



## Necessity of Discretionary Powers: A Critical Appreciation as a Necessary Evil

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Abstract

*With the evolution of the modern welfare state system, state functions have multiplied manifold that consequently necessitated delegation of wide-ranged discretionary powers in the hands of administrative authorities to address ever-growing complex issues with the help of framing rules and deciding matters accordingly, which otherwise came within the exclusive domain of legislative and judicial authorities. With qualitative research methodology, this research aimed to investigate how the idea of administration emerges and whether or not discretion is an unavoidable evil. The research at hand conceptualized administrative actions, various modes for conferring discretion, and explicated its pros and cons. This paper also examined how discretion is a need of modern administrative dispensation and how to control its potential exploitation.*

**Key Words:** Discretion, Delegation, Quasi-Judicial Action, Quasi-Legislative Action, Welfare State.

### Introduction

Discretion is a choice of alternatives available with the state officials in the performance of their functions. The concept of the modern welfare state necessitated the delegation of wide-ranged discretionary powers on the officials to address modern-day complex problems. Consequently, state officials have been conferred with a variety of functions: quasi-legislative, quasi-judicial, and pure administrative functions. With such wide-ranged authority, there always lurks the likelihood of misuse of discretionary authority, which is controlled by subjecting it to various standards and principles. This research investigated various questions such as how the necessity of granting discretionary authority emerged, how discretion has been defined by different scholars, what are the different categories of administrative actions, what are the different modes for conferring discretion, why discretion is a need of modern administrative dispensation, and how to controlled discretion by laying down various standards.

In order to conduct this research, qualitative research methodology has been applied, and data has been taken from the unpublished LLM thesis of the principal investigator. For its operational framework, the research has been divided into the following segments: in the first segment, an overview of the research has been given. In the second segment, the historical background for the necessity of administration has been given, which is further categorized into pre and post-welfare state. In the third segment, discretion has been defined. In the fourth segment, administrative actions have been explicated, which is categorized into two general categories: ministerial actions and discretionary actions, while administrative actions as to kind of powers have been divided into three kinds: quasi-legislative action or rule-making action, quasi-judicial action or administrative adjudication, pure administrative action or rule-application action. In the fifth segment, discretion as a need of modern administrative dispensation has been examined. In the sixth segment, modes of conferring administrative

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discretion have been explicated. In the seventh segment, arguments in favor and against discretion have been given. In the eighth segment, how to achieve objectiveness of discretion has been exemplified, which has been divided into three categories: the standard by the legislature, standards by the administration, and customs and norms. In the last segment, the research has been concluded with meaningful findings on how to regulate discretionary authority, which is a necessary evil.

## Historical Background

The concept of discretion evolved with the evolution of the concept of the state. The establishment of the state necessitated leadership to administer the affairs of the state. No leadership or administration can function without administrative discretion, and the concept got impetus with the emergence of the concept of the welfare state, which resulted in the multiplication of state functions. However, discretion in terms of the welfare state can broadly be classified into two distinct eras: pre-welfare state, the era of a police state, absolute kings, and the laissez-fair states can be characterized as that of pre-welfare state. The welfare of the people was not the principal objective behind the administration of the states. In the era of the pre-welfare state, the administrative authorities were conferred with the power of administrative action, being ministerial in nature. Ministerial actions comprise a series of fixed standards or objective measurements and do not involve the use of personal or subjective judgment in deciding a matter. The administrative authorities performing their functions in ministerial capacity had no option to use their personal judgment and had to follow the prescribed rules of conduct strictly. The public authority merely applied the law to the facts as presented and had no alternate courses of action in reaching a particular decision. Post-welfare state, with the concept of the modern welfare state, which came to be looked upon as a need of the hour in times of industrial revolution of 19th century, it was realized that laissez-fair state was no more successful in running the affairs of state. The legislatures realized the importance of discretionary powers being conferred on the administration for smooth flow of the increased intervention of the state into the affairs of individuals of particular states. With the escalation of state functions, the legislatures were compelled to confer vast discretionary powers on the administration because it was not always possible to lay down standards and parameters for the exercise of administrative powers in novel situations of complex state affairs. It was realized that a government having only ministerial duties with no discretionary functions would be extremely rigid and unworkable and that, to some extent, officials must be given a choice as to when, how, and where they should act.

Despite the well-established proposition that delegation of excessive discretionary power is bad, the fact remains that vast discretionary powers are being conferred on the administration. It is true that no government can function today without officials being given large discretionary powers. But it must always be kept in mind that discretion is far from being a perfect tool, and there always lurks the possibility that an official may exercise his discretion in an improper manner. *Lord Denning* has observed: ‘throughout history, you will find instances of power being misused or abused. *Justice Douglas* of the US Supreme Court ([New York v. the United States, 1951](#)) observed that “absolute discretion, like corruption, marks the beginning of the end of liberty.” In most cases, statutes confer discretionary powers without laying down substantive considerations to guide the exercise of powers. There are several modes of control of administrative discretion which have been developed, e.g. doctrines of natural justice and fairness, excessive delegation and ultra vires. In such circumstances, the courts can play a vital role to ensure that discretionary powers are not abused or misused and are exercised within legal parameters. Here it is worth mentioning that, on the one hand, the courts do not go into the roots of a discretionary decision, for it is a well-established dictum that the Courts will not substitute their own discretion with that of the official on whom it is conferred. On the other hand, the function of the courts is to see that the administrator acts according to the law ([Jain & Jain, 1973](#)). Discretionary power may be conferred generally or with a duty attached to the exercise of that power, where the power and duty to exercise it go together, the authority empowered is under a statutory liability to exercise its discretionary power and if it refuses to do so, the court of law may compel its exercise ([Kesari, 1993](#)).

## Discretion How Defined

Discretion, in its literal sense, means choosing among various available alternatives. However, in terms of

administrative law, administrative discretion means choosing from among various available alternatives, but keeping in view law, rules of reason and justice, and same is not to be exercised according to personal whims. Administrative discretion is one that is to be exercised in accordance with policy or expediency and may not always involve any judicial elements. The statutes conferring power or discretion on public officials are not expressly coupled with a duty to exercise power or discretion being conferred, but it has been construed that discretion so conferred be exercised to meet the ends of justice. A discretionary power grants to the administrative authority freedom to act in any manner it thinks fit, but subject to legal restraints and the requirement that it is exercised in a fair and just manner so as to promote the objectives of the law. The administrative authorities have to face a variety of situations whose course cannot be predicted with any amount of certainty. To overcome such situations, the administrative authorities must possess the capacity to make decisions on the spot. As the legislature cannot definitely anticipate such situations, it has to confer a discretion on the executive. However, in the case of a quasi-judicial body, the authority may be required to act according to the principles of natural justice whose ultimate decision is non-reviewable on merits ([Khan, 2012](#)).

Following are some well-known definitions of discretion: “discretion is the power usually given by the statute to make a choice among competitive considerations” ([Kesari, 1993, p. 224](#)). The exercise of professional expertise and judgment, as opposed to strict adherence to regulations or statutes, in making a decision or performing official acts or duties. “Discretion implies the power to make a choice between alternative courses of action” ([De Smith, Woolf, Jowell, & Le Sueur, 1995, p. 278](#)). According to Coke, “Discretion is a science or understanding to discern between falsity and truth, right and wrong, and not to do according to will and personal affection” ([Massey, 1995](#)). Discretion in administrative context means “choosing from amongst the various available alternatives but with reference to the rules of reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful, but legal and regular ([Sharp v. Wakefield, 1891](#)). Discretion is the power of a judge, public official or private party granted by a contract, trust, will or law to make decisions on various matters based upon personal judgment but within the prescribed limits of the law.

### **Administrative Actions**

Administrative actions, being a comprehensive term, cannot be precisely defined. In modern times, the administrative process, as a by-product of the intensive form of government, cuts across the traditional classification of governmental powers and, to a great extent, combines into the executive authorities all the powers which were traditionally exercised by three different organs of the States, i.e. legislature, executive and judiciary. So, the writers of Administrative law are on the same page that any attempt to classify administrative functions on any conceptual basis is not only impossible but also futile. But to clarify some academic details of the conception of administrative discretion, one needs to classify administrative actions into different types. Thus speaking generally, an administrative action can be classified into ministerial and discretionary actions ([Massey, 1995](#)): ministerial acts are those administrative actions which are to be performed by the administrative authorities strictly according to law with such certainty that the law leaves no room for the discretion or personal judgment on the part of the authority. A ministerial act has been defined as one that a public officer is required to perform under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority. Therefore, a ministerial action involves the performance of a definite duty in respect of which there is no choice, e.g. collection of revenue may be one of such ministerial actions. Administrative agencies have no power to act on their own wishes while performing their duties in a ministerial capacity. Discretionary actions are those administrative actions in which the law gives room to the administrative authorities to exercise discretion.

Because of the prevailing socio-economic complexity, which administration is dealing with, the range of ministerial functions is much smaller as compared to discretionary functions. It is realized that a government having only ministerial duties with no discretionary functions would be extremely rigid and unworkable and that, to some extent, officials must be allowed to have a choice as to when, how, and where they should act. The most obvious reason is that the administration is required to handle complex situations which are subject to investigation of facts, making choices and exercise of discretion before action is taken. Thus, it is the need of the day to leave a lot of discretion with various authorities. Discretion implies the power to make a choice between alternative courses of action. When an administrative agency is acting in a ministerial capacity, it has no power

to consult its own wishes, but when it is acting with discretion, its standards are subjective, and it follows its own wishes ([Gordon, 1933](#)).

Administrative actions as a kind of powers can be categorized into the following three types: quasi-legislative actions or rule-making actions; when any administrative authority exercises the law-making power delegated to it by the legislature, it is known as the rule-making action of the administration or quasi-legislative action being controlled by legislature and the courts. Although the law-making power in most of the written constitutions is expressly vested in the legislature, and it is provided that law-making power must only be exercised by the authorities in whom this power vests, yet the intensification of government functions has compelled them to resort to a delegation of discretionary functions to the executive branch of the state. Another logical explanation is that legislative bodies cannot give the quality and quantity of laws that are required for the efficient functioning of a modern intensive form of government. Quasi-judicial actions or administrative adjudication, administrative decision-making is a power to perform acts administrative in character but requiring some characteristics of judicial traditions incidentally. Today most of the decisions which affect a private individual come not from the courts but from the administrative bodies exercising adjudicatory powers. Administrative decision-making is also a by-product of the intensive form of government. It has been found that the traditional judicial system cannot give to the people the quantity and quality of justice that is required for a welfare state. Pure administrative action or rule-application action, the difference between quasi-judicial and administrative action may not be of much practical consequence today, but it may still be relevant in determining the sphere of both actions in order to make the concepts stand out clearly for academic purpose. The action of administrative authorities having no incidental features of judicial and legislative functions or the residuary functions of the authorities may be termed as pure administrative functions. While performing such functions, the authority is not bound to follow certain procedures, though there may be some minimum procedures in the form of principles of natural justice if provided by law. Pure administrative proceedings don't normally settle rights and duties but may affect rights and are based on policy, expediency, and subjective satisfaction of the authority. Such actions don't involve settled course of action, instead, they are meant to deal with individual cases with particular facts. The instances of such actions may involve issuing directions; fact-finding inquires, appointments, and dismissals etc. ([Khan, 2012](#)).

With the escalation of huge state machinery of the modern era, the functions of the states have increased manifold and gained more complexity in their nature, resulting in enhanced interaction of administrative authorities with individuals. This has led to a hectic list of tasks to be performed by the administration with a view to achieving maximum possible regulation of individual as well as collective spheres of life of those who are subjects of the state. To cope with this grave situation of an unending stretch of executive intrusion, for the purpose of welfare society, into functions otherwise specific to other organs, the administration must be equipped with some effective tools. One of the tools in today modern's government is the discretion vested in the administrative authorities.

### **Discretion as a Need of Modern Administrative Dispensation**

In modern times, the legislatures are compelled to confer wide discretionary powers on the administration because it is not always possible to lay down standards or norms for the exercise of discretion. The administration is always asked to solve a problem whenever it arises, for the legislature is not sure how it can be solved. It is the only administration that is deemed competent to do, and, therefore, power is left with it in broad terms. The conferment of discretionary power assumes that the power should be exercised independently by the authority concerned according to its own assessment. It also imposes a duty to be exercised subject to the limitation of law and ambit of discretion. The administrative authorities vested with discretionary powers should, therefore, act on their own, and they shouldn't be guided by the direction or instruction of their superiors in the discharge of power (Kesari, 2008). The Supreme Court ([UP State Road Transport Corporation v Muhammad Ismail, 1991](#)) observed that discretionary power might be conferred generally or with a duty attached to the exercise of that power, where the power and duty to exercise it go together, the authority empowered is under a statutory liability to exercise its discretionary power and in case of any default, the court of law may compel its exercise.

It is an admitted fact that in an intensive form of government, the government cannot function without the exercise of some discretion by the officials. It is necessary not only for the individualization of the administrative power but also because it is humanely impossible to lay down a rule for every conceivable eventuality in the complex art of modern government ([Massey, 1995](#)). The underlying objective behind discretion is to promote justice by grasping a variety of facts in individual cases so as to avoid the complications of general applications of rules and provisions of law. It is clear for the obvious reasons that each case has special circumstances and needs to be dealt with accordingly. The administrative authorities must possess the capacity to take decisions expeditiously in individual cases, which is possible only if reasonable discretion is granted to the administrative authorities. This is why the administrative functions of today are more based on discretion rather than being ministerial directions. Discretion is the all-pervading phenomenon of the modern age. Discretion is conferred not only in the area of rule-making or delegated legislation but also conferred in adjudicatory and purely administrative matters. In the former case, broad discretion and choice are being conferred on the government to make rules. In the later case, the power is given to apply a vague statutory standard on case to case basis. A ministerial power may be inappropriate due to rapidly changing circumstances. The authority with discretion as a trust can respond appropriately and immediately to the complex day to day questions arising in individual cases by using discretion reposed in him as a trust.

Whether or not an action is required depends upon the happening of certain events or the arising of certain situations. They have to be determined from time to time, and the administration has to respond by using the power being conferred. Where the state has to perform the regulatory function of ensuring that the activities such as business, trade, industry or social services are conducted in the public interest, the ambit of its discretionary power is bound to be large ([Sathe, 2004](#)). Administrative authorities have to exercise the discretion conferred upon them by the legislature in numerous ways. For instance, the administrative authority has to see whether the activities of a person are likely to be prejudicial to the security of society or state, whether a person is to be permitted for a particular act or a license be issued to conduct an activity or exemption be granted. Some of the actions depend on the personal assessment of the situation by the administrative authority, which may be true in his perspective, but which sometime may cross the limits of powers conferred upon him. Thus administrative discretion has not been imposed for an individual to be withheld but for the satisfaction of the society.

The delegation of discretionary power may be necessary for a variety of reasons: the plethora of modern-day complex problems cannot be dealt with without discretion being granted to the administration; the difficulty of providing specific rules in cases arising in different situations; the difficulty of identifying all of the factors to be applied to a particular case; the difficulty of weighing those factors; the need to provide an easy vehicle for changing the considerations to be applied to the problem over time; the complexity of the issue; and the desire not to confer vested rights on a particular party, which might be called the “short leash” principle ([Jones, Anne, & Villars, 1994](#)). For a welfare state, it has become more stressful for the government to exercise discretion to the possible extent coupled with the duty to satisfy subjectively with laying down the statutory guidelines or imposing conditions.

### **Modes of conferring Administrative Discretion**

We must not be oblivious of the fact that the legislature seldom enacts comprehensive legislation complete in all respects. More often, the legislation is sketchy, and its parameters leave many gaps and confer powers on the administration to act in a way it deems “necessary” or “reasonable”, or if it “is satisfied” or “is of the opinion”. Rarely does the legislature clearly enunciate a policy or a principle subject to which the executive may have to exercise its discretionary powers. Quite often, the legislature confers more or less an unqualified or uncontrolled discretion on the executive. Administrative discretion has no particular mode to be conferred by a statute. Many different words may indicate discretion in different statutes. It may be denoted by such words or phrases as “public interest”, “public purpose”, “prejudicial to public safety or security”, “satisfaction”, “belief”, “efficient”, “reasonable”, etc. In this regard, the words of an American scholar are worth-mentioning:

“When we speak of administrative discretion, we mean that a determination may be reached, in part at least, upon the basis of considerations not entirely susceptible to proof or disproof. A statute confers discretion when

it refers an official for the use of his power to beliefs, expectations, or tendencies instead of facts, or to such terms as 'adequate', 'advisable', 'expedient', 'equitable', 'fair', 'fit', 'necessary', 'wholesome', or their opposites. These lack the degree of certainty ... they involve a matter of degree or an appeal to judgment. The discretion enlarges as the elements of future probability preponderate over that of present conditions; it contracts wherein certain types of cases quality tends to become standardized, as in the matter of safety; on the other hand, certain applications of the concepts of immorality, fraud restraint of trade, discrimination or monopoly are so controversial as to operate practically like a matter of discretion" ([Freund, 1928, p. 71](#)).

## Pros and Cons of Administrative Discretion

There exist mixed notions as to the advantages and disadvantages of administrative discretion because, however, controlled the discretion may be, it is always subject to abuse by the concerned authorities. However, administrative authorities have performed much expediently when they are granted discretion rather than when they are under ministerial directions as discretion is not absolute but conditional on observance of law and judicial norms. Even then, there are certain aspects of granting administrative discretion, which might prove that in some ways, administrative discretion is disadvantageous, though not deprived of advantages. The main uses of administrative discretion are enumerated as under: discretion is a tool for promoting high quality justice while conducting administrative functions; discretion, than any other legal tool, is more helpful in removing the rigours caused during the general application of law to individual cases specific in their nature; discretion, being controlled by sound judicial principles, is dependable in terms of efficacy in solving such matters as do not match already decided facts; the present-day problem, which administration is called upon to deal with, are mostly of complex and varying nature and is difficult to be comprehended within the scope of general rules; plethora of problems being faced by the modern world is of complex nature, practically of the first impression; expectancy of each and every problem is not possible but when a problem arises the administration responds spontaneously for the administration of justice despite of the absence of specific rules applicable to that situation ([Khan, 2012](#)).

Following arguments are against conferring discretion: administrative authorities, when given discretion, can misuse the same as rightly pointed out in the case (*US v. Wunderlich*, 1951) by Justice Douglas of the US Supreme Court, "Where discretion is absolute, man has always suffered.... absolute discretion is more destructive of freedom than any of man's other inventions." In another case of the same nature, the words of Justice Douglas of the U.S Supreme Court are worth-mentioning, "Absolute discretion, like corruption, marks the beginning of the end of liberty" (*New York v. the United States*, 1951). Lord Denning has observed in an extrajudicial remark that throughout history, you will find instances of power being misused or abused. Similarly, 'Montesquieu' proves above remarks that "power corrupts and absolute power corrupts absolutely." Uniformity and certainty of administrative decisions may be lacking because of varied decisions by different authorities exercising discretion, which may cause discrimination with individuals in their cases having similar facts. This is not desirable because such variation of decisions by administrative authorities might shake the confidence of the people as we know the discretion is a trust reposed in administrative authorities by the legislature.

## Objectiveness of Discretion – How Achieved

To avoid abuse of power being granted by the legislature, it is very important to identify the ambit of discretion being delegated to the particular executive officer in question. Rarely discretions are completely unfettered. On the contrary, most legislation lays down at least general guidelines within which the authority must exercise the discretion conferred on him. There are three possible ways in which the discretion can be made objective: Standards by the legislature, the first mode by which discretion of administrative authorities can be made objective is the standards and parameters laid down by the legislature itself. The laws conferring discretion may seek to set down the elements and standards which the authority has to apply in exercising its discretion and selecting a course of action. In this kind, the degree of discretion should be restricted by the law itself as far as possible. In such circumstances, the administrative authority in which discretion is vested is bound to exercise power within the prescribed limits given by the legislature.



The second mode by which the exercise of discretion can be made objective is standards by the administration. The phenomenon of standards by the administration is applied when the legislature fails to lay down standards and parameters for the exercise of administrative discretion conferred by the administrative authorities. In such cases, the administration can itself lay down standards by using its power of delegated legislation. The power of delegated legislation can be used by the administration to lay down rules of conduct observed not only by the people but also by the administration itself in given situations. If a statute leaves room in the hands of the administration, the technique of delegated legislation can be used to lay down standards, parameters and criteria with respect to which the discretion is to be exercised. Thus, rules can be promulgated by the administration to channelize the broad stream of statutory discretion into narrow streams by limiting its own freedom of action by putting down the norms, according to which the administrative discretion conferred by the statute is to be exercised in individual cases. Proper application can be ensured from case to case, which would help to anticipate an administrative decision in individual cases, thus, making individual right somewhat certain and reducing the chances of administrative discretion being abused.

Customs and norms of practice prevailing in a society is the third mode by which the exercise of discretion can be made objective. For the purpose of achieving uniformity in discretionary decisions, to some extent, administrative directions and norms of practice can be used instead of the rules and standards set down by the legislature or administrative authority. Customs and administrative directions are applicable only when the scheme is in its initial and experimental stage, where constant adjustments are yet to be made. We must not be oblivious of the fact that no amount of rules or directions can really eliminate the need for discretion in individual cases because situations may arise which fall outside the guidelines and standards prescribed by the legislature, and the administration will have to address novel questions arising out of individual cases and will have to take some decision therein. All these considerations, however, make it indispensable that discretion is vested in the administration to protect individuals of the society ([Khan, 2012](#)).

## **Conclusion**

To conclude, administrative discretion is an inevitable phenomenon, a choice in the hands of state functionaries, which has to be exercised as an entrusted duty reflecting the anticipation of good governance in a welfare state. The need for administrative discretion can be traced back to the era of ancient cavemen; it can be logically explained that the urge for having a society of men was naturally linked with the search for leadership. The leadership must have been looked upon as a source of guidance in different spheres by the men of caliber and wisdom. Search for such leadership can be termed as the first traces of human efforts towards having administration. Although, these traces are not exactly known to human history in terms of exactitude of time, yet the era of a police state is said to have emerged from this search where the then administration was to a large extent equipped with ministerial duties only. However, the concept of a police state is no more in vogue, and from police state to laissez-fair, it has developed into welfare states all over the modern democratic world. Thus, administrative discretion can be historically classified in two distinct eras, i.e., pre-welfare state and post-welfare state. The core difference between the two approaches is due to the nature of duties being conferred on the state functionaries. The former could be associated with ministerial functions, where the officials were bound to observe the granted authority in its letter and spirit, leaving no room for their own judgment. However, in the latter case, the authorities are entrusted with discretionary powers leaving good enough room for the exercise of their own judgment. Modern government, motivated by the people's desire to manipulate state affairs with a view to fostering public welfare, are unable to perform their functions without resorting to discretionary powers. This tendency of granting discretionary powers in the hands of administrative authorities gives birth to the possibility of access, denial or abuse of the powers. To counter the aforesaid possibilities, legislative organ and courts invoke various principles for the efficient exercise of administrative discretion.

To encapsulate the necessity of discretionary powers, reposed as a trust in the state functionaries, discretion has become an unavoidable evil. Moreover, the legislature has to confer broad discretionary powers to redress the plethora of modern-day complex problems of varying nature in a more expeditious and informal way. The proper exercise of discretionary functions led to the concept of the welfare state, but its abuse may lead to a totalitarian state. This state of affairs entails the inescapability of conferring discretionary powers and the

susceptibility of abusing these powers. So, certain standards have been laid down by the legislature, administration and norms of practice to maximize the advantages of these powers and to minimize the susceptibility of their exploitation.



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