



ADMINISTRATIVE DISCRETION AND INCLUSIVE GROWTH IN INDIAN PERSPECTIVE; ACHIEVEMENTS & CHALLENGES

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Abstract

Administrative discretion is need and inclusive growth is the purpose. It must be the slogan and aim of every country. Administrative discretion can become curse for the country if it transform in arbitrariness. Administrative discretion is useless if it unsuccessful to get the inclusive growth. Mostly countries had adopted the concept of welfare state. To fulfill this purpose administration had required for some discretion. Administrative discretion is a means to get the aim of welfare state. India also had adopted the welfare concept. So the power of administrative discretion had also conferred for administrative officers. Administrative discretion was given to get the inclusive growth. I want to say through my paper that administrative discretion and inclusive growth both are going to parallel in India. There are many problems in sits way e.i. corruption, misbehavior, negligence and arbitrariness. Professor Dicey thought that administrative discretion is against Equality, and it becomes the cause of arbitrariness, discrimination and unjust so the purpose of inclusive growth may be fail.

Key Words- *Arbitrariness, Discretion, Welfare, Ministerial Action, Rule of Law.*



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Introduction

Most of countries in the world have adopted social welfare concept after removing the concept of laissez faire concept. With this effect lot of discretion conferred for the administration. State made lot of laws to get the aim of the social welfare, under those laws lot of discretionary powers

were given to administrative authorities. And provide most of opportunities to perform their duties. Many time administrations feel specific knowledge and instant decision power to perform their duty. So it is necessary that the right to take instant decision must be conferred to administrative authorities. After this they can do their work according to circumstances and they can take decisions also. In the real meaning all discretionary powers are given with this intention, no law can be absolute. Nature is dynamic so circumstances also changeable. Law cannot change easily as circumstances. Therefore law cannot control this dynamic society. Whenever these administrative problems will rise, Legislative said that they do not know when and how it will rise. Legislative is unable to provide any help against this critical situation, but administration can solve this problem for this purpose legislative conferred the power of discretion. We cannot fulfill the aim of social welfare state without discretionary powers of administrative authorities. Inclusive growth and discretion both are mandatory for every country. India is also following this concept. We had provided maximum discretion to administrative authorities when they will perform their duty in respect of inclusive growth. Discretion can convert in to arbitrariness so we had imposed a lot of restriction on them. Whenever they will use these powers they will follow those rules also. They will perform their duty within the limits which was imposed by the legislative body. When legislative conferred these powers to administrative authorities they have to maintain the provision to control them also. There are two types of control (Judicial and None Judicial) over the administrative authorities. All acts of administrative authorities will come under the power of judicial review. Court can check all administrative works on the certain grounds. Court has also a limited power to control administrative actions. When any matter rise, which cannot be checked by the court it can be checked by the administrative authorities.

Meaning and Definition of Administrative Discretion

The word administrative discretion denotes two words administrative and discretion. It means discretion which is used by administration in their functions. Firstly we will discuss on discretion than we will point out on the administrative discretion. Discretion means decision power. In other words the power to do something according their mind and wisdom. Every person has discretion regarding their property he can donate, transfer and sale. It is his discretion if wants that his property should go for his heredities he can write a will. If he do not want to give his property to his heredities he can sale it. No one can interfere in his discretion. Individual discretion is different with administrative discretion. In individual discretion there is no any

restriction. But administrative discretion means they have discretion within the given options. They are not free to take the decision as an individual; they can take decision only within the limits which is provided by legislative. Even court also exercises the power of discretion, when they punish to someone. Discretion means choose an option from the given options on the basis of reason and argument it must not be based on individual will. **Lord Cock**, “discretion is a science to understand the difference between truth - untruth, right – wrong and reasonable & unreasonable. They must not do their work under the influence of personal interest and to fulfill own will.” **Mr. Justice Frankfurter** said, “Discretion without a criterion of its exercise is authorization of arbitrariness.”¹ It means discretion is choosing one option from amongst alternatives. These alternatives must be based on reasons and justice not according to personal will. This exercise must not be capricious, blurred and bizarre; it must be legal and regular.

Historical Background

Administrative discretion is also known as, Public Interest, Public purpose, Fair, Fit, Prejudicial to public safety and security, Satisfaction, Belief, Efficient, Expedient, Proper, sufficient, and their opposites. Administrative discretion is a big problem from the beginning time. It has proved that any welfare government cannot do their work without discretionary powers of administrative authorities. It is not compulsory only to improve the powers of administrative discretion. But it is compulsory because no one know about future so any certain law may not enact for the future. But it is also truth that an absolute discretion may become a cruel owner. **Lord Aitkin**, “according to English jurisprudence any member of executive may not interfere with the property and liberty without this condition that he will also express the legality of his act before the court². Administrative actions are either ministerial or discretionary. A ministerial action is one where the authorities have a duty to do a thing in a particular way. Such actions, however, are exceptional. In most administrative actions, the administrative authorities have the power either to act or not to act or to act in one way or the other. This power- to act or not to act or to act in one way or the other – is called discretionary power. Discretion is the power to decide or act according to ones judgment³. Whenever the word “may” use by legislation before explain the administrative powers. The word may indicate discretionary powers. In other words we can say freedom of authority. Professor Dicey criticized it he thought that discretion is the source of

¹ *Brown v. Allen, 344 US 443 at 446 (1952).*

² *Ashugveyi v. Government of Naiziriya, (1931) L.R.670(C.A.)s*

³ *S.P.Sathe, Administrative Law, Seventh Edition, page no. 385*

inequality, discrimination and arbitrary action. It is a clear cut violation of rule of law. With the effect of socio- economic typical problems which rise suddenly, it is faced by administration. So the scope of ministerial powers is shrinking and the scope of discretionary powers is increased. It has been experienced that a government which has only ministerial powers are rigid and dormant. So administrative officers have required the power to choose, which powers, how and when they will exercise their powers. Main reason is behind these problems; administrative authorities have faced such tuff problems e.i. investigation of facts and choose the facts. Therefore the modern concept is this; lots of discretionary powers are conferred to administration. It is mentioned in a statute that government may form rules to fulfill the object of respective act, when they have need. With the effect of this the discretionary power to make rules and choose the time and place to enforce those rules is conferred to government by the legislative. Legislative do not direct that which rules will make.

Reasons behind the Development of Discretionary Powers-

There are many reasons behind the development of the power of administrative discretion. Some reasons are given blow---

- 1- In present time administration face difficult and different- different problems which can not solved by a single rule.
- 2- Most of those problems are new and rise first time, so a general rule can not apply against those problems because they don't have sufficient experience.
- 3- It is not possible always anticipate to all problems, but when these problems rise and cannot be solved according to circumstances than administrative authorities must be solved it.
- 4- Every problem is based on a different circumstance, if we will apply a rule to all it can be cause of injustice.

Administrative authorities can exercise their powers according to their wisdom and circumstances. They can make and exercise various rules to solve the problem which are rise suddenly. But when administration will solved every problem and exercise different – different rules in those problems. It may become the reason of many difficulties, some are given blow—

- 1- No one may know which rule will be exercised in his matter.
- 2- It will be the clear cut violation of article- 14, Right to Equality, because in every matter of same nature will be deal with different rules.
- 3- It may be possible that administrative discretion can be misused by administrative authorities.

On the bases of above discussion administrative authorities must be preferred a general rule. Where it will possible administrative authorities must be exercised equality in their works. If it will not maintain it may not only become cause of administrative violence bit also it will be fail to maintain public trust. When Administration should be exercised administrative discretion they have to care, which rules has been exercised in similar matters otherwise it will be discrimination and create many obstacles in the way of inclusive growth.

Administrative Discretion in Indian System

India has also adopted the concept of welfare state so it was necessary conferred the discretionary powers to administration because it was only one body which can do all works to get the aim of welfare concept. After adopting this concept government participated and interfered in all work which was done by public. Now state thinks about the development of both public and state. Before it state was think about only state and do the ministerial functions. It did not have any interest public matters. Now the state starts to think about public and their facilities, so state imposed the burden of all responsibilities on the administration. But without discretionary power it was not possible. Administrative officers felt the need the power to take instant decision. Without it they are unable to do something. So state conferred discretionary powers to them. 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 given to her. 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 administrative authorities. 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 framing an opinion or being satisfied that the action is necessary. All such

actions are discretionary.⁴ Supreme Court had held that in the respect of discretionary power given under statute to administration. It is expected that the use of discretionary powers would be based on fair, Just and reasonableness, it must not be based on individual interest or will. It must not be doubtful, arbitrary and imaginary. It must be under within the limits, which is expected with a genuine person.⁵

Administrative Discretion and Indian Constitution

Any statute cannot be challenged on the ground of alleged mala fide intentions or mysterious motive, if it is enacted by competent legislature. If any statute confers discretion to the executive, it must impose some limitations for the exercise their discretion. There are so provisions in our constitution which refer discretion. President of India is the supreme of Executive. He exercised much discretionary power. He can impose national emergency if he is satisfied that any condition has been rise under article 352. He has power to enact and enforce ordinance. He can dissolve to lok sabha, when not any party is in majority. He has discretion whose will call to form the government. He has also the power to grant pardon or remission of sentence to person convicted of offences by court of law under article 72 and 161. He can also presidential rule on a state under article 356. But all these power are under some restrictions. These are not arbitrary nature. Even judiciary has also exercised some discretion, when judges punished to guilty person they have discretion where it is mentioned imprisonment or fine or both, they can convict with any sanction.

Administrative Discretion and Fundamental Rights

Fundamental rights control the executive and legislative powers of the government. And it has also the control over the administrative discretion. No Law may provide administrative finality, because court has jurisdiction to check the administrative discretion. If discretion is against fundamental rights it must be void and declared unconstitutional by the court. Court will focus on some protective principles when it may be necessary during exercise discretionary power in respect of fundamental rights. Discretion can be controlled in a limited jurisdiction with the effect of Fundamental rights. Court has also time to time discuss on the legality of such laws, which provide discretionary power. To fulfill this object court see the summary and making procedure of such law. If court finds these laws against constitution, it will be declared

⁴ "Administrative Law" by S. P. Sathe, Seventh Edition, Page no. 386

⁵ U. P. S. R. T. C. v. Mohd. Ismail, SCC 1991.

unconstitutional. Administration cannot violate article 14 & 19 when they will exercise discretionary powers.

Controls over the Administrative Discretion

It has universally admitted that discretionary powers have become the need of the day. Now a question is raised that how it can be control. Because it can be violate of fundamental rights of public. It can be control with two types first judicial and other one is none judicial. Two procedure can be make against administration departmental (administrative) and judicial if they violated fundamental rights and misused their discretion. There are so many ways to control it. We must incorporate such rules which will be mandatory to that authority who will exercise discretion. Discretion must be limited and systematic. If legislative is failed to maintain such norms in that statute to control discretion, those norms must be incorporated by administration with the help of delegated legislation. It must be control in proper way. It can be control with judicial and other authorities, e.i. C.B.I., C.V.C. and Lokpal. Judicial control is more effective. Judicial control can protect to citizens from arbitrariness and exploitation. Now lots of principles have been developed to control discretion by the court. Judiciary must concentrate on two points first it should be direct to legislative that they do not confer wide and unlimited discretion to executive. And other is that every discretionary act must be come under the power of judicial review. It can be determined that every administrative authority did their work according to law and within the limits of their jurisdiction. Judiciary plays a good role to control it.

Judicial control over administrative discretionary powers

England- parliament is sovereign in England so no statute can be checked by judiciary on any ground. Court does not have the power of judicial review against any statute. But court can control administrative discretion on certain grounds, e.i. ultra- vires and abuse of discretion.

U. S. A. - U.S.A. is also followed the concept of judicial review as India. Both of countries are implement similar rule judiciary cannot imposed their personal view instead of discretion.

It must be control, for the proper implementation of Rule of Law. Administrative discretion must be exercised according to Rule of Law not rule of individual. If absolutely freedom to exercise their work is conferred to administration, it can be dictator. So it is necessary to control administrative discretion.

Limits of administrative discretion-

Court may control it on certain grounds. No any discretion can be absolute. There are some restrictions on it, and some of those are given blow.

- 1- Discretion must be used by respective authority which was authorized for it, and with similar motive.
- 2- Delegates cannot delegate his powers to other person it means sub delegation is unconstitutional. When it is not mentioned in parent act. Unless it is mentioned in that act, under which these powers are provide.
- 3- Any authorized person cannot be made incompetent himself with the use of permanent rules. It means no one can be waived their liabilities.
- 4- It must be used for the public welfare. It must not ultra- vires. If any procedure is given, it must be followed. If procedure is not mentioned then a reasonable process must be follow. If administrative authorities are failed, court can declare unconstitutional their work.
- 5- When it will exercise officer must be used his mind, he should not behave like a machine.
- 6- Discretion must be used in the respect of relevant considerations.
- 7- Discretion must be revoked on the ground of mala-fide intention.

Court may check administrative authorities on above grounds. It means discretion has not finality. It can be controlled by court.

Administrative Discretion and Role of Judiciary –

Now these days court has developed lot of new principles to control the discretion. These grounds are success to control discretion. These principles are Doctrine of ultra-vires, abuse of administrative discretion, improper purpose, irrelevant consideration, malice, unreasonableness, violation of procedure, arbitrary use of discretion and administrative discretion. In the case of **Ram Manohar Lohia v. State of Bihar**,⁶ under the defence of India rules, the authority was empowered to detain a person to prevent sub version of Public order. The petitioner was detained with the view to prevent him from acting in a manner prejudicial to the maintenance of Law and order. The court set aside order of detention. In the opinion of the court, the concept of law and order was wider than the concept of public order. Supreme Court in the case **Nalini v. District**

⁶. A.I.R.1966,SC740

Magistrate⁷ has held that under the relevant statute power was conferred on the authority to rehabilitate persons displaced from Pakistan as a result of communal violence but it was exercised to accommodate a person who had come from Pakistan on a medical leave. The order was set aside. *Maneka Gandhi v. Union of India*,⁸ the supreme court held that an order passed under section 10 (3) c of the passport act, 1967, empowering for impounding a passport, could be declared bad under article, 19 (1) (a) & (g) if it imposes unreasonable restrictions on the freedoms covered by the two clauses. The court has held in *Ajay Hasia v. Khalid Majid*,⁹ that allocation of 33.3% of the total marks to oral interview is arbitrary as there are many deficiencies in such a test and it leads to deterioration in moral values. In the opinion of the court, not more than 15% will be allotted to viva voce and that the test should be properly conducted. Justice P. N. Bhagwati stated that, “it is well steered rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them.”¹⁰ In *Air India v. Nargesh Meerza*,¹¹ the question was on the validity of service regulation framed by air India providing for the termination of services of an airhostess on her first pregnancy. Supreme Court held that the regulation to be extremely arbitrary, unreasonable, abhorrent to the notions of a civilized society and interfering with the ordinary course of human nature. It is not a disability, but one of the natural consequences of marriage and immutable characteristic of married life.

So it has proved that administrative discretion is need of the day and its control is the necessity. Judicial review is a good weapon to control it. So it is another dimension of judicial review of administrative discretion. Under article 14, no one can be discriminate. Article 14 illegalizes any discrimination or arbitrary action in the actual exercise of any discretionary power.

Suggestions and conclusion-

Administrative discretion must be conferred but it must be limited. And some restriction must be imposed. It means a procedure should be established for the administration. So I want to point out some suggestions, which are given blow-

⁷ A.I.R.1951, Cal.346.

⁸ A.I.R. 1978, SC 597.

⁹ A.I.R. 1981, SC 487.

¹⁰ R. D. Shetty v. International Airport Authority, A.I.R.1979 sc 1628.

¹¹ A.I.R. 1981, SC 1829.

- 1- Without discretion administrative officers cannot get the success in their aim. They cannot achieve welfare concept so it is necessity that state should confer discretion, but it must not access.
- 2- When state provide discretion some rules (restrictions) should be imposed at that time. These restrictions must be followed during exercising the discretion.
- 3- The wordings of the act must be doubtless and clear, under which discretion is conferred.
- 4- Legislative should establish a procedure to administrative officers, they must follow it during exercise their discretion. If they are failed to follow it. They must be punished.
- 5- If any person is injured with discretion, remedy must be provided to him.
- 6- Discretion must comes under the jurisdiction of judicial review not only certain grounds e.i. mala-fide intention, arbitrariness, discrimination and irrelevant consideration, but on reasonable grounds also. Because day by day new problems are rising.

After above discussion I want to say that discretion must be conferred with some limits. Without discretion administration cannot run smoothly in a welfare state. It is a necessary element in exercise of powers. But limits and standard are also required to be established. Without limits and restrictions administrative discretion becomes absolute. Aristotle has rightly that power corrupts and absolute power corrupts absolutely. Discretion develop creativeness in government. Discretion must be in all administrative actions but at the same time it is necessary to impound arrangement and check discretion to uphold the principle of rule of law in administration least cases of injustice go unheeded and scot-free. Although it is true that discretion is necessary to running the administration but absolute discretion cannot be granted. If discretion is without restrictions then there will be dictatorial rule and rule of will vanish from the country. Without discretion no policy can be carried out in the country. If absolute discretion is conferred, democratic norms will not realized.