JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION IN PAKISTAN

A thesis submitted in partial fulfillment

of the requirements of the degree of PhD in Department of Law

Faculty of Sharī'ah and Law in

The International Islamic University Islamabad

1437/2016

Submitted By

Fakhar Mahmood Makhdoom

Reg. No. 1-SF/ PHDLAW/S11

Supervised By

Professor Dr. Farkhanda Zia Mansoor

1. Administrative discretion
2. pakistan

The world rests on three pillars: on truth, on justice [,] and on Peace.

Rabban Simeon ben Gamaliel, (Abot 1, 18)

A Talmudic Commentary adds to this saying: ***"The three are really one,***

If justice is realized, truth is vindicated and Peace results."

***

If u see a wrong you must right it;
With your hand, if you can (meaning by action), or,
With your words (meaning to speak out), or
With your stare, or
In your heart, but that is the weakest of faith."

Prophet Muhammad P.B.U.H. Hadith (saying)

***

If you want peace, work for justice.

Pope Paul VI[1]

1- M. Cherif Bassiouni. Searching for Peace and Achieving Justice: The need for accountability, *Law and Contemporary problems*, aütumn 1996, p.9.

DEDICATION

This work is dedicated in reverence to the memory of my parents, to whom I owe everything. Who inculcated in me, a spirit of lifelong learning.

International Islamic University Islamabad
Faculty of Shari'ah and Law

****

Approval Sheet

This is to certify that we evaluated the thesis entitled " Judicial Review of Administrative Discretion in Pakistan" submitted by Mr. Fakhar Mahmood Makhdoom, Registration No.1-SF/ PHDLAW/S11 in partial fulfillment of the award of the degree of PhD in Law. The thesis fulfils the requirements in its core and quality for the award of the degree.

Supervisor

Dr. Farkhanda Zia Mansoor _____

Professor of Law

International Islamic University Islamabad.

Prof. Dr. Farkhanda Zia
Professor of Law
Faculty of Shari'ah & Law (FC)
International Islamic University
Islamabad

Internal Examiner

Dr. Ataullah Khan Mahmood _____

Assistant Professor Law

Faculty of Shariah and Law IIUI.

Ataullah Khan Mahmood
Incharge, Postgraduate Program
Department of Law, FSL
International Islamic University
Islamabad

External Examiner

Mr. Hamid Khan _____

Senior Advocate

Supreme Court of Pakistan

External Examiner

Dr. Shahbaz Ahmad Cheema _____

Assistant Professor Law

Punjab University Law College Lahore.

Dean FSL, IIUI

Professor Dr. Muhammad Tahir Hakeem _____

Chairman, Viva Voce Committee.

Prof. Dr Muhammad Tahir Hakeem
Dean
Faculty of Shari'ah & Law
International Islamic University
Islamabad

Declaration

I, **Fakhar Mahmood Makhdoom,** hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

Student: **Fakhar Mahmood Makhdoom**

Signature: F Mahmood.

Date: 05-12-2016

Supervisor: **Professor Dr. Farkhanda Zia Mansoor**

Signature:

Prof. Dr. Farkhanda Zia
Professor of Law
Faculty of Shari'ah & Law (FC)
International Islamic University
Islamabad

Date: _____

List of Examiners

Foreign Examiners:

A. Professor Dr. Hilmi M. Zawati

Chairman,
International Centre for Legal Accountability and Justice, (ICLAJ)
404-2340 Gold Street, St-Laurent, Quebec, Canada H4M 1S4

B. Dr. Werner Menski

Professor Emeritus
School of Oriental & African Studies (SOAS), University of London
United Kingdom.

National Examiners:

A. Mr. Hamid Khan

Senior Advocate
Supreme Court of Pakistan
Senior Partner Cornelius, Lain and Mufti (CLM), Lahore.

B. Dr. Shahbaz Ahmad Cheema

Assistant Professor Law
Punjab University Law College Lahore.

C. Dr. Ataullah Khan Mahmood

Assistant Professor Law
Faculty of Shariah and Law IIUI

ACRONYMS

AC	Appeal Cases
AIR	All India Reporter
All E.R.	All England Reports
Camb. L.J.	Cambridge Law Journal
CLC	Civil Law Cases
FB	Full Bench
Harv.LR.	Harvard Law Review
HC	High Court
LQR	Law Quarterly Review
MLD	Monthly Law Digest
MLR	Modern Law Review
NLR	National Law Reports
NZLR	New Zealand Law Review
OUP	Oxford University Press
P. Cr. L.J.	Pakistan Criminal Law Journal
PC	Privy Council
PLC	Pakistan Labour Cases
PLD	All Pakistan Legal Decisions
PLJ	Pakistan Law Journal
PTD	Pakistan Tax Decisions
PULJ	Punjab University Law Journal
QBD	Queens Bench Division
SC	Supreme Court
SCMR	Supreme Court Monthly Review
US	United States
Yale L.J.	Yale Law Journal

ACKNOWLEDGMENTS

I humbly praise and thank Allah Almighty, the most merciful and beneficent who bestowed upon me, the health, thoughtful mind, talented teachers and a cooperative supervisor, who always back up me to explore the insight into wonderful field of law. First of all, I wish to acknowledge my deep gratitude to my supervisor Professor Dr. Farkhanda Zia Mansoor, for her many years of patience, useful suggestions and expeditious support and guidance throughout the research work.

I am very thankful to Professor Dr. Muhammad Munir, Vice President Higher Studies and Research IIUI and Professor Dr. Muhammad Zia-ul-Haq, Director General Islamic Research Institute IIUI, who initiated PhD in Law program and made it a success despite many hurdles in International Islamic University Islamabad. I am also grateful to Professor Imran Ahsan Niazi, with whom I had many discussions regarding the topics covered in my thesis. I also like to acknowledge the support extended by Mr. Attique ur Rehman FSL Library and staff of Dr. Muhammad Hamidullah Library at IIUI, library staff of Supreme Court Library Islamabad, the Federal Judicial Academy Islamabad, for providing every possible support for my research. I am also thankful to Hafiz Muhammad Usman and Mr. Muhammad Asadullah for partial composing and final layout.

It is with no usual sense of routine that I acknowledge my sincere gratitude and appreciation to my senior colleagues at IIUI Syed Amjad Mahmood, Dr. Ataullah Khan Mahmood and Syed Afzal Ahmad for their guidance and moral support in the completion of this work. Finally, my deepest gratitude goes to my family, the value of their whole hearted cooperation and steadfast devotion is obvious without saying anything.

LIST OF CONTENTS

ABSTRACT

Contemporary developments in the science of administration have magnified the functions of administration beyond traditional boundaries. The change in the scope and character of the government from negative to positive has resulted in the concentration of considerable powers in the executive branch of the government. The growth of administrative process has created a vast new complex of relations between administration and the citizens. A significant aspect of the expansion of the functions of the administration in contemporary systems of governance is the growth of discretionary powers.

The number of administrative agencies with a wide variety of discretionary powers has multiplied so much, that today the individual is more affected by administrative decisions than by judgments of the courts of law. The reason for the preference for the discretionary powers has been the belief that in contrast to ministerial powers which are unduly irregular, whimsical, discretionary powers comparatively bring about speedy, expeditious and transparent decision making. An extensive and pervasive system of governance has come into existence in most of the developing democracies including Pakistan.

Discretionary powers of administration are a by-product of an intensive form of governance and the consequential socialization of law. It also represents a functional approach to law. The working of modern governments generates many disputes, which cannot appropriately be solved by applying objective legal principles or standards. But they depend ultimately on what is desirable in public interest as a matter of social policy.

The judiciary has been conscious of the fact that they have a responsibility to ensure that the administration functions according to the Constitutional norms and the rule of law. The problem of the scope of judicial review of administrative decision is one of the reconciliation between the need for a speedy and specialized verdict and the fundamentals of fair play. The courts have been eager to see that the decision makers are not led to exceed or misuse their powers under the umbrella of finality or ouster clauses. Judiciary continues to play a pivotal role in the control mechanism of the administrative discretion.

A study of judicial review revolves around the question of how far the courts can go into an examination of the decision of statutory bodies and agencies in the proceedings for review, as distinguished from those of appeal. Therefore, one of the main objectives of the present study is to locate the significance and the limits of the judicial control of administrative discretion.

Since the causes of considerable growth of discretionary powers are deep rooted in the history of administrative pattern of each country, this study, therefore, attempts to make a comparative analysis of administrative discretionary decision making in different countries in order to understand its impact on growth of this phenomenon in Pakistan.

The main emphasis of the present work is to study and examine the patterns of administrative decision making under discretionary powers and the role of higher judiciary in evolving a control mechanism to reconcile power and liberty in Pakistan.

Introduction and Context of Research

It is hard to conceive an effective and efficient system of governance capable of preventing an arbitrary abuse of power by executive officials which does not provide for review of their discretionary powers by the courts. Judicial supervision of administrative discretion is the key to Rule of Law and administration of justice in Pakistan.

In each society, a person is either a beneficiary or a victim of governmental power. The conflict between power and justice has immemorial antiquity. Societal context of the Judiciary has been transformed and now it is inspiring more public confidence than the Parliament. Judicial control primarily means review and is based on a fundamental principle inherent throughout the legal system that powers can validly be exercised only within their true limits. Judicial review is the very life breath of Constitutionalism and Rule of Law.

The present century has witnessed that the sphere of fundamental rights is resonating with innovative normative vibrancy. In Pakistan a conviction is spreading that individual rights need more protection than national and provincial assemblies can give them. A feeling is developing among intelligentsia that the maxims of law are best found in the opinions of the judges dealing with actual cases. Quite a few recent pronouncements of the apex judiciary indicate that the judges themselves are beginning to take a broader view of their functioning.[2] They are tending consciously to create those sound principles of governance which will sooner or later have a significant influence beyond their immediate scope.

The Pakistanis are now getting accustomed to think that the ultimate protection of rights is to be found in courts of law and that the judges are the most likely repositories of earthly

2 - *Imran Sajid vs. General Manager TIP*, 2015 SCMR 1257.

justice. A feeling is fast developing that judiciary should not minimize its potential influence on executive. No one should be penalized by inaction of public functionary, which is bound to function in good faith, honestly and within precinct of their powers.[3] A need is being felt to make the executive conscious of the desirability of greater adherence to Constitutionalism. Both the common man and legal fraternity insist that judiciary should also assume responsibility for defining those restraints on executive power which ensures the essence of constitutionalism. This work is intended to be a drop in ocean in terms of Pakistani perspective towards existing literature on the topic of judicial control of discretionary powers of executive organ of state.

The contemporary judicial trend in Pakistan is haphazard which is proved through decisions of the courts. I will endeavor in the present study to formulate certain principles upon which the courts will counter any legislative scheme which in terms adversely affects their jurisdiction.

In this changing era in Pakistan, it is inevitable that great responsibility will be assigned to executive branch of state as well. This will, in turn, necessitate greater control over administrative action. Under Article, 4 and 25 of Constitution of Pakistan 1973, every administrative authority is obliged to act fairly to ensure rule of law and prevent failure of justice.[4] It is frequently established by judiciary that executive discretion has to be structured and cannot be unfettered to ensure good governance.[5] Any public functionary, how high so ever it may be, is subservient to the Constitution and Law and is bound to act within the boundaries

3 - *Mumtaz Oad vs. Sindh Public Service Commission,* 2015 CLC 1605.

4- *ibid.*

5 - *Petro Oil Pvt. Limited vs. Federation of Pakistan,* 2015 CLC 1030.

assigned there under.[6] As government departments acquire the habit of self-restraint, impartiality and fairness, the courts may correspondingly be inclined to lessen their supervisory role. But the presence of this restraining power of the judiciary "aloof in the background but nonetheless always in reserve, tend to stabilize and rationalize the . . . .(administrative) judgment, to infuse it with the glow of merit, transparency and impartiality. The arbitrariness manifest in administrative attitude will in any case. diminish in proportion to the rise of judicial intervention. What is needed immediately is a new examination of the means and methods of judicial control of administration which this work will provide and establish both theoretically and practically.

I earnestly believe that there is tremendous room for improvement in conceptual frame work of judicial review in general and administrative discretion in particular due to the emergence of the concept of judicial activism and constitutionalism in Pakistan. In the present study I will try to minimize this misconception that judicial organ may be rendered incapacitated through politico-legislative tricks.

Firstly, the proposed research will substantiate the need and justification of active judicial review of administrative discretion including delegated adjudication by tribunals. Secondly, it will establish the need to expand the jurisdiction [7] of apex courts by suggesting extended boundary of writ jurisdiction. Thirdly this will explore the lacunas in the implementation of fundamental rights through constitutional jurisdiction of superior judiciary.

The emerging trend of judicial activism and exercise of *suo motu* powers by apex court has caused panic in government.[8] The use of *pro bono publico* litigation has also extended the

6 - *American International School System vs. Mian Muhammad Ramzan,* 2015 SCMR 1449.

7- *Ghulam Farid vs. Naseer Ahmad* PLD 2016 Lah. 478.

8 - CMA No.3854 of 2014 In Suo Motu case No.3 of 2009, 2015 SCMR 976.

scope of judicial powers; this positive development requires the adequate doctrinal defense at academic frontiers by legal researchers. With this objective in mind I will strive to advance the cause of human rights on academic basis. The fragile concept of supremacy of parliament implies a misconception that a law passed by parliament and even a constitutional amendment is beyond the review of judiciary. Although unreasonable exercise of presidential prerogative has been declared invalid[9] yet there is a lot to be accomplished in the domain of good governance. The frequent failure of political leadership in Pakistan is a significant reason of fragile good governance and democratic process. Constitution requires that subordinate public functionaries are not obliged to follow illegal orders of higher authorities.[10]

In the domain of criminal law, our courts have interpreted the relevant law to safeguard the rights of common man against the despotism of law enforcing agencies.[11] However, the law relating to the amenability of registered state agencies dealing with intelligence and commercial enterprise is still in an embryonic stage and has not reached maturity as such. The government companies, no matter wholly controlled by the government are not considered as public authorities amenable to the writ jurisdiction of High court. This notion seems to rest on the ground that the remedies available under Enabling Act are adequate.

This view is no more tenable because courts have started entertaining writs against such agencies which is adequate proof of extension of judicial review powers. In this context I will explore all procedural and substantive inaccuracies which hamper the proper exercise of judicial powers by apex courts.

---

9 - *Jamshed Nawaz vs. Sessions Judge Rawalpindi*, PLD 2015 Lah. 391.

10- *Ali Azhar Khan Baloch vs. Province of Sindh*, 2015 SCMR 456.

11 - *Mst. Haseena vs. SHO Police Station Kotdigi*, 2015 P.Cr.L.J. 790.

Objectives and Research Question

The main objectives and research questions of this study are as under:

- To study the existing constitutional framework and suggest improvements in the powers of judiciary including its independence from executive despotism.
- To make suggestions for the dynamism in jurisdictional aspect by bringing it in conformity with transnational judicial norms.
- To trace the historical perspective of standard norms of judicial review of administrative discretion in developed countries.
- To analyze the possibility that whether western judicial norms may be implemented in letter and spirit in the local legal and constitutional set up.
- To suggest suitable amendments in subordinate legislation dealing with executive discretion by conducting a comparative study of developed democracies.
- To provide knowledge and understanding to the reader about the genesis and evolution of judicial principles so that he may protect his interests against executive despotism.
- To provide a useful academic and practice oriented reading material for scholars, academicians, legal and constitutional experts, students and general public.
- To facilitate the process of improvement and strengthening of institutions in the country, this is the only way towards democratization.
- To grant academic impetus for further intensive research on particular aspects of constitutional status of judiciary, importance of implementation of fundamental rights through writ jurisdiction.

Literature Review

There is a sizeable literature available in Pakistan on the topic in general but the same is less systematic because of haphazard development. The significant indigenous pioneer academic contribution on this topic is a book written by Dr. S.M. Haider published in 1967 captioned **Judicial Review of Administrative Discretion in Pakistan**. This is based on findings of his doctoral thesis comprising of decisions of Supreme and High Court of Pakistan submitted to Duke University. It does not cover the Constitutional and legal developments taking place in Pakistan and abroad since 1967. Moreover, it is solely based on decisions of higher courts dealing with limited aspects of administrative discretion without discussing the grounds of judicial Review of administrative discretion.

The Indian contribution in this context is commendable in a sense that they have shown reasonably adequate research output both at national and international level. Justice Bhagabati Prosad Banerjee has authored a book captioned **Judicial Control of Administrative Action** in 2001 Nagpur, India. This is celebrated academic contribution in the domain of legal literature on Public Law generally. Although it is considered an authentic treatise on the subject of administrative accountability in general, yet it lacks relevance to our national politico-legal circumstances.

Dr. P. Hemalatha Devi has written a book titled **Administrative Discretion and Judicial Review** 1994 published in New Delhi India. It is based on the findings of her doctoral dissertation submitted to Department of Public Administration Osmania University India. It has extensively examined the dynamics of exercise of executive discretion in Personnel Management, Licensing, Land Acquisition and Personal Liberties. It covers the theoretical

framework of the topic in Indian perspective and the approach of the scholar is not legal but Public Administration is predominant field of research.

M.A. Fazal a Bengali Scholar has authored a book in 2000 being third edition published in New Delhi, titled **Judicial Control of Administrative Action.** This is a remarkable contribution in academic perspective having a comparative approach. It has exhaustively dealt with the basic academic issues of public law in Constitutional and Administrative perspective. This work undoubtedly contains some valuable material on the subject; however the issue of administrative discretion has not been dealt with adequately.

S.A. de Smith's landmark treatise being 4th edition titled **Judicial Review of Administrative Action** is matchless and really a monumental work because of its scholarly insight and meticulous accuracy. This book had established itself throughout the Commonwealth as the most authoritative and comprehensive exposition of Public Law. de Smith has devoted a separate chapter in his book to discuss review of discretionary powers of executive, however this entire literature is based on foreign legal and administrative traditions.

Lord Woolf and Jeffrey Jowell authored **Principles of Judicial Review** in 1999 wherein they discussed the academic and doctrinal basis of the concept of judicial review. It is valuable piece of legal literature elaborating justifications of judicial intervention in administrative discretionary decision making in British context. It sheds light on question of legality and reasonableness of administrative adjudication; however its relevance to our legal and constitutional framework is insignificant.

Discretionary Justice authored by K.C. Davis published by Louisiana State University, Baton Rough, U.S.A. is a valuable and monumental work which is considered as the most

authoritative and comprehensive exposition of Public Law in American continent. It explores the philosophical and jurisprudential aspects of important areas of administrative law in general and administrative discretion in particular. The conceptual framework of this work is based on legal approach of American judiciary towards administrative dispensation. Although the scholar has surveyed the need of judicial review in executive sphere on the basis of tangible grounds yet he has ignored the legal developments taking place in the domain of Public Law beyond American continent.

Many other contemporary indigenous academic scholars have contributed a lot for example Justice Fazal Karim's **Jurisdiction and Judicial Review** is a good contribution but its academic and practical relevance and significance is general and same is not particularized. This work culminates that presently there is a conspicuous gap between theory and practice as to academic frontier for safeguarding the jurisdictional issue of apex courts. The judgments given by superior courts have not addressed this question exhaustively in academic perspective rather these are comments which are only relevant to the extent of the case under consideration.

D. J. Galligan's famous treatise **Discretionary Powers, A Legal Study of Official Discretion** Oxford 1990, is really matchless piece of legal literature. It extensively discusses the nature of discretion in logical framework and legal order with theoretical perspective. It surveys the basis of doctrine of judicial review in the context of British jurisdiction. It also covers the importance of procedural fairness in adjudication as well as the transformation in judicial approach towards administrative decision making in U.K. however the judicial trend in the domain of public law from developing democracies do not form part of this work, which will be discussed in the proposed research.

Justice A.R. Cornelius authored a book captioned **Law and Judiciary in Pakistan** edited by Dr. S.M. Haider, published at Lahore in 1981 is a useful collection of articles and scholarly speeches in the domain of Administrative Law. It basically covers variety of topics of Public Law in connection with Pakistani legal and social fabric. Although not very recent but regional administrative and legal developments are minutely discussed in this book. The author and editor have provided valuable legal material for betterment of institutions and good governance in Pakistan. Although it is a useful collection in administrative domain yet the topic of administrative discretion is not discussed adequately with particular insight, which the study in hand intends to discuss.

Recently in 2014 Fazul Suleiman Kazi has written a book titled **Discretionary Powers**. It provides an insight on a variety of topics concerning discretionary powers. The conceptual paradigm of this work is Public Policy, Regulatory Regimes, Good Governance and Fundamental Rights. Although this is a useful addition in the existing cotemporary legal literature having academic and practical utility yet it altogether ignores the importance to regulate executive organ of the government on purely legal justifications.

Some authors have discussed the nature of discretion in administrative sphere generally but no complete object oriented legal material is available as such. This is the era of judicial activism in developing democracies and our judiciary has also shown its commitment to safeguard the rights of common man against bad governance and despotism. It is imperative to revisit the very reason of the state and let the common man be given an opportunity to question the legality and legitimacy of bureaucratic decision making in the garb of governance.

Research Methodology

Since the topic of this research is purely focused on a legal issue, therefore I intend to undertake qualitative research adopting a descriptive and analytical approach. This study will be based upon the contemporary legal innovations with comparative approach primarily to explore the issue of constitutionality of administrative actions taken under discretionary powers. I propose to undertake my research adopting comparative approach including case study of western judicial system (especially common law countries) with certain comparative references to America, Britain and India.

In order to conduct a comprehensive study, the issue of administrative high-handedness will be analyzed from various perspectives and by adopting different methodologies. A comprehensive comparative study about the development of judicial activism in Europe and America will be conducted through analytical methodology wherein the emphasis will be on case law. While examining the issue of administrative discretion, the emphasis of this work will be on case law because the legal system in Pakistan heavily relies on the principles of English law and as such the doctrine of precedent lies at the heart of this system.

Doctrinal legal research starts with simple description of statutory language along with different interpretations to the highly philosophical theory building. Therefore, qualitative, explanatory, logical as well as comparative legal method will be adopted wherein the emphasis will be on case law, local as well as foreign.

CHAPTERIZATION

So far as the breakup of this study is concerned, it has been divided into six chapters in addition to a brief introduction which deals with the context of the research, a brief literature review, methodology to be adopted and research questions involved. Each chapter culminates in precise epilogue/concluding remarks being my personal evaluation of the discussed topic.

First chapter sheds light on genesis of administrative discretion. This chapter significantly elaborates the logic of control mechanism through restrictive principles so that liberty of people may be reconciled with executive power. Chapter 2 focuses on anatomy of administrative decision making process. This chapter describes the qualitative and quantitative models of effective decision making in addition to remedial scheme of the constitution of Pakistan 1973. It also consists of a brief survey of prevailing writ jurisdiction of apex judiciary with its inherent limitations.

Chapter 3 consists of the discussion regarding the respective limits of judicial review and discretionary powers. Through comparative analysis of different devèloped democracies, it exhaustively deals with prerogatives and subjectively formulated discretionary powers in the context of administrative decision making. This chapter also deals with pure local phenomenon in the areas of licensing, dissolution of assemblies and military discretion during war.

Chapter 4 deals with significant grounds of judicial review i.e. excess / abuse of discretion in detail. Within the focus of this chapter are certain important justifications of judicial review e.g. *mala fide, malice* and unreasonableness. It also takes into account the patterns of judicial review in Pakistan particularly on the grounds of taking into account irrelevant considerations or ignoring relevant considerations.

Chapter 5 explains another substantial justification of judicial intervention in administrative discretion i.e. Failure to exercise discretion. It elaborates the doctrine of procedural *ultra vires* in the context of jurisdictional principle in detail. This part exhaustively deals with different patterns of failure to exercise discretionary powers including the judicial approach towards the fate of those administrative decisions which are result of dictation, recommendation or non-application of mind.

Chapter 6 of this work primarily surveys the important areas of administrative discretion in practical paradigm. It consists of the specific adoption of western legal norms in local set up in analytical perspective as well as the development of administrative law in Pakistan through administrative tribunals. It also deals with the implications of application of principles of natural justice and judicial review in administrative adjudication in critical context. Chapter 7 is the concluding portion of this work. The essential component of this chapter comprises different suggestions drawn from the study of judicial pronouncements in futuristic perspective. The suggestions are vital part of this work because it gives an insight to those people who may perform a significant role for the betterment of administrative set up in Pakistan.

It concludes that the goal of "due process of law" which is valued highly by the citizens of Pakistan can be pursued by re-rationalizing the power that vest in the three major political institutions: the judiciary, the executive and the legislature. The new expectations, progressively brought into existence by the welfare state must be thought of not as privileges to be dispensed with unequally or by arbitrary plans of government officials but as substantial rights in the assertion of which the claimant should be given an effective remedy, a fair procedure, and a reasoned decision so that Pakistan may witness the dawn of good governance.

Chapter 1

THE GENESIS OF ADMINISTRATIVE DISCRETION

The Genesis of Administrative Discretion

The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore, where the legislature concedes discretion it also imposes a heavy responsibility.[12]

Discretion in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and the truth, between wrong and right, between shadow and substance between equity and colorable glosses and pretenses, and not to do according to the will and private affections of persons.[13]

When it is said that something is to be done within the discretion of the authorities which something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humor. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself.[14]

12. *Muhammad Nawaz vs. Muhammad Sadiq* 1995 SCMR 105 at P.121.

13. *Rooke's Case* (1598), cited in *Federation vs. Muhammad Aslam* 1986 SCMR 916 at P. 929.

14 . *Secretary of State vs. Tameside* 1977 AC 1014 at P. 1064.

1.1 Anatomy of Discretionary Powers

A significant phenomenon discernible in the present-day administrative process in modern democracies is the conferral of large powers on the administration to make decisions from case to case. Acquisition of more and more discretionary powers by the administration is a demonstrable modern trend today. Every statute which is enacted by the legislature confers some element of discretion on the administration. Discretionary powers are also conferred through delegated legislation. .

The main reason for vesting large discretionary powers in the government and its officials is the increasing state regulation of human affairs.[15] Literally there are tens of thousands of discretionary powers to be found in the statutes and the delegated legislation. Discretionary power may be vested in the government, a minister, an official or an instrumentality constituted to discharge some function of the state.[16] Apparently, there seems to be no identifiable principle to determine that how discretionary powers will be exercised in a particular situation.[17]

Perhaps, administrative expediency is the only test for this purpose. When discretion is vested in a minister or a high official, he has to delegate the power to some official in a lower category, because it will be practically impossible for the minister or the high official to take each and every decision by himself.[18] Some discretionary powers may have far reaching consequences as they can apply to large number of people in the community[19]. The exercise of some discretionary powers may have profound economic consequences. The Bland Committee

---

15. Dil Mohammad Malik, "Delegated Legislation" *Pakistan Law Journal,* 1991 Mag.65

16 *Ibid.*

17 Sir William Wade, *Administrative Law* , 9th Edn. 2005, p.311.

18. K.C. Davis, Discretionary Justice: A Preliminary Inquiry, 4 (1969) at P.20.

19 *Chiniot Cooperative Housing Society vs. Government of Punjab* PLD 2016 Lah. 293.

for administrative reforms in Australia describes the discretionary powers in the following words. [20]

"Discretion may, as well, depend on the existence of a series of pre-conditions being established to the satisfaction of the person having the power. These pre-conditions may relate to readily ascertainable facts, or have elements that raise intricate questions of law, embrace very vague considerations such as whether an applicant for a pension is of good character and deserving of a pension or raise questions calling for extremely personal judgment i.e. whether a woman has been deserted without just cause. Entitlements to some benefits may be specifically excluded, unless the person with the discretion thinks it would be unfair for this to happen.

There are powers to admit or accept and to refuse or reject claims; powers to grant less than the maximum or a prescribed benefit; powers to determine degrees of disablement; powers to select beneficiaries for benefits; powers to seize and forfeit goods; powers to exempt persons from statutory obligations; powers to remit and make rebates; powers whose exercise can advance or prejudice a career, a livelihood or a cherished ambition; and there are powers whose exercise may impinge deeply on property rights, with sometimes no redress for the persons affected."

The above statement establishes the important role which discretionary powers play in the modern administrative process. An exercise of discretion may result in inconvenience to a person or may cause him great financial loss [21]

20. D.J. Galligan, *Discretionary Powers*, Oxford, Clarendon Press, 1990, Ch.3.1, p.210.

21 *Nakhuda Ali vs. M.F. De Jayratne*, PLD 1950 PC 102.

As for example, when a trading license of an individual is cancelled by the licensing officer, the licensee has to suspend his business and thus suffer financial loss till his license is restored, if at all.

"[A] discretionary power is a power exercisable in its discretion by the concerned authority. An official in whom discretionary power is vested has, to a greater or lesser extent, a range of options at his disposal and he exercises a measure of personal judgment in making the choice.[22] As *Davis* says "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction." [23]

"Thus, an official in whom discretion is vested has power to make choices between various courses of action; even if he has to achieve a specific end he has choice as to how that end may be reached. The essence of discretion is choice. The concept of discretion involves a right to choose between more than one possible course of action upon which there may be room for reasonable persons to hold differing opinions as to which option is be preferred in a given situation".[24]

When applied to public functionaries, it (discretion) means a power or right conferred upon them by law of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others[25] Misuse of funds and economic resources by public officials is held to be gross abuse of discretion.[26]

---

22 S. A. de Smith, Judicial Review of Administrative Action, 4th Edition Ch.2 part 1.p.41.

23. *Administrative Law Treatise,* 3rd. Edn. Vol.3, p.93.

24. Davis, *Discretionary Justice: A Preliminary Inquiry, 4* (1969); Lord Diplock in *Secretary of State for Education and Science vs. Tameside (*1976) 3 All ER 665.

25. Tomlin's *Law Dictionary,* as cited in AIR 2004 SC 827.

26. *Economic Freedom Fighters vs. Speaker National Assembly*, 2016 SCMR 1040.

When it is said that something is to be done within the discretion of the authorities that means something is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humor. It is to be not arbitrary, vague, and fanciful, but legal and regular. And must be exercised within the limits, to which an honest man, competent to the discharge of his office ought to confine himself. [27] The discretion is always coupled with a duty: it cannot be used to circumvent the obligation cast under the laws or contract governing the parties. [28] A public official who commits misuse of funds and economic resources is held to be responsible for abuse of discretion.[29]

The discretionary nature of the power is denoted by the use of such expressions as "necessary", "reasonable", "if it is satisfied", "if it is of the opinion" etc. An American scholar Freund says in this regard:[30]

"When we speak of administrative discretion, we mean that a determination may be reached, in part at least, upon the basis of considerations not entirely susceptible of proof or disproof. A statute confers discretion when it refers an official for the use of his power to beliefs, expectations, or tendencies instead of facts, or to such terms as 'adequate' ,'advisable' ,'appropriate' ,'beneficial' 'competent, 'convenient', 'detrimental', 'expedient', 'fair', 'fit', 'wholesome', or their opposites. These lack the degree of certainty.... They involve matter of degree or an appeal to judgment. The discretion enlarges as the element of future probability preponderates over that of present conditions; it contracts where in certain types of case quality tends to become standardized, as in matters of safety: on the other hand, certain applications of

27. *Sharp* vs. *Wakefield,* 1891 AC 763: (1886-90) All ER Rep 651 (HL), per Lord Halsbury, L.C.

28. S.M. Haider, *Judicial Review of Administrative Action in Pakistan*, Lahore, PLD 1967, p. 55.

29. *Economic Freedom Fighters vs. Speaker National Assembly* , 2016 SCMR 1040.

30. Freund, *Administrative Powers over Person and Property,* Chicago: University of Chicago Press, 1939. p71.

the concepts of immorality, fraud, restraint of trade, discrimination or monopoly are so controversial as to operate practically like matter of discretion".[31]

1.2 Ministerial Viz-A-Viz Discretionary Functions

As considered with the concept of discretionary power, there is the concept of ministerial power in which the law prescribes the function to be performed by the concerned authority in somewhat definite and specific terms, leaving no choice to it, and leaving nothing to its discretion or judgment.[32] Such a function involves no investigation into disputed facts; the law imposes a simple and definite duty on the authority concerned which acts in strict obedience to the provisions of law and it can act only in one particular manner, in a given fact situation. A good example of such a function is the issue of a radio or television license. When a person fills in the required form correctly and tenders the prescribed fee, the license is issued automatically by the post office without exercising any discretion.[33] According to *Keir and Lawson*: [34]

"Many of the acts performed by public authorities or public officers are done in strict obedience to rules of statute or common law which impose on them a simple and definite duty in respect of which they have no choice."

In modern times, the range of ministerial functions is comparatively much smaller while that of discretionary functions much larger. [35] Discretion in the administration is all pervading

---

31. *Ibid.*

32. Griffith and Street, *Principles of Administrative Law,* 145 (1973); Keir and Lawson, *Cases in Constitutional Law, 402 (1967); K.C. Davis, Discretionary Justice 4.*(1969); *Nnedjatigil, Judicial Control of Administrative Discretion: A Comparative Study,* (1985) 14 *Anglo American Law Review*, 97.

33. C.K. Thakker, *Administrative Law*, 1992. P. 316.

34. Keir and Lawson, *Cases in Constitutional Law,* 402 (1967).

35.. *Ibid.*

phenomenon of the modern age. [36] The statute book is replete with provisions giving discretion of one kind or the other to the government or its officials for various purposes. It is an admitted fact that conferring of discretionary powers is indispensable in the modern statecraft, due to multifarious tasks to be accomplished by the welfare state. The fact of prime concern here is to prevent the misuse of such power by devising certain parameters to be adhered by the executive authority while discharging their discretionary functions. In this context Supreme Court of Pakistan has recently established that exercise of discretion by Land Acquisition Authority (Collector) is bound to take into consideration present and future potential of the land acquired in addition to statutory requirements.[37] Now by insertion of Article 10-A in the Constitution of Pakistan 1973 by means of Constitutional (Eighteenth Amendment) Act. 2010, fair trial has been taken as a fundamental right of the citizens of Pakistan and depriving any interested person from raising any objection as to his intended deprivation at the hands of administration, would be an act, which can conveniently be termed as violation of the concept of fair trial.[38]

1.3 Reasons for Growth of Discretionary Powers

There are several very good reasons for conferring discretionary powers on officials. Under the modern political philosophy of welfare state, there has been a tremendous state regulation over human affairs in all democracies. This philosophy has led to a great extension of government responsibility for providing social services.[39] Also, the government has assumed much greater responsibility for the management of the economy.[40] Thus, the State has enacted

---

36. Wade and Forsyth, *Administrative Law*, 9th Edn. 2005, p.361.

37. *Govt. of Pakistan vs. Ghulam Murtaza*, 2016 SCMR 1141.

38. *Chiniot Cooperative Housing Society vs. Government of Punjab,* PLD 2016 Lah. 293.

39. *Ibid.*

40. *Ibid.*

legislation for urban development, slum-development, planning, economic regulation etc. Public transport, health, electricity coal mining have all been brought under state control. [41]

All this has necessitated conferment of broad discretionary powers on the government, its officials and instrumentalities. It is felt that owing to the complexity of socio-economic conditions of modern life which the administrative process has to contend with, a government endowed with merely ministerial powers, without having any discretionary powers will be far too inefficient, rigid, circumscribed, and unworkable.[42]

It will not be able to take quick decisions at critical times, and will be ineffective to deal with the modern complex socio-political and economic problems of the society. [43] Also, at times need is felt for technical or other expertise in regulating a particular activity and it is felt for technical or other expertise will develop on a case to case basis.[44]

To achieve these objectives viz., expedition, flexibility and expertise in administrative decision-making, it is felt that, to some extent officials must be allowed some choice as to when, how, and whether they will act.[45] The officials ought to be given some choice in the matter of decision specific cases.[46] The reason is that more often than not, now-a-days the administration is called upon to handle intricate problems involving investigation of facts, applying law to those

41. *Ibid* at p.300.

42 John Dickinson, *Judicial Control of official Discretion,* American Political Science Review, XXII, (1928) 275.

43 Ibid.

44 Ibid. at p. 277.

45 Alexander H. Pekelis, *Administrative Discretion and Rule of Law*, Social Research, X (1943), 22.

46 Ibid.

facts, making of choices and exercising discretion before taking an action.[47] Besides, a few more reasons may be cited leading to the need of conferment of discretionary powers.

The present-day problems which the administration is required to deal with are of complex and varying nature and it is difficult to comprehend them all within the scope of general rules. Most of the problems which arise are practically new, of the first impression. Lack of any previous experience to deal with them does not warrant the adoption of general rules. It is not always possible to foresee each and every problem; but when a problem arises, it must in any case to be solved by the administration in spite of the absence of specific rules applicable to the situation. [48]

Circumstances differ from case to case so that applying one rule mechanically to all cases may itself result in injustice. [49] Therefore, there is a need for individualization of the exercise of power by the administration and hence the need for discretion. [50] Statutes make general provisions; subject to these provisions specific cases have to be decided. The administration is required to apply a vague or indefinite statutory provision to the fact-situation of each and every individual case coming before it for decision.[51]

The circumstances and the fact situation of two cases are not often identical.[52] All these considerations make it inevitable to vest discretionary powers in the official to take care of individual cases on their merits.[53]Accordingly, the modern trend in administrative process is to

47 Ibid.

48 Nathan Isaac, *The Limits of Judicial Discretion*, (2002-2003) 32 Yale Law Journal, 339.

49 Ibid.

50 Ibid. at p. 340.

51 D. J. Galligan, *Discretionary Powers*, Clarendon Press, Oxford, 1986, p.37.

52 Ibid.

53 Ibid.

vest large discretionary powers in officials which mean that they enjoy large areas of choices between alternative courses of action; they can decide whether to act, or not to act in a given factual situation, or when to act or how to act. [54]

The legislation conferring discretionary powers does not specify clearly, definitively or articulately the conditions and circumstances subject to which, and the standards and norms with reference to which, the concerned official may have to exercise the powers conferred on him. [55] The power to do nothing in a situation, or not to act at all, is also a significant power; it is not less important than the power to do something. As Davis observes in this connection: "all along the line an enormous discretionary power is the power to do nothing ... The power to do nothing or almost nothing or something less than might be done seems to be the omnipresent power." [56]

1.4 Justification for Safeguards

Quite often, the legislature bestows more or less an unqualified or uncontrolled discretion on the administration. [57] The power is usually couched in broad phraseology giving a large area of choice to the Administration. Usually no guidelines are laid down in the parent Act as to how the discretion being conferred by it is to be exercised by the donee of the power.[58] The legislation conferring discretionary powers in the administration is very broadly worded and does not specify clearly and definitely the conditions and circumstances subject to which and the norms with reference to which, the administration is to use the powers being conferred on it.[59]

---

54 R. C. Austin, *Judicial Review of Subjective Discretion*, 1975, Current Legal Problems, 150.

55 Ibid.

56 K. C. Davis, Administrative Law, Saint Paul. West Publishing Co. 1951.p. 76.

57 Ibid.

58 Ibid.

59 Ibid. at p.80.

Any number of typical statutory provisions may be culled out from the statute book to illustrate the breadth and variety of discretionary powers conferred on adjudicatory as well as non-adjudicatory bodies.[60] The Statutory provisions conferring discretionary powers usually do not enunciate any policy, principle or standard subject to which the power may have to be exercised by the concerned authority in a given situation. [61]

While broad discretionary powers may be the need of the day from the point of view of the administration, nevertheless, from the concerned individual's point of view there are a number of pitfalls in a discretionary decision-making process.[62] Discretionary decisions seriously affect the rights and interests of the individual.[63] There are several disadvantages in the administration adopting a case to case approach as contrasted with the adoption of a general rule applicable uniformly to all similar cases. Where a case to case decision operates on past facts, a general rule usually avoids retroactively and operates in future so that one has prior notice of the rules applicable to him and he may thus regulate his affairs accordingly. [64]

In a case to case approach, the concerned individual may be caught by surprise and he may not be able to adjust his affairs in the absence of his ability to foresee future administrative action. Such an approach also involves the danger of discrimination amongst individuals; there arises a possibility of individuals not getting like treatment under like circumstances.[65] The authority may not react consistently in similar situations; it may discriminate between, and give differential treatment to, individuals in similar circumstances. The Administration is not bound to

60 Wade and Forsyth, *Administrative Law*, 9th Edn. 2005, p.380.

61 Ibid.

62 *S. S. Mirinda vs. Chief Commissioner Karachi,* PLD 1959 SC 134 at p. 145.

63 Ibid.

64 Ibid.

65 C. K. Thakker, *Administrative Law, 1992*, Delhi, Deep and Deep Publishers, **p.318**.

follow its own previous decisions which may give rise to inconsistency in decisions. This is subversive of the principle of equality before law.[66]

There always exists the danger of arbitrariness and abuse of discretion on the part of the administrators as they may not act according to statutory norms or principles of justice and fairness but may act according to their own whims and fancy. It is axiomatic that the broader the discretion, the greater the chance of their misuse. [67] An administrator having complete freedom of action may indulge in arbitrary action thus seriously threatening individual freedom and this is subversive of the principle of Rule of Law.[68] In the words of Justice Douglas of the U.S. Supreme Court:

"Where discretion is absolute, man has always suffered . . . Absolute discretion ... is more destructive of freedom than any of man's other inventions.[69] and further:"Absolute discretion, like corruption, marks the beginning of the end of liberty". [70] The modern government is impossible without discretionary powers. Discretionary power is a government tool in modern times to achieve certain desired objectives. e.g., for individualization of justice, but it is a dangerous tool as too much discretion may result in injustice from arbitrariness and inequality.[71] *Davis* has observed in this connection:

"I think the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decision and where

66 Ibid.

67 S. A. de Smith, *Judicial Review of Administrative Action*, London, Steven & Sons, 4th Edn, p.284.

68 Ibid.

69 *United States vs. Wunderlick,* 342 US 98, 101 (1951).

70 *New York vs. United States,* 342 US 882, 884 (1951).

71 Ibid.

the imperfections of human nature are often reflected in the choices made." [72] A direct discrimination or injustice is one where the person in authority has done something to the detriment of the subject by or under his order or direction, but, in case of indirect discrimination, the same is done through some instrumentality of subordinate or collateral mechanism. In such a context, it becomes necessary to devise ways and means to minimize the possibility of misuse of absolute discretion and to ensure administrative justice to the individuals.

One cannot depend on the good sense of the Administration itself to use its powers properly. This brings forth the question of safeguards in order to ensure that discretion is properly exercised by the concerned authority. The question of safeguards in this area assumes crucial significance as we want "a government of laws and not of men." [73] The importance of controlling the Administration in the exercise of its discretionary powers has been underlined by many scholars.

It has been observed that it cannot be right or just minister should have unfettered discretion and that, as administrative action now-a-days touches and directly controls the every days life of every person, it is very important that there should be adequate safeguards. [74] *H.W.R. Wade* has observed: "Wide discretion there must be in all administrative activity, but it should be discretion defined in terms which can be measured by legal standards lest cases of manifest injustice go unheeded and unpunished".[75]

---

72 Davis, *Discretionary Justice: A Preliminary Inquiry, St.Paul* (1969). 55.

73 Albert Van Dicey's classical quote that Rule of Law means government of laws and not of men, enunciated in his work, *An Introduction To The Study of The Law of The Constitution*, London, Macmillan Publisher, 1905.

74 Richard c. Fitzgerald, Safeguards in the Exercise of Functions by Administrative Bodies, 28, *Canadian Bar Review* 538 (1950).

75 H.W.R. Wade, *Courts and Administrative Process*, 63 *Law Quarterly Review*, 173 (1949).34.

Thus the major question in the area of discretionary powers is which safeguards exist over decision-making by an authority in the discharge of its discretionary powers? To achieve this objective, a multi-pronged strategy has to be devised and adopted to attain the higher standards of better governance.

This then brings us to the question of supervision of administrative decision making. At the top is the judicial control of discretionary powers. When the legislature leaves the discretion wide open, the courts move in to lay down some norms to regulate discretionary powers to protect the individuals from the vagaries of the administration. The courts have thus responded in a creative manner to the trend of growing discretionary powers of the administration.

The courts have done so because of the feeling that uncontrolled discretionary power may lead to infringement of an individual's rights.[76] Even when some norms or standards are laid down the question may arise whether a particular discretionary decision conforms to these norms or standards.[77] The general legal principle is that administrators ought not to function in excess of their power given to them by law. This is known as the doctrine of *ultra vires*. A very notable feature of the Legal System is that it provides for several channels by following which an aggrieved person can always bring a discretionary decision before the courts for scrutiny.[78]

1.5 A Network of Restrictive Principles

When a statute vests discretion in an authority to exercise a statutory power such authority cannot exercise the same in an unfettered manner otherwise the courts are bound to

76 *Farid Sons Ltd. vs. Government of Pakistan*, PLD 1960 Kar 361.

77 Ibid.

78 *Federation of Pakistan vs. Mrs. A.V. Isaacs* PLD 1956 SC 431.

interfere in manner of exercising the discretion vested in them.[79] This principle has been extended even when the authorities have to exercise administrative discretions under certain situations. Another well-known principle which has emerged during the years that where a statute vests discretion in the authority to exercise a particular power , there is an implicit requirement that it shall be exercised in a reasonable and rational manner free from whims vagaries and arbitrariness.[80]

"A statutory discretion is not, however, necessarily or, indeed, usually absolute: it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken, whether to act and how to act. Moreover, there may be discretion whether to exercise a power, but no direction as how to act. Discretion may thus be coupled with duties." [81]

The Parliament, being a law and policymaking body, has delegated most of its powers to the administrative organ of the government for the implementation of policies it has enacted.[82] Due to these extra Constitutional powers the administrative process has generated demands for judicial and other interventions so that the private rights of the citizens' could be protected from violation.[83] This effort is a drop in ocean wherein an attempt has been made to bring together the points through which the administrative activity could be confined within the statutory limits.[84]

---

79 *District Magistrate Lahore vs. Syed Raza Kazim*, PLD 1961 SC 178.

80 *Bharat Tewari vs. N. Hussain* PLD 1959 Dacca 48.

81 Halsbury's *Laws of England,* 4thEdn..vol.1.

82 *Federation of Pakistan vs. Muhammad Aslam* 1986 SCMR 916.

83 Ibid.

84 Ibid.

A prominent feature of modern legal systems is the extent to which officials, whether they are judicial or administrative, make decisions in the absence of previously fixed, relatively clear, and binding legal standards.[85] The vagaries of language, the diversity of circumstances, and the indeterminacy of official purposes are, as *H.L.A. Hart* has reminded us, considerations which guarantee discretion some continuing place in the legal order and make its elimination an impossible dream.[86] Political development calls for an internal process of decision making whose structure, both organized and unorganized, constitute a system of public order capable of realistic problem solving in pursuit of rising level of participation in all values.[87]

The internal process of decision making that is thus desired for political modernization can only be developed where constitutionalism has been accepted as a desired goal.[88] Constitutionalism in turn, implies that the government should be limited by law.[89] The one issue that overshadows all others in areas where the need for political development is paramount is the issue between constitutionalism and arbitrary government. The most fundamental difference is not between monarchy and democracy, nor even between capitalism and socialism, important though these differences are.[90]

A deeper question is whether people in these countries shall be ruled by law at all, or only by arbitrary will. The responsibility for the enforcement of public policy is entrusted to the

---

85 S. A. de Smith, *Judicial Review of Administrative Action*, London, Steven & Sons, 4th Edn, p.287.

86 This debate owes much of its origin to the views of adjudication advanced in H.L.A. Hart, *The Concept of Law* (Oxford UP, 1961). Two of the most interesting latter discussions are; R.M. Dworkin, *Taking Rights Seriously* (London, 1977), and Neil McCormick, *Legal Reasoning and Legal Theory* (Oxford UP, 1978).

87 Samuel P. Huntington, Political Development and Political Decay, *World Politics*, XVII (1965) 386

88 Ibid.

89 Ibid.

90 C.H. McIlwain, *Constitutionalism and Changing World* (Cambridge, 1939) p.266.

executive branch of the government by the constitution.[91] In practice this responsibility is discharged by the large number of administrators who exercise power of decision making. The law and innumerable rules made under it are the source of authority for the administrators to act.[92] The law may not be comprehensive enough to cover all the contingencies and problems which arise in the course of administration. In the absence of flexibility in the statutory provisions, the administrative activity would be paralyzed. Hence the administrative authority has to exercise a reasonable amount of discretion to adapt its actions to the circumstances of the individual case it deals with.[93]

The government may make rules, which it thinks expedient, to carry out the purposes of the statutory Acts, depending on the complexity of problems, and their varying nature. When the problem arises, it should be solved by the administration, even in the absence of specific rules. Thus one may observe the modern tendency to leave a large amount of discretion with various administrative authorities. Discretion implies a power to make a choice between alternative courses of action.[94]

It is defined by *Justice Coke* as a science or understanding to discern between falsity and truth, between right and wrong, between shadow and substance, between equity and colorable glosses and pretenses, not to do according to will and private affection. [95] *Galligan* is of the view that discretion is the authority to choose among alternate courses of action. [96] But for the sake of

---

91 Ibid.

92 Samuel P. Huntington, *Political Development and Political Decay*, *World Politics*, XVII (1965) 389.

93 *Government of Pakistan vs. Zamir Ahmad Khan* PLD 1975 SC 667.

94 S.A. de Smith, Judicial Review of Administrative Action, (London,1973) p.278.

95 K.C. Rajappa, quoted from *Rooke's case* in 'Administrative Agencies and Role of Discretion' *Lawyer Journal,* February 1961, p.109.

96 D.J. Galligan, Discretionary Powers,(Oxford, 1990)157.

reason, discretion consists not in authority to choose among different actions, but to choose among different courses of action for good reason. To have discretion is, therefore, in its broadest sense, to have a sphere of autonomy within which one's decisions are in some degree a matter of personal judgment and assessment. [97]

An effective and efficient system of governance depends upon the judicial supervision of administrative decisions making; hence judicial review of administrative discretion is the key to the rule of law and administration of justice in Pakistan. Judicial control primarily means review and is based on a fundamental principle inherent throughout the legal systems that powers can validly be exercised only within their true limits.[98] Judicial review is the very life breath of constitutionalism and rule of law.[99]

It has been given a prominent place in the legal systems of all periods. Judicial Review holds the balance of power between the individuals and government. Irrespective of conflicting ideologies and disparities in the system of governance, the accepted doctrine in the world today even for those who advocate a large measure of administrative law and adjudication by agencies and tribunals, is that there should be some kind of judicial supervision.[100]

Judicial control legitimates the application of administrative sanctions. It is a procedure for public accountability of administrative process. In the process of legitimating an administrative action, judicial review operates primarily as a check upon the administrative

97 D.J. Galligan, *Discretionary Powers*,(Oxford, 1990)159.

98 Ibid.

99 Ibid.

100 Woodrow Wilson, *Constitutional Government in the United states*, New York, 1921,p 20.

branch of the government and agencies operating there under.[101] The 21st century has witnessed that the awareness about fundamental rights is increasing day by day. The emergent human rights consciousness and movements have contributed to interrogation of the reason of excessive control of the state.[102]

An increase in technical complexity of state-craft creates a fear of excessive bureaucratization. This problem has been viewed in United States as the erosion of due process of law by the expanded discretion of executive which amplifies the general statute by its own rule making, far removed from the effective control of the public opinion.[103]

In the process of administrative decision making, the executive makes an assessment of the public interest which may not necessarily reflect the legislative intent. Theoretically, legislative and executive readings of the public interest should be identical but differences in quality of human control and institutional ethos become conducive to divergent rather than identical readings.[104]

In the words of *Frankfurter J.* "Discretion without a criterion of exercise is authorization of its arbitrariness".[105] It is an abuse to deal casually with rights guaranteed by the constitution even though they involve limitations on state power.[106] In a democratic state with good

101 Robson, *The Governors and the Governed*, , at p. 18.

102 Ibid.

103 Erich Strauss, The *Ruling Servants*, New York, 1961, at 66.

104 Carl J. Friedrich, Constitutional Government and Democracy, New York, 1946, p 170.

105 *Brown vs. Allen*, 344 US 443.

106 Ibid.

governance, the executive activity takes place within a framework of rules or standards and executives must check whether their action moves within legally allowed orbit.[107]

1.6 Local Perspectives and Context

In Pakistan, public opinion is mobilizing that individual rights need more protection than national and provincial assemblies can give them.[108] Quite a few recent pronouncements of the apex judiciary indicate that the judges themselves are beginning to take a broader view of their functioning.[109] They are tending consciously to create those sound principles of governance which will sooner or later have a salutary influence beyond their immediate scope.[110]

The Pakistanis are now getting accustomed to think that the ultimate protection of rights is to be found in courts of law and that the judges are the most likely repositories of earthly justice.[111] In this context, it is imperative to conduct the research in hand. Judicial review in Pakistan appears to lack breadth and depth. Review of determinations made by statutory bodies is generally adequate; but review of the validity of the acts and decisions of other administrative bodies does not tend to be comprehensive.

Mr. *Justice Kiyani* once observed," The review powers of apex court brings to a benighted morality the light that never was on sea or land. God is in his heaven and all is right with the world—God was in his heaven even before the writ jurisdiction but all was not right

107 *Brown vs. Allen*, 344 US 443. Supra note.

108 *Benazir Bhutto vs . President of Pakistan* PLD 1998 SC 388, 550.

109 Ibid.

110 Ibid.

111 *East and West Steamship Co. vs. Pakistan* PLD 1958 SC 41.

with world. Consequently if you are spiritually inclined, you can say that writ jurisdiction is the modern manifestation of God's pleasure, and the God's pleasure dwells in the apex Court".[112]

In England, administrative attempts to prevent or restrict judicial review of administrative decisions by writ of *certiorari* through finality or exclusionary clauses has been ultimately settled under section 2 of the Tribunals and Inquiries Act 1958 which says that such wording found in any Act passed before the date on which the Act of 1958 came into force, shall not prevent the examination of the decision by means of *certiorari.*[113]

In this context famous scholar David *Foulkes* has rightly observed that the courts will not allow their jurisdiction to be taken away except by clear words to that effect and it has long been the law that where an act is stated by statute to be final, this does not take away the jurisdiction to review the legality of the act, but it does make the decision final on facts.[114]

The contemporary judicial trend in terms of review of legislation in Pakistan is haphazard because of political influence exercised on vulnerable judicial organ of state. High courts normally decline to interfere in orders passed by administrative authorities so that they may implement the policy of the government, unless where there is some inherent defect in the determination causing violation of fundamental rights.[115]

In this changing era in Pakistan, it is inevitable that great responsibility will be assigned to executive branch of state. This will, in turn, necessitate greater control over administrative action. As government departments acquire the habit of self-restraint, impartiality and fairness,

112 Ibid.

113 *Ward vs. James* (1965) 1 All ER 563-570.

114 David Foulkes, *Administrative Law*, London, Butterworth & Co. 1999.p. 176.

115 *Ahmad Din vs. Member Consolidation BOR.* PLD 2016 Lah. 306.

the courts may correspondingly be inclined to lessen their supervisory role.[116] But the presence of this restraining power of the judiciary "aloof in the background but nonetheless always in reserve, tend to stabilize and rationalize the . . . (administrative) judgment, to infuse it with the glow of principle, and keep the faith" [117]

There is enough evidence in support of the view that Pakistan is not yet ready for rapid politicization. This should not, however, preclude an effort directed at the upgrading of legal institutions.[118] The arbitrariness manifest in administrative attitude will in any case, diminish in proportion to the rise of judicial intervention.[119] What is needed immediately is a new examination of the means and methods of judicial control of administration which this work will establish both in terms of theoretical and academic perspective.

Transnational judicial approach in leading common law countries reveal that executive decision making and adjudication by administrative tribunals is frequently accustomed to commit certain substantive and procedural errors, and the same is the case in Pakistan[120] for instance, it is usual for tribunals to give notice on one point and after a hearing in which the respondent directs himself to that point, to make an order upon another point in respect of which the respondent was not heard.[121]

There is also a tendency to make decisions and orders without basis in fact or in evidence of logical probative force, or on the basis of matters not before the tribunal or on secretariat

---

116 A.R. Cornelius, *Fundamental Rights and Human Behavior*, PLD 1965 Journal 45 at 47.

117 Benjamin N. Cardozo, *The Nature of Judicial Process,* New Heaven, American Book Co, 1980, at 93.

118 ibid.

119 Ralph Braibanti, *Administrative Reforms in the context of political growth*, Virginia, Williamsburg, 1965. at 81

120 ibid

121 *Greene vs. Secretary of State for Home Affairs*, AC. 284

reports or evidence not produced at the hearing.[122] Without any necessary intention of unfairness, administrative bodies have developed a characteristic unfairness in their operation. A zeal for carrying out the special function assigned to them leads them to look at their special task out of proportion and to consider individual rights, constitutional guarantees, and the law of the land as negligible.[123]

There is a persistent tendency on the part of tribunals to decide without a hearing or without hearing a party adversely affected and so to make decisions on the basis of preformed opinions and prejudices. [124] Perhaps the worst misuse of administrative discretion results from combining or not differentiating the reviewing of complaints, investigation of them, bringing and conducting a prosecution upon them[125]

The researcher earnestly believes that there is tremendous room for improvement in the conceptual frame work of judicial review in general and administrative discretion in particular due to the emergence of the concept of judicial activism and constitutionalism in Pakistan. In earlier period of its establishment, our superior courts have given landmark judgments in this regard, for instance, an administrative body is under a duty to act justly, fairly and reasonably,[126] and where it acts unreasonably, capriciously or arbitrarily, the court will interfere with its Judgment.[127]

---

122 *United States vs. Chicago M & St. P.R. Co.*, 294 U.S. 409.

123 *Consolidated Edison Company vs. National Labor Relations Board*, 305 U.S. 197

124 *Morgan vs. United Sta*tes, 304 U.S. at 1.

125 *State vs. Board of Education of the City of Seattle*, 19 Wash. at 8.

126 *Hadi Ali vs. Government of West Pakistan*, PLD 1956 Lah.at 824.

127 *Abdul Majid vs. Province of West Pakistan*, PLD 1956 Lah. at 615.

For instance in nominating candidates for admission to a medical college, the government cannot act despotically and throw rules of equity, justice and good conscience to winds. A failure in such direction tenders an act invalid in law.[128] It is equally clear that where a statute confers on a functionary absolute discretion to take or not to take a step and he exercises his discretion one way or the other, the court will not compel him to do what in the exercise of his discretion he has decided to do or not to do.[129] Moreover, it is well established that where he is required to act in his discretion and he has so acted, his discretion will not be interfered.[130]

Firstly, the proposed research will substantiate the need and justification of active judicial review of administrative discretion including delegated adjudication by tribunals; secondly it will establish the need to expand the appellate and jurisdiction of apex courts by suggesting extended boundary of writ jurisdiction. Thirdly this will explore the lacunas in the implementation of fundamental rights through constitutional jurisdiction of apex court. The emerging trend of judicial activism and exercise of *suo motu* powers by apex court has caused panic in governmental benches.[131]

The use of *pro bono publico* litigation has also extended the scope of judicial powers.[132] This development requires the adequate doctrinal defense at academic frontiers by legal researchers. In this context some significant academic contribution has been accomplished.[133] With this objective in mind the researcher will strive to advance the cause of human rights on

---

128 *Presiding officer vs. Sadruddin Ans*ari, PLD 1967 SC at 569.

129 *Mir Zaman vs. Government of West Pakistan*, PLD 1969 Lah.at 71.

130 *Farid Sons Ltd. vs. Government of Pakistan*, PLD 1961 SC at 537.

131 *Muhammad Kowkab Iqbal vs. Federation* PLD 2015 SC 1210.

132 *Rahim Shah vs. Chief Election Commissioner*, PLD 1973 SC 24 at 36.

133 Werner Menski, Rafay Ahmad Alam and Mehreen Raza Kasuri, *Public Interest Litigation in Pakistan*, London and Karachi, Platinum and Pakistan Law House, 2000, xi + 170 pp. [ISBN 0953572803].

academic basis. The fragile concept of supremacy of parliament implies a misconception that a law passed by parliament and even a constitutional amendment is beyond the review of judiciary. This concept requires substantial overhauling due to frequent failure of political leadership to safeguard the fundamental rights through good governance and democratic process in Pakistan.

The law relating to the amenability of registered state agencies dealing with intelligence and commercial enterprise is still in an embryonic stage and has not reached maturity as such.[134] The government companies, no matter wholly controlled by the government are not considered as public authorities amenable to the writ jurisdiction of higher courts.[135] This misconception seems to rest on the ground that the remedies available under Enabling Act are adequate.

This view is no more tenable because courts have started entertaining writs against such agencies which is adequate proof of extension of judicial review powers.[136] In this context the researcher will explore all procedural and substantive inaccuracies which hamper the proper exercise of powers by apex courts.

1.7 Logical Nexus between Good Governance and Discretion

The art of governance involves responsibilities which the courts could not carry out.[137] The doctrine of rule of law and separation of powers are not intended to be extended so far as to enable the courts to appropriate to themselves the powers and responsibilities which belong to and can only be safely exercised by the executive. [138] The judiciary is not a tool of government,

134 S.M. Haider, *Judicial Review in Pakistan*. Lahore, PLD, 1967, Mag. 63.

135 Ibid.

136 *Benazir Bhutto vs. President of Pakistan* PLD 1998 SC 388, at p. 550.

137 *Shamas Textile Mills Ltd. vs. Province of Punjab*, 1999 SCMR 1477.

138 Ibid.

in exercise of review powers its functions are either corrective or directory. Public functionaries unrestrained in powers to pursue its objectives by any and all means considered expedient by the officials of the government is the antithesis of law.[139]

This leads us towards the discussion of the nature of administrative law. Americans characterize administrative law as "the law applicable to the transmission of the will of the state".[140] Canadian jurist, describe it as "the law of statutory discretion."[141]

Primarily, administrative law is concerned with the limitations which are set to be observed by the administration while transmitting the will of the state as enshrined in the constitution and the law. In order to determine whether the executive of a particular country is controlled by legal restraints, the entire system of public law as a whole must be consulted. If the administrative organ of the state follows the prescribed procedures in discharging their functions, then it may be said that a system of administrative law prevails.[142]

Discretion may be defined in various ways.

It embraces,

(1) The notion that a choice between several alternatives can, indeed must, be made, and

(2) The notion that such a choice is not to be made arbitrarily, wantonly, or carelessly, but in accordance with the requirements of the situation.

---

139 Ibid.

140 Adolf A. Berle, *The Expansion of American Administrative Law*, Harvard Law Review, 1917, 431.

141 John Willis, *Three Approaches to Administrative Law*, University of Toronto Law Journal,1 1935-36, at 60.

142 Roscoe Pound, *Jurisprudence*, Saint Paul, at 437.

There is a further notion that discretion ought to come into play within a framework of rules.[143] Administration, in the twenty first century takes an added importance as government enlarges the field of its regulatory powers over the property and affairs of private persons. The scope of activities and action of administration is so important that it is impossible for the constitutional systems to allow the administration a perfectly free hand in the discharge of its duties.[144]

Though there is such a thing as administrative discretion, the essential objection to the activity of administrative agencies is directed against the extremely great amount of discretion with which they are entrusted. Hence, the exercise of discretionary authority is probably subject to more criticism than any other task of governmental administration. There are many ways in which governmental administration can interfere with the liberty of people.

In the first place, the state interferes with the free and unrestricted conduct of individuals, through a multitude of restrictive instruments. A second type of interference consists of orders raising the prices of commodities such as frequent rise in oil and gas prices in Pakistan. A third type of administrative interference is the fixing of minimum standards and inspections in the context of licensing.[145]

Judicial Review is the power exerted by the courts of a country to examine the actions of the legislative and administrative arms of government to ensure that such actions conform to the provisions of the nation's constitution.[146] The actions not so conforming are considered

143 Edgar Bodenheimer, *Jurisprudence*, Cambridge, 1952 at 258.

144 Frank J. Goodnow, *Comparative Administrative Law*, London, 1893, at p 135.

145 Alexander H. Pekelis, *Law and Social Action*, Ithaca, 1950, at 77.

146 *Tariq Transport Company* Case, PLD 1958 S.C. 437 at 461

unconstitutional i.e. illegal and of no effect.[147] The institution of judicial review is predicated upon the existence of a written constitution. Normally, though not invariably, judicial review is associated with a federal constitution, involving division of legislative powers between the federal and provincial governments and with a Bill of Rights or some other system of fundamental limitations on law making powers.[148]

As constitutional practice, judicial review is usually considered as having begun with the assertion of Chief Justice *John Marshal* of the United States, in *Marbury vs. Madison.*[149] The Writ Jurisdiction and fundamental rights have expanded the scope of judicial review of administrative discretion. Judicial review demands that administrative action should comply with the fundamental concepts of procedural and substantive due process of law.[150]

The extent to which the courts of law have jurisdiction to review in Pakistan, and question the validity of statutory rules and orders depends upon the terms of the statute which gives the power to make them, and from which their force is derived. Sometimes such rules and orders are liable to be challenged on the ground that they are not within the powers of authority making them, or in other words that are *ultra vires*, or on the ground that in making them the authority did not exercise the discretion vested in it, but took into consideration extraneous matters.[151]

Judicial review can be divided into two classes: statutory and non statutory review, that provided for in the statutes and that developed by the courts in the absence of legislation. A

147 Louis J. Jaffe, *Judicial Review: Question of fact*, Harvard Law Review, LXIX 1987, at 1022.

148 *Jamal Shah's case* PLD 1966 S.C. 1 at 16.

149 *Marbury vss. Madison*,1 Cranch 137. 5 U.S. 137. 1803.

150 Joseph Rosenfarb, *Freedom and the Administrative State*, New York, Harper & Brothers, 2008, at 43.

151 Bernard Schwartz, *An introduction to American Administrative Law* London: Pitman & Sons, 1992, at 181.

further classification of direct and indirect review can also be made.[152] Transnational dynamics are evident that control of discretionary powers is perhaps the most critical problem of modern times.[153] Interesting developments are taking place with respect to judicial review in many countries. In Australia, a full-fledge inquiry was conducted on the review of administrative discretion; i.e. the final report of Bland Committee on Administrative Discretion 1973.[154] This report has led to the creation of an Ombudsman and a general administrative Tribunal to review discretionary decisions in many areas.[155]

Czechoslovakia has established special constitutional court with authority to determine whether actions of executive are in accordance with its constitution.[156] Germany has adopted judicial review of the acts of national government.[157] The Ireland has followed Canada and Australia in placing the guardianship of its constitution in the courts.[158] In adopting a new constitution, Chile has taken steps to change the system from parliamentary supremacy to a modified regime of judicial supremacy.[159] Switzerland has also accepted the principle of review of actions of the Federal Assembly on American pattern.[160]

In Britain, the principle of judicial review was stated by *Lord Atkin* as follows;[161]

---

152 Dickinson, *Judicial Control of Official Discretion,* Princeton, West Publishing Co, 2003, at 55.

153 Ibid.

154 Ibid.

155 A.T. Markose, *Judicial Control of Administrative Action*, Madras, Eastern Book company,1956, at 40.

156 ibid.

157 ibid.

158 ibid.

159 ibid.

160 Deener, *Judicial Review in Modern Constitutional Systems*, Baltimore, McGraw Hill, 2009, at 85.

161 *Eshugbayi vs. Government of Nigeria* [1931] LR 670 (CA).

"In accordance with British Jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of Justice". In Pakistan a feeling is fast developing that judiciary should not minimize its potential influence on executive.[162] In the domain of procedural law, it is established now that every court should proceed on the principle that "every procedure which furthered administration of justice was permissible even if there was no express provision permitting the same".[163]

A need is being felt to make the executive cognizant of the desirability of greater adherence to constitutionalism. Both the common man and legal fraternity insist that judiciary should assume responsibility for defining those restraints on executive power which is the essence of Constitutionalism and Rule of Law[164], and same is the primary purpose of this work.

1.8 Justifications for Judicial Review of Administrative Discretion

The grant of wide discretionary powers, which was once believed to be incompatible with the concept of rule of law, has now become a necessary by product of the modern welfare state.[165] The rapid and phenomenal growth in functions of state during the present century has necessitated the grant of wide discretionary powers to a variety of public bodies and officials. Since these powers and discretion of executive bodies are linked with the valuable rights of the citizens therefore, its exercise must be regulated so as to protect the common man from

---

162 *State vs. Tariq Aziz MNA*, 2000 SCMR 751.

163 *Zahid Zaman Khan vs. Khan Afsar* PLD 2016 SC 406.

164 *Tariq Transport Co. vs. Sargodha-Bhera Bus Service*, PLD 1958 SC 437.

165 A.V Dicey, "Law of the Constitution". Ch. 4. (10th ed) 202, D.J. Galligan, Discretionary Powers, Oxford, Clarendon Press, 1990. at p.125. *Abul ala Moudoodi vs. Govt. of West Pakistan* PLD 1964 SC 673. and 1992 SCMR 857.

despotism. [166] The legal concept of discretion implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of discretion but the performance of a duty.[167] It is generally accepted notion that the exercise of any public power is subject to express and implied limitations imposed by law.[168]

The scope of judicial review of such discretion will often be determined mainly by the wording of a power and the context in which it is exercised.[169] Thus the legislature while granting discretionary powers imposes some conditions e.g. to record reasons of decision, to consult the interested person, to hold a public inquiry before taking any action under the statute.[170]

In Britain, the principle of judicial review was stated by *Lord Atkin* as follows:[171]

"In accordance with British Jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice".

The courts insist that the grant of discretion is always accompanied by certain implied conditions which guard against the irresponsible exercise of powers. The control of discretionary

---

166 Ibid.

167 S.A., de Smith, "Judicial Review of Administrative Action".4th ed. 1980. P. 278

168 H.W.R. Wade, "Administrative Law". 6th ed. (1994) P. 348

169 *Secretary of State for Education & Science vs Tameside* M.B.C. (1977) A,C,. 1047 per Lord *Wilberforce*. ("But there is no universal rule as to the principles on which the exercise of discretion may be reviewed, each statute or type of statute must be individually looked at")

170 *State vs. Muhammad Nawaz* PLD 1966 SC 481.

171 *Eshugbayi vs Government of Nigeria* (1931) L.R. 670 (C.A)

powers is perhaps the most critical problem of the modern Administrative Law.[172]

An administrative body is under a duty to act justly, fairly and reasonably[173] and where it acts unreasonably, capriciously, or arbitrarily, the court will interfere with its judgment.[174] Long ago chief justice Coke laid down the rule in *Rooke's case* (1598) that discretion is "a science or understanding to discern between falsity and truth, between right and wrong, between shadow and substance, between equity and colorable glosses and pretences and not to do according to wills and affections."[175] Normally courts do not enter into the complexities of modern administered process and they are usually concerned only with the control of illegal exercise of discretion.

English Common Law has developed certain general rules regarding exercise of discretion. In *Robert vs. Hopwood* [176] a borough council empowered under the Act to pay such wages to their employees as it "may think fit", paid over generous wages and the district auditor disallowed the payments. On challenge the decision of auditor was ultimately upheld by the House of Lords. *Lord Wrenbury* held that discretion does not empower a man to do what he likes merely because he is minded to do so...he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably.[177]

In *Wednesbury* case *Lord Greene* MR observed, "It is true that discretion must be exercised reasonably. A person entrusted with discretion must direct himself properly in law. He must call

172 See Final Report of the Bland Committee on Administrative Discretion (1973)

173 *Hadi Ali vs. Govt. of West Pakistan* PLD 1956 Lah. 824

174 *Abdul Majid vs. Province of West Pak*istan PLD 1956 Lah.615; *R vs. Bishop of London* (1889). 24QBD213; *Robert vs. Hopwood* (1925) A.,C. 578.

175 [1598] 5 Co. Rep. 996.

176 [1925] A.C. 578.

177 Ibid.

his own attention to the matters which he is bound to consider. He must exclude from his consideration, matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said to be acting unreasonably". [178]

In *Padfield vs. Minister of Agriculture, Fisheries & Food* [179] the action of the minister refusing to forward the complaint to the investigation committee on irrelevant ground was held to be abuse of discretion similarly in *Breen vs. Amalgamated Engineering Union*[180] *Lord Denning MR* relying on *Padfield* case observed that, "discretion of a statutory body is never unfettered, it is to be exercised and guided by relevant and plausible considerations". Again it has been held in a number of celebrated cases in England that exercise of discretion should not be fettered by over rigid policies so that in the exercise of discretionary powers every case must be decided on its own merits and the compulsion of the public interests.[181]

In Pakistan courts have also developed similar principles of law to control the exercise of administrative discretion. Thus the Constitution of Pakistan and India require that the authority putting a person to preventive detention must communicate to such person, as soon as may be, the grounds of detention so as to enable him to make representation.[182] It is also held by the apex judiciary that if discretion conferred under delegated legislation is exercised in a prudent and regular mode then court is bound to give effect to such decision.[183]

178 *Associated Provincial Picture House Ltd. vs. Wednesbury Corporation* [1948] 1 KB 223.

179 [1968] A.C 997.

180 [1971] 2 QB175 at Page 190.

181 *R vs. Hillingdon B.C. ex. P. Islam* [1983] AC 688, *R vs. London C.C.* [1918] 1 KB 68.

182 Article 10 of Pakistan Constitution 1973, article 22 (5) of Indian Constitution.

183 *Pakistan Gas Port Ltd. vs. Sui Southern Gas Company Ltd.* PLD 2016 Sindh 207.

In *Agha Muhammad Khan vs. District Board Lahore* [184] justice *B.Z. Kaikaus* observed,

"Any exercise of power which is arbitrary, oppressive and wanton is an abuse and is not an exercise of power within the meaning of the statute at all, all abuse in excess"

In *Montgomery flour & general Mills Ltd. vs. Director Food Purchase* [185] justice *Kaikaus* again observed that discretion of executive authority is always circumscribed by the scope and object of the law that creates it and has at the same time to be exercised justly, fairly and reasonably. [186]

In *Federation of Pakistan vs. Muhammad Aslam* [187] the Supreme Court has reiterated the rules to control and review the executive discretion. Justice *Shafi-ur-Rehman* observed, "The limit now well recognized is that all executive power has to be exercised fairly and justly, for advancing the objects of legislation. In other words every such exercise of power has to satisfy the test of reason and relevance."

It is pertinent to mention that we will only discuss the grounds of judicial review in abridged form in this chapter; however a detailed survey on the subject in comparative context will be done in the next chapters.

1.8.1 Abuse / Excess of Discretion

1.8.1.1 Mala-fides

Mala fides or bad faith means dishonest intention or corrupt motive. The Supreme Court of India has observed, "*mala fide* exercise of power does not necessarily imply any moral turpitude as a matter of Law. It only means that the statutory power is exercised for purposes foreign to those

184 PLD 1957 Lahore 780 at P. 783.

185 PLD 1957 Lah. 914

186 Ibid.

187 1986 SCMR 916 at pp. 928-929 see also PLD 1989 SC 162

for which it is in law intended".[188] In this sense, *mala fides* is equated with *ultra vires* exercise of administrative power. However the term *mala fides* is not being used in the broad sense, but in the narrow sense of exercise of power out of dishonest intent or corrupt motive. *Mala fides* in this narrow sense would include those acts where the motive behind an administrative action is personal animosity, spite, vengeance, personal benefit to the authority itself or to its relatives or friends, or which is designed to favor [189] or harm someone.[190]

Mala fides is a question of fact which must be established by evidence [191] however High Court can enquire into *mala fides* if the disputed question of fact can be ascertained from the documents on record.[192] Where government took a disciplinary action to ensure probity and purity in the public service and not to wreak personal vengeance, it was declared not to be *mala fides* or *ultra vires* but at the sometime it is clear that *mala fides* is a distinct ground for quashing administrative action apart from *ultra vires.*[193]

Furthermore, it has been ruled in number of case that the plea of *mala fides* is not available against the legislative action[194] and somewhat surprisingly it has been so ruled even in a case of a law made by an individual for example a Martial Law Administrator.[195] However judgments of superior courts can not be allowed to be eroded or nullified through executive or

188 *Jaichand vs. West Bengal* AIR 1967 SC 483-at P. 485

189 *Ahbab Cooperative Housing Society vs. Commissioner Lahore Divi*sion PLD 1978 Lah 273.

190 Province of Punjab vs. Zahoor Elahi PLD 1981 Lah. 696 upheld in 1982 SCMR 172.

191 *Masood Ahmad vs. State* PLD 1962 Lah 878, PLD 1974 Karachi 375.

192 *Akhtar Hussain vs. Ahangoo Khan* 1981 CLC 1971.

193 S.A de Smith, "Judicial Review of Administrative Action".(1973) 282 at p. 293.

194 *Fouji Foundation vs. Shamim ur Rehman* PLD 1983 SC 457.

195 Ibid.

administrative instrument.[196]

1.8.1.2 Unreasonable and Arbitrary Action

The superior courts in Pakistan have quite often ruled that the public powers must not be exercised arbitrarily. The court has held invalid the exercise of discretionary powers when the action is not based on any relevant material.[197] An action meets the same fate if it is based on unfounded grounds[198] or on such grounds on which reasonable person would consider valid.[199] The courts demand that the repository of public power must apply his mind to all the relevant aspects of the matter before taking an action.

Thus an order of deputy commissioner to take over a cinema as enemy property under Defense of Pakistan Rules (1965) made without application of mind and without giving any reason has been held invalid.[200] Similarly the action was held invalid when an election tribunal based its findings on the solitary evidence of the election officials [201] or a criminal court ordered temporary possession of the crime property to a person not at all entitled to it.[202]

Where malice was imputed for procuring order which from circumstances seemed to be possible, the supreme court of Pakistan held that unless the same was explained by the concerned administrative authority, it would be difficult to justify it.[203] Similarly, where the name of petitioner was placed on exit control list due to pendency of criminal and civil litigation, court

196 *Government of State of Jammu and Kashmir vs. Sardar Javed Naz* PLD 2016 SC (AJ&K) 1.

197 .*Charsadda Sugar Mills vs Govt. of Pakistan.*PLD 1971 Pesh.210, PLD 1981 Lah.368 1982 CLC 2101.

198. *Muhammad Aboo Abdullah vs. Province of East Pakistan.*PLD 1959 Daca 361.

199 *Muhammad Ali vs. Election Controlling Authority* PLD 1963 Lah. 346.

200 *Malina Rani Sons vs Province of East Pakistan* PLD 968 Dacca 177.

201 *Shafiqur Rehman vs. M.S. Mian* PLD 1968 Dacca 332.

202 *Abdur Rashid vs Sessions Judge* PLD 1997 Lah. 613.

203 *University of the Punjab vs Ruhi Farzan* 1996 SCMR 263.

directed the authorities to remove the name of petitioner from Exit Control List.[204]

The authority while passing orders in administrative matters must follow rules and principles of justice and equity so that even when such order has been passed should not stamp such order as *mala fides* and result of bias or malice. [205] It is not necessary for the individual to prove what particular official of the government acted *mala fides.* There is no such burden on the individual as facts lie within the knowledge of the government.[206]

1.8.1.3 Improper Purpose

If a statute confers powers for one purpose, its use for a different purpose would not be regarded as valid exercise of power and the same could be quashed. For instance the government may be empowered to acquire property if it is "satisfied" to the existence of public purpose its order would be legal, provided of course, that the circumstances which it has found to exist do in law constitutes public purpose. [207]

In the area of preventive detention, it has been held in a few cases that the power of preventive detention cannot be used as a convenient substitute for prosecuting a person in a criminal court. It was held that the power of detention could not be used on "simple solitary incident" of theft of railway property, and the proper course to prosecute the person was in criminal court. In some of the cases the court has used the phrase "colorable exercise of power"[208] which does not differ substantially from improper purpose.

---

204 *Muhammad Sadiq vs. Federation* PLD 2016 Sindh 263.

205 Ibid.

206 *State of Punjab vs. Ramjilal* AIR 1971SC 1228.

207 *Muhammad Jamil Asghar vs. The Improvement Trust.* PLD 1965 SC 698.

208 *Zafar – ul –Ahsan vs. The Republic of Pakistan.* PLD 1960 SC 113.

It has however been ruled in some cases that a prior court case, or lack of it would not make the detention order invalid.[209]

1.8.1.4 Irrelevant Considerations

A power conferred by a statute must be exercised on the consideration mentioned in the statute or relevant to the purpose for which it is conferred whenever administrative authority is given power to pass some order. it should exercise its authority independently by taking into consideration all relevant circumstances where such an authority had made decision and issued order there under, under extraneous influence such order should be quashed as invalid.[210]

Thus public functionary vested with power in respect of determination of rights of a citizen qua the state resources is required to exercise the same fairly and properly on sound judicial principles and keeping in view relevant considerations having logical nexus with the object of law and not arbitrarily and whimsically.[211]

1.8.2 Failure to Exercise Discretion

A statutory functionary who is given discretionary powers under the statute is required to exercise these powers by applying his independent mind and without being influenced by others. Where a scheme was published by the manager without the corporation applying its mind to the case before it and the scheme was approved by the governor, the court held it invalid because the corporation had not applied its mind.[212]

---

209 *Samir Chatterjee vs. State of West Bengal.* AIR 1975 SC 1165.

210 *Jawed Hotel vs. CDA*, PLD 1994 Lah.315, *Arif Builders vs. Govt. of Pakistan* PLD 1994 Kar 627.

211 *Muhammad Zahoor-ul- Haq vs. Quarter Master General* 1994 CLC 2449.

212 *Manikehchandra vs. State* AIR 1973 Gau. 1.

In the *Province of East Pakistan vs. Jogesh Chandra Lodh* [213] Chief Justice *Munir* observed,

"It is perfectly clear from this proceeding that the additional district magistrate who made the order under section 3 merely acted as a tool to the land acquisition department of the government and did not at all apply his mind to the question whether it was necessary or expedient to requisition the property for a public purpose on this ground alone, therefore the order must be held to be invalid".

In another celebrated case [214] justice *Hamood-ur-Rehman* ruled, "we are of the opinion that chief settlement commissioner is bound to apply his own independent mind to the questions raised before him and to deal with the three revision petitions put up before him according to law. By merely countersigning the note of settlement commissioner we are clearly of the view that he had not exercised the jurisdiction vested in him in accordance with law". The Lahore High Court quashed an administrative decision which was not taken by the authorized administrative authority on his own independent judgment.[215]

In *Sher Mohammed vs. Abdur Rasheed,* [216] Supreme Court termed such an action as "abdication of jurisdiction, surrender of discretion and refusal to exercise jurisdiction".

1.8.3 The Subjective Formulation of Powers

"Reasonableness" provides quite a flexible basis for the court to interfere and in other factual situations requiring reasonable administrative action, the scope of judicial review may be

213- 11 DLR (SC) 411.

214 *Ghulam Mohi-ud-Din vs. Chief Settlement Commissioner* PLD 1964 SC 829.

215 *Ahmad Zaman Khan vs. Government of Pakistn.*PLD 1977 Lah. 735.

216 1980 SCMR 928.

much wider. In such situation the scope of judicial review is determined by practical realities and it would be absorbed to suppose that the attitude of the courts towards such words as "reasonable grounds" in one legislative context must be reproduced in every other.[217] This may be elaborated with reference to two classical English cases.

In *Liversidge vs. Anderson* [218] being a war time case, involved a regulation of the defense, involving implication of the use of the term "reasonable" in a statute, which ran as follows:

"If the secretary of state has reasonable cause to believe any person to be of hostile origin and that by reason thereof it is necessary to exercise control over him he may take an order against that person directing that he be detained".

The House of Lords was faced with the question whether the words "reasonable cause to believe" should be given an objective or subjective meaning. The House of Lords interpreted the words subjectively and held that parliament had conferred an absolute discretion on executive who is not bound to satisfy anybody else. This ruling was criticized as it disclosed a definite bias in the courts towards subjective interpretation.

In *Nakhuda Ali vs. Jayaratne* [219] The Privy Council stated that it would be very unfortunate if the decision in the *Liversidge case* came to be regarded as laying down any general rule as to the construction of such phrase the court further held that when the legislature used the word "reasonable" it must have been intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power.

---

217 S.A. de Smith, "Judicial Review of Administrative Action". 1973 ed. P. 306.

218 (1942) A.C. 206.

219 (1951) A.C. 66.

But if the question, whether the condition has been satisfied, is to be conclusively decide by the man who wields the power, the value of the intended restraint would in effect be nothing the courts have on the whole, been extremely reluctant to impart the requirements of reasonableness (at least in the broad sense of going into the merits) into a statute by implication. While quashing an executive action under the Companies Act. 1956 the Supreme Court of India stated in *Rohtas Industries vs. S.D. Agarwal.*[220]

"We do not think that any reasonable person much less any expert body like the government on the material before it, could have jumped to the conclusion that there was any fraud involved in the sale of the shares in question".

It is an overriding principle of the French Administrative Law that an administrative act is proper and therefore lawful only if it is reasonable, the opposite of capricious, or arbitrary, and further the administrator must produce the reason before the tribunal (*counsel d` E tat*) whenever it thinks that there is sufficient ground for producing the reason.[221]

In *Mardana Mosque Trustees vs. Mahmud* [222] the Privy Council interpreted the orders "where the minister is satisfied" and held that there must be some grounds on which the minister could be satisfied. The judicial trend was finally approved by the House of Lords in this case.[223] However the English courts were no more sympathetic towards *Liversidge Rule* being war time case yet it took them about forty years to complete its burial. The Rule of *Liversidge* was also

220 AIR 1969 S.C. 707.

221 Hamson."Executive Discretion & Judicial Review" (1954) 495.

222 (1967) AC 13.

223 (1977) AC 1014.

applied in India by Privy Council [224] but after independence our courts quietly started ignoring the *Liversidge Rule.* [225]

Similarly the Lahore High Court held [226] that the satisfaction of executive must be based on some tangible material. The Supreme Court of Pakistan has vividly interpreted [227] the word "satisfaction" of detaining authority must be state of mind which has been induced by the existence of reasonable grounds for such satisfaction.

In summary, the courts are not willing to accept that their jurisdiction, particularly the constitutional jurisdiction can be ousted by the use of subjective language. This is quite justified for the reason that otherwise the executive will be armed with arbitrary power which will seriously hamper the Rule of Law, cause of justice and fair play.

1.9 Epilogue

From the foregoing elaboration, it has been clarified that grant of discretionary power is never unlimited and that the judiciary has placed some restrictions on exercise of such powers to ensure that the same is being used in a responsible and sensible manner. The *Counseil d'état* in France has gone far in the direction of requiring executive decisions to contain reasons.

In Britain the Tribunals and Inquiries Act 1958 imposes a statutory duty to give reasons in administrative adjudication. In Pakistan in 1997, through an amendment in General Clauses Act 1897 by inserting section 24-A, which requires that the authority, officer or person making an order or issuing any direction under the power conferred by or under any enactment should, as

224 *Sibnath Banerjis case*. LR 72, 1A 241 & *Vimlabai Dispande's case* LR 71 1A, 114.

225 *Ghulam Mohammad Khan vs..Crown.* PLD 1949 Sind 12.

226 *Sakhi Daler Khan's case* PLD 1957 Lah. 88.

227 *Ghulam Gilani vs. Govt. of West Pakistan.* PLD 1968 SC 373.

far as necessary or appropriate, give reasons for making the order or issuing the direction. It is reproduced to recapitulate the underlying spirit of new proviso;

"24-A. Exercise of power under enactments. [228]

1. Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person, such power shall be exercised reasonably, fairly and for the advancement of the purpose of enactment,
2. The authority, officer or person making any order or issuing any direction under the powers conferred by or under any enactment shall so far as necessary or appropriate, give reasons for making the order or as the case may be, for issuing the direction and shall provide a copy of the order, as the case may be, the direction to the person affected prejudicially."

This embodies, expressly or by necessary implication,--

(a) Right of hearing,

(b) Absence of bias in the decision maker,

(c) Advancement of the purpose of the enactment as a rule of interpretation to control discretionary powers of public authorities,

(d) Duty to give reasons in support of the decision, and

(e) Duty to communicate the decision to the affected party.

This is important legislation explaining the scope and limit of discretionary powers to avoid

228 This Act governs federal laws, a provision like 24-A does not seem to have been made in the Provincial General Clauses Acts.

mischief and promote probity and equity.[229]

The intrinsic excellence lies in its exercise being just and fair. It embodies the spirit of "due process of law" and its use in the manner prescribed by law.[230] It is an effort to control the ravages of the abuse of power. It neatly summarizes the approach in which power is to be expressed through direction and actions. Remedy for grievance of judicial acts lies through recourse to judicial process to contest the validity of impugned action or direction.[231] This principle is equally applicable to the chief justices of provincial High Courts upon whom the law laid down by Honorable Supreme Court is equally binding.[232]

Superior Courts, in this regard, are of the view that the newly added proviso in General Clauses Act 1897 is of mandatory nature, a willful disregard of it would invalidate the administrative orders and same would be struck down in judicial review.[233] The principles of equity fairness and good conscience in the English Common Law dates back to 1523 which is expounded by *Thomas Woolsey* as Lord Chancellor hearing complaints in Star Chamber,

"that in some cases, it is necessary to leave words of law (i.e. the meaning) and to follow that which the reason and justice require and to the intent equity is ordained; that is to say, to temper and mitigate the rigors of law".[234]

This innovative legislative mechanism introduced in General Clauses Act 1897 will help all those aggrieved persons who want to challenge administration actions in judicial review.

---

229 *Federation of Pakistan vs. Muhammad Saifullah Khan*, PLD 1989 SC 166.

230 Ibid.

231 PLD 1991 SC 14-27.

232 *Manzoor Hussain vs. Muhammad Ashraf* PLD 2013 SC 279,

233 *Ch. Muhammad Hussain Agency Dealer Shakargarh vs. Commissioner Income Tax* NLR 2005 Tax 37.

234 Lord Denning, *Land Marks in the Law*, Aditya Books (Pvt.) Ltd., New Delhi, 1993.p. 62.

Chapter 2

AN INSIGHT INTO ADMINISTRATIVE DECISION MAKING

An Insight into Administrative Decision Making

Administration is often described as a decision making process.[1] In the day to day administration of public affairs, officials take several decisions involving the interests of citizens. The success with which public policy is implemented largely depends upon the innumerable decisions made by the administrator in the management of public affairs.

Decisions have to be not only timely, but must reflect the wisdom of the administrators.[2] The law governing the situation has to be applied to the case which is often unique; and in the process the administrator has to use his discretion in decision making.[3] The efficiency of the administrators is evaluated in terms of his initiative, skill and proper use of experience gained over a period of years.

The term 'decision' is defined as "the act determining one's own mind upon an opinion or course of action" [4] It is a conscious choice between two or more alternatives given in a particular situation. In fact, a decision is the conclusion to long deliberations. The Encyclopedia Britannica defines decision making as "the term applied to the process of making human choices".[5]

It generally involves determining the problem, then trying to sift out relevant information on the subject from the mass of available information, (much of it faulty or irrelevant) and then with the use of such information, trying to determine what will be the most likely outcome

1 Albrow, M., *Bureaucracy*, 12.

2 Ibid.

3 Appleby, P. *Policy and Administration*, 77.

4 Ibid.

5 Quoted by Braybrooke, D, et al. *A Strategy of Decision*, 89.

should certain decisions be made, and one of the possible decisions is then selected for implementation and execution.[6]

The scope of decision making comprehends the interaction of all the participants in the determination and execution of choice, officials and subordinates, fact collectors and policy makers and it comprehends the logical, illogical and chance behavior of all the people involved in the problem – participants, clients, adversaries and competitors and so on.[7]

Thus, decision making is a process of selecting one course of action from an array of alternatives to achieve an objective. Decisions have to be made and remade in the light of the ends to be achieved. Further, all decision makers need not come to the same conclusion in a given situation.[8] Much depends upon the personal characteristics of the administrator, his social environment, cultural values, information gathered and knowledge sought and several other factors.[9]

According to *E. Jacques*, "A decision is a psychological event, characterized by the exercise of discretion i.e. selecting a course of action". [10] So, there are certain important factors which reflect their impact on the personality of the decision makers, in the use of his discretion among the alternatives.

2.1 Factors in Decision Making Process

6 Ibid.

7 - Encyclopedia Britannica, Vol. 3, p. 424.

8 Merton, R.K., *Reader in Bureaucracy*, 60.

9 Ibid.

10- P. H. Levin, 'Decisions and Decision Making', *Royal Institute of Public Administration Journal,* Vol. 50, 1970, p. 26.

Millet refers to three factors in the decision making process.[11]

1- Personal differences,

2- Role of knowledge and

3- Institutional factors.

2.1.1 Personal Differences

The personal characteristics of individuals make some of them decisive, bearing the consequences and other indecisive who do not abide by the choice they make.[12] It may be due to the social environment in which they were brought up and their past personal history and cultural values.[13] The psychological factors like, emotion, motivation, personal temperament and creativity may play an important role in decision making. [14]

2.1.2 Role of Knowledge

Role of knowledge is the second factor in the decision making process. Decision making depends upon the knowledge information and data collected by the administrator. The careful accumulation of detailed facts, their analysis and interpretation, the use of broad concept of human and physical behavior to predict future developments – all these elements, in the use of knowledge, enter into decision making in varying degree. [15] According to *Simon*, the availability of information and the computational capacities available to deal with the information are the important factors in decision process.[16]

---

11 - Millet, Management in the Public Service, pp. 44-45.

12 Martin R.C. *Public Administration and Democracy*, 51.

13 Ibid.

14 Ibid.

15 Marini, F. *Towards a New Public Administration*. 163.

16 Ibid.

2.1.3 Institutional Factors

The administrative agency or the department, where the decision maker works, will have its limitations, within which he is bound to act. On one hand, decision maker must consider the aspirations, traditions and attitudes of the agency, administering of government work. On the other hand, there are personal predilections among administrators which also limit decision making.[17] Predilection means the mental preference of a favorable predisposition towards a particular issue, or matter, or person. Every decision is influenced by the administrators' attitudes, biases, personal beliefs, confidence, self-esteem and dogmatism.[18]

The people with self-confidence can make decisions more quickly than others who are less confident in the way they process information. Administration needs creative behavior which is the production of ideas that are both innovative and useful. "Creative talent is not a single broad ability parallel to but distinct from intelligence, but like intelligence, composed of numerous abilities. Creative performance draws on a large number of these abilities for different purposes and on different occasions". [19]

Creativity and intelligence are not interchangeable. There are various factors which are involved in nurturing this capability. I will try to clarify it in the following discussion.

2.2 The Features of Creative Individuals

17 J. M. Landis, *The Administrative Process*, New Haven, 2009. 170.

18 Ibid.

19 Ibid.

The features of creative individuals can be classified into demographic, behavioral and personality characteristics.[20]

2.2.1 The demographic characteristics:

Family background such as size of family, socio-economic status, father's occupation, child rearing practices of parents, experience of the parents and teachers, the trust and self-confidence reposed in the individual, his school life and his experiences in the school are the important characteristics which have a bearing on the behavior of the administrator.[21] Unhealthy conditions and environment in which persons grew up also will have a profound influence on their behavior. They feel victimized, self-pitying, emotionally bland and submissive. The organization where they work has to recognize and identify the creative behavior, support and reward it so that the potential talent will not be wasted.[22]

2.2.2 Behavioral characteristics:

The perceptual openness, flexibility, resistance to premature judgment, a tendency to discern, and reliance on intuition are some of the behavioral characteristics of creative talent. Such person does not depend on others' opinions as he is more concerned with the quality of the solution he has arrived at. He no doubt takes the ideas and suggestions given by others, but he does not tolerate the pressures to deviate from what he considers as the best approach to the solution. He does not like the interference into his own sense of identity and creativity. [23]

He values his own independence and autonomy, having a high aspiration for self. It is often the outcome of a sense of personal responsibility for the decisions taken by him. The decision

---

20 Keeling, D. *Management in Government*, London, 79.

21 Ibid.

22 Ibid.

23 Ibid.

maker experiences a demand from his superiors that his behavior be reliable, predictable and in a general sense within their control.

Thus he finds that he should conform to the organization's traditional way of conceptualization of decision-situations. He simply follows the rigid process of decision making and fits the decisions into the categories previously developed by his predecessors. The decision maker can remark the conceptualization, if the choice of alternatives is available in the given situation. But he cannot drastically change them against the organizational process, not accepted by his superiors and associates.[24]

2.2.3 Personal Characteristics:

The personal characteristics of effective decision maker are his experience, judgment, creativity and quantitative skills.[25] His seniority and past success and failure of his performance in the organization, create experience which leads to the development of specific responses, which are demonstrated by habit without hesitation, in a particular situation.[26] It provides insight to differentiate the situation. The only disadvantage of experience of the decision maker is his unsuitability to a new problem.

Judgment means the ability of the decision maker to evaluate the information wisely. It is made up of common sense, maturity, ability to reason and experience. "Judgment is very valuable for handling ill-structured problems because it is through judgment that the decision maker can assess the outcome from multiple interactions, apply appropriate weights to criteria, comprehend uncertainties and attempts to simplify the problem, without distorting it by

24 Ibid.

25- P. Robbins Stephen, *Management Concepts and Practices*, Chapter II 'Foundations of Decision Making', p. 71-96.

26 Samuel Krislov, *Representative Bureaucracy*, New Jersey, 204.

excluding the inessentials".[27] Based on information at hand and past experience, the decision maker forms beliefs made up of facts, opinions and general knowledge.

As discussed earlier, creativity refers to the decision maker's ability to uniquely combine or associate ideas to achieve both a novel and useful outcome. It adequately defines the problem, develops alternative, enriches possibilities, imagines consequences and looks at other's outlook of the problem.

2.3 Quantitative Models of Effective Decision Making

Quantitative skills are the techniques typically introduced in the training course, used by the decision-maker as one of the personal characteristics, in a given situation. The following are some of the important models which can be chosen by the administrator for effective decision making" [28]

i) ***Linear Programming:*** It uses graphic, algebraic or simplex techniques to optimally allocate scarce resources. Linear programming is useful only when the input data and information can be quantified and objectives are subject to definite measurement.

ii) ***Queuing theory:*** Wherever a decision's objective is to balance the cost of waiting line against the cost of service to maintain that line, this theory proves useful.

iii) ***Probability theory:*** It is the use of statistics to assist the decision maker, in reducing the risk he takes in deciding. Based on past predictable patterns of statistics, an administrator can improve the current and future decisions.

---

27 - Geoffrey Vickers, The Art of Judgment: A Study of Policy Making, p. 73.

28 - Stephen Robbins, The Administrative Process; Integrating Theory and Practice, Chapter X. pp. 149.

iv) ***Inventory models:*** They attempt to balance the ordering costs against carrying costs.

v) ***Marginal Analysis:*** The concept of marginal incremental analysis is helpful to decision maker in optimizing returns or minimizing cost. It deals with additional costs in a particular decision rather than the average cost.

vi) ***Break Even Models:*** They are concerned with determining the relationship between total costs and total revenues.

vii) ***Network analysis:*** Activities to be performed are defined; time estimates are established for completing the activities and consideration is given to activities that can be performed simultaneously. Network flow charts can then be constructed to assist administrators in making planning and evaluation decisions and to highlight areas where resources may need to be reallocated to ensure that deadlines are reached.

viii) ***Simulation:*** It is the result of structuring a computer to behave in precisely the same fashion that an individual or organization would when faced by the same stimuli.

ix) ***Return on investment:*** Among profit making organizations, the return on investment is a highly popular single criterion to measure productivity of assets.

The above quantitative skills are valuable at the time of evaluating alternatives.[29] They are useful mostly for profit making and financial agencies of administration. The administrator can easily evaluate the alternatives on their basis and come to a conclusion, to decide on a

29 Marini. F. *Towards a New Public Administration*, New Jersey, Butterworth's, 1971. 165.

particular alternative. Thus, it comes mostly under the economic-man-model of decision making.[30]

People in developing nations do not enjoy a broad range of legal protection. The system is such that executive power is subject to very little judicial supervision and that the executive has an apparently unlimited power to manipulate and to make whatever laws the ruling elite deems necessary. The state exercises a degree of control over the individual, far exceeding in scope and intensity, that of any other period in history.[31] Being aware of the situation of governance in Pakistan, a detailed insight of effective models of decision making is necessary- both for administrator and common man.

2.4 Factors Influencing Decision Making Process

Following are the significant factors which have an important bearing on decision making process.[32] They are:

(1) legal limitations, (2) budget, (3) mores, (4) facts, (5) history, (6) internal morale, (7) future, as anticipated, (8) superiors, (9) pressure groups,(10) staff, (11) nature of program, and (12) subordinates.

These factors also form part and parcel of the factors in the institutional setup in which the administrator works. He has to act within these limitations, keeping in mind the aim and

30 Ibid.

31 Karl Von Vorys, *Towards a Concept of Political Development*, Annals of the American Academy of Political and Social Sciences, Vol. xiv, (1965) 18.

32 Vishnoo Bhagwan and Vidya Bhushan, *A Text book of Public administration* .p17.

objective of the decision he takes. A wrong decision may lead to irreparable damage to the person concerned.[33]

So, the effective administrator makes his decisions through a systematic process, composed of clearly defined elements and a distinct sequence of steps, which are essential for the discipline of the decision. Thus the basis of decision making depends upon the nature of the function, the agency and the conditions and circumstances of individual problem.[34]

Bierman classified decisions into two categories:

a) a unique one time decision.

b) a repetitive decision with either reasonably constant or randomly spaced time between decisions.[35]

The first of the above categories demands considerable time and energy of the administrator, as the unique nature of the case does not provide easy clues for decisions.[36] Precedents provide ready-made solutions in respect of the second category, where decision making will be more or less mechanical.[37] Here the experience of the administrator proves to be his chief asset in recapitulating decisions taken earlier in identical cases.

An efficient administrator has to follow a systematic process in decision making with clearly defined steps. He/she has to understand each individual case and its main problem to be solved. Secondly, he/she has to acquire relevant information and background of the problem. The

---

33 Ibid.

34 Ibid.

35 - Bierman and others, *Management Decision Making*, pp. 41 and 47.

36 Ibid.

37 Ibid.

data he collects includes facts, results, observation, figures and statistics, which give full information of different view-points of the problem.[38] The information develops different alternatives among which the choice is available to the administrator to decide. Then he investigates the root cause of the problem by a systematic in-depth study of the information collected.[39]

An analysis is made out, aided by distinguishing between facts, inferences, speculations and assumptions as shown in Figure I and 2 at page 72 and 73. Every problem must be viewed within the context of the organizational structure, external environment, personnel and the present situation. This is to be followed by the identification of the best course of action among the alternatives to make a tentative decision. Before selecting the tentative decision, the administrator can draw upon the past experiences in similar decisions taken, consult his colleagues and subordinates and seek expert opinion over the problem concerned.[40]

The decision must achieve the organizational objectives and it must be result-oriented. The final decision is taken on the basis of the evaluation of the implementation of the tentative decisions and implemented. Even though the administrator follows this methodical process in decision-making he has to take follow up action and finally modify the decision, if necessary, in the light of the results. [41]

Thus, an effective administrator makes his decisions through a systematic process, composed of clearly defined elements and a distinct sequence of steps, as classified by

---

38 Peter Drucker, *'The Effective Executive'*, Harvard Business Review, 1967 quoted in *Public Administration Review*, 1967, p.64.

39 Ibid.

40 James Galza, Jugoslab, Milutinovich and F Glem Bossman, *Decision-making in Administration'*, p. 91.

41 Ibid.

Peter Drucker [42] under six heads.

(1) Classification of the problem,

(2) Definition of the problem,

(3) Specifications,

(4) The decision,

(5) Action, and

(6) The feed-back.

Decision making in government is a cooperative effort. It is a collective activity in which administrators at all level participate. Decision making in government is a plural activity.[43] One individual may pronounce the decision, but many contribute to the process of reaching the decision. Gathering information, making choices and communicating choices are social acts.[44] But the responsibility falls on one single authority who pronounces it. He has to face the consequences for the decisions made.[45] The democratic setup of our administration allows the citizen to challenge the decision taken by the administrator. So he must be careful in decision making.[46]

The administrator has to draw on the collective wisdom of the members of his organization through consultations and conferences.[47] Thus, no person can take a decision at his

42 - Peter Drucker, *'The Effective Executive'*, *Harvard Business Review,* 1967 quoted in *Public Administration Review*, 1967, p.64.

43 P.R. Dubhashi, *Essays in Public Administration*, New Delhi, 93.

44 Ibid.

45 Ibid.

46 Ibid.

47 Truman, D. *The Governmental Process,* Washington D.C. Little Brown & Company. 2009, 217.

own initiative, and act and decide on a particular problem, without consulting the parties to it. The law, rules and regulations governing administrative decisions, act as an important limitation on the decision making powers. [48]

The decision makers must acquire a thorough knowledge of the law and the rights and privileges of the citizens. The administrators have to use their discretion according to rules of reason, justice and law and not according to private opinion.[49] According to Simon, "The correctness of any particular decision may be judged from two different stand points. In the broader sense it is 'correct' if it is consistent with the general social value scale – it its consequences are socially desirable. In the narrower sense it is 'correct' if it is consistent with the frame of reference that has been organizationally assigned to the decision maker".[50]

The administrator, serving a public agency in a democratic state, must give proper weight to all community values that are relevant to his activity and that are reasonably ascertainable in relation thereto, and cannot restrict him to values that happen to be his particular responsibility.[51] He is required to present clearly what lies behind decisions, by making background documents public. He has to prove that most of the decisions he had taken are accompanied by reason.[52]

The British Franks Committee also felt that reasons for decisions should be required – to aid the party wishing to appeal, aid the reviewing court on appeal and encourage better decisions.[53]

---

48 Ibid.

49 Ibid.

50 - H. A. Simon, *Administrative Behavior*, p.199.

51 Ibid.

52 Ibid.

53 - William B. Shore, *'The Developments in Public Administration'*, Public Administration Review,. pp. 205-215.

Decisions can be classified into two categories viz., programmed and non-programmed. Programmed decisions are standing decisions. They exist to guide administrators in highly repetitive and routine decisions. Objectives standards, procedures, methods and policies all represent them. The legal system is well equipped to handle programmed decisions.[54]

"Simon defines non-programmed decisions as 'a response where the system has no specific procedures to deal with situations like the one at hand, but must fall back on whatever general capacity it has for intelligent, adaptive and problem-oriented action".[55] He had given the traditional and modern techniques of decision making in the table given on page 74 is of significant help to understand the nature of decision, and its consequential improvement in the context of better governance.[56]

This detailed survey of minute dynamics of decision making process is significantly important to discuss so that the person in authority may be made cognizant of the limitations of his authority. Another objective to dilate upon decision making process is to give a general perspective to people to understand the pros and cons of decision making process.

The collective objective is to seek the observance of law and policy by the people in power and authority so that administration of justice is ensured.

The modern welfare governments directs the activities of administration towards two ends, viz. the provision of certain services for the benefit of the people, and secondly regulation of the conduct of individual, in the interest of public good. The former may not create serious

54 - P. Robbins Stephen, *'The Administrative Process; Integrating Theory & Practice*, p. 156.

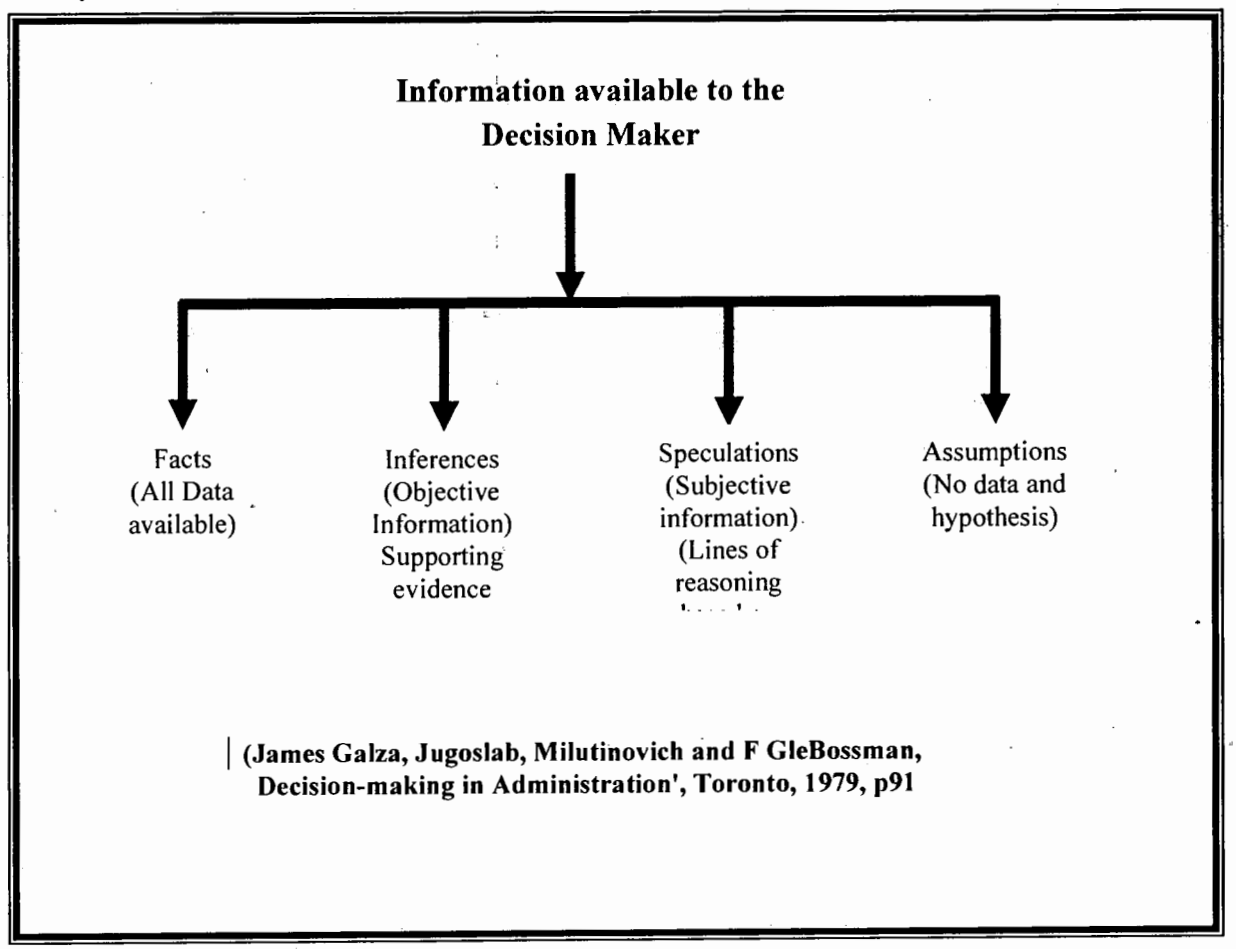
55 - H. A. Simon, *'The New Science of Management Decision'*, quoted in *Indian Journal of Public Administration*, 1977, p.262.

56 Ibid.

problem of enforcement, but the latter i.e. the regulatory functions invest the administrator with wide discretion.

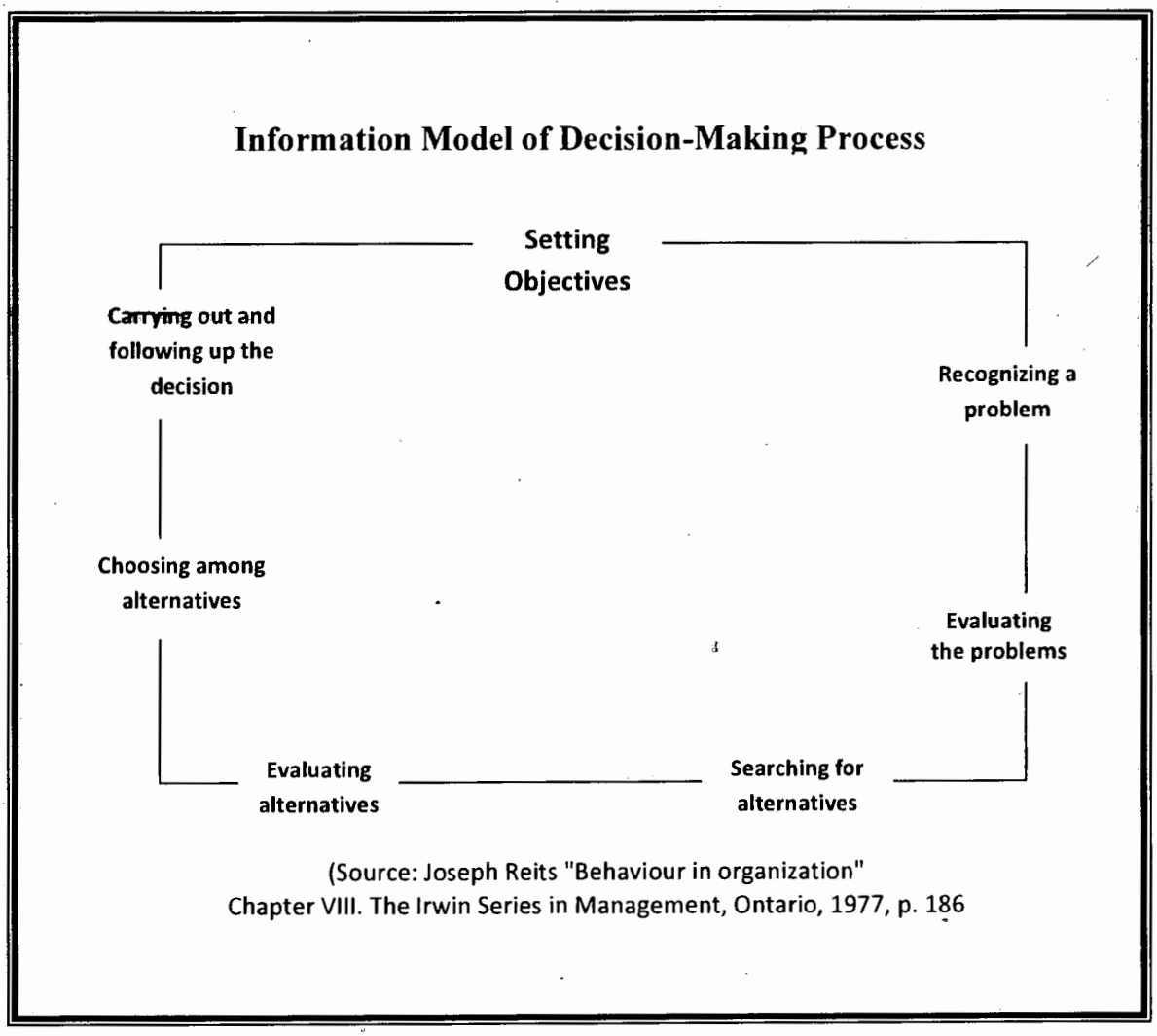
To seek transparency in regulatory function, a detailed knowledge of traditional and modern decision making process is imperative.

Figure 1



(James Galza, Jugoslab, Milutinovich and F GleBossman, Decision-making in Administration', Toronto, 1979, p91

Dynamics of Decision Making in Government, Figure 2



(Source: Joseph Reits "Behaviour in organization"
Chapter VIII. The Irwin Series in Management, Ontario, 1977, p. 186

Figure III

No	Types of Decisions	Traditional	Modern
1.	Programmed: Routine, repetitive Organization develops specific processes for handling them	1) Habit 2) Clerical routine standard operative procedures. 3) Organization structure; common expectation. A system of sub-goals well defined information channels.	1) Operational Research Mathematical analysis models computer – simulation. 2) Electronic Data processing
2.	Non-Programmed: One-shot, ill structured policy decisions handled by general problem solving process	1) Judgment, intuition & creativity. 2) Rules of thumb. 3) Selection and Training of executives.	Heuristic problem solving techniques applied to a) Training human decision makers. b) Constructing heuristic computer programmes.

Generally programmed decisions are useful as long term references that is, beyond five years. Non-programmable decisions, on the other hand, are intended for short term, (less than one year or intermediate term). Programmed decisions are highly repetitive and they are the routine decisions. They are generally decided by standard practices, procedures, rules, methods and policies. The decision maker generally follows the standard practices of earlier decisions,

made in similar situations.[57] He does not change them unless and until new goals are set up or modified in the organization. The complexity of the problems is reduced by following a systematic procedure.[58]

A procedure is a series of sequential steps established for the accomplishment of some tasks. The decision maker need not use his discretionary skill, if he follows the procedure. He has to follow a method if he adopted a procedure. Each step of procedure has to be implemented in a comprehensive and methodical manner.[59] Moreover, the rules restrict the administrator to work within limited boundaries.

He cannot use his discretion if he has to follow the rules. He is bound to adopt them to ensure consistency. The policies are imposed by external forces such as the political processes. Policies are often ambiguous vague and too general and the administrator has to use his discretion within the framework of the policy.[60] Policy provides guidelines to channel the administrator's thinking in a specific direction. It establishes a parameter to assess the situation and take a decision with the fixed boundaries. Usually he follows certain norms and precedents adopted already.

Thus, the programmed decisions depend upon the discretion allowed by the organization to the administrators. But the un-programmed decisions require special attention, strategies and budgets.[61] They require creativity, judgment and intuition and initiative of the administrator. They require special treatment to each individual problem, as they are ill structured and short-

57 H. A. Simon, Administrative Behavior, New York, 1961. Chapter III, pp. 45-47.

58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid at p.50.

termed. They are unique and non-recurring in nature. The decision maker has to follow a special programme in order to achieve the objective.[62]

Programme is a complex of plans among which the administrator has choice to pick and choose and adopt it to the particular problem. Strategies include the actions of different people who adopt the programme, and their reactions are taken into consideration by the administrator to plan his decision and its implementation. Next comes, the financial plan adopted by the administrator, which is in numerical terms. The person in-charge can easily assess the situation and decide the budget or the financial plan he prepares.[63]

There are two administrative techniques that are of key importance in the process of composite. In bring to bear on a single decision; a multiplicity of techniques will be at play. Planning is one of these techniques which bring the skills of various specialists together before the decision is made.[64]

All the experts can be drawn together for the decision making without any difficulty in the planning procedure. The second technique is review which makes the individual accountable for the internal as well as external premises of the decision. The acts of the subordinates can be controlled by the methods of review.[65]

62 Ibid.

63 R. Posner, *The Behavior of Administrative Agencies*,(1972) 1 Journal of Legal Studies, 305.

64 Ibid.

65 Ibid.

The higher authority can easily evaluate the results of his decision and judge the quality and quantity of the work done. This process enables the superior to decide what has to be done and find out whether he achieved his own objective or not.[66]

Simon [67] points out that every decision involves two kinds of elements called factual and ethical elements. They are fundamental in the understanding of administrative decisions. The policy questions and questions of administration can be differentiated to some extent with the help of the distinction made between factual and ethical elements. Factual elements are empirical propositions. They may be tested to determine whether they are true or false.

But the ethical or value statements are imperatives; they have to do with 'oughts' and they cannot be empirically validated. They are neither true nor untrue in any empirical sense. If the decisions lead to the selection of final goals, they may be treated as 'value-judgment' i.e. where the value component predominates. Decisions have both an ethical and factual components. The relevance of this formulation to administration is to be seen in the purposive character of organization which functions to permit groups of individuals to achieve goals ordinarily beyond their individual reach.[68]

The values taken as organizational objectives must be definite, so that their degree of realization can be assessed and the particular action which implements the objectives can be judged easily. Waldo defines administration as a co-operative human action marked by a high degree of rationality. Rational action is the action designed to maximize the realization of

---

66 Ibid.

67 - H. A. Simon, Administrative Behavior, Chapter III, pp. 45-60.

68 - Martin Landau, *'The Concept Decision Making in the field of Public Administration'* in Sidney Mailick & Edward H. Vanessa (Ed.) 'Concepts and Issues in Administrative Behavior.

goals.[69] In Simon's terms; administration has to do with complex interdependent systems of human behavior that exhibit a high degree of rational direction of behavior towards goals that are objectives of common acknowledgement and expectation.[70] A decision maker is guided not by perfect rationality but by bounded rationality, under which principle he is assumed to recognize limited number of possible alternatives, aware of few consequences and have a limited, approximate and simplified model of the real situation.[71]

"Rationality refers to a consistent, value maximizing choice within specified constraints".[72] Rational decision making, therefore, implies that the decision maker can be fully objective and logical. He or she has a clear goal and all the actions lead to the selection of that alternative which leads to the goal. The area of rationality is limited by individual's skills, his values and conceptions of purpose and his knowledge and perception of the problem. But rationality cannot control the behavior of the individual, which is flexible and adaptable to the changing circumstances of each case. Thus the members of an organization are not to be viewed as mere mechanical instrumentalities. They must be regarded as individuals who have wants, motives and drives and are limited in their knowledge and in their capacities to learn and solve the problems.[73]

The rational methods respond to the well-structured problems. Usually several alternatives are examined in the light of their preferences and constraints. The most optimum solution is generated out of it and it appears to be the rational decision. While more rational

69 - Ibid.

70 - H. A. Simon, 'Comment on the Theory of Organization, *Public Administration Review*, New York, 1952, pp. 1130-1139.

71 Ibid.

72 - Graham T. Allison, *Essence of Decision*; 1971. p.30.

73 - Piffiner and Sherwood, *Administrative Organization*, p.366.

options are available to the decision makers, the choices they make are dependent on what others might think.[74] Decision choices may often be based on norms and standards that are socially acceptable, traditionally held or hierarchically given.[75] The personnel are thoroughly trained to follow rules and regulations, where the norms and standards are not clearly prescribed. If a problem situation is not governed by a requisite rule or regulation, it does not seem to exist. The decision maker has to face the challenge involving personal risk for the decision he makes.[76]

If the decision to be taken is more complicated and comprehensive in scope, responsibility to decide should be shifted upward to higher level. Lower level decisions reduce the labor of upper level executives, but they are subject to latter's approval or veto. So, naturally the decisions taken by the top level authorities are broad in scope and involve questions to do with the future of the organization. The assignment of decision making activity depends upon several conditions.[77]

Firstly, the roles in decision making activity are assigned to individuals and groups in some uniform method and are not simply assumed by them as opportunities present themselves. A second condition is that there are effective organizational means for recognizing the complexity and significance of decision problems and for routing them to the appropriate level within the organization. A third condition is that moving up in organization, the men are superior to those at lower levels, in access to information, in analytic skills for diagnosing problems and in competence to render decisions and get them carried out.

---

74 - Anil Chaturvedi, *'Basis of Decision Making'*, Indian Journal of Public Administration, Vol. XXVIII, 1982, p.508.

75 Ibid.

76 Ibid.

77 - R. Dill, William *'Administrative Decision Making'* (Ed.) Sidney Mailek, *Concepts and Issues in Administrative Behavior*, p.38.

A final condition is that the men at the top of the pyramid have time to deal with the problems that are shifted to them.[78] There are two categories of decisions:

(1) Policy decisions and

(2) Case decisions.

The policy decisions require reference to a higher level. Case decisions involve the application of a general policy to a particular instance or set of circumstances known as a case. They are harder to make because they are aimed at a particular person, place or thing. *Cyert* and *March* set forth four basic sub-theories required for a behavioral theory of organizational decision making. *First,* the theory of organizational objectives *second,* the theory of organizational expectations, third the theory of organizational choice and fourth the theory of organizational implementation.[79]

There are certain limitations which can as well be termed as constraints in the decision making process.[80] The authoritative constraints result from policies or directives given within the organization. The decision maker gathers the information he believes as pertinent to the decision. Hence, the final choice has been made within a bounded or restricted area.

Secondly the biological constraints, which arise from the limitations of individuals, who may be affected by the decision.[81] The administrative man cannot gather information directly, so he makes the decision with filtered data – filtered by the perceptions of others. Thirdly, the physical constraints include such factors as geography, climate, physical resources and the

78 Ibid.

79 - For details of the theories see Cyert and March, *Introduction to Behavioral Theory of Organizational Decision Making and Organizational Objectives*, p. 43.

80 Ibid.

81 Ibid.

characteristics of man-made objects. Fourthly, the latest developments made in technology limit the individual's decisions making process and finally, the economic constraints, which include the availability of financial resources to implement the decision, limit its proceedings.[82]

The decision maker's concern to protect his own self interest influences his decisions negatively. Administrators who 'look good' in the short run, by solving highly visible problems, frequently move onward and upward, leaving the critical problems to their successor. Further, in many cases, even though some more information is required, decisions are made with the available partial data, due to limitation of time.

In Public Administration correct decisions are expected to be taken by the authorities. Even though the administrator takes majority of right decisions, he is criticized for the minority of wrong decisions. Sometimes, the decision maker has to take decisions against his wish, due to external or internal pressures and influences.[83]

As the policy is decided by the legislature, the administrator has to decide according to it. But the interpretation of policy may differ from individual to individual. If it is a scientific experiment the scientist cannot change the laws decided, as the science cannot be changed. But in the administrative matters, the authorities interpret the policy decisions in different ways, as the values of each decision depend upon the circumstances of each case. The ultimate responsibility lies on the administrator to make right and responsible decisions for which he is answerable to the people. He must have capacity, ability and willingness to decide and face the consequences.

---

82 - Tannebaum, *'Managerial Decision-Making'* (Ed.) by K. J. Radford, , pp. 22-39.

83 *Pervez Musharraf vs. Nadeem Ahmad,* PLD 2014 SC 585.

Thus we find that decision making is a complicated and difficult process. The decision maker has to give importance to the business of the organization, leaving the unimportant matters to his leisure. He is forced to decide any important matter at the nick of the moment, with practical knowledge and information he collects. So, he tries to avoid or postpone the matter to be decided. An efficient administrator plans for his routine as well as long term work pending and tries to complete them both. It depends on the individual capacity to choose the priority of the problem he has to decide. Further, he cannot ignore the procedure, rules and regulations he has to follow in Public Administration.

To quote *F. M. Marx*, "The right decision must meet a higher test; it must accord with the general interest, the constitutional spirit and the moral principles".[84] The problem of bias is very serious in decision making, as it is very difficult to eliminate the same. Bias may be defined as a 'swaying influence or undue influence to one side'. It may take two forms;

(1) Prejudice, meaning unfavorable opinion or feeling formed before taking a decision without knowledge or reason,

(2) Predilection is a mental preference of a favorable predisposition towards a particular issue or matter or person.[85]

Both are irrational and may occur consciously or unconsciously. If the administrator develops it as a part of policy, it is conscious and implemented under official disguise. Bias can be traced if the administrator has discretionary power to decide either way he chooses. Secondly, if there are no established rules and procedure in the organization, the administrator decides the

84 - F. M. Marx, *The Administrative State*, p. 182.

85- Vishnoo Bhagwan and Vidya Bhushan. *A Text book of Public Administration.*1981., p17.

matter independently. Thirdly, if the administrator is entrusted with judicial as well as administrative powers, he can misuse his power with bias. Fourthly, under abnormal conditions like natural calamities, the administrator can decide the matter either way arbitrarily. When he has to dispense with regulatory functions, bias may take place in any form.

Bias may occur due to lack of information and knowledge of rules and procedure by the administrator. Sometimes, he is influenced by the external forces like political affiliations[86] or groups or caste or religious ideologies. Sometimes it may be due to the selfish interests of the official, leading to corruption. If the administrator has not received proper training and education in the art of administration, he may exhibit biased behavior. If there is no proper publicity for the wrong decisions he had taken, it may result in bias. Proper education and training, simplification of procedure and publicity of the decisions taken can act as safeguards against the biased administrator. Thus the decision maker has to be guided in a proper manner before he decides for the welfare of the society.

The sacred objective of administration of justice requires that if an act was done in violation of law, the same shall have no legal value and sanctity, always open to judicial review.[87]

86 *Registrar Peshawar High court vs. Shafiq Ahmad Tanoli*, PLD 2015 SC 360.

87 *Government of Sindh vs. Muhammad Shafi*, PLD 2015 SC 380.

2.5 Constitutional Framework of Judicial Review in Pakistan

Sovereignty of a state in a modern political system expresses itself with three essential organs namely; executive, legislature and judiciary. The relationships between these three organs have been defined by the supreme law of the land called the constitution. With this document no one within the state can successfully claim to exercise any power not conferred upon him, whether by the constitution or any other law. In this way every government becomes a government of law and not a government of men.

According to *John J. Patrick*,

"Judicial review is the authorities of judge to interpret the constitution and to refuse and enforce measures that are in their opinion in conflict with the constitution".[88]

In other words it can be said as a "constitutional doctrine that gives a court system, the power to nullify unconstitutional" [89] The Supreme Court cannot pronounce upon the constitutionality or otherwise of legislative measures on its own initiative, but only on matter referred to it by an aggrieved party. The object of judicial review is to empower courts to pass orders on the *vires* of administrative actions and also to enable the superior courts to contain subordinate tribunals and courts within their allotted jurisdiction. Power of judicial review is essential to check whether legislature has exceeded its authority". [90]

In democratic system, law is enacted by a legislature which if goes beyond its assigned field, it will be declared as *ultra vires* or beyond the power. Similarly, if a statutory body exceeds

88 - John J. Patrick and Richard C. Remy, 'Lesson on the Constitution, (Washington DC) York Lane Press, Toronto 1985, p.13.

89- Emmanuel Zafar, The Constitution of United State of America, PLD Publications Lahore 1977 p.16.

90- M. Zubair Saeed "Law of Writs in Pakistan", Mansoor Law Publication, Lahore (1995) p.45.

its power allocated to it under the statute or the act of some functionary is *mala fide* or in violation of the principles of natural justice, the same may be judicially reviewed by superior courts declaring the same as *ultra vires* or against the constitution. [91] In England British parliament is a sovereign body. The duty of the British courts is only to interpret a law. They cannot declare it unconstitutional. But in United States of America and in Pakistan the situation is different. In these countries, the Supreme Court is the supreme body.

However, in America the constitution has given limited powers to the congress and the state legislatures, if they overstep their limits, the Supreme Court of America can declare their laws null and void,

"There are three main rules for reviewing when judges interpret the meaning of the Constitution.

1- The courts should not rule on constitutional issues unless such a ruling proves absolutely necessary to settle a case.
2- When there are two reasonable or possible interpretation of a given law, the courts should choose the interpretations that uphold the law as constitutional.
3- A court should limit a constitutional ruling as much as possible and strike down only the unconstitutional portion of a law. It should never anticipate or decide issue not immediately before the court". [92]

91 *Yousaf J. Ansari vs. Govt. of Pakistan* , PLD 2016 Sindh 388.

92 - John J. Patrick and Richard C. Remy, "Lesson on the Constitution, (Washington DC) West Publication, London 1985, p.153.

2:5.1 Remedial Scheme under the Constitution of of Pakistan 1973

In Constitution of Pakistan 1973, part 7 from Article 175 to Article 212A deals with judicature. These contain the judicial power of the states and provide the procedure for judicial review. Judicial review is an exercise of the sovereign power by courts of law established under article 175 of the Constitution to decide the controversy and dispute between the subjects or between state and its subject. It also determines limits and parameter of the power of each organ of the state. Articles 184 and 199 deal with judicial review by superior courts in Pakistan, subject to the bar of alternative remedy.[93]

The Constitution defines "Jurisdiction of the Supreme Court and High Courts under Articles 184 and 199 of the Constitution respectively." In these Articles it is said that the Supreme Court has jurisdiction to exercise and undertake judicial review of administrative action and legislative instrument in the same way as the high court can do under Article 199, if question of public importance relating to fundamental rights is involved.

The High Court's power to issue orders or directions where fundamental rights are involved is discretionary and the Supreme Court only by granting leave to appeal from judgment of the High Court or under Article 184(3), if a question of public importance is involved and the question of fundamental rights arises.

2.5.2 Jurisdiction of Supreme Court of Pakistan

Article 184 is about the original jurisdiction of the Supreme Court. It provides that without prejudice to the provision of Article 199 the Supreme Court shall, if it considers that the question of public importance with reference to the enforcement of any fundamental right is

93- *Inam Akbar vs. Federation of Pakistan.*PLD 2016 Lah. 553.

involved, have the power to make an order of the nature mentioned in the said Article". [94] Article 184 contains the following four essential elements for the purpose of issuance of writs similar to those issued by the High Court under Article 199.

A. The matter in which the writ is sought must be of public importance. In other words it should not be a mere private grievance against the government or a public functionary without having impact on general public.

B. It is the satisfaction of the Supreme Court that the matter involved in the petition brought before it in its original jurisdiction under this Article is of public importance.

C. The matter so brought before the Supreme Court must be with reference to the enforcement of any of the fundamental rights as provided in part 2 of chapter 1 of the Constitution.

D. The order that the Supreme Court can make under this Article must be in the nature as mentioned in the Article 199 which empowers High Court to make order in the nature and on the pattern of various English writs of *prohibition, mandamus, certiorari, habeas corpus, quo warranto,* and issue such other orders and directions as the exigency of the situation in the interest of justice demands". [95]

2.5.3 Kinds of writs in Pakistan

Following are the writs under Article 199 of the Constitution.

1. *Prohibition.*
2. *Mandamus.*
3. *Certiorari.*

94- M. Raffiq Butt, "The Constitution of the Islamic Republic of Pakistan" PLD Publications, Lahore (1973). 105.

95 - M. Zubair Saeed, *Law of Writs in Pakistan,* Mansoor Law Publication, Lahore (1995) p. 83-84.

4. *Habeas corpus.*

5. *Quo Warranto*". [96]

2.5.3.1 Writ of Prohibition

The writ of prohibition is issued to prohibit an inferior body or tribunal from continuing to act in relation to a matter which is beyond its authority. Therefore, a prohibition will be issued.

> Where the tribunal has become *functus officio* (having discharged his duty), and the execution of the order does not lie in his hands or the hand of any of its officers or any one acting under its control.
>
> Where a defect of jurisdiction is apparent on the face of record, a prohibition will lie if an order to be executed. A prohibition is justified where there is an unlawful assumption of jurisdiction as distinguished from erroneous or improper exercise of it, mere irregularities in matter over which there is jurisdiction is not a ground for issuance of prohibition.
>
> Where the defect of jurisdiction is apparent on the face of the record, a writ of *prohibition* may be asked as of right, but where such defect is latent, the writ is neither of right nor of course, and the court has discretion to refuse it on the ground of applicant's conduct.

2.5.3.2 Writ of Mandamus

Article 199 of the Constitution in the same paragraph (i) of sub-clause (a) of clause (i)" [97] provides for the writ of *mandamus* (we command).

---

96 - The Kind of Writs are implied from the Language used in Art 199 of the Constitution of Pakistan 1973

97 - M. Raffiq Butt, *The Constitution of the Islamic Republic of Pakistan 1973*; PLD Publishers, Lahore (1973), p. 113-117.

Writs of mandamus is a command which is issued from a court to any person, authority, tribunal or a subordinate court requiring them to perform the act specified in the command which they are under law obliged to do but which they either failed or refused to do. [98]

A mandamus will not issue where no duty of a public nature is involved and the right claimed is merely a private right. To be entitled to a mandamus the applicant must have legal duty.[99] The office held by the applicant must be of a public nature [100]. Relief by mandamus; being a discretionary relief may be refused on the ground of delay or some other conduct of applicant or other irregularity in procedure. The petition for writ of mandamus should allege demand and denial of justice but this rule is flexible.[101]

2.5.3.3 Writ of Certiorari

According to the definition, it is, "a writ from a higher court to a lower one requesting a transcript of the proceeding of a case for review". [102] "The object of writ of certiorari as described in clause (1) (a) of Article 199, is to bring for examination before a High Court, the proceedings, orders or judgments of subordinate courts and tribunals having duty to act judicially, where they have exceeded the jurisdiction or authority assigned to them, and declare the same as without lawful authority".[103]

"Certiorari jurisdiction is based on the principle that where ever jurisdiction is exercised by an inferior court or tribunal, it is in cases of abuse or excess liable to correction by the king's

---

98- *Karamat Hussain vs. Election Commission of Pakistan* PLD 2016 Lah. 491.

99- *Federation of Pakistan vs. Asad Javed* PLD 2016 Islamabad 53.

100- *Messrs Getz Pharma vs. Federation* PLD 2016 Sindh 420.

101- Ibid foot note No. 95 at p 87.

102 - The American Heritage Dictionary of the English Language, 1969, p.220.

103 - For detailed study see. op cit, M. Zubair Saeed, pp. 122-131, ibid.

Bench Division of the High Court". [104] The difference between a writ of mandamus and a writ of certiorari is that to justify the former there must have been a clear violation of some mandatory provision by an act or omission, while to justify the later it must first be found that the statutory action was essentially judicial in nature. The Article will apply to all statutory functionaries but it will not be applicable to the persons who are engaged in private activities.

Both in Pakistan and India, certiorari process has been used against every conceivable kind of statutory functionaries or department, central and provincial government, administrative authorities and the tribunals, criminal courts, licensing authorities, board of education and board of revenue, claims commissioner, excise and taxing authorities, land acquisition authorities, and land reform regulation authorities, if they exceed their jurisdiction.

No writ can be issued against the recommendation of a public service commission unless the commission is governed by a law and there has been breach of law. Where the law prescribes a particular form of procedure for the exercise of power of discretion, the requirement of law must be fulfilled, or it will be enforced by certiorari". [105] In England certiorari was based on the concept that the high court, as a delegate of supreme judicial authority from the sovereign, is responsible for keeping subordinate courts or tribunals exercising judicial powers within the limits of their jurisdiction.

In English law, certiorari lies to control the action of an administrative authority which is not required to act judicially, but in Pakistan certiorari against such authority is maintainable who acted beyond its lawful limits. In this way certiorari lies in all cases where there is a duty to

---

104 - Ibid. 122.

105 - A.I.R. 1943 P.C. 164.

act judicially or where there is a judicial act or order or where the proceedings are judicial or quasi judicial.

2.5.3.4 Writ of Habeas Corpus

According to the definition it is, "a prerogative writ directed to a person who detains another in custody and commands him to produce or 'have the body' of that person before the court.[106] Chapter 1 of Fundamental Rights of the Constitution [107] describes about the denial of Habeas Corpus in these words, "No person who is arrested shall be detained in custody without being informed as soon as may be defended by a legal practitioner of his choice".[108] Every person who is arrested and detained in custody shall be produced before a magistrate within period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

The basic purpose of this writ is to provide a quick and effective remedy to a person against illegal authority and capricious arrest or detention or illegal restraint of an individual not only by the state but also by some private person having no *locus standi.*[109]

The first thing to notice about the provision is that the person who appeals and the person who is detained need not be identical, and the restriction that the application should be by an aggrieved party is not applicable to an applicant for this writ.

106- John Burk, "Osborn's Concise Law Dictionary, Martins Publishers New York (1976), p. 161.

107 - Chapter 1st of the Constitution of Pakistan, 1973.

108 - Asif Saeed Khan Khosa, *The Constitution of Pakistan 1973*, PLD Publishers, Lahore (1997), p.5.

109 *Muhammad Sadiq vs. Federation.* PLD 2016 Sindh 263.

Where a person is detained in prison under an illegal order the son may apply for a writ. In the matter of a minor, however the application should be by a person who is entitled to the custody of a minor and in the absence of such person, by the person interested in the welfare of the minor and the rule is the same in the case of lunatic, a wife or a person has a right to apply for a writ. This Article applies to all forms of custody, public or private. The legality of a detention is to be determined with reference to the law of the state on which the writ is to be issued.

The High Court has power to examine the sufficiency or reasonableness on the ground for detention even if the law under which the person has been detained provides that sufficiency of the ground shall be determined by the authority ordering the detention. Relief in the certiorari is discretionary but in application for writ of habeas corpus, the court is bound to release the prisoner once it is found that his detention is without lawful authority. It is important to note that illegality of detention must in existing detention and not a previous one.[110]

2.5.3.5 Writ of Quo Warranto

It is a high prerogative writ by the crown against one who claims or usurped any office, franchise or liberty, to inquire by what authority he supported his claim. It is also issued in case of non user of a franchise, or where any public trust was executed without authority".[111]

The writ of Quo Warranto may be granted by the High Court under The Constitution of Pakistan upon a petition against a person who claims an office to inquire from him, by what authority he claims to hold that office. [112] It is necessary for the issue of writ that the office

110- Asif Saeed Khan Khosa, *The Constitution of Pakistan 1973,* PLD Publishers, Lahore (1997), p.7

111 - John Burk, "Osborn's Concise Law Dictionary (1976), p. 277

112 - Art. 199 of the Constitution of Pakistan, 1973

should be one created by the state, by charter or by statute, and that the duty attaching should be of public nature'. It is necessary also that the respondent should in possession of the public office. The writ of Quo Warranto is not a writ of course and the court may in the exercise of its discretion, refuse it if the application is made for a collateral purpose. Supreme Court normally do not interfere where High Court has exercised its discretion on sound judicial principles.

A decision given by the High Court in favor of the holder of the office is sufficient warrant for him to hold the office. Law enjoined upon every judicial forum to settle question about its jurisdiction at earlier possible stage, because subject to certain exceptions, any decision rendered by the court having no jurisdiction stood vitiated on such account alone.[113]

Anyone who is adversely affected by an action of a public authority has an inherent right under the natural justice to approach the next higher forum provided by or under the law. If such right was abridged, there would be miscarriage of justice[114].

2.6 Limitations on Judiciary

The courts play a key role in interpreting the meaning of the constitution through judicial review. Still, the courts do not use judicial review whenever they wished. Nor can groups or individual simply file law suits any time they disagree with the governmental action. Constitutional jurisdiction of apex judiciary could not be invoked as a matter of right, course or routine, rather it was subject to certain circumventions which the court was required to keep in view while exercising extraordinary discretionary powers.[115]

113- *Zahid Zaman Khan vs. Khan Afsar* PLD 2016 SC 409.

114 *Pacific Exim (Pvt.) Ltd. vs. Pakistan Steel Mills*, PLD 2016 Sindh 398.

115 *Ally Imran vs. Mian Muhammad Nawaz Sharif,* PLD 2015 Lah. 671.

A number of restrains are imposed by the Supreme Court to limit the function of courts to use judicial review powers. Three restrictions determine the nature of the cases which qualify for the judicial review;

(1) The life controversy rule,

(2) The standing to sue doctrine, and

(3) The doctrine of political question.

The Superior Courts of Pakistan have evolved certain principles as regards the limitations on the apex judiciary while exercising constitutional jurisdiction, e.g. the doctrine of proportionality has been elaborated by Sindh High Court recently.[116] We may summarize these limitations as follows,

(a) The power of judicial review under constitutional mandate is a greater weapon in the hands of judges, but the judges must observe the constitutional limits set by the parliamentary system on the exercise of this power by means of separation of powers between the parliament, the executive and the judicature. [117]

(b) Judicial review must, therefore, remain strictly judicial and in its exercise, judges must take care not to intrude upon the domain of the other branches of the government.[118]

(c) Under a constitutional system, which provides for judicial review of executive actions, it is a fallacy to think that such a judicial review must be in the nature of an appeal against the decision of the executive authority. It is not the purpose of judicial authority reviewing

116 *Rimsha Shaikhani vs. Nixor College,* PLD 2016 Sindh 405.

117 Lord Scarman in *Nottinghamshire C.C. vs. Secretary of the State* (1986) All E R 199,204.

118 *Salim Javed Baig vs. Federal Ombudsman* PLD 2016 Lah. 248.

executive actions to sit in appeal over the executive or to substitute the discretion of the court for that of the administrative agency.

(d) Judicial restraint is essential to the continuance of rule of law and the public confidence in the political impartiality of the judiciary and the voluntary respect for the law.[119]

(e) It is of utmost importance that the judiciary should not interfere with the police matters which are within their province and into which the law imposes upon them the duty of enquiry.

(f) The high court cannot assume the role of an investigator because the authority to register and investigate a criminal case in law vests in the police and not the court.[120]

The question of application of rule of *stare decisis* has to be determined in each case by discretion of court keeping in view peculiar circumstances of each case.[121]

2.7 Epilogue

This brings to conclude the discussion on the perspectives and prospects of decision making process in administrative sphere as well as the constitutional remedial scheme of prerogative writs within the constitutional frame work of Pakistan. It is an admitted fact that "rules of law must run close to the rule of life, nobody can doubt the supremacy of law, but at the same time law cannot merely be treated, as means of enforcing static authority. Law should be an expression of man's wisdom and self-discipline through which societies can resolve their internal anomalies and improve their capacity to meet the challenges of life".[122]

---

119 *Member Board of Revenue vs. Abdul Majeed* PLD 2015 SC 166.

120 Fazal Kareem J in *Imtiaz Ahmad vs. Government of Pakistan*, 1994 SCMR 2142.

121 *Master Gul Hassan vs. Government of Sindh*, PLD 2015 Sindh 226.

122 Lalit Bhasin, *Indian Judicial System,* Journal of the Bar Council of India, Vol.9 (2), 1982, p.251.

Thus the prevailing social and economic values in Pakistan are bound to influence the use of discretion. The ever changing concepts of economic and social justice and the emerging doctrine of committed judiciary have brought a certain degree of distortion in the classical approach to the concept of justice and use of discretion.

This approach is in sharp contrast to the well settled principle that a person entrusted with discretion must direct himself properly to the law as well as policy [123]. He must exclude irrelevant matters and concentrate his attention to the matter he is bound to consider. He cannot exercise his power in order to frustrate the broad policy of the Act under which it is exercised. The power cannot be used for an ulterior motive, not authorized by law. [124]

123 *Ashfaq Ahmad Khan vs. PTCL and others*, PLD 2016 Islamabad 112.

124 *Peshawar Electric Supply Employment Co. vs. Wafaqi Mohtasib*, PLD 2016 Peshawar 185.

Chapter 3

LIMITS OF DISCRETION AND JUDICIAL REVIEW

Limits of Discretion and Judicial Review

The pattern of judicial control over the exercise of discretionary powers reflects an attempt at reconciling two conflicting values. One, since the legislature has conferred power on an authority, and the courts have not been given power to hear appeals under finality clauses, against its decisions, it may be presumed that the legislature has placed its trust in the judgment and wisdom of the authority concerned. Two, nevertheless, to preserve democratic values and rule of law, it is necessary that the authority does act within the bounds of law and its power, and since the legislature cannot be presumed to have the authority itself to be the final judge of the extent of his own powers, and of the manner of its exercise, it means that the courts have a role to play in the discretionary domain so as to keep the authority within the bounds of law. The interaction of these two variables determines the scope of judicial review of discretionary powers.[1]

An administrator, having the necessary information as well as the expertise in his respective field, is obviously in the best position to make decisions. Also, it is but fair that the one who is ultimately responsible for the consequences should be absolutely free from any intervention.[2]

Discretionary powers conferred on the administration are of different types. It may be simple routine functions just as maintenance of birth and death registers by the local authorities.[3] On the other hand certain discretionary functions may seriously affect the rights of an individual: e.g. acquisition of property, regulation of trade, industry or business, investigation seizure,

1- Jain and Jain, *Principles of Administrative Law*, Nagpur, Wadhwa & Co. 2005.at p.1010.

2 - Dr. D. M. Malik, *Judicial Review of Discretionary Powers*, PULJ, 1990. P.68.

3- Ibid.

confiscation and destruction of property, externment or detention of a person on subjective satisfaction of an executive authority and the like. [4]

As a general rule, it is accepted that courts have no power to interfere with the actions taken by administrative authorities in exercise of discretionary powers.[5] The United States Supreme Court observed in a case [6]

"into that field (of administrative discretion) the courts may not enter".

Lord Halsbury also expressed the same view in *Westminster Corporation vs. London & North Western Railway* [7] and observed.

"Where the Legislature has confided the power to a particular body, with a discretion, how it is to be used, it is beyond the power of any court to contest that discretion".

But as described above, it is a sin to tolerate wrongful use of discretion in the democratic set up. If no limits are put on the exercise of discretion then there is no distinction between totalitarian rule and democracy. *K. C. D*avis [8] has rightly remarked in his leading work on administrative law in the United States:

"at least part of the solution to the problem of agency discretion must lie in judicial review of agency action. The courts can confine agencies within constitutionally permissible boundaries to the extent that the constitution provides justifiable standards. In the U.S. system of government, with policy-making power divided between separately elected legislative and

4 Ibid.

5 - *Muhammad Nawaz vs. Muhammad Sadiq* 1995 SCMR 105 at P.121.

6 - *Small vs. Moss* (1983) 297 US 288.

7 - (105) AC 426.

8 - *Administrative Law Treatise*, Vol. 1, St. Paul. Minnesota, West Publishing Co. 1968.

executive branches, the judiciary also is required to confine administrative discretion within statutory permissible boundaries".

3.1 Source of Limits of Discretion

There are various sources of legal constraints on the exercise of discretion.[9] The first and the foremost constraint is provided by the constitution. A written constitution is regarded as supreme law of land in most of the world democracies. There may be general principles in the constitution which place restrictions on all official actions, and therefore on discretionary decision.[10]

In the United States, the provisions of the Bill of Rights protecting such matters as free speech, due process, and equal protection apply to all decisions by officials. Constitutional principles of this kind normally form part of a belt of constraining standards which must be complied with, but which do not themselves point to a specific result, as standards, they tend to be reason – guiding but non-conclusive.[11]

Where there is no written constitution as in Britain, it is necessary to look to statutes as primary source of legal principles. Two types of provisions are normally provided. One, by enacting general principles of law, implicitly places constraints on all official actions; for example, statutes prohibiting various form of discrimination or equal treatment. There is a close analogy between legal principles of this kind and the provisions of a constitutional Bill of Rights.

---

9 - see generally, Galligan, Discretionary Powers, Ch.5

10 Ibid.

11 Ibid.

The other type of statute is directed specifically towards regulating discretion by such means as stipulating the procedures to be followed ensuring the representation of pertinent groups and interest, requiring the formulation and announcement of the policies to be applied, and requiring reasons to be supplied to the decisions made. Such provisions are contained in the parent statute under which the discretion occurs; alternatively attempts might be made to formulate in general terms a set of principles governing the exercise of discretion. This is one of the objects of the American Administrative Procedure Act [12] which provides a legal framework for the regulation of administrative powers in federal matters.[13]

Extensive revisions with respect to rule making and adjudication cover such matters as the procedure to be followed by agencies and officials, the parties who may be represented, the publication of proposed rules, and the rules of evidence that apply. Provision also are made for judicial review of decisions or actions which are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or which are in breach of procedures, or unsupported by substantial evidence.[14]This approach has been followed by number of States, while others have enacted their own more elaborate statutes, or simply left the formulation of constraints to the courts

The Administrative Procedure Act 1946 and equivalent state legislation constitutes only the bare bones of a legal framework which have been given the substance by the varying practices of administrative agencies and by a large body of judicial doctrine.

12- Administrative Procedure Act, 1946.

13 Ibid.

14 - For detailed analysis, see B. Schwartz and H. W. R. Wade, *Legal Control of Government, Administrative Law in Britain and the United States* (Oxford UP, 1972).

In Australia attempts have been made to advance the legal framework within which discretionary decisions are made, sometimes by creating special tribunals with extensive powers to reviews administrative decisions, at other times by stating in broad outline the grounds on which actions might be challenged by judicial review.[15] Both the American and Australian statutes directed to judicial review but also provided some guidance to the administrative authorities. [16]

Another common feature is that both provide only limited guidance, with questions as to more detailed and precise legal constraints being left to development by the administrative authorities, the special tribunals, and the courts.[17]

In Common Law countries, common law as developed by the courts provides the major source of legal limitations or regulations of discretionary powers. The judicial role is twofold: one is interpreting and applying statutory provisions, which seek to regulate discretion: the other is developing their own principles of judicial review. It is often said to be undesirable that the courts should be responsible for creating principles of review, since this inevitably requires a certain amount of discretion on their own part, and raises important issues of a constitutional kind.[18]

I have already discussed at length that the courts have this power partly because legislatures have been inclined either not to provide statutory guidance, or to provide guidance which requires substantial interpretation.

---

15 - Galligan, Discretionary Powers, p.211.

16- ibid.

17- ibid.

18 - ibid, at p. 214.

From a practical, legal point of view, the judicial role has been regarded as the centre piece of administrative law. No doubt some traditional approaches have exaggerated the role of judicial review, the recent tendency, however, inclined to err at the other extreme.[19] But it is very difficult to exactly say how important the courts are in the overall development of legal limitations on the exercise of discretion by officials. It is clear that the courts have created through precedent, a body of doctrine concerned directly with the regulation of discretion.[20]

K.C. Davis and R. J. Pierce, Jr.[21] gave another example whereby discretionary powers may be limited. To them;

"Legislative rules that resolve generic issues in the same manner in all cases often are particularly good means of limiting agency discretion. To the extent that an agency is unable or unwilling to use legislative rules to constrain administrative discretion and chooses instead to rely on ad hoc adjudication of disputes, the need for judicial limits or agency discretion increased. In the absence of judicial limits, an agency that relies on ad-hoc adjudication often has considerable discretion to favor some parties and disfavor others arbitrarily or to further illegitimate purpose".[22]

American Supreme Court announced a doctrine that is well designed to limit agency discretion in the adjudicatory context in a leading case[23] in this respect. It was held, an agency has a "duty to explain its departure from prior norms Thus if an agency resolves adjudication in one way by applying a policy or set of decisional criteria, and then resolves adjudication. But in a

19 - ibid, p. 216.

20 Ibid.

21 - *Administrative Law Treatise*, 3rd ed.1968, V-III, St.Paul Minn. p.104.

22 Ibid.

23- *Aitcheson of Topeka & S. F. Ry. vs. Wichita Board of Trade*, 412 U. S. 800 (1973).

different way by applying a different policy or set of decisional criteria, the second action must be reversed and remanded as arbitrary, capricious and an abuse of discretion unless the agency explicitly acknowledges and explains the reasons for its change in policy.[24]

3.2 Adverse Effects of Limiting Discretion

K.C. Davis [25] viewed that the indirect effects of judicial review on agency discretion are less obvious, less binding, and potentially more powerful. Judicial review of agency action creates significant delay in agency decision-making and imposes significant costs on agencies. That obviously interferes with the societal goal of efficient and timely implementation of government programs. In some contexts, the delay and high costs created by judicial review also impair the ability of agencies to act in ways that reduce their discretionary power and that of their employees. To the extent that courts create obstacles to agency adoption of rules, they deter agencies from acting by rules. [26]

In the absence of rules, agencies and their employees have discretionary power that is bounded only by those provisions of statutes and of the constitution that provide justiciable standards. In most contexts the degree and scope of discretionary power that would exist in the absence of agency rules would be intolerably large. Judicial review, to them, [27] is both a partial solution to the problem of administrative discretion and a major source of that problem.[28]

---

24 Ibid.

25 -Administrative Law Treatise,3rd ed,1979,St. Paul, V-III, p.105.

26 Ibid.

27 - ibid.

28 Ibid.

This seems to be true in number of other respects. Only few administrative actions are reviewed each year out of innumerable actions taken by all the officials or agencies. It is highly unrealistic to expect that most agencies and officials are sincerely trying to further the public interest most of the times. An agency can also disguise an action based on improper motives in a wide variety of ways. It can,

(1) rely on plausible reasons that differ from its actual unstated reasons,

(2) distort its fact finding process to achieve results in accord with its unstated real motives,

(3) engage in selective inspection, investigation, and enforcement to further unstated and illegitimate goals, or

(4) allocate its scarce investigative, enforcement and adjudicative resources in a manner designed to yield selected exercises of power to further illegitimate goals.

3.3 Alternatives to Judicial Review

When the antagonists of judicial review assail the authority of courts on the basis of lack of political legitimacy, lack of expertise in judges to understand the complex and specialized administrative actions and practical impossibility of judicial review of all administrative actions, they suggest political and bureaucratic limits as alternatives to the judicial review of administrative discretion.[29]

Political checks on administrative discretion are as important as judicial checks, the constitution policy-making power, and hence, power to impose policy-based limits on administrative discretion to several institutions. Firstly, of course, Parliament has power to make policy decisions that limit administrative discretion through the process of statutory enactment,

29 Ibid.

subject only to the constitutional limits on the legislative power.[30] Secondly, the political executive has the power to make policy decisions that bind officials, subject to any statutory limits on its powers.[31] Thirdly, higher officials are appointed by the political executive and they are responsible to it for all their actions. Bureaucracy can itself generate limits on the exercise of discretion. These limits, sometimes naturally evolve from the inherent need for officials to manage the large organizations that most government agencies have become.

Jerry Mashaw [32] has explained in detail the critical role that rules, policies, staff instructions, and decisional guidelines play in any bureaucracy. Courts also play an important role in this respect. First, to the extent that an agency rule being legislative, a court can enforce the rule against the agency. Second, to the agency's general guide lines are not formally binding, a court can reduce the risk that the agency might discriminate among individuals for arbitrary or impermissible reasons by requiring the agency to explain why it departed from its general policy in a given case, third, courts should exercise care to avoid inadvertently deterring agencies from limiting their own discretion and that of their employees.[33]

We again revert back to the main issue i.e. limitations formulated by the courts in the exercise of administrative discretion. de Smith [34] is of the view that the authority in which discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. But in the purported exercise of its discretion it must not do what it has been forbidden to do, no must it do what it has not been authorized to do. Good faith, relevant

30- *Federation of Pakistan vs. Zia-ur-Rehman* PLD 1973 SC 49 also see *Marbury v. Madison*, 5 U.S (1 Cranch) 137 (1803) for Supremacy of the Constitution and void ability of laws which are repugnant to the Constitution.

31 - see *Zahid Akhtar vs. Government of Punjab*, PLD 1995 SC 530.

32 - J. Mashaw ,*Bureaucratic Justice: Managing Social Security Disability Claims* (1983) OUP. London. 23.

33 Jaffe, Louis L. Judicial Control of Administrative Action, (Boston, Little Brown, 1956) 49.

34 - de. Smith, Judicial Review of Administrative Action, 4th ed . 285.

considerations, proper purpose and object of the legislation must be kept in mind while exercising a discretionary power. If any of these considerations are violated then courts are ready to review the administrative decisions, although discretionary.[35]

In the words of Professor *de Smith*: [36]

"The scope of review may be conditioned by a variety of factors: the wording of the discretionary power, the subject-matter to which it is related, the character of the authority to which it is entrusted, the purpose for which it is conferred, the particular circumstances in which it has been exercised, the materials available to the court and, in the last analysis, whether a court is of the opinion that judicial intervention would be in the public interest."

It is pertinent to mention here that much depends on the fact and circumstances of each case, the form of proceedings in which review is sought and nature of relief claimed in judicial review. *Locus standi* (standing in American system) is another hurdle to cross. Then a lot depends upon the nature of relief sought i.e. whether writs in the nature of *certiorari* or *mandamus* are prayed to be issued or a simple declaration or injunction is sought or else damages in tort are claimed.[37]

Another statutory limitation on Revisional jurisdiction of courts under section 115 Civil Procedure Code 1908 is that a petitioner was required to show that the proceedings recorded by the court below were result of mis-reading and non-reading of evidence [38] or some fatal

35 Ibid.

36 - ibid, p.281

37 *Ibid.* de smith *supra* note 34.

38 *Ghulam Farid vs. Naseer Ahmad* PLD 2016 Lah. 478.

procedural defect [39] in the decision of the subordinate court. I will now enumerate general principles of judicial review of administrative discretion laid down by courts in four different jurisdictions including Pakistan.

3.4 Judicial Review of Administrative Discretion in England

Although from Coke's [40] times, legal concept of discretion was known in England but it was in late nineteenth century that courts started to evolve legal regulations in the exercise of discretion. *Lord Halsbury* observed in a leading case, [41] "discretionary powers must be exercised according to the rules or reason and justice, not according to private opinion, and that discretion could not be arbitrary, vague and fanciful, but must be legal and regular."

Robert v. Hopwood [42] is another fine example in this respect (Quoted earlier) which is being quoted in different perspective here. A Borough council empowered under the law to pay such wages to their employees as it "may think fit" The council paid over-generous wages and the district auditor disallowed the payments. On challenge the decision of the auditor was ultimately upheld by the House of Lords which ruled that the council was not at liberty to pay more than what was reasonable in the light of general rates of wages. Court held, "discretion does not empower a man to do what he likes merely because he is minded to do so... he must, be the use of his reason, ascertain and follow the course which reason directs. He must act reasonably''.

39 *Muhammad Ashraf vs. Jaffar and others* PLD 2016 Lah. 487.

40 - *Rooke's case* (1598) 5 Co Rep. 996 .

41 - *Sharp vs. Wakefield* (1891) AC 173.

42 - (1925) AC 578.

Proceeding cautiously, the court also observed [43] "There are many matters, which the courts are indisposed to question, though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decision of the local authority simply because they are themselves ill-equipped to weigh the merits of one solution of a practical question as against another".

All subsequent English precedents are based upon these basic reasoning and England has developed certain specific grounds for judicial review of administrative discretion.

3.5 Judicial Review of Administrative Discretion in the United States

In United States history of judicial approach towards discretionary powers start from the famous case of *Marbury v. Madison.* [44] The issue was whether the court could compel the Secretary of State for providing commission to individuals who had been appointed justices of the peace through the process of nomination by the President and confirmation by the Senate. A statute explicitly commanded the secretary to provide a commission to anyone so appointed. The court emphasized the clear and explicit nature of duty imposed by the statute in the process of holding that the court had the responsibility to interpret and to enforce the statute.[45] The court observed [46] "It is emphatically the province and duty of the judicial department to say what the law is". However, the court also recognized that some actions are unreviewable because they are committed to the discretion of agencies and officers of the executive branch.[47]

43 - ibid, Per Lord Sumner, p. 606.

44- 25- U.S (1 Cranch) 137 (1803).

45 Ibid.

46- Ibid.

47 Ibid.

Throughout the nineteenth century, courts stick to this presumption of un-reviewability of discretionary powers. It was, however, in the very beginning of twentieth century that the presumption was abandoned. The Supreme Court held in 1902 that the Postmaster General's issuance of fraud order could be reviewed. The court did not extract its answer from the statute and it did not declare a reversal of the presumption; instead, it simply said the Postmaster General's action was "a clear mistake of law." The courts must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled arbitrary action of an administrative officer.

After the American School case [48] Supreme Court found reviewability in many other cases. [49] But following the English Common Law traditions, the American Supreme Court was particularly reluctant to authorize judicial review of exercise of prosecutorial discretion. In *United States v. Nixon*, [50] the court cited the confiscation cases for the broad proposition that the executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case. The court has shown this undesirability both in criminal and civil actions. [51]

Although the United States Attorney Statute, 1789 imposed mandatory and non discretionary duty to "prosecute for all offences." Court used the following reasoning for the compelling the Attorney to continue with the case" [52] Public prosecutions, until they come before the court to which they are returnable are within the exclusive discretion of the district attorney, and even after they are entered in court they are so far under this control that they may enter a

48-*American School of Magnetic Healing vs. Mc Annulty* 187 US 94 (1902).

49- Dismuke vs. U.S. 167 U.S. 167 (1936) Claim for retirement benefit; *Shields s. Utah Idaho Central Rly. Co.* 305.

50- 418 U.S. 683 (1974).

51- *Confiscation cases*, 74 U.S. (7 Wall) 454 (1868).

52- Ibid, P.457.

noulle prosequi at any time before the jury is empanelled for the trial of the case, except in cases where it is otherwise provided in some Act of Congress." [53] Civil suit in the same and for the benefit of the United States, are also instituted by the district attorney, and in the absence of any discretion from the Attorney General, he controls the prosecution of the same in the district and circuit courts, and may, if he sees fit, allow the plaintiffs to become non suit, or consent to a discontinuance.

This consistent attitude of the Supreme Court is based upon the reasoning that no prosecutor has access to all of the investigative and prosecutorial resources required to prosecute all violations of law within his jurisdiction. But prosecutors sometimes do abuse their discretion. The court; however, has failed to lay down some criteria upon which the prosecutorial discretion could be reviewed. Courts cannot realistically be expected to detect and correct all form of abuses of discretion by the prosecution. The only exception to this general principle was created by the Supreme Court in *Yick Wo case.* [54]

Yick Wo was imprisoned for violating a San Francisco Ordinance that regulated laundries. He filed petition for writ of *habeas corpus* in which he alleged that the Ordinance was enforced only against Chinese. Two hundred Chinese but no non-Chinese had been found guilty of violating the Ordinance. The court granted the *Yick Wo's* writ and held unconstitutional San Francisco's practice of highly selective enforcement based solely on race and nationality.

---

53 Ibid.

54- *Yick Wo vs. Hopkins*, 118 US 356 (1886).

The Court condemned it in these words; [55]

"When we consider the nature and the theory of our institutions of government, the principles upon which they suppose to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails, as being the essence of slavery."

There were certain unusual features in this case which necessitated court's intervention in the prosecutorial discretion. *First*, the petitioner was in jail and requested for his release. *Second,* the selective enforcement was of the most socially destructive type. *Third,* the pattern of racially based selective enforcement was crystal clear.

In this case, [56] the Supreme Court again applied the presumption of reviewability, the facts were that after two decades of intense State and local political controversy, the Memphis city council, and secretary of transportation, Volpe finally reached agreement on a route that would go through part of a municipal Park, Overton Park. Citizens to Preserve Overton Park sought judicial review of that decision alleging that Volpe's decision to authorize federal funding violated the section of the federal statute [57] that required avoidance of Parks when a "feasible and prudent" alternative exists. The court remanded the case to the district court and asked the respondent to submit there, the reasons for authorizing funding of the highway.

55- Ibid. P.369-370.

56- *Citizens to Preserve Overton Park vs. Volpe*, 401 U.S. 402 (1971).

57- The Federal Aid to Highway Act.

After the *Overton Park case*, the presumption of reviewability was partially eroded in *Chaney case* [58] and *Doe case*.[59] But in both cases, the presumption of reviewability was rebutted. Previous to these, in *Community Nutrition case* [60] United States Supreme Court stated that the presumption of reviewability can be rebutted by any of the following five ways:-

(1) Specific statutory language,

(2) Specific legislative history,

(3) Contemporaneous judicial construction followed by congressional acquiescence,

(4) The collective import of the legislative and judicial history of the statute, and

(5) Inferences of intent drawn from the statutory scheme as a whole.

In a recent case, [61] the court by applying the presumption of reviewability held that a court could review the secretary's exercise of discretion in taking the census by applying the statutory requirement that the Secretary produce a census of the "whole number of persons in each State" and by analyzing the Secretary's policy decisions to ensure consistency.

3.6 Judicial Review of Administrative Discretion in India

In India also similar principle is accepted and the Supreme Court has held that court has no power to interfere with the orders passed by the administrative authorities in exercise of discretionary powers [62] Muhammad Iqbal's case [63] is the leading case on the subject that how far

58- *Heckler vs. Chaney*, 470 U.S. 821 (1985).

59- *Webster vs. Doe*, 486 U.S. 592 (1988).

60 - *Block vs. Community Nutrition Institute*, 467 U.S. 340 (1984).

61 *Franklin vs. Massachusetts*, 112 U.S. 2767 (1992)

62 *A.K. Gopalan vs. State of Madras*, AIR 1950 SC 27; *Ram Mandar Lohia vs. State of Bihar*, AIR 1966 SC 740.

63- *Muhammad Iqbal vs. Superintendent, Central Jail*, AIR 1969 Delhi 45.

the courts can interfere in the subjective exercise of discretion. The court laid down the scope of such interference in the following word,

"The order under section 3(1) (a) Preventive Detention Act, 1950, is to be made on the subjective satisfaction of the detaining authority. That subjective satisfaction is, subject to certain exceptions, not justifiable. That subjective satisfaction is in certain aspects open to judicial review but the area thereof is limited. For instance, the detenu may contend that the grounds applied to him could not possibly lead to a reasonable mind to the conclusion arrived at by the detaining authority. In testing such a contention, the courts cannot go into the inadequacy of material on which satisfaction is founded. The Court can strike down the detention order if:

(a) The grounds furnished to the defense are found to be extraneous or irrelevant in the sense that they are foreign and germane to the matter which falls to be considered under the relevant statute; or

(b) The grounds furnished are such as deprive the detenu of the constitutional right of making representation against the order, as guaranteed by Article 22(5) of the Constitution; or

(c) The order is *malafide*; or there is violation of the constitutional provisions such as supply of all the grounds on which orders of detention has been made; or

(d) There has been a non-application of mind by the detaining authority

In support of the plea that the authority concerned has not applied his mind or the order is *malafide,* a detenu can legitimately contend that on the facts on which the detention order has been based, no reasonable mind could have come to the conclusion that the detention was necessary."

In spite of the fact that the court has categorically observed that subjective discretion is not ordinarily reviewable but still a number of exceptions are provided which are so wide and even subjective exercises of discretion can be looked into and reviewed by the courts. But interference in such exercise is always restricted one in India.

In another case, [64] Indian Supreme Court observed:

"It is not for the courts to question whether the grounds of subjective satisfaction are sufficient or not where the legislature makes the subjective satisfaction of the detaining authority sufficient for detention."

In a subsequent case, [65] Justice *Yenkatachaliah* observed, "every power tends to corrupt and absolute power tends to corrupt absolutely' (Lord Atkin's famous saying). All powers have legal limits. The wider the power, the greater the need for the restraint in its exercise."

In *Dude vs. Shive Shanker*, [66] the Supreme Court quoted a golden passage from Nirad Chaudry's Clive of India, P. 381. Bruke's statement [67] in House of Commons with regard to the affairs of East India Company and Clive was quoted in that book. He said that when discretionary power is lodged in the hands of any man or class of men, experience proves that it will always be abused. Where no laws exist men must be arbitrary and very necessary acts of government will often be, in such cases, represented by the interested and malevolent as instances of wanton oppression. There must be control over discretionary powers of the administration so that there will be a "government of laws and not of men."

64- *Saraswatti Seshagin vs. State of Ker*ala, (1982) 2 SCC 310.

65- *Ranjit Thakur vs. Union of I*ndia, AIR 1987 SC 2386.

66- AIR 1988 SC 1208.

67- (1772) Proceedings of the House of Commons.

A remarkable development can be seen in the attitude of the Indian Supreme Court in the *Kamal's case.* [68] It was held that it is the time that abuse of power is not to be assumed lightly but, experience belies the expectation that discretionary powers are always exercised fairly and objectively. But still Indian Supreme Court insists that judicial review of discretionary powers must be confined within limits. The judicial inquiry must confine to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land [69]

3.7 Judicial Review of Administrative Discretion in Pakistan

Pakistani courts have also adopted similar principles in curbing the wrongful use of administrative discretion. In some respects, our courts went further than the other courts of the democratic countries, due to our peculiar social and the political conditions. During early days, *Justice Kaikaus* did a memorable job in limiting the administrative discretion through judicial review. In *Agha Muhammad Khan's case,* [70] *Justice Kaikaus* while rejecting the plea that a civil court cannot review the actions within the discretion of district board, held;

"it cannot be doubted that any powers that are granted to the District Board and in fact to any public body are always subject to an important limitation, namely, that they are to be exercised fairly and reasonably. Any exercise of power which is arbitrary, oppressive and wanton is an abuse and is not an exercise of power within the meaning of the statute at all."

68- *State of Maharahstra vs. Mamal Durgule*, AIR 1985 SC 119.

69- *Shiv Sitaram Sugar Co. Ltd. vs. Union of India*, AIR 1990 SC 1277.

70- *District Board Lahore vs. Agha Muhammad Khan* , PLD 1957 Lah. 780.

Once again in *Montgomery Four Mills' case*, [71] while giving the opinion of a Divisional Bench, *Justice Kaikaus* observed:

"It should be remembered that no discretion vested in an executive officer is an absolute and arbitrary discretion. The discretion is vested in him for a public purpose and must be exercised for the attainment of that purpose. Even though there be no express words in the relevant legal provisions to that effect, the discretion is always circumscribed by the scope and object of the law that creates it and has at the same time to be exercised justly, fairly and reasonably''.

Again, in another case [72] which related to the import license and release of quota of silk yarn, it was argued by the respondents that grant of import license and release of quota was within the sole discretion of the chief controller and textile commissioner. It was held that the High Court in its writ jurisdiction could determine whether the discretion was exercised justly, fairly and reasonably and on a correct interpretation of, and in accordance with the relevant statute.

The Supreme Court also upheld the same view of reviewability of the exercise of discretionary powers in *East & West Steamship Company*'s case [73] *Chief Justice Munir* observed that there can be little dispute about the proposition that where a statutory functionary acts *mala-fide* or in a partial, unjust and oppressive manner, the High Court in the exercise of its writ jurisdiction has ample power to grant relief to the aggrieved party.

71- *Montgomery Flour and General Mills Ltd. vs. Director Food Purchases*, PLD 1957 Lah, 914.

72- *Frontier Textile Mills Ltd vs. Textile Commissioner*, PLD 1958 Lah. 345.

73- *East and West Steamship Co. vs. Pakistan* PLD 1958 SC (Pak) 41.

It is to be noted that in all these early cases, no distinction was made by our courts as regards the subjective or objective language of the provision. Our courts seemed to be really ready to review even the widest power granted by a statute to an official and only objective test was to be applied.

These cases were decided under 1956 Constitution. However, Constitutional deviation period started in 1958 with the promulgation of Martial Law. Martial Law was lifted in 1962 when the new Constitution came into force. Under Article 98 of new Constitution, the Court's jurisdiction was somewhat remodeled and the famous writs were defined by self contained provisions.

Interference with the exercise of discretion appeared somewhat doubtful for the reason that *certiorari,* the usual remedy for controlling the exercise of discretionary powers, was restricted to acts which were done without lawful authority. Superior Courts used *mandamus* type order in cases of abdication of discretion and directed that the authority must apply its own independent mind. [74]

In *Akber Ali v. Razi-ur-Rehman,* [75] where a presiding officer at basic democracies election wantonly cancelled six ballot papers which were free from any defect, his order was set aside and a direction was issued to the presiding officer to declare the result according to law. In another leading case, [76] the presiding officer cancelled some ballot papers on the ground that the intention of the voters was not clear, the High Court after examining the ballot papers decided that the intention was clear from the ballot papers and issued the appropriate order. On appeal, it

74- Dr. Dil Muhammad, Judicial Review of Discretionary Powers 1990 PULJ 68.

75- PLD 1966 SC 492.

76- *Presiding Officer vs.. Sadruddin Ansari*, PLD 1967 SC 569.

was argued that the presiding officer was vested with discretion to resolve the dispute about the marking of ballot papers and High Court could not interfere in its constitutional jurisdiction. Rejecting the argument, Justice *Hamood-ur-Rehman* held:

"It is time that *mandamus* does not lie where a duty is purely discretionary but from this does not follow that a party upon whom the duty vests can exercise this discretion in any manner. The mere fact that there is an element of discretion in the duty to be discharged is not by itself sufficient to exclude relief by way of mandamus, for even a discretion must be exercised reasonably and honestly and not arbitrarily capriciously or in a bad faith..... such an arbitrary exercise of power may well be said to be mere colorable exercise of power or even abuse of power."

The court upheld the decision of the High Court. After initial few years of 1962 Constitution, Courts again started to quash the wrongful use of discretion with declarations in the nature of *certiorari*. In a case [77] before Lahore High Court, the misuse of discretionary power was held to be without lawful authority.

The Shops and Establishment Ordinance, 1969 required that every shop must remain closed for one day in a week. The barber and hairdresser shops were exempted from this condition but the provisional government could withdraw this exemption. A notification issued by the provincial government withdrawing this exemption in relation to some cities of the Province, was challenged in the High Court which accepted constitutional petition. The court held that if the law is administered in arbitrary, oppressive, partial and unjust manner the action can be declared unlawful, it declared that the notification was issued without lawful authority.

77- *The Pakistan Barber Association vs. Province of Punjab* PLD 1976 Lah. 769

It was decided by the Supreme Court in *Jaffar Hussain vs. Additional Rehabilitation Commissioner* [78] that where the Chief Settlement and Rehabilitation Commissioner had discretion either to ascertain the revision petition and decide it on merits or dismiss it on the ground of *laches*. The revision petition was filed before the Chief Settlement and Rehabilitation Commissioner more than three years after the dismissal of the application of appellant before the Additional Rehabilitation Commissioner. It was even delayed up to five months after the decision of an incompetent review petition.

Dr. Nasim Hassan Shah, J. held: "A discretion having been exercised, which cannot be described as illegal and capricious, it was rightly not interfered with the exercise of the writ jurisdiction." The Chief Settlement and Rehabilitation Commissioner had dismissed the revision on the ground of *laches*. It is clear that where two lawful alternatives are available to any authority, it may choose either of them.

In *Federation of Pakistan vs. Muhammad Aslam* [79] the petitioner fulfilled all the prescribed conditions, applied for an import permit under the gift scheme, and was partially granted to him. However, subsequently, the government cancelled his existing permit, court rejected the orders of the government as being arbitrary and, therefore, unlawful. In Supreme Court, it was argued that the Government possessed untrammeled powers to prohibit and control the import of goods into the country. But this argument was rejected.

78- 1985 SCMR 1076.

79- 1966 SCMR 916 Also See *Muzaffar Ali Burney vs. Hafiz Muhammad Ahmed* PLD 1989 SC 162.

Justice *Shafi-ur-Rehman* observed:

"The limit now well recognized is that all executive power has to be exercised fairly and justly, for advancing the object of the legislation. In other words such exercise of power has to satisfy the test of reason and relevance." In the appointment of *Civil Judges case*, [80] a Division Bench of the Karachi High Court observed that appointments to civil service was to be made by competent authority but such appointment was required to be made on the recommendation of Public Service Commission.

In order to accept recommendation of Public Service Commission, competent authority, has to act under some rule or at least some cogent reason which factors were absent in the case of petitioner, as he was not appointed on the pretext of his political activities. The court held this as an insufficient reason for rejecting the recommendations of the Public Service Commission.

In the words of *Naimuddin, C.J;*

"The competent authority may have discretion in the matter still then the discretion has to exercised on well-settled principles that is, it should be exercised in good faith having regard to all relevant considerations and for public purposes and in accordance with law and it should be exercised justly, fairly and reasonably. It should not be exercised arbitrarily or capriciously."

In the famous case [81] of *Islamabad Stock Exchange (formation),* Justice *Shafi-ur-Rehman* while deciding the matter between four contenders for establishment of Stock Exchange at Islamabad observed:

80- *Manthar Ali Jatoi vs. The Government of Sind*, 1988 PLC (C.S.) 344.

81- *Inam Ullah Khan vs. Federal Government of Paksitan*, PLD 1990 SC 190.

"Whenever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion and it has been pointed out in the Administration Law Text by *Kenneth Culp Davis* (Page 94) that the structuring of discretion only means regularizing it, organizing it, producing order in it, so that discretion will achieve the high quality of justice".

The seven instruments that are the most useful in the structuring of discretionary power are,

- " open plans,
- open policy statement,
- open rules,
- open findings,
- ,open reasons,
- open precedents and
- fair informal procedure."

The order of the ex-minister of state dated 19-08-1989 granting registration to *Amanullah* & associates was declared as without lawful authority and applications were ordered to be considered afresh in accordance with law.

In *Muhammad Qadir Hussain vs. Controller of Patents and Designs* [82] where interpretation of section 79 of Patents and Designs Act 1911 was involved. A division bench of Karachi High Court held what there was no prerogative existed in favor of Government withholding the patent of the petitioner. The prerogative mentioned in the section 79 is a mere discretion conferred by law which has to be exercised in accordance with recognized and well settled principles.

82- 1990 MLD 11

"The exercise of discretion should not be arbitrary and where a particular situation is governed by clear and unambiguous provisions of law that cannot be frustrated or rendered ineffective under the garb of exercise of discretion. The order withholding the grant of patent was set aside and respondents were directed to proceed in accordance with law. In another case[83] where section 3 of the Import and Export(Control) Act, 1950 empowered the Federal Government to regulate the import and export of goods, and a Notification S.R.O.1101(1)/83 granted exemption to disabled persons who had imported vehicle for actual use, Justice Akhtar while giving the opinion of the court observed:

"An authority has to exercise his discretion taking into consideration the facts and circumstances of the case and in such manner that the remedy provided by the statute is advanced. The discretion is not the whim, caprice or desire of any authority, nor is it an unfettered or absolute power. When discretion is vested in an authority, than it is an unwritten code that it cannot be exercised arbitrarily unreasonably or *malafide*. It should be judiciously exercised." [84]

Justice Malik Muhammad Qayyum in *Mian Mehraj Din vs. Home Secretary* [85]observed that High Court can correct the wrongful exercise of discretion by jail authorities in their refusal to grant better class to prisoner under rule 242 of Prison Rules. He held "There can be no doubt that even in matters of discretion of functionaries charged with the duties of administering law have to act reasonably, fairly, justly and in accordance with the rules on the subject. If an order is

---

83- Aziz-ur-Rehman Khan vs. Federal Disability Board, 1990 MLD 1420.

84- Ibid at P.1426.

85- NLR 1991 Criminal 721.

passed by a statutory functionary proceeding on the basis of the considerations which have no relevance under the law the discretion is liable to be struck down". [86]

In this case the court refused to interfere with the exercise of discretion, as it was rightly exercised. In *Abdullah & Co. vs. Province of Sindh* [87] *Nasir Aslam Zahid* J. held that although Government has the power to withdraw the contract but the power or discretion which affected individual rights are required to be exercised in fair, reasonable and just manner.

"An executive discretion which affects private rights cannot be exercised at the whim of the executive authority. It must have a basis and such basis must be reasonable, fair and just in the circumstances of the case."[88]

Similar view was taken by Justice *Munir A Sheikh* in *Anwar-ul-Haq Ramay vs. Federation of Pakistan* [89] The basis for the exercise of discretionary power must be relevant having legal nexus with the object of law, with wisdom and authority keeping in view above all the interest of the state. Public functionary is bound to follow these principles in exercise of their powers even if they are not provided in the statute. "They are so fundamental in character that they need not be expressly provided in the statute itself." Same was held in *Ardeshir Cowasjee vs. Multiline Associates Co.* [90] by the Karachi High Court.

86- Ibid, P.724.

87- 1992 MLD 293.

88- Ibid, P.304.

89- 1992 MLD 2135, at P.2143.

90- PLD 1993 Karachi, 237 , at p.275.

Justice Shafi-ur-Rehman did commendable job in structuring the administrative discretion. In *Chairman R.T.A. v. Pakistan Mutual Insurance Co* [91] it was held by his Lordship:

"A public official who undertakes to perform an act, even an act which is completely discretionary, must do reasonably and in complete good faith without such delay as would frustrate its ultimate objective. "It was further pointed out that wherever wide worded powers conferring discretion are found in a statute, there remains always the need and desirability to structure the discretion. In our case, these powers have been taken to be an enchantment of the powers and it gives that impression in the first instance but where the authority fail to rationalize it and regulate by rules, or policy statements or precedents, the courts have to intervene more often is necessary, apart from the exercise of such powers appearing arbitrary and capricious at times" [92].

Conclusions were drawn in that case [93] there were two defects in the exercise of discretionary power by the appellant authority. First, the difference between amounts deposited at the time of Company's incorporation and registration was no indication of the solvency of the company. In adopting the yardstick which was wholly irrelevant, unjustified and improper under the law the appellant reached a conclusion which could not be arrived at if that element had been ignored. Secondly, in exercising discretionary powers, one has to deal without discrimination, fairly, justly and reasonably. Here, the appellant authority acted discriminately as two similarly situated parties are dealt with differently.

91- PLD 1991 SC 14, at P. 25.

92 Ibid.

93- Ibid, P. 26.

In another case, [94] similarly, Justice *Shafi-ur-Rehman* while outlining the scope of the exercise of administrative discretion observed:

"The nature of this power in the particular section or rule, the object of the said section or rule the scope of the Act or the rule where the power appears, or the conditions and limitations which define or limit its exercise, or the conditions precedent which have to be fulfilled before it can operate, all require to be carefully examined before any idea can be formed as to how it can be exercised." [95] In a case [96] where a plot was allotted to the petitioner from the reserved quota but the quota was abolished before the actual handing-over of the plot. The incumbent chief minister rejected the application of the petitioner for handing-over the plot as being against the existing policy. The court, while reversing the order of the chief minster observed,

"The discretion vested in any public functionary especially in the holder of a public office as representative of the people of Pakistan, has to be exercised and shall be exercised for attaining the objectives of justice generally, but specifically for the amelioration of the injustice arbitrariness or oppression to which a citizen of Pakistan may have become the unfortunate victim of, and the discretion so vested has to be exercised in a judicious manner; keeping in view the fundamental principles of natural justice, fair play and equity." [97]

From the above mentioned judicial trends in different jurisdictions, it is manifestly clear, that powers given to the administrators or agency are inherently a sacred trust, which may be only exercised in its proper statutory context if authorities exercise self restraint and impartiality

94- *Muhammad Iqbal Khokhar vs. Government of the Punjab* PLD 1991 SC 35.

95- Ibid P 50.

96- *Ch. Muhammad Anwar vs. Province of Punjab* PLJ 1996 Lahore 455.

97- ibid, Justice Sajjad Ahmed Sipra, at P.462.

by avoiding bias. This rule is so universal in its application, that pure administrative authorities are expected to act judicially if there is a question of application of discretion.[98]

3.8 Prerogatives and Subjectively Formulated Discretionary Powers

In order to ensure minimum interference in the administrative function, courts frequently used the principle of '*locus standi*'[99] or '*aggrieved person*'.[100] But in the recent past this principle has been liberalized as per requirements of different situations and for the sake of justice. [101] However, it was held in one of the following cases on the subject [102] that a tax payer had no *locus standi* as to impugn the allocation of resources by the Government. The court reasoned that if it was allowed them it will lead to endless litigation and undue interference in the fundamental structure of the executive.[103]

In English law, if it is claimed that the authority for the exercise of discretion derives from the royal prerogative, the English courts have traditionally limited review to questions of *vires* in the narrowest sense of the term. However, the courts have exerted their authority to determine whether the prerogative power exists, what is its extent, whether it has been exercised in the appropriate form and how far it has been superseded by statute; they have not normally been prepared to examine the appropriateness or adequacy of the grounds for exercising the

98 *Mehboob Elahi vs. Khan Abdur Rehman & Others* PLD 1958 SC 96.

99- PLD 1958 SC 437, PLD 1968 Lahore 1155.

100- See Art. 199 of the Constitution of Islamic Republic of Pakistan 1973.

101- PLD 1969 SC 223 and also PLD 1982 SC 308.

102- *Ch. Muhammad Younas vs. Pakistan* PLD 1972 Lahore, 847.

103 Ibid.

power, or the fairness of the procedure followed before the power is exercised, and they will not allow bad faith to be attribute to the Crown.[104]

English courts have held following powers as within the prerogative of the Crown:

Nolle Prosequi or prosecutional discretion [105]

Exclusion of alien.[106]

License granted to enemy company to sue in British court. [107]

Disposition of forces.[108]

Prerogative of mercy/pardon [109]

Treaty-making power [110]

Dissemination of official information.[111]

Issuance of passport [112]

Similarly courts usually show their utmost reluctance to intervene in the matters of 'foreign affairs'. However, the decision of the House of Lords in ***Padfield's case*** (1968) A.C. 997 marked the emergence of the interventionist judicial attitude and that attitude has been followed in many recent judgments. Hence, it is not an absolute rule even in Britain that in no

104- See de Smith's Judicial Review of Administrative Action, 4th edition P. 286.

105- *R.vs. Allen* (1862) 1 B. & S. *850.*

106- Musgrove vs. *Chun Teeong Toy* (1918) A.C. 272.

107- *Bugsier vs. Reederei et al* (1951) 2 T.L.R. 409.

108- *Chandler vs. D.P.P.* (1964) A.C. 763.

109- *Freitas vs. Benny* (1976) a.c. 239 , also see *Hakim Khan vs. Govt. of Pakistan* PLD 1992 SC 595.

110- *Blackburn vs. Att. Gen.* (1971) 1. W.L.R. 1037.

111- *Jenkins vs. Attorney General.* (1971) 115 S.J. 674.

112 *Secretary of State for Home vs. Lakdawalla* (1972) All. E.R. 26.

circumstances would the courts be prepared to review the exercise of prerogative power by the Crown.[113]

In Pakistan, however, courts would not accept any Common Law prerogatives of the Crown or the Government. Justice *Qadeeruddin* in *General Manager North Western Railway vs. Sher Muhammad*[114] observed that the principle of the bounty of prerogative of the Crown is no longer good law in Pakistan after the promulgation of the Constitution of 1962.

In another case [115] it was observed that:

"The concept that it is in the prerogative of the Crown to dismiss its servants at its pleasure was never really asserted even in England, for, the courts there preferred to be this claim on firmer grounds of public policy, but so far as the Indian sub-continent was concerned there was never any scope for invoking such a prerogative of the Crown as India was controlled by the various Government of India Acts and, at any rate, after the enactment of the Act of 1935 it was by reason of section 2(1) thereof, to prevail "except in so far as may be otherwise provided by or under" the said Act. The prerogative of the Crown is only such as the law allows and if the law had curtailed that right then the law should prevail."[116]

Again in a case [117] Division Bench of the Karachi High Court observed that:"The Constitution and law are the source of power and jurisdiction to be exercised by respondent No.2 (Central Government) under The Patents and Designs Act 1911 was framed when, the Crown

113 Ibid.

114- PLD 1966 Karachi 483.

115- *Pakistan v. Mrs. A.V. Issacs* PLD 1970 S.C. 415.

116 Ibid.

117- *Muhammad Qadir Hussain v. Controller of Patents & Designs* 1990 MLD 11.

was the supreme head of the British Empire and the same terminology of prerogative has continued till today although neither Crown's pre-eminence nor is its prerogative attached to or inherited by Respondent No.2 (Central Government)."[118]

Hence, in Pakistan there exist no common law prerogative power in favor of the government. Here, the authority of Government begins and ends within the sphere provided to it by the Constitution or laws made thereunder.[119]

3.9 Subjective Expressions in Legislation and Discretionary Powers

"if satisfied"

Subjective expressions, among others, are "if the authority is satisfied", "... if it appears to the authority to be necessary...", "... necessary or expedient...", "... or has reasonable cause to believe...", "... or where it appears to the authorities that he may, or where in the opinion of the authority he may..."

No consistent judicial interpretation of such expressions is to be found from cases and the law in this field is uncertain and confusing. Does such a phrase confer absolute subjective power or authority or could the courts see if there were any grounds on which the thing could appear the way minister saw or did in fact appear or that way could reasonably appear to be so? *Gavan J.* observed: [120]

"The Minister has to be satisfied. There must be countless occasions in the life of a Minister of State on which he has to be satisfied as to particular facts before taking a particular

118 *Muhammad Qadir Hussain vs. Controller of Patents & Designs* 1990 MLD 11.

119 Ibid.

120 - 1940 IR 136 (Irish case).

course, occasions on which nobody would for a moment expect him to act judicially in order to be satisfied, otherwise the daily routine of administration would become impossible. But under Section 555 the Minister, who may be any Minister of State, is not exercising any normal function of his office; he is exercising a most exceptional statutory power, and a man's liability depends on his exercise of it. The authority... is an authority not merely to act judicially but to administer justice, and an authority to administer criminal justice and condemn and alleged offender without charge or hearing without the aid of a jury".

In 1941, in the case of *Liversidge vs. Anderson* [121] the House of Lords decided in an action for false imprisonment that such an expression gave the Home Secretary absolute discretion and was outside the scope of judicial review. The expression was 'reasonable cause to believe'. There is, however, shattering dissent of *Lord Atkins* which Professor *Wade* calls *tour de force* in the English legal literature. And this decision has been regarded more as the House of Lord's "contribution to the War effort" and considered an "exegesis of an emergency regulating in *D. P. P. vs. Chandler.* [122] *Lord Reid* described it as a "very peculiar decision" in *Ridge vs. Baldwin.*

In *Nakhuda Ali's* case, *Lord Radcliff* observed:

"... it would be very an unfortunate thing if the decision in *Liversidge's* case came to be regarded as laying down any general rule as to the construction of such phrases (i.e. reasonable cause to believe) when they appear in statutory enactments... however read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power...". *Nakhuda Ali's* case laid down that where the Controller has reasonable grounds to

121 - (1949) 3 All England Reports 338.

122 - (1962) 3 AER 142 (159).

believe that any dealer is unfit to be allowed to continue as a dealer, it must be construed to mean that there must in fact exist reasonable grounds known to the Controller before he could validly exercise the power.[123]

The act was considered administrative and not judicial; therefore, certiorari was refused. The decision in 1947, after the war was over, in *Robinson vs. Minister of Town and Country Planning* (Plymouth's case), [124] is an example where the meaning given is totally subjective. The court of Appeal held that if the Minister said he was satisfied, then he was satisfied and it was not permissible to inquire why he was satisfied. Therefore, it seems that when expression like "Satisfied" or "If it appears to the competent authority necessary" or "necessary" or "expedient", are used, judicial review is excluded and no question of natural justice arises.[125]

The case of *Ayr Collieries Limited vs. Lloyd George* [126] and *Carlton Ltd vs. Commissioner of Works,*[127] seem to exclude judicial review on the ground that ministerial action under the authority is purely administrative. [128] In A. I. R. 1968 Patna 193, the satisfaction of a detaining authority was held to be subjective and thus not justiciable. In PLD 56 Karachi 538 at page 549, it was held by *Kaikaus J.* interpreting word 'thinks" that the word (thinks) in this connection does not mean anything more than is 'of opinion' or 'is satisfied'. It is, however, submitted that even with interpretation it is only a matter of personal satisfaction.

123 - J.F. Garner, "Administrative law", p. 139.

124 - (1947) KB 702.

125 Ibid.

126 - (1943) 2 All England Reports 546.

127 - (1943) 3 AER Reports, 560.

128 - See also C.K. Allen, "Law and Order", p.254.

In *Maudoodi's case* [129] *Cornelius* C. J. at page 714 observed:

"... should, therefore, the courts be asked to shut their eyes to all the facts and circumstances and consider themselves as bound to hold the action to be within the section merely because the section implies the word "opportunity", there would be involved a denial of the judicial function in a field where that function is most directly attracted, namely, the methods of liberties under a written Constitution and where the judicial mind is both apt and accustomed to travel with utmost confidence".[130]

In *Earl Fitzwilliam Wentworth Estate Company vs. Minister of Town and Country Planning* [131] *Lord Denning*, as usual, took the lead in his dissenting judgment and put a proper and just construction on the phrase, which construction has been followed later in a number of cases. *Denning L. J.* said:

"... I do not agree with the contention that once the Minister says he is satisfied; there Courts cannot look behind it to see what he is doing. If a Government Department, however well-intentioned, takes upon itself the function of Parliament, and seeks to legislate without any authority in that behalf, then it is the duty of these Courts to intervene in these days as they did in the days past". So Denning L. J. made the meaning of "satisfaction".

In *Earl Fitzwilliam etc. vs. Minister* [132] (reviewable by the Courts).

In *Read vs. Smith*, [133] it was suggested that the main reason in *Liversidge's* decision was the danger to the nation in time of War of disclosing the sources of the minister's factual

129 - PLD 1964 S C. 714.

130 Ibid at p.718.

131 - (1951) 2KB 311.

132 - ibid.

information. However, such explanation is only an attempt to get away from the strict bounds laid in *Liversidge' case* and cannot change the law. Better view has been taken by *Hamood-ur-Rahman* J. In *Baqi Baluch case*, [134] where his Lordship observed:

"The trend of decisions both in this country as well as in England has, therefore, been to regard the decision in *Liversidge's case* as limited to the interpretation of Regulation 18.... *As a special war measure*."[135].

In *Ross Clumis vs. Papadelias* [136] the Privy Council was prepared to apply objective test to the word 'satisfied'. [137] Both the *Liversidge's case* and *Nakhuda Ali's case* have been criticized by the House of Lords in *Ridge vs. Baldwin*, which is a very welcome decision on more than one point, and now it seems that the Courts will not lightly accept such expressions as 'satisfied' or 'final' as totally excluding review. (It may also be noted that if the power has been used unreasonably it may also be evidence of mala fide or non-application of mind)."[138]

In *Attorney-General for Canada vs. Hallett Carey Ltd.* [139] *Lord Radcliffe* chose an objective definition of the phrase: "... Parliament has chosen to say explicitly that he shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined to for whatever he does must be capable of being related to one of the prescribed purposes..." It seems that it only controls the substance and not the manner of doing a

---

133 - (1959) NZLR 996 (1000).

134 - PLD 1968 S.C. 313.

135 Ibid.

136 - (1959) 2 AER 23.

137 See Lord Morton's speech at page 3 and compare the observation of Roamer J. in (1950) 1 All England Reports 1062 at page 1067.

138 Ibid.

139 - (1952) AC 427 (450).

particular act and, therefore, is not exhaustive opinion in this respect. The above observations of Lord Radcliffe were followed in *Reid vs. Smith* (the New Zealand case) to define the scope of the power given by the expression, "... thinks necessary".[140]

In 1962 in *R. vs. Brixton Prison ex-parte Soblen, Lord Denning* has held that the Court cannot compel the Home Secretary to disclose the materials on which he has acted. The Supreme Court had said:

"The view taken in *Ghulam Jilani's case* is not so new or radical as the learned Advocate-General would have us believe for indeed it seems that it was the conventional view generally accepted even in England, till the House of Lords in case of *Liversidge vs. Anderson* gave the doctrine a subjective test, a new dimension... It is interesting to note that in another case, which was heard contemporarily with the case of "*Liversidge vs. Anderson,* the Attorney-General himself had suggested a middle course, as would appear from the opinion of *Lord Wright* in the case of *Green vs. Secretary* (1941) A. E. L. R. 388. (401)".

In reference to Article 98, his Lordship says: "if the mere production of an order of a detaining authority declaring that he was so satisfied was to be held to be sufficient also to satisfy the Court then what would be the function that the Court was expected to perform in the discharge of duty". [141]

So it follows that the Court cannot ask for any material; but if there is some, then they can judge the matter objectively. The decision in *ex-parte Soblen's case* must be restricted to context and cannot be laid as a general proposition of law. The explanation seems to be that the

140 Ibid.

141 - PLD 1968 S. C. 313.

court was satisfied of the exercise of proper discretion and that it was considered to be for the public good as the power was exercisable by the Home Secretary wherever he deemed it to be conducive to the public good, otherwise it is an unfortunate decision and cannot be welcome as it will create a loophole to defeat review in all cases. *Hamood-ur-Rahaman*, J. in *Baqui Baluch's case* observed:

"... there is a difference between 'being satisfied' and 'suspecting upon reasonable grounds,' the difference, in my humble opinion, is this that the former connotes a state of mind bordering on conviction induced by the existence of facts which have removed the doubts, if any from the mind and taken it out of the stage of suspicion...".[142]

In *Mardana Mosque case* from Ceylon,[143] the Privy Council held that the function of the Minister in satisfying himself about the contravention of a statutory provision was a judicial function. In was held in *Sugathadasa vs. Jayasingh* [144] that the phrase "where it appears" or "appears to the satisfaction" or "consider expedient", etc., exclude the duty to act judicially. In *Duryappah vs. Fernando* (1960) the Judicial Committee had said that the words such as "where it appears to" or "if it appears to the satisfaction of" or "considers it expedient that" or "is satisfied that", standing by themselves within the words or circumstances of qualification exclude a duty to act judicially.

The case of *Padfield vs. Minister* [145] relates to interpretation of the Agricultural Market Act 1958 which provided for the establishment of a committee of investigation to consider

142- *Abdul Baqi Baloch vs. Govt. of Pakistan* PLD 1968 SC 373 at p. 380.

143 - (1967) A. C. 13.

144 - (1958) 59 N. L. R. 457.

145 - (1969) A. C. 997.

complaints referred to it about the operation of market schemes ''if the Minister in any case so directs'. This would appear to give the Minister a wide discretionary power, leaving it entirely up to him whether or not to refer any matter to the committee. But the House of Lords held that power was coupled with a duty to direct properly, and mandamus was granted to order the minister to refer a complaint about a milk marketing scheme to the committee because his reasons for not doing so were unsatisfactory."[146]

The Minister was not permitted to misdirect himself in law as to the exercise of his discretion, to take into account irrelevant matters, or to omit relevant matters from consideration. *Dr. Yardley* considers it one of the most important Administrative law cases of the decade (the other being *Anisminic case*). *Yardley* observes:

"... in a sense this decision can be regarded as little more than yet one more example in a long line of cases upholding the right of the courts to set aside some inferior decision or act which is *ultra vires* because of unreasonableness. But it can be suggested that it is more than this. The decision is a very firm conclusion in the highest court in the land that an Act of parliament conferring powers on a minister in the widest possible terms cannot of itself exclude judicial review. Indeed *Lords Reid* and *Upjohn* suggest in their speeches that there is no longer any such thing as an unfettered discretion".[147]

In *Commissioner of Customs and Excise vs. Cure and Deeley Ltd.*, [148] *Sachs J.* observed "... the arguments on the first and main issue have been so lucid; it is now practicable to state my conclusion relatively compactly. In the first place I reject the view that the words 'appear to

146- Ibid.

147 - New Law Journal, April 2, 1970.

148 - (1962) 1 QB 340.

them to be necessary' when used in a statute conferring the powers on a competent authority necessarily make that authority the sole judge of what are its powers as well as the sole judge of the way in which it can exercise such powers as it may have...".[149]

3.10 Can Discretion be Absolute, Unfettered?

The starting point of this discussion must be the traditional enquiry – Is there anything like absolute or unfettered discretion? In this context, it is necessary to clarify what the terms 'discretion', 'objective discretion' and 'subjective discretion' are intended to convey.

"Any person empowered to make a decision possesses a 'discretion' if, on a given or proven set of facts, he has a choice between two or more alternative courses of action. Thus, a decision maker has no discretion if, on proof of facts a, b, and c, he must take action 1, or on proof of facts d, e and f, he must take action 2, however if the decision maker is empowered on proof of facts a, b and c to take either action 1 or action 2, he possesses a choice or discretion. The word 'discretionary' will be used in the same sense" [150]

"The decision maker's discretion is 'objective' where the source of his power imposes defined or ascertainable pre-determined criteria by which, and solely by which, he must make his choice. The decision maker's discretion is 'subjective', however, when the source of his power confers upon him the freedom to determine his own criteria for choosing between the alternative courses of action open to him..."[151] Absolute discretion' is used in the same sense in which we

149 - (1962) 1 Q B. 340, per Sachs J.

150 - ibid.

151 - on this subject, reference may to Justice Mathew's classic passage in *Yick Wo case* 118 US 356 quoted in PLD 1957 SC Pak 89 and RC Austin's "Judicial Review of Subjective Discretion – At the Rubicon; Wither Now?" in 1975 *Current Legal Problems*150.

speak of an absolute monarch'. It means that the discretion is unfettered and unrestrained, not subject to review by any court.[152] It is a discretion that can be "exercised" arbitrarily and without accountability".[153]

As to the word 'arbitrary', the British Committee on Administrative Tribunals and Enquiries – the Frank Committee – referred to 'the notion of what is according to the rule of law, its antithesis being what is arbitrary, and said:

"The rule of law stands for the view that decisions should be made by the application of known principles or law. In general such decisions will be predictable, and the citizen will know where he is. On the other hand there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, the antithesis of a decision taken in accordance with the rule of law".[154]

After referring to this, *Kenneth Culp Davis* 'says that the word 'arbitrary' in English dictionaries has two meanings; the one that dominates American usage is synonymous with unreasonable, capricious, despotic and the other is synonymous with discretionary..."[155]

Mac Shannon vs. Rockware Glass [156] was a case of judicial discretion, but in the context of arbitrariness, the observations that follow may serve as guidance to the administrative decision-makers as well. The grant of a stay, said *Lord Diplock*, "involves the application of a judicial discretion to the facts of the particular case; but the judge in his consideration of the facts

152 - Lord Denning MR in *Ward vs. James* (1965) 1 All ER 563, 569-570.

153- Lord Brightman in *Chief Constable vs. Evans* (1982) 3 All ER 141, 152.

154- ibid.

155 - In his "Discretionary Justice", at p.29.

156 - (1978) 1 All ER 625, 631 cited in *Muhammad Nawaz vs. Muhammad Sadiq* 1995 SCMR 105, 123.

should not wear blinkers... if justice is to be seen to be done, the discretion, which will fall to be exercised by different judges in different cases, must manifest a reasonable consistency as between one case and another...."[157]

We can now return to the enquiry – Is there anything like absolute or unfettered discretion? In a country governed by the rule of law and not of men, the plain answer is 'No'.

"Law has reached its finest moments", said Justice *Douglas* in *US vs. Wunderlick* [158] "When it has freed man from the unlimited discretion of some ruler... Where discretion is absolute, man has always suffered". The discussion that follows will show that judicial power itself has reached "its finest moments" when it has freed man from absolute discretion.[159]

We have seen that Article 4 of the Constitution of Pakistan 1973 encapsulates the essence of the Rule of Law:

"To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being in Pakistan...." [160] It is understood that in a country governed by a written Constitution, the written constitution is the rule of law. And, where the constitution guarantees certain fundamental rights, which are subject to reasonable restrictions imposed by law, as the fundamental rights guaranteed by Articles 15, 16, 17, 19 and 23 of our constitution are, then the question can legitimately be raised whether an unfettered and arbitrary restriction is a reasonable restriction.

157 Ibid.

158 - 342 US 98, 101, (1951).

159 Ibid.

160 Article 4, Constitution of Pakistan 1973.

In the frequently quoted *Montgomery Flour and General Mills v. Director Food* [161] the claim of the food department that it had, in the matter of grant of sugar quota, unfettered discretion was rejected in emphatic terms. If there was such a thing as unfettered discretion to grant or withhold the quota, *Kaikaus J.* held it void "on account of its inconsistency with Article 11 of the Constitution.... This confers on all citizens the right to acquire property and to dispose of property subject to only reasonable restrictions in the public interest". So held *Kaikaus* J,

"to withhold quota is not a reasonable restriction".[162]

The basic principle, according to *Lord Bridge,* is to be found "nowhere more clearly expressed and explained than by *Professor Sir William Wade QC* in 'Administrative Law".[163] After quoting from authorities going back to classic *Rooke's case* [164] *Sir William Wade* writers:

"The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended". [165]

Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is

161 - PLD 1957 W.P. Lah. 914, 921.

162 PLD 1957 W.P. Lah.914, 921.

163 - 5th ed. 1982, pp. 355-56, also cited by Saleem Akhtar J in *Gadoon Textile vs. WAPDA* 1997 SCMR 641.

164- (1598) 5 Co-Rep 996, 77 ER 209.

165 Ibid.

whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose, everything depends upon the true intent and meaning of the empowering Act.

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives[166].

This is unfettered discretion, but a public authority may do neither unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good... Unreviewable administrative action is just as much a contradiction in terms as is unfettered discretion, at any rate in the case of statutory powers. The question which has to be asked is what the scope of judicial review is? But "there are legal limits to every power is axiomatic".[167]

Accordingly, unfettered or absolute discretion is a 'beguiling heresy', and those who argue, that some enactment confers unfettered discretion, are in the words of Wade and Forsyth, "guilty of constitutional blasphemy. Unfettered discretion cannot exist where the rule of law reigns".[168]

It follows that even when discretion is conferred in terms which are on their face unlimited, the courts are not powerless to prevent administrative discretion from being exercised

166 *Muhammad Amin Lasani vs. Messrs Ilyas Marine & Associates* PLD 2015 SC 33.

167 *Gadoon Textile v. WAPDA* 1997 SCMR 641, 802-3

168 H.W.R Wade & Forsyth, *Administrative Law*, Oxford, Clarendon Press, 7th Ed.1995. 88.

unconstitutionally and unlawfully.[169] Indeed, "before deciding whether discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion is conferred....".[170]

3.11 Wednesbury Principles

The judgment of Lord Greene MR in *Associated Provincial Picture Houses vs. Wednesbury Corporation* [171] contains the classic exposition of the principles on which administrative discretion must be exercised and of the grounds on which the courts will intervene, the most important of them being what has come to be known as 'Wednesbury reasonableness', also now referred to as 'the irrationality test'[172]

In Wednesbury, the plaintiffs were proprietors of Cinematograph Theater. Under the Sunday Entertainment Act, 1932, "subject to such conditions as the authority think fit to impose", and under this general power the authority imposed the condition that "No children under the age of 15 years shall be admitted to any entertainment, whether accompanied by an adult or not". This condition was challenged as unreasonable and 'in consequence, it was *ultra vires* the corporation'. The contention was held to be "based on a misconception of the effect of Act in granting this discretionary power to local authorities".

In what seem to be the leading passages, *Lord Greene* said:

"The courts must always remember, first, that the Act deals not with a judicial act, but with an executive act; secondly, that the conditions which, under the exercise of that executive

169 - Brind (1991) 1 All ER 720-723: *Teh Chung Poh vs. Public Prosecutor* (1980) AC 458, 472.

170 Ibid.

171 - (1947) 2 All ER 680.

172 - see Brind (1991) 1 All ER 720, 731.

act, may be imposed are in terms put within the discretion of the local authority without limitations; and thirdly, that the statute provides no appeal from the decision of the local authority. What, then, is the power of the courts? The courts can only interfere with an act of an executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority contravened the law to establish that proposition".[173]

On the face of it, a condition of this kind is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like local authorities will exceed their powers, and the court, whenever it is alleged that the local authority has contravened the law, must not substitute itself for the local authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of the discretion can only be challenged in the courts in a very limited class of cases.[174]

It must always be remembered that the court is not a court of appeal. The law recognizes certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law. What then are those principles? They are perfectly well understood. The exercise of such discretion must be real exercise of the discretion. If in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it

173 *Brind* (1991) 1 All ER 720-725.

174 *District Bar Association Rawalpindi vs. Federation of Pakistan,* PLD 2015 SC 401.

clear that certain matters would not be germane to the matter in question, they must disregard those matters.

Expressions have been used in cases where the power of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty – those, of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration.

In the present case we have heard a great deal about the meaning of the word 'unreasonable'. It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretion often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law.[175]

He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could even dream that it lay within the powers of the authority. [176]

Warrington, L.J..... gave the example of the red-haired teacher, who was dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into

175 *Teh Chung Poh vs. Public Prosecutor* (1980) AC 458, 472.

176 Ibid.

consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head".[177]

It is perfectly clear that the local authorities are entrusted by Parliament with the decision on a matter in which the knowledge and experience of the authority can be best trusted to be of value. The subject-matter with which the condition deals is one relevant for its consideration. It has considered it and come to a decision on it. Theoretically it is true to say – and in practice it may operate in some case – that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.[178]

The court may very well have different views from those of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse. All over the country, I have no doubt, one a thing of that sort; honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority who are put in that position and provided they act, as they have acted here, within the four corners of their jurisdictions, the court, in my opinion, cannot interfere..."

I do not wish to repeat what I have said, but it might be useful to summarize once again the principle, which seems to me to be that the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account, on neglected to take into account matters which it ought to take into account. Once that question is answered in favor of

177 Ibid.

178 *Khalid Iqbal vs. Mirza Khan,* PLD 2015 SC 50.

the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it.

In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it. Wednesbury principles have, despite some observation, [179] continues to be part of the English administrative law.[180]

Wednesbury was followed in *S.S. Mirinda Ltd. vs. Chief Commissioner, Karachi.*[181] Section 14 of the Sind Abkari Act, 1878, gave power to the Collector to grant licenses for the manufacture etc of intoxicants. The appellant was a company registered in, and with head office at, Bombay. It was also registered in Pakistan but the share-holders always resided in Bombay. In Pakistan, it was being managed by a Pakistani at Karachi under a power of attorney. The company had been trading in liquor since 1908 under a license. Since 1943, it had been given blending and bottling licenses. It was given retail 'off' license in 1946. But when it applied for the

179 - For example *in R vs. Chief Constable* (1999) 1 All ER 129, 157, Lord Coke said: "It seems to me unfortunate Wednesbury standards of judicial review and higher standards under -European Convention: "And I think that that Wednesbury and some of the Wednesbury phrases have become established incantations in the courts of the United Kingdom and beyond", and in *R vs. Secretary of State ex parte Daly* (2001) 3 All ER 433, 447 – The same Law Lord said in the context of the distinctions between traditional that is to say, in terms of English case law particularly the day will come when it will be more widely recognized that the Wednesbury case was an unfortunate retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness..."

180 - see for example, *Alconbury* case (2001) 2 All ER 929, at 976, per Lord Slynn: "Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing".

181 - PLD 1959 SC (Pak) 134, 145.

renewal of these licenses for 1957-58, the Collector enquired as to why they should be renewed. Finally, the licenses were cancelled and the Collector declined to renew the licenses. The Collector gave no reason, but the Commissioner on appeal, observed that "orders of refusal were issued presumably because the applicants are a foreign concern".[182] The Commissioner upheld the Collector's order.

Judging the case with reference to the Wednesbury principles, the Supreme Court held that the consideration that the applicant was a foreign company was a relevant, and not an extraneous, consideration and the executive discretion in question was therefore not liable to be interfered with.[183]

In *Amulya Chandra vs. Corporation of Calcutta* the Municipality had power, by section 556 of the Calcutta Municipal Act, 1899, to acquire any land which was in their opinion needed for carrying out any of the purposes of the Act. Acquisition of land for a *Dharamasala* was held to be one of the purposes of the Act. "This being so, "it was held "their Lordships would be the last to question the opinion or the exercise of discretion by the Municipality.... Even if they differed from it.... The Act has expressly placed the discretion, not with this board or with a court of law, but with the municipality itself" [184]

3.12 License, when it is a Matter of Discretion in Pakistan

A license means official or legal permission to engage in a regulated activity.[185] In *Government of Pakistan* vs. *Zamir Ahmad Khan*, [186] pursuant to a policy order made under the

182 Ibid.

183 Ibid.

184 Ibid.

185 *D.S. Textile Mills Ltd. v. Federation of Pakistan,* PLD 2016 Lah. 355.

Exports (Control) Act, 1950, the respondent applied, on 04.08.1972, through his Bank for the import license for the import of certain cinematograph films borne on free list. However on 09.08.1972 the policy order was amended, with the effect that from the date of amendment, cinematograph films could be imported from abroad only by an official agency to be named by the Ministry of Information & Broadcasting. Accordingly, the respondent was refused the license.[187]

It was held that Section 3 (1) of the Act conferred power of the widest amplitude on the Federal Government to prohibit, restrict or otherwise control the import and export of goods. Thus a complete ban on the import of particular variety of goods was clearly envisaged. In any case merely by applying on 04.08.1972 and satisfying all the conditions for the grant of license before the amendment, no vested right accrued to the respondent, nor had the acquired any legal right for the grant of license by merely applying for it. "Grant of license remains a privilege until it is actually granted and is accompanied by a grant". There was a clear distinction between refusal to grant license and to cancel a license already granted. "In the latter case, legal rights are often created because of the incident of the grant as a sequel to the license".[188]

Zamir Ahmad case noted above was considered in *Federation of Pakistan vs. Muhammad Aslam*[189] which too was a case under the Imports & Exports (Control) Act of 1950. The respondent, acting on the gift scheme dated 16.07.1978 applied for the import licenses to import

186 - PLD 1975 SC 667.

187 Ibid.

188 ibid.

189 - 1986 SCMR 916.

126 truck chassis. The scheme was revised on 20.03.1983. The authorities under the Act came to the conclusion that the truck chassis imported or sought to be imported were "new". [190]

They withdraw the import licenses already issued and declined to issue the remaining merely for the reason that they were not of the latest / current model. Thus they changed the criteria unilaterally and retrospectively and the Court held that the action of the authorities in recalling the 19 import permits already issued and refusal to permit the import of the remaining 107 was without lawful authority.[191]

Justice *Shafi-ur-Rahman* J. speaking for the Supreme Court, referred to *Zamir Ahmad case*, which was relied upon by the Government to contend that the respondents could not claim the import permits as of right. References were made to a press note, which had clarified the meaning of the word "new". The meaning so given to the word, it was held, was untenable. [192]

It was accepted that the Government possessed untrammeled powers and could prospectively prohibit or control the imports; such a power it was held had been recognized in *Zamir Ahmad case*. All the same, even such an extensive power has its limits. One such limit was spelt out in *Zamir Ahmad's case* and it is that vested rights cannot be allowed to be overridden, unless it takes place by unequivocal words, by an organ or authority competent to impair or override the vested rights". [193]

The second limit well recognized, is "that all executive power has to be exercised fairly and justly, for advancing the object of the legislation. In other words every such exercise of

190 Ibid.

191 Ibid.

192 PLD 1975 SC 667.

193 Ibid.

power is to satisfy the test of reason and relevance": It was found that in the circumstances of the case the respondent had acquired a vested right and was entitled to have its application for import permit considered according to the import policy in force before its revision on 20.03.1983.[194]

It has been said, and some of the precedents considered above can be cited as authority for the proposition, that those who seek a license or permit, seek a privilege, and have no entitlement and therefore no right to be dealt with fairly. *Lord Woolf* said in *R vs. Secretary of State, for the Home Department, ex p Fayed* [195] that "The days when it used to be said that a person seeking a privilege is not entitled to be heard are long gone".

3.13 Duty to Give Reasons and When Evidence must be recorded

Similarly, *Fayed* is authority for the view that however widely worded the discretion conferring provision may be, there is a duty to give a reasoned decision.[196]

In *Chief Constable vs. Evans*,[197] the relevant regulation enjoined the Chief Constable to consider that the respondent, a constable on probation, was 'fitted physically or mentally to perform the duties of his office' or was likely to "become an efficient or well-conducted constable" before dispensing with his services. In his affidavit, the Chief Constable claimed that the regulation gave him an absolute discretion to dispense with probation's services.

It was on this assumption that the Chief Constable forced the constable to resign. It was held that "the Chief Constable's decision to force the resignation of the respondent was vitiated both by the erroneous assumption that he had an absolute discretion and by his total failure to

194 Ibid.

195 - (1997) 1 All ER 228, 240.

196- ibid.

197- (1982) 3 All ER 141.

observe the rules of natural justice". The Chief Constable did not, it is to be emphasized, observe the rule of natural justice – *audi alteram partem* – because he thought, wrongly, that his discretion was absolute. So far as the responsibilities of a public functionary are concerned, it is sufficiently established that they act as a trustee. They are bound to be loyal to their trust. Role of a public official in a democratic set up is to serve the rights and interests of general public.[198]

In *Nawab Khan vs. Govt. of Pakistan*,[199] by the relevant rule, the authorized officer had discretion to decide, whether in a disciplinary proceeding against a civil servant in response to his reply to the charge sheet, a regular enquiry should be held or not. The discretion was not controlled by any precondition or guidance, "but nevertheless, this discretion, like all other discretion, is to be exercised fairly and reasonably and not arbitrarily or capriciously with the object to deny the civil servant the right of fair defense.

So if the charge is founded on admitted documents / facts, no full fledged enquiry is required but if the charge is based on disputed question of fact, a civil servant cannot be denied a regular enquiry, as the same cannot be resolved without recording evidence and providing opportunity to the parties to cross examine the witnesses.

In such a matter if findings of fact are recorded without recording any evidence, the same will be based on surmises and conjectures, which will have no evidentiary value as to warrant imposition of any punishment on the civil servant concerned".[200]

198- *Institute of Architects vs. Province of Punjab,* PLD 2016 Lah. 321.

199 - PLD 1994 SC 222, 229.

200 Ibid.

3.14 Discretion in Dissolution of Assemblies - A Typical Pakistani Perspective

Judicial reviews, in general, and judicial review of discretionary powers, in particular, reached a very high water mark in the dissolution of assemblies cases starting with *Khawaja Muhammad Sharif vs. Federation* [201] which on appeal became *Federation vs. Haji Muhammad Safiullah Khan* [202] they were followed in subsequent cases namely *Ahmed Tariq Rahim vs. Federation of Pakistan* [203] *Khalid Malik vs. Federation of Pakistan* [204] *Khawaja Ahmed Tariq Rahim vs. Federation of Pakistan* [205] *Mian Muhammad Nawaz Sharif vs. President of Pakistan,* [206] and *Benazir Bhutto case* [207]

By clause (2) of Article 58– the President 'may' also dissolve the national assembly 'in his discretion', where, in his opinion, "a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary".[208]

In view of the very wide terms used in this clause to vest the President with the power to dissolve, not unnaturally, it had been argued that the President's discretion was unfettered and absolute and not open to judicial review. The argument was consistently repelled.

---

201 - PLD 1988 Lah. 725.

202 - PLD 1989 SC 166.

203 - PLD 1991 Lah. 30.

204 - PLD 1999 Kar. 1.

205 - PLD 1992 SC 646.

206 - PLD 1993 SC 473.

207 - PLD 1998 SC 388.

208 Ibid.

In the words of *Sajjad Ali Shah* CJ in *Benazir Bhutto vs. President of Pakistan* [209]

"the discretion of the President is not absolute, but is deemed as qualified one and is circumscribed by the object of law that confers it. Secondly the court can go into the question whether the discretion is exercised justifiably or not and whether there is material in support of the grounded. In other words discretion is put in strait – jacket and is made open to judicial review..."

Thus, in the field of judicial review, abuse or excess of discretionary power is a well recognized ground for intervention. "A person entrusted with discretion must direct himself properly in law; he must call his own attention to the matters which he is bound to consider; he must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules, then this action will be abuse of power or in excess of power, and, therefore without lawful authority"[210]

3.15 Discretion to be used for the Statutory Purpose - Local Perspective

Even if the discretion is conferred in very wide terms, without any guidance, it is not an unfettered discretion and it must be used to promote the policy and the objects of the enabling Act. This is known in England as the Padfield doctrine after the case of *Padfield vs. Ministry of Agriculture* [211] The same principle had earlier been enunciated in 1957 in the *locus classicus* on the subject – *Montgomery Flour and General Mills vs. Director Food* [212]

209 - PLD 1998 SC 388, 550.

210- *Muhammad Nawaz vs. Muhammad Sadiq* 1995 SCMR 105, 121.

211 - (1968) 1 All ER 694.

212 - PLD 1957 (WP) Lah. 914.

By virtue of the Sugar and Sugar Products Control Order, 1948, which continued to be in force under the Essential Supplies Ordinance, 1956, the distribution of sugar was controlled and sugar could be purchased only on a permit issued under that Order by the food department. The petitioner's sugar quota was stopped on the ground that it had failed to pay a disputed debt unpaid by the petitioner as owner of another concern. The question was whether the director of food could withhold the quota of sugar on the ground that there was an unsettled money claim of the food department against the petitioner. The answer, it was held, must be in the negative:

"The discretion, given by section 7 of the Sugar and Sugar Products Control Order, for the distribution of sugar is not an absolute and arbitrary one, to be exercised according to the pleasure of the director of food. It is discretion to be exercised with a view to attaining the object for which the Essential Supplies Act, 1946, under which this Order was promulgated, was enacted. The Essential Supplies Act was necessitated because on account of deficient supply of certain commodities it was necessary that their prices and distribution be controlled and the object of the Sugar and Sugar Products Control Order is the fair distribution of sugar.

The director of Food (or other officer empowered under the Order) is entitled to pass an order granting or withholding quota of sugar only on the ground that that is the order which should be passed for a proper distribution of sugar in accordance with the object and policy of the Essential Supplies Act and the Order. If the order granting or rejecting the quota of sugar be based on ground that is beyond the scope of the Essential Supplies Act, the order is an abuse of power. The Essential Supplies Act was not enacted in order to arm the Government with a weapon to enforce its alleged claim and cannot be used for this purpose. The Director of Food might as well refuse quota for the purpose of putting pressure on a person to leave a particular

political party, or be a witness for the prosecution in a police *challan* or to give information to the Customs Department.

It should be remembered that no discretion vested in an executive office is an absolute and arbitrary discretion. The discretion is vested in him for a public purpose and must be exercised for the attainment of that purpose. Even though there are no express words in the relevant legal provision to that effect, the discretion is always circumscribed by the scope and object of the law that creates it and has at the same time to be exercised justly, fairly and reasonably.

Every officer who passes an order in a matter of discretion should ask himself the question: what is the order I should pass if I were acting justly, fairly and reasonably? If the order that he passes is not in accordance with the answer which he would himself give to this question, he exceeds his jurisdiction and abuses his powers. The answer to the question must be his own for the discretion is his and not that of the court but his action must correspond to his own answer to the question".

These principles were cited with approval by the Supreme Court in *Messrs East & West Steamship vs. Pakistan* [213] and then in *Federation of Pakistan vs. Muhammad Aslam.* [214] And in *Federation of Pakistan vs. Muhammad Saifullah Khan* [215] it was said of the President's power under Article 58 (2) (b) to dissolve the National Assembly, that "this discretion conferred... on the President cannot, therefore, be regarded to be an absolute one, but is deemed to be a qualified one, in the sense that it is circumscribed by the object of the law that confers it".

213 - PLD 1958 SC (Pak) 41.

214 - 1986 SCMR 916, 929-30.

215 - 1989 SC 166, 189.

Padifield [216] is the leading authority for the proposition that there can be no such thing as an unfettered discretion in public law. That case concerned the power of the minister under section 19 (3) of the Agricultural Marketing Act, 1952, to appoint a committee of investigation into the operation of milk marketing schemes. The Act provided for a committee of investigation, which was to consider and report on certain kinds of complaint "if the minister in any case so directs".

The question was whether those words gave the minister absolute discretion or whether it was subject to review and if so on what grounds. "It was implicit in the argument for the minister that there were only two possible interpretations of that provision – either he must refer every complaint or he has an unfettered discretion to refuse in any case".

Lord Reid said: "I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and object of the Act, the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if person aggrieved were not entitled to the protection of the court. So is necessary first to construe the Act".[217] As a result of the interpretation of the Act and examination of the authorities referred, *Lord Reid* said:

"So, there is ample authority for going behind the words which confer the power to the general scope and objects of the Act in order to find what was intended... I have found no

216 - (1968) 1 All ER 694.

217 Ibid.

authority to support the unreasonable proposition that it must be all or nothing – either no discretion at all or an unfettered discretion. Here the words 'if the Minister in any case so directs' are sufficient to show that he has some discretion, but they give no guide as to its nature or extent. That must be inferred from a construction of the Act of 1958 read as a whole, and for the reasons which I have given I would infer that the discretion is not unlimited, and that it has been used by the Minister in a manner which is not in accord with the intention of the statute which conferred it. As the minister's discretion has never been properly exercised according to law, I would allow this appeal".[218]

Padfield was described by Lord Denning in *Breen vs. Amalgamated Engineering Union*[219] as "a landmark in modern administrative law". Said *Lord Denning:*

"It is now well-settled that a statutory body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still it will act fairly. It must, in a proper case, give a party a chance to be heard: The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith: nevertheless the decision will be set aside".

So for as statutory construction is concerned, so said *Stuart-Smith* LJ in *R vs. Secretary of State ex p. Spath Holme* [220] "the Court adopts a purposive approach", and the materials which are

218 Ibid.

219 - (1971) 1 All ER 1148.

admissible in order to determine the statutory purpose include – "the legislative history of the Act, or the sections concerned, the legislative history of previous relevant enactments, white papers, official committee reports and law Commission reports. They also include other parliamentary materials where (a) the legislation is ambiguous or obscure or leads to an absurdity, (b) the material relied upon consists of one or more statements by a minister or other promoter of the bill together if necessary to understand such statements and their effect. (c) the statements relied upon are clear. Moreover in the case of judicial review the practice which has continued over a number of years is that has frequently been referred to with a view to ascertaining whether a statutory power has been improperly exercised for an alien purpose or in a wholly unreasonable manner".

It remains to be observed that the principle that a statutory power of administrative discretion must be used for statutory purpose has now received legislative confirmation in a recently enacted provision namely section 24A of the General Clauses Act, 1897, which, among others, provides that a statutory power of making an order "shall be exercised.... for the advancement of the purposes of the enactment" which gives that power. As we perceive this provision as a legislative confirmation and recognition of the judicially enunciated principles noticed above, it must be read in the light of those principles, as providing the necessary background for it.

---

220 - (2000) 1 All ER 884, 894.

3.16 Military Discretion' during War

Armed forces are part of the executive authority of the State [221] and therefore military discretion' is part of the administrative or executive discretion.

The case of *Korematsu vs. US* [222] provides a prime example of 'military discretion' and the respect and consideration that the courts will accord it. During World War II, in March 1942, Congress passed legislation empowering the President by executive order and Cabinet and military officers under his direction to restrict movement or residence in any designated military area or War Zone where he felt that such restriction was necessary to national security. Exclusion Order No. 34 was issued by the Commanding General of the Western Command, barring all persons of Japanese descent from named military area. *Korematsu* an American citizen of Japanese ancestry refused to leave the area where his home was located. He was convicted for violating the Act and he appealed to the Supreme Court. While the majority upheld the conviction, *Justice Murphy*, in his dissenting opinion, said:

"In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgment of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters vital to the physical security of the nation.

221 - *Liaqat Hussain vs. Federation of Pakistan* PLD 1999 SC 504, 656-7, per Saeed uz zaman Siddiqui J.

222 - 323 US 214. (1942).

At the same time, however, it is essential that there be definite, limits to military discretion, especially where material law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interest reconciled. 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions'[223]

The judicial test of whether the government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonable related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.[224] Yet no reasonable relation to an 'immediate imminent, and impending, public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of material law".

In *Taylor and others vs. Monroe District Auditor*,[225] *Lord Parker CJ.* observed: "... that the District Auditor came to the conclusion that the Council did not have what I may call an absolute discretion... but a discretion under which they were bound to act reasonably preserving the balance between the duty they owed to the general body of rate-payers and the duty which they owed to these particular tenants..."

223 - *Sterling vs. Constantine* 287 US 378, 401; 53 S. Ct. 190, 196.

224 - *United States vs. Russell*, 20 L Ed. 474.

225 - D.C.M. Yardley, "A Source Book of Administrative Law", p.180.

Garner observes at page 141: "... the difficulty here is to recognize the cases in which the Courts will say Parliament has conferred an unfettered discretion on the administrative agency and to distinguish them the cases where the agency will be expected to exercise its discretion in accordance with standards prescribed in the statute or implied by the Court...". Where power was given to build hospitals in London for the benefit of the poor, it was held not to authorize the building of a smallpox hospital in Hampstead where the Hospital was a nuisance to the neighborhood, *Metropolitan Asylum District vs. Hill*". [226] Since the statutory power gave discretion as to the sites of the hospitals it was presumed that Parliament did not intend to permit the violation of private rights. There is, therefore, a presumption that discretionary power shall, if possible, be exercised so as to respect the rights of other people.

In PLD 1956 Lahore 824 at page 832 it was observed:-

"... on a careful consideration of the matter I am of the opinion that it is not possible to support the proposition that in respect of purely executive acts the discretion of the executive is not subject to any consideration of justice, reason and fairplay...".

At page 835, *Kaikaus* J. while referring to *SK. Gosh vs. Vice-Chancellor Utkal University* observed that it was held in that case that a body exercising statutory powers was not protected merely because it acted bonafide. It must also act reasonably and with due care. Kaikaus J. cites Lord Mansfield at page 837, "... it is true that the judgment and discretion of determining ... This profession is trusted to the College of Physicians and this Court will not take it from them nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this

226 - Wade, "Administrative Law", p.154.

trust thus committed to the 'ought' to be fair and candid and unprejudiced, nor arbitrary, capricious or biased much less wrapped by respondent or personal dislike...".

In PLD 1956 Lahore 615 at page 639 *Yaqub Ali J.* approved the following Para from *Maxwell:-*

"... where as in a multitude of acts something is left to be done according to the discretion of the authority on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute. According to his discretion means, it has been said, according to the rules of reason and justice, not private opinion, according to law and not humor, it is to be not arbitrary, vague and fanciful, but legal and regular, to be exercised, not capriciously but on judicial grounds and for substantial reasons and it must be exercised within the limits to which an honest man competent in the discharge of his office ought to confine himself, i.e. within the limits and for the objects intended by the Legislature".[227]

The above Para is also approved by *Kaikaus J.* in PLD 1956 Lahore at page 833. In this case *Kaikaus J.* while referring to the decision of the Privy Council in *Leslie Williams vs. Haines Thomas* observes that "even though the above case was an extreme case and the exercise of discretion was as their Lordships put it at best, a colorable performance, but there are observations in the judgment which without doubt support the conclusion that there does exist even in respect of administrative acts a duty of being just fair and reasonable".

His Lordship further observes at page 838: "... my conclusion is that even in respect of purely administrative acts there is a duty to act justly, fairly and reasonable and if the order impugned be one which could not possibly have been passed by a person acting justly, fairly and

227 - PLD 1956 Lah. 639.

reasonably, the order will be invalid in law...". In PLD 1957 Lahore, 914 at page 920 *Kaikaus,* J. observed:

"... it should be remembered that do discretion vested in an executive officer is an absolute and arbitrary discretion. The discretion is vested in him for a public purpose and must be exercised for the attainment of that purpose. Even though there are express words in the relevant legal provision to that effect, the discretion is always circumscribed by the scope and object of law that creates it and has at the same time to be exercised justly, fairly and reasonably.

Every officer who passes an order in a matter of discretion, should ask himself the question what is the order, I should pass, if I were acting justly, fairly and reasonably. If the order that he passes is not in accordance with the answer which he would himself give to this question, he exceeds his jurisdiction and abuses his powers. This answer to the question must be in his own discretion and not that of a Court, but his action must correspond to his own answer to the question..." [228]

His Lordship seems to envisage here a very honest and fair executive officer, the species of which are rare. It must be remembered that though the last sentence in the above observation tends to suggest that the criterion is subjective, but in fact it is not difficult to see that the test is objective and the Court standard therefore is applied as test. In PLD 1958 Lahore 345, it was held that there was an arbitrary exercise of discretion when the licensing authority even though acting in administrative capacity had cancelled the license of the petitioner.

In PLD 1967 Supreme Court 559, at page 579, *Hamood-ur-Rahman J.* observed in an election case heard by the full court: "... the mere fact that there is an element of discretion in

228 - PLD 1957 Lah. 914 at page 920.

the duty discharged is not by itself sufficient to exclude relief by way of *mandamus* for even a discretion must be exercised reasonably and honesty and not arbitrarily or capriciously or in bad faith...".

His Lordship further observed that in reference to the validity of the votes cast "... there was no possibility of any doubt for dispute as to the person in whose favor the marks had been made on the said ballot paper. In the circumstances the action of the presiding officer in declaring those papers invalid was, in my opinion, wholly arbitrary and not inspired by any sense of duty, which he had to perform, that is, to do justice between the rival candidates. Such an arbitrary exercise of powers may well be said to be a merely a colorable exercise of powers or even an abuse of power '...".

In PLD 1961 Lahore 453, at page 465 it was observed "... No doubt the law has conferred authority on these officers to decide whether the property is divisible or not and if their decision is based on good grounds and is not arbitrary or capricious, no interference can be made by this court in exercise of writ jurisdiction. The decision of this question, however, is not based on any ground, what to say of reasonable ground and appears to be arbitrary and capricious.

In these circumstances this Court would be justified in interfering by issuing an appropriate writ...". Further observed at page 466: "... although this Court is not called upon to substitute its own judgment for that of the chief settlement commissioner, the contention is that the conclusion of that officer is so unreasonable that no reasonable person could have ever come to it and hence interference in the matter is called for. This contention, in my opinion, is

supported by authorities and hence on this ground also the order of chief settlement commissioner is liable to be quashed".[229]

In the case above referred to (*Hadi Ali's Case*, the following citation from *Leslie Williams vs. Haines* case is reproduced. "... in that case the public service board had to determine what amount should be granted as gratuity to a servant of the State of New South Wales. The Board had discretion to grant at the rate of a month's average salary for each year of service. The average monthly salary of the servant concerned was £ 23 and 10 Shillings and 1 pence... they, i.e., the Board struck off the pounds, they struck off the shillings and they allowed him just one penny for each year of service...". It was no body's case that the servant had in any way misconduct himself so as to merit such treatment. Their Lordships held that there was no true exercise of discretion.

Lord McNaughton who delivered the judgment of the Court, while discussing the question whether there was a real exercise of discretion, said "... well, this is not the first occasion on which 7 year's faithful service has met with a recompense at once, unexpected and undesired. That is probably the best that can be said for the action of the court, but was it reasonable? Was it fair? Few would deem it a generous or handsome produce to the work of an old and faithful servant, even with the extra farthing thrown in. plain folk would call it a mockery, a sham, pretence.

Nobody, of course, can dispute that the Government or the Board has discretion in the matter. But it was not an arbitrary discretion as Bring J. seems to think. It was a discretion to be exercised reasonable, fairly and justly...". Further, *Maxwell* is cited: "...if people who have to

229 - PLD 1961 Lah. 466.

exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion".

In PLD 1964 S C 761. *Kaikaus, J.* had observed:

"... on a question of principle, I would also say that discretionary remedies are no substitute for remedies to which a person has a right even though the discretion is a judicial one".

Discretion must not be exercised arbitrarily.[230] Where unfettered discretion was given, the Ordinance was declared invalid.[231] Where the discretion was arbitrary, Ordinance was declared ultra vires.[232]See also the following cases.[233]The courts have directed the officers to consult lawyers before they use discretion.[234] Discretion in administrative decisions must be exercised in an objective manner.[235]See *Mian Sultan Ali's case*,[236] also *following cases*.[237]

230 - PLD 1959 S. C. 134, PLD 1964 S. C. 337.

231 - PLD 1965 Dacca 156 and compare it with *Raza Kazim's case*, PLD 1961 S. C. 138 which is difficult to reconcile.

232 - PLD 1964 Lah. 718.

233 - PLD 1963 S. C. 582; PLD 1962 Lah. 42 and PLD 1962 Lah. 751.

234 - PLD 1962 Dacca 310: PLD 1955 Sind 96.

235 - PLD 1949 Sind 22: PLD 1961 Lah. 247.

236 - PLD 1949 Lahore 301.

237 - PLD 1954 Punjab Rev. 5 (1) PLD 1957 Lah. 914, PLD 1956 kar. 237, PLD 1957 Lah. 487. Supreme Court of Texas said in *Morcau vs. Bond* 114 Tex 468, 271 Sw. 379 as follows:

"those rights, fundamentals in their nature, which have been guaranteed by the Bill of Rights cannot be the subject of judicial discretion. Judicial discretion is a legal discretion and not a personal discretion: a legal discretion to be exercised in conformity to the Constitution and the laws of the land. It is only in the absence of positive law or fixed rule that the judge may decide by his view of expediency or of the demand of justice or equity".

3.17 Extended Survey Of British Judicial Trend On Interpretation Of Subjective Statutory Expressions

"REASONABLE"

In *Smith v. Cardiff Corporation* [238] and *Summerfield v. Hampstead Borough Council* [239] objective test was applied to the word reasonable. In PLD 1964 S. C. 715 Cornelius C.J. observed:

"... The absence of express requirement of reasonable ground's has never stood in the way of British Courts interfering to review an executive action...".

For the difference between "sufficient cause" and reasonable cause" see *Osgood v. Nelson* [240] In *Kruse vs. Johnson* [241] *Lord Russell of Killowen,* C.J. observed:

"...notwithstanding what Cockburn C. J. said in *Bailey vs. Williamson*, an analogous case, I do not need to say that there may not be cases in which it would be the duty of a Court to condemn bye-laws, made under such authority as these were made as invalid because unreasonable. But unreasonable in what sense?

If for instance they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclose bad faith, if they involve such oppressive or gratuitous interference with the rights of those subject to them a, could find no justification in the minds of reasonable men. The Court might well say Parliament never

238 - (No. 2) (1955) 1 All England Reports, 113.

239 - (1957) 1 All England Reports 221.

240 - LR 1827 AC 63.

241 - (1898) 2 QB 91.

intended to give authority to make such rules; they are unreasonable and ultra vires. But it is in this sense and in this sense only, as I can conceive that the question of unreasonableness can properly be regarded. A bye-law is not unreasonable, merely because particular Judges may think that it goes further than is prudent or necessary or convenient or because it is not accompanied by a qualification or an exception which some judges may think ought to be there... indeed if the question of the validity of bye-laws were to be determined by the opinion of Judges as to what was reasonable in the narrow sense of that word the cases in the books on this subjects are not guide for they reveal as indeed one would expect and a wide diversity of judicial opinion and they laid down no principle of definite standard, by which reasonableness or unreasonableness may be tested...".

In *Nakhuda Ali's case*, *Lord Radcliffe* observed: "... it would be impossible to consider the significance of such words as "where the Controller has reasonable grounds to believe" without taking account of the decision in *Liversidge's case*.... And the decision of the majority of the House did lay down that those words in that context meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the required thing. On that basis, granted good faith, the maker of the order appear to be the only possible Judge of the conditions of his own jurisdiction....".

Professor *Garner* says:[242]

"... As we have seen expressions like such phrases as 'they may think fit' and 'review from time to time' do not confer on a local authority any absolute discretion, the reasonableness of their decisions will be judged by an objective test and the Courts will not be content merely to

242 - J. F. Garner, "Administrative Law" p.144.

allow the authority to take such decisions as they may consider reasonable ... thus although the Housing Act empowered (local authority) to grant such rebates from rent as they may think fit, it was held in *Smith vs. Cardiff Corporation* that the reasonableness of such charges and rebates was open to review by the Courts because the charges must be reasonable in fact and not merely reasonable in the opinion of the local authority..." [243]

Similarly in *Summerfield vs. Hampstead Borough Council* [244] the Court was prepared to consider whether the rent scheme of the defendant local authority was a reasonable one. But it is not for the Courts per Lord Justice Harman, *in Luby vs. Newcastle Under Lyme Corporation* [245] to substitute its view of what would be reasonable or the view of the Corporation on whom this discretion has been conferred by Parliament.

In *Taylor and others vs. Munroe District Auditor* [246] the question was as to whether the law required powers to be exercise reasonably and the answer was in the affirmative. Lord Justice Parker C. J., observed: "... (District Auditor) came to the conclusion that this Council did not have what I may call an absolute discretion under Section 4 of Act of 1955, but the discretion under which they were bound to act reasonably, preserving a balance between the duty which they owed to the general body of rate-payers and the duty which they owed to the particular tenants...".

A vast amount of case-law surrounds these limitations (on bye-laws), especially the requirements of reasonableness, which, depends always on particular circumstances, and which

243 - J. F. Garner, "Administrative Law" p.144.

244 - (1957) 1 AER 221.

245 - (1962) 3 AER, 179 at page 173.

246 - (1960) 1 WLR 151.

therefore, case is *Kruse vs. Johnson* and a study of the long line of decisions reveals entertaining distinctions and contrasts in judicial standards of reasonableness... so far as local authority bye-laws are concerned, and they are the most important to the ordinary citizen, it is seldom now a days that they violate reasonableness and common sense...".[247]

In *Maudoodi's case*, *Cornelius C. J.* at page 708 observed:

"... the courts cannot regard themselves as satisfied that the citizen's freedom has been subjected to a reasonable restriction unless it is proved to their satisfaction, that not only the grounds or restriction as stated by the laws are reasonable in themselves, but they have been applied reasonably, as required by the constitution.

The only manner which the court themselves would regard as reasonable is that the existence of the factual grounds of the restriction should have been established in the mode which the courts recognized as essential when a right to life or liberty or property is concerned, namely after a proper hearing given to the person concerned". [248]

Fazal-e-Akbar J. observed in *Maudoodi's case* [249] "... the court while testing reasonableness, may also consider the precise nature of the interest that has been adversely affected, the reasons for doing it, the manner in which it has been done, the procedure that was followed, the balance of hurt complained off and the good accomplished ...".

Further observed "... the provisions of Criminal Law Amendment Act of 1908 being penal in nature cannot possibly be regarded as reasonable restriction on a fundamental right. It in

247 - C.K. Allen, "Law and Order", p.232.

248 - PLD 1954 S. C. 708, See page 700 also.

249 - PLD 1964 S. C. 708.

effect destroys the right of an association for an indefinite period without hearing or trial merely on the subjective satisfaction of the executive. Indeed such a law can on no construction of the word "reasonable" be described as coming within that expression..."

Hamood-ur-Rahman J. observed in the same case:

"... it seems to be that from the very nature of things no hard and fast rule can be laid down as to what matters are relevant or irrelevant for the purpose of determining the reasonableness of an act or restriction. Reasonableness is itself a relative term. What is unreasonable in one given set of circumstances may well be reasonable in another different set of circumstances"

In my view it will neither be possible nor advisable to lay down any exact or precise enumeration of the matters which may be taken into consideration for testing the reasonableness of such a restriction, for there can be no general standard of reasonableness applicable to all cases.

It will certainly depend upon the nature of the rights sought to be restricted, the nature and extent of the restrictions sought to be imposed, the nature of circumstances in which the restriction is to be imposed, the evil sought to be prevented or remedies, the necessity or urgency of the action proposed to be taken and the nature of the safeguards if any provided to prevent possibilities of abuse of power.

All these and there may well be other considerations such as the objectives of the legislation and the prevailing conditions at the time in the light of which the reasonableness has to be considered. This much, however, appears from decided cases that the Courts, both in this and other foreign jurisdictions have treated restriction as unreasonable, if the restriction is for an indefinite or an unlimited period or disproportionate to the mischief sought to be prevented or, if

the law imposing the restriction has not provided any safeguard at all against arbitrary exercise of power. I am not prepared to go to the extent of saying that if a law merely confers an unfettered discretion, then it must necessarily be bad. It is not difficult to conceive a situation where power must be vested in some authority to take immediate action to prevent acts coupled with imminent danger, even though such prevention encroaches upon the fundamental rights guaranteed to citizens by the Constitution of this country.

But here again the reasonableness of this would be dependent upon the circumstances, which requires the taking of such drastic action, the duration for which is to be taken and the safeguard provided against abuse of power. If the circumstances do not demand such action or the action is disproportionate to the mischief to be prevented can be exercised without any check, then the restriction will certainly be unreasonable..."

"**REASONABLE CAUSE TO BELIEVE**": It was said in *Nakhuda Ali's case* that it would be a very unfortunate thing if the decision in the *Liversidge's* case came to be regarded as laying down any general rule as to the construction of such phrases. *Lord Devlin* in the House of Lords in *D. P.P. vs. Chandler* [250] (1962) referred to the reasoning in *Liversidge's* case as an exegesis of an emergency regulation rather than part of the common law and in *Ridge vs. Baldwin*, Lord Read referred to it as "very peculiar". It has also been termed as a contribution to the War effort. *Hamood-ur-Rahman* J. restricted the decision to be an interpretation of section 18 of the relevant Act [251]

250 - 1962 2A E. R. 142 (1959).

251 - see PLD 1964 S. C. 673 Hamood-ur-Rahman J, PLD 1951 S. C. 41, AIR 1951 S. C. 118, PLD 1968 S.C. 313, PLD 1936 Lah. 615 (639) PLD 1956 Lah. 824 (833) PLD 1957 Lah. 920. See Wade, "Administrative Law" at pp 63-64, Halsbury Vol. 2nd Ed. (26) 1283, D.C.M. Yardley, "A Source Book of English Administrative Law"

"THINK FIT"

It was observed in the famous *Mohammad Akram case* (5 writs petitions decided together by one judgment – Election case, petition accepted): "We have no doubt in our mind that the expression "as it may think fit" in S 60 (of Electoral College Act IV of 1964) means according to the rule of reason, of justice and in accordance with law and not in accordance with humor, caprice or private opinion. The Legislature cannot be presumed to have invested him with arbitrary power of a despot to make any order to satisfy his caprice". [252]

See *Board of Education v. Rice* at p. 182 *Lord Loreburn L. C.*

Foulkes, the learned author says: "It will be seen, therefore, that there are important checks on the exercise of discretion even where the recipient of a power can do as he thinks fit".[253]

Legislatures sometimes try to restrict the power of court to review the administrative discretion by conferring powers in the subjective language. The laws which are meant for emergency situation, usually, give the executive powers over person and property. The wording of these powers are considered sufficient at least on a literal interpretation, to support validity of almost any act purported to be alone in pursuance of them.

Apart from emergency situations, the courts strictly interpret their subjectively worded powers against the ouster of judicial review. In this regard *Professor de Smith's* [254] reviewed:

---

pp.122, 183, J. F. Garner, "Administrative Law" p 144, and Fazal, "Judicial Control of Administrative Action in India and Pakistan", pp. 107-108.

252 - Ibid.

253 - Foulkes, Administrative Law, p. 108.

254- Judicial Review of Administrative Action, 4th ed. P.290.

Wartime and immediate post-war decisions ought not to be treated with the reverence." When Professor de Smith had said so, he of course had cases like *R vs. Halliday* [255] *and Liversidge vs. Anderson* [256] in his mind. *Liversidge vs. Anderson* is one the bad precedents in the field of judicial review of administrative discretion. The Defense Regulations provided: "If the Secretary of State has reasonable cause to believe any person directly that he be detained." The House of Lord by its majority decision held that the Secretary of State had subjective discretion which could not be challenged in judicial review.

There was one of the few cases [257] where the courts have great latitude over executive to exercise their discretionary power subjectively and be immense from the clutches of judicial review. Although English courts indirectly tried their best the liberate themselves from the harsh precedent laid down in *Liversidge vs. Anderson* but it was only after about forty years the dicta was expressly reversed by the House of Lords in *ex P. Ross minster.* [258]

Lord Diplock held that Liversidge case was wrongly decided. Lord Scarman observed that the ghost of that case need no longer haunt the law. But this dictum too lasted only for few days and again in *exp Zamir.*[259] House of Lords Subjectively interpreted the Immigration Act, 1971, and allowed wide discretionary powers to the minister. Bu this is regarded as prerogative power of the Crown (Supra) by the English Courts. However, even *Zamir's case* was expressly overruled by the House of Lords in *ex p Khawaja* [260] Nonetheless, it clearly shows the glorious

255- (1917) A.C. 260.

256- (1942() A.C. 206.

257- *For others kindly see, King Emperor vs. Benoari Lal Sarma (1945) A.C. 18,Mc Eldowney vs. Forde* (1971) A.C. 632, *Laker Airways vs. Department of Trade* (1977) Q.B. 643, *Ningkan vs. Govt. of Malaysia* (1970) A.C. 379.

258- (1980) AC. 952.

259- (1984() AC. 930

260- (1984) A.C. 24.

uncertainties of English law, and who knows the ghost may well be around the corner[261]. The same subjective interpretation of Liversidge case was applied by the Privy Council in *Sibnath Bamerji's case*, [262] and *Vimlabai Dispande's case* [263] from its Indian jurisdiction.

Here we will try to classify the subjective words usually used by the legislature and will see that how the courts have interpreted these words.

'If Satisfied'.... Words like 'if satisfied' or 'satisfaction' appearing in any provision of law was used to be interpreted subjectively except in the case of bad faith. Even in *Liversidge case, Lord Atkin* (dissenting) accepted that if the regulation had merely required the Secretary of State to be ;satisfied', in the case, he would have had complete discretion. But English Courts changed their attitude and in *Mardana Mosque Trustees vs. Mahmud*, [264] the Privy Council interpreting the words where the minister is 'satisfied' held that there must be some grounds on which the Minister could be 'satisfied'.

This was a break through as the 'satisfied' was objectively interpreted. In another case [265] House of Lords approved this practice. Under the Education Act, 1944, the Minister could issue directions to the local authority if he was 'satisfied' that the authority had acted unreasonably. When minister's directions to the authority, not to abandon a scheme of comprehensive schools made by its predecessor authority, were not obeyed, they applied for an order of mandamus but without success.

261- Dr. D.M. Malik, Judicial Review of Discretionary Powers 1990 PULJ 68 at P.72.

262- LR 72 1 A 241.

263- LR 73 1A 144.

264- (1967) A.C. 13.

265- Tameside case (1977) A.C. 1014.

The *House of Lords* held:

"If a Judgment requires, before it can made, the existence of some facts, then although the evaluation of those facts is for the secretary of state alone, the court must inquire whether those facts and have been taken into account."

In Pakistan, soon after independence our courts started giving objective meaning to subjective words. In 1949 the Sind High Court held that the 'satisfaction; of detaining authority under N.W.F.P. Public Safety Act, 1949 was not subjective and the authority was required to show that it had carefully considered the facts and law applicable to the matters. In *Sakhi Daler's case* [266] the Lahore High Court held that the 'satisfaction' of the Government must be based on some material.

In one of the leading case [267] on the subject, in interpreting the word 'satisfaction' of the detaining authority under Defense of Pakistan Rules, 1965, the Supreme Court observed that 'satisfaction' of the detaining authority must be a state of mind which has been induced by the existence of reasonable grounds for such 'satisfaction'.

The Supreme Court of Pakistan defeated another attempt to defeat the judicial review of the legislature through its enunciation of law in two subsequent cases [268] of detention.

The Opinion..... "Opinion" is another word which is generally considered as subjective but English and Pakistani Courts by their concurrent findings held that the authority

266- PLD 1957 Lahore 813.

267- *Ghulam Jilani vs. Govt. of West Pakistan* PLD 1968 SC 273.

268- PLD 1968 SC 313.

should from its opinion or some grounds and not in isolation. In *Reade vs. Smith*,[269] power vested in the Governor General to make such regulations as he 'thinks necessary to secure the due administration' of an Educational Act was held to be invalidly exercised in so far as his 'opinion' as to the necessity for such a regulation was not reasonably tenable.

In *Customs and Excise Commissioners vs. Cure and Deeley Ltd*[270] the Commissioner of Customs and Excise was empowered to make regulations for "any matter for which provision appears to the them necessary for the purpose of giving effect" to the Act was not construed as constituting them as the sole judges of what was in fact necessary for them for the purposes of the Act, and a regulation whereby they gave themselves power to determine conclusively the amounts of tax payable was held to be *ultra vires.*

The landmark decision in English legal history in this respect came in *Padfield case.*[271] The minister had refused to appoint a committee, as he was statutorily empowered to do when he think fit, to investigate complaints made by members of the milk marketing board that the majority of the Board had fixed milk prices in a way that was unduly unfavorable to the complaints. The House of Lords held that the minister's decision was not unfettered and that the reason ultra *vires* by taking into account factors that were legally irrelevant and by using his power in a way calculated to frustrate the policy of the Act.

In Pakistan, *Abul A'la Maudoodi vs. government of West Pakistan*[272] Is the leading case in which the subjective word 'opinion' was interpreted by the Supreme Court objectively,

269- (1959) N.Z.L.R. 996;see also *Law vs. Earthquake Commission* (1959) N.Z.L.R 1198.

270- (1962) 1 Q.B. 340.

271- *Padfield vs. Minister of Agriculture, Fisheries and Food* (1968) A.C. 997.

272- PLD 1964 S.C. 673.

Section 16 of the Criminal Law Amendment Act, 1908, provided that government could declare an association as unlawful if in its "opinion" the association's aims was to interfere in the maintenance of law..... *Cornelius, C.J* Construed the word "opinion" as under"

"..... it is a duty of Provincial Government to take into consideration all relevant facts and circumstances that imports the exercise of an honest judgment as to the existence of conditions in which alone the opinion may be framed, consequent upon which the opinion must be framed honestly,, that the restriction is necessary. In this process, the only element which is found to possess a subjective quality as against objective determination is the final formation of opinion that the action proposed is necessary."

Even this is determined for the most part, by the existence of circumstances compelling the conclusion....., the requirement of a honest opinion based upon the ascertainment of certain matters which are entirely within the grasp and appreciation of the government agency is clearly a pre-requisite to the exercise of the power.

In the period of foreign rule, such an argument, i.e. that the opinion the person exercising authority is absolute may have at times prevailed, but under autonomous rule, where those who exercise power in the state are themselves citizens of the same State, it can hardly be tolerated."[273] Again in one of the leading cases in our Constitutional history, i.e. *Federation of Pakistan vs. Muhammad Saifullah Khan* [274] The Supreme Court, while construing the power in the hands of President to dissolve the National Assembly in his discretion under Article 58 (2)(b) of the Constitution, observed:

273- Ibid, at P.13 & 14.

274- PLD 1989 S.C. 166, see also *Ahmed Tariq Rahim vs. Federation of Pakistan* PLD 1992 S.C. and also *Nawaz Sharif vs. Federation of Pakistan* PLD 1993 S.C. 473.

"it must further be noted that.... President has to first form his "opinion", objectively and then it is open to him to exercise his discretion one way or the other, i.e. either to dissolve the Assembly or to decline to dissolve it.... An obligation is cast on the President.... That before exercising his discretion he has to form his 'opinion' that a situation of the kind envisaged in Article 58(2) (b) has arisen which necessitates the grave step of dissolving the National Assembly.[275] Again it was held that absence of requisite statutory provisions or rules could not be filled through administrative orders.[276]

As it thinks fit or just and proper.....- the courts have generally declined to construe such words as investing the authority with an absolute discretion to do as it pleases. It was as back as in 1927 that English courts held that the Minister of Transport, when empowered to make such orders as he "think fit" on a licensing appeal, was obliged to confine himself to matters raised in the course of the appeal and to disregard irrelevant consideration in exercising his discretion.[277]

In the famous case of *Robert vs. Hopwood*,[278] it was held by the House of Lords that the council was empowered to pay their employees such wages as they "think fit" would not imply that the council was at liberty to pay more than what was reasonable in light of general rates of wages.

275- Ibid, at P 189 (Per Dr. Nasim Hassan Shah J.).

276- *Punjab Healthcare Commission vs. Mushtaq Ahmad* PLD 2016 Lah. 237.

277- *R. vs. Minister of Transport, ex. P. H.C. Motor Works Ltd.* (1927) 2. K.B. 401.

278- (1925 A.C. 578, see also *Taylor vs. Munrow* (1960) 1W.L.R. 151. And also *Prescott vs. Birmingham Corporation* (1955) ch. 210.

Utility Stores Corporation vs. Punjab Labor Appellate Tribunal [279] is the landmark judgment in the development of administrative law in Pakistan *Muhammad Haleem, C.J.* while construing the words "just and proper", occurring in section 25A(5) of the Industrial Relations Ordinance, 1969 observed:

"The words "just" and "proper" mean "right or fair" and "suitable" respectively. The word "just".... Has been used as an adjective to the mean "According to law" and the word "proper" to mean "Accurate". There, the order to "just and proper" conveys the eminent sense of the order being in accordance with law and to be proper.

It involves procedural application of law and includes adequate application of substantive provisions thereof. It also takes into account matters of legality, propriety and correctness of the order." [280]

3.18 Epilogue

In summary the courts are not willing to accept that their jurisdiction, particularly, the constitutional jurisdiction, can be ousted by the use of subjective language. And this is quite justified for the reason that otherwise the executive will be armed with arbitrary powers which will seriously affect the rule of law. [281]

So far as scope of review of decision of apex courts on the basis of errors of judgment is concerned, it is sufficiently established that such review is confined only to error apparent on face of record or floating on the surface of the judgment which, if noticed earlier, would have

279- PLD 1987 S.C. 447.

280- Ibid, at P 451.

281- Dr. Dil Muhammad, *Judicial Review of Discretionary Powers*. 1990 Punjab University Law Journal 68 at P. 78.

direct impact on the conclusions drawn by the court.[282] Thus, in almost all the democratic countries it is accepted that discretion conferred on the administration is not unfettered, uncontrolled and always reviewable by the courts, whose decisions can not be allowed to be eroded or nullified through executive or administrative instrument.[283]

282. *Government of Punjab vs. Aamir Zahoor ul Haq* PLD 2016 SC 421.

283 *Azad Govt. of Jammu & Kashmir vs. Sardar Javed Naz* PLD 2016 SC (A J & K) 1.

CHAPTER 4

EXCESS OR ABUSE OF DISCRETION

Excess or Abuse of Discretion

Discretion and restrictions go hand in hand so that one should not act in bad faith. No discrimination could be made while exercising discretion between persons on the basis of irrelevant criteria. Discretion once conferred cannot be restricted or fettered. When the discretion is conferred by statute, the authority cannot refuse to exercise discretion. While exercising discretion, the authority has to maintain independence and impartiality. The authority upon whom discretionary power has been conferred cannot act at the dictates of the higher or other authority. When the discretion is conferred upon the authority, it is the authority, which has to exercise according to his own mind, and after taking into consideration all relevant factors keeping in view the object of conferring such discretion.[1]

These are the prime questions which form part of this chapter. Whenever, an authority takes a decision in the exercise of its discretionary powers, some person is bound to be adversely affected thereby and feel aggrieved by the decision. He therefore seeks to challenge the decision in the court, because in Common Law countries, courts act as a control mechanism over the administration. The court then assesses the validity of the impugned decision and lays down in the process certain norms, which the administration ought to follow in exercise of its discretionary powers.

This is what we call as the judicial review of administrative action. In this way, in course of time, a corpus of norms is developed by the courts from case to case approach to structure and regulate the actual exercise of discretionary powers. If a discretionary decision falls foul of any of these norms, the decision is vitiated and the court would quash the same. These norms which are all created by the courts may also be characterized as the grounds for judicial review of

1- *Justice B.P. Banerjee ,Writ Remedies*, 3rd Edn, 2002, Delhi, p. 366.

discretionary powers. "The boundaries of discretionary powers are typically defined by reference to the process of decision making and not by the quality or merit of decision itself".[2]

"It is pertinent to mention here that initially after independence the courts in Pakistan were rather cautious of interfering with the exercise of discretion by the executive, but gradually, the courts have shed some of their inhibition and hesitation in this regard. Realizing that uncontrolled exercise of discretionary powers may lead to infringement of individual's rights, the courts have been developing norms and idioms so as to ensure that such powers are duly exercised under the constitutional paradigm".[3]

In the past, there has been evidence of the emergence of a judicial trend to increasingly control the exercise of discretionary powers. During the last thirty years or so, the courts have expanded the ambit of their control over the area of administrative discretion. This jurisdiction is still in the evolutionary stage and is continuously being developed and expanded by the courts. However, it can now be asserted that there is nothing like an absolute discretionary power howsoever broad the phraseology may be adopted in the statute to couch the power in question.[4]

All legal power, as opposed to duty, is inevitably discretionary to the greater or lesser extent, but now the emphasis falls upon the nature of discretion itself and the standards upon which the courts insist in order that it may be exercised in a proper and lawful way in accordance with the presumed intention of the legislature that conferred it.[5]

2- C. Mc Rudden, Codes in a Cold Climate: Administrative Rule Making by the Commission for the Racial Equality, (1988) *51 M.L.R.*, 409. Quoted by de Smith, Woolf and Jowell's, ***Principles of Administrative Law***, 1999, Sweet & Maxwell, London, 153.

3- SCMR 2005 186, PLD 2003 Peshawar, 18.

4- *Muhammad Shoaib vs. Government of K.P.K.* 2005 SCMR 91.

5 Sir William Wade, Administrative Law, 9th. Edn. 2005, p.311.

There are various restrictions on the exercise of discretion, such as one should not act in bad faith. No discrimination could be made while exercising discretion between persons on the basis of irrelevant criteria. Discretion once conferred cannot be restricted or fettered. Authority or functionary having discretion to decide a particular matter could not act in violation of laid down rules, principles and laws.[6]

As regards court's attitude towards excess or abuse of discretionary powers, *S.A. de Smith* viewed:

"...the courts begin by determining whether the power has been exercised in conformity with the express words of the statute and may then go on to determine whether it has been exercised in a manner that complies with certain implied legal requirements. In some contexts they have confined themselves to the questions whether the competent authority has kept within the four corners of the Act and whether it has acted in good faith. Usually they will pursue their inquiry further and will consider whether the repository of discretion, although acting in good faith, has abused its power by exercising it for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness." [7]

He rightly further observed:

"These several forms of abuse of discretion "overlap to a very great extent" and "run into one another," [8] and the task of separating them analytically in particular fact situations may be almost inseparable. But they are recognized as forming distinct legal categories, and in the majority of cases separate identification is not impossible." [9]

---

6 *Pirzada Jamaluddin A. Siddiqui vs. Federation of Pakistan.* 2012 PLC, C.S. 996, Sindh High Court.

7 Judicial Review of Administrative Action, 4th ed, P.322 & 323.

8- Quoting the famous speech of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation* (1948) 1 K.B. 223.

9- de Smith's Judicial Review of Administrative Action, 4th Edn, P.323.

Abuse of discretion is the improper or unreasonable mode of exercising the valid power.[10]

Thus, "if a new and sharp axe presented by father Washington (the Legislature) to young George (the statutory body) to cut timber from the father's compound is tried on the father's favorite apple tree, an abuse of power is clearly committed."[11]

From this discussion we could formulate following major categories of excess or abuse of discretion. i.e.

(a) Improper purpose;

(b) Irrelevant considerations;

(c) *Mala fide;* and

(d) Unreasonableness.

4.1 Improper Purpose

A statutory power conferred on the authority must be exercised for that purpose alone and if it is exercised for a different purpose, that is abuse of power by the authority and the action may be quashed. Improper purpose should be distinguished from another ground, i.e.' *male fide'*. In a *'mala fide'* act, personal malice or oblique motive is present, while on the other hand in improper purpose; it may not be so, and the action of the authority may be *bona fide* and honest and yet, if it is not contemplated by the relevant statute, it may be set aside.

In the words of *David Foulkes,*[12] "Powers are given for achievement of certain ends. Obviously, and as we have seen, an authority must have regard to the purposes for which a

10- A.T. Markose, Judicial Control of Administrative Action in India. (1956) P.417.

11- C.K. Thakker, Administrative Law, (1992) P. 338.

12 *Administrative Law*, 7th ed (1990), P.230.

power is given. Equally obviously, a power must be used only for the purpose for which it was given; or, must not be used for a purpose for which it was not given."[13]

In *R. vs. Darlington School* [14] *Warrington, L.J.* had rightly observed,

"It may be also possible to prove that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore imperative." [15]

In *Sydney Municipal Council v. Campbell* [16] the council had statutory power to acquire compulsory land which was required for carrying out improvements in or remodeling any portion of the city. No plan for improvement or remodeling the land in question was ever considered by the council the court restrained the council from using the power to acquire land for the purpose of benefiting from an anticipated increase in the value of the land.[17]

Robert vs. Hopwood [18] is the leading case in this respect. The Popular borough council acting under the power to pay its employees such wages as the council thinks fit, decided on a minimum wage of £ 4 a week. This was substantially in excess of the national average wage for similar workers, especially women. The district auditor acting under his statutory duty to "disallow every item of account contrary to law" surcharged the councilors the sum of £5000. The House of Lords held that the council had indeed acted contrary to law. It had in fact used its power to pay wages for an improper purpose, namely, to make gifts.

13 Ibid.

14 (1844) 6 Q.B. 682.

15 Ibid, P.715.

16 (1925) A.G. 338.

17 Ibid.

18 (1925) A.C. 578.

In *R. vs. Liverpool City Council, ex p Secretary of State for Employment* [19] the Council resolved to reject all use of and support for the government's newly introduced Employment Training Scheme on the grounds that it did not pay the rate for the job, did not give participants the status and protection of full employment, etc. In pursuance of that it decided not to give financial assistance to voluntary organizations who took part in the scheme. The organizations in question would be acting quite lawfully in participating in the scheme, the purpose was to punish or coerce those who would not toe its line. The court held that although the council could not be compelled to support the scheme, but it acted unlawfully in seeking to deter in the way it did.

If a discretionary power is conferred without reference to purpose, it must still be exercised in good faith and in accordance with such implied purposes as the courts attribute to the intention of the legislature. [20]

In *Padfield vs. Minister of Agriculture, Fisheries and Food* [21] the minister, in reliance on an ostensibly unfettered discretionary power, refused to refer a complaint by milk producers to a committee of investigation because this might lead him into economic and political difficulties. The court held that the minister had violated the unexpressed purpose for which the power of reference had been conferred. The minister was therefore required to consider the complaint according to law.[22]

Again, an authority may act for mixed purposes, some good, and some bad. If the dominant purpose is a proper one, the act will be valid. In *Westminster Corporation vs. London and North Western Railway Company* [23] the corporation had power to build subterranean public

19 (1988) Times, 12 November.

20 de Smith's Judicial Review of Administrative Action, P.326.

21 (1968) A.G. 997.

22 Ibid.

23 (1905) A.G. 426.

lavatories. They built some in such a way that it was possible by means of the subway to pass from one side of the street to the other. The corporation had not power to construct a subway and the railway company agreed that the lavatories were built in order to make the subway. While agreeing that if the power to make one kind of building was fraudulently used for the purpose of making another kind of building, the exercise of the power would be invalid, the House of Lords found that the corporation had not so acted. Making of lavatories, according to the courts, was the basic purpose of the building.

The leading American case on the point is *Nader vs. Bork.* [24] By an order, Cox, Watergate special prosecutor was dismissed by the attorney general. The relevant regulation provided that "the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part." The authority had, however, discretion to revoke the regulations. In the purported exercise of the said power, the attorney general revoked the regulation retrospectively, abolished the office of Watergate Special Prosecutor and within time reinforced the regulations. They could hold the action of revocation of regulation illegal. It was "simply a rule to permit the discharge of Cox, a purpose that could never have been legally accomplished with the original regulation in effect.

Same Principle is being followed by the Indian courts. In *Nalini Mohan vs. District Magistrate*, [25] the statute empowered the authority to rehabilitate the persons displaced from Pakistan as a result of communal violence. That power was exercised to accommodate a person who had come from Pakistan or medical leave. The order was set aside.

24 (1973) 366 F. Supp. 104.

25 AIR 1951 Cal. 346.

Similarly in *State of Bombay vs. K.P. Krishnan,* [26] the government refused to make a reference on the ground that 'the workmen resorted to go slow during the year.' The Supreme Court held that the reason was not germane to the scope of the Act and set aside the order.[27]

Again *Vora vs. State of Maharashtra* is another leading case in this respect. The state government passed an order in 1951 requisitioning the flat of the petitioner. The petitioner requested the authority in 1964 for de requisitioning it, but the request was turned down. Quashing the order, the Supreme Court observed:

"The concept of acquisition has an air of permanence and finality in that there is transference of the original holder to the acquiring authority. But the concept of requisition involves merely taking, of' domain or control over property without acquiring rights of ownership and must by its very nature is of temporary duration the power of requisition is exercised by the government only for a public purpose, which is of a transitory character. The public purpose for which the premises are required is of a perennial land permanent character from the very inception, no order can be passed requisitioning the premises and in such a case the order of requisition, if passed, would be a fraud upon the statute...."[28]

The same principle was applied by the Pakistani court in reviewing the administrative discretion. In a leading case [29] decided by Lahore High Court upholding the principle that the authority exercising a discretionary power must act in line with the purpose of law granting that power. The petitioner mill defaulted in the payment of money on account of supply of wheat. The respondent department in order to put pressure for the repayment stopped the sugar quota of

---

26 AIR 1960 SC 1223.

27 Ibid.

28- AIR 1984 SC 866.

29- *The Montgomery Flour and General Mills Ltd vs. Director Food Purchase* PLD 1957 Lah. 914.

the petitioner required for the manufacture of biscuits. The action was quashed on the ground that the Essential Supplies Act was not enacted in order to arm the government with a weapon to enforce its alleged claim and cannot be used for this purpose. *Kaikaus, J.* held:

".... no discretion vested in an executive officer is an absolute and arbitrary discretion. The discretion is vested in him for public purpose and must be exercised for the attainment of that purpose. Even though there are no express words in the relevant legal provision to that end, the discretion is always circumscribed by the scope and object of the law that creates it and has at the same time to be exercised justly, fairly, and reasonably. [30]

In *Mira Jan vs. Deputy Land Commissioner Mardan* [31] wherein court held that suppression of material facts by a party alone would be sufficient for refusal of discretionary relief. In *Ghulam Ali vs. Commissioner Lahor*e [32] where arms license held by the petitioner was cancelled by the District Magistrate. Section 12 of the West Pakistan Arms Ordinance, 1965 provided the procedure for cancellation and elaborates the purpose as "for the security of the public peace' for cancellation or suspension of the arms license.

Justice *Manzoor Hussain Sial* observed.

"....in the absence of any material on the record, the District Magistrate's mere assumption on 31-5-1979, that by not renewal of the license during the grace period commencing from 31-12-1973 to I -4-1979, it was necessary for the security of the public peace to cancel the licenses of the petitioner was not a reason relatable to the statutory purpose laid down in Section 12 of the aforementioned Ordinance." [33]

---

30 *The Montgomery Flour and General Mills Ltd vs. Director, Food Purchase* PLD 1957 (W.P.) Lahore 914., P.920 & 921.

31 2012 YLR 577 (d) Peshawar, PLD 2012 Sindh 412.

32 PLD 1981 Lahore 368.

33 Ibid, P. 370.

In a case [34] of resumption and allotment of land under M.L.R. 115, Justice *Usman Ali Shah* had rightly observed:

"It may be observed that if an order of the authorities is found to be perverse and for that matter it defeats the object or scheme of the regulation, this court in the exercise of its writ jurisdiction will have the occasion to take note of what the Authorities have done. It cannot be said that under M.L.R. 115. the Land Commission Authorities enjoy the unfettered discretionary powers to act whimsically without having regard to the balance of equity in a matter coming before them under the regulation. Similar law of discretion will be a wild law which cannot be countenanced in a society governed by the constitution." [35]

Justice *Shafi-ur-Rehman*, while upholding the ratio laid down in *Montgomery Flour and General Mill's case* [36] *and* in *Federation of Pakistan vs. Muhammad Aslam* [37] held that the government possessed vast powers in the field of imports. However, such power too has its own limitations and a vested right could not be taken away except under the clear authority of a competent legislature. He further observed:

"All executive powers are to be exercised fairly and justly, for advancing the object of the legislation. In other words every such exercise of power has to satisfy the test of reason and relevance." [38]

Again in *Muhammad Iqbal Khokhar vs. Government of the Punjab* [39] Justice *Rustam S. Sidhwa* held that Section 22 of the Punjab Civil Servants Act, 1974 conferred discretionary

---

34 Omar Khan vs. Land Commissioner, NWFP, 1980 CLC 1717.

35 Ibid, P. 1720.

36 Ibid.

37 1986 SCMR 916.

38 Ibid.

39 PLD 1991 SC 35.

power. However, the grant of seniority or promotion under the section, unless it meets the prerequisites of being just and fair, can only be destined as colorable violation of the law, which cannot be permitted.

He observed:

"Discretion, everywhere outwardly appearing as absolute, will always be treated as qualified by the terms and the spirit of the provision in which it occurs and by the object of the law." [40]

In another leading case relating to the terms and conditions of civil servants, the Supreme Court held that civil servants empowered under Rules of Business, 1974 were acting against the purpose and object of these rules when they pass a transfer order on the behest of some other authority. Acting on the same lines, Justice *Saleem Akhtar* observed in another case: [41]

"Authority exercising discretion should take into consideration and advance aim and object of the enactment rule or regulation under which it was authorized to act; it should not act in complete negation of the object of such law, rule regulation or established policy otherwise it would not be fair, reasonable and just exercise of power."[42]

4.2 Irrelevant Considerations

Discretionary power conferred on an administrative authority by law must be exercised on the relevant considerations and such considerations must be relevant to the object of that law. On the other hand, if the authority takes into account considerations irrelevant to the purpose for

40 Ibid,

41 *Walayat Ali Mir vs. P.I.A.C.* 1995 SCMR 650.

42 ibid.P. 659.

which the power is conferred then the action will he *ultra vires* and denounced as bad in the eye of law. To Professor *S.A. de Smith.*" [43]

"If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations, a court will normally hold that the power has not been validly exercised." Ordinarily, statute itself provides for relevant considerations and a provision granting discretionary power indicates the limits within which it is to be exercised."

P.P. Craig[44] in this context observed:

"The second method of controlling the exercise of discretion is relevancy. A decision will be declared *ultra vires* if it is based upon irrelevant considerations or if relevant considerations are not taken into account. Relevancy overlaps with control maintained through improper purposes and a number of the cases could be classified under one section or the other."

The ground of irrelevant considerations may be distinguished from *mala fide* or improper motive as there is no deliberate choice of authority in irrelevant considerations but as a result of the honest mistakes it makes about the object or scope of its powers.

In *Wednesbury case*, [45] it was held that if the red-haired teacher was dismissed because she had red hair, the action will be bad in the eye of law.

Similarly, where the teacher is dismissed because she took an afternoon off in poignant circumstances,[46] or because the teacher refused to collect money for pupil's meals [47] All these actions were declared *ultra vires* on the basis that they are based upon irrelevant considerations.

---

43 *Judicial Review of Administrative Action*, 4th ed, P. 339 & 340.

44 *Administrative Law*, 2nd ed, P. 284.

45 *Associated Provincial Picture Houses Ltd. vs. Wednesbury Corpn , (1948) 1 K B 223.*

46 *Martin vs. Eccles Corpn., (1919) 1 Ch. D. 387.*

47 *Price vs. Sunderland Corp. (1956) 1 W.L R 125.3*

In declaring an action as based on irrelevant considerations, the court may face the difficulty of substituting its own views for those of the administration. *Diplock L.J. In Luby vs. Newcastle-under-Lyme Corpn.*[48] Pointed towards the same danger. The Housing Act, 1957 vested the management of local authority houses in the corporation and gave it power to charge reasonable rents. The policy of the defendant was to fix rents for the houses as a whole at an aggregate sum necessary to balance the cost of the loan capital and repairs: there was no differential applied whereby tenants paid rent according to their means.

After a series of rent increases, Luby complained that the basis of assessment was invalid as it did not take account of his personal circumstances, thereby imposing an unreasonable rent on him. *Diplock L.J.* while rejecting the claim, said, the court should not substitute its view for that of the corporation. The latter was applying a social policy on which reasonable men could differ; it had decided against differential rating and this was not a decision so unreasonable that no reasonable corporation could come to it.

Any deficit in the housing revenue would have to be made good from the general rate fund. The choice of rent structures involved therefore a weighing of the interests of tenants as a whole with those of the general body of rate payers.

In *R. vs. St. Pancras Vestry*,[49] *Lord Esher M.R.* stated the 'irrelevant consideration' doctrine. In this case a vestry had mistakenly fixed the pension of a retiring officer on the erroneous assumption that they had no discretion as to the amount.

Lord Esher observed [50]

48 (1964) 2 Q.B. 64.

49 (1890) 24 Q.B.D. 371.

50 ibid,

"But they must fairly consider the application and not take into account any reason for their decision which is not legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the exercise of their discretion, then in the eye of the law they have not exercised their discretion".[51]

Same principle is applied by the Indian courts. For example, in *Ram Manohar Lohia vs. State of Bihar*, [52] under the relevant rules, the authority was empowered to detain a person to prevent subversion of public order. The petitioner was detained with a view to prevent him from acting in a manner prejudicial to the maintenance of 'law and order'. The Supreme Court set aside the order of detention on the ground that the term 'law and order' was wider than the term 'public order'.

Again in *Rohtas Industries Ltd. vs. Agrawal*, [53] an order of investigation was issued against the petitioner company under the Companies Act, 1956. The ground for the order was that there were a number of complaints of misconduct against one of the leading directors of the company in relation to other companies under his control. The court while holding the ground irrelevant set aside the order.

In Pakistan, throughout the post-independence era, courts frequently applied this doctrine of 'irrelevant considerations' in exercise of their power of judicial review. Same was the case in *Muhammad Aboo Abdullah vs. The Province of East Pakistan*[54] Fundamental Rules, rule 30(10) imposed a duty on the government to grant to a servant the benefit of the 'next below rule' when such servant, who though efficient, suitable and not on leave, is superseded because he is on

51 Ibid.

52 AIR 1966 SC 740.

53 AIR 1969 SC 707.

54 PLD 1959 Dacca 361.

deputation. The court held that the government had acted arbitrarily in refusing the benefit of the 'next below rule' to the petitioner on the unfounded ground that he was not considered suitable for the post of D.I.G. Police.[55]

The *Presiding Officer vs. Sadruddin Ansari* [56] is a leading case on the subject. Presiding Officer rejected ballot-papers on the ground that they did not adequately disclose intention of voters. Voters put cross marks on ballot-papers not precisely on dotted line against which name of candidate appeared but in between respective dotted lines hearing names of rival candidates. The Supreme Court held that voter psychologically more likely to use space above line for his candidate than below it and there being no requirement under Rule 5(3) [57] to put cross mark precisely on dotted line. The Supreme Court upheld the order of the High Court and set aside the order of the presiding officer as being based upon irrelevant ground.

Similarly, where a student was denied admission in the Bolan Medical College on the ground that he has received part of his education out of the province. The High Court held that the rejection order is based upon irrelevant considerations and hence not tenable in law.[58]

Again, in *Asif Khayam vs. Board of Intermediate* [59] where neither memorandum of the alleged recovery of the piece of printed paper was prepared nor was the petitioner's statement recorded under the rule, it was alleged that he had refused to give statement when called upon to do so. Even then on the mere assumption that a piece of paper was recovered from the petitioner, he was disqualified by the Board. The Lahore High Court held:

---

55 Ibid.

56 PLD 1959 Dacca 361.

57 West Pakistan Basic Democracies (Election of Chairman) Rules.1960, r 5(3).

58 *Abdul Khaliq vs. Province of Baluchistan;* 1981 CLC 728.

59 1982 CLC 2101.

"Taking all the facts into consideration the findings of the Discipline Committee and the Committee of Appeal (of the Board)seems to be based on erroneous assumption of facts and not upon material which could justify for holding the petitioner to be guilty of copying." [60] Again, where the Land Acquisition Collector fixed the price of land without taking into consideration the relevant factors, the High Court set aside the order and remanded the case for fresh determination. [61]

In *Federation of Pakistan vs. Mohammad Saifullah Khan* [62] *Dr. Nasim Hassan Shah J.* while declaring the President's action as being based on irrelevant considerations observed:

"The first four grounds stated in the order for dissolution, were, as already noticed, extraneous having no nexus with the preconditions prescribed by Article 58(2) (b) of the constitution empowering the President to dissolve the National Assembly in his discretion. As the fifth and last ground, namely, that "a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution" nothing was shown either before the High Court or before us that the machinery of the Government of the Federation had come to a standstill or such a breakdown had occurred therein which was preventing the orderly functioning of the Constitution. Indeed, it appears that the first mentioned four grounds are the basis for the assertion made in the last mentioned ground that the Government could not be carried on in accordance with the provisions of the Constitution. [63]

But as observed already, the first mentioned four grounds were extraneous to and had no nexus with the preconditions prescribed by Article 58(2) (b). Hence, in the eye of law, no basis

---

60 ibid,

61 *Mubarik Bibi vs. Commissioner;* 1983 CLC 1455.

62 PLD 1989 SC 166, *see also; Nawaz Sharif vs. Federation of Pakistan,* PLD 1993 SC 473.

63 *Nawaz Sharif vs. Federation of Pakistan,* PLD 1993 SC 473.

existed on which the President could form the opinion "that a situation had arisen in which the Government of Pakistan cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

"But unless the President is of said "opinion", he cannot pass an order of dissolution even in exercise of his discretion because under sub-clause (b) of clause (2) of Article 58 his "opinion" in this behalf is a condition precedent to the exercise of the discretion. Thus, if it can be shown that no grounds existed on the basis of which an honest opinion could be formed, the exercise of the power would be unconstitutional and open to correction through judicial review."[64]

In *Zahid Akhtar vs. Govt. of Punjab*, [65] *Saeed-uz-Zaman Siddiqui* J held that the successive transfer orders of the petitioner were based on extraneous considerations bearing no nexus with the object and spirit of rules governing the transfer of government servants.[66]

In short, discretion must be exercised with full application of mind on the facts, even policy is framed to facilitate discretion, leading to an efficient administrative system, pillared on consistency and certainty, it is never so absolute as to disable exercise of discretion to facts of every case because some cases might have unusual facts that might not be covered under the policy but meet all legal requirements under law. Whenever discretion is subjected to a perfunctory application of a policy without independent application of mind to facts of each case, discretion is said to be fettered and hence bad in law. [67]

64 ibid, P. 189 & 190.

65 PLD 1995 SC 530.

66 Ibid.

67 V.G. Ramachendran, *Law of Writs*, Vol.I, P.69.also see PLD 1969 SC 14, PLD 2010 Lah.546, 2012 PTD 1522 .

4.3 Mala fide

According to *de Smith*, [68] the concept of bad faith eludes precise definition, but in relation to the exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice. Then explaining 'fraud and malice' he observed:

"A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been conferred. For example, a local authority committee would exercise in bad faith its power to exclude interested members of the public if it deliberately chose to hold the meeting in a small room. The intention may be to promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise." [69]

Vaughan Williams L.J. in Westminster Corporation vs. London and North Western Railway Co [70] had given a very wide meaning to malafide by saying:

"You are acting *mala fide* if you are seeking to acquire land for a purpose not authorized by the Act.[71] In this context *mala fide* is interchangeable with unreasonableness, improper purpose and extraneous considerations.

However, *Megaw L.J.* in the Court of Appeal has sought to limit bad faith to dishonesty: "I would stress, for it seems to me that an unfortunate tendency has developed of looseness of language in this respect, that bad faith, or as it sometimes put, 'lack of good faith', means dishonestly: not necessarily a financial motive but still dishonesty. It always involves a grave

68 de Smith's Judicial Review of Administrative Action, 4th ed. P. 335.

69 ibid, P.335 & 336.

70 (1904) 1.Ch.759.

71 ibid, P.767.

charge: It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which in law is irrelevant." [72]

'Malice' in *Black's Law Dictionary* [73] is defined as:

"The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply, an evil intent. A condition of mind which prompts a person to do a wrongful act willfully, that is an purpose, to the injury of another, or to do intentionally a wrongful act towards another without justification or excuse". A conscious violation of the law (or the prompting of the mind to commit it) which operates to the prejudice of another person. A condition of the mind showing a heart regardless of social duty and fatally bent on mischief. Malice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen." A suit would be dismissed with special compensatory costs if it is found to be malafide and fraudulent.[74]

In the leading case of *Federation of Pakistan vs. Saeed Ahmed Khan* [75] *Hamood-ur-Rehman*, C.J. had written an elaborate treatise on *'mala fide'*. He held;

"*Mala fides*" literally means "in bad faith". Action taken in had faith is usually taken malicious in fact, that is to say in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to benefit oneself. Action

72 *Cannock Chase District Council vs. Kelly* (1978) 1 All ER 152 at 156.

73 6th. ed, P 956

74 *Mrs. Dr. Yousaf Fida vs. Justice (R) Muhammad Azam Khan* PLD 2016 Peshawar 105.

75 PLD 1974 SC 151, at P.170.also see, *Iftikhar-ud-Din vs. Muhammad Sarfraz*, PLD 1961 Lahore 842 (Per Shabir Ahmad J. at P.848) *Khalid Malik vs. Federation of Pakistan*, PLD 1991 Karachi 1. at P.127(Per Mamoon Qazi J).

taken in colorable exercise of powers; that is to say, for collateral purposes not authorized by the law under which the action is taken, or action taken in fraud of the law are also *mala fide*."[76]

Thus, in nutshell, an action which is designed to favor [77] or to harm [78] someone is *mala fide*. And also where the order is made contrary to the object and the purpose of the statute is also mala fide.[79] Such actions are clearly *ultra vires* the implied conditions of the grant of power, for the legislature cannot be presumed to have authorized a *mala fide* action [80]

Justice Kaikaus in one case [81] observed:

"A *mala fide* act is by its nature an act without jurisdiction. No legislature when it grants power to take action or pass an order contemplates mala fide exercise of power. A *mala fide* order means one which is passed not for the purpose contemplated by the enactment granting the power to pass the order, but for some other collateral or ulterior purposes." The action of demolishing unauthorized construction by approval of Municipal Corporation was held valid since proof of *mala fide* was not established.[82]

The necessary outcome of the above discussion is that there are two types of *mala fides* or malice. *Mala fides* or malice may be "express malice" or "malice in fact" and "implied malice" or "malice in law".

---

76 Ibid.

77 *Ahbab Co-operative Housing Society vs. Commissioner, Lahore Divisio*n, PLD 1978 Lah. 273.

78 *Province of Punjab vs. Zahoor Elahi*, PLD 1981 Lahore 696.

79 *Roshan Bijaya Shaukat Ali vs. Govt. of East Pakistan*, PLD 1965 Dacca 241upheld in PLD1966 SC 286.

80 Dr. Dil Muhammad Malik, Judicial Review of Discretionary Powers, PULJ, (1990). 64.

81 *Abdul Rauf vs. Abdul Hamid Khan*, PLD 1965 SC 671, at P. 675.

82 *Bashir Ahmad Shauk vs. Municipal Corporation Faisalabad*, 2016 SCMR 1134.

4.3.1 Malice in Fact

Viscount Haldane, L.C. had given an apt definition of malice in fact in the case of *Shearer vs. Shields*.[83] He says,

"Malice in fact' means an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract, a very material ingredient in the question of whether a valid cause of action can be stated. In other words, 'malice in fact' means an act committed due to personal spite, corrupt motive or malicious intention".[84]

In the legal parlance 'malice in fact' means express or actual malice, towards a particular person-, an actual intention to injure or defame such person. [85] Actual malice or malice in fact, means a positive desire and intention to annoy or injure another person. [86]

It is said to exist where a wrongful act is done with a sedate and deliberate mind and formed design. The term is used to describe the mental attitude involved not merely in the doing of an unlawful act, but in the doing of it designedly and with preconceived purpose, at the prompting of hatred and revenge.[87]

Thus, in *Mumtaz Begum vs. Province of East Pakistan* [88] where through a notice an unspecified, undefined and un demarcated part of the petitioner's property was sought to be taken in order to enable the Chief Engineer to change his mind and to devise ways and means by which he could save the property of *Mrs. Zohra Hussain* from the proposed road site. The High Court

83 (1914) A.C. 808.

84 Ibid.

85 Black's Law Dictionary, Sixth ed, P.957.

86 American Jurisprudence, 2nd, v 52, P.161.

87 ibid,

88 PLD 1962 Dacca 516.

quashed the order as being *malafide*. Again in another requisition case [89] where the authority tried to *rob Peter to pay Paul*, the High Court held the action as *mala fide* and the most arbitrary one.

In *Abdul Rauf vs.. Abdul Hamid Khan* [90], the respondent filed a civil suit on the plea that proceedings under the F.C.R were mala fide having been started at the instance of *Khan Abdul Qayyum Khan*, then Chief Minister for the Province. The Supreme Court held that the civil court has ample jurisdiction to adjudicate upon the matter despite the express bar contained in sections 10 & 60 of the Frontier Crimes Regulations. *Kaikaus, J.* giving the opinion of the court observed"

"A *mala fide* act is by its nature an act without jurisdiction. No Legislature when it grants power to take action or pass an order contemplates a mala fide exercise of power. A mala fide order is a fraud on the statute. It may be explained that a mala fide order means one which is passed not for the purpose contemplated by the enactment granting the power to pass the order, but for some other collateral or ulterior purposes." Recently this view is endorsed by our superior courts". [91]

Again, in *Muhammad Jamil Asghar vs. Improvement Trust* [92] *B.Z. Kaikaus*, J. clearly made out his point with the following words:

"However, with respect to mala fides the jurisdiction of the civil court can never be taken away for a mala fide act in its very nature an illegal and void act and the civil court can always pronounce an act to be mala fide and therefore void."

---

89 Safar Ali Hazara vs. Deputy Commissioner, PLD 1964 Dacca 467.

90 PLD 1965 SC 671, at P.675 .

91 *Gul Sher vs. Maryam Sultana* 2011 YLR 1000, 1988 CLC 1546, 2007 MLD 570, PLD 1973 SC 530.

92 PLD 1965 SC 698, at P. 704.

In *Kafil-ud-din Ahmad vs. Chairman Pabna Municipal Committee* [93] where the petitioner was suspended from his job by the respondent on the ground that some proceedings were pending against him and appointed in his place another person against whom also criminal proceeding was pending. The High Court held the suspension order as being *mala fide* and quashed it. Again, where a deputy commissioner, in de-requisition unduly favoured one party at the cost of the petitioner's property. An order was passed at the behest of the Deputy Commissioner's confidential clerk, a close relation of the other party. Order passed at the instance of the confidential clerk not only declared illegal but also *mala fide*.[94]

Province of Punjab vs. Zahoor Elahi [95] is a typical example of *mala fide* act. The property of an opposition leader, falling outside the municipal limits of a city, was acquired though the Law authorized the acquisition of property falling within the municipal limits. This order was withdrawn and after extending the municipal limits, so as to cover the area the dispute, a new acquisition order was issued. The action of the government was quashed by the civil court on the basis of *mala fide*. The high court and the Supreme Court upheld the order of the civil court.

Thus, the requisition order was passed with a view to avoid legal consequences of default in payment of rent and of ejectment order issued five years back and to deprive landlord of rent for last ten years. The order was held as *mala fide*. [96]

An inference may be drawn from the above discussion that mala fide is a very strong ground of attack. However, it is the most difficult to prove. Unless there is some clear evidence

93 PLD 1968 Dacca 733.

94 *Ismail Talukdar vs. Govt. of East Pakistan*, PLD 1970 Dacca 243.

95 PLD 1981 Lahore 696, upheld in *Province of Punjab vs. Zahoor Elahi* 1982 SCMR 173.

96 *Minhaj-un-Nisa vs. Deputy Commissioner*, 1983 S\CLC 2228.

of mala fide courts.won't give much heed to the plea of mala fide. The official acts are presumed to be done lawfully and bona fide [97] until and unless contrary is proved [98]

But it was held in *Govt. of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri*[99]

"It must also be remembered that initially the onus is on the detaining authority to justify the detention by establishing the legality of his action for under the principles of English law, which have been adopted in our system also, the presumption is that every imprisonment without trial and conviction is prima facie unlawful (per *Lord Atkin in Liversidge v. Anderson*) [100] and it is only then that the onus shifts on the detenu to show *mala fides*."

However, in a subsequent case,[101] Supreme Court held that this principle does not apply in other cases where the onus is initially upon the person alleging ***mala fides*** to prove it. Again, the higher the authority whose action is being challenged on the ground of *mala fide*, the greater is the burden of proof on the shoulders of the petitioner.[102]

In the leading case of *Federation of Pakistan vs. Saeed Ahmad Khan,*[103] *Hamood-ur-Rehman,* C.J. laid down four basic principles with respect to the plea of *mala fides*, they are:

(i) *mala fides* must be pleaded particularly and specifically;

---

97 *Aisha Steel Mills Limited vs. Federation of Pakistan* 2011 PTD 569 Sindh High Court (DB).

98 *Sai Muhammad vs. West Pakistan*, PLD 1958 SC 181; see also, *Muhammad Abdu vs. Province of East Pakistan*, PLD1960 SC 164; *Imtiaz Ahmad vs. Ghulam* , PLD 1963 SC 382 and *Sajjad Haider vs. Province of West Pakistan*, PLD 1967 Lahore 938.

99 PLD 1969 SC 14 at P.35. (per Hamood ur Rehman. J).

100 (1942) A.C. 206, See also, *Abdul Baqi Batch v. Govt. of Pakistan* PLD 1968 SC 323.

101 *Federation of Pakistan vs. Saeed Ahmad Khan*, PLD 1974 SC151 (Per Hamood ur Rehman C.J.)

102 *Iftikhar-ud-Din vs. Muhammad Sarfraz*, PLD 1961 SC 585.

103 PLD 1974 SC 151.

(ii) when one kind of *mala fide* is alleged then other kind of *mala fide* should be allowed to be proved;

(iii) Allegations must not be vague or indefinite, but concrete and specific.

(iv) the initial onus is on the petitioner to prove *mala fides*., and

(v) Presumption of regularity is attached to all official acts.

Malice in fact is essentially a question of fact which could only be proved through adducing evidence [104] Normally, High Court won't enquire such allegations in its writ jurisdiction.[105] However, if the disputed question of fact can be ascertained from the documentary evidence produced on record, then the court is willing to determine the question of mala fide' or where the allegation of mala fide was not specifically denied by the other party. [106]

4.3.2 Malice in Law

Malice the law is different from malice in fact and may be assumed from the doing of a wrongful act intentionally without just cause or excuse, or for want of reasonable or probable cause. It is the malice which the law infers from or imputes to certain acts. Thus, it may appear that in the commission of an unlawful act the defendant was not actuated by hatred or revenge or passion towards the plaintiff, nevertheless, if he acted wantonly, doing what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicially and injurious to another, the law, will imply malice. [107] Hence, it is the intentional doing of a wrongful act without just cause or excuse which can be described as 'malice in law'. [108]

---

104 *Masud Ahmad v. State*, PLD 1962 Lahore 878 and *Shah Mardan Shah v. Chairman Federal Land Commissioner*. PLD 1974 Karachi 375.

105 *Hussain Ali Chagla v. District Magistrate*, PLD 1966 Lahore 309.

106 *Lahore Conservation Society v. Chief Minister of Punjab*, PLD 2011 Lah.344.

107 52 *American Jurisprudence*, 2nd ed. P.163 & 164.

108 Black's Law Dictionary. Sixth Edn, 1990, P.958.

In *Sheerer vs. Shields,* [109] *Viscount Haldane, L.C.* observed:

"A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind, he is taken to known the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so Far as the state of his mind is concerned, he acts ignorantly and in that sense innocently."

The distinction between 'malice in fact' and 'malice in law' was laid down with clarity by *Muhammad Alzal Lone, J. in Ghulam Mustafa Khar vs. Federation of Pakistan*" in the following words:

"Malice in law is different from the malice as known in the common parlance which is usually associated with evil notice influencing the mind of the person committing the malicious act. An order in violation of law is mala fide in law, though actual malice may not be present in the mind of the authority passing the order." [110]

Again, in another case, [111] *Malik Muhammad Qayyum,* J, clarifying difference held: "An action is said to be suffering from mala fide on facts if it is taken due to some personal grudge, animosity, or for some personal benefit. Tints, the state of mind of the person taking action is of great importance. On the other hand, an action is said to be suffering from malice in law if the authority taking the action is not competent to do so or has acted beyond its powers or in violation of the law applicable even though it may have acted bona fide and without ill-will".[112]

In *Govt. of West Pakistan vs. Begum Agha Shorish Kashmiri* [113] *Hamood-ur-Rehman,* J. Held:

---

109 (1914) A.C. (808), at P.813).

110 PLD 1988 Lah.49.

111 *Mian Manzoor Ahmed Watoo vs. Federation of Pakistan.* published in "The News" dated November 4. 1996.

112 Ibid.

113 PLD 1969 SC 14.

"In other words when it is said that no reasonable person could have upon such and such material, formed the opinion that the person detained had brought himself within the mischief of the statute, in effect the contention is that the officer concerned has in these circumstances acted mala fide in law. (I make a distinction between *mala fide* in fact and malice in fact and *mala fide* or malice in law)".Thus, in *Al-Karam Associates Ltd. vs. Sind Road Transport Corp*, [114] where the respondent corporation had expressly declared that the plot in dispute was not suitable for its purpose and de requisitioned it. Petitioner purchased the plot in these circumstances. Corporation reverted back to the previous situation. In these circumstances, it was held that the waiver of the Corporation amounted to abandonment of right to plot and it could not revert to such right. Exercise of power to acquire such plot held nothing but mala fide in law and hence bad.

Again in *Mohammad Tufail vs. Province of Punjab* [115] where the petitioner got the eviction order against government. The day when the eviction was completed, the commissioner issued another requisition order of the same property. The order was quashed as being *mala fide* in law as it defeats the object and purpose of the Act under which it was passed. Similarly, in *Murree Brewery Co. Ltd. v. C.D.A*, [116]

Where a statutory body acquired land not for the purposes of the statute but for financial motives, the order of acquisition was held mala fide in law. In many other cases governmental action was set aside as being *mala fide* in law.[117] Recently Supreme Court has reiterated its past stance that *mala fide* cannot be attributed to legislature.[118]

---

114 PLD 1975 Karachi 1050.

115 PLD 1978 Lahore 87.

116 PLD 1972 SC 279.

117 *Miraj-ud-Din vs. Senior Superintendent of Police*, PLD 1970 Lahore 569; and Begum *Nazir Abdul Hamid vs. Pakistan*, PLD 1974 Lahore 7; see also PLD 1971 Kar. 514 & PLD 1965 Dacca 241.

118 *Ali Azhar Khan Baloch vs. Province of Sindh*, 2015 SCMR 456.

In *Mian Manzoor Ahmed Wattoo vs. Federation of Pakistan* [119] A full bench of Lahore High Court declared the actions of the government as *mala fide* in law. Giving the opinion of the court, *Malik Mohammad Qayyum*, J. held:

".....It is clear that the report made by the Governor, the proclamation issued under Article 234 of the Constitution as also the order of the governor directing the petitioner to obtain vote of confidence suffer from malice in law is as much as Article 234 of the Constitution could not have been invoked on the ground that the members of cabinet had resigned or that the chief minister had lost confidence of the majority at least without putting him to floor test and also because the governor could not during the of the proclamation ask the chief minister who has ceased to function to obtain vote of confidence".[120]

Although it is very difficult to prove but still *mala fide* is a very strong ground of attack. And even the constitutional indemnity does not protect *mala fide* action so as to oust the jurisdiction of the superior courts.[121] However, there is only one exception in it and that is with respect to legislative action. A full bench of Supreme Court has held that a legislative act cannot be struck down by a superior court on the ground of mala fide or lack of bona fide or non application of mind in exercise of such power. [122]

The proper forum for determination of political questions is Parliament and not the courts. It is established by superior courts[123] that any decision taken or policy adopted by government would be presumed to be in public interest unless otherwise proved by cogent

---

119 see 'The News' International, Monday. November 4, 1996 – "JUDGEMENT"

120 Ibid.

121 *Federation of Pakistan vs. Saeed Ahmed Khan. PLD 1974 SC 151 see also Ghulam Mustafa Khar vs. Federation of Pakistan, PLD 1989 SC 26.*

122 Sabir Shah vs. Shad Muhammad Khan PLD 1995 SC 66.

123 M.D. Tahir Advocate vs. Chief Secretary Govt. of Punjab, 1995 CLC 1687. PLD 1979 SC 723.

evidence led to the contrary. On many occasions courts have ruled that the plea of *mala fide* is not available against a legislative action.[124] Although courts are entitled to strike down excesses committed by executive authorities, yet may not interfere into the area of legislature.

In a famous case [125] *Muhammad Anwar Khan Kasi* J, has held in the following words;

"Administrative authorities could not be blessed with whimsical and arbitrary exercise of discretion, because if discretion is exercise in such a manner, common people would be at the cruel mercy of the authorities and there would be a general unrest in the society. Rules no doubt could be relaxed by government but not in an arbitrary manner, which would cause inconvenience to the people".

Gross irregularities are always subject to correction by the High Court in constitutional jurisdiction being guardian of the rights of people and under obligation to provide justice and equity to the aggrieved people. If court ignores such irregularities in exercise of discretion by executive agencies on the basis of technicalities, purpose of Article 199 of the Constitution would be frustrated". The scope of jurisdiction of courts under Article 199 of the Constitution is broader to the extent that investigation functionaries too fall into its domain of review. Their actions are also in no case sacrosanct so as to be excluded from judicial scrutiny. [126]

4.4 Unreasonableness

There exists general agreement amongst jurists that all powers should be exercised reasonably. Even if there is no express requirement in the statute conferring power with regard to

---

124 *Fauji Foundation vs. Shamim-ur-Rehman*, PLD 1983 SC 457.*Maula Baksh vs. Chairman Federal Land Commission*, PLJ 1986 Quetta 76; *Assaf Ahmed Ali sv. Muhammad Khan Junejo*, PLD 1986 Lah. 310; see also PLD 1987 Kar.s296 and PLD 1995 SC 66.

125 *Fazal Abbass vs. Federation of Pakistan* 2011 PLC (CS) 788 Islamabad High Court.

126 *Fatima Bibi vs. Mallan* 1995 P.Cr.L.J. 507.

the reasonableness of the action, the authority taking the action is under an implied condition to use power reasonably and not otherwise. An authority failing to comply with this obligation, acts unlawfully or *ultra vires*.[127]

'Reasonable' means fair, proper, just, moderate, and suitable under the circumstances. Fit and appropriate to the end in view having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason. Thinking, speaking or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.[128]

It is, however, rightly said in *Stroud's Judicial Dictionary*[129] that it would be unreasonable to expect an exact definition of the word 'reasonable'. The word has in law the *prima facie* meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know.[130]

Unreasonableness is synonymous to arbitrary but it may include many things; e.g. irrelevant or extraneous considerations might have been taken into account by the authority or there was improper or collateral purpose or *mala fide* exercise of power by it or there was colorable exercise of power by the authority and the action may be set aside by courts. Arbitrary' is in an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle not founded in the nature of things; non rational; not done or acting according to reason or judgment; depending on the will alone: absolute in power; capriciously; tyrannical-, despotic.[131]

---

127 de Smith's, Judicial Review of Administrative Action, 4th ed, P. 345.

128 Black's Law Dictionary, Sixth ed, P. 1265.

129 Stroud's Judicial Dictionary, 4th ed, P. 2258.

130 *A Solicitor, Re:* (1945) K.B. 368, at P. 371.

131 Black's Law Dictionary, Sixth ed, P.104.

"Legality and not the reasonableness is the concern of courts in judicial review. However, courts consider an unreasonable action *ultra vires* because of the following two reasons advanced by *D.J. Galligan*".[132]

(a) a decision may be otherwise ultra vires as being based upon an improper purpose, irrelevant matters, or inadequate impartial support; or

(b) a discretionary decision is considered ultra vires if it were so unreasonable that no reasonable authority could have made it.

Frequently quoted *Rooke's case* [133] is regarded as oldest on this subject. The Commissioner of Sewers had levied charges for repairing a river bank, but they had thrown the whole charge on one adjacent owner instead of apportioning it among all the owners benefited. In law they had power to levy charges in their discretion. But this charge was disallowed as inequitable and unreasonable. *Coke, J.* observed:

"For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substances, between equity and colorable glasses and pretences, and not to do according to their wills and private affections; for as one *saith, talis discretion discretionem confundit.*"[134]

Roberts v. Hopwood [135] is the leading case on the topic of reasonableness. The district auditor had disallowed as contrary to law the over-generous wages paid by the borough council of Poplar to pay their employees under an Act empowering them to pay such wages as they "*may think fit*". Upholding the auditor's decision *Lord Sumner* said that the words 'as they think fit'

132 Discretionary Powers, 1990, P. 321.

133 (1958) 5 Co. Re. 996.

134 Ibid.

135 (1925) A C. 578.

contained a necessary implication both of honesty and of reasonableness. Lord Wrenbury in the same case observed:

"Is the verb 'think' equivalent to 'reasonably think'? My Lords, to my mind there is no difference in the meaning, whether the word' reasonably' or 'reasonable' is in or out I rest my opinion upon higher grounds. A person to whom is vested discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably."[136]

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [137] is the leading, frequently approved of and relied on authority on the subject. The facts were that the Sunday Entertainment Act, 1932 gave local authorities power to allow cinemas to open on Sundays 'subject to such conditions as the authority thinks fit to impose'. Wednesbury Corporation gave the plaintiff permission subject to the condition that no children under fifteen should be allowed in, with or without an adult.

Lord Greene although observed that even where an authority has observed the 'relevancy rules', a decision may still be 'unreasonable', when he said:"It may still be possible to say that, although the local authority has kept within the four corners of the matter which they ought to consider they may nevertheless have come to a conclusion so unreasonable that no reasonable authority could ever come to it....

136 ibid. at P. 613.

137 (1948) 1 K.B. 223.

To prove a case of that kind would require something overwhelming, and, in this case the facts do not come anywhere near anything of that kind."Again, analyzing the ground of 'unreasonableness', *Lord Greene* observed:

"Lawyers familiar with the phraseology, commonly used in relation to exercise of statutory discretion use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct- himself properly in law. He must call his own attention to the matters which he is bound to consider."

He cannot exclude from his consideration matters which are relevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting 'unreasonably". [138]

Similarly, there may be something, so absurd that no sensible person could ever dream that it lay within the powers of the authority. *Warrington L J in Short vs. Poole Corpn.* [139] quoted the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith-, and in fact all these things run into one another"[140]

In *R v. Tunbridge Wells Health Authority, ex p. Goodridge* [141] "the authority had a duty to consult a committee about any proposal to make a 'substantial variation' in its services. It resolved on the temporary closure of a 'cottage hospital' and referred to plans to reopen it as a

138 Ibid.

139 (1926) Ch. D. 66.

140 *Associated Provincial Picture House Ltd vs. Wednesbury Corpn.*(1948) I KB 223.at P 229.

141 (1988) Times. 21 May.

rehabilitation unit for the mentally infirm. The court, applying the Wednesbury reasonableness, said that no reasonable authority could have taken the view that the 'temporary closure' was not a 'substantial variation', after that closure the hospital would never again open as a 'cottage hospital'.[142]

To quote a few examples from Pakistani jurisdiction *Hamood-ur-Rehman*, J. in the leading case of *Farid Sons Ltd. v. Govt. of Pakistan* [143] had rightly remarked:

"....whenever the executive authority is given the power by some law to decide upon and affect the rights of subjects for specified reasons and in a specified manner then there is duty cast upon it to decide objectively as to whether those reasons exist or not in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice."

Again, where the controlling authority, set aside the election on ground which no reasonable person could consider reasonable. The High Court in its writ jurisdiction quashed the order as being illegal.[144]Similarly, where an Election Tribunal recorded findings on the mere testimony of an interested witness, high court held the order unreasonable and arbitrary and hence set it aside[145]

In *Govt. of Pakistan vs. Dada Amir Haider* [146] *Justice Nasim Hassan Shah* observed:

"...., no reasons whatever were given by the authorities to indicate why the applicant could not be issued a passport. Such an order is not a proper order as without disclosing the reasons why

142 Ibid.

143 PLD 1961 SC 537, at P. 571.

144 *Muhammad Ali vs. Election Controlling Authority*, PLD 1963 Lah. 34.

145 *Shafiq ur Rehman vs. M.S, Mian*, PLD 1968 Dacca 332; *Muhammad Akram vs. C.A. Seed*, PLD 1965 Lah.703.

146 PLD 1987 SC 504 see also *Kishan Das vs. Chairman WAPDA*, PLD 1983 Quetta 61; and *Zahoor Elahi vs. Secretary*, PLD 1975 Lah. 494.

the discretion has been exercised against the applicant it is not possible to say whether the discretion exercised has been exercised properly or arbitrarily." [147]

In *Province of Punjab vs. Miss Khakan Mehmood*, [148] a Division Bench of the Lahore High Court held the rules in prospectus regulating the admission policy can be stride down as invalid on the ground of unreasonableness. In another case, the Supreme Court held that rules in prospectus can be challenged on the ground that they were repugnant to the laws of the land or on the ground that they were uncertain, or that they were unreasonable.[149]

Exercise of statutory discretion affecting individual's interests was although invariably reviewable, yet courts would be reluctant to substitute their own discretion for that of the administrative authority, where discretionary power was not arbitrarily exercised. Authority, wherein discretion was vested could, however, be compelled to exercise its discretion but could not be compelled to exercise the same in any particular manner.

Where party proceeded against had done whatever possibly could be done in fair exercise of his discretion, particularly keeping in view prime object of the project for which such discretion was exercised, no illegality was committed, no arbitrary procedure was followed. Where entire transaction in exercise of discretion was transparent, court could decline to interfere in such matter. [150]

Again, where a contract was not granted to the highest bidder without any just cause, the exercise of discretion was held arbitrary and the order was set aside. [151] Similarly, where

147 Ibid.

148 PLD 1985 Lah.300 (DB).

149 *Muhammad Iqbal Khan Niazis case*, PLD 1979 SC.1.

150 *Port Service (Pvt.) Ltd. vs. Pakistan* PLD 1995 Kar. 374. *Jones vs. Swansea* (1989) 3 All E.R. 162.

151 *Javed Hotel (Pvt.) Ltd. vs. C.D.A.* PLD *1995 Lah 315.*

settlement authorities have decided cases unreasonably, capriciously or arbitrarily, the courts readily set aside those exercises of discretion. [152]

In *Malina Rani Das vs. Province of East Pakistan,* [153] the Deputy Commissioner took over a cinema as enemy property under Defense of Pakistan Rules, 1965. The order was made without application of mind and without giving any reason. The High Court held the order as invalid.

In nutshell, Professor *H.W.R. Wade*'s [154] conclusion seems to be right and relevant and pertinent here. He observed,

"the doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision."

Discussing the same problem *Lord Hailsham* [155] observed that

"*two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable*".[156]

In GCHQ case, [157] *Lord Diplo*ck has rightly stated:

"It (unreasonableness) applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

---

*152. Manzoor All Burney vs. Hariz Muhammad.*PLD 1989 SC 162, *Azam Baig vs. Abdul Aziz*, 1970 SCMR 182. *N.M. Khan vs. Chief Settlement Commissioner*, 1970 SCMR 158: and *Mohammad Iqbal's case*, PLD 1964 SC 404.

153 PLD 1968 Dacca 177.

154 Administrative Law, 9th Edition. 2005.

155 *An Infact, Re,* (1971) A.C. 682, at P.700.

156 *Emphasis added through italics.*

157 *Council of Civil Service Unions vs. Minister of Civil* Service, (1985) A.C. 374, at P 410.

We may summarize the above discussion with the dictum of *Iftikhar Muhammad Chaudhry J* [158] which is in line with the earlier judicial trends [159] in the following words,

"consideration of all the facts and circumstances of the case and proper appreciation of the questions involved therein, would constitute proper exercise of discretion, which would not be interfered by the Supreme Court under constitutional mandate".[160]

4.5 Epilogue

I may conclude the instant chapter wherein a thorough survey on the topic of abuse or excess of discretion has been accomplished. Prominent English jurist *A.V. Dicey* in his commentary, Law of the Constitution, 9th Edn. @ Page 200, states that it is used to be thought to be classical doctrine that wide discretionary power was incompatible to the rule of law, for what the rule of law requires is not that wide discretionary powers would be totally absent, but the law should be able to control its exercise so that there may not be any abuse of discretion. It is well settled that all power has its legal limits, and that the courts should draw those limits in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizens.

Now-a-days, parliament calls for more powers upon the executive which on their face might appear to be absolute and arbitrary. The court cannot recognize or accept the existence of any arbitrary power and unfettered discretion. All decision makers are expected to act in good faith.

158 *Shahzad Ahmad vs. State* 2010 SCMR 855.

159 Also see 1995 SCMR 1249,.

160 1994 SCMR 1283.

CHAPTER 5

FAILURE TO EXERCISE DISCRETION

Failure to Exercise Discretion

Logically, when discretion has been conferred on an authority, it must itself exercise the discretion after considering the facts and circumstances of the case before it, and come to its own decision thereon. The authority cannot divest itself of the power given to it; if it does so, its action will be invalid. In such a situation, the authority is deemed to have failed to exercise its discretion. The grounds of invalidity of discretionary decisions discussed earlier and the current one are not exclusive but overlapping.

In a classic case, *Lord Esher* MR in *The Queen of Prosecution of Richard Waste Brooke vs. Verstry of St. Pancras* [1] stated;

"....if the people who have to exercise public duty by exercising their discretion take into account matters which the courts consider not being proper for the guidance of their discretion then, in the eye of law they have not exercised their discretion."

In a true democratic state, actual law, be it enacted or customary, was what the courts interpreted and finally enforced. [2] It is adequately established that courts are the final arbiters in the domain of interpretation of law. An administrative authority or functionary having discretion to decide a particular matter could not act in violation of laid down rules, principles and laws.[3]

It is appropriate, before going into details, to start with a passage from Professor *de Smith's* book[4] which was also quoted in the two leading cases [5] on the subject in Pakistan.

---

1 (1890) 24 QBD 371 at 375.

2 *Baz Muhammad kakar vs. Federation of Pakistan*: PLD 2012 SC 923.

3 *Pirzada Jamaluddin A. Siddiqui vs. Federation of Pakistan*.2012 PLC (C.S.) 966(e) Sindh High Court.

4 *Judicial Review of Administrative Action.* 4th Edn.London, Stevens and Sons Ltd, 1980. P. 285-286.

5 *Manthar Ali M. Jatoi vs. Government of Sind* 1988 PLC (C.S.) 344 (DB).*Ardeshir Cowasjee vs. Multiline Associates* PLD 1973Kar. 237.

The relevant principles formulated by the courts may be broadly summarized as follows; "The authority in which discretion is vested can be compelled to exercise, that discretion, but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it may not act under the dictation of another body or disable itself from exercising discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do." [6]

It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter and spirit of the legislation, that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped into two main categories: failure to exercise discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts *ultra vires*. It is not possible to differentiate with precision the grounds of invalidity contained within each category. [7]

The foundational feature of subordinate legislation is that its source of power was the legislature itself, while the source of administrative direction was the agency established by the same legislature.[8] The main object of conferring discretionary power on an administrative authority is that the authority itself must exercise the said power. If there is failure on the part of

6 Ibid.

7 Ibid.

8 *Punjab Healthcare Commission vs. Mushtaq Ahmad Ch.* PLD 2016 Lah. 237.

the authority to exercise discretion, the action will be bad in law and hence reviewable. We may divide such failures into the following major categories:

- Sub-delegation;
- Imposing fetters on discretion by self-imposed rules of policy;
- Acting under dictation;
- Non-application of mind; and action on recommendation.
- Non- compliance of procedural requirements/procedural *ultra vires*.
- Non-observance of jurisdictional principle

5.1 Sub-Delegation

According to Professor *de Smith* [9]

«A discretionary power must in general, be exercised only by the authority to which it has been committed. It is a well-known principle of law that when a power has been confided to a person in circumstances indicating that trust is being reposed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another."

This principle, which has often been applied in the law of Agency, Trust and Arbitration and is expressed in the form of maxim *'delegatus non potest delegare' (delegari)* A maxim which owes its origin to mediaeval commentators on the Digest and the Decretals. The widespread assumption that it applies only to the sub-delegation of legislative powers and to the sub-delegation of other powers delegated by a superior administrative authority is unfounded. It

9 *Judicial Review of Administrative Action,* 4th ed. P. 298, P.W. Duff & H. Whiteside (1929) 14 *Cornell L.Q.* 168.S The author suggests that the maxim recited by *Coke* in his *Institutes* (ii, 597) was probably taken from an incorrect rendering in a passage in an early printed edition of Bracton. But see Horst P. Ehmke (1961) 47 *Cornell L.Q.* 50, 54-55, pointing out that Bracton was indeed addressing himself to the impropriety of sub-delegating judicial power delegated by the King.

applies to the delegation of all classes of powers, and it was indeed originally invoked in the context of delegation of judicial powers. It is therefore convenient to travel beyond the delegation of discretionary powers in the strict sense and to view the problem as a whole."[10]

To Professor *P.P. Craig* [11] "The general starting point is that if discretion is vested in a certain person it must be exercised by that person. This principle finds its expression in the maxim *delegates non potest delgare*. It is important, however, to bear in mind that the maxim is expressive of a principle and not a rigid rule. Whether a person other than that named in the empowering statute is allowed to act will be dependent upon the entire statutory context, taking into account the nature of the subject-matter, the degree of control retained by the person delegating, and the type of person or body to whom the power is delegated."

Professor *Wade* [12] putting all this in nutshell, viewed,

"The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable."

Thus, in *Ellingham vs. Minister of Agriculture* [13] the Court held that it was unlawful for a wartime agricultural committee, to which powers concerning cultivation of land had been delegated by the Minister of Agriculture, to delegate to an executive officer the choice of which particular fields should be subject to certain type of cultivation.

In *Ellis vs. Dubowski* [14] a condition imposed by the licensing committee of a country council that it should not allow films to be shown unless certified for public exhibition by the

10 John Willis, "*Delegatus non potest delegare*" (1943) 21 *Can. B.R.* 257, 259.Quoted by de Smith *infra.*

11 Administrative Law, (1989) 2nd ed, P.306.

12 H.W.R. Wade, *Administrative Law*, 5th ed, P.319 .

13 (1948) 1 All E.R. 780.

14 (1921) 3 K.B. 621.

Board of Film censors, was held invalid as involving a transfer of power to the latter. In *Barnard vs. National Dock Labor Boards* [15] registered dock workers were suspended from their employment after a strike. The power to suspend laborers under the statutory dock labor scheme was vested in the local dock labor board. The suspensions were made by the port manager to whom the board had purported to delegate its disciplinary powers. The dockers obtained declarations that their suspension was invalid since the board had no power to delegate its functions and should have made the decision itself. Same principle was applied in *Ratnagopal vs. Attorney General.* [16]

Although the question was basically of form in all these typical English cases on the subject but convenience and necessity often demanded that a public authority, executive officers and other such agencies should also adhere to it. Professor *Wade* [17] in this regard, observed:

"The law makes little difficulty over this provided that the subordinate agencies merely recommended, leaving the legal act of decision to the body specially empowered. It is obvious that in many such situations the real discretion will be exercised by the agency that recommends, and that in substance the law allows this function to be delegated. Nevertheless it is more than a matter of observing legal forms. The valid exercise of discretion requires a genuine application of the mind and a conscious choice by the correct authority."

Indian Supreme Court relying upon different leading English authorities on the subject held sub-delegation of power as bad in the eye of law[18] However, in *Pradyat Kumar vs. Chief Justice of Calcutta* [19] the inquiry against the registrar of the High Court was made by a puinse

15 (1953)2 Q.B.18.

16 (1970) A.C. 974.

17 H.W.R. Wade, *Administrative Law*. 5th ed, .321.

18 *Ganpati Singhji vs: State of Ajmer*. AIR 1955 SC 188.

19 AIR 1956 SC 285.

judge of the court. After considering the report and serving a show cause notice, he was dismissed by the Chief Justice.

The Supreme Court held that it was not a case of delegation of power by the chief justice but merely of employing a competent officer to assist the chief justice. If the authority retains in its hands general control over the activities of the person to whom it has entrusted in part the exercise of its statutory power and the control exercised by the administrative authority is of a substantial degree, there is in the eye of law no delegation at all.

In Pakistan, *Ghulam Mohi-ud-Din vs. Chief Settlement Commissioner* [20] is the leading case on the subject of sub-delegation. In this case chief settlement commissioner just countersigned an office memorandum submitted by the settlement commissioner. This sub-delegation of authority was held to be invalid. Justice *Hamood-ur-Rehman* observed:

"We are of the opinion that chief settlement commissioner should apply his own independent mind to the questions raised before him and to deal with the three revision petitions according to law. By merely countersigning the note of the settlement commissioner we are clearly of the view that the chief settlement commissioner had not exercised the jurisdiction vested in him in accordance with law." [21]

This principle was followed in many subsequent cases. [22] However, in *Faiz Ali vs. Barkat Ali* [23] where the settlement commissioner based his decision regarding divisibility of house on a report made by the additional settlement commissioner after a spot inspection, the Supreme

20 PLD 1964 S.C. 829.

21 ibid, P. 840.

22 *Khurshid Mehmood vs. S&R Commissioner*, PLD 1971 S.C. 498; *Chanda Begum vs. Settlement Commissioner*, PLD 1977 SC 503: *Muhammad Ismail vs. Deputy Commissioner* PLD 1976 Lah. 758; and *Shad Mohammad vs. Settlement Commissioner*. PLD 1986 Pesh. 169.

23 1963 SCMR 1036.

Court refused interference in the findings of the settlement commissioner. Presumably, this was held for the reason that settlement commissioner had not merely countersigned the report but only made it a basis of his order which he passed after the application of his mind. Sub-delegation is also authorized where the statute expressly or impliedly allows it.

In a famous case [24] Lahore High court held invalid the discharge order passed by a magistrate without giving reasons for his order and merely acted on the application of the Police. It was held that he has not applied his independent mind in exercising his discretion to discharge the accused.

5.2 Imposing Fetters on Discretion by Self Assumed Rules of Policy.

It is a general principle that administrative discretion has to be exercised upon the facts and circumstances of each case. On the other hand if the authority imposes fetters on its discretion by adopting fixed rules of policy to be applied in all cases coming before it, there is failure to exercise discretion on the part of that authority. What is expected is that, the authority must consider the facts of each case, apply its mind and decide the case.

To Professor *S.A. de Smith* [25]

"A tribunal entrusted with discretion must not by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases". Similarly *P.P. Craig* [26] is also of the view that where the public body adopts a policy which precludes it from considering the merits of a particular case is a circumstance of an unlawful fetter on its discretion".

24 *Petitioner vs. Respondents*, NLR 1991 Criminal 725.

25 *Judicial Review of Administrative Action*, 4th ed, P. 311.

26 *Administrative Law*, 2nd ed, P.310 8, 311.

D.J. Galligan [27] speaks of no-fettering doctrine in this respect. He summarizes the doctrine in the following words."

a) an authority in the exercise of discretionary power may, but is under no duty to adopt or create a set of standards upon which its decisions may be based,

b) those standards must not be treated as rules to be applied automatically to situations that come within them, but must allow consideration of the merits of each case.,

c) consideration of merits of each case means that the authority must direct itself to the case, and then decide whether the standards should apply, whether they should be modified , or whether, in the circumstances an exception should be made to them",

d) He gives two other links to complete the equation, "

e) an authority has a duty to allow an interested party to direct arguments against general standards with a view to showing how they should be applied in the present case, or why they should be modified or not relied on at all." But, to him, this is not a firm principle (observance of natural justice in these cases). The last link of the doctrine, to him, "

f) where an authority discloses the standards, it may be under a duty to apply them, and to departure from them is possible only after giving parties an opportunity to be heard, although again this may depend on the subject matter of the discretion and on the extent to which disclosure may be regarded as an implied undertaking to those affected.

In *R vs. London County Council, exp. Conic* [28] the court quashed a decision refusing the applicant permission to sell pamphlets at certain meetings. The decision had been taken in

27 *Discretionary Powers* (1990), P.281, 282.

reliance upon a council by law that nothing was to be sold in parks. *Darling* J. stated that each application must be heard on its merits, there could not be a general resolution to refuse permission to all.

However, it can be prejudiced from the cases like *Byole vs. Wilson* [29] that a public body is not precluded from having any general policy at all; a general policy is allowed provided due consideration of the merits of an individual case takes place, and provided that the content of the policy is regarded as *intra vires.*

It was in *R vs. P.L.A. ex P. Kynoch Ltd.*[30] that *Bankes L.J.* well stated the principles. The Port of London Authority had refused an application for a license to construct certain works, on the ground that it had itself been charged with the provision of accommodation of that character; *Bankes L.J.* observed.

"There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will be in accordance with its policy decide against him, unless there is something exceptional in his case if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whosoever made. There is a wide distinction to be drawn between these two classes."

The difference between the two approaches is brought out well by *Galligan:*[31]

---

28 (1918) 1.KB. 68.

29 *(1907) A.C. 45, See also, R. vs. Torquay Licensing Justices, ex.p Brockman (1951) 2 KB. 784, and R vs. Tower Hamlets London Borough Council, ex.p .Kayne levenson* (1975) 1 Q.B. 431.

30 (1919) 1.KB. 176.

31 *The Nature and Function of Policy within Discretionary Power* (1976) *LQR*, 332, P.349.

"The implications of this more restrictive approach are that not only must an authority (a) direct itself to whether in the light of the particular situation a predetermined policy ought to be altered, but also(b) must refrain from regarding a policy anything more than one factor amongst others to take into account. In other words a policy may not become a norm which, subject only to (a) determines the outcome of particular decisions."

American approach is slightly different from that of British. *K.C. Davis and R.J. Pierce Jr* [32] gave the American approach on the subject in the following words,

"An agency's instructions to its staff do not "bind" the agency in at technical and formal sense, but they limit agency discretion in important ways.

Firstly, a reviewing court can rely on the existence of staff instructions as the basis for impeaching an agency's assertion concerning the meaning of a legislative rule....

Secondly, an agency's policy statements and instructions to its staff limit the discretion of the agency's employees".

Given the large number of investigative, enforcement, and adjudicatory personnel that would otherwise possess broad discretion, this effect is extremely important....

Thirdly, to the extent that agencies make their non legislative rules accessible to the public, affected members of the public can ascertain the agency's rules and policies. They can use that knowledge as the basis for decisions either to act in accordance with the agency's policies or to attempt to change those policies.

Fourthly, politically accountable officials ---- the President and members of Congress - can assertion agency policies to the extent that they are accessible in some form. They can use that knowledge to induce agencies to change policies with which the President or Congress

32 *Administrative Law Treatise*, 3rd ed. V.III. P.108, 109.

disagree."But here also, agency can depart from the general guidelines or instructions provided reasons should be given for such departure in a given case".[33]

Generally speaking, same principles as are applicable in Great Britain are applicable in India [34] and Pakistan on the subject. In Pakistan, *Ikram Bus Service vs. Board of Revenue* [35] is the leading precedent in this respect. the Supreme Court quashed the order of the Regional transport Authority by which the Authority acting according to the policy decision of the Provincial Government entertained the applications of limited companies and altogether refused to entertain applications of individual transporters although the relevant law did not lay down any such condition.

It was observed that R.T.A. being an autonomous body must act under the provisions of the Motor Vehicles Act, 1939, and that it could not act merely as agents to the Government and impart extraneous considerations in deciding the applications for permit, and that the authority tried to give effect what it conceived to be the settled policy of the Government without exercising its own independent judgment on the matter as required by the statute.

But in *Province of West Pakistan v. Din Muhammod* [36] Justice *Hamood-ur-Rehman held* that administrative instructions contained in memorandum issued by authority competent to alter or amend rules can be as effective and binding as statutory rules. Although such memorandum may not have expressly amended the rules, it may nevertheless have effect of amending previous rules.

---

33 *Atchison, T.&S.F.R. vs. Wichita Board of Trade*, 41 2.U.S.800 (1973).

34 For Indian cases see, *Jit Singh vs. State of Punjab*, AIR 1979 SC 1034, *Gurbaksh Singh vs. State of Punjab*. AIR 1980 SC 1632, *Rama Sugar Industries vs. State of A.P.* AIR 1974 SC 1745 *&J.C. Jaday. vss. Haryana* AIR 1990 SC 857 where a contrary stance was taken by the Indian Supreme Court.

35 PLD 1963 SC 564.

36 PLD 1964 SC 21.

In this context *P.P. Craig* [37] has rightly concluded:

"It is readily apparent that the optimum balance between rules and discretion will vary from area to area. Only careful analysis of particular regulatory context can reveal that balance. Given that this is so one should treat with reserve suggestions that the courts should force or persuade agencies to develop more rules than they presently possess. The judiciary is not in a good position to assess whether the complex arguments for and against rule-making should lead to an increase in the prevalence of such rules within a particular area."

The whole topic was summarized by *Lord Coke, J. in Stringer vs. Minister of Housing* [38] in the following words:

"a minister charged with the duty of making individual administrative decisions in a fair and impartial manner may nevertheless have a general policy in regard to matters which are relevant to those decisions, provided that the existence of that general policy does not preclude him from fairly judging all the issues which are relevant to each individual case as it comes up for decision".

In the context of the conduct of petitioner who is invoking constitutional jurisdiction of Supreme court under Article 184(3) to seek discretionary relief [39] it has been recently reiterated by *Iftikhar Muhammad Chaudhry CJ* through this pronouncement [40] that since jurisdiction of

37 Administrative Law, 2nd Ed. P.319.

38 (1970) 1 W.L.R. 1281.

39 *Ameer Umar vs. Additional District Judge Dera Ghazi Khan*2010 SCMR 1215.

40 *Kamal Shah vs. Govt. of N.W.F.P.* 2010 PLC (CS) 809, *Nawab Syed Raunaq Ali's case* PLD 1973 SC 236.

Supreme Court is discretionary [41] · even grant of leave to appeal is discretionary [42] therefore, the (petitioner) is bound to come into court with clean hands. [43]

5.3 Acting under Dictation

According to Professor *Wade*, [44]

"Closely akin to delegation, and scarcely distinguishable from it in some case, is any arrangement by which a power conferred upon one authority is in substance exercised by another.... The effect then is that the discretion conferred by parliament is exercised at least in part, by the wrong authority, and the resulting decision is *ultra vires* and void." Similarly Professor *S.A. de Smith* seems to be in full agreement with Professor *Wade*, when he says,

"An authority entrusted with a discretion must not in the purported exercise of its discretion, act under the dictation of another body or person."[45]

Legally, this sort of attitude by the officials in the exercise of their discretionary power is aptly called as failure to exercise discretion, and is pronounced as bad in law.

English Courts always followed their principle and never hesitated to strike down a decision which is dictated by an incompetent authority.

In *Lavender (H) & Son Ltd. vs. Minister of Housing and Local Government* [46] a minister dismissed an appeal purely on the strength of Policy objections entered by another minister; it was held that his decision had to be quashed because he had, in effect, surrendered his discretion

41 *Chiragh vs. Ibrahim* 2010 SCMR 1976, *Muhammad Faiz Khan vs. Ajmer Khan* 2010 SCMR 105.

42 *Raja Khan vs. Manager (operations) FESCO,* 2011 SCMR 676, PLJ 2010 SC 560, 2010 PTD (service) 113.

43 *Aisha Sabir vs. Fida-ul-haq*, 2010 SCMR 1811.

44 H.W.R. Wade, Administrative Law, 5th ed, p. 329.

45 S.A. de Smith, *Judicial Review of Administrative Action*, 4th ed. p.309.

46 (1970) 1 W.L.R. 1231.

to the other minister. Similarly in a wartime case [47] the court invalidated a reinstatement order made under wartime labor regulation by a national service officer, who was empowered to direct reinstatement of workers dismissed for misconduct. For the officer was acting under discretion from the minister, whereas he had a statutory authority in his own right and should have exercised his personal discretion.

An interesting argument arose in a famous case of *R .vs. Walthaur Forest London Borough Council* [48] The respondent council by a resolution increased the rates by over fifty per cent. Ratepayers challenged the said resolution inter alia on the ground that certain councilors who had voted in favor of the resolution had voted against it prior to a council meeting. They had voted in favor of the resolution under the dictation of their party ' while' rejecting the argument, *Donaldson, M.R.* observed:

"Bearing in mind that it must always be open to a member of the council to change his mind at any time before the actual vote in council, the fact that he expressed a different view at an earlier lime does not, of itself, give rise to any inference that his discretion was fettered or that he voted contrary to his genuinely held views....

It is to make up his own mind on how to vote, giving such weight as he thinks appropriate to the views of councilors and to the policy of the group of which he is a member. It is only if he abdicates his personal responsibility that question can arise as to the validity of his vote. Same principle was applied by the Indian Supreme Court in *Commissioner of Police vs. Gardhandas Banerji* [49] under the law, the Police Commissioner granted license for the constitution of a cinema theater. Subsequently, he cancelled it at the direction of the state

47 *Simms Motor Units Ltd. vs. Minister of Labor* (1946) 2 All E.R. 201.

48 (1928) Q.B. 419: (1987)3 All E.R. 671.

49 AIR 1952 SC 16.

Government. The Supreme Court set aside the order of cancellation as the commissioner had acted merely as the agent of the Government.

The court however rightly observed that the commissioner was entitled to take into consideration the advice tendered to him by a public body set up for this express purpose, and he was entitled in the bona fide exercise of his discretion to accept that advice and act upon it even though. he would have acted differently if this important factor had not been present in his mind when he reached a decision." This stance was upheld by the Indian Supreme Court in many subsequent cases[50]

Pakistani courts have applied this principle strictly and very frequently. In an early case [51] the Supreme Court laid down the rule prohibiting the exercise of discretion on the directions of superior authority. The requisition law empowered the provincial government to requisition property under specified circumstances and also authorized the government to delegate its functions to any of its subordinate official. The provincial government after having authorized the District Magistrate to discharge the functions relating to the requisition of property directed him to requisition certain property, but the requisition order of district magistrate was set aside.

50 *Rowjee vs. State of Andra Pradesh,* AIR 1964 SC 962; *Rajagopala Naidu vs. State Transport*, AIR 1964 SC 1 573 *Orient Paper Mills v. Union of India*, AIR 1970 SC 1498; *and Durgacharan vs. State of Orissa,* AIR 1987 SC 2267.

51 *The Province of East Pakistan vs. Jogesh Chandra Lodhi*, 11 DLR (SC) 411.

Chief Justice Munir observed:

"It is perfectly clear from this proceeding that the additional district magistrate who made the order under section 3 merely acted as a tool to the land acquisition department of the Government and did not at all apply his mind to the question whether it was necessary or expedient to requisition the property for a public purpose. On this ground alone, therefore, the order must be held to be invalid".[52]

In another case [53] the deputy commissioner made a reference to Jirga on the order of the Home Secretary, The full bench of the High Court held the order incompetent on the ground that he did not make the order in his own discretion or on his own satisfaction, but in obedience to the orders of the home secretary.

Similarly, in *Mohammad Nawaz vs. Chairman District Council* [54] where a schoolboy was rusticated by the Inspector of Schools under the strong influence of the chairman district council, the court issued *certiorari* to quash the order of rustication, after observing that the inspector of schools did not make the order independently, it was held by *Justice Sajjad Ahmad*:

"When the law requires that an order should he made by a particular authority, the requirements are that the authority must exercise its own independent judgment while giving the decision and not follow a line laid by some other extraneous authority, however higher in rank and status it may be. If an official functionary who is under a legal obligation to come to his own judgment in a matter allows himself to be completely swayed by someone else and accepts his verdict without giving his own independent thought to the matter, the only sole conclusion to be drawn is that such official functionary allow his will to be substituted by that of the other. The

52 Ibid.

53 *Sher Wali vs. State, PLD 1961 Pesh.* 117 (FB).

54 PLD 1961 Pesh. 152.

decision thus made is not his decision, having been imposed on hint by an extraneous authority which he has not been able to resist."[55]

This principle was followed in many subsequent cases by the Pakistani courts.[56] Our courts went so far in applying the principle that where a statute provided for seeking assistance, guidance or instructions, they construed it very strictly and upheld this principle.

In *Al Abram Builders vs. Income Tax Appellate Tribunal* [57] where interpretation of section 7 of the Income Tax Ordinance was involved. Section 7 envisages obtaining of assistance guidance or instructions by an I.T.O. from his superiors. *Justice Ajmal Mian* giving the opinion of the court held that it was only in exceptional cases of difficulty that I.T.O. can seek such assistance etc. The legislature never meant, by adding this provision, to allow an I.T.O. to abdicate his functions and duties in favor of someone else. If it is interpreted otherwise, then the very purity and sanctity of the hierarchy which provides for original and appellate jurisdiction is completely tarnished.

In leading case of *Zahid Akhtar vs. Government of Punjab* [58] in matter of terms and conditions of civil servants, our Supreme Court strongly condemned the illegal attitude of elected representatives and their unlawful meddling in unauthorized posting and transfers of civil servants. Provincial Rules of Business, 1974 provide for the authority competent to transfer a civil servant. In that case, the appellant was repeatedly transferred from one place to another by the authority at the behest of elected representatives. But Supreme Court went wrong, as after

---

55 ibid.

56 *Abdur Rehman vs. State,* PLD 1971 Pesh. 61; *Fayyaz Hussain vs. Administrator* PLD 1972 Lah 316; *Mohammad Yousaf vs. Province of Sind* PLD 1976 Kar. 1219; *Muhammad Tufail vs Province of Punjab*, PLD 1978 Lah: 87 and *Abdul Hasan vs. Chief Settlement Commissioner.* PLD 1981 Lah.271.

57 1993 SCMR 29.

58 PLD 1995 SC 530.

strong condemnation of this flagrant case of acting under dictation, it dismissed the petition as being not maintainable. Similarly, since education had become a provincial subject after the Eighteenth Amendment to the constitution, therefore the Governor, who was a federal appointee, could not be empowered with sole discretion while exercising Revisional powers to interfere in provincial autonomy.[59]

The Supreme Court had ample jurisdiction to entertain the petition and to grant the leave and relief to the appellant. However, it was not too long after this decision that the Supreme Court had changed its attitude and granted leave and relief in a similar case.[60]

5.4 Non Application of Mind and Acting under Dictation

An authority entrusted with a discretionary power should apply its independent mind to the facts and circumstances of the case. In case of breach of this condition, there is a clear non-application of mind and hence the order bad in the eye of law. The authority might be acting mechanically without due care and caution or without a sense of responsibility in the exercise of its discretion. [61]

Even during colonial period in *Emperor vs. Sibnath Banerji* [62] an order of preventive detention was quashed as it had been issued in a routine manner on the recommendation of police authorities and the Home Secretary himself had not applied his mind and satisfied himself that the impugned order was called for.

59 *Dr. Zahid Javed vs. Dr. Tahir Riaz Ch.* PLD 2016 SC 637.

60 *S. Mazhar Hussain Bokhari vs. Government of Punjab*, PLD 1996 SC 59.

61 *Humaira Hassan vs. Federation of Pakistan*; 2012 PLC (C.S.) 566 (b) Lah.

62 AIR 1945 PC 156.

In *Mohammad Anwar vs. Province of East Pakistan* [63] Dacca High Court held that the requisition authority should apply its own independent mind in order to reach the conclusion that whether the property in question should be requisitioned or not.

In *Abul Ala Maudoodi vs. Government of West Pakistan* [64] an argument was advanced from the respondent's side that section 16 of the Criminal Law Amendment Act, 1908 empowered Provincial Government to exercise a purely subjective judgment and the opinion will be good even if no grounds are mentioned. *Cornelius, C.J.* repelling this contention observed:

"That is a view with which I find it difficult to agree, the judgments (impugned) at the same time indicate that in view of learned judges, it is a duty of the Provincial Government to take into consideration all relevant facts and circumstances. That imparts the exercise of an honest judgment as to the existence of conditions in which alone the opinion may be formed, consequently upon which, the opinion must be formed honestly, that the restriction is necessary."[65]

Again his Lordship observed:

"A critic, doubting the applicability of this observation (observation of *Lord Reid* in *Ridge vs. Baldwin* (1964) A.C. 40) to the present case would probably pick upon the absence in section 16 of any requirement that the Provincial Government should have 'reasonable grounds for its decision, but it would require no great force of language to brush aside such an objection.

As I have pointed out, if the section be construed in a comprehensive manner, the requirement of an honest opinion based upon the ascertainment of certain matters which are entirely within the grasp and appreciation of the governmental agency is clearly a pre-requisite to

63 PLD 1960 Dacca 776.

64 PLD 1964 SC 673.

65 ibid. at P. 713.

the exercise of the power." [66] *Justice Cornelius* had clearly laid down that the authorities entrusted with discretionary powers cannot act mechanically but their decisions must be based upon some reasons formed after application of their minds in each and every case. Normally, superior courts do not interfere in the matters concerning exercise of discretion by administrative bodies and subordinate courts unless it is shown that the same had been exercised arbitrarily, fanciful or against the principles laid down by the superior courts in this regard.[67]

Barium chemicals Ltd. vs. Company Law Board [68] is the leading Indian case on the subject. Under the companies Act, 1956, the government was empowered to issue an order of investigation if there are circumstances suggesting fraud on the part of the management.

An order of investigation against the petitioner company was passed by the central government. It was held by the Supreme Court that it was necessary for the Central Government to state the circumstances which led to the impugned action so that the same could be examined by the court.

Shelat J observed:

"There must therefore circumstances exist which in the opinion of the Authority suggest what has been set out in sub-clauses (I), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for anyone to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute."[69]

---

66 ibid, P. 714.

67 *Tassaduq Hussain Gilani vs. State*: 2012 P. Cr. L. J. 1108 (SC).

68 AIR 1967 SC 295.

69 ibid P. 325.

Justice Hidayatullah in the same case observed:

"No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the *sine quo non* for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to inference unless the existence of the circumstances is made out."[70]

Lahore High court has clarified this point as follows,,

"an authority which is given discretionary powers is bound to exercise it fairly according to rational and intelligible reasons. Any action or decision which does not meet such threshold requirements has to be considered to be arbitrary, hence subject to review. [71] Quite a similar reasoning was applied by the Supreme Court of Pakistan in the leading cases of dissolution of National Assemblies.[72]

In *Ghulam Mohy-ud-Din Shah vs. Government of Punjab* [73] Justice *Ihsan-ul-Haq Ch.* relying on the same principle held:"The difficulty is that respondent No.2 (Secretary) did not apply his mind to the request of the petitioner. He kept on waiting for feeding from the subordinates who had their own objects in dealing with the matters of the citizens."

Here, the Secretary (Respondent No.2) did not apply his mind to the application of the petitioner with regard to the de-notification of the property requisitioned in 1978.

Closely related to the concept of application of mind is acting on recommendation or dictation. There are two types of recommendations one is lawful recommendation and second is unlawful.

---

70 ibid, P. 309.

71 *Sikander Ali vs. Government College University Lahore* 2012 PLC (CS) 119(b) Lahore High Court.

72 *Haji Saif Ullah Khan's case*, PLD 1989 SC 166: *Ahmed Tariq Rahim vs. Federation of Pakistan* PLD 1992 SC 646, and *Nawaz Sharif vs. Federation of Pakistan*, PLD 1993 SC 473.

73 1995 CLC 1998.

Unlawful recommendations are those where the authority exercising discretionary power acts on the advice or recommendation of some other authority that is aptly regarded as alien for that purpose. Thus, for example, when Thal development authority dismissed an employee on the directions of chairman agricultural development corporation[74]or the chief settlement commissioner instead of himself deciding a question relating to the registration of an industrial concern left in India relied on the finding of Claims Authority [75] or Revenue Authorities refused to renew a lease of colony lands by acting under the instructions of Army [76] or the chairman, federal land commission exercised *suo motu* revision on the application of another person [77] or the delegate of Chief Settlement Commissioner made his adjudication relating to the verification of claims entirely dependent on the findings of a third party.[78]

All these exercise of discretionary powers were declared as without lawful authority. In the last mentioned case, *Shafi-ur-Rehman J.* termed such an action as "abdication of jurisdiction, surrender of discretion and refusal to exercise jurisdiction."[79]

There is, however, another position, i.e. when by law an authority has to act on the recommendation of some other body. Courts have shown a completely different attitude in such like case. In two cases' [80] Karachi High Court and the Supreme Court had held that where an authority has to exercise its discretion, by law, on the recommendation of another statutory body

74 *Saddique Ahmed vs. Chairman Agri. Development Corp.,* PLD 1968 Lah. 685.

75 *Yousaf vs. Govt. of Pakistan*, PLD 1970 Lah. 581.

76 *Mohammad Aslam Sial vs. Govt. of Pakistan*, PLD 1973 Notes .148 at 225.

77 *Mohammad Khan vs. Chairman, Federal Land Commission*, PLD 1977 Lah. 461.

78 *Sher Mohammad vs. Abdur Rashid*, 1980 SCMR 928.

79 Ibid.

80 *Manthar Ali M. Jatoi vs. Govt. of Sind*, 1988 PLC (C.S.) 344, and *Walayat Ali Mir vs. P.I.A.C.* 1995 SCMR 650.

then those recommendations should be adhered to except for reasons to be recorded. The famous *Judges case or the Al-Jehad Trust case* [81] was also decided relying upon this principle.

Federation of Pakistan vs. Charsada Sugar Mills Ltd [82] is a classic example of failure to exercise discretion. The Central Board of Revenue, although satisfied that there was a substantial short-fall in the production capacity of the Mills, did not allow the actual shortfall. The Board merely relied on its own formula of 10% cut on the total production capacity. *Justice Muhammad Akram* very rightly observed:

"In doing so the board acted almost mechanically and failed to exercise the discretion vested in it under the law. It was the duty of the Board to have acted justly, fairly and reasonably having full regard to the facts and circumstances of the case before it. The board did not weigh and examine the merit of the claim pleaded by the respondent. This indeed, is tantamount to the refusal on the part of the Board to exercise quasi-judicial discretion vested in it under the law." [83]

Apart from these categories Professor *de Smith* [84] makes another category, i.e. undertaking not to exercise discretion. If an authority by grant or contract divests itself from the very essential purpose for which it is created then courts readily declared such contract or grant, as the case may be, as unlawful. But there is a very complicated jurisprudence in relation to this ground of judicial review. Courts normally interfere only in the cases where the authority have renounced at least a part its statutory birthright and not otherwise. [85]

81 PLD 1996 SC 324.

82 1978 SCMR 428.2009 SCMR 1354.

83 ibid, at P. 430.

84 Judicial Review of Administrative Action, 6th ed, P. 474.

85 *Shabana Akhtar vs. D.C.O. Bhakkar*, 2012 PLC (CS) 366 (a) LHC.

5.5 Non-Compliance of Procedural Requirements

Exercise of discretionary power can be held to be bad because of authority concerned did not comply with the procedural requirements laid down in the statute, provided that the court holds the compliance with the procedure to be mandatory. Procedural errors are also held jurisdictional errors if the procedural requirement is held mandatory as distinguished from directory.[86] It is for the court to decide whether a procedural requirement is mandatory or directory. For example a provision requiring the decision making body to consult another authority before arriving at a decision, is usually considered mandatory.

In *Narayana vs. State of Kerala,* [87] the provision in question authorized the state government to revoke the license of a licensee for supply of electric energy in public interest but only after consulting the state electricity board. The court ruled that the consultation with the board was a condition precedent for exercising the power of revocation of license and was thus mandatory. Although the board's opinion was not binding on the government, nevertheless, consultation with it was imperative condition for revoking the license.

Another case on the similar point is *Naraindas vs. State of Madhya Pradesh* [88] The Government was authorized to prescribe text books for various courses in schools in consultation with the board of higher education. The government consulted the chairman but not the entire board. The government's notification prescribing text books was accordingly held void. Under the Land Acquisition Act, the collector is required to give an opportunity of being heard to a person filing objections against the proposed land acquisition. This duty to afford the opportunity

86 *Muhammad Ismail vs. Province of East Pakistan*, PLD 1964 SC 475, PLD 1964 Kar. 425.

87 AIR 1974 SC 175. Quoted by Hamid Khan, *Principles of Administrative Law*, Oxford U.P. 2012, Karachi, 208.

88 AIR 1974 SC 1232. Ibid.

of hearing has been held to be mandatory in *Mandir Sita Ram vs. Lt. Governor of Delhi* [89] if property is acquired without complying with this procedure, it would be quashed.

It is an admitted fact that effective checks and control of abuse of power by judiciary on the basis of procedural ultra vires would help to drastically cut down, large number of pending litigation in apex courts in Pakistan. [90] Somehow in our country, the wide worded conferment of discretionary powers without framing rules and procedures to regulate its exercise has taken to be enhancement of power and it gives the impression in the first instance, but where the authorities fail to rationalize and regulate it by compliance of procedure, courts have to intervene more often. [91]

Supreme Court of Pakistan on many instances[92] has made it clear that if an act is required to be performed by agency, authority or instrumentality according to prescribed procedure within the legal ambit, it must be performed accordingly and not otherwise.

Mr. *Justice A.R. Cornelius* [93] had advocated the structuring of administrative tribunals to scrutinize the power exercised by the public functionaries, in performance of their duties. Alluding to the fact that, the administrative agent in exercising his discretion in a particular case, has to take into account, frequently, a great number of relevant factors which are beyond the ordinary contemplation of the judiciary, and often cannot be formulated on any precise principle.

The court whose discretion is always exercised judiciously, being added by the formulation of guidelines either in the statutory procedure or in the precedents, would not be in such cases to view the matter from too narrow an angle. This is one of the major factors of

89 AIR 1974 SC 1868. Quoted by Hamid Khan ibid.

90 *Abid Hussain vs. P.IA.C.* PLJ 2005 SC 886, PLD 1992 SC 1092, 1999 SCMR 467.

91 *Government of K.P.K vs. Mejee Flour and General Mills.*1997 SCMR 1804.

92 PLD 1987 SC 447, 1998 SCMR 2268, 1998 SCMR 2419, PLD 1964 SC 829, 1986 SCMR 7, 1993 SCMR 177.

93 " The Law" Fortnightly, Karachi, 1st December, 2005.

favoring the belief held in the countries where the "*Droit Administratiff*" is prevalent, that the criticism of administrative actions cannot be safely entrusted to judicial authorities.

Administrative courts have much extended powers and means for obtaining relevant information that is possessed by judicial courts. This undoubtedly is an aid to correct appreciation of any decision under review, and if I might say so, it probably acts equally efficaciously on the one side for granting the review prayed by the citizens, and on the other, to justify the action of administration on the ground not appearing from the order under review."

Brown and Bell [94] have expressed the view that judicial control presupposes the existence of judges, law and procedure. Here the discretion must be exercised not only in accordance with the general principles of substantive law, but also strictly within the procedural cannons set by positive law.

Whenever any person or body of persons is empowered to take decision after *ex post facto* investigation into facts which would result in consequences affecting the person, property or other right of another person, in the absence of any express words in the enactment excluding the application of principles of natural justice, the courts of law are inclined generally to imply that the power so given is coupled with the duty to act in accordance with such procedural principles of natural justice as may be applicable to the facts and circumstances of the case. [95]

The significant procedural principle of *audi alteram partem* will be read into the law unless its application is excluded by express words. A duty is cast on every administrative tribunal to act fairly and justly and with due regard to the principles of natural justice unless specifically exempted from such limitation. Before a stigma is attached to one's character, which

94 *French Administrative Law*, Clarendon Press, Oxford, 1993, p.41.

95 *University of Dacca vs. Zakir Ahmad*, PLD 1965 SC 90.

might dog one's footsteps all one's life, it is incumbent upon an administrative authority to give an adequate opportunity of showing cause against the proposed action. [96]

The primary purpose of judicial review is to keep the powers of government within their legal bounds so as to protect the citizen against their abuse. [97] The individual is in the weakest defensive position against the mighty power of administration. It is therefore, important function of courts to ensure that government powers are exercised according to the law, on proper legal principles, according to rules of reason, justice and not on the mere caprice or whim of the administrative officers, and that individual has adequate remedies when his rights are infringed by the administration. The abuses of governmental powers do not necessarily carry any innuendo of malice of bad faith. Government departments may misunderstand their legal position as easily as many other people and the law which they have to administer is frequently complex and uncertain. Abuse is, therefore, inevitable, and it is all the more necessary that the law should provide means to check it. [98]

The courts are constantly occupied with cases of the kind which are nothing more than the practical application of the rule of law, meaning that the government must have legal warrant for what it does and that if it acts unlawfully, the citizen has an effective legal remedy. On this elementary foundation, courts have erected an intricate and sophisticated structure of rules.

It is also the concern of judicial review to see that public authorities can be compelled to perform their duties if they default in doing so. The courts are called upon in many cases to compel administrative authorities to perform their functions and to exercise their powers in accordance with law and principles of natural justice. The law provides compulsory remedies for

96 *Abdus Saboor Khan vs. University of Karachi*, PLD 1966 SC 536.

97 H.W.R. Wade, *Administrative Law*, (1977) ibid.

98 Ibid.

such situations, thus dealing with the negative as well as positive perspective of maladministration.[99]

The spirit of judicial scrutiny lies in judge made doctrines which apply right across the board and which therefore, generally set legal standards for conduct of public functionaries. The purpose of administrative justice, subject as it is to the vast empires of executive power that have been created, is that the public must be able to rely on the law to ensure that all his power may be used in a way comfortable to its ideas of fair dealing and good governance. Administrative agencies are not empowered with discretion to choose a procedure of their own choice; such unstructured discretion would breed arbitrariness in decision making process, which is contrary to principles of good governance.[100]

5.6 Non-observance of Jurisdictional Principle

The most difficult, yet most important task; however is to distinguish jurisdictional facts from other facts----a distinction that determines the reviewability of a question. [101]The doctrine of jurisdictional ultra vires has attained a high level of sophistication, so that the courts are enabled not merely to control actions which are obviously outside of jurisdiction, but to examine the reasonableness, motives and relevancy of considerations.[102]

Clear-cut cases of *ultra vires* are those where the authorities act without any jurisdiction or in excess of jurisdiction vested in them. A tribunal improperly constituted acts without any

---

99 Ibid.

100 - *Mst. Alia Riaz vs. Government of Punjab*, 2015 CLC 1640.

101 D.M. Gordon, *The Relation of Facts to Jurisdiction,* [1929] 45 *LQR* 459 at 479 on the difficulty to draw the distinction.

102 Ibid.

jurisdiction. Thus where a chairman the resolution of the committee in which three members not entitled to vote participated, the resolution was held illegal. [103]

Similarly, wrong action constitutes want of jurisdiction e.g., where a conciliation officer instead of issuing a failure certificate (due to impossibility of settlement), referred a labor dispute to his superior officer. [104] A tribunal acts in excess of jurisdiction where it having initial jurisdiction, oversteps its limits by doing something not authorized by law.[105] Procedural errors are also held jurisdictional errors if the procedural requirement is held mandatory as distinguished from directory.[106]

Where, a licensing authority, instead of renewing regular permits, entertains applications and invited objections for the renewal of a temporary permit for motor vehicles, the proceedings were held vitiated by grave errors of procedure. [107] Thus if a licensing tribunal, having already issued its permits, seeks to impose a further condition by attempting to make owners of auto rickshaws fix taxi meters of an improved brand, it exceeds its powers.[108]

Theoretically, the jurisdictional principle enables the courts merely to prevent the inferior courts, tribunals and authorities from acting in excess of their powers, but in reality they have increasingly entered into the heart of the subject matter by interfering on grounds discussed in earlier chapter namely, reasonableness, bad faith, extraneous considerations, unfairness, manifest injustice etc. Procedural ultra vires are also held to be jurisdictional defects if the

103 *Abdur Rehman vs. Collector* , PLD 1964 SC 461.

104 *Hotel Metropole Karachi vs. Employees Union* PLD 1964 SC 633.

105 *Baldwin & Francis Ltd. vs. Patents Appeal Tribunal* [1959] 2 All ER 433 at **448.**

106 PLD 1964 SC 475. Ibid.

107 *Chandra Transport Company vs. State of Punjab*, AIR 1964 SC 1245.

108 *M.Y. Raza Beg vs. R.T.A. Dacca* PLD 1965 Dacca 33, PLD 1992 SC113.

procedural requirement is mandatory. [109] However on a point of law, if administration has adopted an interpretation which is possible one, the courts would support the executive action based on such construction. [110] On a point of procedure, the essential duty is to secure fairness. The most important aspect of the question is, to what extent does the jurisdictional principle enable the reviewing court to control the exercise of power by the executive authorities?

Agencies invested with discretion must exercise it properly and they are not allowed to surrender their power to any other authority. This phenomenon is termed as abdication or surrender of authority or discretion. Thus, where the chief settlement commissioner did not apply his independent mind to the question raised in the petition for revision, but mere countersigned the note put up by the settlement commissioner, it was held that he has not exercised the jurisdiction vested in him. [111] Similarly, expulsion from a scholarship scheme by a government department did not render a student liable to be expelled from university. Expulsion from the university had to be ordered by the proper authority in accordance with the relevant statutes and regulations. [112]

When a commissioner delegated with the power by the government to requisition immoveable property under a statute acts on the directive of the government, his orders were struck down as being abdication of his own authority, and such orders were considered the violation of jurisdictional principle. [113]

In a case where a person sought an appointment as assistant in the office of D.C. Gujarat, Post was advertised and many applicants applied for the post. Recruitment committee held test

109 *Muhammad Ismail vs. Province of East Pakistan*, PLD 1964 SC 475.

110 PLD 1964 SC 673.

111 PLD 1964 SC 829.

112 *Hamid Javed vs. Dean, Faculty of Engineering*, PLD 1964 Lah 483.

113 *Muhammad Tufail vs. Province of Punjab*, PLD 1978 Lah. 87.

and interviews of the candidates for the post, but a person who never appeared in test or interview and allegedly nonresident of the district concerned was appointed due to the recommendation of chief minister of Punjab. The Supreme Court held that the appointment letter issued in this case is not sustainable in the eyes of law, being outcome of undue influence and abdication of authority. [114] This view was reiterated in many judgments concerning same point of law and fact. [115]

5.7 Epilogue

From the above extended discourse, it is clear that not only judicial control of administrative discretion is one of the organs of good governance but by and large it is the most important one. The courts have become final arbiters of the exercise of authority by administration in order to ensure that such authority is exercised in accordance with law and free from abuses like arbitrariness, caprice, perversity and violation of principles of natural justice.

In the process of this judicial activism, a vast body of principles and procedures has been laid down by the superior courts in all common law countries, including Pakistan. These principles and procedures have become the primary guidelines for bureaucracy in exercise of their power and authority. The Administrative Law is at the crossroads of the principle organs of the government, legislature, executive and judiciary.

Legislature, frames the laws and rules there under for the conduct of the administration in a country, the executive carries out its functions in accordance with laws and rules so framed, and is responsible for the conduct of the administration; and the judiciary, through judicial

114 2004 SCMR 303.

115 NLR 2004 Service 85.

review, keeps administration and administrative authorities within the bounds of law framed by legislature.

Thus, judicial review, exercised by the courts over the acts and orders of administrative authorities, has emerged as *sine qua non* for the welfare state. The Judicature has to perform the ultimate function of accountability of administrative authorities and protection of a common man by the instrument of judicial review.

CHAPTER 6

EVOLUTION OF DOCTRINES OF JUDICIAL REVIEW AND ADMINISTRATIVE ACCOUNTABILITY

Evolution of Doctrines of Judicial Review and Administrative Accountability

So long as the government's minimum functions in Pakistan remained the preservation of domestic order and the defense of national interests and integrity, there was little concern about the arbitrary exercise of administrative power. If the government did no more, there would be relatively infrequent occasions for direct confrontation between the public officers and the private citizens. With the decision of the government to start social development projects, public power became an instrumentality in the country for the achievement of purposes beyond the minimum objectives of domestic order and national defense.

Old rights began to be subjected to new forms of limitations. Some matters once left to private bargaining became foreclosed by public statutes. The doctrines and procedures of ordinary law gave little specific help in working out the ultimate pattern by which old rights could be subjected to the social interests given preferred place in the welfare state.

As social justice became a conscious end of state policy there was an inevitable increase in the frequency with which ordinary citizens came into a relationship of direct encounter with government power holders, the citizen's significant encounter was with the officials representing a rehabilitation and resettlement authority, an administration of local government, a rent control body or a land acquisition officer etc. It was this dramatically increased incidence of encounter that laid the task of judicial review of administrative discretion in Pakistan. What had happened in these instances was that areas of decision formerly subject to private negotiations were then brought within the reach of the rule of law. There were other features inherent in the system of the judiciary in Pakistan which encouraged the growth of judicial review. Among those features was the extraordinary respect and influence that the judiciary commended in Pakistani society.

Braibanti had made a survey of the historical, social and political factors which have contributed to this influence. He ascribes the prominent role of the judiciary and its influence to severe political instability over a period of several years which prevented the flourishing of institutions capable of infusing order and justice in the bureaucratic system. Legislatures scarcely had time to organize themselves when crisis seized them and dissolution was upon them. The industrial sector was not large enough to have spawned a strong trade union movement; hence no redress of internal bureaucratic grievances could be had from employees unions . . . . .

6.1 Fusion of Western Legal Norms in Local Framework

"In Pakistan the presence of feudal and tribal values premised essentially on a master-servant relationship stood as an ideological deterrent to effective trade unionism . . . . . In the haste of partition the trauma of its afterglow, and the disorder of its sequel, the administration of Pakistan could barely maintain itself no less experiment with new means of employee representation.

Hence, a natural vacuum was created into which the power of the judicial order flowed in obedience to the laws of nature. Secondly, the disarticulation caused by partition and especially by the large number of refugees who had to be integrated into the bureaucratic apparatus, created the raw materials for litigation. An uncommon amount of distress was to be found with significant injustice. Not only was this true in matters concerning the internal operation of bureaucracy but in matters of external administrative law as well . . . . ." [1]

For the purpose of judicial review, the judiciary in Pakistan has classified administrative authorities into two groups: the first group consists of those which may be called tribunals or

1 - Ralph Braibanti, "The Higher Bureaucracy of Pakistan" in Ralph Braibanti and associates, *Asian Bureaucratic Systems Emergent from the British Imperial Tradition, p. 519.*

quasi-judicial bodies and the second comprises those who are mere administrators. As regards the first category, the control of the court is generally confined to compelling them to do or to abstain from doing any specific act which any statute positively requires them to do or to abstain from doing [2]

The superior courts of Pakistan have laid down two tests to determine whether the tribunal is a court or not. One of the tests is whether the tribunal exercises jurisdiction by reason of the sanction of law and another test of tribunal's being or not being a court is whether it can take cognizance of a *lis* and whether in exercising its functions it proceeds in a judicial manner. [3]

The Supreme Court has clarified the distinction by pointing out that is on policy, expediency and discretion and the approach is subjective. A judicial tribunal, on the other hand, determines disputes by a fixed objective standard. [4] There is no separate law of administrative liability in Pakistan. There are, however, a number of special rules peculiar to various classes of authorities. Special immunities are enjoyed by police officers, customs and excise officials and members of the armed forces on duty.

Several statutes which empowered public authorities to acquire land compulsorily provided that the validity of such orders might be challenged in High Court on prescribed grounds by aggrieved persons.[5] Other statutes provided a right of appeal to the superior administrative tribunals in respect of orders and decisions of public bodies. For example, a person aggrieved by the decision of a regional transport authority could file an appeal, under the Motor Vehicles Act, to the Board of Revenue. Appeals to the superior tribunals were confined to

---

2- *Messrs Farid sons Ltd., Karachi and another* vs. *Government of Pakistan, PLD 1961 S C 537.*

3 - *Works Manager, Carriage and Wagon Shops, Moghalpura* vs. *Hasmat,* I L R 1947 Lah. 1.

4 - *The Tariq Transport Company, Lahore vs. Sargodha-Bhera Bus Service, Ltd. P L D 1958 S C (Pak.) 437.*

5- *WAPDA vs. Bashir Hussain Shah,* PLD 2015 SC 344.

questions of law. The decision of many classes of applications, claims and controversies in which the interests of administration were involved was committed to special administrative tribunals which were thought to enjoy a substantial measure of independence of the administration. In one sense, these special tribunals were part of the machinery of administration; in another sense they were to be regarded as machinery provided for adjudication.

The tribunals differed from one another in constitution, powers and procedures. The regional transport authorities, the custodians of evacuee property and the rent controller constitute examples of administrative tribunals which performed *quasi*-judicial functions as well. The High Court nevertheless exercised writ jurisdiction in relation to decisions made by these tribunals. [6]

The Supreme Court, in the case of *Fazal-ul-Qadeer Chaudhry* established the principle of the inherent prerogative of the courts to interpret the constitution and to review legislation for its Constitutionality. The Chief Justice of Pakistan placed the matter of the court's power on a more general ground, namely, the ground that a written constitution necessarily connotes the existence of courts which will, in a graded hierarchy, examine and fully decide the questions which are certain to arise in a great number, of whether an act of a statutory authority or a law passed by a law-making authority under the constitution is, or is not, in contravention of the Constitution. [7]

In another case the Supreme Court took the opportunity once again to affirm the right of judicial review of legislative acts. The right was extended by the Chief Justice to the review of executive acts. [8]

---

6 *Ishfaq Khan Khakwani vs. Mian Muhammad Nawaz Sharif*, PLD 2015 SC 275.

7- P L D 1963 S C 486.

8 - *Saiyyed Abul 'Ala Maudoodi* vs. *Governement of West Pakistan*, P L D 1964 S C 673.

The scope of judicial review was conditioned by a variety of factors in Pakistan such as the language in the statute of discretionary power, the subject-matter to which it was related, the character of the authority to which it was entrusted, the purpose for which it was conferred, the materials available to the court and, in the last analysis, whether a court was of the opinion that judicial review would be in the public interests. In some cases the scope of review was also influenced by the form of proceedings in which review was sought.[9]

The power of the courts to control abuse of discretion varied accordingly as a party aggrieved brought an application for *certiorari* or *mandamus*. But in Pakistan no clear guidance was available for the drawing of a boundary line between discretion which was regarded as essentially administrative and therefore reviewable only in other forms of proceedings. The High Courts did not ordinarily issue writs in matters lying within the jurisdiction of administrative authorities. They did so only if they came to the conclusion that a provision of law, rule or a regulation had been entirely overlooked. [10]

The crucial problem about the scope of judicial review of administrative discretion in Pakistan has been the determination of the extent to which courts could review mixed questions of law and fact. According to authoritative judicial opinions, some questions are deemed questions of fact because substitution of judicial for administrative judgment is undesirable, and some questions are deemed questions of law because there is no clear line of demarcation between the two.[11] The seeming inconsistency of the cases compels recognition of a wide margin for judicial discretion in determining whether or not a particular question is a question of fact.

---

9 - *Shahjehan vs. Syed Amjad Ali* 2000 SCMR 88.

10- This conclusion is supported by the decision of the Lahore High Court in *Muzaffar Ali Shah and another* vs. *The Vice-Chancellor, University of the Punjab*, P L D 1961 Lah. 130.

11 - *Iffat Kazmi vs. Shuja Akbar* PLD 2005 SC 395.

The presence of an alternative remedy under a statutory provision did not operate as a bar to the issuance of writs in Pakistan, particularly when an administrative tribunal assumed jurisdiction in a matter in which it did not have jurisdiction. The writs were also issued when the alternative remedy was either too costly or entailed such delay that the petitioner was likely to suffer irreparable loss.[12]

The powers of the High Courts to issue directions, orders and writs was not limited to writs in the English form but extended to the making of orders restraining or directing any administrator whose exercise of discretion was not proper. In the exercise of their writ jurisdiction, however, the high court did not substitute their discretion for the administration. [13]

The superior courts of Pakistan were not satisfied when a citizen's freedom was subjected to restriction uncles it was proved to their satisfaction that the grounds for the imposition of restrictions were not only stated by law as reasonable in themselves but were also applied reasonable and the restrictions proposed to be imposed were based on facts. [14]

The judiciary was doing its best in Pakistan to infuse into the administrative process the legal norms of the constitution. A conscious effort was being made to inculcate in the public servants a spirit dedicated to preserve, protect and defend the Constitution.[15]

The practice of voluntarily giving reasons for decisions was not a feature of the administrative process in Pakistan. The superior courts, therefore, evolved doctrines that had the direct or indirect effect of requiring the administration to furnish justification for its own conduct.[16] An administrative body in ascertaining facts or law was placed under a duty to act

12 - *Wali Muhammad* vs. *BadrulJalil,* P L D 1956 Kar. 250.

13 - *Tariq Transport Company vs. Sargodha-Bhera Bus Service,* P L D 1958 S C 437.ibid.

14 - *Saiyyed Abul 'Ala Maudoodi vs. Government of West Pakistan,* P L D 1964 S C 673.

15- *M. H. Baker vs. Federation of Paksitan,* P L D 1956Lah. 925.

16 - Genevra Richardson, "The Duty to Give Reasons: Potential and Practice" 1986 *Public Law*, 437-445.

judicially even though its proceeding did not have the formalities of a court of law. The administrative body whose decision was actuated in whole or in part by questions of policy was in some cases required to act judicially in the course of arriving at that decision. It was particularly true when the administration, in order to arrive at a decision, had to consider proposals, objection and evidence.[17]

In cases dealing with requisition and acquisition of land and also in various other cases where administrative powers exercises under different statutes the courts had frequently noticed careless applications of the law. Since public officers called upon to exercise such powers did not carefully read the provisions of law under which they purported to act, they were advised to consult State lawyers before undertaking various steps under the relevant statutes.[18] Not only the administrators of lower ranks but also the governors were persuaded by the courts to stick to constitutional provisions[19]

The courts in Pakistan have insisted that any invasion on the rights of citizens by anybody, no matter whether by a private individual or by a public official, must be justified with reference to some law of the country. This principle is embodied in Article 2 of the Constitution of Pakistan 1973 which seems to be the outgrowth of the concept of "due process of law" as conceived in the American Constitution. The courts have also emphasized that there is no inherent power in the executive, except what has been vested in it by law, and that law is the source of all powers and duties.[20] The Superior Courts in Pakistan have made efforts to educate the bureaucracy to act according to the maxim: *Nemo debet esse judex in propria causa* (no man

17- *M. H. Baker vs. Federation of Pakistanm, P L D 1956* Kar, 217.

18 - *Mesesrs Momin Motor Company vs. Regional Transport Authority, Dacca,* P L D 1962 Dacca 310.

19 - *Maulvi Tamizuddin Khan vs. Federation of Pakistan,* P L D 1955 Sind 96.

20 - *Ghulam Zamin vs. A. B. Kondkar,* P L D 1965 Dacca 156.

can be a judge in his own cause). This principle was made applicable to all tribunals and bodies having jurisdiction to determine judicially the rights of the parties.[21] The public officers were advised not to do anything which might even create a suspicion that there had been an improper interference in the cause of justice.[22]

Public administration in Pakistan was exposed by the judiciary to the need for the application of the concept of "equal protection of laws". One of the propositions put forward by the courts was that no person or class of persons should be denied the same protection of laws which was enjoyed by other person or persons or other classes in like circumstances. Another generalization more frequently stated was that the guarantee of equal protection of laws required that all persons should be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. [23]

The higher courts of Pakistan did not appreciate the attitude of some members of government bureaucracy when it was found that they used force and frightening techniques to enforce their decisions. A serious view of this matter was taken when an officer attempted to deal with the rent control dispute on the administration side and ordered the police to inquire into the antecedents of the tenant. The high court recorded its disapproval of the technique adopted by that officer and issued a note that a public servant acting in deliberate disregard of law in such matters exposes himself personally to the risk of an action for damages.[24]

The concept of equality before law was applied by the Pakistan judiciary in cases in which administrative discretion was reviewed. The concept was not interpreted to mean an

---

21- *Muhammad Usman Khan vs. Deputy Rehabilitation Commissioner Mardan,* P L D 1957 (Peshawar), 54.

22 - *Ibid., p. 56.*

23 - *Inam ur Rehman vs. Federation of Pakistan,* 1992 SCMR 563.

24 - *Khalil ur Rahman vs. Deputy Commissioner, Larkana and others,* P L D 1963 Kar. 213.

absolute equality of men, but the denial of any special privilege by reason of caste, creed and gender. In order to enforce this principle, the courts insisted that the powers of public officers must be defined. The principle of equality before law did not come into play in any controversy as to the validity of a law enacted by the State. It came into play in the sphere of its enforcement. Most of the jurisdictions offered for judicial review in Pakistan were general, not historical, in nature.[25]

Usually they started from recognition of obvious dangers to civil liberties inherent in any democratic community in which majorities reflected public opinion. It was then concluded that the only or best method of curbing these dangers was to empower the judiciary to veto the action of majorities in the interests of the republican virtue.[26]

6.2 Evolving Doctrines of Judicial Review

There are certain doctrines which were enunciated in the pre-martial law period and continued to be used during and after the withdrawal of martial law. The continuity of some of them was not, however, maintained. There are instances in which it is possible to discern a single thread through the entire fabric of judicial review. The concepts of "natural justice", "due process of law" and "equal protection of laws" constitute threads which run through most of the decisions in which administrative directions is reviewed. The doctrines which remained in uninterrupted use are mostly those which were found in the writings of Western jurists.

6.2.1 Doctrine of Natural Justice

Prominent among the doctrines which remained in uninterrupted use in Pakistan was the concept of natural justice embodied in the maxim *audi alteram partem* (no man shall be

25 - *I.A. Sharwani vs. Government,* 1991 SCMR 1041.

26- *Muhammad Shabbir Ahmed vs. Secretary, Finance Division,* 1997 SCMR 1026.

condemned unheard). The concept was originally explored by Western jurists. Its frequency of application in the decisions of the national courts in the United States and England and also in the pronouncements of the International Court of Justice has been very high.

The principles of natural justice were considered to be those rules in Pakistan which are laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure adopted by a judicial, *quasi*-judicial or administrative authority while making an order affecting the rights of private citizens. These rules were intended to prevent decision making authorities from doing injustice. The Four principles of natural justice commonly recognized by the superior courts of Pakistan were that:

a) person whose civil rights were affected must have a reasonable notice of the case he had to meet;

b) he must have reasonable opportunity of being heard in his defense;

c) the hearing must be by an impartial tribunal; and

d) The authority must act in good faith and not arbitrarily but reasonably. [27]

The first traces of any systematic use of the doctrine of natural justice appeared in 1954 in Pakistan. The Sind Chief Court, in that year, interpreted the meaning of the term "reasonable opportunity to show cause". In the opinion of the court mere opportunity to submit an explanation was not enough. The opportunity could be considered reasonable only when an order for the submission of explanation had preceded a proper inquiry and court would interfere when decision of the public authority is arbitrary, unreasonable and in violation of principles of natural

27 - These principles of natural justice were developed first in *Safeuddin* vs. *Secretary, Social Welfare and Local Bodies Department,* P L D 1958 Pesh. 157. They were repeated by Justice Faizullah Khan in *Rahmatullah Khan vs. The State,* P L D 1965 Pesh. 162.

justice.[28] The Court considered it a necessary ingredient of the concept that the authority concerned should not only allow an opportunity to the person proceeded against to meet the charges in writing but should also give adequate opportunity to produce evidence in support of his contentions. He should be permitted to refute the charges leveled against him. [29]

The thinking of the Sind Chief Court gradually permeated the other superior courts of Pakistan. It was very well reflected in the case of *Mir Ali Ahmad Khan.* In that case, the Sind Provincial Government ordered suppression of the municipality of *Tando Muhammad Khan* for alleged maladministration and abuse of powers without calling for an explanation, or at any rate considering the application submitted by the municipality. The order of suppression, it was felt by the High Court, affected the right of councilors inasmuch as it deprived them of an office, affected the right of the people to be governed by men of their choice and also condemned councilors and office-bearers by declaring them to be incapable of holding an office.

A detailed scrutiny of the facts of the case led the High Court to hold that an inability on the part of administrators to call for an explanation or their inability to consider the explanation of the person proceeded against constituted a violation of the principles of natural justice. [30]

The High Court extended the application of this principle even to purely administrative orders. [31] It was asserted that the principle applied not only to proceedings before a court, but also to all cases and before all tribunals where the element of judicial consideration was involved. [32]

---

28 *Province of Punjab vs. Shah Nawaz 2012* MLD 1045 (a) Lah.

29 *Habib Khan vs. The Federation of Pakistan,* P L D 1954 Sind 199.

30 - *Mir Ali Ahmad Khan vs. Province of West Pakistan,* P L D 1956 Kar. 237.

31 - See *Muhammad Hanif Shahid vs. Provincial Transport Authority,* P L D 1957 Kar. 414.

32 - *Ali Ahmad vs. Rent Controller,* P L D 1957 Kar. 204.

Not only denial of opportunity to prove allegations was regarded, as a factor in disregard of natural justice, [33] but the withdrawal of permission once given had also the same effect. This is illustrated by the case of *Dr. A.H. Usmani.* In that case the ground floor of a building was requisitioned by the controller. The owner of the building, after receiving permission from the authorities concerned, sold the whole building to a physician who agreed to abide by the requisition order. The physician made a representation to the government and the requisitioned ground floor was released. A few weeks later, the government withdrew the order of release and refused to vacate the premises. The High Court declared that the withdrawal of the order of release amounted to violation of natural justice [34]

Another important qualification of the concept of natural justice appeared in Pakistan. The qualification meant that if an administrator did not exercise independent judgment but acted according to the instructions of his superior without applying his mind to the matter under consideration, his action would be considered to have contravened that principle. [35]

Similarly, in another case interpretation of "natural justice" directed the executive authorities not to exercise discretion arbitrarily, capriciously or unreasonably. The interpretation made it clear that if an executive authority took irrelevant and extraneous considerations into account in arriving at a decision, the decision would be liable to quashed on account of its clash with the spirit of natural justice [36]

The decision of Court in the case of *Dost Ali* removed the uncertainty that was lingering around the methods by which rules of natural justice could be inferred. The High Court

33 - *Haji Usman Haji Ghani vs. S. S. Raza,* P L D 1957 Kar. 548.

34- *Dr. Azhar Hussain Usmani vs. Federation of Pakistan,* P L D 1957 Kar. 347.

35- *Muhammad Ayub Dar vs. Deputy Commissioner, Attock,* P L D 1957 Pesh. 63.

36 - *Shafiuddin* vs. *Secretary, Social Welfare & Local Bodies Department,* P L D 1958 Pesh 157.

explained that the rules of natural justice could be inferred from the nature of the tribunal, from the scope of the inquiry and from the objective of the statute.[37]

Doubts were expressed whether it was obligatory on the part of teachers and administrators of educational institutions to make use of the principle of natural justice in deciding the cases of students. It was a sensitive area for school authorities who felt that the observation of "natural justice" would result in student indiscipline. The high court did not exclude educational institutions from the operation of this doctrine. In one case, an order of the college council rusticating a student without hearing him was set aside.[38]

In another case an order of the Chancellor of a University affecting adversely the rights of students was quashed as it was passed without giving the affected students an opportunity of being heard. [39]

The exposition of the concept of "fair hearing" as an essential ingredient of the doctrine of natural justice was made by the Supreme Court. It was held that fair hearing did not necessarily imply an oral hearing. An opportunity to make a defense by stating the case in writing was equally acceptable as a condition of fair hearing. The court further held that any rule which could deprive the person of a right of being heard as void in the eyes of law. [40]

As regards the stage at which an opportunity for hearing should be given, the Supreme Court suggested that a full and fair hearing should precede the action intended to be taken against a certain person. [41] The hearing should not be conducted in the absence of the party likely to be

37 - *Dost Ali vs. Province of West Pakistan,* P L D 1958 Kar. 549.

38 - *Muhammad Munir Shahid* vs. *Principal, Government College Sargodha,* P L D 1958 Lah. 466.

39- *S. M. Saleem* vs. *Vice-Chancellor University of Karachi,* P L D 1958 Kar. 297.

40 - *Chief Commissioner, Karachi* vs. *Mrs. Dina Sohrab katrak*, P L D 1959 S C(Pak.) 45.

41 - *S. A. Haroon and others* vs. *Collector of Customers, Karachi,* P L D 1959 S C (Pak.) 177.

affected by an administrative order. The party should be permitted to examine all the pertinent documents and to cross-examine the witnesses.

In *Sardar Ali's case,* an intelligence officer was deputed by the government to hold an *ex parte* inquiry. The collector of customs confiscated the goods belonging to *Sardar Ali.* The court found that prejudicial action was taken by customs officers in which the party affected by the decision was not allowed to participate. The collector's order, being in violation of the principles of natural justice, was turned down. [42]

As a further elaboration of the doctrine of natural justice, the court laid down that the scope of the words "failure of natural justice" was apt to be misconstrued. A possibility like that existed and it was not capable of precise definition. A failure of natural justice would, however, be considered to have occurred if there had been a violation of some fundamental principle of law or procedure of such importance that it would "shock the conscience of the court." [43]

Whether the principle of natural had been violated depended upon the facts of each case. In order to determine "failure of natural justice", it was essential to find out whether any prejudice had been caused by the fact that party was not heard by the authority that passed the order.[44]

Though the service of notice was considered to be one of the basic elements of the application of the principle of natural justice, there were many situations in which this requirement was dispensed with. In the case of *Abdul Ghafur* an unauthorized person in

42 - *Federation of Pakistan* vs. *Sardar Ali,* P L D 1959 S C (Pak.) 25.

43- *Bharat Tewari* vs. *N. Hossain,* P L D 1959 Dacca 48.

44- *Muhammad Ishaq* vs. *Saiduddin Swaleh,* P L D 1959 Kar. 669. Justice *Qadeeruddin* dissented from this view. According to him the principle that "no man shall be condemned unheard" was not dependent on the presence or absence of prejudice. This right imposed a duty on all judicial and *quasi*-judicial tribunals to give adequate hearing irrespective of prejudice. It would prevent the administrative authorities from denying the right of hearing to a person on the ground that no prejudice had been caused to him.

occupation of evacuee shop was served with a show-case notice, and the shop was passed on by him to another unauthorized person who contended that he was entitled to a fresh show-cause notice before ejection. The High Court held that the person to whom possession had been transferred could not claim an independent notice. [45]

The concept of natural justice was not frequently employed. In one case, it was held that the right to natural justice was so vital as to affect the jurisdiction of authority concerned to make an order. [46] In another case it was declared that a right to natural justice included a right to criticize and question the evidence or reports likely to affect the person against whom action was being taken. [47]

The only prominent exposition of the concept of natural justice that was made indicated that the principles of natural justice were not to be enforced as technicalities. Since their main purpose was to do justice, they were not to be converted into technical provisions of statutes. [48] Moreover courts held that when the law required a thing to be done in a particular manner by the administrators, the same must be done accordingly without involvement of personal whim.[49]

The concept of natural justice lost its pristine vigor during martial law period when the West Pakistan High Court gave its decision in the case of *Mian Iftikharuddin.*

It was held, during Martial Law, that in cases where a party had not been given a right of being heard, the court would not declare any provisions of that law to be invalid on the ground that the party had been deprived of a right of audience. [50]

---

45 - *Abdul Ghafur* v. *Khan Zahur ul Hassan Khan,* P L D 1959 Lah. 199.

46 - *Naseem Ahmad v. Secretary Ministry of Interior*, P L D 1960 Kar. 260.

47 - *Khawaja Hafiz ur Rehman* v. *Collector, Central Excise and Land Customs,* P L D 1960 Lah. 962.

48 - *Allah Din* v. *Jamshed Aderji Dubash,* P L D 1961 Kar. 38.

49 - *Uzma Shahzad v. Principal School of Nursing* , 2012 CLC 1464 (d) Lah.

50 - *Mian Iftikahruddin and another* vs. *Muhammad Sarfraz and another,* P L D 1961 Lah. 842.

Though the application of the doctrine of natural justice slowed down during Martial Law period, the superior courts continued to assert their validity. The high court held that even in proceedings of screening committee certain basic principles of fair hearing must necessarily be followed. The basic principles of fair hearing, in the opinion of the court, consisted of an opportunity to defend and to be heard.[51]

The concept of natural justice that lost it vigor during Martial Law regained greater strength after the promulgation of the Constitution, [52] particularly in 1963 when fundamental rights were made justiciable. A very significant change was noticeable in the rulings of the high court from martial law to post-martial law period. During martial law it was held that the principle of natural justice could be invoked only if the relevant statute had not specifically or impliedly barred the application of that principle. [53] The Supreme Court revised the view and held that the government could not by framing a rule take away the right to show cause and that the doctrine of natural justice should be deemed to have incorporated in every enactment. [54]

This dictum of the Supreme Court operated to protect the rights of the people even though the Legislature, by means of an enactment, made efforts to deny those rights to the citizens. The Supreme Court repeated this dictum in the case of *Abdur Rahman.* In that case it was stated although there was no specific provision in the Basic Democracies Order entitling the

---

51 - *Muhammad Fayyaz Ali Mazumdar* vs *Province of East Pakistan,* P L D 1960 Dacca 854.

52 - the concept of natural justice was employed in *Akber Ali* v. *Republic, Abdul Majid* vs. *Settlement Commissioner Rashid (*P L D 1962 Pesh. 40), Chargul vs. *Commisioner, F CR (*P L D 1962 Quetta 15), *Mst. Sattan* vs. *Masroor Hussain (*P L D 1962 Lah. 151) *Osman Abdul Karim Bhawaney vs. Collector of Customs (*P L D 1962 Dacca 162) and *Ghous Bux Khan* vs. *Custodian of Evacuee Property (*P L D 1962 Kar. 462).

53- *Mst. Sattan* vs *Masroor Hussain,* P L D 1962 Lah. 151.

54- *Manzoor ul Huq* vs. *Controlling Authority,* P L D 1963 S C 653.

person proceeded against to an opportunity to show cause, he was entitled to such opportunity on principles of natural justice which were to be read in every enactment.[55]

It was repeated again by the Supreme Court in the case of *Fazlur Rahman* when it held that mere absence of provision for notice in the relevant statute could not override the principles of natural justice.[56]

The Supreme Court of Pakistan continued to hold that whenever a power was conferred upon a person or body of persons to deprive a person of rights or to impose a penalty upon him, implicit in the conferment of such power was the condition that it should be exercised fairly and in accordance with well-established principles of natural justice.[57] The same doctrine was upheld in the cases of *Imam Ali* and *Tofazzal Hossain*.[58]

In conclusion, it could be stated that the concept of natural justice as it evolved in Pakistan implied that a person must not only be given an adequate opportunity to know the case he had to meet, he was entitled to receive an adequate opportunity to answer it. In situations where he was held to be entitled to appear in person, he had a right to be represented by an agent or by a counsel. At the hearing, the officer concerned was bound to permit him to call his own witnesses. A further requirement of the principle was that the right to appeal to a court within a

55- *Sh. Abdul Rahman* vs. *Deputy Commissioner, Bahawalnagar,* P L D 1964 S C 461.

56 - *Commissioner of Income-tax* vs. *Fazlul Rahman,* P L D 1964 S C 410.

57 - *Ghulam Nabi Shah* vs. *Collector and Controlling Authority,* P L D 1964 Kar. 542. See also *Lakhu Sarkar vs. Government of East Pakistan,* P L D 1964 Dacca 217; *Noor Ahmad* vs. *Province of East Pakistan,* P L D 1964 Dacca 546 and *Muhammad Abdus Salam* vs. *District Magistrate,* P L D 1964 Dacca 554.

58- *Ch. Imam Ali* vs. *District Magistrate, Lyallpur,* P L D 1965 Lah.318 and *Tofazzal Hussain* vs. *Province of East Pakistan,* P L D 1965 Dacca 478.

prescribed period. The doctrine was made applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals. [59]

Of great significance is the concept which appeared in 1951 and the courts have not forgotten it. The concept implies that every case should be decided on its merits. The principle developed in the case of *Lower Bari Transport Society* [60] attracted the attention of tribunals in the case of *The New Jhelum Transport Company.* [61]

In the case of *The Lower Bari Co-operative Transport Society* [62] *Nazir Beg* [63] *and Ikram Bus Service case* [64] two years after the birth of Pakistan the Chief Court of Sind laid down the doctrine that an administrative decision should not be arrived at on subjective, personal or private opinion but should conform to an objective standard or criterion recognized by law. [65] From that time onwards the apex Court ordered the administrative tribunals to follow it. [66]

---

59 - These conclusions are based on the decisions of the High Courts in *Qazi Inayat ullah* vs. *The Province of West Pakistan,* P L D 1956 Pesh.33; *Mir Ali Ahmad Khan* vs. *Province of West Pakistan and others* P L D 1957 Lah.309; *Ali Ahmad* vs. *Rent Controller,* P L D 1957 Kar.204; *Mian Mubarak Din* vs. *Registrar, Co-operative Society,* P L D 1957 Lah.1013; *Pir Syed Shafiuddin vs. Secretary Social Welfare and Local Bodies PLD 1948* Pesh. 157 and *S.A. Haroon and others vs. Collector of Customs, Karachi,* P L D 1959 Lah. 748.

60 - *Lower Bari Transport Society Ltd. Montgomery vs. Regional Transport Authority, Multan,* P L D 1951 Punjab (Rev.) 9.

61 - *The New Jhelum Transport Company Ltd. vs. Regional Transport Authority, Rawalpindi,* P L D 1955 Punjab (Rev.) 1.

62 - *The Lower Bari Co-operative Transport Society Ltd. vs. The Express Transport Society, Lahore,* P L D 1956 West Pakistan (Rev.) 67.

63 - *Nazir Beg vs. District Magistrate, Mardan,* P L D 1961 Lah. 142.

64 - *Ikram Bus Service and others vs. Board of Revenue West Pakistan and others,* P L D 1963 S C 564.

65 - *Rahmatullah vs. Maqbool Alam* P L D 1949 Sind 22.

66 - See the judgments given by the High Courts at Lahore in the cases of *The Sargodha-Bhera Service, vs. The Regional Transport Auhtority, Lahore,* P L D 1958 Lah.269, and *Mehr Allah yar vs. Syed Hasan Jahanian Shah Gardezi,* P L D 1961 Lah. 247.

The Superior Courts have examined with great concern the administrative decisions based on errors apparent on the face of the record and have made emphatic declarations of the rule that such errors should not be overlooked. Errors apparent on the face of the record have served as the main justification for the reversal of administrative decisions in many cases. Appearing in the case of *Sofi Amir Ahmad* [67] the doctrine was followed by the Quetta Bench [68] and by the Lahore Bench [69] subsequently. The attention of administrative agencies was drawn to the doctrine that refusal to accept an application amounted to the rejection of that application.[70]

An inability on the part of an administrative tribunal to show documents on which the conclusion of misconduct was based was treated illegal.[71] An order of a tribunal under the belief that it had more powers than it actually possessed was declared void in the eyes of law.[72] The superior courts designed the principle that a public officer was not meant to govern but to serve and should discharge his duties in a manner consistent with proper administration of justice.[73]

Hence, they refused to recognize a state of law in which officers could, in the discharge of their duties, cause harm to persons according to their individual whims and arbitrary discretion. [74] Similarly, a declaration had been made that an ordinance which places curbs on free expression of views on national affairs is ineffective and void.[75] A declaration of equal importance was that a conclusion of misconduct would be invalid if it was arrived at on the basis

---

67- *Syed Sofi Amir vs. Syed Riazuddin Ahmad,* P L D 1957 Kar. 539.

68- *Abdul Wahid Khan vs. Custodian of Evacuee Property,* P L D 1962 Quetta 72.

69 - *Mst. Jindo and another vs. Custodian of Evacuee Property, West Pakistan and others,* P L D 1964 Lah. 351.

70 - *The Diamond Transport Company vs. Provincial Transport Authority,* P L D 1961 West Pakistan (Rev.) 65.

71 - *Messer's Farid sons Ltd. vs. Government of Pakistan,* P L D 1961 S C 537.

72- *Messrs Doreen Barkat Ram vs. Custodian,* P L D 1962 Lah. 424.

73 - *Imtiaz Ahmad vs. Ghulam Ali,* P L D 1963 S C 382.

74 - *Ibid.*

75- *Khawaja Muhammad Safdar vs. Province of West Pakistan,* P L D 1964 Lah. 718.

of secret correspondence that was not shown to the person against whom any administrative action was intended to be taken. The superior courts have expounded the principle that administrators should be mindful of the consequences of a given administrative action. In certain situations the finding of an administrator may debar the person forever from securing his livelihood. When such a decision was taken, the consequence would be far more serious than in a criminal case.

The courts did not look with favor on the withholding of the application of a person on the ground that the request made in the application was not in conformity with the existing policies of the Government. They were also not favorably disposed to the introduction of a new criterion for judging the suitability of an application contrary to the action taken earlier on application of a similar nature.

The principle of objectivity in decision making was advanced very forcefully by superior courts. The administrators were directed to base their decision on some guiding principles. They were required not to ignore legal requirements in all processes of decision making [76] and further required to avoid unnecessary digressions and wrong interpretation of facts. [77]

The post-martial law period has seen the birth of another doctrine that any power not controlled by a statutory provision was in the last resort subject to fundamental principles of justice and fair play. [78] It appears that a consistent effort has been made during his period, to evolve a formula of judicial review presumably by restricting the courts to denied channels of restraint. A ruling was included in one of the earliest major decisions that the Court would not review a finding of fact, even when erroneous, unless the mode of ascertaining facts was outside

76- *Alif Gul vs.The State and others,* P L D 2015 Pesh. 238.

77- *Inayat Khan vs. Sahib Din,* P L D 1961 Lah. 680.

78- *Syed Muhammad Ayyub vs. Government of West Pakistan,* P L D 1957 Lah. 487.

the spirit and intent of the statute. [79] "This doctrine established by a relatively expansionist interpretation of the courts' role which has been a characteristic of the doctrine of judicial review of administrative discretion in Pakistan." [80]

The courts in Pakistan were particularly concerned to ensure: ---

a) that the executive exercised its powers within the four corners of the statute which sought to deprive the individual of his liberty;

b) that the power has been exercised by an officer who was fully empowered by the statute;

c) that every formality required by the legislation was complied with;

d) that the order was in conformity with the provisions of the statute; and

e) That the statutory power was exercised honestly.

6.2.2 Specific adoption of Western Legal Norms

Western impact is pronounced on the law of Pakistan and the judiciary has played a significant role in producing it. The most recent development appears to be the effort of the judiciary to work out a synthesis between the local and Western principles thereby building a legal edifice which, while in accord with Western principles of law and justice, tries to adjust itself to the peculiar needs of the area for which it is intended.

The reception of Western legal norms is not confined to Pakistan. There are many other countries such as Japan, India, Malaysia, Turkey and Iran which have been influenced by the Western ideas.

Earnest Levy has given adequate reasons for this tendency to accept western legal concepts. When in a period of growing prosperity, and self-reliance and ambition, people go

79 - *Muhammad Saeed vs. Election Petitions Tribunal,* P L D 1957 S C 91.

80 - Braibanti, *Research on the Bureaucracy of Pakistan,* p. 303.

through an awaking, when it refuses to lag behind others and yet realizes that its own legal habits or concepts are not adequate to meet the needs of the time, it naturally turns to a superior system .... It has lately been discussed whether Western superiority of legal systems is, as a rule, due to the general authority or esteem enjoyed by the Western legal culture ....

The question cannot be answered once for all. Both criteria are valid; both at times overlapped and blended [81] Western legal norms have been easily assimilated in Pakistan because the whole course of development of representative institutions in this country is a continuation of such institutions through more than six centuries in the United Kingdom. When the British took over India, several branches of law were practically non-existent. Since no such rights existed. [82] In this state of affairs, the British filled the void in those areas in which the pre-existing customs were not sufficient to constitute a body of law precise enough for a well-organized court to work upon. This was done mainly through the agency of the courts.[83] Sometimes they supplemented native custom by their own ideas of what was just and fair. The phrases "equity" and "good conscience" were utilized to embody the principles by which judges were to be guided when positive rules were not forthcoming. [84]

Islamic Legal rules were retained in Personal Law cases involving Muslims in India. However these rules were interpreted in many instances by British judges, or by indigenous judges with British training. Thus a case-law was built up which interpreted principles of Islamic

---

81 -Ernst Levy, "The Reception of Highly Developed Legal Systems by Peoples of Different Cultures", *Washington Law Review and State Bar Journal,* XXV (1950), 244. See also Albert Kocourek, "Factors in the Reception of Law", *Tulane Law Review,* X (1935-1936), 207-230.

82 - James Bryce, "The Extension of Roman and English Law Throughout the World", in Ernst Freund, W. E. Mikel and John H. Wigmore (eds.), *Select Essays in Anglo-American Legal History,* I (Boston, 1907), 598.

83 - *Ibid.,* p. 600.

84 - James Bryce, "The Extension of Roman and English Law Throughout the World," in Ernst Freund, W. E. Mikell and John H. Wigmore (eds.), *Select Essays in Anglo-American Legal History,* I (Boston, 1907), 600.

Law not infrequently along the lines of British legal thinking. [85] From the time British jurisprudence was introduced, the superior courts continued to hold in high esteem the decisions of the British courts. This is clearly evidenced from the comments of the former Chief Justice of Pakistan, reproduced below:

"I agree that the decisions of Privy Council are no longer binding on us now, but being expositions of the law by one of the highest judicial tribunals in the world composed of distinguished men who had special knowledge of our public law, they are entitled to the greatest respect and were not to be disregard merely on the ground of changed conditions because the recognition of any such ground for departure from well-settled and fundamental principles would be tantamount to imputing judicial dishonesty to that tribunal". [86]

The judges, deeply immersed in British tradition, found it convenient to locate the authority for their decisions in the judgments rendered by the British courts. The practice of following British norms continued. In the very process of delivering judgment on the British pattern, the Judges unconsciously, accepted the doctrines enunciated by the United States Supreme Court several decades ago.

These doctrines are found diffused in whatever status the institution of judicial review could attain in a short term. The courts, for instance, laid down that it was essential for administrative agencies to give fair hearing to the applicants and that they should follow objective standards in taking action on the concept of fair hearing was laid by the United States Supreme Court in a number of pronouncements. It has repeatedly affirmed that a hearing before

85 - Herbet J. Libesnym "Religious Law and Westernization in the Moslem Near East," *American Journal of Comparative Law*, II (1953), 492.

86 - See the observations of Chief Justice Muhammad Munir in the case of *Noor ul Hassan and others* vs. *Federation of Pakistan*, P L D 1956 S C 331.

an administrative agency must be fair open, and impartial, and if such a hearing has been denied, administrative action is void. [87]

The Pakistan High Courts, soon after the inauguration of the 1956 Constitution, made liberal use of the doctrine that power exercises arbitrarily and capriciously amounts to denial of fundamental rights. The thinking of the United States Supreme Court has been approaching very close to it in some of its decisions. [88]

The courts have always seemed to be well disposed to incorporate in their decisions the legal formulae developed by the judiciary in the United Kingdom and the United States of America. The Court accepted, in the case of *Shaukat Ali* [89] the rule laid down in England that the enactments which affect only procedure may be considered to have retrospective effect unless the contrary intention appears from the context. The same court looks with favor on the notion of the State courts in the United States and the courts in England that the writ will generally be refused in all cases where petitioner fails to show that he has proceeded expeditiously after discovering that it was necessary to refer to it.[90]It has been acknowledged that law on the subject of the writs of *mandamus* has followed in all essential respects the practice of the English

87 - See the judgments of the United States Supreme Court in *Morgan* vs. *United States,* 304 U. S. 1; *Kessler* v. *Strecker;* 307 U. S. 221 *Wong Yan Sung vs. McGrath, 399 U. S. 33* and *Brownell vs. Shung,* 352 U. S. 180.

88 - See, e.g. the decisions of the United States Supreme Court in *Public Service Commission* vs. *Havemeyer,* 296 U. S. 506; *Great Northern Railway Company vs. Weeks,* 297 U. S. 135; *Swift and Company vs. United States 316* U.S. 216; *Interstate Commerce Commission vs. Hoboken Manufacturers R. CO.,* 320 U. S. 368.

89 - This rule was originally discussed in the case of *Colonial Sugar Refining Company vs. Irwin* (1905), A C 369, and adopted by the Pakistani Court in the case of *Shaukat Ali vs. Commissioner, Lahore Division,* P L D 1963 Lah. 127.

90 - This principle developed in the cases of *Block* vs. *Brinkly,* 54 Ark. 375, and *City of Chicago vs. Condoll,* 244 III. 595, was followed in the case of *Mst. Fahmida N'yyar vs. Government of West Pakistan* P L D 1963 Lah. 352.

courts.[91] The Supreme Court suggested in the case of *Z. A. Mazari* the suitability of making quotations from the judgment of the British court because "the observations therein bring out the full force of the rule" [92]

The concepts of the freedom of speech and the freedom of press are peculiarly Western.[93] The superior courts of Pakistan have been attracted by the significance of those concepts for an independent nation. Quite a few judgments written by the superior courts in Pakistan reflect the appreciation that the judges have for the role played by the United States Supreme Court in the preservation of the basic freedoms and liberty of the masses.

It is probably this feeling that led Justice *S.A. Mahmood* to quote with appreciation the dictum of the United States Supreme Court that "liberty of circulation is an essential to the freedom of press as freedom of publication", and that "the freedom of speech would be no freedom if the views and ideas cannot be communicated to others." [94] Justice *Mahmood* found much material from the decisions of the United States Supreme Court that was pertinent to the case under his consideration.

The concept of "equal protection of laws" is now being liberally used by the superior courts of Pakistan in the determination of cases before them. They have acknowledged that the expression "equal protection of laws" has been borrowed from the Fourteenth Amendment to the Constitution of the United States which was intended to secure to the emancipated Negroes equal

---

91 - *The Lahore Central Co-operative Bank Ltd. vs. Pir Saifullah Shah,* P L D 1959 S C 210.

92 - See the observations of Justice Kaikaus in *Federation of Pakistan vs. Z.A. Mazari,* P L D 1958 Lah. 472.

93 - John Plamenatz, "In What Sense Freedom is a Western idea," in R. S. J. MacDonald (ed.), *Current Law and Social Problems (Toronto, 1960),* pp. 13-15.

94 - See the comments of the U.S. Supreme Court in *Ex parte Jackson,* 96 U. S. 227. Justice Mahmood made a reference to these observations in *Khawaja Muhammad Safdar, M.P.A. vs. Province of West Pakistan* P L D 1964 Lah. 718.

protection to the enjoyment of life, liberty and property. [95] A year later the Court reiterated the desirability of seeking assistance from American decisions because the source of the guarantee of equal protection of laws lies in the Constitution of the United States. [96] The courts are aware that there is voluminous and illuminating literature on that subject in the United States [97]

The superior courts in Pakistan have frequently emphasized that they will not substitute their judgment and discretion of an administrative agency. [98] Thus they have shown agreement with the ideas of the United States Supreme Court advanced in the cases of *New York & Q Gas Company* [99] *Manufacturers R. Company* [100] *Railroad Company* [101] and *Woodhaven Gas Light Company* [102]

The Supreme Court has applied the maxim *omnis nova imponeradebet non peaeteritas* in the case of *Bibi Jan* [103] The maxim was developed in the West and means that except in special cases, the new law ought to be construed so as to interfere as little as possible with vested rights. Another maxim of law that has received the attention of superior courts of Pakistan is that every word in a statute ought *prima facie* to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context.[104] In keeping with the

---

95 - See the opinion of Chief Justice Muhammad Munir in *Jibendra Kishore Achharyya Chowdhry vs. The province of East Pakistan;* P L D 1957 S C 9.

96- See the judgment of Justice *Abdul Hamid* in *Abdul Rauf and others vs. N.W.F.P* P L D 1958 Pesh. 73.

97- *Ibid.*, p. 125.

98 - *Tariq Transport Company, Lahore vs. Sargodha-Bhera Bus Service,* P L D 1958 S C 437.

99 - *New York & Q gas Company vs United States,* 246 U. S. 457. (1967).

100 - *Manufacturers R. Company vs. United States,* 246 U.S. 457. (1971).

101 - *Railroad Company vs. Rowan and N. Oil Company,* 310 U.S. 573. (1974).

102 - *Woodhaven Gas Light Company vs. Public Service Commission,* 269 U. S. 244. (1978).

103- *Mst. Bibi Jan and others vs. Miss R.A. Monny and another,* P L D 2015 S C 79.

104 - This doctrine appeared in 1883 in the case of *Attorney-General for Ontari vs. Mercer* and was accepted by the West Pakistan High Court in 1961 in the case of *Dr. Bashir Ahmad Haqqani vs. Sikander Bakht,* P L D 1961

Western tradition and judges in Pakistan are reluctant to assume the functions of Legislature. The real position is that, whenever called upon to interpret a provision of law, they have, of necessity travelled, under the well-settled cannons of construction, into the domain of legislation.[105]

Some of the Western courts, particularly in England and the United States, have approached the issue from the same perspective. A doctrine that is borrowed from the West and is highly respected by the Pakistan judiciary is that the Constitution of the state is higher in authority than any law, direction or order made by anybody or any officer assuming to act under it. In any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity.[106]

Another mode that has found favor with the Supreme Court is that of making comparisons of the Pakistan legal practices with those of the legal norms of the United States and England. A comparison like this is in itself an important source of the diffusion of Western ideas. The case of *Jibendra Kishore Achharyya* presents an adequate illustration of the comparisons being made by the superior courts.

Chief Justice *Munir* advanced a comparison in that case in the following words:

"I have liberally quoted the judgment of Mr. Justice *Mathews* (of the United States) . . . in order to bring out one of the basic principles in the American constitutional law that a statute is void if it confers upon a body or individual not what is called discretion which is liable to be controlled by judicial process but an arbitrary power not circumscribed or limited by an statutory decisions. The American system abhors nothing more than such power because its conferment

---

Lah. 515, and by the Supreme Court in 1962 in the case of *Khawaja Ghulam Sarwar vs. Pakistan,* P L D 1962 S C 142.

105 - See the observations of Chief Justie *S. M. Murhsed* in the case of *Abdus Sattar* vs. *Arag Ltd. and others,* P L D 1964 Dacca 773.

106 - *Fazlul Quader Chowdhry vs. Mhammad Abdul Haque,* P L D 1963 S C 478.

makes the administration of the statute depend not on law but on the will of the particular body or individual." [107]

Another comparison of Pakistan with the United States appears in the case of *Ata Elahi.* The court expressed its views as follows: " [W]hile the Constitution (of Pakistan) defines the qualifications of voters for elections to parliament and the Provincial Assemblies, it leaves to the provincial Legislature to determine the qualifications or disqualifications of voters for the District Board elections. This position is similar to that obtaining in the United States where the Constitution itself does not define the qualifications of voter for elections to the Congress and leaves each State free, subject to the supervisory jurisdiction of the Congress, to make law defining the qualifications of voters . . . As now understood, the Fourteenth Amendment protects not only civil rights but also political rights and governs the conferment of privileges as well as the imposition of liabilities.

It will therefore be seen that in Pakistan the position as regards to the provincial Legislature's power to make laws relating to the qualifications of voters at the District Board elections is analogous to the [United States]' power to determine the mode of election to the state and House of Representatives as it existed before the Fifteenth Amendment. [108]

The evidence that has been collected corroborates *Braibanti's* suggestion that the judiciary has demonstrated its capacity to infuse Western judicial norms in the larger society. It has been manifested its resiliency as countervailing force to executive power.[109] Its system of judicial review has probably prevented the rise of tyranny devoid of a rule of law. The analyses made in this study are conducive to the conclusion that the judiciary in Pakistan is motivated by

107- *Jibendra Kishore Achharyya Chowdhry vs. The Province of East Pakistan,* P L D 1957 S C 9.

108- *Ch. Ata Elahi vs. Parveen Zohra,* P L D 1958 S C 298.

109- Ralph Braibanti, "Pakistan; Constitutional Issue in 1964," *Asian Survey,* V (1965), No. 2, 79.

a keen awareness of its own historical role as an instrument of preserving liberty and a just society.[110] The influence of the judiciary and its awareness of its norms and its role are stated by *Braibanti* in the following words:

"[The] judiciary was keenly aware that the roots of its norms were not in its own culture. It was compelled by the mere process of rendering judgments which entered the realm of western legal scholarship to fit indigenous practices to Western norms. The application of the doctrine of *stare decisis* , the almost exclusive reliance on British precedent, a sense of identification of the judges with a body of jurisprudence transcending national cultural limits --- all of these helped the judiciary maintain a source for the continued permeation of western norms in the bureaucracy, not in administrative technique or organization, but in values of order of the bureaucracy, it was the judiciary which made constructive, positive proposals for reform, proposals based on understanding of social environment, on knowledge of comparative jurisprudence, and on a sense its own limitations." [111]

Some projections can be made into the possibilities of the assimilation of western legal norms in the future. There is every likelihood that the practice of borrowing concepts from the West will continue in the next several decades. This conclusion finds support from the observations of Chief Justice *Cornelius* that "previously, in each case, the courts referred to precedents from England, the United States . . . to determine whether they had power to review the case before them . . ."

As regards the future, the Chief Justice finds it "difficult to suppose that earlier precedents will lose their value as guidance". [112] There is a great likelihood that the judiciary in

---

110 - Braibanti, "Public Bureaucracy and Judiciary in Pakistan", p. 436.

111 - *Ibid.*

112- Cornelius, "Address on Writ Jurisdiction". Full text in *Braibanti, Research on the Bureaucracy of Pakistan,*

Pakistan will rely more heavily in the future on American concepts and procedures than it did in the past. The reasons for the establishment of this trend can be located in the assertion of *Lord Evershed* concerning Great Britain that, anyone who wishes to reflect on the broad problems of law's philosophy and the judicial function in its exposition will, without doubt turn to the writings and recorded lectures and opinions of the great American Judges and law teachers of recent times. To these authorities all English lawyers. particularly English Judges. acknowledge their indebtedness.[113]

6.3 Development of Administrative Law through Administrative Tribunals

Comparing the conditions that made the government efficient during the days of *Confucius* with those obtaining in the present times, Chief Justice *A. R. Cornelius* discloses that during the days of *Confucius* it was enough to ensure competent government of a principality by means of ruler who was highly cultivated, intelligent, shrewd and cynical --- a person who could successfully be "all things to all men".[114]

Today, the Chief Justice emphasized, the ruler is expected to observe the rule of equality and to be the same to all men. [115] Every administrator is now bound by the dictates of the Constitution to follow certain principles in exercising his power in relation to the circumstances appearing before him. [116]

---

p. 521.

113- Lord Evershed, "The Judicial Process in Twentieth Century England", in *Essays on Jurisprudence* from the *Columbia Law Review (*New York, 1964), p. 79.

114 A.R. Cornelius, Law and Judiciary in Pakistan, Lahore, Law Times Publications, 1981, p. 242.

115- Cornelius, "Address on Public Administration and the Law", Full text in *Braibanti ,Research on the Bureaucracy of Pakistan*, p. 509.

116- *Ibid., p. 510.*

Chief Justice *Cornelius* pointed out that in modern days the government officials have yielded to various kinds of partialities including those which are politically inspired. Many partialities remain hidden as people do not have courage to expose them: Under the present conditions, it is only when the abuse is carried to the extent of public scandal that it ever comes to light.[117] Some of the administrators today, *Cornelius* asserts, think that efficiency in administration is all that is required and there is no need for legal knowledge. They fail to realize that administrative authority exercises by a person ignorant of the law pertaining to the question under consideration involves a risk of violating the second Article of the Constitution --- the Article that places the whole country under the rule of law.[118]

There is a further failure to recognize that it is precisely in the field of discretionary power that executive authorities need the utmost guidance. It is in that region that acts may be performed which on the surface have all the appearance of legality and are true to form but, in fact, conceal an exercise of power tinged with the grossest partiality.[119]

There is apparently not much consciousness of the principle that the due exercise of public power over the citizen should follow a procedure which is consonant with the proper ascertainment of rights and with the requirements of natural justice. For the eradication of these evils, the Chief Justice of Pakistan considers it necessary to promote judicial review of administrative discretion exercising inquisitorial powers and imbued with a desire to maintain probity in the administration.[120]

117- Cornelius, "Address on Administrative Tribunals". Full text in *ibid.*,pp. 474-488.

118- Cornelius, "Address in Writ Jurisdiction". Full text in Baribanti, *Research on the Bureaucracy of Pakistan,* p. 523.

119- Cornelius, "Address on Administrative Tribunals." Full text in *ibid.*,p. 483.

120 - *Ibid.*

A widespread consciousness of these principles will in itself be a great social force to advance the cause of administrative law. There is nothing unusual about them for this is practically universal also in all civilized countries to allow judicial review when fault is found with administrative action. In certain countries, this judicial process is applied by a cell within the executive described as administrative tribunal. In other countries grievances are ventilated in courts. By such means from case to case, principles are laid down not only as to the action to be taken under the law or the regulation involved, but also as to the procedure to be followed.

The courts have a long history behind them and the tradition which they have observed throughout is one of fairness. It can be confidently assumed that where the court give their attention to matters arising out of the administrative sphere which call for correction, they will incline in the direction for ensuring fair dispensation of benefits, fair application of remedies, fairness in imposition of penalties and generally fairness in putting peoples right[121]

Proposals for other modes of judicial control have been advanced. The principal mode suggested has been the establishment of a system of administrative tribunals on the pattern of French administrative law.

Chief Justice *A. R. Cornelius* was the major proponent of this scheme.[122] He first made this proposal in an address at the convocation of the Law College in Punjab University, and subsequent address before the Rotary Club in Lahore in 1960.[123] His fullest analysis of the

---

121 - Cornelius, "Address on Public Administration and the Law". Full text in Braibanti, *Research on the Bureaucracy of Pakistan,* pp. 510 -511.

122 - Justice Cornelius' proposal for consideration of the French system of administrative tribunals stimulated controversial discussion regarding the practicability of its introduction in Pakistan. See *Hafizullah* Khan Administrative Law for Pakistan", *Law Journal,* XLI (1961), 24-62; *Mushtaq Ahmad Khan,* "Administrative Tribunals and Their Desirability in the Legal System of Pakistan", *Law Journal,* XLI (1961), 116-25; see also Nasim Hasan Shah. "The Concept of Administrative law", *Pakistan Times,* January 18, 1961.

123 - Braibanti "Public Bureaucracy and Judiciary in Pakistan", pp. 427-428.

problem appeared in this address to the All Pakistan Lawyers' Association.[124] Which is relevant even today.

He explained his views and maintains that as condition of life become more and more complex, the people become more and more insistent that the matters affecting their right should not be dealt with superficially or on the basis of a single dictate by some one or the other. The complexities obviously result in a greater demand for the enlargement of the responsibility of courts to protect the constitutional rights of citizens both against each other as well as against irregular or excessive exercise of public power[125]

Carrying his argument further, the Chief Justice reiterated that an effective method of correction of the exercise of the public power is that of the administrative tribunals which is prevalent in France. [126] The system includes a hierarchy of tribunals headed by the Council of State. These tribunals are staffed by the most experienced public servants who have been withdrawn from their parent departments and permanently absorbed into theses tribunals.[127]

The Chief Justice bases his recommendations for the introduction of administrative tribunals in Pakistan on the merits that are inherent in the system as such. In his own words, all cases where the exercise of power over citizens has given rise to complaint are preferable to these tribunals in the simplest form and at the smallest cost. The burden upon the complainant of establishing his case is reduced to the minimum by the practice of these tribunals, which are equipped with their own machinery of inquiry, and in the course of time have gained the power to procure all relevant information from the administrative departments.

124- A.R. Cornelius, "Speech at a Meeting of the Pakistan Legal Aid Society", P L D 1964 Journal 125.

125 - Cornelius, "Address on Writ Jurisdiction". Full Text in Braibanti, *Research on the Bureaucracy of Pakistan,* p. 519.

126 - *Ibid.*, p. 520.

127 - *Ibid.*

Being themselves fully experienced in the techniques and the difficulties of administration, the members of these tribunals can place themselves in the position of the official concerned to appreciate the nature and the quality of his acts. They are familiar also with the laws, rules and regulations, and how they are to be interpreted for this due application.

Having themselves been in contact with the public, they can appreciate also the position of the complainant and they are this very well placed to provide a solution for each question arising before them, and to give wise direction as to the proper attitude and action in the case, with impartiality. Being strictly judicial body within the executive sphere they can be trusted to exercise their powers consistently with all requirements of the executive. [128]

The Chief Justice reiterated the desirability for the introduction of administrative tribunals in an *obiter dictum* that appeared in the case of *Farid sons Limited.* Referring to the absence in Pakistan of a procedure similar to that of French administrative law, the Chief Justice explained that under the system.

There is a *quasi*-judicial tribunal provided to which a person injured by any action of a public servant performed in the exercise of public powers may have instant recourse, and these tribunals . . . apply necessary correction to the executive action by issuing appropriate directions to the directions to the executive authorities. In our law, apart from departmental appeals on the executive side, the judicial remedy lies only with the prerogative writs . . . The procedure, as these cases illustrate is cumbersome and lengthy.[129]

The *Conseil d' Etat* which constitutes a very important tier in this hierarchy is a body whose jurisdiction has in the one hundred and seventy years of its life been securely established

128 - Cornelius, "Address on Writ Jurisdiction". Full text in Braibanti, *Research on the Bureaucracy of Pakistan,* p.520.

129 - *Messrs Farid Sons Limited vs. Government of Pakistan,* P L D 1961 S C 537.

as covering every aspect of the internal administrative field. It is possible to bring before it any government or official act which is fairly within public powers. Although it paces the highest value upon correctness of form, it is not content with mere formality or legality.[130] It sets great stress upon requirements of justice. [131] Ministers and authorities do not hesitate to appear before it for giving justifications for their acts in the confidence that the *Conseil d'Etat* knows the necessities of administration and will not interfere with any executive authority any more than is consistent with the due performance of his functions.[132]

Even if an act is within the purely discretionary field, the *Conseil* retains its jurisdiction to inquire into it and discover the reasons which led to the grant of a franchise to another. [133] The *Conseil d'Etat* has succeeded in demonstrating its competence in bringing evils of every kind to the surface and in property dealing with them[134]

A second approach was suggested by Justice *S. A. Rehman* of the Supreme Court. Searching for a means whereby civil servants could effectively move the state in regard to arrears of salary, he suggested that it was time for the Government of Pakistan to pass legislation enabling public servants to obtain relief with respect to salary claims against the State, and the same has been accomplished by legislature.

He proposed modification of the Civil Procedure Code, alternatively, a law similar to the Crown Proceedings Act, 1947, of Great Britain which he felt might be found "to be more in

130 - Cornelius, "Address on Administrative Tribunals". Full text in Braibanti, *Research on the Bureaucracy of Pakistan*, p. 478.

131 - *Ibid.*

132 - *Ibid.*

133 - *Ibid.*, p. 482.

134 - *Ibid.*, p. 486.

consonance with the spirit of the times."[135] The Law Reform Commission recognized the problems inherent in the writ jurisdiction of the high court but rejected the idea of creating separate administrative tribunals. The Commission did not consider the proposal of Justice *S. A. Rahman* for an adaptation of the British Crown Proceedings Act.[136]

The basic support of Cornelius proposal for consideration of the French system of administrative law came from the comments made by the distinguished former Prime Minister, *Chaudhry Mohammad Ali*. The comments were given by him in his written answer to a questionnaire sent by the Constitution Commission. In response to a question in which the introduction of administrative law concept would be beneficial, he answered:

"The introduction of an administrative law to suit conditions in Pakistan would probably be of advantage. With the introduction of such a law the power of writ exercised by the High Court and the Supreme Court in respect of the civil administration should be withdrawn. The procedure under the administrative law should be as simple as possible so that complains whether by civil servants against corruption, nepotism and high-handed behavior of civil servants are promptly dealt with. In the past the civil services have been demoralized by the feeling that they were at the mercy of ministers. On the other hand the ordinary procedure for action against civil servants for dishonesty and maladministration is so dilatory and complicated that corrupt officials are seldom brought to book and still rarely punished. If the administrative law remedies these defects, it could be of great benefit to the country.[137]

135- *Government of West Pakistan vs. Fazal-Haq Mussarrat, (1960), 1 P. S. C. R 124.*

136 - See *Report of the Law Reforms Commission 1959- (*Karachi, 1959).

137 - This opinion of *Chaudhry Muhammad Ali* on administrative law has appeared as part of his total response to the questionnaire, in *Pakistan Times, June 13,* 1960, p. 8. And is relevant even today.

The attitude that the government officers are the enemies of individual citizens and hence their power should be evaded by fair and foul means is embedded in the mind of an average Pakistani. The Pakistan constitution does not take into account this felt opposition between man and bureaucracy.

This does not mean, however, that the judge's role in Pakistan has been made insignificant by the constitution. A number of influences have been at work to enlarge the scope of judicial review. Quite a few recent pronouncements of the Supreme Court and the High Court indicate that the judges themselves are beginning to take a broader view of their functions. They are tending consciously to create those sound principles of administrative law which will sooner or later have a salutary influence beyond their immediate scope.

The Constitution of Pakistan 1973 has taken special care to appoint only those persons as the judges of the Superior Courts in Pakistan who are capable of discharging their onerous duties, in spite of several temptations, allurements and the possible harassment by the politicians. The judges in Pakistan have shown by their conduct that the judicial polity, impartiality and independence come to them as a gift of nature. They have won for themselves an abiding place in the esteem and affection of the people. The judges have always repelled all attempts from whatever quarters they came to subvert the process of impartial and orderly decision. The judges realize that an independent and fearless judiciary is the corner stone of every stable and progressive State.[138]

The Pakistanis are now getting accustomed to think that the ultimate protection of rights is to be found in courts of law, and that the judges are the most likely repositories of earthly justice. A feeling is developing among the lawyers and the *intelligentsia* that the maxims of law

138- *Sardar Bahadur Khan vs. Government of Pakistan,* P L D 2005 Pesh, 104.

are best found in the opinions of the judges dealing with actual cases. Such a feeling for law provides a base on which a strong structure of administrative law can be built.

In Pakistan the conviction is spreading that individual rights need more protection that national and provincial assemblies can give them. A feeling is fast developing that judiciary should not minimize its potential influence on bureaucratic power. A need is being felt to make the bureaucracy conscious of the desirability of greater adherence to constitutionalism. Both the common man and the lawyer insist that judges should assume responsibility for defining those restraints on bureaucratic power which form the essence of constitutionalism.

The comparatively high incidence of writ petitions filed by government servants is a reflection of the secretiveness that prevails in Pakistan public administration. The secretiveness may no doubt be traced, to some extent, to a desire to avoid laying down a set of rules or principles which would bind the administrator as strictly as a court of law. The decision of the administrator emerges all of sudden, and none can question its wisdom, since no one can know the considerations which moved the mind of the authority. Every sentence which lays down a clear and certain principle narrows the future freedom of choice of the administrator. The present survey reveals that the superior courts in Pakistan have consistently refused absolute discretionary powers to the executive. This does not mean that the courts, while reviewing the exercise of discretion, substituted their own decision for that of the administrator. The cases which came before the courts were mainly those where discretionary powers had been improperly exercised and it was with the control of that power that the superior courts were mainly concerned. They have controlled administrative discretion arising from bias, from consideration of irrelevant issues, from failure to consider relevant issues and from improper motives.

In Pakistan, judicial review, so far, has fallen short at the frontier between control over the legality of administrative action and full re-examination of the merits of administrative action. The frontier here has been set along a line which leaves the administration with a vast area of discretion effectively shielded from judiciary scrutiny. On many occasions, exercise of free discretion is seen to generate into arbitrariness.

Judicial review in Pakistan appears to lack breadth and depth. Review of determinations made by statutory bodies is generally adequate; but review of the validity of the acts and decisions of other administrative bodies does not tend to be comprehensive.

The superior courts have not applied a consistent theory of jurisdiction, In general they have refused to accept as conclusive the doctrine that whenever an inferior tribunal has jurisdiction to inquire into a matter for the purpose of giving a decision, its finding are final. But they have never definitely rejected this doctrine.

Actions for damages against members of administrative tribunals have not come to notice in the cases analyzed in the present dissertation. The reasons for this may be that where the order of an administrative body does have the effect of interfering with existing property rights, the party aggrieved may have a statutory right to challenge the validity of the order only within a specified period.

The proportion of cases in Pakistan in which administrative acts and decisions are directly or indirectly impugned in the courts appears to be much less than the actual number of decisions made by administrators affecting adversely the rights of people. This may be due to a variety of reasons: the fact that most of the principal non-statutory remedies are obtainable only in the High Court where the cost of litigation is very high; the limited scope of some of these remedies; the widespread impression the prospects of successfully challenging orders made by

the directors, the commissioners the governors and the secretaries are remote; failure to appreciate some of opportunities for obtaining judicial redress under the present law; and the evolution of formal procedures such as prior notice to government before instituting suits in courts.

Practically equivalent to the absence of contentious issues in the field of licensing is their obscurity or non-recognition in the public mind or in the minds of the parties affected. This applies particularly to application for route permits presented for adjudication to the regional transport authorities. It seems almost objectionable that the finding of conditions for the grant or refusal of permit should be left entirely to administrative regulation, in view of the sharp conflict of interest and opinion. Normally, it would seem that the progressive recognition of distinct issue would produce a pressure to have the solution of the issue incorporated in statutory provisions.

An analysis of the licensing cases reveals that administrative discretion was not, in many instances, guided by considerations appropriate to the subject-matter. The courts have detected circumstances leading to malicious considerations. The French call this an "excess of power", and it may properly be treated as transgression of jurisdiction.

There have been instances in which licenses have been refused on the basis of the political views and political affiliations of the applicant. The courts hesitate to take jurisdiction in these matters because it is very difficult for them to assume supervision of a large part of the petty operations of the government. Yet it is in cases of discretionary action in these petty operations that there is the greatest danger of injustice to individuals.[139]

The problem of interpretation in the spirit of the constitution remains open to experiment in Pakistan. A beginning has been made of judicial interpretations of legislative action. Some of

139 *WAPDA and others vs. Bashir Hussain Shah* PLD 2015 SC 344.

the Pakistani judges have been used to relying on English rules of statutory interpretation according to which the intention of the law makers had to be ascertained from the words of the enactment. Since the Constitution of Pakistan favors parliamentary form of government, it would be worthwhile if Pakistan judiciary, in the interests of uniformity, decides to adopt patterns which have greater affinity to the Constitution than the English pattern has. [140]

In this changing era in Pakistan. it is inevitable that great responsibility will be assigned to administration. This will in turn, necessitate greater control over administrative action. As government departments acquire the habit of self-restraint impartiality and fairness, the courts may correspondingly be inclined to lessen their supervision. But the presence of this restraining power of the judiciary, "aloof in the background, but nonetheless always in reserve, tends to stabilize and rationalize the . . . (administrative) judgment, to infuse it with the glow of principle, and keep the faith." [141]

There is enough evidence in support of the view that Pakistan is not yet ready for rapid politicization. This should not, however, preclude an effort directed at the upgrading of legal institutions. The arbitraries manifest in administrative decisions will, in any case, diminish in proportion to the rise of judiciary in Pakistan. What is needed immediately is a new examination of the meaning and methods of judicial control of administration as envisaged in the United States Constitution. Another effort in the direction involves an important human element --- the creation of awareness in people that their liberties can be safeguarded by an effective organization of judicial review. This awareness must include a willingness periodically to re-examine the system with a view to correcting defects and inadequacies.

---

140 *Ishaq Khan Khakwani vs. Mian Muhammad Nawaz Sharif* PLD 2015 SC 275.

141 - Benjamin N. Cardozo, *The Nature of Judicial Process* (New Haven, 1921), p. 93.

In Pakistan examples are not lacking where the executive and judicial functions are united in one and the same person. The findings of High Court discloses that a person who had administrative and executive duties to perform cannot discharge the judicial functions with the same unbiased and free mind which a judicial officer can do.[142]

During the colonial rule, the British perhaps considered this combination of functions necessary to promote their own policy of law and administration. It is now desirable to put an end to this state of affairs.[143] Otherwise people will lose confidence in the administration of justice. With regard to tangible factors, a blueprint for a new or remodeled system of judicial review in Pakistan must emphasize the necessity of appropriate constitutional language under which administrative law can be organized. Provision may be made for annual conferences, training and refresher programmes in administrative law for all judges, professors of law, public officers performing judicial or *quasi*-judicial functions and member of bar associations.

As a preliminary step to the establishment of an Institute for Administrative Law, it may be desirable to organize in the country a judicial council for administrative law composed of lawyers, judges, professors, academics, legislators, public officers and lay leaders. The membership of such a council may vary from eight to ten and may be selected by the Supreme Court from government departments, universities, academies, assemblies, bar associations for overlapping terms.

A highly trained person in administrative law may be appointed as permanent secretary to the council. The inclusion of lay leaders in the proposed council would constitute an assurance

142 - *Ghulam Sarwar Khan* vs. *The Provincial Government, N.W.F.P,* P L D 1953 Pesh. 45.

143 - *Ibid.*, p. 48.

that "the administration of justice in a dynamic democracy is not a private concern of the members of the legal profession,"[144] but belongs to the public in a very real sense.[145]

If judicial control of administrative action is to be of more than theoretical efficacy in Pakistan, then it must be relatively simple and inexpensive means of access to the courts. The relevant procedure must enable the judiciary to afford sufficiently wide review to check administrative abuses, unhindered by technicalities of pleading unsuited to modern conditions. Review of administrative discretion has been influenced in Pakistan by the excessive concern with the procedural aspects of justice. The result has been an undue emphasis on technicalities in a field where there is little place for procedural niceties.[146]

During military regime, judicial review was deprived of its vitality by the various martial law orders and regulations which gave overriding powers not only to martial law authorities but also to many members of the civil service. The martial law government had found it necessary to forbid public assemblies, to suppress freedom of expression, to confiscate private property and to violate practically all the fundamental rights guaranteed by the Constitution.

It is, no doubt, true that no constitutional system would be complete without some sort of provision for emergency measures of this kind. But these measures are subject to abuses, which, if unchecked, would destroy the balance of federal and provincial functions which lies at the very basis of any federal system. Armed with the tremendous powers inherent in the state of martial rule . . . the executives may well be tempted to use an actual or imaginary breach of the public

144 - Robert C. Finley, "Upgrading Court Organization and Administration: A Small Blue Print for a Big Job", *Duke Law Journal,* (1945), 327.

145 *Muhammad Kaukab Iqbal vs. Govt. of Pakistan,* PLD 2015 SC 1210.

146 *Liberty Papers Ltd. vs. Human Rights Commission,* PLD 2015 SC 42.

order as an occasion to deprive local authorities, with whom they may be in disagreement of their normal constitutional rights.[147]

Friedrich and *Fauker* have asserted that the vesting of broad emergency powers in the hands of the central authorities is not without danger to the maintenance of any federal system of government. [148] In order to provide adequate guarantees against the abuse of executive powers on such occasions. it is worthwhile for Pakistan Constitution to make use of the experiences of other constitutional states in laying down the requirements which, if satisfied, would tend to operate as technical barriers to the usurpation of power during periods of emergency. These requirements, , are that:

a) the assumption of emergency powers be strictly legitimate in character;
b) the assumption of power must be for a relatively short period of time;
c) the final authority to determine the need for emergency power must never rest with the agency which assumes the power; and
d) That the judicature must determine whether or not acts perpetrated under an assumption of emergency powers were in defense of the Constitution. [149]

The findings of this research points further to the necessity of making amendments in the Pakistan Constitution in order to strengthen the rule of law. The suggested principles which the Constitution should incorporate are:

a) the arbitrary power should be withheld from the executive;
b) an effective control of delegated legislation should be maintained;

147 - Carl J. Friedrich and Guy J. Fauker, "Defense of the Constjtutional Order", in Robert R. Bowie and Carl J. Friedrich (eds.), *Studies in Federalism,* p. 963.

148 - *Ibid.*, p. 682.

149 - ibid.

c) the discretionary power of the executive should be defined in the relevant statutes; and

d) The fundamental rights should be adequately safeguarded.

The implementation of the "welfare state" concept in Pakistan requires that the country should give priority to the rule of law. The need for such priority arises because the government is assuming more and more responsibilities for the dispensation of benefits and the employment of masses. The growth of governmental power in Pakistan is attended by dangers and problems of which the citizens of a welfare state must take account. The discretionary power of administrators that is increasing very fast has dangerous potentialities against which the supporters of "welfare state" must be alert to provide.

It is being gradually realized that the successful execution of any community development project in Pakistan will necessitate a reduction in the discretion left to the executive organs who wield coercive power. This realization is giving rise to a perplexing issue as to how far it is possible to reduce the discretionary element, without destroying a statute's effectiveness, as an instrument of public policy. Experience shows that it is not possible to draft effective legislation in many welfare areas without leaving way for the exercise of administrative judgment in adjudication. Is discretion then such a deadly poison to the rule of law in Pakistan that is better to abandon legislative objects than to run the risk of possible arbitrary use of discretionary power?

The answer to this question lies in the need that exists in Pakistan to devise a perfect safeguard system against the always present danger of abuse of administrative authority. Meaningful statutory standards, realistic procedural requirements, and effective techniques of judicial review are among the tools of control well along in the course of development in this

country. Moreover, there is not much evidence to indicate that the administrative officers are themselves alien to the tradition of honest judgment and fair decision embodied in the rule of law.

CHAPTER 7

CONCLUSIONS & SUGGESTIONS

Conclusions and Suggestions

Administrative discretion is the power granted to officials by a legislature. For the proper exercise of discretion, a lot depends upon the public morals of officials exercising discretionary power. Misuse or abuse of discretion also depends upon the efficiency and discipline in those administrative agencies.[150]

Discretionary powers are germane to a democratic welfare system. That's why they are usually exercised in the back ground of political considerations. Reasonableness, rationality, purpose and morality, however, are the essential constraints on such exercise of power.[151]

With the development of the welfare system, it is almost impossible to halt the growing course of ever-increasing administrative discretion. It is something *sine qua non* for a modern polity. The apprehensions that discretionary powers are incompatible with higher concepts like rule of law are a matter of the past. Nobody could deny the utility and compulsory nature of discretionary authority in the modern era.

And now it is generally accepted that administrative discretion is not contrary to the concept of rule of law. But in many ways it helps in the establishment of the rule of law. Gone are the days of Dicey and his traditional concept of the rule of law. Even in that definition some critics believe, Dicey meant to condemn, the arbitrary exercise of power and not that there should not be any discretion with the administration.

Again, the impact and compatibility of judicial review have long been a matter of discussion vis-a-vis the principle of separation of powers. It is, however, well settled now that judicial review of administrative discretion is in no way in conflict with the doctrine of

150 Suo Motu action regarding suicide bomb attacks, PLD 2014 SC 699.

151 *Habibullah Energy Ltd. vs. WAPDA*, PLD 2014 SC 47.

separation of powers; which is essentially dependent upon the principle of checks and balances. It rather strengthens the doctrine by providing checks on the arbitrary or unlawful exercise of authority vested by the legislature. The only concern of the courts is to keep the executive within bounds and limits set by the legislature. That is why courts only determine the legality of an administrative action or inaction.[152]

This, then, poses another problem i.e. the problem of the extent of judicial review of administrative discretion. In the earliest days of judicial review, even the minimal fulfillments of standards of legality were considered sufficient for denying judicial review. However, dawn of this century saw a great increase in the discretionary powers of administration. With the development of discretionary powers the need to limit the administrative discretion also increased. The solution of this problem was found in enlarging the scope of judicial review and in some very selective cases courts even substituted their own view apart from considering the legality of the cases before them.[153]

There are various intermediary points between these two extremes and the courts normally confine their authority of review within that intermediary area. A lot is needed to develop a coherent and justifiable approach in this respect. Uncertainty should not be kept untouched. Still there are many open issues in this field and there is a dire need that more specific principles should be developed for effective administration of justice.[154]

Presently, apart from laying down some general principles, superior courts have normally left ample discretion with the reviewing courts to exercise their power of review in accordance with the merits of each case. The rationale of this rule is that courts should possess ample

152 *Dossani Travels Pvt. Ltd. vs. Travels Shop Pvt. Ltd.*PLD 2014 SC 1.

153 *Province of Sindh vs. M.Q.M.* PLD 2014 SC 531.

154 *National Bank of Pakistan vs. SAF Textile Mills Ltd.* PLD 2014 SC 283.

jurisdiction to do *complete justice* in accordance with the facts, peculiar circumstances and requirements of each case.[155]

Generally speaking, exercise of discretion depends upon facts and circumstances of each case. Courts have laid down certain general standards which are applicable on every exercise of discretion by any administrative authority. Observance of these standards is the minimum requirement for the proper and lawful exercise of administrative discretion. Courts. in their power of judicial review, have never been hesitant to quash the administrative order based upon failure to exercise discretion vested in an authority.

Again, courts readily condemn the abuse of discretion by the authority as bad in the eye of law. *Certiorari* is the usual remedy, however, in rare cases the remedy of *mandamus* may also be resorted to by the court in order to do complete justice. Unauthorized sub-delegation, putting fetters on discretion by self-imposed rules of policy, acting under the dictation of some unauthorized body or authority, non-application of one's own independent mind, or inaction on the recommendation of authorized statutory body are considered as the major ingredients of the failure to exercise discretion.[156]

While, the exercise of power for an improper purpose, on irrelevant considerations, with *mala fide* intention, or unreasonably are the basic grounds for the determination of abuse of discretion. Any action falling within any of these categories is readily reviewed by the courts and declared as *ultra vires*. If high court declines to exercise its discretionary constitutional jurisdiction in a case wherein an administrative action was taken through proceedings which

155 *Dossani Travels Pvt. Ltd. vs. Travels Shop Pvt. Ltd.* PLD 2014 SC 1.

156 *Habibullah Energy Ltd. vs. WAPDA.* PLD 2014 SC 47.

were not maintainable, the apex court was justified to correct the decision of executive in exercise of writ jurisdiction by issuing an order in the nature of *certiorari.* [157]

Courts have adopted a consistent approach towards attempts to oust their jurisdiction of judicial review. The ouster clauses are to be strictly interpreted. *Corum non judice,* excess of jurisdiction and mala fide acts are not considered to be covered even under the express ouster clauses. Same is the case with the Constitutional ouster clauses. Again. on the same lines. even the worst subjective language of a provision vesting discretionary power is interpreted objectively in order to guard against the ouster of judicial review. Similar sort of approach prevails in Great Britain and India as in Pakistan. American courts, however, are not so strict in the interpretation of subjectively worded discretionary power.

American courts normally give much room to the authorities exercising discretion compared to the attitude of courts of the three other common law countries (India, Pakistan & Britain).This approach although has some of its own peculiar merits but in countries like Pakistan, it is something impractical and unrealistic. It is so because greater the discretion, more the chances of abusing it, only judicial review could work as an effective deterrence. In this context, our courts have done a commendable job in broadening the scope of judicial review as it works as a bridle which tames the *wild horse* (officials exercising discretion).[158]

At the same time our courts should adopted a policy of "*Judicial Restraint*" as well in appropriate cases.[159] For instance, the court has held [160] that while exercising the power of judicial review, the principle of "judicial restraint" is to be followed as individual interest is to

157 - *National Bank of Pakistan vs. Islamic Republic of Pakistan*, 1992 SCMR 1705.

158- Suo Motu case No.11 of 2011, PLD 2014 SC 389.

159- *Habibullah Energy Ltd. vs. WAPDA* PLD 2014 SC 47.

160 -*Kanwar Intizar Muhammad Khan vs. Federation* 1995 MLD 1903.

give way to the collective good and public interest". Court further ruled [161] that transparency in the process of decision making by public functionaries is although an essential requirement, yet judicial review does not enable or empower the court to get into the chair of public functionary to take over his job and substitute its decision for his decision. Courts while exercising judicial review cannot and don't take on the charge of the government or public bodies. Respective sphere of activities is well defined and same is to be kept in mind in such matters.[162]

Hence, although delay, expense and lack of confidence in the officials exercising discretion are the necessary outcomes of frequent judicial meddling in the administrative affairs. But this is essential for preserving the higher concepts of rule of law and administration of justice. There is a pressing need that discretion should be impersonalized[163]. Legislature never intended to vest discretion in an individual but it is always attached to an office, or an institution. This should be understood in it's entirely by the individuals exercising discretion.

They exercise the power by virtue of their office or to the grace of their institution. Resultantly, they should not betray their official responsibilities and be honest to their office or else the institution[164]. Only such practice could affect the attitude of courts in exercising the power of judicial review of administrative discretion. Otherwise, courts always try to guard against any violation of people's right to life, liberty and property by the officials exercising discretionary powers.[165]

It is highly advisable that in our society, every department should set some minimum standards for its officials as to how they are supposed to exercise their particular discretionary

161 -*Presson Manufacturing Ltd. vs. Secretary Ministry of Petroleum* 1995MLD 15.

162 *Ghulam Rasool vs. Government of Pakistan*, PLD 2015 SC 6.

163 Ibid.

164 In the matter of action against distribution of development funds by Ex. Prime Minister PLD 2014 SC 131.

165 *Mst. Shahista BiBi vs. Superintendent* , PLD 2015 SC 15.

power. And if peculiar circumstances of a case demand deviation from the set standards then the official might to be bound to give reasons for such departure. Only then he should have to be allowed to deviate from those fixed standards. In this context, a full bench of Supreme Court has held [166] that any exercise of discretionary power in the nature of prerogative power claimed by the government or any of its functionaries has, however to be justified either under some statute law or under the provisions of the constitution, however, higher courts are expected to act in aid of law and not to hamper the smooth working of subordinate administrative authorities, established by or under the law.[167]

Higher courts are not supposed to set up hegemony in itself and thwart the procedural law. [168] It is also mandatory for the litigants to agitate their rights at the proper forum at a proper time, so that law may take its own course. Otherwise court is not bound to grant discretionary relief to stale demands instituted before a wrong forum. [169]

Where it is evident from the record of the administrative body that substantial justice has been done through diligent exercise of discretionary powers, apex court is not bound to take cognizance of such matters and it should decline to exercise its discretionary jurisdiction in favor of such petitioner. [170] In the context of revisional Jurisdiction of higher courts, it is established that same is discretionary and equitable in nature. No party is entitled to it as a matter of right. [171] Its objects include *inter alia* to foster the ends of justice, preserve the rights of parties and to

166 *Controller of Patents and Designs Karachi vs. Muhammad Qadir Hussain* 1995 SCMR 529.

167 *Economic Freedom Fighters vs. Speaker National Assembly*.PLD 2016 SC 1040.

168 *Bangul vs. Province of Sindh* 2001 P.Cr. L.J. 1700.

169 *Iqtidar Haider vs. Bank of Punjab* 2001 MLD 1537.

170 *Muhammad Saleem Ullah vs. Additional District Judge Gujranwala*, 2003 YLR 998.

171 *Mehdi Hussain vs. Muhammad Arif*, PLD 2015 SC 137.

right a wrong by placing a check on the administration, [172] however if the action of executive is *ultra vires, mala fide* or unreasonable , then court is bound to take cognizance of such irregularity. [173]

In the context of judicial discretion, as it has been already established[174] that while exercising constitutional jurisdiction, High Court is not bound by any precedent, each case entails its own objective conditions and the discretionary relief is to be granted or refused on the basis of such conditions without being influenced by pre-conceived notions. Courts while exercising review powers on the actions of subordinate executive agencies should take extra care and caution to ascertain that whether the authority has followed minimum standers of transparency.[175]

Where discretion exercised by the officer was not proved to be arbitrary or capricious, High court should decline to interfere in the discretion so exercised.[176] Judicial discretion vested by statutory provisions cannot be construed in such a manner as it will arm the court with arbitrary powers and would inevitably destroy the public confidence in the stability of the judicial arrangements. [177] Another suggestion is that higher officials should themselves try to rectify the mistakes of their subordinates. Officials exercising discretionary authority should be bound to give reasons in writing for their action or inaction, as the case may be.[178]

---

172 *Naghma Nawb vs. Waseem Nawab*, 2010 YLR 2372, *Muhammad Bashir v. Province of Punjab*.2003 SCMR 286.

173 *Abdul Sattar vs. Bashir Ahmad* 2004 CLC 370.

174 *Aftab Ahmad Khan Sherpao vs. Governor, N.W.F.P.* PLD 1990 Peshawar 192.

175 *District Bar Association Rawalpindi vs. Federation of Pakistan* PLD 2015 SC 401.

176 *Aftab Hussain vs. Collector of Central Excise and Land Customs Quetta*, 1987 P.Cr.L.J. 1413.

177 *Hudaybia Textile Mills Ltd. vs. Allied Bank of Pakistan Ltd.* PLD 1987 SC 512.

178 *District Bar Association Rawalpindi vs. Federation of Pakistan*, PLD 2015 SC 401.

These suggestions if implemented will not only help in curbing the abuse of power but people will also be certain about the behavior of the authority in peculiar circumstances. This way, it will be easier to review any abuse of power. It will also help in reducing the high rate of litigation against administration. In nutshell, this seems to be a practicable solution through which we could check and halt the frequent high-handedness of the administrative authorities.

The goal of "due process of law" which is valued highly by the citizens of Pakistan can be pursued by re-rationalization of power that vest in the three major political institutions: the judiciary, the executive and the legislature.[179]

The new expectations, progressively brought into existence by the welfare state must be thought of not as privileges to be dispensed with unequally or by arbitrary plans of government officials but as substantial rights in the assertion of which the claimant should be given an effective remedy, a fair procedure, and a reasoned decision. The judges of superior courts in Pakistan can undoubtedly play a prominent role in the fulfillment of these expectations. It remains to be seen, however, whether the judicial mind in Pakistan would succeed in developing a tradition of decisions that should create and develop an ethos of freedom, justice, transparency, rule of law and above all, constitutionalism.

[Further God knoweth the best]

179 *Dr. Iftikhar Ahmad vs. Government of K.P.K.* PLD 2016 Peshawar 212.

Further Research

The researcher tried his best to do a comprehensive and result oriented work regarding the topic and endeavored to provide useful information to the reader, however, further research is earnestly suggested regarding the scope and extent of administrative discretion in regional perspective. Since the legal principles are organic in their nature hence, I expect that someone will take the responsibility to do further research so that new horizons may be explored in this regard

Bibliography

Books

Azfar, Kamal, Pakistan, Political and Constitutional Dilemmas, (Karachi, Pakistan Law House, 1987).

Ashraf, K.M., Fundamental Rights, (Lahore, Mahmood & company, 1964).

Abbas, Qamarul Islam, Mian. Some Aspects of Administrative Law, (Lahore, Law Times, 1970).

Bakshi, P.M.: Encyclopedia of writ Law (New Delhi, Capital Law House, 1999).

Brown, L. Neville and Garner J.F.: French Administrative Law (London, Butterworths 3rd.ed. 1983)

Brohi, A.K., Fundamental Law of Pakistan (Karachi, Din Mohammedi Press, 1958).

Braibanti, Ralph, Public Bureaucracy and Judiciary in Pakistan, (Princeton, Princeton Univ. Press, 1962).

Basu D.D., Shorter Constitution of India (Nagpur, Wadhwa, 12th.ed.1999).

----------Comparative Administrative Law (Calcutta, Sarkar 1968).

Bilal, Noor Muhammad, Dynamism of Judicial control and Administrative Adjudication, New Delhi, Deep and Deep Publications, 2004.

Cornelius A.R. Law and Judiciary in Pakistan (Lahore, Lahore Law Times Publisher. 1981).

Choudhary, Ghulam Waheed., Constitutional Developments in Pakistan, Ph.D. Thesis, (Columbia University, 1956).

---------- Documents and Speeches on the Constitution of Pakistan, (Vancouver, University of British Columbia, Canada, 1967)

Craig, P.P., Administrative Law (London Sweet & Maxwell, 1983).

Craig, P.P., The Doctrine of Judicial Review (Princeton, Princeton Univ. Press, 1984)

Cane, Peter: An Introduction to Administrative Law (Oxford, Clarendon Press.2nd.ed.1992)

Cross, Rupert, Precedent in English Law, Oxford UP, 1964.

Calder, G.J. Constitutional Debates in Pakistan, 45 Muslim World, 40,144,253(1956).

Davis, K.C. Administrative Law Cases, Text & Problems (St. Paul Minn. 6th. Ed.1977)

----------Administrative Law Treatise Vol. 1 (St. Paul. Minn., West 1968).

---------- Discretionary Justice (Baton Rouge, Louisiana, 1972).

Davis, K. C., *Administrative Law Text,* St Paul, 1972.

Davis, K. C. (1975) Police Discretion, 2B. Discretionary Justice in Europe &America (1976).

Dickenson John, Administrative Justice and the Supremacy of Law in United States (Mass, Harvard Univ. Press, 1927).

Dworkin, R. M., Taking Rights Seriously, London, 1977.

Denning, Sir Alfred., Freedom under the Law (London, Stevens and Sons, 1949).

De Smith, S.A., Judicial Review of Administrative Action,(London, Stevens, 4th.Ed 1980).

De Smith, Woolf and Jowell, Judicial Review of Administrative Action (London, Stevens 5th Ed. 1995).

Dicey, A.V., An introduction to the study of the Law of Constitution (London, MacMillan 10th Ed. by E.C.S. Wade, 1965).

Elcock, H.J.E., Administrative Justice (London, Longman's Green and Co. 1969).

Ely, John, Democracy and Distrust: A theory of Judicial Review (New York, Harvard Univ. Press 2nd Ed. 1980).

Fazal, M.A., Judicial Control of Administrative action in India, Pakistan and Bangladesh (Allahabad, L.B.C., 2nd.Ed. 1999).

Freedman, Charles E. The *Conseil d'etat* in modern France (New York, Columbia Univ. Press, 1961).

Friedman and Benjafield, Principles of Australian Administrative Law (Sydney, Law Book Co., 1966).

Fazal Karim, Jurisdiction and Judicial Review (Lahore, PLD Publishers 1990)

----------, Judicial Review of Public Actions (Karachi, Pakistan Law House 2006).

Foulkes, D., Administrative Law (London Butterworth's 1999).

Garner, J.F., Administrative Law 5th. Edn.(London, Butterworth and Co. 1979).

Griffth, J.A. and Street H., Principles of Administrative Law (London, Pittman and sons,2nd Ed. 1959).

Ghosh, Comparative Administrative Law (Calcutta, Butterworth and Co., 1990).

Haider, S.M., Law and Judiciary in Pakistan, (Lahore Law Times Pulishers.1981.)

Halsbury, Laws of England, Vol. 8 (London, Butterworth and Co. 4th. ed., 1980).

Hamson, C.J., Executive Discretion and Judicial Control (London, Stevens & Sons, 1964).

---------- Executive Discretion and Judicial Control—An aspect of French *Conseild'etat.*, Hamlyn Lectures (London, Stevens 1954).

Hewart Lord. The New Despotism (London, Earnest Benn, 1929)

Hayek, Fredrick A., The Road to Serfdom (Univ. of Chicago Press, 1944).

Iqbal, Khurshid, the Right to Development in International Law, New York, Rutledge 2010.

ILI, Judicial Review Through Writ Petitions (New Delhi, Indian Law Institute 1962).

Jackson, Robert H. The Supreme Court in the American System of Government (Columbia U.P. 1955).

Jacob, Alice, Article 32, Right to Constitutional Remedies in Material on Constitutional Litigation, (BCI, 1982).

Jaffe, Louis L. Judicial Control of Administrative Action, (Boston, Little Brown, 1956).

Jain M.P. and Jain S.N., Principles of Administrative Law, (Bombay, Tripathi, 1981).

Jain P.C., Administrative Adjudication, A Comparative study of France, UK, USA, and India (N. Delhi, Sterling, 1981).

Jennings, Sir Ivory, The Law and the Constitution, (Univ.of London Press, 5th. ed. 1959).

Khan Hamid, Constitutional and Political history of Pakistan (Lahore, OUP, 2008).

----------, Principles of Administrative Law (Lahore, OUP, 2012).

La Porte, Robert Jr., Power and Privilege, Influence and Decision Making in Pakistan (Berkeley, Univ. of California Press, 1975).

Marshall, Charles, Reflection on a Revolution in Pakistan, (Foreign Affairs, 1959)

Mallick, M.R., Writs: Law and Practice, (Calcutta, Eastern Law House, 2000).

Markose A.T. Judicial Review of Administrative Action in India (Madras, M.L.J. 1956)

Miller, Charles A., The Supreme Court and the uses of History, (Cambridge, Harv. Univ.Press, 1969).

Mauro Cappellette, Judicial Review in the contemporary World, (Indianapolis, The Bobb-Merrill Co. 1971).

Mc Whinney, Edward, Judicial Review in the English Speaking World, (Toronto, Toronto Univ. Pres 1956).

Menski Werner, Rafay Ahmad Alam and Mehreen Raza Kasuri, Public Interest Litigation in Pakistan, London and Karachi, Platinum and Pakistan Law House, 2000.

Munir, Muhammad, Justice, Constitution of Pakistan 1973. (Lahore, PLD.1974)

Munir, Muhammad, Precedent in Pakistani Law.(Karachi, Oxford U.P. 2014).

Noorani, A.G. Citizen's Rights, Judges and State Accountability,(OUP, New Delhi,2002)

Oliver and Jowell, J.L., New Directions in Judicial Review, -- Current Legal Problems. (London, Sweet and Maxwell, 1988).

Pound, Roscoe. Justice According to Law (N.H., Yale Univ. Press., 1952)

Pirzada, Sharifuddin, Fundamental Rights and Constitutional Remedies in Pakistan, (Lahore, PLD Publishers, 1966).

Ramachandran, V.G., Fundamental Rights and Constitutional Remedies, Vol. 1 & 2, (Lucknow, Eastern Book Co. 1959-60).

Reddy, G.B., Judicial Activism in India, 1st. ed. (Hyderabad, Gogia Law Agency, 2001).

Robson, Justice and Administrative Law, (London, Stevens & Sons 1951).

Schwartz, B., Administrative Law, (Boston, Little Brown, 1976).

Schwartz, Bernard and Wade H.W.R., Legal Control of Government: Administrative Law in Britain and United States (Oxford, Clarendon Press, 1972).

Saharay, H.K., Administrative Law and Tribunal, (Calcutta, Eastern Law House, 1987).

Shapiro, Martin, the Supreme Court and Administrative Agencies. (New York, The Free Press, 1968).

Singh, M.M., Justice by Tribunals, A study in Method with reference to India, (Calcutta, World Press, 1973).

Stone , Julius., Social Dimensions of Law and Justice,(Bombay, Tripathi, 1966).

Seervai, H.M., Constitutional Law of India, Vol. 2 (Bombay, N.M. Tripathi, 1993).

---------- Right to Judicial Remedies in Material on Constitutional Litigation (Bombay, Bar Council of India, 1982).

Suleiman, Fazal Kazi, Discretionary Power, Karachi, Pakistan Law House, 2014.

Thakkar, C.K., Administrative Law (Lucknow, E.B.C., 1992).

Wade, H.W.R., and Forsyth, C.F., Administrative Law, (Oxford, Clarendon Press, 7th Ed.1995).

---------- Government and Citizen's Rights, New Problems, New Institutions, Vithal bhai Memorial Lectures (1st. Edn. 1976).

Wani, A.A., Exclusion of Judicial Review (New Delhi, Metropolitan, 1st.ed. 1987).

Wheeler, Richard, Government and Constitution making in Pakistan, Ph.D. Dissertation, (Berkeley, Univ. of California, 1957).

Yousaf, Hamid, Pakistan in search of Democracy (Lahore, Afrasia Publications, 1980).

Yardley D.C.M., Principles of Administrative Law, (London, Butterworths. 2nd Ed.1986).

Ziring, Lawrence, The Failure of Democracy in Pakistan, Ph.D. Dissertation. (Columbia Univ. 1962.

Research Articles

A. Markose, "Judicial Review of Administrative action in India." (1956) Madras L.J

Abrahim, H. F. "Public Offices and Public Officers in the United States and Germany," Tulane Law Review, XXI(1946), 1-53.

Anand, A.S., Judicial Review—Its Contents—Its Reach, AIR (Journal) 2000 P.55.

Baldwin, R. and Hawkins, K. (1984) Discretionary justice: Davis reconsidered, Public Law, 570.

Baxi, Upendra, Constitutional Changes, An Analysis of Swaran Singh Committee Report, 2SCC, (1978).,

Baxi, Upendra, Developments in Indian Administrative Law, Public Law in India, (1982)

Baxi, Upendra, Laches and the Right to Constitutional Remedies, ILI, Constitutional Developments since Independence, (1975).

Berger, Raoul, "Administrative Arbitrariness Process," Public Administration Review, VIII (1948), 126---133.

Boynton, Sir, John, Judicial Review of Administrative Decisions, 64 Public Administrations (1986).

Brendt, Eric, Separation of Powers and Constitutional Govt., Public Law, (1995).

Burrows, J. F., 'Statues and Judicial Discretion' 1976 *NZLR* 1.

Buttle, Edgar, A., The Search for Administrative Justice, 44, American Bar Association Journal, (1958).

Carr, Cecil, Administrative Adjudication in America, LQR, (1942).

Chaterjee, N.C., Control of Legislative Power of Administration, JILI (1958-59).

Chayes, Abram 'The Role of the Judge in Public Law litigation (1976) 89 *HarvLR*1287.

Chitkara, M.C., Administrative Tribunals, Origin, Role and Future Trends, 18 Cochin Univ. Law Review, (1994).

Cole, Roy, L., Administrative Agencies and Judicial Review, Vol. 44. ABAJ, (1958).

Cooper, Robert M. "Administrative Justice and the Role of Discretion," Yale Law Journal, XLVII (1938), 577-602.

Corwin, Edward, S., The Higher Law, Background of American Constitutional Law, Harvard. Law Review, (1928-29).

Craig, P., Ultra Vires and Foundation of Judicial Review, Cambridge Law Journal, (1998).

Davis, K. C., (ed.), Discretionary Justice in Europe and America, U of Illinois L.J. 1976.

Davis, K.C., Requirement of Opportunity to be Heard in Administrative Process, Yale Law Journal, Vol. 5, (1942).

De Smith, S.A., Administrative Law—Wrongs and Remedies, Modern Law Review,Vol.15, (1952).

Deener, David, "Judicial Review in Modern Constitutional Systems," Harvard Law Review, LXI (1948), 389-418.

Dickinson, John. "Judicial Control of Official Discretion," American Political Science Review, XXIII (1928), 275-300.

Diplock, Lord, 'Administrative Law: Judicial review Reviewed' 1975 *CLJ* 233.

Dugdale, D. F., 'The Statutory Conferment of Judicial Discretion', 1972 *NZLJ* 556.

Dworkin, R. M., 'Law as Interpretation' (1982) 60 *Texas LR*527.

Elias, Erwin A. "Administrative Discretion" No Solution in Sight," Baylor Law Review, XIV (1962), 1-31.

Fahy, Charles. "Judicial Review of Executive Action," Georgetown Law Journal, L. (1962), 709-732.

Faller B. 'Does Dworkin's Rights Thesis Succeed in Solving the Problem of Judicial Discretion?'(1984) 22 *UWOLR.*

Freedman, S. and Morris G., Judicial Review and civil Servants; Contract of Employment declared to Exist, Public Law, (1991).

Galligan, D.J., 'Discretionary Decision-making in the Regulatory Agencies: a Conceptual Framework' (1983) 57 *SCLR 101.*

Galligan, D. J., 'The Nature and Function of Policies within Discretionary Powers' 1976, *Public Law, 332.*

Galligan, D.J. (1976) Nature & functions of Policies within discretionary Powers, P.L. 332 at 438.

Ganz, G. "Limits of Judicial Control over the Exercise of Discretion," Public Law (1964), pp. 367---385.

Goldstein, J., 'Police discretion not to Invoke Criminal Process' (1960) 69 *YLZ 543.*

Gordon D.M. Administrative Tribunals and Courts, 49 LQR (1933).

Greenawalt, Kent, 'Discretion and Judicial Decision: the Elusive Quest for Fetters that Bind Judges' (1975) 75 *ColLR*359.

Grey, J. H., 'Discretion in Administrative Law' (1979) 11 *Ga LR 991.*

H.W.R. Wade, Anglo American Administrative Law; More Reflections (1966) 82 LQR 226- at 249

Harper, M. C., 'The Exercise of Executive Discretio: a Study of a Regional Office of the Department of Labour' 1982 34 *AdmLR 559.*

Hill, M. (1969) 'The Exercise of discretion in the National Assistance Board' Public Administration 59.

Husain, Syed Akhlaque, Writ Jurisdiction of Superior Courts in Pakistan, PLD 1958 Journal 1.

Jaffe M. Louis J. "The Report of the Attorney-General's Committee on Administrative Procedure."University of Chicago Law Review, VIII (1941), 401---440.

Jaffe m Louis J. "The Right to Judicial Review,', Harvard Law Review LXXI (1958), 401---437.

Jaffe, L. L. and Henderson, E., 'Judicial Review and the Rule of Law' (1956) 72 *LQR* 345.

Jaffe, L., Judicial Review, Constitutional and Jurisdictional Fact, 70 Harvard Law Review (1956).

Jaffe, L., Judicial Review; Substantial Evidence on the whole Record, 64 Harvard Law Review (1951)

Jones, H. W., 'The Rule of Law and the Welfare State' (1958) 58 58 *ColLR*143.

Joshi, K.C., Constitutional Status of Tribunals, JILI (1999).

Jowell, J. (1973) the legal Control of Administrative Discretion' Public Law 178.

Kerry, Michael Sir, Administrative Law and Judicial Review, — The practical effects of developments of last 25 Years, 64 Public Administration (1986).

Khan, Faizullah, Independence of Judiciary in the Future Constitution of Pakistan," P L D 1950 Journal 7.

Landis, James M., Administrative Policies and Courts, 47 Yale Law Journal 1938).

Letourneur. M. and C. J. Hamson. "Control of Discretionary Executive Powers in France," Cambridge Law Journal , XI (1952), 258---279.

Levinson, S., 'Taking Rights Seriously: Reflections on "Thinking Like a Lawyer"' (1977-8) 20 *StanLR*1071.

Lewis C (1993) The Exhaustion of Alternative Remedies in Administrative Law, 51, Cambridge Law Journal 138

Leys, W. A. R., 'Ethics and Administrative Discretion' 1943 *PAdR*10.

Lovegrove, Austin, 'The Listing of Criminal Cases in the Crown Court as an Administrative Discretion' 1984 *CrimLR*738.

Lyons, 'Dworkin on Judicial Discretion' (1963) 60 *JPhil*638.

Macdonald, R. A., 'Judicial Review and Procedural Fairness in Administrative Law' (1979) 25 *McGill JL* and (1986) 26 *McGill LJ.*

Martin, R. C. (ed.), *Public Administration and Democracy,* Syracuse UP, 1965.

Mashaw, J. L., 'The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews* v. *Eldridge.* Three Factors in Search of a Theory of Value' (1976) 44 *U.Chic.LR.*28.

Misra, T.S., Judicial Functions in Administrative Law, Vol. 2, Journal of Parliamentary Information, (1976).

Mukherji, P.B., Administrative Law----Judicial Review, JILI (1958-59).

Munzer, P., 'Right Answer, Pre-existing Rights and Fairness' (1977) 11 *GaLR*1055.

Oliver, Dawn. Is the Ultra Vires Rule the basis of Judicial Review, Public Law, (1987).

Peiris, G.L., Judicial Review—Judicial Policy; the Evolving Mosaic, LQR (1987).

Pekelis, Alexander H. "Administrative Discretion and the Rule of Law," Social Research. X(1943), 22—37.

Pillusbury, Warren H., Administrative Tribunals, 37 Harvard Law Review, (1922—23)

Pound, Roscoe, 'Discretion, Dispensation, and Mitigation: The Problem of the Individual Special Case' (1960) 35 *NYULR* 925.

Rabin, R. L., 'Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement' (1976-7) *UChicLR*60.

Rabin, R. L., 'Legitimacy, Discretion, and the Concept of Rights' (1983) 92*YLZ* 1174.

Rao, P.P., Basic Features of the Constitution, Indian Bar Review, Vol. 26, (1999).

Rao, V. Nageshwara, and Reddy G.B., Doctrine of Judicial Review and Tribunals; Speed Breakers Ahead., 39 JILI (1997).

Raoul Berger, Administrative Arbitrariness & Judicial Review, 65 Col. L.R. 55

Raz, Joseph, 'Legal Principles and the Limits of Law' (1972) 81 *YLZ* 823.

Raz, Joseph, 'On the Nature of Rights' (1984) xciii Mind, 194.

Reddy, Y.R., & Reddy Y.P., Administrative Tribunals vis-à-vis the Jurisdiction of High Courts, Indian Bar Review, Vol. 13(2). 1986.

Reiss, A.J. (Jun) (1990) 'Bok Review of Discretionary Justice' 68 Michigan Law Review 994.

Rosenbloom, David H., Public Employment and the Constitution; Recent Judicial Developments in USA, Indian Journal of Public Administration, Vol. 20 (1974).

Sartorius, R., 'Bayes' Theorem, Hard Cases, and Judicial Discretion' (1977) 11 *GaLR*1269.

Sartorius, R., 'The Justifications of the Judicial Decision' (1968) 78 *Ethics* 171.

Sathe, S.P., Constitutional Law, 1, XX111 ASIL. (1987).

Schwartz, B. 'Administrative Discretion: the Next Stage' (1983) 92 ***YLJ*** 1487

Shetly, K.P.K., Judicial Review and Imposter Institution, Cochin Univ. Law Review, (1996).

Shirivastav, D.K., The Province of Article 136, Banaras Law Journal, Vol. 5 (1969).

Skelly Wright, J., 'Beyond Discretionary Justice' (1971-2) 81 *YLJ* 575.

Steiner, J. M., 'Judicial Discretion and the Concept of Law' (1976) 35 *CLJ* 135.

Stone, 'From Principles to Principles' (1981) 97 *LQR* 224.

Summers, R. S., 'Justiciability' (1963) 26 *MLR* 530.

Thakker, Justice C.K., L. Chandra Kumar v. Union of India, AIR 1997 SC 1125 ; Restoration of Jurisdiction of High Courts, AIR journal 1997.

Titmuss, R. M., 'Welfare "Rights", Law and Discretion' (1971) 42 *PolQ*113.

Treves, G.E, "Administrative Discretion & Judicial Control" (1947) Modern Law Review 276

Upadhyay, M.L., Administrative Tribunals; No Alternative Mechanism for Judicial Review, Central Indian Law Quarterly (1989)

Varshney, Mrs. Surendra, Tribunals and concept of Jurisdiction, The Madras Law Journal (1970).

Vibhute, K.I., Administrative Tribunals and the High Courts,; A Plea for Judicial Review, JILI, Vol 29 (1987).

Wade, H.W.R. Administrative Tribunals and Administrative Justice, Vol. 55 Australian Law Journal (1981).

Walsh, Bernadette A., Judicial Review of Dismissal From Employment; Coherence or Confusion? Public Law (1989).

Wells, R. S. and Grossman, J. B., 'The Concept of Judicial Policy-Making' (1965) 15 *JPL* 286.

Wilson, H. T., ' "Discretion" in the Analysis of Administrative Process' (1972) 10 *Osgood HJL*117.

Winkler, J., 'Law, State, and Economy' (1975) 2 *BJLS* 103.

Yellin, J., 'High Technology and the Courts: Nuclear Power and the Need for Institutional Reform' (1981) 94 *Harv.LR* 489.

List of Cases

A Solicitor, Re: (1945) K.B. 368, at P. 371.

A.K. Gopalan v. State of Madras, AIR 1950 SC 2.

Abdul Baqi Bloch v. Govt. of Pakistan PLD 1968 SC 323.

Abdul Ghafur v. Khan Zahur ul Hassan Khan, P L D 1959 Lah. 199.

Abdul Hasan v. Chief Settlement Commissioner.PLD 1981 Lah.271.

Abdul Khaliq v. Province of Baluchistan; 1981 CLC 728

Abdul Majid v. Settlement Commissioner P L D 1962 Pesh. 40.

Abdul Majid vs. Province of West Pakistan PLD 1956 Lah. 615;

Abdul Rauf and others v. The N.W.F.P Government, P L D 1958 Pesh. 73.

Abdul Rauf v. Abdul Hamid Khan, PLD 1965 SC 671

Abdul Sattar v. Bashir Ahmad 2004 CLC 370.

Abdul Wahid Khan v. Custodian of Evacuee Property, P L D 1962 Quetta 72.

Abdur Rashid vs Sessions Judge PLD 1997 Lah. 613

Abdur Rehman v. Collector , PLD 1964 SC 461.

Abdur Rehman v. State, PLD 1971 Pesh. 6.

Abdus Saboor Khan v. University of Karachi, PLD 1966 SC 536.

Abdus Sattar v. Arag Ltd. and others, P L D 1964 Dacca 773

Abid Hussain v.P.I.A.C. PLJ 2005 SC 88

Aftab Ahmad Khan Sherpao v. Governor, N.W.F.P. PLD 1990 Peshawar 192.

Aftab Hussain v. Collector of Central Excise and Customs Quetta, 1987 P.Cr.L.J. 1413.

Ahbab Co-operative Housing Society v. Commissioner, Lahore , PLD 1978 Lah. 273

Ahmad Din v. Member Consolidation BOR. PLD 2016 Lah. 306.

Ahmad Zaman Khan vs. Governmnet of Pakistn.PLD 1977 Lah. 735

Ahmed Tariq Rahim v Federation of Pakistan PLD 1992 SC 646,

Aisha Steel Mills Limited v. Federation of Pakistan 2011 PTD 569 Sindh High Court.

Aitcheson of Topeka & S. F. Ry. vs. Wichita Board of Trade, 412 U. S. 800 (1973).

Akhtar Hussain vs. Ahangoo Khan 1981 CLC 1971

Alconbury case.(2001) 2 All ER 929

Ali Ahmad v. Rent Controller, P L D 1957 Kar. 204.

Ali Azhar Khan Baloch v. Province of Sindh, 2015 SCMR 456.

Alif Gul v.The State and others, P L D 2015 Pesh. 238.

Allah Din v. Jamshed Aderji Dubash, P L D 1961 Kar. 38.

Ally Imran v. Mian Muhammad Nawaz Sharif, PLD 2015 Lah. 671.

Ameer Umar v. Additional District Judge Dera Ghazi Khan 2010 SCMR 1215.

American International School System v. Mian Muhammad Ramzan, 2015 SCMR 1449.

American School of Magnetic Healing vs. Mc Annulty 187 US 94 (1902).

Ardeshir Cowasjee v. Multiline Associates PLD 1993 Kar. 237.

Arif Builders vs. Govt. of Pakistan PLD 1994 Kar 627

Ashfaq Ahmad Khan v. PTCL and others PLD 2016 Islamabad 112.

Assaf Ahmed Ali v. Muhammad Khan Junejo, PLD 1986 Lah. 310;

Associated Provincial Picture House Ltd v Wednesbury Corpn.(1948) 1 KB 223.

Azad Govt. of Jammu & Kashmir v. Sardar Javed Naz PLD 2016 SC (A J & K)

Azam Baig v. Abdul Aziz, 1970 SCMR 182.

Aziz-ur-Rehman Khan v. Federal Disability Board, 1990 MLD 1420

Baldwin & Francis Ltd. v. Patents Appeal Tribunal [1959] 2 All ER 433 at 448.

Bangul v. Province of Sindh 2001 P.Cr. L.J. 1700.

Bashir Ahmad Shauk v. Municipal Corporation Faisalabad, 2016 SCMR 1134.

Baz Muhammad kakar v. Federation of Pakistan: PLD 2012 SC 923.

Begum Nazir Abdul Hamid v.Pakistan, PLD 1974 Lahore 7.

Benazir Bhutto vs. President of Pakistan PLD 1998 SC 388, at p. 550.

Bharat Tewari v. N. Hossain, P L D 1959 Dacca 48.

Blackburn v. Att. Gen. (1971) 1. W.L.R. 1037.

Block v Community Nutrition Institute, 467 U.S. 340 (1984).

Brind (1991) 1 All ER 720

Brown v. Allen, 344 US 443

Bugsier v Reederei et al (1951) 2 T.L.R. 409

Ch. Ata Elahi v. Parveen Zohra, P L D1958 S C 298

Ch. Imam Ali v. District Magistrate, Lyallpur, P L D 1965 Lah. 318

Ch. Muhammad Anwar v. Province of Punjab PLJ 1996 Lahore 455.

Ch. Muhammad Hussain Agency Dealer vs. Commissioner Income Tax NLR 2005 Tax

Ch. Muhammad Younas v. Pakistan PLD 1972 Lahore, 847

Chanda Begum v Settlement Commissioner, PLD 1977 SC 503:

Chandra Transport Company v. State of Punjab, AIR 1964 SC 1245.

Chargul v. Commisioner, F CR P L D 1962 Quetta 15

Charsadda Sugar Mills vs Govt. of Pakistan.PLD 1971 Pesh. 210,

Chief Commissioner, Karachi v. Mrs. Dina Sohrab katrak, P L D 1959 S C(Pak.) 45.

Chief Constable v. Evans (1982) 3 All ER 141,

Chiniot Cooperative Housing Society v. Government of Punjab PLD 2016 Lah. 293.

Chiragh v. Ibrahim 2010 SCMR 1976

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

CMA No.3854 of 2014 In Suo Motu case No.3 of 2009, 2015 SCMR 976.

Commissioner of Income-tax v. Fazlul Rahman, P L D 1964 S C 410.

Confiscation cases, 74 U.S67.

Consolidated Edison Company v. National Labor Relations Board, 305 U.S. 197

Controller of Patents and Designs v. Muhammad Qadir Hussain 1995 SCMR 529.

Controller of Patents and Designs v. Muhammad Qadir Hussain 1995 SCMR 529

Council of Civil Service Unions v. Minister of Civil Service, (1985) A.C. 374, at P 410.

D.S. Textile Mills Ltd. v. Federation of Pakistan PLD 2016 Lah. 355.

Dismuke v. U.S. 167 U.S. 167 (1936)

District Bar Association Rawalpindi v. Federation of Pakistan, PLD 2015 SC 401.

District Board Lahore v. Agha Muhammad Khan , PLD 1957 Lah. 780

District Magistrate Lahore vs. Syed Raza Kazim, PLD 1961 SC 178.

Dossani Travels Pvt. Ltd. v. Travels Shop Pvt. Ltd.PLD 2014 SC 1.

Dost Ali v. Province of West Pakistan, P L D 1958 Kar. 549.

Dr. Azhar Hussain Usmani v. Federation of Pakistan, P L D 1957 Kar. 347.

Dr. Bashir Ahmad Haqqani v. SikanderBakht, P L D 1961 Lah. 515,

Dr. Iftikhar Ahmad v. Government of K.P.K. PLD 2016 Peshawar 212.

Dr. Yousaf Fida v. Justice (R) Muhammad Azam Khan PLD 2016 Peshawar 105.

Dr. Zahid Javed v. Dr. Tahir Riaz Ch. PLD 2016 SC 637.

Durgacharan v State of Orissa, AIR 1987 SC 2267

East and West Steamship Co. v. Pakistan PLD 1958 SC (Pak) 41.

Economic Freedom Fighters v. Speaker National Assembly, 2016 SCMR 1040.

Eshugbayi vs Government of Nigeria (1931) L.R. 670 (C.A)

Farid Sons Ltd. v. Government of Pakistan, PLD 1961 SC at 537.

Fatima Bibi v. Mallan 1995 P.Cr.L.J. 507.

Fayyaz Hussain v. Administrator PLD 1972 Lah 316;

Fazal Abbass v. Federation of Pakistan 2011 PLC (CS) 788 Islamabad High Court.

Federation of Pakisan v. Z.A. Mazari, P L D 1958 Lah. 472.

Federation of Pakistan v. Asad Javed PLD 2016 Islamabad 53.

Federation of Pakistan v. Saeed Ahmed Khan.PLD 1974 SC 15.

Federation of Pakistan v. Sardar Ali, P L D 1959 S C (Pak.) 25.

Federation of Pakistan v. Zia-ur-Rehman PLD 1973 SC 4

Federation of Pakistan vs. Muhammad Saifullah Khan, PLD 1989 SC 166-189.

Federation.of Pakistan V. Saeed Ahmad Khan, PLD 1974 SC151

Fouji Foundation vs. Shamim ur Rehman PLD 1983 SC 457

Franklin v. Massachusetts, 112 U.S. 2767 (1992)

Frontier Textile Mills Ltd v. Textile Commissioner, PLD 1958 Lah. 345.

Gadoon Textile v. WAPDA 1997 SCMR 641.

Ganpati Singhji v. State of Ajmer, AIR 1955 SC 188.

Ghous Bux Khan v. Custodian of Evacuee Property (P L D 1962 Kar. 462).

Ghulam Farid v. Naseer Ahmad PLD 2016 Lah. 478

Ghulam Farid v. Naseer Ahmad PLD 2016 Lah. 478.

Ghulam Gilani vs. Govt. of West Pakistan. PLD 1968 SC 373

Ghulam Muhammad khan v. Crown PLD 1949 sindh 12

Ghulam Mustafa Khar v Federation of Pakistan, PLD 1989 SC 26.

Ghulam Nabi Shah v. Collector and Controlling Authority, P L D 1964 Kar. 542.

Ghulam Rasool v. Government of Pakistan, PLD 2015 SC 6

Ghulam Sarwar Khan v. The Provincial Government, N.W.F.P, P L D 1953 Pesh. 45.

Ghulam Zamin v. A. B. Kondkar, P L D 1965 Dacca 156.

Ghulm Mohi-ud-Din vs. Chief Settlemnt Commisoner PLD 1964 SC 829

Government of K.P.K v. Mejee Flour and General Mills.1997 SCMR 1804.

Government of Punjab v. Aamir Zahoor ul Haq PLD 2016 SC 421.

Government of Sindh v. Muhammad Shafi, PLD 2015 SC 380.

Government of State of Jammu and Kashmir v. Sardar Javed Naz PLD 2016 SC (AJ&K)1.

Government of West Pakistan v. Fazal-Haq Mussarrat, (1960), 1 P. S. C. R 124.

Greene V. Secretary of State for Home Affairs, AC. 284

Gul Sher v. Maryam Sultana 2011 YLR 1000

Habib Khan v The Federation of Pakistan, P L D 1954 Sind 199.

Habibullah Energy Ltd. v. WAPDA PLD 2014 SC 47.

Hadi Ali vs. Govt. of West Pakistan PLD 1956 Lah. 824

Haji Saif Ullah Khan's case, PLD 1989 SC 166.

Haji Usman Haji Ghani v. S. S. Raza, P L D 1957 Kar. 548.

Hakim Khan v. Govt. of Pakistan PLD 1992 SC 595.

Hamid Javed v. Dean, Faculty of Engineering, PLD 1964 Lah. 483.

Heckler v Chaney, 470 U.S. 821 (1985).

Hotel Metro pole Karachi v. Employees Union PLD 1964 SC 633.

Hudaybia Textile Mills Ltd. V. Allied Bank of Pakistan Ltd. PLD 1987 SC 512.

Humaira Hassan v. Federation of Pakistan; 2012 PLC (C.S.) 566 (b) Lah.

Hussain Ali Chagla v. District Magistrate, PLD 1966 Lahore 309.

Iftikhar-ud-Din v. Muhammad Sarfraz, PLD 1961 Lahore 842

Ikram Bus Service and others v. Board of Revenue West Pakistan, P L D 1963 S C 564.

Imran Sajid v. General Manager TIP, 2015 SCMR 1257.

Imtiaz Ahmad v. Ghulam Ali, P L D 1963 S C 382.

Imtiaz Ahmad v. Government of Pakistan, 1994 SCMR 214

In the matter of action against distribution of development funds by Ex. Prime Minister PLD 2014 SC 131.

Inam Akbar v. Federation of Pakistan.PLD 2016 Lah. 553.

Inam Ullah Khan v. Federal Government of Paksitan, PLD 1990 SC 190.

Inayat Khan v. Sahib Din, P L D 1961 Lah. 680.

Institute of Architects v. Province of Punjab PLD 2016 Lah. 321.

Iqtidar Haider v. Bank of Punjab 2001 MLD 1537.

Ishaq Khan Khakwani v. Mian Muhammad Nawaz Sharif PLD 2015 SC 275.

Ishfaq Khan Khakwani v. Mian Muhammad Nawaz Sharif, PLD 2015 SC 275.

Ismail Talukdar V. Govt. of East Pakistan, PLD 1970 Dacca 243.

Jaichand vs. West Bengal AIR 1967 SC 483-at P. 485

Jamal Shah's case PLD 1966 S.C. 1 at 16.

Jamshed Nawaz v. Session Judge Rawalpindi, PLD 2015 Lah. 391.

Jawed Hotel vs. CDA, PLD 1994 Lah. 315,

Jenkins v. Attorney General. (1971) 115 S.J. 674.

Jibendra Kishore Achharyya Chowdhry v Province of East Pakistan, P L D 1957 S C 9.

Kamal Shah v. Govt. of N.W.F.P. 2010 PLC (CS) 809,

Kanwar Intizar Muhammad Khan v. Federation 1995 MLD 1903.

Karamat Hussain v. Election Commission of Pakistan PLD 2016 Lah. 491.

Khalid Iqbal v. Mirza Khan, PLD 2015 SC 50.

Khalid Malik v. Federation of Pakistan, PLD 1991 Karachi 1.

Khalil ur Rahman v. Deputy Commissioner, Larkana and others, P L D 1963 Kar. 213.

Khawaja Ghulam Sarwar Pakistan, P L D 1962 S C 142.

Khawaja Hafiz ur Rehman v. Collector, Central Excise , P L D 1960 Lah. 962.

Khawaja Muhammad Safdar v. Province of West Pakistan, P L D 1964 Lah. 718.

Khursheed Mehmood v. S&R Commissioner, PLD 1971 S.C. 498;

King Emperor v. Benoari Lal Sarma (1945) A.C. 18,

Kishan Das v. Chairman WAPDA, PLD 1983 Quetta 61;

Lahore Conservation Society v. Chief Minister of Punjab, PLD 2011 Lah. 344.

Laker Airways v. Department of Trade (1977) Q.B. 643,

Lakhu Sarkar v. Government of East Pakistan, P L D 1964 Dacca 217;

Law v. Earthquake Commission (1959) N.Z.L.R 1198.

Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504

Liberty Papers Ltd. v. Human Rights Commission, PLD 2015 SC 42.

lmtiaz Ahmad v. Ghulam , PLD 1963 SC 382

Lower Bari Transport Society Ltd. Montgomery v. Regional Transport Authority, Multan, P L D 1951 Punjab (Rev.) 9.

M. H. Baker v. Federation of Paksitan, P L D 1956 Lah. 925.

M.D. Tahir Advocate v. Chief Secretary Govt. of Punjab, 1995 CLC 1687..

M.Y. Raza Beg v. R.T.A. Dacca PLD 1965 Dacca 33, PLD 1992 SC113.

Malina Rani Sons vs province of East Pakistan PLD 968 Dacca 177

Manikehchandra vs State AIR 1973 Gau. 1

Manthar Ali M. Jatoi v. Govt. of Sind, 1988 PLC (C.S.) 344,

Manufacturers R. Company v. United States, 246 U.S. 457.

Manzoor Ahmed Watoo v. Federation of Pakistan."The News" dated November 4. 1999.

Manzoor All Burney v. Hariz Muhammad. PLD 1989 SC 162,

Manzoor Hussain vs. Muhammad Ashraf PLD (CS) 279, Sindh High Court Karachi.

Manzoor ul Huq v. Controlling Authority, P L D 1963 S C 653.

Marbury v. Madison, 5 U.S (1 Cranch) 137 (1803).

Masood Ahmad vs. State PLD 1962 Lah 878.

Master Gul Hassan v. Government of Sindh, PLD 2015 Sindh 226.

Maula Baksh v. Chairman Federal Land Commission, PLJ 1986 Quetta 76;

Maulvi Tamizuddin Khan v. Federation of Pakistan, P L D 1955 Sind 96.

Mc Eldowney v. Forde (1971) A.C. 632,

Mehboob Elahi vs. Khan Abdur Rehman & Others PLD 1958 SC 96.

Mehdi Hussain v. Muhammad Arif, PLD 2015 SC 137.

Mehr Allah yar v. Syed Hasan Jahanian Shah Gardezi, P L D 1961 Lah.247.

Member Board of Revenue v. Abdul Majeed PLD 2015 SC 166.

Messrs Doreen Barkat Ram v. Custodian, P L D 1962 Lah. 424.

Messrs Farid sons Limited v. Government of Pakistan, P L D 1961 S C 537

Messrs Getz Pharma v. Federation PLD 2016 Sindh 420.

Messrs Momin Motor Company v. Regional Transport Authority, P L D 1962 Dacca 310.

Mian Iftikahruddin v. Muhammad Sarfraz and another, P L D 1961 Lah. 842.

Mian Mubarak Din v. Registrar, Co-operative Society, P L D 1957 Lah. 1013;

Minhaj-un-Nisa v. Deputy Commissioner, 1983 CLC2228.

Mir Ali Ahmad Khan v. Province of West Pakistan, P L D 1956 Kar. 237.

Mir Zaman vs. Government of West Pakistan, PLD 1969 Lah.at 71.

Miraj-ud-Din v. Senior Superintendent of Police, PLD 1970 Lahore 569;

Mohammad Aslam Sial v. Govt. of Pakistan, PLD 1973 Notes .148 at 225.

Mohammad Iqbal's case, PLD 1964 SC 404.

Mohammad Khan v. Chairman, Federal Land Commission, PLD 1977 Lah. 461.

Mohammad Yousaf v. Province of Sind PLD 1976 Kar. 1219;

Montgomery Flour and General Mills Ltd. V. Director Food, PLD 1957 Lah, 914.

Morcau v. Bond 114 Tex 468, 271 Sw. 379

Morgan v. United States, 304 U.S. at 1.

Mst. Alia Riaz v. Government of Punjab, 2015 CLC 1640.

Mst. Bibi Jan and others v. Miss R.A. Monny and another, P L D 1961 S C 79.

Mst. Fahmida N'yyar v. Government of West Pakistan and another, P L D 1963 Lah. 352

Mst. Haseena v. SHO Police Station Kotdigi, 2015 P.Cr.L.J. 790.

Mst. Jindo and another v. Cusodian of Evacuee Property, P L D 1964 Lah. 351.

Mst. Sattan v. Masroor Hussain P L D 1962 Lah. 151

Mst. Shahista BiBi v. Superintendent , PLD 2015 SC 15.

Mubarik Bibi v. Commissioner; 1983 CLC 1455.

Muhammad Abdu v. Province of East Pakistan, PLD1960 SC 164;

Muhammad Abdus Salam v. District Magistrate, P L D 1964 Dacca 554.

Muhammad Aboo Abdullah vs.Province of East Pakistan. PLD 1959 Daca 361

Muhammad Akram v. C.A. Saeed, PLD 1965 Lah.703.

Muhammad Ali vs. Election controlling authority PLD 1963 Lah. 346

Muhammad Amin Lasani v. Messrs Ilyas Marine & Associates PLD 2015 SC 33.

Muhammad Ashraf v. Jaffar and others PLD 2016 Lah. 487.

Muhammad Ayub Dar v. Deputy Commissioner, Attock, P L D 1957 Pesh. 63.

Muhammad Bashir v. Province of Punjab. 2003 SCMR 286.

Muhammad Faiz Khan v. Ajmer Khan 2010 SCMR 105,

Muhammad Fayyaz Ali Mazumdar v. Province of East Pakistan, P L D 1960 Dacca 854.

Muhammad Hanif Shahad v. Provincial Transport Authority, P L D 1957 Kar. 414.

Muhammad Iqbal Khokhar v. Government of the Punjab PLD 1991 SC 35.

Muhammad Iqbal v Superintendent, Central Jail, AIR 1969 Delhi 45.

Muhammad Ishaq v. Saiduddin Swaleh, P L D 1959 Kar. 669.

Muhammad Ismail v. Deputy Commissioner PLD 1976 Lah. 758;

Muhammad Ismail v. Province of East Pakistan, PLD 1964 SC 475.

Muhammad Jamil Asghar vs the improvement Trust. PLD 1965 SC 698

Muhammad Kaukab Iqbal v. Govt. of Pakistan, PLD 2015 SC 1210.

Muhammad lqbal Khan Niazis case, PLD 1979 SC.1.

Muhammad Munir Shahid v. Principal, Government College, P L D 1958 Lah. 466.

Muhammad Nawaz v. Muhammad Sadiq 1995 SCMR 105

Muhammad Qadir Hussain v. Controller of Patents & Designs 1990 MLD 11

Muhammad Sadiq v. Federation PLD 2016 Sindh 26

Muhammad Saeed v. Election Petitions Tribunal, P L D 1957 S C 91.

Muhammad Saleem Ullah v. Additional District Judge Gujranwala, 2003 YLR 998.

Muhammad Shoaib v. Government of K.P.K. 2005 SCMR 91.

Muhammad Tufail v Province of Punjab, PLD 1978 Lah: 87.

Muhammad Usman Khan v. Deputy Rehabilitation Commissioner, PLD 1957Pesh, 54.

Muhammad Zahoor-ul- Haq vs. Quarter Master General 1994 CC 2449

Mumtaz Oad v. Sindh Public Service Commission, 2015 CLC 1605.

Musgrove v. Chun Teeong Toy (1918) A.C. 272.

Muzaffar Ali Burney V. Hafiz Muhammad Ahmed PLD 1989 SC 162.

Muzaffar Ali Shah and another v. The Vice-Chancellor, P L D 1961 Lah. 130.

N.M. Khan v. Chief Settlement Commissioner, 1970 SCMR 158

Naghma Nawab v. Waseem Nawab, 2010 YLR 2372,

Nakhuda Ali vs. M.F. De Jayratne, PLD 1950 PC 102.

Naseem Ahmad v. Secretary Ministry of Interior, P L D 1960 Kar. 260.

National Bank of Pakistan v. Islamic Republic of Pakistan, 1992 SCMR 1705.

National Bank of Pakistan v. SAF Textile Mills Ltd. PLD 2014 SC 283.

Nawab Syed Raunaq Ali's case PLD 1973 SC 236,

Nawaz Sharif v. Federation of Pakistan, PLD 1993 SC 473

Nazir Beg v. District Magistrate, Mardan, P L D 1961 Lah. 142.

New York & Q gas Company v United States, 246 U. S. 457.

New York v. United States, 342 US 882, 884 (1951).

Ningkan v. Govt. of Malaysia (1970) A.C. 379.

Noor Ahmad v. Province of East Pakistan, P L D 1964 Dacca 546

Noor ul Hassan and others v.The Federation of Pakistan, P L D 1956 S C 331.

Nottinghamshire C.C. v. Secretary of the State (1986) All E R 199,204.

Omar Khan V. Land Commissioner, NWFP, 1980 CLC 1717.

Orient Paper Mills v. Union of India, AIR 1970 SC 1498;

Osman Abdul Karim Bhawaney v. Collector of Customs (P L D 1962 Dacca 162)

Pacific Exim (Pvt.) Ltd. v. Pakistan Steel Mills, PLD 2016 Sindh 398.

Padfield v. Minister of Agriculture, Fisheries and Food (1968) A.C. 997

Pakistan Gas Port Ltd. v. Sui Southern Gas Company Ltd. PLD 2016 Sindh 207.

Pakistan v. Mrs. A.V. Issacs PLD 1970 S.C. 415.

Pervez Musharraf v. Nadeem Ahmad, PLD 2014 SC 585.

Peshawar Electric Supply Employment Co. v. Wafaqi Mohtasib, PLD 2016 Pesh. 185.

Petitioner v. Respondents, NLR 1991 Criminal 725.

Petro Oil Pvt. Limited v. Federation of Pakistan, 2015 CLC 1030.

Pir Syed Shafiuddin v. Secretary Social Welfare & Local Bodies PLD 1948 Pesh. 157

Pirzada Jamaluddin A. Siddiqui v. Federation of Pakistan. 2012 PLC (C.S.) 966(e) Sindh

Port Service (Pvt.) Ltd. V. Pakistan PLD 1995 Kar. 374

Prescott v. Birmingham Corporation (1955) ch. 210

Presiding Officer v. Sadruddin Ansari, PLD 1967 SC 569.

Presson Manufacturing Ltd. V. Secretary ministry of Petroleum 1995MLD 15.

Province of Punjab v. Shah Nawaz 2012 MLD 1045 (a) Lah.

Province of Punjab V. Zahoor Elahi 1982 SCMR 173

Province of Punjab vs.Zahoor Elahi PLD 1981 Lah. 696

Province of Sindh v. M.Q.M. PLD 2014 SC 531.

Punjab Healthcare Commission v. Mushtaq Ahmad PLD 2016 Lah. 237

Punjab Healthcare Commission v. Mushtaq Ahmad Ch. PLD 2016 Lah. 237.

Qazi Inayat ullah v.The Province of West Pakistan, P L D 1956 Pesh. 33

R v Tower Hamlets London Borough Council, ex.p .Kayne levenson (1975) 1 Q.B. 431

R v. Chief Constable (1999) 1 All ER 129, 157

R v. Hillingdon B.C. ex. P. Islam [1983] AC 688,

R v. Secretary of State ex parte Daly (2001) 3 All ER 433,

R vs. Bishop of London (1889) 24QBD213;

R. v. Torquay Licensing Justices, ex.p Blackmun (1951) 2 KB. 784,

R.v. Allen (1862) 1 B. & S. 850

R.vs. Minister of Transport, ex. P.H.C. Motor Works Ltd. (1927) 2. K.B. 401

Rahmatullah Khan v. The State, P L D 1965 Pesh. 162.

Rahmatullah v. Maqbool Alam ,P L D 1949 Sind 22.

Railroad Company v. Rowan and N. Oil Company, 310 U.S. 573.

Raja Khan v. Manager (operations) FESCO, 2011 SCMR 676,

Rajagopala Naidu v. State Transport, AIR 1964 SC 1573.

Ram Mandar Lohia v. State of Bihar, AIR 1966 SC 740.

Ranjit Thakur v. Union of India, AIR 1987 SC 2386.

Registrar Peshawar High court v. Shafiq Ahmad Tanoli, PLD 2015 SC 360.

Rimsha Shaikhani v. Nixor College, PLD 2016 Sindh 405.

Robert vs. Hopwood (1925) A.,C. 578

Roshan Bijaya Shaukat Ali v. Govt. of East Pakistan, PLD 1965 Dacca 241

Rowjee v. State of Andra Pradesh, AIR 1964 SC 962;

S. A. Haroon and others v. Collector of Customers, Karachi, P L D 1959 S C (Pak.) 177

S. M. Saleem v. Vice-Chancellor University of Karachi, P L D 1958 Kar. 297.

S. Mazhar Hussain Bokhari v. Government of Punjab, PLD 1996 SC 59.

S.A. Haroon and others v. Collector of Customs, Karachi, P L D 1959 Lah. 748.

Sabir Shah v.Shad Muhammad Khan PLD 1995 SC 66.

Saddique Ahmed v. Chairman Agri. Development Corp., PLD 1968 Lah. 685

Safar Ali Hazara v. Deputy Commissioner, PLD 1964 Dacca 467

Sai Muhammad v. West Pakistan, PLD 1958 SC 181;

Saiyyed Abul 'Ala Maudoodi v. Government of West Pakistan, P L D 1964 S C 673.

Sajjad Haider v Province of West Pakistan, PLD 1967 Lahore 938.

Sakhi Daler Khan's case PLD 1957 Lah. 88

Salim Javed Baig v. Federal Ombudsman PLD 2016 Lah. 248.

Samir Chatterjee vs. state of west Bengal. AIR 1975 SC 1165

Saraswatti Seshagin v. State of Kerala, (1982) 2 SCC 310

Sardar Bahadur Khan v. Government of Pakistan, P L D 1956 Pesh, 104.

Secretary of State for Education and Science v. Tameside (1976) 3 All ER 665.

Secretary of State for Home v. Lakdawalla (1972) All. E.R. 26.

Sh. Abdul Rahman v. Deputy Commissioner, Bahawalnagar, P L D 1964 S C 461.

Shabana Akhtar v. D.C.O. Bhakkar, 2012 PLC (CS) 366 (a) LHC.

Shad Mohammad v Settlement Commissioner.PLD 1986 Pesh. 169.

Shafiq ur Rehman v. M.S, Mian, PLD 1968 Dacca 332;

Shafiuddin v. Secretary, Social Welfare & Local Bodies, P L D 1958 Pesh 157.

Shah Mardan Shah v. Chairman Federal Land Commissioner.PLD 1974 Karachi 375.

Shahjehan v. Syed Amjad Ali 2000 SCMR 88.

Shahzad Ahmad v. State 2010 SCMR 855

Shamas Textile Mills Ltd. vs. Province of Punjab, 1999 SCMR 1477

Sharp v. Wakefield, 1891 AC 7

Shaukat Ali v. Commissioner, Lahore Division, P L D 1963 Lah. 12

Sher Mohammad v. Abdur Rashid, 1980 SCMR 928

Sher Wali v. State, PLD 1961 Pesh. 117 (FB)

Shields v. Utah Idaho Central Rly. Co. 418 U.S. 683 (1974)

Shiv Sitaram Sugar Co. Ltd. v. Union of India, AIR 1990 SC 1277.

Sibnath Banerjis case. LR 72, 1A 241

Sikander Ali v. Government College University Lahore 2012 PLC (CS) 119(b) Lah.H.C.

Small v. Moss (1983) 297 US 288.

State of Maharahstra v Mamal Durgule, AIR 1985 SC 119.

State of Punjab vs Ramjilal AIR 1971SC 1228

State v. Board of Education of the city of Seattle, 19 Wash. at 8.

State vs. Muhammad Nawaz PLD 1966 SC 481.

State ys. Tariq Aziz MNA, 2000 SCMR 751.

Sterling v. Constantine 287 US 378, 401; 53 S. Ct. 190, 196.

Suo Motu action regarding suicide bomb attacks PLD 2014 SC 699.

Suo Motu case No.11 of 2011, PLD 2014 SC 389.

Syed Muhammad Ayyub v. Government of West Pakistan, P L D 1957 Lah. 487.

Syed Sofi Amir v. Syed Riazuddin Ahmad, P L D 1957 Kar. 539.

Tameside case (1977) A.C. 1014

Tassaduq Hussain Gilani v. State: 2012 P. Cr. L. J. 1108 (SC).

Taylor v. Munrow (1960) 1W.L.R. 151.

Teh Chung Poh v. Public Prosecutor (1980) AC 458, 472.

The Diamond Transport Company v. Provincial Transport Authority, P L D 1961 West Pakistan (Rev.) 65.

The Lahore Central Co-operative Bank Ltd. v. Pir Saifullah Shah, P L D 1959 S C 210.

The Lower Bari Co-operative Transport Society Ltd. v.The Express Transport Society, Lahore, P L D 1956 West Pakistan (Rev.) 67.

The Montgomery Flour and General Mills Ltd v. Director, Food Purchase PLD 1957 (W.P.) Lahore 914.,

The New Jhelum Transport Company Ltd. v. Regional Transport Authority, Rawalpindi, P L D 1955 Punjab (Rev.) 1.

The Pakistan Barber Association V. Province of Punjab PLD 1976 Lah. 769

The Province of East Pakistan v. Jogesh Chandra Lodhi, 11 DLR (SC) 411

The Sargodha-Bhera Service, v.The Regional Transport Authority, P L D 1958 Lah. 269,

Tofazzal Hussain v. Province of East Pakistan, P L D 1965 Dacca 478.

United States v. Chicago M & St. P.R. Co., 294 U.S. 409.

United States v. Russell, 20 L Ed. 474.

United States v. Wunderlick, 342 US 98, 101 (1951).

University of Dacca v. Zakir Ahmad, PLD 1965 SC 90.

University of the Punjab vs Ruhi Farzan 1996 SCMR 263

Uzma Shahzad v. Principal School of Nursing , 2012 CLC 1464 (d) Lah.

Vimlabai Dispande's case LR 71 1A, 114

Walayat Ali Mir v P.I.A.C. 1995 SCMR 650.

Wali Muhammad v. BadrulJalil, P L D 1956 Kar. 250.

WAPDA and others v. Bashir Hussain Shah PLD 2015 SC 344.

Ward v. James (1965) 1 All ER 563, 569-570.

Webster v Doe, 486 U.S. 592 (1988).

Woodhaven Gas Light Company v. Public Service Commission, 269 U. S. 244.

Works Manager, Carriage and Wagon Shops, Moghalpura v. Hasmat, 1 L R 1947 Lah. 1.

Yick Wo case 118 US 356.

Yousaf J. Ansari v. Govt. of Pakistan , PLD 2016 Sindh 388.

Yousaf v. Govt. of Pakistan, PLD 1970 Lah. 581.

Zafar – ul –Ahsan vs The Republic of Pakistan. PLD 1960 SC 113

Zahid Akhtar v. Government of Punjab, PLD 1995 SC 530

Zahid Zaman Khan v. Khan Afsar PLD 2016 SC 409.

Zahoor Elahi v Secretary, PLD 1975 Lah. 494.