

ABUSE OF DISCRETION: SAFEGUARDS AND CHECKS POST 2015 IN REFERENCE TO OMBUDSMAN IN INDIA

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Abstract

The principle of administrative discretion is a fundamental aspect of modern governance, enabling authorities to respond with increased flexibility and in a manner that is tailored to specific contexts. But without serious scrutiny of that discretion, arbitrariness, corruption and maladministration spread. This paper studies the dynamics of the abuse of discretion in India in terms of its relationship particularly with the institutional protections of the Ombudsman system i.e. Lokpal and Lokayuktas.

This paper charts the conceptual history of administrative discretion & investigates its abuses with regard to the lawfulness and constitutional rights – especially that of Articles 14 and 21. It also examines the establishment of the Indian body of Ombudsman at the national level, through a historical perspective focusing in particular on the Lokpal and Lokayuktas Act of 2013 and operationalisation, post 2015.

*The study also highlights the influence of the judiciary in curbing discretionary abuse via cases of precedent such as *E.P. Royappa v. State of Tamil Nadu* and *Maneka Gandhi v. Union of India*, which expand the sphere of judicial review. Moreover, it takes a new look at post 2015 developments, such as institutional difficulties, appointment delays and threats over independence and efficiency.*

In terms of doctrinal and critical, the current legal and institutional frameworks examined in this paper can be seen as having taken into consideration to some extent the sufficiency with which protection against discretion abuse is guaranteed under law. It concludes by acknowledging the gaps of ability to enforce, and making suggestions for reform to improve accountability, transparency and governance in the Indian system of administration.

INTRODUCTION

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Administrative law regulates the exercise of power through administration in administrative institutions by public authorities and provides that an exercise of power must occur in conformity with legal and constitutional provisions. A central aspect is administrative discretion, in which powers may be exercised as opposed to a legal duty. While discretion is key to good governance, however, abuse of discretion can lead to arbitrary behaviour and overreliance.

"In a democracy like India that we enjoy vast political freedom of law and the rule of law, the absence of that power of discretion will always undermine the position of those that underwrite, and guard against threats to, democracy, and it would be virtually impossible for every one of that. No effective checks were in place and therefore the vulnerabilities of corruption, bias and in violation of basic rights have been exacerbated. In response to these concerns the Indian law has evolved judicial review and institutionally entrenched safeguards (Ombudsman).

The establishment of Lokpal and Lokayuktas marks two major steps towards ensuring administrative accountability. These two bodies constitute an independent branch of the public authority that investigates complaints made against public officials with their problems of maladministration and corruption as well as those complaints made by other public officials.

The nature and seriousness of misuse of administrative discretion in India's system, the checks and balances that can be set up to prevent its abuse, and what role the Ombudsman mechanism owes--the emphasis of this article has been on this point since 2015. It is also an effort to examine whether or not the existing system effectively manages administrative efficiency and is itself transparent and responsible.

CHAPTER 1: ADMINISTRATIVE DISCRETION: DEFINITION AND ORIGIN

Administrative discretion Administrative discretion refers to the ability to judge or make decisions based on a set of laws. Nowadays, governance in a modern welfare state like India becomes multifaceted socio-economic decisions and multiple problems to be solved — political as well as regulatory issues — which means the legislature cannot predict an everchanging environment and makes rules and policies that might be inappropriate. Discretion is a tool that administrative officials use to adapt their activity to various situations and in doing so, be effective.

The root risk: more discretion = more abuse. Do not confuse discretion with arbitrariness.

It contains legal principles of reasonableness, proportionality and fairness to which it is constrained. Abuses of discretion include the failure of a government to discharge its obligation to act within the law rather than use its power for unlawful ends. Likewise, misunderstandings and misbehaviours are

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committed and misbehaviour- acts or omission of the law in bad faith (mala fide), which is unrelated and indifferent. Such things undermine the rule of law and public confidence in governance.

- Indicators of abuse: Bad faith, unreasonable justifications, failure to use reasoning, and randomness.

But the Indian legal system has always been a central player by defining the border of power and administrative authority. While in this matter of *E.P. Royappa v. State of Tamil Nadu*,³ the Supreme Court pointed out that arbitrariness is contradictory to equality by stating that excess exercise of discretion is a breach under Article 14 of the Constitution. In that case, it showed how the non-arbitrariness doctrine had changed to administrative action and how this contrasted sharply with a strict characterization of equality.

In further application of that principle, the Court expanded the content of Article 21 in *Maneka Gandhi v. Union of India*⁴, stating that “Any administrative action affecting personal liberty must be just, fair and reasonable.” The ruling enshrined substantive due process as an object of Indian constitutions, which places the need for procedural and substantive equity to be fulfilled in the exercise of discretion.

• *Judicial development: formal legality → fairness, reasonableness, due process.*

That has in turn fortified the rule of reasonableness, via judicial review designed to curtail the use of arbitrary powers. Courts will look to determine whether the decision-making authority has acted well within their authority, has exercised due process and has considered relevant factors. If any element is absent it will be dismissed as an abuse of discretion.

• *Control mechanism: What happens at trial: Judicial review confirms legality, rationality and procedural propriety.*

Although safeguards for the judiciary, the large number of administrative actions of the courts so far exceeds their capacity that it is difficult to find every case of abuse that leads them into resolution. It also demands additional mechanisms such as the institutions of the Ombudsman, vigilance bodies, internal administrative controls.

Its proper use must comply with constitutional order, juridical doctrines and institutional monitoring. For administrators is a delicate balance: You’d like some leeway, but then you don’t want to allow this leeway to be used arbitrarily or unfairly

³ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

⁴ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

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The improper use of administrative discretion has long been a top concern in administrative law; the potential for unaccountable, arbitrary and discriminatory action is a serious concern as unchecked discretion undermines fundamental rights. For that reason the judiciary is the single most important actor for delineating the boundaries of decision-making by constitutional regulation. The mechanism through which administrative authorities have exceeded or abused their powers is the judicial review.

• *Judicial role: Courts are protectors against arbitrary and abuse of discretion.*

Non-arbitrariness is the foundation of judicial control over discretion. In *E.P. Royappa v. State of Tamil Nadu*⁵, the Supreme Court held that arbitrariness is the very antithesis of equality, thereby making any arbitrary administrative action violative of Article 14. [1] This judgment signifies a seismic change in Indian administrative law, which has enlarged judicial review from a simple question of legality to one also of fairness and reasonableness.

In expanding this doctrine further, the Supreme Court in *Maneka Gandhi v. Union of India*⁶ stated administrative actions must be “right, just and fair” and not arbitrary, fanciful or oppressive. The case had ushered substantive due process in Indian jurisprudence: the discretion of officials shall conform not only to procedural fairness, but to substantive fairness as well.

• **Doctrinal shift: From procedural law → to substantive fairness and due process.**

Other important judicial principle is the doctrine of proportionality, which assures that any administrative measures are not excessive in relationship to their intended object. Thus, in *Om Kumar v. Union of India*⁷, the Supreme Court viewed that proportionality is a key ground for judicial review particularly at such cases in the fields of fundamental rights and others [3].

Culturally, South Asian and Indian administrative law are influenced by international jurisprudence. The doctrine known as “Wednesbury unreasonableness” was first introduced in the UK by the case of *Associated Provincial Picture Houses Ltd. v. Wednesbury*⁸. Corporation enabling courts to strike down decisions deemed irrational or unreasonable to an extreme degree. This approach has been widely applied in India for the scrutiny of discretionary decisions.

⁵ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

⁶ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

⁷ *Om Kumar v. Union of India*, (2001) 2 SCC 386.

⁸ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1948] 1 KB 223 (UK).

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•PUBLIC INTEREST LITIGATION (PIL) AS A TOOL TO CHALLENGE ARBITRARY DECISIONS

Public Interest Litigation (PIL) is an enforcement mechanism where all persons must have access to courts and help ensure justice. It's particularly useful for people who can't afford legal representation, so that people and communities can go to court for issues that concern them, even if they can't speak on their own behalf. PIL diminishes the barriers to seeking justice against lawbreakers by easing the criteria for who can file a case.

The Supreme Court has also adopted well-meaning cases to give legal effect to appeals in such things as *SP Gupta v. Union of India*⁹. It really changes the game for Indian law, making it a lot more accessible and sensitive. People have been using PIL to oppose arbitrary actions of the government, counter corruption, and to defend fundamental rights.

It has been vital in such areas as environmental conservation, human rights campaigning and reforms of governance. In essence, PIL acts as the vital link between citizens and the courts, helping to reveal administrative misdeeds. Despite some concerns, one thing is clear about PIL: it serves an important role to enhance accountability and transparency in our governmental systems. It is an ally of judicial review and Ombudsman processes that makes abuse of discretionary action accessible.

•PRINCIPLES OF NATURAL JUSTICE IN ADMINISTRATIVE DECISIONMAKING

The principles of natural justice of the rule of law provide the basic protections against the abuse of power due to administrative discretion which exists in every legal system. These values guarantee fairness, transparency and impartiality in the decision-making process and they, in turn, serve as a necessary brake on arbitrary power abuse. The concept of natural justice in India has evolved from the common law and has now become a component of the constitutional jurisprudence, particularly under Articles 14 and 21.

- Natural justice provides fairness and prevents arbitrary administrative action. The two fundamental principles of natural justice are audi alteram partem (the right to be heard) and nemo iudex in causa sua (a judge must not be appointed to act in their own cause).

⁹] S.P. Gupta v. Union of India, 1981 Supp SCC 87.

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The first principle will ensure that when a person is condemned no party shall go unheard so that fairness in sentencing is served. The second principle speaks to bias, that is, a decisionmaker should act impartially and with no vested interest in the decision. In *A.K. Kraipak v. Union of India*¹⁰, the Court blurred the distinction between administrative and quasijudicial functions. It focused on the fact that even in administrative measures the administrative actions of a certain kind should comply with the idea of natural justice.

When decisions are analysed, it adds an element of fairness by providing clear information as to how those decisions were made; process is not unlike the system of transparency that is used by judges and that of judicial review. Yet, for all of its words, those protections have not been effectively implemented. And at times administrative authorities just have the ability to bypass standard procedure using claims like urgency or public interest or whatever else the case might be, even if there is some chance of wrongdoing or abuse of power in play. Indeed, only through adhering to natural justice principles can fairness be promoted within an established system of administration.

•HOW THE RIGHT TO INFORMATION ACT OF 2005 HELPS STOP ABUSE OF POWER

This is a big step toward more accountability in government, and it fits perfectly with what the Right to Information Act of 2005 says! The Act protects citizens from abuse of administrative discretion by empowering them to access the information held at the discretion of public authorities. Open and fair, transparency serves as a check against corruption and keeps administrative conduct publicly accountable.

Transparency decreases the possibility for arbitrary use of discretion. Citizens have the right to demand information on the decisions, policies and the actions of government under the RTI Act. People can question administrative decisions and hold authorities accountable in this way.

In *State of Uttar Pradesh v. Raj Narain*¹¹, the Supreme Court took the view that the right to know is fundamental to freedom of speech and expression under Article 19(1)(a).

This principle eventually gave grounds for enactment of the RTI Act. Its effectiveness in controlling abuse of discretion is evident in RTI's ability of uncovering corruption and irregularities in public administration, which has given citizens and civil society groups the tools they need to question

¹⁰ *A.K. Kraipak v. Union of India*, (1969) SCC 262.

¹¹ *State of Uttar Pradesh v. Raj Narain*, (1975) 4 SCC 428.

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arbitrary decisions and hold the powerful accountable. RTI functions like a citizen controlled system of accountability.

However, challenges like delays in providing information, misuse of exemptions, and lack of awareness among citizens limit the effectiveness of the Act. Implementation and timely information disclosure are critical to effective implementation.

•WHISTLEBLOWER PROTECTION AND VIGILANCE MECHANISMS IN INDIA

The whistle-blower protection and vigilance mechanisms in place to assist the government prevent the abuse of administrative discretion, and incentivize whistleblowers to report corruption without fear of being punished. These mechanisms align with formal institutions such as the Lokpal to constitute an internal check on the administrative system. Whistleblowers are internal monitors for corruption. The Whistle Blowers Protection Act, 2014 seeks to give protection against abuse or corruption by individuals exposed by the state.

The relevance of the CVC was heightened after the Supreme Court issued a decision in the Vineet Narain v. Union of India ¹². which established the checks and balances for the investigation institutions. These watchdog groups have protections against the misuse of power, but have also faced hurdles such as lack of awareness among those who feel compelled to report abuses, fear of retaliation, and cumbersome protocols that really inhibit their effects. We need better legal safeguards and genuinely independent bodies to make these institutions more involved in governance.

•DIGITAL GOVERNANCE AND E-ADMINISTRATION — AN ETHICAL CHECK ON ARBITRARY POWER DIGITAL GOVERNANCE AND E-ADMINISTRATION

Digital governance and e-administration represent a new chapter for India, emphasizing the importance of prudent management. Historically, administrative processes were largely human controlled and often utilized patchwork processes that led to inefficiencies and corruption.

Yet, along with digital technology, we can observe a move toward more open governance guided by rules that drastically restrict abuse of discretionary power.

- Increase Transparency: Digital governance increases transparency by limiting the number of people who participate in decision making Although digital tools can deliver great accountability, it's not enough for us to rely upon just the rule of legislation anymore. We have to look beyond technical compliance, noted India's case of K.S. Puttaswamy v. Union of India under the Supreme Court, which

¹² Vineet Narain v. Union of India, (1997) SCC 226.

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further pointed out such factors must not be ignored entirely. Effective use of technology without infringing upon individual rights requires a combined approach to both aspects.

But... Well, we are dealing with new obstacles now because mainly technological advancement itself that result and not because humans have figured out what a given algorithm would get you (so when you can do things well at one end, you can make the best choice when you can do those things for you); in such cases, because algorithms will have some biases, where faulty programming ends up producing unfair results, and with respect to that, compared to traditional ones, it can take people getting the nitty-gritty data, this flexibility issue, certainly also carries risks and exclusion due to barriers to e-governance, particularly for marginalized communities that do not know enough about how to use e-governance but the overall infrastructure reducing the chances some groups do not participate in e-governance at all which in itself can result in loss of essential service offerings undermining what we thought those kinds of inclusive practices was about once and for digital language usage!

Therefore, so even though we live in a time of great things going on now creating a lot of obstacles back to inequities that are inextricably tied back to the socio-economics making life harder and which lead right back to full circle requiring to focus equally on data protective issue/privacy related issues with agencies collecting large amounts of sensitive info which would need to be covered by strong laws preventing future issues down the road — we also don't forget what society expects of its society: privacy vs open-book policies, established as far back as the Supreme Court of India and the most notable example the sentencing of Justice K.S. Puttaswamy reminds us why ensuring basic rights is relevant and why a lot is being put pressures on authorities that need to be monitored operating responsibly and in line, but not above board so they always should be watching it and should anything eventually start slipping past their notice, be it financial or otherwise...

Another but definitely not the least important aspect worth mentioning would be the future prospects ahead in which AI/machine learning capabilities are driving efficiencies yet again— they have the potential for wonders optimizing workflows whilst at the same time limiting your manually administered oversight—but regulation needs to need to focus before ensuring ethical usage in order to ensure that all of us stay ahead of the evolving complexity introduced till now because if new forms abuses surface, they might emerge before you know they are occurring and show signs of suffering to real lives lived day to day life compromising original goals formed well-established trust relationships from time to time flowing smoothly together harmoniously shared experiences, we observed them mutually enjoying the fruits of existence happily rich life.

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Essentially I say without qualification there is so much potential for Digital Governance/EAdming: While exciting opportunities can be unlocked through managing corruption faced by administrators in the age ago (who will have to be less involved, more in the industry, as evidenced by the infamous case of Justice K.S. Puttaswamy,¹³ the world is facing problems not only of managing this kind but also those that have arisen alongside their algorithmic power, those which the future vision (e.g. algorithms, digital gap that exist today and divide populations where the real people without clear, effective and integrated solutions fail in navigating these landscapes as they will not appreciate their responsibilities, they will need to make the necessary checks that must be put in place and take actions to ensure fair and just society thrives and provides opportunities for everyone to use the tools to contribute

•ANALYSIS OF KEY JUDGMENTS (2015–PRESENT) ON ABUSE OF ADMINISTRATIVE DISCRETION

India's judiciary has taken an evident step up in dealing with cases on misuse of administrative power since 2015. When it comes to the exercise of executive power, the Supreme Court and High Courts have really increased their game and ensure fairness and transparency as top concerns. Today, judges have taken a more hands-on approach, conducting regular governance reviews of management decisions facing scrutiny. During recent years courts have begun to pay closer attention to restraining executive authority.

A landmark case is Justice K.S. Puttaswamy v. Union of India¹⁴, in which the Supreme Court saw privacy as an Article 21 fundamental right. Such a ruling has far-reaching implications for exercise of discretion, particularly of data-gathering and surveillance-type administrative policies. It stresses that government actions need to be legal, necessary, and proportionate if they want to limit discretionary powers. An even greater and further important case is Shayara Bano v. Union of India.

As much as it was related to personal law, it underscored the fact that arbitrariness isn't consistent with constitutional governance, and deepened our understanding of non-arbitrariness in Article 14. Today, arbitrary action is seen as a flagrant infringement of the fundamental rights.

The Supreme Court has recently held in Navtej Singh Johar v. Union of India¹⁵.that constitutional morality and individual dignity is a matter of personal dignity for individuals. This ruling is a message to all that a basic human right should be considered — not powerless decision making: the power of the state or the bulk of the population should not alone determine what may be considered proper

¹³ Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC .

¹⁴ Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

¹⁵ Navtej Singh Johar v. Union of India, (2018) 10 SCC.

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administration. Likewise in *Indian Young Lawyers Association v. State of Kerala*¹⁶, the Court held that acts of the State should respect constitutional principles, not be arbitrary and not discriminate against religion or other factors.

The Constitutional morality checks discretionary authority. Transparency and accountability in governance have also received scrutiny by the judiciary.

For example, in *Common Cause v. Union of India*¹⁷, the Court stressed the need for holding public officials accountable and having anti-corruption regimes effectively functioning. The result is a new framework to study administrative discretion based on rights. In the case law to make sure executive decisions are not unjustified, more and more than ever, courts have applied doctrines such as proportionality, legitimate expectation and non-arbitrariness in their interpretation of executive power to ensure that executive acts are constitutional. • Today's judicial review revolves around rights, fairness, responsiveness.

This means that jurisprudence in a post-2015 context signals a deep interest in curtailing the abuse of executive authority by constitutionally interpretative and judicial devices. That discretionary powers are used is still an important part of the judiciary, which helps determine that the system has to be governed by rule of law.

•SUGGESTIONS AND RECOMMENDATION

The very thought of trying to investigate the mechanisms of administrative discretion and how we can regulate it actually indicates the necessity of some drastic changes that would help to increase accountability and governance. Some of the most important changes which are essential in this case are making Ombudsman institutions, such as Lokpal and Lokayuktas, more independent. This implies that they should establish a distinct investigative unit, that they are transparent on how appointments are made, and above all they should be able to operate independently financially to make sure that these institutions are not influenced by external factors.

Meanwhile, we ought to strengthen their capacity to operate, i.e. consider improving staffing, infrastructure and procedures to improve accountability and credibility in such organizations.

¹⁶ *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC

¹⁷ *Common Cause v. Union of India*, (2018) SCC

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The other crucial area which should be addressed is the setting of the administrative rules in India by enacting a detailed law. We also require better laws that provide benchmarks on the speed at which decisions should be taken and also the accountability procedures so that when decisions are made we know who is accountable; this will reduce uncertainty and harmonize the activities of the various industries.

These rules would incorporate such values as natural justice and rational decision-making in our legislation - to achieve higher transparency and enforceability in general.

Co-ordination between the different organisations fighting corruption should also be enhanced to ensure that the cases can be addressed effectively in all directions. There should be streamlining of operations among agencies such as Central Vigilance Commission (CVC), Central Bureau of Investigation (CBI) and Lokpal to ensure that there is no confusion regarding jurisdictional issues and no hiccups in the procedure.

The citizens are also required to be made aware of these systems-the public policy should be revised to be more accessible that will ensure people are aware of what they can do in terms of recourse that can be availed by these institutes.

With technology in the world likely to keep on becoming part of the everyday governance practices, powerful legal provisions to ensure privacy protection against algorithmic bias ought to follow suit as technology developments can result in controversial directions in case they are not addressed effectively.

Besides that instilling ethical government practices may entail a host of measures like organizing educational initiatives or developing codes of ethics-all aimed at increasing the internal accountability as well as external law enforcement.

Last but not least, the incorporation of international best practices particularly Scandinavian ones or European ones and matching them with the local practices in line with the international standards like UNCAC can go a long way in ensuring that the system of accountability in administration of India is made efficient as well as ensuring that everything is transparent and responsive enough to meet the needs of the society!

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