



RESEARCH PAPER

Principles of Administrative Discretion: A Case Study of Pakistan

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ABSTRACT

With the emergence of the concept of welfare state and multiplication of executive functions, administrative discretion has to be accepted as a necessary evil. Discretionary authority conferred on the executive is never been absolute rather subject to legislative and judicial control. State functionaries, in performance of their duties, are entrusted with certain discretionary powers to regulate state affairs and to advance the cause of justice. In the exercise of discretionary powers, the executive authorities are bound to observe certain principles, standards, and parameters articulated by legislature and the Superior Courts so as to avoid misuse of authority. With the help of qualitative and deductive research methodology, this article aims to examine various case laws wherein the Superior Courts enunciated principles and standards for the proper exercise of discretionary authority, in order to keep the executive in its bounds.

Introduction

Discretion, in its literal sense, means choosing amongst the various available alternatives. However in terms of administrative law, administrative discretion means choosing from amongst the various available alternatives but keeping in view law, rules of reason and justice and not according to personal whims. Administrative discretion is one which is to be exercised in accordance with policy or expediency and may not always involve any judicial elements. The statutes conferring power or discretion on public officers are not expressly coupled with a duty to exercise the power or discretion being conferred, but it has been construed that discretion so conferred be exercised to meet the ends of justice. A discretionary power grants to the administrative authority freedom to act in any manner it thinks fit but subject to legal restraints and the requirement that it is exercised in a fair and just manner so as to promote the objectives of the law.

The administrative authorities have to face a variety of situations whose course cannot be predicted with any amount of certainty. To overcome such like situations, the administrative authorities must possess capacity to take decisions on the spot. As the legislature cannot definitely anticipate such situations, it has to confer discretion on the executive. However, in case of a quasi-judicial body, the authority may be required to act according to the principles of natural justice whose ultimate decision is non-reviewable on the merits (Khan, 2012).

State functionaries while performing their functions must observe certain norms to achieve high quality justice in a welfare society. These principles are motivated to advance the cause of justice and to discourage the whimsical use of powers entrusted to public officials. Discretion should not be exercised to supersede any statutory provision, nor should it be exercised by a person other than the one in whom law vests authority to use that discretion. However, in case of denial, access or abuse of observance of the norms of discretion, the aggrieved person may get the impugned decision quashed or the proceedings frustrated which has affected or is likely to affect any of his legal rights. The courts also play a vital role by keeping executive authorities within their legal sphere. Till recent past, the officials seemed to be enjoying much more privileges as to secrecy of records and other immunities attached to public records and the courts were hesitant to go into the merits of discretionary decisions. But, now with the 18th Constitutional Amendment wherein right to information has been incorporated as fundamental right (Article 19A of the Constitution of Pakistan of 1973) this judicial reticence is dissipating. Apart from the standards of fundamental rights, the courts have evolved several other principles which the administration is bound to keep in view while exercising its discretionary powers.

Principles of Discretion

These are considerations that have to be kept in mind while exercising discretion to make sure the proper work of administration. Though discretion is a choice amongst alternative courses of action and a trust reposed in administrative authorities by legislature to expedite the ever growing functions of administrative authorities as a result of extended state control over the individual lives. Discretion has inborn risks in terms of misuse but it is comparatively safe if properly controlled and regulated. In spite of the fact that it is an intriguing phenomenon, it has to be accepted as inescapable evil. However, discretion is never been absolute but is exercised subject to certain conditions even though they are not mentioned in law. They have been developed through legislation as well as judgments of the courts. Purpose of the control of administrative discretion through courts is not to hinder the administrative discretion but to supervise its use. Administrative discretion is wider in its scope as compared to judicial discretion because the former deals with policy matters and is meant to be more expedient in its result. But, principles regulating both the administrative and judicial discretion are same which are discussed below.

Judicial Exercise of Discretion

Administrative authority should exercise discretion judicially and not arbitrarily, whimsically or without applying judicial mind. In a case (*Azad Hussain v Haji Muhammad Hussain*, 1994) where the defendant appeared in the court along with his counsel and admitted his signatures on the pronote, time was given to file the written statement which was not filed in due course and adjournment was granted subject to payment of cost. It was made clear that no further time would be granted. The written statement could not be filed on the next date of hearing. The court has rightly exercised its discretionary power to pronounce judgment against the defendant because he failed to file the written statement in stipulated time. The same principle was reiterated in another case (*Col (Ret) Ayub Ali Rana v. Dr. Carlites Pune and another*, 2002) the petitioner filed a suit for recovery of damages and summons was served on the respondent, but the respondent delayed the submission of the written statement without any reason. The court made the expression, "no further opportunity would be granted to file a written statement". These words were intended to disclose the intention of the court that it required earlier submission of the written statement and did not want its discretion to be used whimsically and without applying judicial mind. The principle enunciated in the given case is 'whenever the law confers discretion on any authority to make an order, the same has to be exercised on the application of judicial mind based on relevant considerations, in just and proper manner to advance the cause of justice and not whimsically and arbitrarily.

The administrative authorities should use discretion keeping in view the judicial norms and not perversely. The Supreme Court has enunciated that if the court finds the existence and exercise of discriminatory, unreasonable, arbitrary and whimsical use of discretion against judicial norms or such discretion is exercised by the person other than in whom the discretion is vested, the court can interfere with and review such decisions (*Zeenat Manufacturing v. The Secretary, Survey and Rebate, Central Board of Revenue*, 1999). In a case (*Hassan Wali v State*, 2011) where judicial Magistrate granted bail to accused persons declaring the case to be of further inquiry, the same was challenged by the complainant party along with the State before the court of Additional Sessions Judge, who cancelled the bail. The accused filed an appeal against the impugned order of the Additional Session Judge. The Chief Court held that Judicial Magistrate having discretionary powers was competent to hear a bail matter but the same had to be exercised concisely with full judicial diligence especially in cases of heinous crimes. In another case (*Muddasar Qayyum Nahra v Ch. Bilal Ijaz and others*, 2011) where appellant, disqualified by a university for holding a bogus degree, concealed the report against him, and managed to take admission in another university and acquired a degree. Election Tribunal disqualified the appellant for producing a degree acquired by using unfair means. Nothing was available on record to show that at the time of taking admission in the university, the appellant brought basic documents to the notice of university authorities. The Election Tribunal had judicially exercised discretionary powers and

rightly held that if appellant had disclosed his previous disqualification, by bringing the report of previous university into the notice of later university, he would not have been allowed to appear during subsisting period of disqualification. Appellant was rightly declared a person who was neither righteous nor honest and ameen. Judgment passed by Election Tribunal did not suffer any illegality or factual infirmity to interfere with.

Fairness and Reasonableness

Discretion should be exercised in judicious, fair and reasonable manner. The action of executive officer must be based on transparent, open and just considerations. To act fairly on the part of state functionaries have been evolved to ensure rule of law and to prevent failure of justice. Similarly, powers conferred on government officials are to be reasonably exercised in compliance with the essential standards to exercise such powers. In a case (*Collector of Customs v Pakistan Petroleum Ltd*, 2002) where the respondent, Pakistan Petroleum Ltd, was fined for delaying the payment of excise tax while company was engaged in the production of gas from Sui. The Court held the fine unreasonable because the respondent was unable for cogent reasons to pay the tax within the stipulated time and non-payment of dues was neither deliberate nor willful on the part of the respondent. The Additional Collector, Excise and Sales Tax, was having power to impose penalty in his discretion. But, he imposed penalty under the misconception that he was bound by law in this regard. Such was not required under the Central Excise Act when assessee was unable to pay duty in time. Imposition of additional duty was discretionary with Additional Collector, which had to be exercised reasonably, equitably, and fairly. Additional Collector was under legal obligation to consider the reasons offered by respondent for not paying the amount within stipulated time. The penalty had been imposed without considering explanation of the respondent. Tribunal had rightly remitted the penalty. The High Court dismissed appeal after considering circumstances of the case and laid down the principle that discretion should be used in a judicious, fair and reasonable manner. In another case (*Punjab Privatization Board, Government of the Punjab through Secretary v. Muhammad Younas Malik*, 2008) where the respondent being the highest bidder of the property, put in auction by Privatization Board, could not claim mala fide or unreasonableness for the re-auction of the property in question as the Board was not satisfied with its earlier decision of accepting bid of the respondent and had to rescind its earlier decision in larger public interest. Similarly, no objection could be raised if bid was found to be below the price which Government expected the property would fetch. The High Court set aside the judgment passed by single judge laying down the principle that a court could review a public contract only on the touchstone of reasonableness, fair play, natural justice, equality, and non-discrimination. In another case (*Shakeel Ahmed v Mst. Shaheen Kousar*, 2010) where the defendant terminated agreement to sell her house and confiscated earnest money of the plaintiff. The suit was decreed in favour of the plaintiff by Trial Court but the High Court dismissed the suit. The Supreme Court, keeping in view the principles of justice, equity, good conscious, and fairness, did not find the plaintiff entitled to

discretionary relief of specific performance of contract as a matter of right. The plaintiff had been found entitled to the extent of benefits taken by the defendant by devaluation of currency and conversion to her own use by forfeiting the same on a baseless plea. Therefore, she was liable, to pay principal amount inclusive of the earnest money to plaintiff. The Supreme Court enunciated the principle that discretion, under S.22 of Specific Relief Act, 1877, has been given to courts to grant specific performance of contract arrived at between the parties. However, court is not bound to grant relief merely because it is lawful to do so irrespective of the conduct of contracting parties and no unfair advantage is to be given to a party or to the other in the suit for specific performance. Moreover, relief can be refused though there may not be any fraud or misrepresentation on the part of the plaintiff.

Legality of Discretion

Discretion should not violate any statutory provision and should be purported to advance the ends of justice. In a case (*Shahab-ud-Din & 5 others v Mir Ali Khan*, 2001) the respondent being a pre-emptor in his plaint wrongly stated the sale price and affixed 1/3rd amount accordingly. The trial court on the application of vendee directed the pre-emptors to deposit additional amount so that the amount should have come according to the sale price mentioned in the sale-deed. The order of trial court was challenged before lower appellate court which dismissed the revision but extended the time for deposit of the additional amount using discretion in violation of the statutory period fixed for deposit of money under the suit of preemption. Another revision petition was filed in the High Court where the same was also dismissed but the time was further extended. The Supreme Court held that discretion was misused delaying justice and was violative of statutory provision by extending time for deposit of money under the suit of pre-emption. The pre-emptor in a mala fide and in a motivated way intentionally contravened the mandatory provisions of law and the lower appellate court by exercising the discretion extended period rather it should have placed premium on the fraudulent conduct of the pre-emptor. Furthermore, the High Court was also not competent to exercise such jurisdiction as second revision was not competent before it. Even if the High Court was competent to exercise the jurisdiction in the matter, then it should have taken all the circumstances into consideration before using discretionary power. When the sole object of pre-emptor in filing of an appeal was to delay deposit of the pre-emption money, in such a case lower appellate court should have declined to extend the time. Orders passed by both the courts were set aside and the suit of pre-emptor was dismissed for his failure to deposit the pre-emption amount in accordance with law in due course of time. The Supreme Court enunciated the principle that discretion should be exercised to advance justice and not to violate statutory provisions. In another case (*Syed Mushtaq Hussain Shah v Jewan and 4 others*, 2007) where the respondents deposited 1/3rd consideration of the sale one day after the expiry of statutory period, i.e., 30 days of the presentation of the suit including the day on which petition was filed to exercise the right of pre-emption. The High Court by accepting the writ petition held that the respondent's suit could not have

been decreed. The courts below while passing the decrees in exercise of discretionary powers had acted in violation of the statutory provisions of law and principles enunciated by the Superior Courts. Hence, impugned decree was therefore set aside.

Legal Authority to Exercise Discretion

Discretion should be exercised by the person in whom law vests authority to exercise discretion. In a case (*Messrs Zeenat Manufacturing Pvt. Ltd. v The Secretary, Survey and Rebate, Central Board of Revenue, Govt. of Pakistan, Islamabad, 1999*) where the petitioner, a private limited company, demanded extension for the exemption of custom duty and sales tax on imported raw material from Central Board of Revenue, Government of Pakistan, Islamabad. The authority refused to grant further extension having already granted the same. The petitioner claimed through the High Court which observed that there was no discrimination in refusing extension on part of the CBR. Appeal was filed to the Supreme Court that time being not essence of availing benefit; further extension should have been granted. The Supreme Court held that petitioner could not claim extension of time as a matter of right as objection about time was not agitated before the High Court and the same could not be raised before the Supreme Court. The petitioner on four occasions applied for the extension of time for availing the facility which was granted and that the petitioner was fully conscious about time span for utilization of benefits. Thus, objection that time was not of the essence for the performance of obligation, automatically lost significance. No arbitrariness or discrimination of treatment of the concerned authority in refusing to grant further extension having been shown, the decision of the High Court was upheld and the Supreme Court articulated the rule that if the court finds the existence and exercise of discriminatory, unreasonable, arbitrary and whimsical use of discretion against judicial norms or such discretion is exercised by the person other than the in whom the discretion is vested, the court can interfere with and review such decisions. In a case (*Naseem Ali Khan v. K.D.A, 2007*) where the Karachi Development Authority (KDA) allotted a plot in question to the original allottee under the orders of the Chief Minister who transferred the said plot in favour of the petitioner through the agreement of sale. The allotment of the said plot was cancelled on the ground that it had been carved out from amenity land meant for nursery and such conversion of amenity land into residential plots was itself illegal because it was expressly required that an amenity plot could not be converted for any other purpose without inviting public objections. The High Court while pronouncing judgment quoted the decision of the honorable Supreme Court that 'Chief Minister had no authority, whatsoever, to allot plots under different schemes of the authority (*Al-Shafique Housing Society v Pakistan Medical Association, 1992*). The initial allotment order and conversion of an amenity plot into residential plot was without jurisdiction and the petitioner could not be assumed to have acquired any legal right. The High Court dismissed the petition and added that the petitioner being a bona fide purchaser for valuable consideration may approach a competent civil court for redress. In another case (*Imran Hussain v WAPDA through Chairman, 2011*) where a Managing Director of a public sector company changed recruitment policy at the behest of Minister in violation of the fundamental rights, which

reflected poor and reckless governance. The impugned recruitment and appointment of the candidates were set aside as being unconstitutional, illegal, and without lawful authority. The public sector company, in the present case, defrauded the legitimate expectations of hundreds of people who desired a decent and lawful employment. However, instead of carrying out transparent recruitment process, the authorities have failed to perform their public duty and had abused the public trust reposed in them by the people of Pakistan. The public functionaries involved in the process were held accountable including the Board Members of the company who seemed to have taken no note of such a huge breach of trust. Therefore, the Chairman WAPDA was directed to inquire into the matter of these appointments and to identify the real beneficiaries of unlawful recruitment process. The High Court directed that all the said posts shall be deemed to be vacant and be filled again in terms of present judgment and the recruitment policy unless the same was lawfully amended or modified.

Policy Making and Discretion

Policy making should not violate any statutory provisions. So, discretion which is in violation of law is illegal and cannot supersede law. In a case (*University of the Punjab v. Muhammad Aslam Bora, Advocate, 1988*) the respondent filed an application to the administration of University of the Punjab for the correction of his date of birth in matriculation certificate. His application was not considered so he filed a suit against the decision of the university administration. It was argued that the syndicate of the university had already made a policy not to entertain applications regarding correction of date of birth whereas the law gave right to the candidate for the correction of his date of birth. University of the Punjab filed revision petition at the Lahore High Court against the impugned order of the lower court. The High Court affirmed the decision and enunciated the rules that no policy of syndicate can violate statutory provisions nor can any executive order nullify the law. Hence, administrative discretion cannot annul the law. In another case (*Nadeem Ahmed v Government of the State of Azad Jammu and Kashmir through Chief Secretary, 2010*) where the petitioner, applied for the post of Assistant Commissioner instead of scoring the highest marks in the written test, was not called for interview because of some deficiencies in his application, i.e. signature and copy of state-subject certificate. The Court held that the applicant should not have been excluded from the competition for such irregularities which could be rectified. The Public Service Commission has violated statutory law and the petitioner had been condemned unheard, discriminated, and had been deprived of his fundamental right to compete for appointment against the said post. So, rejection of his application was declared illegal and without lawful authority. Furthermore, the application of the petitioner would be deemed pending until he overcomes the irregularities, thereafter, he would be interviewed by the Public Service Commission and in case he would qualify the same, he would be recommended against the post of Assistant Commissioner. The High Court further observed that where the Public Service Commission had properly taken proceedings for selection, a court could not

substitute its wisdom nor it was function of the High Court to hear appeals over the decision of the Public Service Commission. However, when the proceedings had been taken in violation of the statutory rules and adversely affected the fair selection, the High Court was not precluded from scrutinizing the action of the Public Service Commission. Rules were framed for carrying out the purpose of the Act and their strict compliance was mandatory, but the Rules of Procedure could not be applied in the manner that an innocent citizen was deprived of his vested or lawful right.

Relevant Considerations

Discretion should be exercised on application of judicial mind based on relevant considerations. In a case (*Mst. Hakumat Bibi v Imam Din and Others*, 1987) the appellant counsel undisputedly appeared before the court and represented that he was authorized by the appellant to appear on her behalf. Allegation was made that the appellant had not really given the counsel any power to appear on her behalf in the court. But, no prayer was made before the Appellate Court to get her admitted thumb impression compared by an expert with her purported thumb impression affixed on the power of attorney filed before the trial court by the advocate. The appellant also failed to move the Bar Council to take action against the counsel who filed the said power of attorney in the court without the appellant's authority and was rightly rejected by the courts below. The Supreme Court held that whenever law confers on any court discretion to make an order, the same has to be exercised on the application of judicial mind based on relevant considerations in a just and proper manner to advance the cause of justice. In another case (*Muhammad Shehzad Malik v Muhammad Suhail and another*, 2010) a contempt petition was decided by the Court, filed by the respondent, without any findings on the guilt of the appellant. The appellant filed appeal against the disposal of contempt petition filed by the respondent and the same was accepted by the Appellate Court. The Supreme Court held that the order of the High Court was not sustainable in the eyes of law on any canon of justice and by accepting this appeal declined to take action against the appellant. The Superior Courts have ample jurisdiction to look into the subsequent events at the time of deciding of a case and the court has to decide controversy between the parties after judicial application of mind based on relevant considerations and not whimsically. In another case (*Fasih-Ud-Din Khan and others v. Government of the Punjab and others*, 2010) the Board of Revenue was primarily dealing with the question of the resumption of land whereas the appellant prayed subsequently for the grant of proprietary rights. The Revenue authorities refused to grant such proprietary rights to the appellants and the High Court maintained the orders passed by the revenue authorities. In the earlier round of litigation, Board of Revenue had given 'observation' without the application of mind, therefore, such observation particularly in the case of resumption were not relevant. The High Court also made a mistake in law that the appellants filed a constitutional petition before the High Court after considerable delay without analyzing the relevant facts. All orders of the revenue authorities up to the Board of Revenue and the judgment passed by the High Court were set aside. The Supreme Court remanded the matter to the Collector for deciding afresh the application for the grant of proprietary rights

filed by the appellants. In another case (*Muhammad Akbar Abbas v. Muhammad Zafar*, 2010) where the Trial Court, on the application of the defendant, set aside ex parte decree made on the consideration of the cheque for the recovery of money. Furthermore, the defendant was allowed for leave to appear and to defend the suit subject to the condition of the submission of the surety of equal amount within a couple of weeks, which was extended on the request of the defendant. The plaintiff alleged that the defendant was not entitled to the discretionary relief of extension. The trial court had taken into consideration various factors for the extension of time for the submission of the surety bond: age factor being old, distance of the court premises from his residence, and lack of familiarity at the city where the court was situated. The Supreme Court held that discretion had been exercised after weighing and balancing the respective pleas of the parties and by judicial application of mind which cannot be anticipated arbitrary or fanciful.

Structuring of Discretion

Discretion should be controlled and structured by the law itself. Whenever discretion is given to the administrative authorities, it should be structured by laying down rules, conditions or parameters or by giving some remedies against the misuse of discretion. This can be done by the parliament as well as the delegatee. There must be certain principles and policies for the exercise of discretion. The objectives of law must be taken into consideration providing viable manner to achieve the objective. So, the administrative authorities should make exhaustive rules regarding the regulation of discretion. In a case (*Amanullah Khan and others v. The Federal Govt. of Pakistan*, 1990) where the Corporate Law Authority refused to entertain application for registration of Stock Exchange under S.5 of the Security & Exchange Ordinance 1969 on the ground that there already existed one stock exchange. The applicant was not informed at all about the fate of his application and the disclosure of the reason had taken place during the hearing of constitutional petition in the High Court. It was alleged that such ground of refusal to entertain the application was not valid as it did not disprove the public interest or trade benefit. The honorable Court in deciding the matter referred to the concept of structuring of discretion by '*Kenneth Culp Davis*' as under;

“Discretion needs to be structured whenever wide powers conferring discretion exist. The structuring of discretion only means regularizing it, organizing it, producing order in it so that decision will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure. Somehow, the wide worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first instance but where the authorities fail to rationalize it and regulate it by Rules, or Policy statements or precedents, the Courts have to intervene

more often than is necessary, apart from the exercise of such- power appearing arbitrary and capricious at times” (Davis, K. C. (1972).

In another case (*Ayesha Sabohi v Inspector-General of Police, Punjab, Lahore, 2010*) where the concept was further elaborated, the petitioner, Assistant Sub-Inspector, was sent on training but was dropped from the same and was suspended without affording him an opportunity of being heard or show cause to explain her position. The Commandant Training School made the orders due to her absence without leave for two days. The impugned action was taken on the assumption of irrelevant consideration and contemplation that petitioner was not interested in training and remained absent willfully. As the appointing authority of the petitioner was Capital Police Officer and she remained absent for cogent reasons, so, order passed by the Commandant was without legal authority and had no legal consequences. The High Court, while directing the Commandant to take the petitioner back into the course, enunciated the principle that the exercise of discretion conferred on public official must be structured , which means regularizing it, organizing it, producing order in it so that decision should achieve high quality justice avoiding any chance of unreasonableness, irrationality or inequality.

Conclusion

Government functionaries, while exercising their discretionary authority being granted either by legislation or otherwise, must observe principles, standards and considerations as laid down by the judgments of the courts as well as the legislative organ to avoid the capricious use of discretion. This will be instrumental in achieving high quality justice and fair play which can help attain the ultimate purpose of discretion vested in administrative authorities, i.e., good governance which is a *sine qua non* to overcome the complicated problems of the modern age and to accomplish the needs of a welfare state. In case of any deviation from the aforesaid principles, the person whose right is adversely affected or is likely to be affected by use, abuse or undue withholding of discretion may get the order impugned by the next immediate authority or courts.

Courts have evolved several norms such as fairness, reasonableness, legal authority to exercise discretion and relevant consideration etc. which the executive officers must observe while performing their duty to make sure efficient administration. Furthermore, the authorities in no case will substitute its discretion with the settled principles of law. The essence of these norms is to assure fair play, uniformity and to favor high quality justice in administrative actions. The part of administrative law dealing with administrative discretion is not very clear in its application. Although, we find that the standards or principles of administrative discretion are well established, yet their application to individual cases bears some other factors for the consideration of the authorities. The interference of the courts with administration is always fluctuating because of the inferences drawn by the judges in each case according to their own inclination of mind. There are judges who readily interfere with administrative functions; on the other hand, there are judges

who do not consider it proper to meddle in administrative matters. But, the fact remains there that the administrative principles enjoy sound footings in the eye of the judges and the same is expected by the public officials.

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