

## ADMINISTRATIVE DIRECTIONS AUGMENTING THE LAW IN LIGHT OF THE 2G SCAM IN INDIA

- Disha Vipul Thakkar\*

### Abstract

*The 2G Spectrum Scam is said to be the biggest scam in the history of independent India. This paper emphasizes the imperative need to subject administrative directions to judicial review in light of the 2G Spectrum scam that came before the public eye in 2010. This scam was based on certain irregularities in the allocation of licenses for mobile communication that lead to a loss of 1.76 Lakh Crores to the exchequer. The author wishes to argue that there are certain exceptions to administrative directions which fall within the exception of non-enforceability and hence should be subjected to judicial review. In this case, the recommendations of the Telecom Regulatory Authority of India and the note issued by the Department of Telecommunications were in the nature of administrative directions. By examining the magnitude of corruption and grave abuse of power in this case, it brings into perspective the need for the judiciary to ascertain more concrete principles by way of interpretation to meet the ideals of a fair, just and a non-arbitrary society.*

2G Spectrum Scam, titled by Times Magazine, as the second biggest instance abuse of power, falling just below Richard Nixon's Watergate Scandal was based on certain irregularities in the allocation of second generation licenses for mobile communication and limited data transmission that lead to a loss of 1.76 Lakh Crores to the exchequer.<sup>1</sup> This scandal came before the public eye in 2010, when the Comptroller and Auditor General, Vinod Rai submitted a report exposing the various inconsistencies in 2008 involving the grant of 122 2G Unified Access Services (UAS) licenses that were given to telecommunication companies at the market price decided in 2001.<sup>2</sup> Moreover, this allotment was to be done in accordance with the First Come First Serve (FCFS) principle that was formed by the Department of Telecommunications (DoT). It was alleged that the then Telecom Minister, A Raja, made changes to the procedure of allotment of licenses in

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\* Disha Vipul Thakkar is a student at Jindal Global Law School, O.P. Jindal University.

<sup>1</sup> Tharoor, Ishaan. 2011. "Top 10 Abuses of Power". *Time Magazine*, 2011. [http://content.time.com/time/specials/packages/article/0,28804,2071839\\_2071844\\_2071866,00.html](http://content.time.com/time/specials/packages/article/0,28804,2071839_2071844_2071866,00.html).

<sup>2</sup> Comptroller and Auditor General of India (2010). *Performance Audit Report on the Issue of Licenses and Allotment of 2G Spectrum by the Department of Telecommunications*. p.40. Available at: [https://cag.gov.in/sites/default/files/audit\\_report\\_files/Union\\_Performance\\_Civil\\_Allocation\\_2G\\_Spectrum\\_19\\_2010.pdf](https://cag.gov.in/sites/default/files/audit_report_files/Union_Performance_Civil_Allocation_2G_Spectrum_19_2010.pdf).

order to favor certain companies <sup>3</sup> thus manipulating the seniority of applicants that was to be maintained by the FCFS policy. <sup>4</sup>

The manner in which there has been a violent miscarriage of justice and an unfettered abuse of power by the administrative authorities of India is of a high magnitude. The blatant ignorance of the recommendations of various government bodies and procedural inconsistencies in order to further a personal interest has raised several questions with regard to the transparency in the working of the DoT and exposing the failure of the administrative authorities in complying with due processes. By way of this paper, the author would like to focus on the gruesome administrative law violations, emphasizing on the recommendations of the Telecom Regulatory Authority of India (TRAI) <sup>5</sup> and the note issued by the Department being in the nature of 'administrative directions' and the need to subject it to judicial scrutiny.

The FCFS policy was meddled with by the DoT in a manner that had affected the innate criteria of the policy. <sup>6</sup> The CAG report exposed how the violation of the FCFS policy proved to be detrimental to certain bona fide applicants and was advantageous to a certain class of companies who were made aware of the change in policy beforehand. With regard to this specific issue in the case of *CBI v A Raja*,<sup>7</sup> the Delhi High Court held that the FCFS policy was unable to stand the increasing number of applicants and hence making modifications was inevitable. What is important to understand is that the mere lack in the uniform implementation of the policy is not a sufficient logical reason for the DoT and the Minister to meddle with the policies to suit their interests.

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<sup>3</sup> Unitech and Swan Telecom Ltd are the two companies that benefitted from this scandal and as alleged in who's favor the Telecommunication Minister and others were working for.

<sup>4</sup> The department acted against the recommendations of the Telecom Regulatory Authority of India (TRAI) of 'not having a cap' on the number of licenses by issuing a press release on 24<sup>th</sup> September, 2007 announcing the acceptance of licenses only till 1<sup>st</sup> October, 2008. However, the deadline was ex-post reset to 25<sup>th</sup> September, 2007 thus enabling the DoT to rule out several applicants. The DoT had selectively leaked the information regarding the date of issuance of letter to intent on 10<sup>th</sup> January, 2008 to certain applicants so that they could deposit their fee before the others.

<sup>5</sup> Telecom Regulatory Authority of India (2003). Recommendations on Unified Licenses. Available at: <https://main.trai.gov.in/sites/default/files/Recomodifiedfinal.pdf>. TRAI, through its report in 2003, recommended and provided with the roadmap for the shift from the former regime to the new regime of uniform licensing

<sup>6</sup> Comptroller and Auditor General of India (2010). *Performance Audit Report on the Issue of Licenses and Allotment of 2G Spectrum by the Department of Telecommunications*. p.40. Available at: [https://cag.gov.in/sites/default/files/audit\\_report\\_files/Union\\_Performance\\_Civil\\_Allocation\\_2G\\_Spectrum\\_19\\_2010.pdf](https://cag.gov.in/sites/default/files/audit_report_files/Union_Performance_Civil_Allocation_2G_Spectrum_19_2010.pdf).

The CAG Report exposed how the criteria for attaining the license had shifted from being based on seniority of applicants based on their date of receipt of application to 'who would comply with the condition stipulated in the LOI first'. This change was made on 10<sup>th</sup> January, 2008 by way of an announcement stating the time duration of an hour that prospective licensees had to collect their LOI and comply with the conditions. This information was selectively disclosed to a certain class of companies so that they were prepared with the required conditions beforehand.

<sup>7</sup> *CBI vs A. Raja & Ors.* Available at: <https://drive.google.com/file/d/1Ow74Zp-h9H5Cq5BmNDAKiwO8QsDKaH60/view>

Hence, to question this abuse of administrative discretion, it is necessary to see the recommendations in light of administrative directions to rule out any prejudice caused.

Administrative directions fall within the realm of the exercise of executive power itself and are often in the form of instructions that are a part of the internal administrative procedure in a government department or at times for the public. The rationale behind administrative directions is to fill the lacuna in the existing law, rule out chances of arbitrary exercise of administrative discretion and ensure uniformity in the proceedings.<sup>8</sup> However, on a general perusal, the directions issued are dominantly unenforceable and non-justiciable in court of law as it neither confers an obligation on the administration nor any enforceable right on the individuals.<sup>9</sup> It is a matter solely based on facts and circumstances on a case to case analysis.

To ascertain this, it is important to delve into the purpose of the TRAI, an independent body established by an act of the Parliament namely, the Telecom Regulatory Act of India, 1997. It has been the intrinsic function of the TRAI, owing to the high level of specialization that the organization carries out and the government entrusts it with,<sup>10</sup> to give recommendations for the distribution of licenses to service providers.<sup>11</sup> There existed a due process under Section 11 of the TRAI Act that ensured that the Government would mandatorily seek recommendations from the TRAI even though the recommendations were not binding.<sup>12</sup> This section shows the intent of the provision<sup>13</sup> of giving prominence to the recommendations made by the TRAI thus asserting its significance and the need to give weightage to the recommendations.<sup>14</sup>

Upon viewing the functions discharged by the authority and the efficacy in ensuring a smooth and uniform procedure to the allotment of licenses, it is argued that these recommendations, which are in the form of 'instructions' for the inter-department functioning are administrative directions.

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<sup>8</sup> Jain, S. N. "LEGALITY OF ADMINISTRATIVE DIRECTIONS." *Journal of the Indian Law Institute* 8, no. 3 (1966): 349-57. <http://www.jstor.org/stable/43949908>.

<sup>9</sup> *Prabhakar Reddy v State of Karnataka*, AIR (1980) Karnt 207.

<sup>10</sup> Telecom Regulatory Authority of India Act, 1997. Sec. 4 provides that the chairperson should be an individual who holds special knowledge and professional experience in telecommunication

<sup>11</sup> *Telecom Regulatory Authority of India Act*, 1997. Sec. 11.

<sup>12</sup> *Telecom Regulatory Authority of India Act*, 1997. Sec. 11.

Section 11 Proviso 5 states that on a prima facie analysis, if the Government is of the opinion that the recommendations made by the TRAI are unacceptable or needs modifications, then the Government has to refer back to the authority the recommendations for reconsideration. A final decision shall be taken by the Government after the authority has replied on the reference of the Government within 15 days of making such reference.

<sup>13</sup> *Chief Commercial Manager, South Central Railway, Secundrabad v G. Ratnam*, (2007) 8 SCC 212. It was held that in order to ascertain whether a certain manual, rule or notification is an Administrative Direction it is necessary to take into consideration the intent of the provision that establishes the report made by the body.

<sup>14</sup> This principle was established in the case of *Cellular Operators Association of India and Ors. v. Union of India and Ors*, (2003) 3 SCC 186 where the recommendations by TRAI were held as binding.

An absence of compliance requirement of procedures of tabling, consultation, publication and other technicalities that come along with rule making, indicate these recommendations of the TRAI to be administrative directions.<sup>15</sup> Looking at the nature of the provision and its ambit of application is a key tool to identify an administrative direction.<sup>16</sup>

The note that is issued by the Director of the DoT was sought to merely confirm the policy involved and hence had an inter-departmental application and not a general one. During the hearing of the case in the Delhi High Court<sup>17</sup>, it was asserted as a fact that A. Raja deleted a provision in the note, which becomes instrumental in ascertaining the intent of the administration. The Minister deleted the provision which dealt with inter seniority among the applicants based on the date of application submission in a situation when more than a single licensee has paid the fee prescribed in the Letter of intent on the same day.

Since, the nature of these recommendations has been established to be tilting towards being administrative directions, the question of its enforceability in a court of law is one of great concern in a case involving spectrum license, which forms a part of natural resources of our country hence being a national asset. There are occasions when administrative orders do confer rights and impose duties and hence the principle of non-enforceability is not absolute.<sup>18</sup> It is in the hands of the judiciary that exercises the right to determine whether an administrative direction can be judicially scrutinized or not, depending on the nature of the directions and its intensity in affecting the roots of the matter, when the legislature has remained silent on the matter.<sup>19</sup>

It is strongly contended that the administrative directions in this case fall within the exceptions of non-enforceability due to several reasons and accountable to judicial review. Firstly, the recommendations of the TRAI, Clause 26 of the Guidelines specifically<sup>20</sup> and the note issued are not inconsistent with the rules already formed<sup>21</sup> but in fact are bridging an integral gap which

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<sup>15</sup> *Kumari Regina v St. AHE school*, AIR (1971) SC 1920.

<sup>16</sup> *Chief Commercial Manager, South Central Railway, Secundrabad v G. Ratnam*, (2007) 8 SCC 212.

<sup>17</sup> *CBI vs A. Raja & Ors.* Available at: <https://drive.google.com/file/d/1Ow74Zp-h9H5Cq5BmNDAKiwO8QsDKaH60/view>

<sup>18</sup> *Union of India v. K. P. Joseph*, AIR (1973) SC 303.

<sup>19</sup> *Pratap v Shri Kirshna Gupta*, AIR 1956 SC 140. This case held that some rules are vital and go to the root of the matter, the others are directory a breach of whom can be overlooked as long as there is substantive compliance with the rules and no signs of prejudice is involved. When the legislature remains silent on which falls under which category, it is the judiciary that exercises a right to bifurcate one class from the other based on certain principles of enforceability.

<sup>20</sup> Telecom Regulatory Authority of India (2003). *Recommendations on Unified Licenses*. Available at: <https://main.trai.gov.in/sites/default/files/Recomodifiedfinal.pdf>.

<sup>21</sup> *Sant Ram Sharma v State of Rajasthan and Ors*, AIR (1968) 1 SCR 111. Supreme Court held that 'Government cannot amend or supersede statutory rules by administrative instructions but if the rules are silent on any particular point, they can be held enforceable as long as the directions are not inconsistent with the rules already formed.'

existed in the policy dealing with the allotment of UAS licenses on a FCFS policy. If the 2017 Delhi HC judgment *CBI v A. Raja* is correct, it is established that the FCFS was ambiguous and insufficient to be carrying the allotment effectively. Relying on the case of *State of Uttar Pradesh v. Chandra Mohan*<sup>22</sup>, since this administrative direction is filling a gap that is prevalent in the implementation of the policy, it is held to be enforceable in nature. Due to the silence of the rule on effective implementation of the policy, these directions issued assure a uniform application of the policy, ruling out any possibility of arbitrariness and creating a fair-play for all the players involved. This principle was reiterated in the case of *Union of India v Rakesh Sharma* as well.<sup>23</sup> Hence, the non-compliance of the department with the recommendations and the changes made by the Minister to the note are matters that are subject to judicial scrutiny.

Additionally, the directions issued establishes a right of fair procedure and non-arbitrary allotment of licenses among all the license applicants. Relying on the emphasis laid upon transparency and fair play that is guaranteed by the directions in *BS Minbas v Indian Statistical Institute*,<sup>24</sup> it was held to be an enforceable direction. Similarly, the situation in the current case not only creates a right of non-arbitrary proceedings but also involves a question of gigantic public interest at stake thus regarding the matter to be of supreme importance and hence subject to judicial scrutiny. Non-compliance with the recommendations that were directions, has proved to be detrimental to the class of companies that relied on the allotment being granted on basis of seniority in accordance with the original policy. Moreover, the information with regard to the change in allotment criteria was selectively leaked only to a certain class of companies thus exposing the arbitrariness of administrative action. Holding such a kind of administrative direction to be valid, would go against fair procedure and would act against the Principles of Natural Justice, which is the bed rock of all laws, holding a primary significance especially in administrative law matters. It is certain that the Principles of Natural Justice apply to certain administrative actions that have civil consequences attached to it.<sup>25</sup>

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<sup>22</sup> *State of Uttar Pradesh v. Chandra Mohan*, 1977 AIR 2411.

<sup>23</sup> *Union of India v Rakesh Sharma*, AIR (2004) 4 SCC 309.

<sup>24</sup> *B. S. Minbas v. Indian Statistical Institute*, AIR (1984) SC 363. The court held that if the direction was properly published, it would attract more people to apply for the appointment and hence there would be a large pool of applicants to choose from thus ensuring a better candidate holding the position of a director.

<sup>25</sup> *A.K. Kraipak v. Union of India*, AIR (1970) SC 150. This principle is relevant in the concerned fact pattern as a particular small class of companies are being affected and has a 'direct consequence' on not being allotted the license, which is inherently detrimental to the company interested in seeking licenses.

Courts have also established a principle of enforceability of an administrative direction in matters where a benefit to an individual is created.<sup>26</sup> Prior to the change in the policy, a benefit was created in favor of all the applicants who would get priority owing to seniority based on the date of receipt of application. Hence, compliance with the recommendations leads to the advantage created in those specific applicants and hence it is argued that the direction is made subject to judicial scrutiny. Moreover, recommendations of the TRAI and the note were made public and hence it is prevalent by way of the facts of the case, that several license applicants had acted on the direction issued, the remedy in which lies by way of equitable estoppel thus holding the agency responsible.<sup>27</sup>

Since these events have come to light, this crisis has been an illustration of mere blame game. The recent judgment of 2017 of the Delhi High Court has in fact proved how all the accused have been acquitted of a crime so heinous, thus exposing the grave miscarriage of justice brought along. It is mandated by way of Article 39(b) of Indian Constitution, for the distribution of the natural resources to be in line with public good and the same to be carried out in light of principles of justice, fairness and equality. Since, there is no doubt in the magnitude of corruption of this case and abuse of administrative power, it brings to light the gaps prevalent in the administrative law of the country and the misuse of fluidity costing several applicants mammoth losses and denial of equality, in particular and the loss of reputation of the nation at large. Hence, understanding the reasoning for the lack of statute making enforceability of administrative directions binding, this paper asserts the need for judiciary to ascertain more concrete principles by way of interpretation in this regard to meet the ideals of a just, fair and non-arbitrary society. If no remedy is exercised in an instantaneous manner, it would fail to set a precedent for several persons in power to deter from taking this power they possess, for granted.

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<sup>26</sup> *Khet Singh v Union of India*, AIR (2002) 4 SCC 380. This case held that since the instructions issued by the Narcotic Control Bureau issued are important for carrying out search and seizure under the Act, Supreme Court held those instructions to be binding or enforceable as it creates a benefit in favor of the individual subject to being searched under this act.

<sup>27</sup> *Union of India v Anglo Afghan Agencies*, AIR (1968) SC 718.