

# Judicial Review of Administrative Discretion - An Analysis

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**Abstract:** Judicial review of administrative discretion has become necessary in modern days to avoid abuse and arbitrary exercise of power by the administrators. It is important to have a check on the powers of this authority. The Supreme Court of India through its judgments has made it clear that the discretionary exercise of the powers has to be done according to rule of law and principles of Natural Justice. Judicial review is required so that no authority can exercise its power arbitrarily. Judicial review acts as a weapon so that no authority can misuse their powers and should give only fair treatment. This paper is going to analyze the importance of judicial review in administrative discretion and why there is a need for such review.

**Key words:** Judicial Review, Administrative Discretion, Welfare State

## Introduction

The traditional theory of “laissez faire” has been given up by the State and the old “police state” has now become a “welfare state”. Because of this philosophy, governmental functions have increased. The administrative authorities have acquired vast discretionary powers and generally, exercises 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 legislative powers are delegated to it by the legislature 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.

## Meaning of Administrative Discretion

The definition of “administrative discretion” is given by Prof. Freund in the following words: When we speak of administrative discretion, we mean that a determination may be reached, in a 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 facts 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.

## Judicial Review: Meaning

Judicial review may be defined as a courts 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. In *Minerva Mills Ltd V Union of India* case the Supreme Court observed that the constitution has created an independent judiciary which is vested with the power of judicial review 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 as sentinel on the quiver. Thus judicial review aims to protect citizens from abuse of power by any branch of the state.

## Nature and scope

Judicial review of administrative action is perhaps the most important development in the field of public law in the second half of this century. In India the doctrine of judicial review is the basic feature of our constitution judicial review is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law judicial review is the touchstone of the constitution. The Supreme Court and high courts are the ultimate interpreters of constitution it is therefore their duty to find out the extent and limits of the power of coordinate branches executive, and legislature and to see that they do not transgress their limits. This is indeed a delicate task assigned to the judiciary by the constitution.

The power of judicial review is an integral part of our constitutional system and without it there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review is a basic and essential feature of the constitution and it cannot be abrogated without affecting the basic structure of the constitution.

The areas where judicial power can operate are limited to keep the executive and legislature within the scheme of division of powers between three organs of the state the ultimate scope of judicial review depends upon the facts and circumstances of each case the dimensions of judicial review must remain flexible. It is a cardinal principle of our constitution that no one however highly placed and no authority lofty can claim to be the sole judge of its power under the constitution the rule of law requires that the exercise power by the legislature or by the judiciary or by the government or by any other authority must be conditioned by the constitution.

## English Law

Dicey who advanced the doctrine of rule of law was opposed to conferment of discretionary power or administrative authorities. He stated:

Wherever there is discretion there is room for arbitrariness and that in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects the law requires that the government should be subjected to the law rather than the law subject to the government.

## Indian law

Judicial review of administrative action is perhaps the most important development in the field of public law in the second half of the 20th century in India. The doctrine of judicial review is the basic feature of our constitution. It is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law. It is also the touchstone of the constitution. The Supreme Court and High Courts are the ultimate interpreters of the constitution. It is therefore their duty to find out the extent and limits of the power of coordinate branches viz executive and legislature and to ensure that they do not transgress their limits. This is indeed a delicate task assigned to the judiciary by the constitution. Judicial review is thus the touchstone and essence of the rule of law.

The power of judicial review is an integral part of our constitutional system and without it there will be no government of laws and the rule of law will become a teasing illusion and a promise of unreality. Judicial review therefore is a fundamental and essential feature of the constitution and it cannot be abrogated without affecting the basic structure of the constitution.

The concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the constitution. The rule of law requires that the exercise of power by the legislature or by the government or by the judiciary or by any other authority must be conditioned by the constitution. Judicial review is thus the touchstone and repository of the supreme law of the land. It is a vital principle of our constitution which cannot be abrogated without affecting the basic structure of the constitution. It is the function of the judiciary to ensure that the government carries its duty in accordance with the provisions of the constitution.

### **Constitutional Status**

Judicial review is itself a basic feature of the constitution and no restriction can be imposed on the power of the Supreme Court and the High Courts with regard to the enforcement of fundamental rights of the citizens which is inherent and cannot be extinguished by constitutional or statutory provisions. Being the protector of civil liberties the Supreme Court and the High courts have not only the power and jurisdiction but also an obligation to protect fundamental rights guaranteed by part III of the constitution in general and article 21 in particular, jealously and vigilantly.

The scope of judicial review before Indian courts has emerged in three dimensions – firstly, to establish fairness in administrative action, secondly, to protect the guaranteed constitutional fundamental rights and lastly, to rule on questions of legislative competence between the Centre and the States. The power of the Supreme Court of India to enforce and implement these fundamental rights is derived from Article 32 of the Constitution. It gives citizens the right to directly approach the Supreme Court and High courts for seeking remedies against the violation of these fundamental rights. The makers of the Constitution very judiciously incorporated in it the provisions of Judicial Review so as to maintain the balance of federalism, to protect the fundamental rights guaranteed to the citizens and to afford a useful weapon for equality, liberty and freedom.

### **Judicial Review As a Part of the Basic Structure**

In the land mark judgment of *Keshavanda Bharathi v. State of Kerala* the Apex court of India propounded the doctrine of basic structure according to which it said that the legislature has power to amend the Constitution, but such amendments shall not change the basic structure of the Constitution, The Constitutional bench made no attempt to define the basic structure of the Constitution. S.M. Sikri, C.J mentioned five basic features:

- Supremacy of the Constitution
- Republican and democratic form of Government
- Secular character of the Constitution
- Separation of powers between the legislature, the executive and the judiciary
- Federal character of the Constitution

Justice Sikri observed that these basic features are easily distinguishable not only from the Preamble, but also from the whole scheme of the Constitution. He further added that the structure was built on the foundation of dignity and freedom of the individual which undoubtedly cannot be amended. It was also observed in that case that the above are only illustrative and not exhaustive of all the limitations on the power of amendment of the Constitution.

In *S.P. Sampath Kumar v. Union of India* Justice P.N. Bhagwati, C.J., relying on *Minerva Mills Ltd.*, case stated that it was well settled and established that judicial review was a basic and essential feature of the Constitution. If the power of judicial review was absolutely eliminated, the Constitution would lose its basic structure and independence.

### **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 v. Moss*, the US 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.

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. The wider the discretion the greater is the possibility of its abuse. As it is rightly said, “every power tends to corrupt and absolute power tends to corrupt absolutely”. 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 a “government of laws and not of men”. 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.

## Grounds

While exercising power of judicial review, the court does not exercise appellate powers. It is not intended to take away from administrative authorities the powers and discretion properly vested in them by law and to substitute courts as the bodies making the decisions. Judicial review is a protection and not a weapon.

In India, the courts will interfere with the discretionary powers 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:

- Sub-delegation
- Imposing fetters on discretion
- Acting under dictation
- Non-application of mind
- Power coupled with duty

### 2. Excess or Abuse of Discretion

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

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

- Acting without jurisdiction
- Exceeding jurisdiction
- Arbitrary action
- Irrelevant considerations
- Leaving out relevant considerations
- Mixed considerations
- Mala fide
- Collateral purpose; Improper object
- Colourable exercise of power
- Colourable legislations: Fraud on Constitution
- Non-observance of natural justice
- Doctrine of proportionality
- Doctrine of legitimate expectation
- Unreasonableness

## Conclusion

The basic rule should be that the governing power wherever located must be subject to the fundamental constitutional limitations. Thus, in almost all the democratic countries it is accepted that discretion conferred on the administration is not unfettered, uncontrolled or non-reviewable by the courts. To keep the administration within its bounds, the courts have evolved certain principles and imposed some conditions and formulated certain tests and taking recourse to these principles, they effectively control the abuse or arbitrary exercise of discretionary power by the administration. 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 "the safest possible safeguard" against abuse of power by any administrative authority, the judiciary cannot be deprived of the said power.

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