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**Judicial Review of Administrative Discretion in Pakistan and  
Judicature of the Country.**

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**Abstract:**

In a modern type of welfare state, the functionaries are endowed with multiplicity of discretionary powers to run the business of the state. These discretionary powers cannot be left un-controlled and unfettered. The Superior Judiciary of the country has established a set of principles to exercise the discretionary powers. This paper aims at ascertaining the powers of Superior Judiciary of the Country under Constitution and Lower/District Judiciary under The Code of Civil Procedure, 1908 and the Specific Relief Act, 1877 coupled with principles to be followed in the exercise of administrative discretion lay down by the Apex Judiciary of Pakistan through its judgments and the grounds on which a Court may revisit the actions of the Administrative Authority. The other purpose of this piece of research is to substantiate that in addition to the Superior judiciary, Civil Courts of Pakistan are also empowered to review administrative actions. To accomplish these tasks, qualitative research methodology adopted and both primary and secondary sources of data have been consulted.

**Key words:** Administrative Discretion, Ascertain, Civil Courts, Exercise, Grounds, Judicial Review, Judgments, Legislation, Pakistan, Principles, Superior Judiciary.

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## **Introduction:**

A modern democratic state is a combination of three (03) organs viz., The Legislature, The Judicature and The Administration or Executive. The Legislature is Law Making Body; the Judicature is to Interpret and the Administration or Executive to implement those Laws. All the organs owe powers, functions and limitations from the Constitution of the country. In the words of Lord John Acton “power corrupts and absolute power corrupts absolutely”. Therefore, none of the three (03) Institutions can enjoy unfettered set of powers and functions rather there must be a check on arbitrary exercise of these powers and functions. The core purpose behind a modern Democratic State is the welfare and protection of fundamental rights of its masses. Among these organs, judicature holds a dual status: interpreting and reviewing constitutionality of statutes drafted by the legislature and safeguarding fundamental rights of the citizens. In this way, it is constitutional obligation of Judicature of the State to ensure that the Laws made by the legislature and actions of the administrative/executive branch of the State are neither against the norms of the Constitution nor violative of fundamental rights of the masses.

## **Judicial Review:**

Judicial Review is the power of a Court to review the actions of public authorities in terms of their lawfulness as well as the power to review the constitutionality of a statute. Judicial Review is to observe whether the actions of public authorities are legal or not. Its second part is to review whether a state is within the parameters of constitution. The discretion of an Administrative Authority to perform any act within the parameters of a statute is called Administrative Discretion. In the words of Justice Coke “discretion is the science of understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colorable glasses and pretence not according to the will and private affections” (Stott, 1997). Lord Halsbury observed that “where 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” (Mayor and Corporation of West Minister vs. London and North-Western Railway Company, 1905). Lord Re in a judgment commented that “parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act” (Padfield vs. Minister of Agriculture, Fisheries and Food, 1968). Philips Cooper has defined

administrative discretion as “power of an administrator to make significant decisions that have the force of law, directly or indirectly, and that are not specifically mandated by the Constitution, statutes, or other sources of black letter law” (Cooper, 2000).

### **Judicial Review in Pakistan:**

Justice (r) Fazal Karim is of the opinion that "under a written constitution, as in the United States, Pakistan and India, the written constitution is at once the source and the touchstone of all governmental powers- legislative, executive, judicial; it is a magnet from where every part of the business of the government must take its direction, and as with all constitutions, it must be preserved inviolate." (Karim, 2018). Pakistan came to being on August 14, 1947 and adopted the Government of India Act 1935 mutatis mutandis. Thereafter, different legislatures of the country, apart from Interim Constitution for the Country in 1972, drafted three (03) constitutions in 1956, 1962 and 1973 (now in force) respectively and all these Legislations granted the Courts the powers of Judicial Review.

Article 175 (1) of the Constitution of the Islamic Republic of Pakistan, 1973 provides for establishment of various kinds of Courts in Pakistan which says: “There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law”.

Apart from superior judiciary, there are also Courts at District Level known as The District or Lower Judiciary which is also empowered with the powers of judicial review in the form of Civil Suits under the Specific Relief Act 1877 and The Code of Civil Procedure 1908 against the public functionaries.

### **Basic Principles for Exercise of Administrative Discretion:**

The Higher Judiciary of Pakistan has laid down a set of rules to be followed by the Administrative Authorities while exercising discretion. These include:

1. Discretion should be exercised in judicious, fair and reasonable manner. This principle was elaborated by the Quetta High Court in a judgment titled “Collector of Customs vs. Pakistan Petroleum Limited” (Collector of Customs, Sales Tax and Central Excise Quetta vs. Messrs Pakistan Petroleum Limited, 2002).
2. Discretion should not violate any statutory provision and be ported to advance justice. This principle was established by the Supreme Court of Pakistan in a

judgment titled “Shahab Ud Din vs. Meer Ali Khan” (Shahab Ud Din and 5 Others vs. Mir Ali Khan, 2000).

3. The August Supreme Court of Pakistan in a renowned case titled “Col (r). Ayyub Rana vs. Dr. Carlite S. Pune” held that “whenever the law confers on any Court discretion to make an order, the law has to be exercised on application of judicial mind based on relevant consideration in just and fair manner to advance the cause of justice and not whimsically and arbitrarily” (Col. (Retd.) Ayub Ali Rana vs. Dr. Carlite S. Pune and another, 2002).

4. The Hon’ble Lahore High Court in a case titled “The University of the Punjab vs. Aslam Bora” declared that “no policy of syndicate can violate the statutory provision nor can any executive order nullify the law. Hence administrative discretion cannot nullify the law.” (The University of the Punjab Lahore through Registrar vs. Muhammad Aslam Bora Advocate and another, 1988).

5. The Supreme Court of Pakistan in a renowned judgment titled “ (Messrs Zeenat Manufacturing (PVT) Limited, Gadoon Amazai Industrial Estate Swabi vs. The Secretary, Survey and Rebate, Central Board of Revenue, Government of Pakistan, Islamabad and others, 1998)” laid down that “administrative authority should use discretion keeping in view judicial norms and not perversely”.

6. The Supreme Court of Pakistan in a judgment “Aman Ullah vs. Federal Government of Pakistan” held that discretion should be controlled and structured by the law itself. It means that the law granting discretion should provide for a control over the use of that discretion (Aman Ullah Khan and others vs. The Federal Government of Pakistan through Secretary, Ministry of Finance and others, 1990).

### **Grounds of Judicial Review:**

There are no hard and fast drafted legislation regarding grounds of judicial review rather the Apex Courts of the Country have laid down some rules governing the Judicial Review through judgments which are as under:

#### **1. Mala fide:**

The August Supreme Court of Pakistan in “The University of the Punjab vs. Roohi Farzana” laid down this principle observing “Even in administrative matters it is not the sole discretion of the authority to pass orders in any manner it likes. It must follow the rules and principles of justice and equity so that even the person against whom order has been passed should not stamp it as mala fide and a

result of bias or malice” (University of Punjab through Vice Chancellor, Lahore vs. Mst. Roohi Farzana, 1995).

## **2. Improper Purpose:**

The Supreme Court of Pakistan in a case titled “Jamil Asghar vs. Improvement Trust” held that “A purely administrative officer, who is empowered to pass an order if certain circumstances exist, has no jurisdiction to determine those circumstances and the objective existence of those circumstances is an essential condition of the validity of his order. In respect of; very order passed by him the Court can make an enquiry and if it find, that the circumstances needed for passing the order were not present it will declare the order to be void” (Mr. Muhammad Jamil Asghar vs. The Improvement Trust, Rawalpindi., 1965).

## **3. Abuse of Discretion:**

The August Supreme Court of Pakistan established this principle that if the Discretion exercised by any Administrative Authority renders abuse of such discretion. This type of Discretion is also subject to judicial review. This fact is depicted in a judgment titled “Pir Sabir Shah vs. Shad Muhammad Khan” (Pir Sabir Shah vs. Shad Muhammad Khan, Member Provincial Assembly, 1994)

## **4. Colorable Use of Authority:**

This ground means that the action has been taken prima facie seems legal but in actuality it is illegal. The principle was defined by the Lahore High Court, Lahore holding that “Colorable exercise of power used for a purpose not contemplated by Act, action taken in colorable exercise of powers and for collateral purpose not authorized by law” (Muhammad Tufail vs. Province of the Punjab and 5 others, 1977).

## **5. Acting under Dictation:**

The Supreme Court of Pakistan in a judgment titled “Zahid Akhtar vs. Government of the Punjab” set up this principle holding that “Government servant should comply wily with those orders/directions of his superior which were legal and within his Competence. Compliance of illegal or an incompetent direction/order could neither be justified on the plea of same having been issued from superior authority nor same could be defended on Uri; ground that non-compliance thereof, could have

exposed concerned Government servant to the risk of disciplinary action exposed concerned Government servant to the risk of disciplinary action” (Zahid Akhtar vs. Government of Punjab through Secretary Local Government and Rural Development, 1995).

#### **6. Authority Imposing Fetters:**

If the Administrative Authorities are exercising the power of discretion which is causing any kind of fetter to the imposition of relevant law such act of the Authorities is liable to be reviewed judicially. The Hon’ble Lahore High Court, Lahore precedented this rule in a judgment titled “Muhammad Tufail vs. Province of the Punjab” reported as PLD 1978 Lahore 87.

#### **7. Reasonableness:**

Two judgments titled “Arif Builders vs. Government of Pakistan” reported as PLD 1997 Karachi 627 and titled “Government of Pakistan vs. Salahuddin” reported as PLD 1991 SC 546 laid down principles of reasonableness and doctrine of Promissory Estoppel. Another judgment titled “Federation of Pakistan vs. Muhammad Aslam” reported as 1986 SCMR 916 also held the Doctrine of Promissory Estoppel.

#### **Remedies Available against Administrative Action:**

Under the Constitution of the Islamic Republic of Pakistan, 1973 and other domestic legislations in Pakistan, there are two (02) types of remedies available with the Courts to have judicial review of administration discretion i.e. Writ Jurisdiction and Civil Suits. Both these are discussed below:

##### **1. Writ Jurisdiction/Public Law Remedy:**

Under Article 184 (3) of the Constitution of Islamic Republic of Pakistan 1973, the Supreme Court of the Country has been conferred power of Judicial Review through Writ Jurisdiction. The said article is reproduced as “Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article.”

Article 199 (1) of the Constitution of the Islamic Republic of Pakistan, 1973 empowers a High Court within its territorial jurisdiction to exercise the powers of judicial review through the following five (05) types of writs:

1. **Writ of Mandamus** a directive to a Public Authority to do an act.
2. **Writ of Prohibition** a direction against a public authority to refrain from doing an illegal act.
3. **Certiorari** a writ for correction of a legal error.
4. **Writ of Quo Warranto** is against a public office holder under the auspices of what authority?
5. **Habeas Corpus** which is filed against illegal detention of a person.

## **2. Suits and Injunctions/Private Law Remedy:**

Apart from Constitutional remedy there is a civil remedy against wrongs done by the public functionaries. Section 9 of the Code of Civil Procedure, 1908 grants the Civil Courts exclusive jurisdiction to try all kinds of suits: “The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.” Section 42 of The Specific Relief Act 1877 equip the Civil Court to hear declaration suits against any person: “Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief”. Under Section 52 of this Act a Civil Court has discretionary power to issue injunctions: “Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual”. The power of the Civil Court under Section 9 of the Code of the Civil Procedure 1908 has been declared equal to the power of High Courts under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 by the Lahore High Court, Lahore by holding that “The superiors judiciary on the other hand is conferred authority under Article 199 of the Constitution to override in the manner provided by that Article orders of Executive Authorities. The same power vests in the civil Courts (the Courts of general jurisdiction) unless their jurisdiction is specifically or impliedly barred by any Statute (See section 9, C. P.C.) (Muhammad Tufail vs. Province of the Punjab and 5 others, 1977)”. The August Supreme Court of Pakistan in its two (02) esteemed judgments

titled “Abdul Qayyum vs. Niaz Muhammad” (Abdul Qayyum and another vs. Niaz Muhammad and another, 1992) and “Muhammad Khan and others vs. Province of Punjab” (Muhammad Khan and others vs. Province of Punjab and others, 2007) affirmed that Civil Courts can review an Administrative Action. The same principle was also laid down by the August Supreme Court of Pakistan in another case titled “Province of Punjab through Collector District Khushab, Jauharabad vs. Haji Yaqoob Khan” (Province of the Punjab through Collector District Khushab, Jauharabad and others vs. Haji Yaqoob Khan and others, 2006) holding that if order of a statutory authority violated law, it was civil court’s job to declare it as without jurisdiction or mala fide.

### **Conclusion:**

The nutshell of the above narrated facts is that judicial review is a mechanism provided by the Statute to the Judicature of the Country. In Pakistan all the Constitutions: the Government of India Act 1935, The Constitution of Pakistan 1956, The Constitution of the Republic of Pakistan 1962 and the Constitution of the Islamic Republic of Pakistan, 1973 put into force provided remedy against wrongs done by the Administrative Authorities. The Superior Judiciary of the Country laid down certain principles for use of discretion in judicious, fair and reasonable manner, not violate any statutory provision, application of judicial mind based on relevant consideration, not violate the law, use of discretion keeping in view judicial norms and not perversely and the discretion should be controlled and structured by the law itself. The Apex Courts of the Country also provided some principles for review of the Administrative actions like mala fide, improper Purpose, abuse of discretion, colorable use of authority, acting under dictation, authority imposing fetters and reasonableness. The Constitution of the Islamic Republic of Pakistan, 1973 provides Writs mechanism and The Specific Relief Act, 1877 and the Code of Civil Procedure 1908 provide Civil Suits mechanism against unfair use of the administrative discretion.

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