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ADMINISTRATIVE DISCRETION – POLICE- UTTAR PRADESH

AUTHORED BY: PEEHU BHARDWAJ

ABSTRACT

Administrative Discretion means the flexible decision-making power given to the public administrators. One such discretion is exercised by Police in their powers of arrest, investigation, interrogation. However, the unregulated discretion leads to abuse of power that defeats the very purpose of this discretion. The complaints are narrowed down to police custody deaths with case study on Uttar Pradesh. The reason of choosing Uttar Pradesh as case study for police related human right violation is that barring few instances, UP accounts for more than 60% of total complaints regarding police excesses.

The paper examines the efficacy of these structuring methods through the Reports collected from NCRB and NHRC. Researcher is relying on only government sourced data for making the analysis; however, the actual figures may or may not be higher than the reports. The analysis is done through presenting a systemic graph of number of complaints from period 2003 to 2020, understanding how the pattern has changed in number of cases registered and chargesheets filed. Further, presenting

INTRODUCTION

The delicate balance in reasonable exercise of discretion and its freedom from Judicial control was expressed in *R.v Vestry of St Pancras*¹. It was held that “if the people exercising the discretion to exercise the public duty are to be guided by the Court then in eye of law they have not exercised the discretion. But the discretion should be fairly applied and guided by reasoning that is within the ambit of legality.”²

It is important to understand here the legal and moral tussle. While at one side the Court cautious and perhaps aware that they may arrive at a different conclusion, but as long as the authority has exercised discretion within the given parameters, the Court shall not interfere. However, once the

¹ R.v Vestry of St Pancras, (1890), 24 Q.B.D. 371

² G.E.Treves, Administrative Discretion and Judicial Control, The Modern Law Review, Jul., 1947, Vol. 10, No. 3 (Jul., 1947), pp. 278

Court get reasons to believe that the discretion was applied unfairly, it becomes the duty of the Court to intervene. So, the Court intervenes once the motive (not the act) transgresses the legal limits.

The discretion allows the administrator to make a choice among the available course of actions. Thus discretion is necessary as it allows the administrator to overcome the technical and political obstacles to implementation. The golden rule guiding this choice are: 'just and reasonable', 'public interest.'³

However, to what extent these rules were followed cannot be ascertained provided there are some methods to control the discretion.

STRUCTURING AND CONTROLLING DISCRETION IN POWER OF POLICE

To control discretion, the course of action of the authority needs to be determined minutely that is technically possible. This is done in following steps:

1. Formalizing discretion by stating boundaries:

Confining discretion means fixing boundaries. This may come externally from the legislature and also internally by administrator's self-regulation. This is done by stating publicly how the legislative intent is to be interpreted.

To check discretionary powers of police, following confining measures are in place:

- **Indian Constitution:**⁴ Article 21, 22(1), 22(2), 14, 39 (A), 20(2) are some of the constitutional safeguards to protect the rights of an arrested person by limiting the powers of police to some extent. These include the right to free legal aid, right against self-incrimination, production before a Magistrate within 24 hours.
- **CrPC:** The chapter V of the Criminal Code of Procedure 1973⁵ lays down clear procedure to be followed to prevent the abuse of police power while search, arrest, and other related matters. The wider discretionary powers have been confined by various amendments to CrPC and judicial predicaments.
- **Criminal Law Amendments:**

³ H. KENEETH HIBBELN and DOUGLAS H. SHUVAMON, Methods of structuring administrative discretion, Vol. 15, pp 124-129, state and local government review, 1983

⁴Indian Constitution

⁵ The Code of Criminal Procedure, 1973, Acts of Parliament (India)

a) 2005 Amendment⁶: Insertion of Section 50A in CrPC making it obligation for the police to inform about arrest of a person to a nominated person.

b) 2009 Amendment:⁷ Insertion of:

Section 54: examination of arrested person by medical officer at the time of arrest

Section 55A- Health and safety of arrested person to be duty of person having custody

Section 60A: All arrests to be made strictly according to the Code

Section 41: Arrest in non-cognizable offence not without a warrant or order from the Magistrate.

c) 2013 Amendment⁸: Insertion of Section 54A: In case the arrested person is mentally or physically disabled, identification to take place under supervision of Judicial Magistrate.

- **Significant Judicial Interventions:**

a) *Joginder Singh vs State of Punjab*⁹: This is a landmark case in which the Apex Court established the guidelines of arrest by Police. These guidelines were later incorporated through Criminal Law Amendment by insertion of Section 41A to CrPC to prevent police atrocities.

b) *Lalita Kumari vs Govt of UP*:¹⁰ Mere registration of FIR under Section 154 does not give power to arrest.

c) *Arnesh Kumar Guidelines*¹¹: Landmark judgement of the Indian Supreme Court, stating arrests should be an exception, in cases where the punishment is less than seven years of imprisonment.

d) *D.K.Basu guidelines*:¹² These are the most comprehensive and significant guidelines given by the Court to check rising incidences of custodial death. Importantly, the Supreme Court obligated the police to follow certain procedure, and failure to do so will make them liable for contempt of the Court and departmental action.

2. Formalizing discretion by structuring it:

The responsibility of formalizing through structuring is placed upon the administrator. This

⁶ Criminal Law Amendment 2005, Act No. 25 of 2005, Acts of Parliament (India)

⁷ Criminal Law Amendment 2009, Act No. 5 of 2009, Acts of Parliament (India)

⁸ Criminal Law Amendment 2013, Act No. 5 of 2013, Acts of Parliament (India)

⁹ *Joginder Singh vs State of Punjab*, 1994 AIR 1349

¹⁰ *Lalita Kumari vs Govt of UP*, AIR, 2014, SC 187

¹¹ *Arnesh Kumar vs State of Bihar*, (2014) 8 SCC 273

¹² *D.K.Basu vs State of WB*, AIR 1997 SC 610

is done clarifying the position of using discretion, taking out policy statements, open plans, departmental rules etc. Departmental enquiries are one such method of structuring.

3. **Formalizing discretion through Checking –**

- **NCRB:** The National Crime Registration Bureau is an Indian Government Agency under the Ministry of Home Affairs. It is responsible for collecting and analyzing the data. The data regarding the police excesses are categorized under 6 heads – death in police custody when not in remand, death in police custody when in remand, human rights violation complaints against police, cases registered against police personnel, escapes, reasons of custodial death.
- **NHRC:** National Human Rights Commission is a statutory body that was set up in 1993 through Protection of Human Rights Act, 1993¹³. The Commission has summarized various human rights complain in the Annual Reports. Complain against police excesses tops the nature of complaints, and among them custody death/rape is the main issue. The Commission has passed various guidelines to the States to check police atrocities, including the reporting of any custodial death within 24 hours and video-graphing of the autopsy.
- **Independent Commissions, Human Rights Watch groups:** Besides the above standard bodies, there are other groups, both national and international, that collect, analyze and summarize the data regarding misuse of discretion by police. These reports are important in connecting the dots as NRCB and NHRC majorly rely on the reporting of crime by the State, and thus does not account the incidences that are not reported for whatever reasons.

ISSUES ADDRESSED BY THE RESEARCH PAPER

1. Whether formalizing discretion methods have shown efficacy
2. What are the challenges in controlling administrative discretion

OBJECTIVE OF THE RESEARCH PAPER

The Objective of the paper is to examine the efficacy of formalization of administrative discretion tools. While highlighting the strength and weaknesses of these tools, it examines the extent of abuse caused by the discretion. Further, the paper attempts to identify the technical and grassroots

¹³ Protection of Human Rights Act, 1993, No. 10 of 1994, Acts of Parliament (India)

lacunae that leads to these weaknesses and identifies the best possible solution to close the gaps.

METHODOLOGY

The paper uses Quantitative data analysis and document review method:

1. By analysing and comparing the Annual Reports of NHRC and NCRB from period 2003-2020.
2. Verifying and understanding the recommendations and claim in the report through landmark Judicial judgments.
3. Reference books, Bare Acts, journals, internet sites and newspaper to broaden the perspective.

QUANTITATIVE DATA RESEARCH

Total Complaint Received Against Police							
	Compl aint receiv ed	Case registre d	Charges heeted	%age of case registered against received complaint	%age of chargesheete d against complaint received	%age of chargesheete d against the registered cases	Convictio n of number of personnel
2003	5239	1227	29	23.4	0.55	2.36	0
2004	4935	667	63	13.5	1.27	9.45	8
2005	5284	1378	54	26.07	1.02	3.93	1
2006	3503	825	47	23.6	1.34	5.7	0
2007	4620	1693	96	36.6	2.08	5.67	0
2011	11971	9203	80	76.89	0.67	0.87	0
2013	4086	119	39	2.91	0.95	33	9
2015	2257	414	62	18.3	2.74	15	0

2017	No data	106*	36	-	-	33	92
2018	No data	90*	27	-	-	30	5
2019 **	No data	161*	50	-	-	31	0
2020 **	No data	100*	40	-	-	40	0

FIGURE- 01

*For this period, the data shows only the number of complaints registered. Thus, not showing the total numbers of complaints received.

**For this period, the NHRC data on complaints against police is not recorded.

Resourced from Annual Reports of NCRB and NHRC from 2003 to 2020 (please see Bibliography for detail)

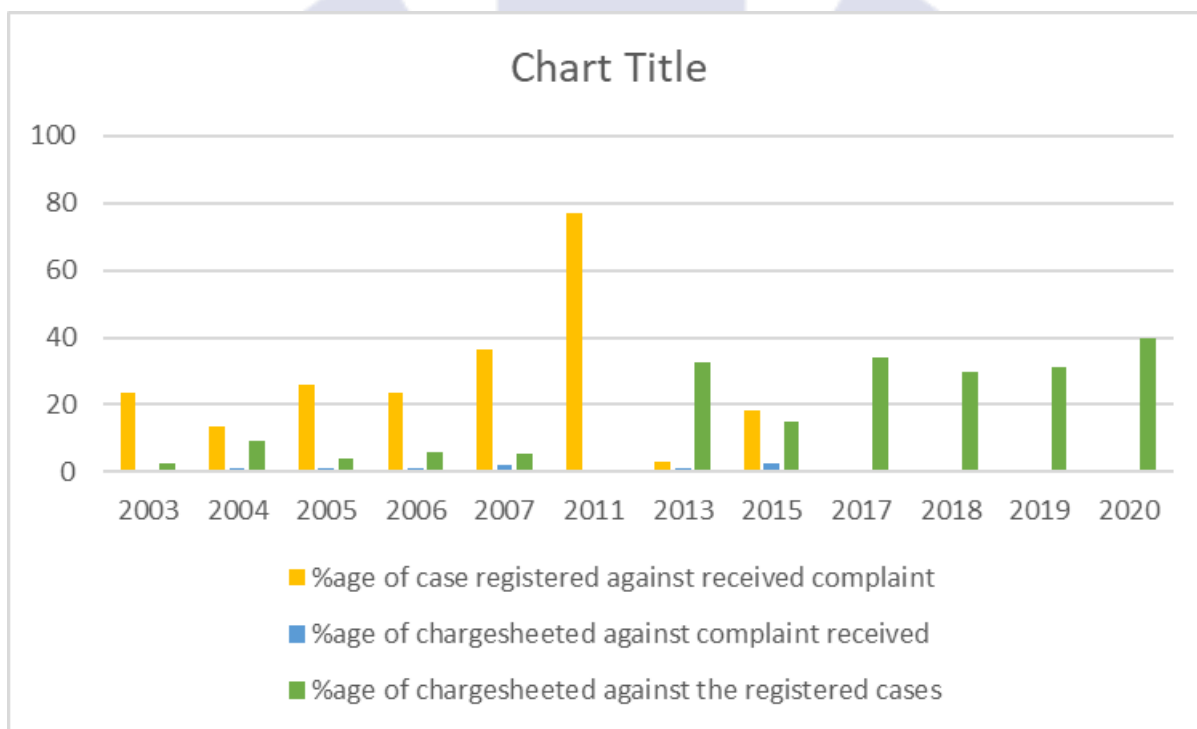


FIGURE-02 – Summarization of Figure One

Observation:

- Percentage of cases registered against received complaints have increased from 2003 to 2011, while dipped again in the period from 2013-15. The data is missing from 2017

onwards due to change in data categorization methods of NCRB which stopped including the total complaint in the reports.

- Percentage of chargesheeted cases against complaint received have remained below the appreciable limit, with showing noteworthy progress in 2015.
- Percentage of cases that were chargesheeted against the cases registered have improved over the years. 2013 onwards the percentage has improved and maintained.

Analysis:

The investigation of cases that are charge-sheeted has improved from 2013, showing better implementation of guidelines and checking mechanism over discretion.

From 2011 onwards the documentation was done on 4-5 factors including total complaints received, this was modified in 2017 where only total cases actually registered were mentioned not the total complaints received, so there could be possibility that number of cases were higher. However, despite the fact as per the analysis, the researcher identifies that post 2011 there is a steady increase in the number of charge sheets filed against the cases registered. This shows the change in law that has impacted this Research Outcome.

However, the conviction rate remains low in the chargesheets filed, except the year 2017. This leads to the conclusion that important changes are needed in strengthening the law in this area. It is discussed in detail in the following part.

OVERALL ANALYSIS BASED ON ANNUAL REPORTS OF NHRC AND NCRB

Among the nature of complaints, from the Annual Reports studied by the researcher, consistently the top factors are – custodial death, torture, fake encounters, police highhandedness. Role of NHRC as watchdog over human rights violation by police has many challenges. Firstly, police is a state subject, thus the guidelines issues by the body is met with minimum compliance by the State and police. Some of the main issues listed in the annual reports are:

1. **Jurisdiction issue:** Unclarity in jurisdiction of NHRC Courts set up under Section 30 of the PHRA Act. ¹⁴
2. **Noncompliance:** Among the Cases disposed, the compliance is not met by the States in a large number of cases, UP tops in the list of non-complying States where the proof of monetary compensation to the victim's next of kin is not provided. Non-compliance with

¹⁴ Protection of Human Rights Act, 1993, No. 10 of 1994, Acts of Parliament (India)

the guidelines: From 2011 onwards, reporting of death within 24 hours improved but the documents, autopsy and other guidelines not adhered. Validated by the low or nil conviction rate even after registration of cases.

3. **Misuse of Section 154:** According to the NHRC Annual report, among major complaint against police inaction was the misuse of Section 154 of CrPC regarding cognizable offences,¹⁵ where police allegedly, avoided registration of complaint, registered case under lesser gravity of offence
4. **Negligible criminal accountability of the abusers of discretion:** Monetary compensation is paid. In a large majority, the offenders get away with minimum conviction.
5. **Under-reporting in NCRB data:** because it is collecting only that data in which FIR is registered.
6. **Alarming low conviction rate:** The conviction rate is very low or zero in all the years except 2017. This signifies the grey areas in reporting, collecting evidence and cooperation of the police during the enquiry. The Supreme Court in *State of Madhya Pradesh Vs. Shyamsunder Trivedi & Ors* addressed the reasons of this low conviction: “Police makes every effort to hide the death in custody. In most cases, the reason of death is shown ‘suicide.’ Because of brotherhood ties, the police suppress any complaint against their colleague. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting into death as the police lock-up where generally torture or injury is caused is away from the public gaze and the witnesses are either police men or co- prisoners who are highly reluctant to appear as prosecution witness due to fear of letaliation by the superior officers of the police. Another problem is inquiry, as the police is in better position to hide the evidences. This is validated by the fact that hardly any conviction has resulted from the enquiries.”¹⁶
7. **Low registration of cases:** Despite higher number of complaints, about one tenth portion is registered and much lower percentage chargesheeted. This highlights the further possibility of police highhandedness in coercing the complainants to withdraw complain.

¹⁵ Id At... Report 2007-08, pp 34

¹⁶ State of Madhya Pradesh Vs. Shyamsunder Trivedi & Ors. 1995 (3) Scale, 343

CONCLUSION AND SUGGESTIONS

The complaints and cases against police have consistently increased over the years, with Uttar Pradesh occupying top position in the reports. To get actual figure there is need to modify the methodology of collection of data, as it relies on State's reporting and the cases in which FIR is filed.

If we focus only on the cases that are registered, the number of cases in which chargesheets are filed has improved from 2011 onwards. This collaborates with NHRC's report that the State's are showing better adherence to guidelines. However, low conviction rate and still very high number of custodial deaths (reported and unreported) presses for the need of certain reforms. These are summarized below.

Recommendations:

1. **Special Tribunals for such violations:** In Kamlesh Kumar Singh case¹⁷ of suspicious suicide in police custody, the enquiry by Commission revealed that the death of victim was homicide not suicide. However, the case filed by deceased's mother against police was withdrawn and despite the clear evidence of foul play, it was closed. There is need of special Tribunals to deal with such crimes where the Police and other Authority are under the radar of serious crime.
2. SOP for independent tool of investigation must be adopted and incorporated in day to day functioning of police.
3. In case of complaint against torture, investigation to be done by a person rank higher than the accused.
4. **Amendment to PHRA:** Suitable amendment in PHRA needed to make NHRC recommendation binding on the respondents.
5. **Amendment to Indian Evidence Act:** Insertion of Section 114B in the Indian Evidence Act, as recommended by 113rd Report of the Law Commission¹⁸. This will shift the burden on proof on police in custody death cases.
6. **UN laws:** If India becomes signatory to UN Convention Against Torture, 1984, this ensure better compliance with these guidelines as Police being state subject, remains out of reach of NHRC as it remains within ambit of State Human Right Commissions.

¹⁷ Case No. 16296/24/6/2011-pcd

¹⁸ INJURIES IN POLICE CUSTODY, 113rd Report, Law Commission of India, 1985. Accessible at: <https://lawcommissionofindia.nic.in/101-169/Report113.pdf>

7. Ensuring implementation of Supreme Court guidelines like D.K.Basu, Prakash Singh case, installation of CCTV camera.
8. Departmental action to be stringent. In majority of the cases, the offenders get away with minimum departmental action which is not effective in deterring them.
9. **Grievance Redressal System and Permanent Commission:** Huge gap in cases reported in NCRB and in NHRC. This highlights the gaps in structuring administrative discretion and calls for an independent and powerful body to regulate departmental enquires, complaints received and reported to the collating bodies. Setting up of Digitalized Grievance redressal system for Police related complaints

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