



Research Article

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Should Discretionary Power be Controlled Politically Through the Democratic Process or it Should be Controlled Through the Courts?

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Abstract

The number one function of governments anywhere in the world is to achieve public interest. Public interest and social interactions are so vast, complex and dynamic that; a government can not effectively administer all aspects by itself. Plainly put, whenever citizens require or request for a service from government, it is an implicit request for government to set up an institution to administer the discharge or provision of that service. Owing to this, institutions are set up to aid in the management of the different facets of public service. These institutions and their officials are then conferred power to effectively perform their functions. This power is Discretionary Power. The paper examines discretionary power from various angles and especially investigates the lingering question of how this power should be controlled to prevent abuse. The standpoint of the author is that judicial control is the most effective means of regulating the use of discretion.

Keywords: Administrative law, Constitution of Ghana, Discretionary powers, Green light theory, Judicial review, Political control, Red light theory

1. Introduction

For a state to function, administrative bodies, which can be said to be extensions of the arms of government; are created by a Parliamentary act to carry out or aid in the running of state functions or public business. The powers used by these administrative bodies in the exercise of their duties is known as discretion. Grey (1979) defined discretion as the ability to make a choice that cannot be objectively judged to be right or wrong. Administrative discretion is described as "a public official's or agency's power to exercise judgment in the discharge of its duties" by Black's Law Dictionary. Operationally speaking, discretionary power is the authority to select one course of action over another. Discretionary power dilutes the certainty of law because it offers the official the power or freedom of choice¹. Impliedly, discretion imposes a duty to make a choice². Discretionary power is the ability of a person or a body to pick among a variety of options for achieving a goal. But the options available are far from endless.

¹ Oswald K. Seneadza, *Introduction to Administrative Law in Ghana* (KOS Publication, 2018)

² Fredrica Ahwireng-Obeng, *The ABC of Administrative Law and Administrative Justice in Ghana*

One of the most crucial weapons in the state's toolbox is the ability to exercise discretion. The greatest danger to the establishment of democratic values in our political system is its abuse. It makes sense that the constitution has put restrictions on its use. In order to ascertain whether the use of discretionary power was appropriate, a citizen who feels that a public official has overstepped his bounds may request judicial review. Therefore, the fundamental query is: under what circumstances does an official possess discretion? Galligan posits as follows,

*"First, he needs the power to select from a range of possibilities. Second, he needs to be able to establish broad criteria for achieving the selected course of action. Thirdly, in order to accomplish the specified goal, he must be able to modify the overall criteria as necessary. Finally, his authority to establish and alter the fundamental principles governing the legal and political framework must be acknowledged."*³

Certain concerns have been levelled against the use of discretion in public affairs due to the aspect of personal choice that it entails. For instance, it has been suggested that there is always a possibility that discretionary powers will be used arbitrarily. In recent years, Dicey has equated discretion with arbitrariness. According to K.C. Davis, officials may make arbitrary decisions based on unimportant factors when exercising their discretion. The connection between discretion and fairness is another recurring issue that critics have brought up. These issues are reflected in the position of the laws of Ghana, on the subject. This paper would therefore critically assess the position of the law governing discretionary power in Ghana and how the courts have dealt with the use of discretion as well as whether or not the use of discretion should be controlled by the democratic process or by the courts. However, it is my position that discretionary power should be the preserve of the judiciary as it holds the final judicial power to all matters and ensures that administrative bodies and officers act within the confines of the law.

2. Nature of Discretionary Power

Four conditions must be satisfied for an official to exercise optional powers. First, the official must have the expert to choose amid varied choices. In the view of Owuoye (2015), an official must first have jurisdiction before he can be said to have power to exercise discretion.

As Anin-Yeboah stated in *Owusu-Mensah and Another V NAPTEX*,

It is vapid learning that jurisdiction is basic to every proceeding and therefore if a court of law or tribunal lacks jurisdiction to hear or determine any matter, the decision or order from the Court or tribunal is a nullity.

The official must also have the authority to establish broad standards for achieving the selected option. Thirdly, in order to accomplish the chosen goal, the official must be able to modify the general standards when necessary.

Finally, the official's authority to establish and alter general standards within the legal and political framework must be acknowledged³.

Choice is the fundamental idea behind discretion. An official must be given the freedom to select the goal to be pursued or the best way to get there within a broad framework in order for discretion to exist. Modern states have made discretion a key tool for exercising power in the public sphere. This is a result of the need to keep the law abreast with the changing pace of society.

3. The Justification and Dangers of Discretionary Power

³ D.J. Galligan, *Discretionary Powers*, Clarendon 1990 pp 21-22

The increased creation of administrative bodies has been necessary to match the rising need to control the increasingly complex and expanding social, economic and political spheres of human interaction. The many facets of social life require the intervention of the contemporary state. For instance, the state gets involved in a lot of social issues, like transportation, employment, education, healthcare, and the environment. The alterations in these areas of concern mean that administrative bodies and officials have to take a flexible method to handle these issues. Discretionary power offers flexibility in the exercise of power. The issues to be resolved in an area may be inherently complex. These difficulties necessitate specialist knowledge and a flexible strategy. This necessitates giving discretionary powers to administrative bodies and officials. These difficulties necessitate specialist knowledge and a flexible strategy. This necessitates giving discretionary powers to administrative bodies and officials. This ensures that institutions have a measure of flexibility and enables them to consider new situations.

The demands of human interactions are so wide and so complicated that, it is impossible to have all everything; including future novel circumstances, captured in statutes and procedures. Therefore, the judgment of the administering agency or official will always be required to some level, at some point. As a result, the state must handle these issues in a flexible and non-rules-based manner (Mensah, 1998).

The state must deal with issues like gas emission pollution, reasonable pricing for transportation services, efficient use of transportation facilities, anti-competitive behavior, and more in the transportation sector, as an example. These difficulties demand both expert knowledge and a flexible strategy. The state must deal with issues like gas emission pollution, reasonable pricing for transportation services, efficient use of transportation facilities, anti-competitive behavior, and more in the transportation sector, as an example. These difficulties demand both expert knowledge and a flexible strategy.

Speaking on this issue of flexibility in France V Electoral Commission, Date-Bah JAC noted:

Such a broad literal interpretation would result in serious trouble. So to speak, the government as we have known it since 1969 would experience a nuclear meltdown as a result. To require public servants and organizations generally to establish rules governing their judgment before they can use it is utterly unworkable.

Discretion consequently seems to make the carrying out of government mandate, easier and more efficient. It allows for flexibility in the administration of public business as the unique situation surrounding every case can be considered and decisions judged most appropriate taken. This even includes novel circumstances.

Discretion however doesn't come without its own dangers and demerits. Discretion introduces inconsistency and uncertainty and can foster arbitrariness. There also is the issue of fairness; in a substantive sense, procedural sense and fairness sense (Mensah, 1998). Discretionary power is liable to abuse. It can be used unfairly and arbitrarily in the following ways:

- Exercising discretion out of malice or resentment
- The use of discretionary power for some other purpose other than the intended purpose.
- Discretionary power may be used wrongly or at the wrong time.
- Irrelevant factors may be taken into consideration and relevant factors may be ignored
- Adopting the wrong procedure in exercising discretionary power.

Per Marful-Sau, JSC in Afoko V Attorney-General,

Any conduct in the exercise of such discretion that could be characterized as being capricious, born out of resentment or bias by personal distaste, or falls short of due process, is not the healthy exercise of discretionary power and constitutes abuse of same. The proper exercise of discretion should be marked by fair treatment and candor.

In view of the potential abuse of discretionary power, the constitution fetters the exercise of discretionary powers conferred on administrative bodies to ensure administrative justice. Where there is alleged abuse of discretionary power, the court's supervisory can be invoked to review and nullify the decision arrived at where there has been an abuse of discretionary power.

4. Theories on the Control of Discretion

The control of discretion has sparked a debate among many. There have been a myriad of opinions and perceptions on the control of discretion. This has led to the birth of diverse theories which are primarily on the seeming opposition of judicial review to democracy.

4.1 Red and green light theories

The red and green light theories were introduced by Carol Harlow and Richard Rawlings (1984). Courts are seen as "the key arsenal for the safeguard of the citizen and control of the executive" according to the Red-Light Theory (Harlow & Rawlings, 1984). The Red-Light Theory is based on the idea that people should be free from government intrusion. Believers in this theory believe in the control of the excesses of executive power or in essence, discretionary powers through the rule of law and courts.

According to the Green Light Theory, the executive should be free from all kinds of restrictions as it works for the welfare of the citizens. Believers of this theory perceive excess administrative-legal intervention as an impediment to effective administration. This however does not condone arbitrariness. The theory just prefers a more democratic approach to exercising control over the executive.

4.2 Liberal and functional theories

4.2.1 Liberalists

Liberals typically prioritize the defense of individual rights over all other political goals. They hold that a life lived independently, without interference from the government, is the ideal. Mensah (2000).

Hard liberals detest tact and harbor a Diceysian mistrust of the executive. Mensah contends that while soft liberals acknowledge the value of discretion in making wise decisions, they still favor giving the courts a key role in policing administrative behavior.

Liberals therefore believe the law should be given the last word on matters pertaining to discretion. This they believe is to protect the rule of law and individual rights.

4.2.2 Functionalists

The functionalist perspective is centered on administrative structures and administration. They acknowledge that the state must get involved in many facets of social life as a result of the complexity of contemporary societies. The effective use of discretion is what they seek to see.

Since courts lack administrative expertise, they do not see a need for them to interfere with administrative decisions. Because of the issue of substantive expertise, soft functionalists emphasize the need to protect administration while still recognizing the significance of democratic values (Mensah, 1998).

5. Discretionary Power Under the 1992 Constitution of Ghana

The 1992 Constitution confers and constricts the exercise of discretionary powers. The constitution creates a wide range of circumstances where discretionary power is conferred. Examples of such

situations are:

- Appointment and dismissal of some public officers such as ministers⁴ and their dismissal by the president⁵.
- Initiation of judicial proceedings by the Attorney General⁶
- Allocation of funds
- Sanctions and benefits.

The constitution guides the exercise of discretionary powers to ensure administrative justice under articles 23 and 296.

In order to achieve administrative justice, Article 23 of the 1992 Constitution mandates that administrative bodies and officials act fairly and sensibly. Article 23 stipulates:

People who have been wronged by the execution of such acts or decisions have the right to seek redress before a court or other body. Administrative bodies and administrative personnel must operate fairly and reasonably, and they must adhere to the standards imposed on them by law.⁷

Acting fairly implies compliance with the rules of natural justice and compliance with the law conferring power on the administrative body or official. Natural justice implies a fair hearing and the avoidance of bias or the likelihood of bias in decision-making. Acting reasonably implies acting rationally and taking into consideration the rights of other citizens and the interest of the public.

Discretionary power is further guided under article 296 of the 1992 Constitution. The exercise of discretion must be fair and candid. Failure to do this constitutes a breach. Article 296 establishes a positive duty and counterbalances it with a negative obligation. Article 296 provides:

"Where in this constitution or in any other law discretionary power is vested in any person or authority:

The exercise of the discretionary power shall not be arbitrary, capricious, or biased whether motivated by resentment, prejudice, or personal dislike and shall be in accordance with due process of law. Additionally, where the person or authority is not a judge or judicial officer, regulations that are not inconsistent with the provisions of this Constitution shall be published by constitutional instrument."⁸

From article 296, discretion should be exercised in a fair and candid manner devoid of arbitrariness, bias, resentment and personal dislike.

This was clearly defined in the case of *Tema Development Corporation and Musa v Atta Baffour*⁹. In this case, the Tema Development Corporation (TDC) rented its property to Mr Quartey who before his death sublet the property to Atta Baffour. Baffour after the death of Quartey paid all monthly rents, rates and outgoing for 8 years, and kept the house in tenantable condition before his possessory rights was challenged by Musah. The rent tribunal set up to settle the respective claims granted tenancy to Musah. Aggrieved by the decision of the tribunal, Baffour sued TDC. The court held that the decision of the tribunal was not a fair exercise of their discretion as it deprived Baffour of his rights and benefits after performing his obligations for 8 years. The court determined that pursuant to article 296 the corporation was bound by the law and could not act as it saw fit. Their contested decision, which sought to deny the plaintiff access to the property, was unfair, irrational, and unreasonable.

The courts demand that statutory powers be used in a legitimate, prudent, and responsible manner when they are granted to a person or organization. Administrative officials and bodies must abide by all other applicable laws, including the legislation establishing the relevant administrative.

Discretionary powers can be controlled in ways as enumerated below:

⁴ 1992 Constitution of Ghana, art 78(1)

⁵ *Ibid*, art 81(a)

⁶ *Ibid*, art 88

⁷ *Ibid*, art 23

⁸ *Ibid*, art 296

⁹ [2205-2006] SCGLR 121

5.1 Judicial control

By its very nature and the fact that it is based on human judgment, control of discretion is complicated. Judicial review does not determine whether discretion is right or wrong as this is purely subjective. It is rather to make sure the right procedures are followed in the exercise of discretion. The decisions and actions of administrative officials are subject to scrutiny by the courts through the process of judicial review. All lower courts and any adjudicating authority are subject to the High Court's supervisory jurisdiction, which allows it to issue orders and directives to ensure that its supervisory powers are being upheld. The High Court also has original jurisdiction to uphold fundamental human rights, such as the right to an impartial hearing and the right to treatment without bias. A subject matter for judicial review should be a decision, an act or omission by an administrative body which affects the rights and freedoms of a person or body of persons. Lord Diplock in *Associated Provincial House Ltd v Wednesbury Corporation*¹⁰ established three main tests or grounds for judicial review namely; illegality, irrationality and procedural impropriety.

5.2 Illegality

The decision-maker must correctly understand the law that governs his decision-making power and must give it effect in order for there to be an illegality as a basis for judicial review.

5.3 Irrationality

The term "Wednesbury unreasonableness" refers to a decision that is so outrageous in its defiance of morality or logic that no reasonable person who had applied their minds to the issue at hand could have come to it. The principle of reasonableness is referred to as proportionality in some jurisdictions in Europe. The proportionality test examines the effect of the decision on the right of the person affected vis-à-vis the public purpose sought to be promoted by the decision.

The High Court may issue any directives, orders, or writs, including writs or orders like habeas corpus, certiorari, mandamus, prohibition, and quo warranto, as judicial review remedies if it deems them necessary for enforcing or securing the enforcement of any provisions on the fundamental human rights and freedoms to which the person in question is entitled¹¹.

5.4 Procedural Impropriety

Diplock chose this to encompass two kinds of Procedural Impropriety (P.I). Failure to follow the prescribed rules and procedures under the statute the tribunal or administrative body is supposed to operate under law or failure to follow the rules of natural justice.

The Court of Appeal also observed as follows in *Owusu-Mensah and Another v NAPTEX*

"In the exercise of their functions, administrative bodies set up implement executive policies exercise judicial or quasi-judicial functions that determine the rights of persons in relation to inter alia, executive policy and/or their implementation. Judicial review is the power of the court to ensure that such activity that affects the rights of persons is done fairly. It controls public administration by checking the abuse or misuse of public power"

6. Institutional Control

Article 216 of the 1992 constitution establishes the Commission on Human Rights and Administrative Justice (CHRAJ) as an ombudsman to investigate cases of administrative injustice. The Commission

¹⁰ (1948)1 KB 223.

¹¹ 1992 Constitution, art 33(2)

investigates complaints and takes appropriate action to call for the remedying, correction and reversal of instances complained of through such means as are fair, proper and effective¹². The availability of information technology around the world is linking up valuable people and activities while switching off from conventional networks of power and wealth (Ennin & Mensah, 2019). Adarkwa, 2001 (as cited in Mensah, 2019) refers to training as a planned activity that aims at fulfilling challenges in the individual or group of people concerning their knowledge, skilled and committed employees. These are all institutional measures.

7. Political Control

In addition to the judicial and institutional controls above, discretionary power can also be controlled politically through the establishment of a Commission of Inquiry. According to Article 278(1) of the 1992 Constitution, the President may, by constitutional instrument, appoint a commission of inquiry into any matter of public interest if: a) the President is of the opinion that such a commission should be appointed; b) the Council of State recommends such a commission be appointed; or c) the President determines that such a commission should be appointed by resolution, Parliament requests the appointment of an inquiry commission to look into any issue it identifies as being of public interest.¹³

The matter to be investigated could be the abuse or misuse of discretionary power by an administrative body or official. It is still doubtful whether the objectives of the commissions of inquiry have been met.

Political control could also take the form of dismissal of administrative authorities by the appointing authorities. For instance, the President appoints ministers of state with the prior consent of members of Parliament.¹⁴ The power to appoint also implies the power to dismiss. Therefore, if the President revokes a minister of state's or deputy minister's appointment, the position will become vacant¹⁵.

Through a vote of censure, the parliament can also exert political control over public servants like ministers and deputy ministers. A Minister of State may be subject to a vote of censure from Parliament if a resolution is approved by not less than two-thirds of all members. If a Minister is subject to a vote of censure, the President may revoke his appointment unless the Minister resigns¹⁶. Political tolerance is critical to democracy and fundamental to the proceedings of parliament and other bodies like the legislature. It means accepting the basic rights and civil liberties of persons and groups whose viewpoints differ from one's own (Jaha, Mensah & Acquah, 2017).

In our opinion, the exercise of discretion should be controlled through the court process of judicial review due to its effectiveness over the institutional and political controls. Judicial control of the exercise of discretionary powers ensures fairness and legal compliance. Judicial processes are devoid of political interference. The court also has the jurisdiction to make orders and directions to give effect to its decisions. Moreover, there is certainty in the procedure for judicial review. The procedure for an application for judicial review is clearly stated under Order 55 of the High Court (Civil Procedure) Rule, 2004 (CI 47). There is also a right of appeal for a dissatisfied party.

¹² 1992 Constitution, art 216, 218 (d)

¹³ Ibid, art 278(1)

¹⁴ Ibid, art 78(1)

¹⁵ Ibid, art 81(a)

¹⁶ Ibid, art 82(1),(2).

²³ 1961/2 G.L.R. pp. 523-535.

²⁴ 1942/1 A.C. pp. 206-283

²⁵ [1993-94] 2 GLR 459-509

²⁶ *Ransford France vrs The Electoral Commission and the Attorney-General* writ no. J1/19/ 2012 19th October, 2012

²⁷ *National Democratic Congress Vrs Attorney-General and Another* (J1 9 of 2020) [2020] GHASC 25 (25 June 2020)

8. Reaction of the Courts in Ghana on the use of Discretionary Power

It must be emphasized that as enshrined in Article 23 of the 1992 Constitution, it provides for a challenge of the use of discretion by an administrative body or official. As such it accentuates a judicial review of the use of discretion which underscores the point that the control of the use of discretion has been subtly given to the court that in case of any adverse effect of the use of discretion by a body or person mandated by law, same can be challenged for appropriate redress at a court.

In *Re Akoto and 7 Others*²³, in accordance with section 2 of the Preventive Detention Act of 1958, Akoto and seven other people were detained. The Act gave the Governor-General the authority to detain anyone he believed to be endangering the security of the state. After the High Court rejected the detainees' habeas corpus request, they appealed to the Supreme Court. One of their grounds for appealing was that their detention lacked a legal foundation, and the court was required to look into that foundation in order to determine whether the action taken—their incarceration—was necessary to safeguard the security of the state. The court's judgment was delivered by Korsah CJ, who said the following.

*According to the English ruling in Liversidge v. Anderson*²³, the courts lacked the power to look into the circumstances surrounding their detention. The executive branch was given discretion by the statute, and the courts will not interfere with the use of this discretion so long as there is no evidence that the executive branch behaved dishonestly.

This principle of not interfering with the exercise of discretion has become a principle which is largely applied by the court unless there is proof that the discretionary power exercised was overbroad and largely undermines the rights of a person. It was therefore seen in the case of *NPP v IGP*²³ when this principle was watered down, post the 1992 Constitution where an exercise of discretion by an official was deemed to be repugnant with the bill of rights guaranteed under the 1992 Constitution. The court held that;

The form and content of a permission application are not specified in Section 8(2) of NRCD 68, nor is the yardstick or standard that the officer should use to decide whether or not to grant the permit. Even though the police officer was required to explain his reasoning for refusing to provide the permission, the refusal could not be contested in court on the grounds of bias, prejudice, political preference, or any other flimsy and unsupportable justification. It is obvious from this that there was a genuine risk that section 8 of the NRCD 68 may be utilized to repress citizens' basic liberties and civic rights.

The court, therefore, underscored the inherent discretionary powers given to the Police to refuse or accept the application for a group to go on a procession. However, the court placed a premium on the rights of citizens in Article 21 of the 1992 Constitution. The position of the law is therefore premised on the fact that, the court accepts the use of discretionary powers as enshrined in the Constitution but the same must be proportional to the mandated duties and should not be in breach of the constitution or any law. The Supreme Court, therefore, gave its blessings in the case of *Abu Ramadan (No.2)*²³ where Gbededgbe JSC asserted;

Where the constitution intended for any of the Electoral Commission's functions to be subject to another person or law, this is stated in the relevant clause. In light of this, the effect is that the Constitution intended the Electoral Commission to exercise its discretion without the control or direction of any person or entity when such provisions have not specifically been specified. As the highest court in the land, this court makes a point of adhering to the limits of the authority granted to it in order to uphold the Constitution's supremacy.

Benin JSC further stated that;

I must underline that, even if there is a validation clause in the legislation or regulations, the court cannot order the first defendant to use that strategy unless it is the only one authorized by those documents. The actor has the discretion to choose whatever option, within the parameters given by

article 296 of the Constitution, will best suit the task at hand if the law offers for multiple methods of executing the assignment. Even if it is thought that a more effective manner exists, they cannot be faulted as long as the method they have selected to purge the register is permitted by the legislation or rules.

9. Implications of Article 296 Of The 1992 Constitution

Discretion can be risky because it can be used arbitrarily and unfairly. Additionally, discretion falls short of giving citizens enough direction so that they can live their lives in accordance with the law. The 1992 Constitution's (supra) Article 296 makes an attempt to address these dangers. Discretionary decisions must be made in a fair and transparent manner, according to Article 296 (a). The prohibition against arbitrary decisions is imposed by Article 296(b). The publication of regulations outlining how a discretionary power will be used is required by Article 296 (c). Therefore, the laws represent an effort to instruct locals in proper behavior. Be prepared for the exercise of discretion. This deals with the problem of direction.

The Constitutional Commission which put forward the proposal on this issue for consideration by the Constituent Assembly in 1968 had this to say on the rationale for discretionary powers (in paragraph 732 of its Proposals of the Constitutional Commission for a Constitution for Ghana at pp. 199-200):

We strongly feel that there must be some constitutional limitation on the exercise of discretionary power and we, therefore, propose that when discretionary power is given to any person or authority that person should publish a statutory instrument which will set out the principles, the manner and the mode of the exercise of the discretionary power conferred.

However, in the case of *France v EC*,²⁶ *Date -Baah JSC*, speaking through the court held that;

As Akufo-Addo CJ said in Captan, regarding Ministers complying with the equivalent of article 296(c) of the 1992 Constitution, in relation to the exercise of their discretionary powers, "The government could hardly govern if this were so." This sagacious comment applies with equal force in relation to the first defendant in this case. The Electoral Commission could hardly perform its functions if prior to each time it exercises a discretion it has to promulgate regulations containing the principles governing the exercise of that discretion. The framers of article 296(c) of the 1992 Constitution could not have intended such an absurdity.

This principle, therefore, accentuates the position of the law in regard to the exercise of discretion, and that unless a body is a quasi-judicial body before it is mandated to publish regulations. This same principle was applied in the case of *NDC v EC*²⁷.

10. Conclusions

Administrative justice works hand in hand with administrative law by ensuring that administrative authorities conferred with discretionary powers act fairly and within the legal boundaries. In spite of the statutory limitations, discretionary power may still be abused hence the need for controls in the event of abuse. Among these, judicial control through the court process is most effective due to its effectiveness as seen in various decided cases cited above. Thus, in our opinion, every government must employ a combination of democratic and judicial control over discretionary powers subject to the needs of the state.

Legally, there are mechanisms put in place to control the use of discretionary powers to avoid abuse and the fundamental freedoms and liberties of the public. These are done through conferment where areas and conditions under which discretionary powers are used are clearly stated. Controls can also be in the form of structuring in which limits are set down in the form of procedural rules are set to guide how an administrator makes which choice from varied alternatives. Judicial review is the

major form of control where the supervising courts exercise their supervisory role over lower courts and lower courts over administrative bodies by determining their actions ultra vires, null and void if they act contrary to acceptable law. The question however is should control be limited to the courts or it should be left to another political tool.

The red-light theorists like Dicey and Wade argue that based on the concept of checks and balances the courts should serve as vanguard and declare actions of the executives null and void when they go contrary to law in the discharge of them of their functions just as parliament controls the course of the executives. The red-light theories have the same basic tenets which are; that the law is discrete and superior to politics, the state can be limited through the law, and the best way of controlling the power of the state is through the law and liberty of the individual can be safeguarded. These theorists are of the perception that the supremacy of the courts must prevail over politics, for judicial control the general system of adjudication is appropriate, the law is political, neutral and independent of government, politics and administration. this further explores the notion they believe that courts are the primary form of protection from the control of the executives.

The green light theorists on the other hand are more of a separation of powers advocates who believe the courts should play minimal roles but allow other democratic tools of parliamentary committees and investigations. The green light theorists, on the other hand, believe the law is merely a matter of political discussion that public administration is good and politics is not evil and does not threaten the liberty of the individuals, that administrative law should not only focus on the negatives of government but also facilitate sound practices. There can always be alternatives to the courts and these should be encouraged in the democratic system. They primarily seek to limit the influence of the courts.

Arthurs contends that because courts lack substantial competence in administrative issues, they should be limited in their ability to review administrative judgement. The link between law and substance is so tight that when it assures logic and bona fide. There is no other cause for the courts to intervene in administration. According to Arthurs, judicial review is only permissible when it assures logic and bona fide. There is no other cause for the courts to intervene in administrative decision-making.

The amber light seeks to build a consensus between the two competing theories and holds that none is superior to the other. and that admirative law should aim at extracting the positives of the two theories and apply them to seek utility for the public. Therefore, the amber theories should be emphasized and championed because it allows a level of discretion of public actors in the exercise of their function. However, the admiration should not be left uncontrolled. There must be some limitation to the exercise of such powers and the courts should act as a last resort to prevent any abuse. Finally, judicial supremacy should prevail to protect civil liberties but judicial activism should not be encouraged.

From the analysis above, it could be inferred that the court in Ghana has stamped its authority in the use of discretion and same has been shaped well by the Supreme Court which makes it an applicable law. And that, leaving the use of discretion to the democratic process would be an albatross around the necks of people since the use of discretion could be a tool to oppress the right of people.

However, since the court holds final judicial power, the review of discretion in the court would be an effective channel of controlling the use of discretion by officials and bodies. It would therefore be suicidal to leave this power to the democratic process, be it the executive or the legislature.

No government can run only by law and statutes. There is a need for discretion. However, because there is a high likelihood of arbitrariness, illegality and unreasonableness in the exercise of discretion, it has to be controlled. This is to protect the individual's rights while allowing the government to carry out its mandate effectively. Questions have been raised on judicial control of discretion as it might translate to the courts exercising a superior power and interfering in the will of the people. Arguments have also been made in the favor of courts checking the exercise of discretion to control arbitrariness. In an actual sense, judicial review consolidates democracy and does not

jeopardize it.

In our opinion, judicial control through the court process is most effective control of discretionary power among all options. Every government must employ a combination of democratic and judicial control over discretionary powers subject to the needs as well as democratic and developmental aspirations of the state; but prominently employ the judicial control of discretion. In all of these, the media is often referred to as the mirror of society, reflecting events and issues that occur in society (Ennin & Mensah, 2018). The media can also contribute by informing and supporting democratic values, in general and in the case of an intervention. It can play a particular role in promoting independent judiciary based on sound journalistic principals (Mensah, Boasiako & Acquah, 2017).

As Hayfron Benjamin beautifully put it in *PPP v Attorney-General*,

"The High Court has extremely broad powers, but they seem to me to represent the drafters' aim that the courts should be the guardians and protectors of the liberties of each Ghanaian person. It is a duty that is both burdensome and honorable. The courts must walk a fine line between the Scylla of overzealousness and the Charybdis of judicial timidity in carrying out their tasks. They should offer protection where the citizen's freedom has been violated, but they shouldn't look for violations where none exist."

11. Recommendations

Based on the cases cited above and the conclusions from this paper, the author made the following recommendations:

1. The rule of law should be appropriately applied in all facets of our democratic, political and institutional controls.
2. The courts should establish adequate control measures in the case of discretionary abuse.
3. Judicial review must be practiced at all necessary levels of the court and be applied to authorities having something to do with the application of the law in delivering justice.
4. There should be rightful implementation of the law at all levels of justice administration.
5. Separation of Powers and the independence of the Judiciary should be at adequate enforcement and must not be jeopardized with.
6. The media should be resourced well to expose likely ills to occur in law administrative processes as journalists also apply high journalistic standards and principles in their line of duty.
7. Effective democratization in line with judicial process.
8. Political tolerance is key in every rightful political system.

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