

ADMINISTRATIVE DISCRETION AND JUDICIAL REVIEW

1. There are many definitions of "administrative discretion". The term is best described in the "**Judicial Review of Public Actions**" by Justice (R) Fazal Karim when quoting the famous Aharon Barak he writes "**Discretion is the power given to a person in authority to choose two or more alternatives, when each of the alternatives is lawful**".

It follows that the choice or adoption of an alternative that is not lawful falls outside the ambit of the legitimate exercise of discretionary power.

2. The need for administrative discretion has been steadily increasing over the years because of amongst other things:

- i) The complexity and intricacy of modern government
- ii) The vast numbers of laws that are enacted and the increasing range of subjects that fall within the scope of legislative action
- iii) Impossibility of foreseeing all the eventualities that may occur in practical life with reference to the laws that are to be applied
- iv) Trend of laws to be purposive in which general rules and principles are stated and an ever wider range of discretion is given to law enforcing authorities to apply the laws according to the specifics of the facts of each case
- v) Rising trend toward delegating rule making powers to the technical or specialist administrative authorities
- vi) Possibility of injustice if laws are applied in a stringent and inflexible manner

without regard to the special needs of individuals in circumstances that are not ordinary circumstances

3. The identified reasons and needs for exercise of discretionary power are further explained and amplified in the following judgments:-

i) Justice Dixon in his judgment (in *Shire of Swan Hill v. Bradbury* (1937) 56 CLR 746) (quoted from "Administrative Law" by J. Beatson and M.H. Matthews) said

" In the course of the modern attempt by provisions of a legislative nature to reconcile the exercise and enjoyment of proprietary and other private rights with the conflicting considerations which are found to attend the pursuit of the common good , it has often been thought necessary to arm some public authority with a discretionary power to allow or disallow the action of the individual, notwithstanding that it has been found impossible to lay down for the guidance of the individual, or of the public authority itself, any definite rule for the exercise of the discretion. The reason for leaving the ambit of the discretion undefined may be that legislative foresight cannot trust itself to formulate in advance standards that will prove apt and sufficient in all the variety of facts which may present themselves. On the other hand, it may be because no general principles or policy for governing the particular matter it is desired to control are discoverable, or, if discovered, command general agreement."

ii) Lord Wenbury in *Roberts v. Hopwood* (quoted from *Judicial Review of Administrative Actions* by Justice (R) Fazal Karim) says that a person in whom is vested a 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 his reason directs. He must act reasonably."

4. In a country like Pakistan with a written Constitution the exercise of administrative discretion must, in the first instance, be bound by, and in conformity with, the relevant constitutional provisions. In our case these include Article 4 which prescribes the right of all individuals to be dealt with in accordance with law and to enjoy the protection of law and which confers on every citizen the inalienable right that no action detrimental to life, liberty, body, reputation or property shall be taken except in accordance with law, and that further that no person shall be prevented from doing that which is not prohibited by law and no person shall be compelled to do that which the law does not require him to do.
5. The Fundamental Rights guaranteed by the Constitution to every citizen include, with certain limitations, freedom of movement, freedom of assembly, freedom of association, freedom of trade, business or profession, freedom of speech, right to life, access to justice and information, and protection of property rights. Article 8 prohibits the State, inclusive of legislative and executive authorities, from making any law or rule that is inconsistent with the Fundamental Rights. At the same time, while guaranteeing the afore-mentioned

Discrimination

rights to every citizen the Constitution prescribes that loyalty to the State is the basic duty of every citizen, and obedience to the Constitution and law is the inviolable obligation of every person in Pakistan.

6. Subject to the Constitutional safeguards in regard to Fundamental Rights the legislative authorities can make laws conferring discretionary authority on executive functionaries provided that such delegation power cannot be unfettered or unbridled. In the case of *Ziaullah Khan v. Government of Punjab (PLD 1989 Lah. 554)* Justice Zia Mehmood Mirza observed that "Where the statute itself does not make any classification of persons or things and leaves it in the discretion of the Government to select and classify persons or things without laying down any principle or policy to guide the Government in the exercise of discretion, the statute will be struck down on the ground of making excessive delegation of power to the Government so as to enable it to discriminate between the persons or the things similarly situated."

Reference may also be made to an excerpt from "Administrative Law" by Sir William Wade who writes:

"The basic notion 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.

Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in our system

based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose every thing 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 dependants, 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. 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 is the scope of judicial review. But that there are legal limits to every power is axiomatic."

7. Within the framework of the Constitution and the guaranteed Fundamental Rights, the exercise of administrative discretion has been structured by section 24A of the General Clauses Act which reads as under:-

“ARTICLE 24A of the GENERAL CLAUSES ACT, 1897: 24A. Exercise of power under enactments — (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, justly and for the advancement of the purposes of the enactment. (2) The authority, office or person making any order or issuing any direction under the power 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 or, as the case may be, the direction to the person affected prejudicially”.

Section 24A *ibid* was discussed in the case cited as “Chairman State Life Insurance Corporation v Hamayun Irfan (2010 PLC (SC) 1183 and it was held:

“It is settled proposition of law that it is the duty and obligation of the public functionaries to decide the cases of their subordinates after application of mind in view of Articles 4 and 5(2) of the Constitution of the Islamic Republic of Pakistan. After addition of section 24A in the General Clauses Act, it is the duty and obligation of the competent authority to decide the cases of their subordinates after application of mind with reasons.”

→ WEDNESBURY PRINCIPLES Para 14.
8. In the exercise of administrative discretion the executive authority has to inter-alia ensure that:-

- Notes date
- i) the exercise of discretion is legal and not unlawful and not against the principles of natural justice
 - ii) the rule Audi Alteram Partem is observed i.e. the right of a person to be heard before passing of an order against him
 - iii) the exercise of discretion is not on the dictation or order of superior authority
 - iv) the exercise of discretion is free from any taint of malafide or lack of bonafides

- v) the exercise is based on sound reasons and for advancing the purpose(s) of law or the rule after due application of mind to the facts of the case.
9. It is basic to the exercise of all administration discretion that it must be within the scope of the enabling Act and must further the purposes of the said law. Reference may be made to the excerpt from "Judicial Review of Public Actions" by Justice (R) Fazal Karim who writes:

purpose

"The same principle had earlier been enunciated in 1957 in that locus classicus on the subject- *Montgomery Flour and General Mills v. Director Food*. 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 owing 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 a 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 give up a particular political party, or to give evidence for the prosecution in a police challan, or to give information to the Customs Department.”

10. The exercise of discretion vesting in a designated authority cannot be abdicated. Reference may be made in this behalf to the case of H.M. Abdullah v, Income Tax Officer, Karachi (1993 SCMR 1195) wherein it was observed that:

"We agree with the Learned judges that as a general rule an authority in whom discretion is vested under provisions of Statute cannot bargain away or fetter its powers. The position is however different when such fetters are authorized by the Statute itself.”
11. Several of the principles discussed hereinabove, and codified vide section 24A of the General Clauses Act, were discussed in the case of Messrs Airport Support Services v.

The Airport Manager (1998 SCMR 2268) wherein it was observed “It has consistently been held that while routine contractual disputes between private parties and public functionaries are not open to scrutiny under the Constitutional jurisdiction, breaches of such contracts, which do not entail inquiry into or examination of minute or controversial questions of fact, if committed by government, semi-government or Local authorities or like controversies if involving dereliction of obligations , flowing from a statute, rules or instructions can adequately be addressed for relief under that jurisdiction . Further a contract, carrying elements of public interest, concluded by functionaries of the state has to be just fair, transparent, reasonable and free of any taint of mala fides, all such aspects remaining open for judicial review. The rule is founded on the premises that public functionaries, deriving authority from or under law are obligated to act justly, fairly, equitably, reasonably, without any element of discrimination and squarely within the parameters of law as applicable in a given situation.”

Noted
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12. The checks on exercise of discretion by executive functionaries include:-

- Superior Administrative Authority
- Ombudsman
- Parliament and its committees
- Courts of law.

13. Under the Constitution of the Islamic Republic of Pakistan 1873 the Superior Courts have jurisdiction to review the exercise of administrative power under Article 184 in the case of the Supreme Court and Article 199 in the case of the High Courts. The constitutional powers of the Superior Courts include the powers to make order:-

- i) directing the executive authority to refrain from doing anything it is not permitted by law to do or to do anything which it is required by law to do
 - ii) declare that any act done or proceedings taken by an executive authority is without lawful authority and of no legal effect
 - iii) direct that a person in custody is brought before the Court so that the Court is satisfied that he is not being held without lawful authority or in an unlawful manner
 - iv) require a person holding a public office to show under what authority of law he claims to hold that office
 - v) make an order for enforcement of any of the fundamental rights.
14. The same or similar powers vest in the Superior Courts of India and UK. In the case of the UK:

“Lord Greene in his landmark Judgment in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* outlined the principles according to which judicial review of administrative discretion should be exercised. These came to be known as the Wednesbury Principles the concluding chapter of which reads as follows:

‘.... The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into

Relevant considerations
Reasonableness
Good faith

account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matter which they ought to consider, they have nevertheless 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 as an appellate authority to override a decision of the local authority, but as 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 them....”

15. In another case titled “Barnard v National Dock Labour Board” decided by McNair J, it was held that if an administrative authority could not delegate its discretionary power it also could not ratify later on the exercise of such power by its subordinates. The relevant excerpt from the judgment reads:

“Next, it was suggested that even if the board could not delegate their functions, at any rate they could ratify the actions of the port manager; but if the board have no power to delegate their functions to the port manager, they can have no power to ratify what he has done. The effect of ratification is to make it equal to a prior command; but just as a prior command, in the shape of a delegation, would be useless, so also is a ratification.”

16. From Indian jurisdiction the following cases are of interest because the principles laid down therein have been followed by our Courts also:

*(Improper) delegation
cannot be ratified
later -*

State of W.B. v. Anwar AH Sarkar—in this case, in order speed up the trial for certain offences, Section 5(I) of the West Bengal Special Courts Act, 1950 conferred discretion on the State Government to refer any offence for trial by the Special Court. Since the procedure before the Special Court was stringent in comparison with that for normal trials, the respondents asserted its unconstitutionality on the ground that it violates the equality clause in Article. The court held the law invalid on the ground that the use of vague expressions, like 'speedier trial', confers a wide discretion on the government and can be a basis of unreasonable classification.

Unfettered
Discretion

Manohar Lal v. State of Maharashtra—In this case and many others, sums of judicial humility or withdrawal in judicial behaviour on account of administrative convenience are strikingly visible. In this case, Section IS7-A of the Sea Customs Act gave wide discretionary power to the authorities to either refer a case of smuggled goods to a magistrate or to look into the matter themselves. The court upheld the constitutionality of the statute on the ground that as this discretion is to be exercised by senior officers, that will stand as a guarantee against its misuse. This kind of judicial behaviour aimed at preserving wide discretionary powers may ultimately end up in destroying it.

OK. if
exercised
by senior
officers

Monarch Infrastructure (P) Ltd. v. Commr., Ulhasnagar Municipal Corpn.—In this case. Municipal Corporation had invited tenders for appointment of agents for the collection of octroi. However, one of the eligibility conditions was deleted after the expiry of time for submission of

PPRA Rules

tender's but before opening thereof. Thereafter, tender was awarded to one who did not fulfill the deleted condition. The Supreme Court held award of tender arbitrary and discriminatory.

State of Maharashtra v Kamal S. Durgule. – In this case the legislature had given the power to the competent authority to declare a land vacant and then to acquire it.

The power had been given without laying down any guidelines for the exercise of this discretion and no provision had been made of any notice and hearing to the owner.

Quashing Sections 3(1) and 4(1) of the Land Acquisition Act, the Supreme Court held that because law confers arbitrary powers on the government, hence it violates Article 14 of the Constitution. The Court further observed that the fact that the exercise of this power has been given to officers of high echelon makes no difference to the position and is not a palliative to the prejudice which is inherent in the situation.

Purtaborc Co. Ltd. v. Cane Commr. Of Bihar. – is notable case in point. In this case the Cane Commissioner who had power to reserve sugarcane areas for the respective sugar factories, at the dictation of the Chief Minister, excluded 99 villages from the area reserved by him in favour of the appellant-company. The court quashed the exercise of discretion by the Cane Commissioner on the ground he abdicated his power by exercising it at the dictation of some other authority, therefore, it was deemed that the authority had not exercised its discretion at all.

Thus the exercise of discretion or in compliance with instructions of some other person amounts to failure to exercise the discretion altogether. It is immaterial that the authority invested with the discretion itself sought the instructions.

Sr. Officers –
makes no
difference.

Discretion exercised
at behest of
Superior authority

Barium Chemicals Ltd. v. Company Law Board.—This case shows a definite orientation in the judicial behaviour for an effective control of administrative discretion in India. In this case the Company Law Board exercising its powers under Section 237 of the Companies Act, 1956 ordered an investigation into the affairs of Barium Chemicals Ltd. Under Section 237, the Board is authorized to order investigation if in its opinion the business of the company is being conducted with ^{malice} ~~malice~~ to defraud its creditors or members, etc., or the management of the company is guilty of fraud, misfeasance or other misconduct, or the members of the company have not been given full information about the affairs of the company. However, the basis of the exercise of discretion for ordering investigation was that due to faulty planning the company incurred a loss, as a result of which the value of the shares had fallen and many eminent persons had resigned from the Board of Directors, The court quashed the order of the Board on the ground that the basis of the exercise of discretion is extraneous to the factors mentioned in Section 237 for such exercise of discretion. This case also stands for the proposition that mere executive declaration that there was material for forming an opinion will not save the exercise of discretion from judicial scrutiny.

S.R. Venkataraman v. Union of India.—The appellant, a Central Government officer, was prematurely retired from service in 'public interest' under Rule 56(j)(i) on attaining the age of 50 years. Her contention was that the government did not apply its mind to her service record and that in the facts and circumstances of the case the discretion vested under Rule 56(j)(i) was not

exercised for furtherance of public interest and that the order was based on extraneous circumstances. The government conceded that there was nothing on record to justify the order. The Supreme Court, quashing the order of the government, held that if a discretionary power has been exercised for an unauthorized purpose, it is generally immaterial whether its repository was acting in good faith or bad faith. An administrative order based on a reason or facts that do not exist must be held to be infected with an abuse of power. The Court quoted with approval Lord Esher in *The Queen on (he Prosecution of Richard Westbrook v. Vestry of St. Pancras*": "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 guidance of: their discretion, then in the eye of the law they have not exercised their discretion.

17. Amongst the many law precedents set by the judgments of our own Courts the following need notice/mention:-

Federation of Pakistan & others v. Ch. Muhammad Aslam & others [1986 SCMR 916].— In construing the departmental orders/proceedings two principles have to be observed. If a particular ground, reason or procedure is adopted in justification of it then that ground reason or procedure is examined strictly on merits or establishing its validity and efficacy. If it does not stand that test then all the plenary/residuary powers possessed by the department which could possibly be of avail and pleaded in justification have to be explored and examined, to protect rather than to frustrate the order.

Cannot be
rtd without
justification

Review of RHC.

An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and rightly so. I He that takes the procedural sword shall perish with that sword.

Acts performed and orders made by public authorities deserve due regard by Courts and every possible explanation for their validity should be explored and the whole field of powers in pursuance to which the public authorities act or perform their function examined and only then if it is found that the act done, order made or proceeding undertaken is without lawful authority should the Courts declare them to be of no legal effect.

The department possessed untrammelled powers and could prospectively prohibit or control the imports.

All the same, even such an extensive power has its limits.

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.

All executive power has 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.

Proceedings under discretion ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.

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 provision to that effect, the discretion is always circumscribed by the scope and the object of the law that create it and has at the same time to be exercised justly, fairly and reasonably.

On a consideration of all the facts and the law we uphold the -finding of the High Court that the respondent writ petitioner was entitled to have his application for import permit considered according to the import policy in force before its revision on 20-3-1983, that from all the enquiries got made by the appellant he satisfied those requirements and if the vehicles received conform to the description particulars provided, he is entitled to the grant of import permits for them. This appeal fails and is dismissed with no order as to costs.

Imran Hussain vs. Water and Power Development Authority & 4 others [PLD 2010 SC 546].-- Administrative discretion has to be structured, reasoned, rational, logical and objective. One of the ways to arrive at such a structured exercise of discretion is to fashion it on a well-thought-out, carefully deliberated objective standard. This helps test various faculties of the interviewee especially those, which the institution concerned requires. The standard can, therefore, cover experience, alertness, initiative, general aptitude, behaviour, knowledge, dependability, etc. which forms a uniform yardstick, gauge, scale or criteria for the exercise of discretion. Discretion without a uniform yardstick or a formula is a loose jumble of haphazard human subjectivity, which is inescapably susceptible to error and indubitably arbitrary, ex facie discriminatory, highly irrational and painfully illogical. The

administrative compulsion and wisdom to structure discretion (in the present case by providing a well-thought out objective criterion/test or a score card) is to remove human subjectivity from exercise of discretion.

On an institutional level, structuring the discretion is to protect the institution and the public from the vice of arbitrariness. It is to filter whims, vagaries, caprice, surmises and volatility attached to human behaviour, translated into human dissection. These vices are a breeding ground for corruption, nepotism and favouritism. These vices are like termites and if permitted to exist, weaken the foundations of democratic public institution.

Wherever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion. Structuring of discretion only means regularizing it, organizing it, producing order in it so that decision will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open finding, open reasons, open precedents and fair informal procedure. Somehow, in the context of Pakistan, the wide worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first instance but where the authorities fail to rationalize it and regulate it by Rules, or policy statements or precedents, the Courts have to intervene more often, than is necessary, apart from the exercise of such power appearing arbitrary and capricious at time.

Constitutionally, unlimited and unchecked exercise of discretion is inherently discriminatory. It has no internal check to ensure uniformity and objective application of mind across the board. It, therefore, extends unequal treatment to equals. Absence of an objective criterion in

exercise of discretion especially in a case where thousand of candidates had applied is therefore, discriminatory and hence violative of Article 25 of the Constitution.

—Arts. 4, 18, 25 & 199—Civil service—Public sector company—Recruitment of employees—Career and future prospects of employment and livelihood of the applicants for appointment was subjected to an unstructured, unchecked, unguided and unfettered exercise of discretion—Such process put the fragile career of the applicants hostage to corruption, political opportunism and nepotism resulting in constitutional breach of Articles 4 and 18 of the Constitution—Letter issued by Managing Director of the public sector company changing the Recruitment Policy at the behest of Minister, besides offending fundamental rights, reflected of poor and reckless governance—Impugned recruitment and appointment of candidates was declared to be unconstitutional, illegal, without lawful authority and therefore set aside—High Court directed that all the said posts shall be deemed to be vacant and filled again in terms of present judgment and the Recruitment Policy unless the same was lawfully amended or modified—Public Sector Companies, in the present case, had played fraud with the legitimate expectations of hundreds of people who innocently applied desiring a decent lawful employment, however, instead of carrying out transparent recruitment process and giving meaningful employment, these institutions failed to perform their public duty and had abused the public trust reposed in them by the people of Pakistan—Such situation called for strict accountability of the public functionaries involved in the process including the Board Members of the companies who seemed to have taken no note of such large-scale breach of trust—High Court, therefore, directed the Chairman WAPDA to inquire into these unlawful appointments and to identify the real beneficiaries of unlawful recruitment process—Chairman, WAPDA shall also hear and incorporate the views

of the candidates who were rejected as well as the ones whose appointment had been set aside through the present judgment—Such report shall be placed before High Court within five months from the date of present judgment.

Public sector company is not only to look after the interest of its shareholders alone but has a wider responsibility as it acts as a trustee for the people of Pakistan – Higher standard of governance stricter fiduciary duty and an institutional collegiality in decision making process is an expected operational benchmark of a public sector company – Principles.

Tariq Azizuddin and others: in re (2010 SCMR 1301).—Fair and transparent discretion, exercise of – Principles – Action must be based on fair, open and just consideration to decide matters more particularly when such powers are to be exercised on discretion – Arbitrariness in any manner is to be avoided to ensure that action based on discretion is fair and transparent – Discretion is to be exercised according to rational reasons which means that; there be finding of primary facts based on good evidence; and decisions about facts be made for reasons which serve the purpose of statute in an intelligible and reasonable manner – Actions which do not meet these threshold requirements are considered arbitrary and misuse of power – Discretionary power conferred on Government should be exercised reasonably subject to existence of essential conditions required for exercise of such power with the scope of law – All judicial, quasi judicial and administrative authorities must exercise power in reasonable manner and also must ensure justice as per spirit of law and instruments regarding exercise of discretion – Obligation to act fairly on the part of administrative authority has been evolved to ensure rule of law and to prevent failure of justice [pp. 1331, 1339].

Abu Bakar Siddique vs Collector of Customs (2006 SCMR 705).—Exercise of discretion – Principles – Authority enjoining the discretionary powers, exercise the same without any guideline but at the same time such authority must not exercise the discretion in arbitrary and capricious manner – It may not be obligatory for the concerned authority to exercise the discretion in a particular manner but exercise of such power in unreasonable manner is not proper and in such a case the order passed in discretionary jurisdiction is not immune from judicial review of superior Courts – In a case in which statute authorize a person for exercise of discretion to advance the cause of justice, the power is not merely optional but it is the duty of such person to act in the manner it is intended [pp. 715, 716].

Allied Bank Ltd vs Syed Nasir Abbas Naqvi (2007 SCMR 1143).—Art. 199 – Disciplinary matters and administrative functions of public organizations – Interference in such manner by High Court in exercise of its constitutional jurisdiction – Scope – Unless order passed by an authority in its discretion was capricious, arbitrary or illegal, High Court would not interfere in such matters – Departmental authority had exclusive jurisdiction to determine quantum of punishment in the light of charge and court might not substitute its decision in such matter – High Court in suitable cases might look into question of legality or otherwise of an order passed by public functionaries affecting right of a person – Principles [pp. 1147, 1148].

Mahmud Ali Akbar vs Member Board of Revenue (2005 YLR 1152).—

a) West Pakistan Land Revenue Act (XVII of 1967)—

—S.36—West Pakistan Land Revenue Rules, 1968, R.16—General Clauses Act (X of 1897), S.24-A—Constitution of Pakistan (1973), Art. 199—Constitutional petition—Appointment of Lambardar—Office of Lambardar was a selection post and selection was administrative prerogative of Revenue Authorities who, of course, were to follow the Rules, in that behalf—Appointment of Lambardar being purely an administrative function, no particular person had a vested right to be appointed as Lambardar—Selection of Lambardar could not be made by the Court in exercise of its Constitutional jurisdiction nor could discharge of such administrative duties be hampered or impeded by Court intervention—Even in discretionary and administrative fields, law and its purposes had to be kept in view—Administrative discretion and power would not extend to empower the Authorities to rewrite the law of their own choice, to understand it the way they liked and to lay down the law for subordinates and those in the lower hierarchy in an arbitrary manner and on an erroneous understanding of law—Member Board of Revenue in the present case had given specific finding that DO(R) had not given his own recommendations and that finding was in consonance with the record—Said official had only signed note of DRO—Mere countersigning the note of subordinate, would not mean that countersigning Authority had applied its own independent mind—Provisions of S.24-A of General Clauses Act, 1897, had cast duty upon public functionaries to pass orders after application of mind with reasons—Note of DO(R) would not fulfill requirements of S.24-A of General Clauses Act, 1897 which was also in violation of law.

(b) Constitution of Pakistan (1973)—

—Art. 199—Constitutional jurisdiction—Scope—High Court had no jurisdiction to substitute its own finding in place of findings of Tribunal below while exercising powers of Art. 199 of the Constitution—Constitutional jurisdiction was a discretionary in character-Where substantial justice had been done between the parties, the High Court could not exercise discretion in favour of petitioner.