" ^[46]

Irrationality (Wednesbury Test)

Irrationality as a ground of judicial review was developed by the court in *Associated Provincial Picture House Ltd. Vs. Wednesbury Corporation* ^[47], later came to be known as *Wednesbury test* to determine "*irrationality*" of an administrative action. A decision of the administrative authority shall be considered as irrational:

1. if it is without the authority of law,
2. if it is based on no evidence,
3. if it is based on irrelevant and extraneous consideration, and
4. if it is so outrageous in its defiance to logic or accepted norms of moral standard that no sensible person, on the given facts and circumstances, could arrive at such a decision. In other words, it is so absurd that no sensible person could even dream that

⁴⁴ Wade & Forsyth, *Administrative Law*, (2009) 313-314, cited in C.K. Takwani, "Lectures on Administrative Law", Fifth Edition, Eastern Book Company, Lucknow, 2014, p. 333.

⁴⁵ (1969) 2 Ch 149; (1969) 1 All ER 904 (CA), cited in C.K. Takwani, "Lectures on Administrative Law" Fifth Edition, Eastern Book Company, Lucknow, 2014, p. 338.

⁴⁶ *R Vs. Secy. of State for the Home Deptt.* (1985) 1 All ER 40 (CA) Ibid, p. 339.

⁴⁷ (1947) 2 All ER 680 (CA), Ibid, p. 379.

it lay within the power of the administrative authority. It is the use of the doctrine in a substantive sense.

5. it is so unreasonable that it may be described as done in bad faith.

The principle of irrationality shares space with the rule of law, reasonableness and non-arbitrariness. If the action of the administrative authority violates any of these principles, court can quash such action as violative of Articles 14,19 or 21 of the Constitution.

Doctrine of Ultra Vires

The basic tool at the disposal of the courts to control exercise of discretionary power is the *doctrine of Ultra Vires*. The courts invoke this doctrine to check excesses of bureaucratic power. "*Ultra Vires*" literally means "*beyond the powers*". The basic principle is that a body has no power except what the statute (or the Constitution) has conferred on it. Discretionary powers flow from statutes, and thus they are finite, and hence the doctrine of *Ultra Vires*. Primarily, the function of the court is to ensure that discretion is exercised by the authority concerned according to law. It is regarded as the first principle of jurisprudence based on Rule of Law that the Administration should not exceed its powers. It is therefore the duty of the Court to see that an authority does act in accordance with law, and does not go beyond what the law prescribes. If any provision of the relevant law is contravened, then the exercise of power by the Administration is invalid. Thus, *Ultra Vires* constitutes one of the most fundamental concepts in Administrative Law.

a) Substantive Ultra Vires

This aspect of *ultra vires* means that the decision-maker lacks substantive power under the empowering statute to make the decision or take the action in question. An exercise of administrative power to be valid must be exercised within the terms of the law conferring the power. A statutory body cannot exercise a power which has not been conferred on it. Thus, a statutory power to run buses does not permit the running of railways.

b) Procedural Ultra Vires

It is the basic principle of law long settled that, if the matter of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all.

^[48] The origin of this rule is traceable to the decision in *Jaylor Vs. Jaylor* ^[49], which was followed by Lord Roche in *Nazir Ahmad Vs. King Emperor* ^[50] who stated as under:

"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."

A power under a statute has to be exercised in accordance with the provision of the statute and in no other manner.

⁴⁸ *Babu Verghese Vs. Bar Council of Kerala*, AIR 1999SC, 1281, Cited in M.P. Jain & S.N. Jain, "Principles of Administrative Law", 7th edition, Vol. 1, Lexis Nexis, Gurgaon, Haryana, 2013, p. 1116.

⁴⁹ AIR 1936 PC 253, (1875) 1 ch D 426, Ibid.

⁵⁰ AIR 1936 PC 253 : (1936) 63IA 372, Ibid.

c) Extended Ultra Vires

In course of time, the courts have given an extended significance, a broader connotation, to the *ultra vires* doctrine in order to extend their control over discretionary decisions. Over the years, the courts have shown a good deal of vitality in the matter of evolving the principles of Administrative Law, and controlling Administrative discretion is one of them. Accordingly, the courts have developed an extended notion of ultra vires with a view to control the abuse or wrongful exercise of discretionary power. The rationalisation for such an approach is that even though the legislature may confer discretion on the executive, it can not be said that the legislature intended that the executive should be the sole judge of the extent of its own power or how it would exercise the same. If this were to be so, the executive would come to enjoy a completely uncanalised power, and there would then be negation of Rule of Law. The courts have thus expounded several principles or norms to regulate the exercise of discretionary power.

Conclusion

It is a fundamental principle of law that every power must be exercised within the four corners of law and within the legal limits. Exercise of administrative power is not an exception to that basic rule. The doctrines by which those limits are ascertained and enforced form the very marrow of administrative law. Unfettered discretion cannot exist where the rule of law reigns. Again, all power is capable of abuse, and that the power to prevent the abuse is the acid test of effective judicial review.

Under the traditional theory, courts of law used to control existence and extent of prerogative power but not the manner of exercise thereof. That position has considerably modified and court have emphasized that the review ability of discretionary power must depend upon the subject matter and not upon its source. The extent and degree of judicial review and justifiable area may vary from case to case.

In the end, the whole of the above discussion can be summarized very well by the following times of Magna Carta:

"We will not make justices, constables, sheriffs or bailiffs who do not know the law of the land and mean to observe it well."

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