CONTROLS OVER ADMINISTRATIVE DISCRETION: A CASE LAW STUDY IN THE CONTEXT OF PAKISTAN

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Abstract

With the evolution of modern welfare state, state functionaries have to perform numerous functions and discretion has to be accepted as a necessary evil. In order to avoid misuse of authority, a mechanism of legislative, administrative, and judicial controls have been devised. With the help of qualitative research methodology, this research aims to investigate how to keep control over the administrative actions without creating hindrance for the state officials in performance of their duties. Despite the fact that there are two competing views regarding conferring of discretion, the same could be adjusted with the help of reasonable controls at various stages: pre-conferment and post-conferment, which can be further categorized into legislative, administrative, and judicial controls. Nevertheless, these controls have to be exercised with utmost diligence so as to avoid apprehension of interbranch conflict and to ensure smooth functioning of the executive authorities.

Keywords: Checks on discretion, Discretionary control, Safeguards and controls of discretion

Introduction

Discretion, being an inevitable tool for good governance, means choice of alternatives available with administrative authorities in the performance of their functions. With the development of the concept of modern welfare state and multiplication of state functions, wide discretionary powers have been conferred on the administration to address the ever growing complex problems of present era. To avoid abuse of power being granted by legislature various principles and controls for the exercise of administrative discretion have been established. The enlargement of state functions opened a new debate about the conferring of discretion. One school of thought is of the view that the discretion should be granted generously to the public functionaries because of their diversified duties which cannot be performed in the absence of optimum discretion. On the other hand, the other school of thought is not inclined to grant wide discretionary powers to the administration; reason being the abuse

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of such powers. However, both the schools agree that discretion is to be allowed even though as a necessary evil. Furthermore, the two extremes can be adjusted by granting discretion subject to certain controls, i.e., legislative, administrative and judicial.

In order to conduct this research, qualitative research methodology has been applied wherein both primary and secondary sources have been consulted. Data has been collected from various sources such as books, case laws, research articles, statutes, previously unpublished LL.M. thesis of the principal author, and online databases. Considering time and other constraints, scope of the research is confined to India and Pakistan as both countries have inherited same administrative fabric from the British. The operational framework of the research has been broadly categorized into the following three segments: in first segment, an overview to the inevitability of administrative discretion and necessity to regulate its exercise is given. In second segment, controlling mechanism for the exercise of discretionary powers has been explicated wherein legislative, administrative, and judicial controls have been examined with the help of judicial precedents. In last segment, the research has been concluded with the findings that discretion is an unavoidable evil, which has to be accepted at any cost and could be properly regulated by subjecting it to certain controls.

Legislative Control

The legislative body conferring discretion may itself lay down accountability mechanism through various degrees of control for the exercise of discretion in selecting a course of action. In a parliamentary form of government, the executive is kept under an obligation to give an account of its performance to the parliament.[1] Legislature, thus, not only controls the delegation of powers, but also puts the executive under its check and control in the exercise of administrative powers. In this kind of control the degree of discretion is restricted by law itself so far as possible. So, the executive has to perform their functions within the prescribed skeleton of authority granted by the legislature. The legislature while delegating discretionary powers to the executive authorities uses words like may, might, will, etc., meaning thereby to give discretion to the public authorities in their dealings with public at large. But, the discretion so granted is never uncontrolled and arbitrary; the authorities are expected to apply their judicial mind in the exercise of these discretionary powers.

The nature of these expressions is not obligatory rather it is on the option of the authorities to use such powers. But, if the official is authorized to discharge functions at his choice in a positive sense, then it can be construed as imposing an obligation to perform accordingly. Moreover, if the discretionary power is conferred upon a public authority with an obligation under the law, it

is also to be deemed as an obligation of the public authorities to exercise such power. Meaning thereby, these expressions convey discretionary use of certain powers only in exceptional circumstances but generally the exercise of these powers is considered mandatory in the context of relevant provisions and the nature of duty contained there-under.

The authority in whom discretion is vested, exercises the same without any directions but it is expected under the law that the authority shall not exercise discretion in arbitrary and capricious manner. The authority granted under the statute is to be exercised to advance the cause of justice and not the vice versa. Hence, the exercise of discretionary power is not merely optional but it is the duty of such person to act in the manner as provided under the law. As far as the manner of exercising such discretion is concerned, no particular mode has been provided by the statute and the administrative authority is bound to exercise discretion within the parameters of reasonability. The unreasonable exercise of such powers is not immune from judicial review of the Superior Courts.

In a case[2], the appellant imported gold in personal baggage which was confiscated by the Custom Authorities. It was restricted for registered person or a company to regulate its import and business in local market but its import by unregistered person neither debarred the Customs Authorities from using the discretionary power, nor the legislature by using the word 'may' intended to give unbridled power to the Customs Authorities to act entirely in their own wisdom. The Supreme Court allowed the appeal and thereby set aside the Judgment passed by the High Court. Furthermore, the matter was remanded to Collector for the consideration of the redemption of goods in lieu of payment of fine.

Administrative Control

In cases, where legislature does not impose limits on the executive officers for the smooth exercise of administrative discretion and to counter maladministration, a rules-mechanism can be established by delegated legislation where the administration channelizes the broad stream of its statutory discretion into narrow streams limiting its own freedom of action by following ways: by laying down certain parameters and guidelines to exercise discretionary powers, the grounds on which the public officials make their decisions exercising discretionary powers, the procedure to exercise discretion by the public authorities under the statute, and the procedure to control abuse of discretion by public officials. The whole process is to ensure proper and uniform application of power minimizing its chance of being abused, especially, when a number of parallel and co-equal administrative authorities have to deal with the nature of cases arising under a particular scheme.[3]

The complex bureaucratic fabric inevitably causes many grievances and complaints while administering plethora of services. Unlike courts, when a

government department has acted mala fide or misled the complainant or delayed his case or treated him badly, a statutory tribunal will be able to accommodate him both cheaply and informally. However, there are large number of grievances which fit into none of the regular legal systems. A humane system of government must provide some way of it for the proper administration of justice in a more expeditious, cheaper and reasonable manner. To put the parliament in motion or initiate a special inquiry is quite difficult, unreasonable and expensive way. So, Parliamentary Commissioner for Administration (ombudsman) was devised for proper and effective administration.[4]

In Pakistan, replica of office of ombudsman is *Wafaqi Mohtasib* with same functions, powers, and duties. In a case[5], it was observed that neither the Supreme Court nor the High Court, in ordinary course, undertakes to supervise or control administrative matters; a high level and substantially reliable mechanism is available, i.e., the Ombudsman, for this purpose. In another case[6], the court observed that to undo the administrative excesses within the administration, making justice available to the wronged person, is the object of establishing the office of the *Wafaqi Mohtasib*. In another case[7], ombudsman gave an order to the Federal Public Service Commission to appoint/consider a successful appointee to a post under the Federal Government and the President set aside the orders of the Ombudsman in representation filed by the government. The Lahore High Court reviewed and set aside the orders of the president in writ jurisdiction and upheld the orders of the Ombudsman. The Supreme Court also upheld the judgment of the High Court, and further elaborated that the President should assign reasons in his orders. In a case[8], the complainant denied the service of notice served on him being forged. The signatures on the Returns and other documents in Urdu showed that the assessee was hardly literate. Whereas, notice bore the signature in English as acknowledgement of receipts, which seemed to be clearly forged with bad and improper motive which frustrated the entire proceedings. The entire action suffered from malice, bad faith and mala fide resulting in fraud on both, the statute and the complainant. In like circumstances, the Federal Tax Ombudsman had jurisdiction to investigate into the matter and to provide relief according to law, canceled the impugned order in respect of the assessment years and also gave directions for disciplinary action against the notice server for the forged signatures of the complainant.

Judicial Control of Administrative Discretion

The concept of separation of powers bars the organs of the state to interfere in spheres of the other organs. Generally, the courts do not probe into the decisions of administrative authorities in exercise of their discretion. The absolute separation of powers would lead to a situation where an organ can

become despotic in its nature and functions. So, the constitutionalist introduced a parallel concept of checks and balances whereby an organ of the state is being reasonably checked by the other. So, under this concept the courts exercise their powers to review the actions of the administrative authorities on certain touchstones giving rise to the concept of Judicial Review. Furthermore, the emergence of the concept of welfare state make' it necessary to vest certain powers in the courts to stop the abuse of wide ranging discretionary powers held by the public authorities. In Pakistan, powers are granted to the High Courts and the Supreme Court under Article 199 and Article 184(3) of the Constitution of Pakistan, 1973 respectively, as a safeguard against the abuse of powers and injustices committed by the administrative authorities. Judicial Review upholds the supremacy of the constitution and protects the fundamental rights of the citizens.

The Superior Courts can issue the following orders against the public functionaries: Mandamus; an order to public functionary to do or refrain from doing an act which that body is obliged under law to do or forbear from doing, as the case may be. Prohibition; it is an order to public official to stop him from taking an unlawful action. Certiorari; it is an order to declare the illegal action of a public authority null and void. Quo Warranto; it is an order to question authority of a public office holder and to declare the office vacant if not lawfully appointed or qualified. Habeas Corpus; it is an order to a public authority or a private person to recover a person from unlawful custody.

In a case[9], it was held that to protect the rights of the citizens and to draw a balanced and rational compromise, between the rights of the citizens and the actions of the public functionaries, is obligation of the Superior Courts. The Supreme Court observed that the very concept of fundamental rights is that these rights are guaranteed by the Constitution and the same cannot be taken away by the law. These rights impose restrictions on the legislative and executive organs of the state and in case of any divergence the person who feels aggrieved of the same can go for judicial dispensation.[10] In another case[11], the Lahore High Court explained that object, scope, and purpose of fundamental rights guaranteed by Constitution lay down a very broad concept of liberty of an individual which demands a very high level of respect and observance of such rights from the State and its functionaries. The fundamental rights thus provide a basis to the judiciary in Pakistan to control administrative discretion to a large extent. However, problems may arise in adjudication of the validity of a law conferring discretion on the administration. For this purpose, the courts look into substantive as well as procedural aspects of the law in question. The former part is examined to see whether the discretion conferred is within the permissible limits, and the later part is examined to see whether there are necessary safeguards subject to which discretion is to be exercised. The law can be declared unconstitutional if it is defiant in either of the two cases.

Inevitability of grant of administrative discretion to the administrative authorities has led to the abuse of discretion which always needs to be checked by courts for an efficacious state machinery to redress public grievances against government officials. Courts generally review the orders of administrative authorities on the following grounds:

Mala Fide. It means dishonest intention or corrupt motive. Public authority is required to act according to law, fair play, justice and equity. They should try to avoid doubts about their decisions. An action is *mala fide* if it is contrary to the purpose for which it was authorized to be exercised.[12] It must not appear that their action is based on dishonest intention, ulterior motive or personal ill will, all of which constitute mala fide. It may be difficult to determine whether or not the authority has exceeded its powers in a particular case because of the broad terms in which the statute in question may have conferred powers on the administrative authority. It is difficult for an individual to collect sufficient evidence as he has no access to the government record. However, as mentioned above, the course of events, public utterances of the authority, statement in the pleadings or affidavits, filed by the authority, failure to file the affidavits denying the allegations, etc, may lead to the establishment of the charge of mala fide.

In a case[13], the candidate failed in two papers applied for rechecking of her papers. She was informed that marks had been correctly awarded. The Vice-chancellor ordered re-evaluation of said papers on candidate's request naming one examiner in his order after whose report the same was sent to another one for re-examination of the papers but did not name the other examiner. Such exercise did not appear to be honest, bona fide and transparent. Moreover, there was some unexplained tampering in answer books. Either, vice-chancellor should have named two examiners simultaneously, or should have accepted report of the named examiner in whose estimation papers were not correctly marked. The candidate was entitled to more marks which entitled her to pass the examination.

Mala fide can be of any of the following forms: Without Jurisdiction, mala fide act is by its nature an action without jurisdiction.[14] No legislature while granting power to take action or pass an order, contemplates mala fide exercise of power. A Fraud on the Statute, mala fide act is a fraud on the statute and it is an order which is passed not for the purpose contemplated by the enactment.[15] Following Manner not required by Law, a thing required to be done in a particular manner must be done accordingly or not at all. And doing something which is in conflict with that would not only be unlawful but mala fide.[16] Latent Defect of Jurisdiction, mala fide is a latent lack of jurisdiction because a mala fide action stands lawful unless challenged by so many words and proved by cogent evidence. It is one of the grounds of ultra vires but "ultra vires" is wider than a mere mala fide.

Improper Purpose and Colourable Exercise of Power. Improper purpose means the public authority has used the power conferred for a purpose not contemplated by law. It also means to use authority for a purpose alien to law. In a case[17], the Court observed that improper purpose may be based on honest as well as dishonest intention. In this context, improper purpose is broader than mala fide as. It is also a good ground of Judicial Review because public servant is bound to follow the law in letter and spirit and is not allowed by the legislature to define purpose of law even for public interest.

Colourable exercise means under the 'colour' or 'guise' of power conferred for one purpose, the authority is seeking to achieve something else which it is not authorized to do under the law in question. In a case[18], the Court has remarked that colourable means when the power is exercised apparently for the authorized ends but really to achieve some other purpose. In a case[19], Nagpur municipality acquired property at its own expenses. Later on, it was discovered that a trust needed the property and the same had borne the expenses. The court held that it was colourable exercise of power. In another case[20], the government issued notification to acquire property for public purpose but it was actually to be acquired for a company. So, company was not a public purpose and consequently the order was quashed.

Ultra Vires Exercise of Power. Where the authority being vested with the discretionary power does not exercise the power but sub-delegates it to subordinate authority. Similarly, where the designated authority does not consider the matter itself but, acts on the directions of the superior authority would amount to ultra vires exercise of power.[21] In a case[22], a license for the construction of cinema theatre was granted to the respondent by the Commissioner of Police on the recommendation of the advisory committee but had to cancel it at the directions of the state government. The court held the cancellation order bad as the Commissioner acted on the directions of the State Government and not at his own instance.

Arbitrary Exercise of Power. The court can interfere with and strike down the administrative order when it is made or seems to be motivated by extraneous considerations or a decision made mechanically without application of mind. An administrative authority is legally bound to grant license to a dealer who to whom it was already issued; deposits. Instead of issuing license, the administrative authority prosecuted the dealer for carrying business without obtaining license. The court held that the prosecution order to be set aside for being arbitrary and unjust and further directions were given to grant license to the dealer.[23] In another case[24], the petitioner made the highest bid for a plot and the same was accepted by the competent authority. So, he deposited the required amount and asked for the possession of the plot but he was informed that his bid has been cancelled by the authorities. The court observed that the

Additional Director General, to whom power has been further delegated by DG, was not competent to cancel the bid and held cancellation order as arbitrary, whimsical and capricious, based on extraneous consideration.

Irrelevant Considerations. It provides an additional ground to the courts to attack action being taken by the administrative authorities for application of irrelevant considerations while performing their functions. A power conferred by a statute must be exercised on the consideration mentioned therein. Where the authority concerned pays attention to or takes into account, circumstances, events, or matters wholly irrelevant or extraneous to those mentioned in the statute, then the administrative action would be ultra vires and should be quashed. In case[25], Regional Transport Authority denied a route permit without taking care of legal considerations / conditions on the directions of government, the court held that transport authority did not apply its mind and decision was based on extraneous considerations. Same principle was reiterated in another case[26] where government acquired land for construction which ought to have been acquired after its subjective satisfaction in larger public interest as mentioned in the statute. The government cannot take both the meaning of the word and its subjective satisfaction. The court held that the purpose for which consent was given by the government was not so authorized by the Act. The work to be constructed on the land should be directly beneficial to the public and not the products which were required for the construction of the work.

Regarding the irrelevant consideration, following factors must be taken into account: Leaving out Relevant Considerations, the action of administrative authority becomes invalid where relevant factors have not been taken into consideration which the concerned statute prescribes expressly or impliedly. The relevant factors in this regard may be quality, production capacity, economic factors or administrative policy pertaining to maintenance of law and order.[27] Regarding Mixed Considerations, the courts have different notions where an administrative order is based on partly relevant and existent considerations and partly on irrelevant or non-existent considerations. Such cases are divided into the following two categories with competing views: Strict view; the cases here mostly involve individual liberty and the courts have established that the whole order will be void even if one of the so many considerations is irrelevant. Liberal view; these are the cases where an individual liberty is not involved, relevant considerations among all the mixed ones will be considered sufficient for validity of an order to the extent of such relevant considerations.

Not Using Discretion. The authority to which discretion is granted is expected to use it and not to withhold it. The public authorities should exercise discretion by applying their mind and should not discriminate among individuals. Refusal to exercise discretion may appear in different forms:

surrender of discretion; surrender of discretion involves the cases where authority does not consider the facts itself or any other person has determined facts or has used discretion whereas such person has no discretion vested in him by law. In a case[28], where a scheme was published by the manager without the corporation applying its mind thereto and scheme was approved by the governor, the court held it invalid. Acting under dictation, a situation of non-application of mind by the authority arises when it exercises discretion under the dictation of a superior authority. This would amount to abdication of authority which is not intended by the statute. In another case[29], where the commissioner of police, authorized to grant license for the construction of cinema-theatres, issued the same to the respondent on the recommendation of an advisory committee, but later on cancelled it at the direction of the state government. The court held the cancellation order bad as it has flowed from the government and the commissioner merely acted as a transmitting agent. Applying fetters to discretion, a case of non-application of mind may arise when the authority deliberately applies limitations or fetters on discretion. In a case[30] the court observed that the statutory discretion cannot be fettered by self-created rules or policy. Although it is open to an authority to which discretion has been entrusted to lay down the norms or rules to regulate exercise discretion. Acting mechanically, another situation of non-application arises when authority takes an action without due care and acting mechanically. In another case[31], the commissioner who was performing his functions as appellate authority acted on the findings of lower staff without applying his mind. The Supreme Court quashed the order passed by the Commissioner. Non compliance with procedural requirements, the exercise of discretion can be held bad because the authority did not comply with the mandatory procedure laid down in the statute. It was held in a case[32] where government was authorized to recommend school text books in consultation with Board of Higher Education. The government consulted only its chairman. The notification prescribing text books was held to be void for want of statutory procedure, i.e., to consult the entire Board.

Unreasonableness. Unreasonableness is taken as a separate ground where fundamental rights are affected or where unreasonable classification is made. Both India and Pakistan have adopted English doctrine of reasonableness which implies that powers, especially discretionary ones, should be exercised judiciously and not arbitrarily or capriciously. 'Reasonable' means something which appeals to the mind of an ordinary prudent man. An action on evidence is reasonable whereas that on suspicion is unreasonable. Unreasonableness may have many facets; even a decision on relevant grounds is unreasonable where the authority has given more weightage to some factors than they deserved as compared with other factors.[33] However, it is important to note that satisfaction cannot be challenged on sufficiency of reasons. It is to be checked on the

parameter whether evidence exists or not. Moreover, reasonableness has to be interpreted according to circumstances and it cannot take an objective form. In a case[34], where some Japanese were detained on the satisfaction of Secretary of State as being the citizens of a hostile country during World War II. The court said that the word "satisfaction" is subjective and cannot be opened in court, thus giving a liberal interpretation. However, in another case[35] the Court held that the rule laid down in *liversidge* case was not a general rule because it was laid down in special circumstances, i.e., war which was not applicable after that time. But, in the UK, India, and Pakistan, the administrative actions as well as the delegated legislation can be challenged on the ground of unreasonableness.

Principles of Natural Justice. The administrative authorities while exercising discretionary powers must observe the principles of natural justice, i.e. fair hearing and the rule against bias. These are the minimal standards considered necessary to deliver justice to the masses. The breach of any of these principles entitles the aggrieved person to get the order of the public officials quashed. It has been held in a case[36] that the principle of hearing shall be applicable to the proceedings no matter they are purely administrative in nature. In this case Section 179 of the District Municipal Act of 1901 provided that any Municipality could be superseded on two grounds: abuse of Power and bad administration. Municipality of Tandu Muhammad Khan was superseded on the above two grounds without opportunity of being heard. One of the aggrieved brought an action to the High Court and pleaded that PNJ should be attracted to the proceedings as they were quasi judicial in nature. High Court of Karachi held that the principle of hearing shall apply even to those cases where the action is pure administrative, although the law did not provide for hearing. The principles about the rule against bias were enunciated in a case[37] where the Court observed that justice should not only be done but manifestly and undoubtedly should be seen to have been done. No person should be a judge in his own case. Rules of bias are to be applied on courts, tribunals, and authorities having jurisdiction to determine judicial rights of the parties. Any direct pecuniary interest, however small, in the subject of inquiry does disqualify a person from acting as a judge in the matter.

Legitimate Expectations. The last but not the least ground to attack administrative action is principle of legitimate expectations which evolved as a new ground for challenging the action being taken by the administrative authorities. Functionaries under trusted duties are supposed to perform their functions to come up to the anticipations of the masses. A task once initiated by public official gives birth to the legitimate expectations of the people to be accomplished and in case of divergence any person, even not having a legal right, may get the court in motion to direct particular department for the completion of that particular task. But, at the same time, it is also noteworthy

that court will have to go to the future and socio-economic implications of that very project.

This principle of legitimate expectations operates only in public law field and provides *locus standi* for judicial review whose denial is a ground for challenging the decision but the decision can be justified only by showing some intervening public interest. Furthermore, denial by itself does not constitute any absolute right to claim relief but it is limited to denial of any right or where action taken is arbitrary, unreasonable, against public interest and inconsistent with principles of natural justice. However, the court shall not interfere merely on the ground of change in the government policy.[38] In a case[39], the petitioner sought direction to the authorities for implementing scheme for construction of bridge over river, approved by government in year, 2005. Plea raised by authorities was that completion of the scheme was low in priority. Case of petitioners was based on principle of legitimate expectations which had been evolved and invoked to provide relief on considerations of fairness and reasonableness even though no enforceable legal rights were being asserted or claimed. A duly approved public welfare scheme after having been put in operation, had given rise to legitimate expectations which could not be allowed to be frustrated. Good governance also demanded that project once approved and put in operation should be completed otherwise substantial amount in millions which had already been incurred would go down the drain. Low priority of scheme might have been available before its implementation but decisive steps were taken and it was too late then to discard the scheme. High Court directed the authorities to resume and complete remaining construction of bridge in question at the earliest.

Conclusion

To say precisely, in the context of modern welfare state granting of discretionary powers to public officials is unavoidable. There always lurks likelihood of abusing these powers by the administrative authorities. In order to administer functions of the state authorities, within the purview of their jurisdiction, a mechanism comprising of legislative, administrative and judicial accountability has been devised for the efficacious state functioning. The legislature, being the first agency of control at pre-conferment stage, while delegating its powers ascertains the limits and guidelines for proper use of these powers. Nonetheless, the legislature never abdicates its powers completely, but provides only a framework within which executive can exercise the discretionary powers. At post-conferment stage, the administrative dispensation also provides apparatus to control the wide ranged powers of public officials. On one hand, the administrative control ensures transparency and accountability with regard to smooth administration and provides relief through its own

agency to the aggrieved person on the other hand. In common parlance, relief granted by the administration against its official is called departmental remedy. As a last resort, to avoid the abuse of authority by public functionaries, judiciary serves as a check and the aggrieved person is provided with a judicial remedy.

Though a number of grounds have been established by the courts to review and annul the orders of the administrative authorities, yet on the contrary the situation is not that downy for an individual to get such orders quashed. One of the main reasons is that the proof of such grounds as mala fides, improper purpose, colorable exercise, irrelevant consideration, etc, is normally unavailable in the form of documentary evidence because government authorities enjoy privileges in many aspects not to publicize the official record and the courts have also shown hesitation to call for the same with special emphasis. The Superior Courts grant remedy to the aggrieved through means of judicial review. The same is in practice in Pakistan where the Superior Courts are empowered to review administrative actions on certain grounds as provided under the Constitution and judicial precedents. So, the dream of good governance in a welfare state can only be materialized when discretionary powers entrusted to the administrative authorities are used in such a way as to be instrumental to advance the cause of justice and public welfare.

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