D I S S E R T A T I O N

THE SCOPE OF DISCRENTIONARY POWERS WITH SPEFIC REFERENCE TO EAST AFRICA

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PREFACE

"Where law ends, discretion begins and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice either reasonableness or arbitrariness" (DAVIES K.C. IN DISCRETIONARY JUSTICE). It is in the light of the above quotation that I have been prompted to venture into one area of Administrative law that bristles with technicality and confusion as soon as it is touched, namely discretionary powers. However this dissertation is not intended to be an exhaustive study of all the discretionary powers that ~~exhaustive study of all the discretionary powers that exist~~ exist in the realm of Administrative law. Its purpose is to expose some of the rules that have raised much hue and cry from lawyers and judges alike, with a view to having them reformed.

At this stage, I wish to extend my sincere thanks to MR. J.B. KANGWANA, MY SUPERVISOR for his incisive and illuminating comments, on this dissertation. I am also greatly indebted to him for patiently correcting the numerous mistakes I made. However, responsibility both for the views expressed and for the errors of law or fact or judgement is entirely mine. I wish also to thank Mrs. Rachel M. Nyamori for sacrificing her time and energy to type this dissertation. I am even more grateful that she managed to reduce my illegible handwriting to this neat manuscript. And finally I am grateful to all those others who directly or indirectly assisted me in writing this dissertation.

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LIST OF ABBREVIATIONS

PERIODICALS:

E.A. L.J.	EAST AFRICAN LAW JOURNAL
C.L.P.	CURRENT LEAGAL PROBLEMS
HARV. L.R.	HARVARD LAW REVIEW
J.P.L.	JOURNAL OF PUBLIC LAW

CASES:

A.C.	APPEAL CASES
ALL ER	ALL ENGLAND REPORTS 1936 DATE
B& AD	BARNE WELL & ADOLPHUS 1830 - 1834
BURR	BURROW 1756 -1772
d.l.r.	DOMINION LAW REPORTS 1912 - DATE
E.A.L.R(E.A)	EAST AFRICAN LAW REPORTS 1957 DATE
K.B.	KINGS BENCH
K.L.R.	KENYA LAW REPORTS 1912-1956
Q.B.D.	QU EEN BENCH DIVISION
U.S.	UNITED STATES
W. L.R.	WEEKLY LAW REPORTS 1953

-I-

INTRODUCTION

The branch of discretionary powers like all other branches of administrative law has tended to develope in a distinctive manner. The rules in this area have to some extend been uncertain and very flexible. It is in this respect that John Wills calls it"the acrobatic part of the law[1]."

However, despite the uncertainty and sometimes complexity that looms large in this province of Administrative law, it is a very important areas of study. This is more so in view of the fact that " we cannot accomplish the main objectives of modern government without significant discretionary power[2]." As a matter of fact no legal system in World history has been without such powers. Discretionary powers become evenmore necessary in one study of Administrative law considering that in recent years vast quantities of discretionary powers have grown in many systems.

It has been argued that the legislative bodies realizing the need for administrative discretion in one problem after another have gone on delegating discretionary powers. The result is that perhaps the significant 20th century change in the fundamentals of legal systems has been the tremendous growth of discretionary powers[3]. Three reasons may be attributed to this growth. Firstly, most governments are likely to go on undertaking tasks for the execution of which no one is able to provide advance rules of guidance . Secondly discretion is very desirable even where rules have been formulated for the purpose of individual justice. Thirdly, in most systems there has developed a habit of allowing discretionary power to grow which far exceeds what is necessary and which is less controlled than it should.

Whereas discretionary powers are indispensable it is submitted that the powers should not be left uncontrolled as they continue to develop. As Davies has rightly put it "Discretion is a tool only when properly used; like an axe, it can be a weapon for mayhem or murder[4]." Since elimination of all discretionary powers is both impossible and impracticable what is required, then is the elimination of that which is not necessary and to find the optimum degree of control of that which is necessary.

It is on the basis of the above analysis that the scope of discretionary powers shall be discussed and with reference to East Africa. Because of the high level of generality of the subject the discussion will be limited to only those rules the author felt are necessary for the purposes of this dissertation. In this dissertation the author's first attempt will be to give an account of the main rules governing discretionary powers. Secondly, there will be an attempt to analyse the judicial attitude towards these rules i.e. which possible tests the courts may apply to decide whether the discretion has been exercised in the manner required. Finally its the object of this dissertation to show the inconsistencies and contradictions interest in these rules with a view to showing that discretionary powers are still developing in the sence that its difficult to tell in what circumstances and to what extent a rule applies to any given set of facts.

The dissertation will be divided into three chapter and a conclusion. The following is the breakdown:-

CHAPTER ONE: The concept of discretion and the rule against sub-delegation

CHAPTER TWO: Abdiction and fettering of discretion.

CHAPTER THREE: Abuse of discretion.

CONCLUSION. A Critique of the rules and recommendations.

CHAPTER ONE

THE CONCEPT OF DISCRETION AND THE RULE AGAINST SUB-DELEGATION:

In order to under stand fully how the rules governing discretionary powers operate, it is necessary that one also understands what the concept of "discretion" encompasses in relation to adiministrative action. One of the earliest definitions of'discretion' is to be found in the words of Lord Halsburry . He said

> "Discretion means, when it is said that something is to be done within the discretion of the authority..... that something is to be done according to the rules of reason and justice, according to law and not humour. It is to be not arbitrary, vague fanciful but legal and regular."[1]

This definition paraphrases similar remarks by Lod Mansfield in the case of R.V.WILKES[2] and represents the traditional attitude of the English judges, that is dicretion must be exercised within the legal limits.

Jaffe on the other hand has defined "discretion" as the power usually given by statute to make a choice among competing considerations.[3] This means that the exercise of discretionary powers involves elements of choice. However it is submitted that the more comprehensive definition is that given by Davies K.C. In defining discretion Davies says "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible causes of action or inaction.[4] Thus, a decision-maker has no discretion if on proof of facts a, b and c he must take action I 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 action 1 or 2 he possesses a choice or discretion. This definition presumes a choice only at the end not at the beginning. For the purposes of this discussion the definition by Davies will be used as a means of classifying the powers conferred upon administrators. The word"discretionary" will also be used in the same sence.

Since discretionary powers involve freedom of choice, how does a competent authority or officer go about exercising the powers? It is submitted, here, that quite often the competent authority or officer will first find the necessary facts then apply the law and finally decide what is desirable in the circumstances

after the facts and law are knwon. The third of the above functions is the most important and is the object of this discussion.

It is submitted that the exercise of discretion will largely depend on whether the decision-maker's discretion is "objective" or "subjective." The decision-makers 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.[5] The decision -maker's discretion is subjective, however, when the source of his power confers upon him the freedom to set his own criteria for chossing between the alternative courses of action open to him.[6] Subjective discretion is is normally conferred in such general phrases as "if he thinks fit," "if in his opinion" etc. It is submitted that is is quite relevant to make adistinction betwen "objective" and "subjective" discretionary powers. This is in view of the fact that, the application by the courts, of the doctrine of substantive ultravires, in reviewing discretionary powers depends upon the existence in the empowering legislation of criteria against which the decision -makers choice can be measured.

However, it should be noted that the full reality about discretion is quite complex than it appears above. This is because sometimes a decision asto what is desirable in given circumstances may not only include weighing desireability but also guessing about unknown facts and making a judgement about doubtful law. This obviously means the decision arrived at is not necessarily good. Another facet of the complexity in discretion is the fact that the mind that makes the decision does necessarily separate the fact, law and discretion and this may give rise to problems especially where the law is not clear. Finally the courts have not as yet expressly articulated the distinction that exists between "objective" and "subjective" discretions. This will be seen more clearly when attention will be focused on abuse of discretion. In this chapter it will suffice to say that there has been alot of injustice done due to the complexity of the concept of discretion.

This does not, however, mean that the concept should be done away with, for all legal systems are of the fact that elimination of all discretionary powers is both impossible and

and undesirable. Infact one writer has said "it would be utter insanity!" to do away with the concept of discretion. So what most legal system have done is develop certain rules to guide the exercise of discretionary powers. This rules as it will be seen later are not without defects and to a large extent add more confusion to the existing law.

One of the rules developed to guide the exercise of discretionary powers is the "rule against sub-delegation." The rules against sub-delegation is often expressed in a latin Maxim" delegatus non potest delegare." What this means is that, if the legislative confers powers upon X, the evident intention is that it shall be exercised by X and not by Y. Therefore in general terms the law requires that a discretionary power be exercised by the authority it has been vested in. To use the words of De Smith,."..... when a power has been confided to a person in circumstances, indicating that trust is being placed in his individual judgement and discretion he must exercise that power personally unless he has been expressely empowered to delegate it to another."[8] There are at least two East African cases to illustrate the operation of this rule. In REMTULLA GULAMANI V. R.[9] the Governor was given power to make by lawa under rule (II) of the cotton Rules, 1931, for the destruction of cotton plants, harbouring pests and diseases of cotton. This power was exercised by the Director of Agriculture and gazetted on 11th October, 1935, as General Notice No. 993 the accused subsequently contravened it and was fined Ksh. 300/=. He there upon appealled and it was held "..... the terms of paragraph (II) of S2 of the Ordinance do not extend to confer such a power upon the Director of Agriculture but upon the Government and the Governor alone, who is precluded from transfering this by the principle of law expressed in the maxim - Delegatus non potest delegare."[10] Similarly in R.V. JAN MOHAMMED,[11] the accused was conficted under rule 12 (B) of the Native produce Improvement and inspection Rules, 1936, which rule should have been made by the Governor in council but was made by the Director of Agriculture under delegation of the Governor. It was held the rule was rule was ultra vires and against the principle of sub-delegation and therefore conviction was quarshed.

Though the rule against sub-delegation is sometimes applied so strictly to the extent that it causes administrative inconveniences there are exceptions to the general rule.

A typical example is during emergency or war time whereby parliament may relax the general rule either by express provision or by implication. It has also been argued that the rule against sub-delegation will not apply where it may reasonably be inferred that the power was intended to be delegable.[12] However the question that arises is, which are the cases whereby it may reasonably inferred that the power was intended to be delegable? It is submitted that, such are the insta ces whereby the rule against sub-delegation is watered down. It is further submitted that departments of the central government have the benefit of a special rule whereby officials may act in their minister s names without any delegation of authority. However such cases are not prevalent in cases where there is a clear provision that the Minister must act himself. When powers are conferred upon Ministers who have charge of large departments, it will often happen that the powers are not exercised by the Minister in person. Parliament is, of course, aware of this and ministerial powers are therefore taken, to be exrcisable by officials of the Minister's department acting in his name. The courts have to some extent recognized the above arguement. In leading case, Lord Greene M.R. had this to say:-

> "The duties imposed upon Minister's and the powers given to Minsters are normally exercised under the authority of the Ministers by responsible officials of the department. Public b usiness could not be carried on if that were not the case."[13]

Whereas it is clear that in practice Ministerss may be allowed to delegate powers conferred upon them, it is, however, doubtful as to what extent a minister may do this. It can be argued that the minister has to draw his attention to matters of policy and let other officers in his department deal with matters of detail. This, however, will not be a easy task as in certain cases there is no clear-cut distinction as to which matters are of policy or of detail consequently many ministerial powers are exercised by officials who recite " Iam directed by the Minister," "the minister is of the opinion" and so forth, when inreality they are acting on their own initiative. In an English case LEWISHAM METROPOLITAN BOROUGHT AND TOWN CLERK V. ROBERTS; JENKINS J. was of the view that acts done in the exercise of (minsters) functions are equally acts of the minister whether they are done by him personally or through departmental officials as in practise except in matters of first importance they

almost invariably would be done (emphasis mine). This case introduces a nother test that: " in matters of first importance," the ministers may not delegate the powers conferred upon them. However, what matters can be considered to be of first importance? This particular test, it is submitted, leaves a lot to be desired, and one can conslusively say that there is still uncertainty as to when, and in what matters, it may be reasonably inferred that the power was intended to be delegable by the minister to his officials.

Another facet of uncertainty is whereby delegation is not even spoken of. This may occur in situations where the departmental official may be said to be the 'alter ego' of the minister and therefore may exercise his powerss since he is subject to the fullest control by his superior.[15] Lord Parker CJ in relation to the above propostion has said in a recent case that the proper responsible officials are the 'alter ego'of the minister. " It is not, I think sufficient to say that, it is a principle which is applicable whenever its difficult or impracticable for a person to act himself, in other words thatwhenever it is difficult or impracticable the principle applies."[16] This, though not very relevant to sub-delegation, may affect the rule against sub-delegation as it adds uncertainty to the existing rules.

Finally the operation of the rule against sub-delegation may be exluded where the courts may characterise the exercise of the power as falling under the concept of agency than delegation. In R.V. CHAMPMAN EXP. AIRLIDGE,[17] the court involved the rules of agency to justify a questionable delegation. This was a case where the city council's public health committee has authorized their chairman to deal with urgent matters in the vacation and the delegation was said to be valid.

It is submitted, here, that all the cases seem to turn on the implications of various statutory provisions and there is no rigid rule against sub-delegation. As far as East Africa is concerned, Administrative Law is a recent phenomenon and thus, has not developed to the extent that complexities have arisen in the area of sub-delegation. The reason for this may be said to be due to the fact that the machinery of public inquiry is little used and the administrative hierarchy is insufficiently complex. In fact one writer was content to state that the law governing delegation of

functions in East Africa as being that of misterial duties i.e. those functions involving no disdretion may be sub-delegated whereas those with discretionary powers may not, without express authority. This simplified generalization is indeed as far as the East Africa cases go. This is clearly illustrated in the case of ODENDAL V. GRAY,[19] whereby the learned judge held that while S51 of the Crown Lands Ordinance did not authorize the commissioner to authorize a sub-ordinate to exercise powers vested by the ordinance in the Governor and delegated by him to the commissioner, it did however not empower the commissioner to entrust to another officer the mere task of dignisying that the commissioner had performed an act he was duly authorized by the Governor to perform.

In conclusion it may be said that generally, the rule against sub-delegation as a guidance to the exercises of discretionary power is not of strict application. This is in view of the fact that there are many uncertainties as to what test a court may apply to a given case. The decided cases come up with different tests and this manifests the fact that the law is still developing.

CHAPTER TWO

FETTERING DISCRETION AND ABDICATION OF DISCRETION

This chapter will focus on the rules governing the exercise of discretionary power where an authority has fettered its discretion and where an authority has abdicated its discretion. The two heads will be dealt with separately. Quite often the discretionary powers given to an authority may either be too broad or too narrow. In either case justice is doomed to suffer. It has been submitted that when a discretionary power is "too broad justice may suffer arbitrariness or inequality when its is too narrow justice may suffer from insufficient individualizing.[1]"

However there are situations where the discretionary powers given are neither too broad nor too narrow. But in this case too justice is not often done due to the policy adopted by the authority. The authority may adopt the policy on the own motion as being what it considers a desirable course of action. Where an authority adopts a general policy to guide it in the exercise of the discretion the general rule is that, it must not fetter its own discretion from dealing with each case individually.[2] H.W.R. Wade in support of the above contention has said that "it is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case.[3]" The rationale of this rule is that the policy adopted by the authority may be over-rigid and thus fail to direct its mind to a case before it, by blindly following a policy laid down in advance. This, then means that each case must be considered on its own merit and decided as the public interest requires at the time.

In enforcing the above rule the courts underline the difference between judicial and administrative processes. The legal rights of the litigants are decided according to legal rules and precedents which are sometimes held to prevail over the courts opinion . However, whereas administrative tribunals are allowed to apply precedents, this cannot be done at the expense of the merits of an individual case. This was clearly stated in the ose of MERCHANDISE TRANSPORT LTD. V. BRITISH TRANSPORT COMMISSION (1962) 2 QB 173 where Lord Devlin said " a tribunal must not

pursue consistency at the expense of the merits of an individual case.[4]

However the question that always arises is just how far can an authority pursue a fixed policy? This question is difficult to answer because there are situations where an authority fails to exercise their discretion in the most deserving cases. The dictum in the case of R.V. P.L.A. Exp. KYNOCH LTD. (1919) I K.B. 176 by BANKES LJ has frequently been cited as the one to be followed in such situations. Bankes LJ contrasted two classes of cases:-

> "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 in accordance with its policy decide against him, unless there is something exceptional in his case; and cases where atribunal has passed a rule, or come to determination, not to hear any application of a particular character by whomsoever made."[5]

The conclusion to be drawn ffom this judgement is that the courts are careful not to inhibit public authorities from laying down policies, since consistent administrative policies are not only permisaable but highly desirable. However the policy must naturally be based on proper and relevant grounds. The authorities must also be ready to listen to reasons why in an exceptional case that policy should not apply.

Another important aspect of BANKES LK's dictum is the fact that it is quite desirable that an authority should openly state the rules or policies it intends to be guided by in the exercise of its discretion. The rationale of this arguement is that the public should be made to know what to expect in case a situation of that kind arose. It is conceded here that making the policies publicly known may help to minimize injustice from the exercise of discretionary power.

DAVIES K.C. has in support of the above contention stated that "open rules" is one of the instruments to be used to control the exercise of discretion.[6] This is because where the rules and policies are kept secret for instance, through confidential instructions, the private parties are prevented from checking any arbitrary action. And as Davies has rightly put it "openness is the natural enemy of arbitrariness and natural ally in the fight against injustice.[7]

There are at least two East African cases that have attempted to deal with the issue of disclosing the policies to the public.

However these cases haven't dealt with the issues exhaustively. These are:- MURGIAN & SONS V. TRANSPORT APPEALS TRIBUNAL (1959) E.A. I; and R. Exp. EASTERN PROVINCE BUS COMPANY LTD. V. TRANSPORT APPEALS TRIBUNAL (1959) E.A. 449.

In both cases it was held that tribunals are entitled to act upon policy directives from the chairman of the Transport Licencing Board and to consult their files and records without having to disclose such information to the parties. In view of the above cases it is submitted here, that it is time that the authorities made the policies adopted known to the public. This is very desirable especially in the area of licences. The rules adopted by the liquor licencing tribunals in Kenya have in the past been very restricted. There is no objection to a policy that is aimed at reducing the number of licences in a particular area provided that the application is properly heard and considered in each case. The policy must be made public so that the applicants know in advance what to expect. It must be noted that the duty of the authority is merely to exercise their discretion in each case and not shut the door indiscriminately to all cases in pursuance of a policy. The approach that has just been discussed it is submitted, helps to provide modern answers to modern problems and this modern answers should be tailored to the special needs of the individual cases.

Though an authority is allowed to adopt a certain policy to guide it in the exercise of discretionary powers there are situations where they depart from the policy, Such situations for instance are, where an authority entrusted with statutory powers must be guided by public policy. The policy to be followed may largely depend on the government of the day and this will be relevant in weighing the consisiderations of public policy. For this reason it has been argued that the range of policy considerations that an authority may take into account will be so large that it becomes difficult to set any effective limit by which it may guide itself.[8]

In an English case SCHMIDT V. SECRETARY FOR HOME AFFAIRS,[9] the policy thatwas adopted was that of excluding any alien student of scientology. The court said this was validly done as the study of of scientology was harmful to the public welfare. This concept of public policy may also be illustrated by an East African case of[10] KENYA ALUMIMIUM AND INDUSTRIAL WORKS LTD. V. MINISTER FOR AGRICULTURE.

In this case, by S9 of the wheat and Industry Ordinance, 1952, the

Minister was empowered "in his discretion either to grant or refuse permission" to a mill owner to make additiona to the plant in his will. Refusal in this case was based on the ground that to grant permission would conflict with the Government policy of protection. The protection policy was the result of an agreement with the Government of Tanganyika (now Tanzania) which specifically limited the capacity of mills to avoid redudancy in mills. The learned judge inthis case Sir Alistair Forbes, V.P. described the decision as having been arrived at "in the interests of the public and in a sence of paternalism towards industry."[11]

On the facts of the above case the minister was entitled to rely on this policy as the policy was of such national importance that it would take exceptional grounds, which did not exist in this case, to justify a departure from it. It is obvious, then that the importance of different policies which different administrative bodies may adopt will vary to infinite degrees. Some may be of such trivial importance that they may have to be replased by other considerations.[12] At the other extreme, it is easy to invisage a policy of overwhelming importance as in the Kenya Alluminium case, that indeed strong grounds have to be adduced to justify a departure from the policy a dopted. It would appear that, it is not advisable to set any standards for the displacement as such, and therefore each case will be considered on its merit.

This concept of national policy has been criticized for not leaving any room for individual judgement and as such justice may not be executed properly. The arguement is that, the exercise of a statutory powers with the element of national or public policy looming largeis like the exercise of absolute powers. This is in view of the fact that the grounds on which they have been exercised cannot be questioned by the courts.[13] This means then that the only control may be polical economic or social. However, even then its the writers arguement, that there must be room for individual judgement.

The aspect to be considered now is where an authority adopts a policy under the influence or dicretion of some other authority. This is a situation whereby a power conferred upon one authority in is substance exercised by another. and is closely a kin to that of delegation. The general rule is that an authority entrusted with

a discretion must not in the purported exercise of the discretion act under the dictation of another.[14] An example is where an authority may be empowered to issue licences to cinema corporations. The issuing of such linences may be subject to conditions provided by the relevant Film Censorship Board. It has been held that even in such cases the authority must preserve residual discretion to overside the rulings of the Board in or individual case, otherwise it shall be held to have abdicated from its statutory duty to exercise its own discretion.[15]

Ministers and their departments have fallen foul of the same rule many times. And hence in deciding say an appeal Minister X must not dispose of the matter solely on the basis of Y's policy. This was clearly demonstrated in LAVENDER (H) AND SON LTD. V. MINISTER OF HOUSING AND LOCAL GOVERNMENT (1970) I.W.I. R 1231. In this case the Minister of Housing and Local government dismissed an appeal involving planning because the Minister of Agriculture always opposed such a development. The Minister of Housing and Local Government by adopting and applying a stated policy of another minister, had in effect inhibited himself from exercising his discretion. The learned judge Willis J has this to say, "I think the Minister failed to exercise a proper or indeed any discretion by reason of the ftter which he imposed upon its exercise in acting solely in accordance with his stated policy."[16]

How it should be pointed out that this rule is not so restrictive to the extent that a government department may not genuinely seek advice from another. There must always be distiction between situations where an authority seeks advice and then genuinely exercises its own discretion ans situations where an authority acts obediently or automatically under some one else's advice or discretion. The former is permissable but the latter is not andthe resulting decision is 'ultra vires' and void because the power is exercised by the wrong authority. It is also submitted that where a servant acts under the dictation of a superior in the administrative hierarchy this may be held to be valid.

In an East African case, ODENDAL V. GRAY (1960) E.A. 263, THE COMMISSIONER OF LANDS had been entrusted with some power under S 88 of the Crown Land's Ordinance, 1955, the commissioner then left this powers to be exercised by another officer, who by mere signature was deemed to have given consent to the usage of Crown Lands.

This was held to have been validly done and the commissioner had carried out his statutory duties as authorized by the Governor.

However the problem that has arisen in certain jurisdication show that cases of unlawful dictation may arise where the ministers have attempted to interfere for political reasons. A case in point is RONGARELLI V. DUPLESS.[17] Here the prime Minister of Quebec gave instructions for the cancellation of liquor licence where the licence was supporting an unpopular section of the community i.e. he repeatedly bailed out a jehovah's witness member. Such situations are likely to arise especially in East Africa where the Ministers have such wide discretionary powers. For this reason it is argued, here, that the authority must keep "its mind ajar" for it is under a legal duty to exercise a genuine discretion as it thinks fit and with regard to the case before it. As wade, says; "The valid exercise of a discretion requires a genuine application of the mind and a conscious choice by the correct authority."[18]

In conclusion, it is submitted that the goal of any legal system should be an elimination of the unnecessary rules and better control of the necessary discretionary powers. This may be achieved if the discretion is exercised by the proper authority, and where rules or policies have been adopted to guide the authority they should not be too rigid. There should also be an attempt to strike a balance between rules and discretion. This is because some circumstances may require or even both. And its is by examining each individual case that it may be said that justice is not only being done but seen manifestly and undoubtedly to be done.

CHAPTER THREE
ABUSE OF DISCRETION

In recent years it has become quite customary to find a statute that empowers an authority to act "in its discretion". However despite the generality of such phrases, there must be limits to such powers, both in the interest of administrative efficiency and in the interest of all persons affected by the exercise of the discretion. Therefore in this chapter attention will be focused on the excesses or abuses of this discretionary powers.

At this stage its essential to point out that there are several forms of abuse of discretionary powers. These several forms of abuse "overlap to a very large extent" and "run into one another."[1] It is therefore submitted that it is very difficult to classify them or even define them conclusively. For the foregoing reasons and for the purposes of this dissertation, the several forms shall be discussed under three broad headings; firstly the exercise of a discretionary power for an improper purpose or motive; secondly the ground of "good faith" and unreasonableness in the exercise of a discretionary power to relevant considerations.

1. EXERCISE OF A DISCRETIONARY POWER FOR AN IMPROPER PURPOSE OR MOTIVE.

The general rule is that where an authority has been entrusted with some discretionary powers, the authority must not go outside the scope of that power. This is sometimes referred to as the "four corners" doctrine. The " four corner" doctrine was first enunciated under that title in CARLTONA V. COMMISSIONER FOR WORKS (1943) ALL ER 560. This was a war time case dealing with a power conferred upon the commissioners for works to requisition properly if it appeared to them necessary or expedient for securing certain ends such as public safety, defence supplies and services, public order or the effieient prosecution of the war. The plaintiff whose food factory had been requisitioned by the commissioner challenged the validity of the order on the ground, interalia, that it went beyond the scope of the power in that the requisition of the factory was neither necesary nor expedient for securing any of those purposes. The court of appeal held that it was not possible for the courts to question the necessity or expediency of the requisitioning and that "...all that the court can do is see that the power which is claimed to be exercised is one which falls within the

"four corners" of the powers given by the legislature.[2]" This doctrine was applied with more success in WHITE AND COLLINS V. MINISTER OF HEALTH.[3] Whereby a minister was empowered to acquire land forming part of a park under the Housing Act. 1936 Section 75 and the Land acquired was alleged to be part of the grounds of a large house, and therefore, not properly included in comuplsory purphase order as forming in the words of S75 "part of any park." A local inquiry was duly held and the Minister confirmed the order, but excluded a considerable part of the land therefrom:- It was held that he had gone beyond the express scope of his powers. It is submitted that the judgement in the above decisions sheds some light on the judicial attitude towards the objective and subjective powers.[4] Though the decisions do not reflect the distinction that exists between objective and subjective discretion, it is clear that whether review is available under the "four corners" doctrine depends on the existence of thatpower. Secondly the judgement in the above cases especially in CARLTONA V. COMMISSIONER FOR WORKS, demostrates the early judicial attitude towards statutes that are silent as to purpose. Their attitude was that if a statute was silent as to purpose and left it open to the decision-maker to determine for himself, why, in what circumstances and for what purpose he should exercise his power, they could not interfere.

However this attitude has cha ged tremendously in recent years, The judiciary is no longer reluctant in reviewing the decisions of administrators simply because the empowering legislation conferred subjective powers and was silent as to purpose. The courts will step in to imply the purposes for which the legislature must in its view have intended the powers to be use. a case in point is PADFIELD V. MINISTER FOR AGRICULTURE.[5] Under a statute, a milk Marketing Board fixed prices for each of the 11 region considered that they should be paid more. The majorityof the Board did not agree, so they complained to the Minister, asking him to appoint a a committtee to investigate under the Act he was empowered to appoint such a committee, if he in any case so directs. The Minister refused to appoint a committee and one of the reasons was that if the committee reported in favour of an increase this would place him in an embarrasing situation politically. The court rules that the purposes for which the powers were exercised were beyond those which the court considered implicit in the legislation. The court further ruled that the Minister had taken into account irrelevant considerations.[6]

In another case ROBERTS V. HOPWOOD[7], the House of Lords was prepared to construe an apparently subjective discretionary powers to set wages so that it could imply certain limits upon the matters which the local authority was not entitled to, so as to provide a reasonable living wage as a model to other employers.

In East Africa there are at leat two cases that illustrate how discretionary powers may be exercised for improper purposes:- In REBUKOBA GYMKHANA CLUB (1963) E.A. 478 the applicant who was a holder of a liquour licence for about 34 years applied for renewal under section 9 of the liqour licencing Ordinance, to the liquor licencing Board. The Board could refuse under the Act, an application for renewal of a licence "in its discretion," the application made by Bukoba Gymkhana Club was refused on the ground that the constitution of the club was "still largely discriminatory." On this ground of alleged discrimination the Board pointed to "Rule 6" in the clubs constitution which required applications for membership to be supported by two current members of the club. The club sought a court of certionari to invalidate that refusal. On this facts it was held that the board's decision was not only influenced by but was indeed based on the fact thatthe club's rules provided that candidates for the membership must be proposed and seconded by existing members. The fact was considerations extraneous to the scope of the exervise of the board's discretion. In another case FERNADES V. KERICHO LIQUOR LICENCING BOARD (1968) E.A. 640. The application for the renewal of a general retail liquor licence was refused by the liquor licencing Board on the ground that the liqour licences were being issued with preference to Kenyans. The appeal was brought on the ground that the liqour licencing board had power to refuse the renewal only if the applicant suffered from one of the six disqualifications set out in section 10 of the liqour licencing Act which did not include lack of citizenship. The court rules that the Board had exercised their discretion for improper purpose. The liquor licencing Act had empowered the Board to either renew or refuse to renew a licence if the applicant suffered from one of the six disqualifications set out in section 10. The discretion in this case was objective in that the Board had been given the criterion on which to base their decision.

However from the judgements of the two English cases mentioned above, it can be concluded that the courts are now prepared to read in to the statutes, by implications, limitations which they contend must have been intended by the legislature but which are not

expressly contained in the statute, because the decision-makers power has been subjectively defined. It's the writers submission that t this new development is rather disturbing. It is disturbing in the sence that there is a possibility that the courts may simply be replacing their own subjective views for those of a person such as a Minister who is beter qualified and equipped to exercise the discretionary power.

It is further submitted that difficulties are aikely to arise where the decision-maker has sought to achieve authorized as well as unauthorized purposes. The difficulties arise because there are far too many tests or standards that have been applied in order to determine the validity of an act. It is for this reason that this area has been described as "a legal porcupine which bristles with difficulties as soon as it is touched." However it will suffice, here to state that generally if an impugned act does not substantially fulfil the purpose or purposes for which the power was conferred, then the exercise of the discretionary power may be pronounced invalid regardless of the persons'motives. And where the purpose is doubtful of the purpose is materially fulfilled the courts may further inquire as to what end or ends the decision-maker was seeking to chieve.[8]

Finally, it is submitted that the ground of improper purpose cannot be defined clearly. This is due to its intimate relationship with other grounds in the realm of abuse of discretion. For instance in PADFIELD V. MINISTER FOR AGRICULTURE,[9] the ground af improper purpose was discussed but at the same time the House of Lords said that the Minister had taken into account irrelevant considerations. This was also demonstrated in the case of RE BUKOBA GYMKHANA CLUB[10] where the court ruled that due to the considerations of irrelevant mattters the authority had clearly exceeded the scope of its didcretionary powers. In ROBERTS V. HOPWOOD,[11] the ground of improper purpose was viewed in the light of reasonablness. The above in instances fo further to show the point mentioned earlier on that the several forms of abuse of discretion are not distinct and that to large extent they overlap.

II. THE GROUND OF GOOD FAITH AND UNREASONABLENESS IN THE EXERCICE OF DISCRETIONARY POWERS:

Because of the necesity for consistency and foreseeability of results in any legal system, indefinite terms like "good faith" quickly harden into definite legal concepts which are used to describe

standards applied by courst in specific situations. By "good faith" the courts mean that a public authority must exercise its discretionary powers honestly, that is not for corrupt or improper motive and that the powers must be exercised for ends which the powers are designed to attain.[12] The power to acquire land for example cannot be exercised for the purposes of increasing the value of the land. Whereas this may be so, the concept of "bad faith" on the other hand, has no precise definition and the reason for this may be as Lord SOMERVELL[13] suggested in SMITH V. EAST ELLOE RURAL DISTRICT COUNCIL, that"its effects have remained mainly in the region of hypothetical cases[14]."

The ground of "good faith" as it can beseen from the above definition is scarcely distinguishable from that of improper purpose. However it has been a subject of debate as to whether it can be distinguished ffom that of "unreasonableness." A few illustrations will highlight this debate. In WESTMINISTER CORPORATION V. LONDON& NORTH-WESTERN RLY CO. (1905) A.C. 426; Lord MACNAGHTEN, was of the opinion that the duty of act reasonably was implicit in the duty to act in goodfaith. He also went further to state that the allegation of "bad faith" was however a serious charge.[15] However it has also been argued that ".... a duty to act in good faith..... is distinguishable from a duty to act reasonably.[16]" SCRUTTON LJ in support of the latter view has argued that"some of the most honest people are the most unreasonable, and some excesses may be sincerely believed in but yet quite beyond the limits of reasonableness.[17]" And in a more recent cases Lord HAILSHAM L.C. had this to say " not every resonable exercise of judgement is right and not every mistaken exercise of jugement is unreasonable. There is band of decision within which no court should seek to replace the individuals's judgement with (its) own.[18]" From these observations one can rightly conclude that the ground of "reasonableness" is still very vague and incapable of an exhaustive definition. It is therefore submitted that the ground of "reasonableness" largely depends on what meaning one attaches to it. It is also submitted that due to this inherent incapability of definition the judicial standards of "reasonableness" will also vary from one case to another. A few cases will illustrate the above proposition. In a much celebrated case, ASSOCIATED PROVINCIAL PICTURE HOUSES V. WEDNESBURY CORPORATION,[19] the court of appeal held that a power to impose on cinema licences such conditions as the authority thought fit was validly exercised

when a condition that no dhildren under the age of 15 be admitted was attached to the grant of a licence to show films on Sundays. In response to the arguement that the condition was inreasonable, it was stated that the discretion was vested in the aurhotiry and not in the court, and its exercise could only be attacked for unreasonableness, if no authority could have come to such a decision and not because the court thought it unreasonable. Lord GREENE M.R. went on to state:-

> "It is true that discretion must be exercised reasonably. Now what does that mean? It is.... used as a general description of the things that must be done. For instance, a person entrusted with a descretion must..... direct himself properly in law. He must exclude from his considerations matters which are irrelevant to what he has to consider..... similarly there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority."[20]

The test enunciated in the above cases appears to include the irrelevant considerations and improper purposes tests, but it goes further in that atthough the court cannot substitute its own views, as to what is or is not reasonable, it can apparently impose a purportedly objective test of unreasonablness , namely " something so absurd that no sensible persons could ever dream that it lay within the powers of the authority."[21] In ROBERTS V. HOPWOOD,[22] The aldermen and councilloers of the poplar Burough council, in the exercise of their power to pay such wages as they thought fit, has decided that they should be model employers, and should set a fair and reasonable minimum living wage for both male and female employees particularly to women. The auditor regarded the wage level as excessive and unlawful. House of Lords held that the council had taken into account irrelevant considerations and that the power to set wates as they think fit should be exercised reasonably. In this case, one judge, Lord ATKINGSON, further said that the aurhority had disregarded relevant matters such as "trade union rates, cost of living....."[23] and instead they had taken into account irrelevant considerations which he referred to as "eccentric principles of socialistic philanthropy" and " feminist ambition."[24]

However it must be noted that the statute was silent as to what the reasonable wage level should be in the above case. How then did Lord ATKINSON arrive at conclusion? It is submitted, here, that

by superimposing upon the clear words of the statute the duty of accountability, Lord ATKINSON, was in effect substituting his personal views, or those of the district Auditor, as to what wages he thought fit for the local authority to pay, for the concillors view as to what was a fit wage. It is further submitted that the danger inherent in judicial interference with exercise of discretionary power is that the judges may apply their own views.

In East Africa, two cases will illustrate the judicial attitude towards the ground of "unreasonableness." In PATEL V.R. (1961) E.A. 79 Arm. Patel was convicted of the offinee of failing to comply with an order by the Nairobi City Council to remove a "building by w ich the council apparently meant an authorized door in his shop. The order was issued under by-law of the concil authorizing the concil to require persons having made an unauthorized alterations in buildings to make the buildings conform to regulations or to remove, or to demolish the building. The court of appeal found that, to the extent that the by-laws gave the council the option of requiring repair or removal of a building the by-law was invalid for unreasonablesness; removal could not be ordered for a trivial defect. To apply the by-law reasonably and thus validly the council must give owner the option of repair or removal of the building. It's failure to do so in this particular case invalidated the order to Patel. In a more recent case CHHAGANLAL V. KERICHO URBAN DISTRICT COUNCIL (1965) E.A. 370; The court of appeal found that if a by-law was going to destroy the vested property rights of Mr. Chaganlal without compensation, it was unreasonbble and void. However it must be noted that in both these cases the court went beyond the consideration of reasonableness of the manner of the action and considered the reasonableness of the by-laws themselves. This would mean then that the courts may look at both. The vaious cases that have been discussed demonssrate that many variable exists in the application of the ground of unreasonableness by the courts.

It is therefore submitted, here, that the ground of "unreasonableness" in the realm of discretion may depend on the subject-matter of the powers, particular circumstances of the case, the prevailing climate of the judicial opinion and the views of individual judges to the desireability of intervention. This obviously leads to the state of law being extremely fluid and any synopsis will be inexact,

It is further submitted that the ground of unreasonableness does not only suffer from inherent incapability of definition but seems to have been reduced to little more than a synonym for other grounds like irrelevancy good faith and improper purposes. This was clearly demonstrated in the foregoing cases especially in the cases of ROBERTS V. HOPWOOD and ASSOCIATED PROVINCIAL PICTURE HOUSE V. WEDNESBURY CORPORATION.

III. The Exercise of A didscretionary Power of Irrelevant grounds or without regard to relevant considerations: It has been argued that if the exercise of a discretionary power has been influenced by the considerations of irrelevant power has not been validly exercised.[25] The writer further submits that the test to b e applied will largely depend on the wording of the statute . For instance, if the empowering legislation either expressly or implicitly imposes ascertainablecriteria by which the decision-maker must abide in making his choice, he will acting ultra vires, if he refuses to consider those criterial or considers other, and thus irrelevant criteria . In the early cases, the judiciary was of the opinion that the above rule had no application if there was no such criterial A good examples is the case of LIVERSIDGE V. ANDERSON.[26] Here, the Homse secretary could under an order directing a person to be detained "if he has reasonable cause to believe (him) to be of hostile origin or association" Liversidge having been detained under this order sued for false imprisonment. The House of Lords held that it could not inquire whether infact the Home secretary had reasonable grounds for his belief. However it can also be argued that this being a war case it might explain the behamior of the courts during emergency situations.

However the recent developments show that the courts have been able to construe the empowering legislation so as to imply objective limits upon the matters which the decision-maker could take into account. Thus in ROBERTS V. HOPWOOD,[27] the House of Lords was prepared to construe that the authority was not entitled to set wages levels so as to provide a reasonable living wage as a model to other employers. Nor could aminister refuse to refer an issue to a special Committee merely because their ensuring recommendation might cause him embarrasment if it were to be contrary to his already stated view of the dispute in respect of a statutory scheme for milk distribution and pricing as in PADFIELD V. MINISTER FOR AGRICULTURE.[28]

In East African the courts were prepared to read into the statute and found out that the liquor licencing Board had been influenced by extraneous considerations in refusing to renew a liquor licence.[29] This recent development of courts stepping in to imply as to what matters should be taken into account and as to what matters should be left out by the decision-maker may lead to erroneous decisions. This is in view of the fact that there is no mode of forcing a person who has a discretionary power to exercise it in a particular manner.

One writer has submitted that the decision in PADFIELD V. MINISTER FOR AGRICULTURE is erroneous in both principle and logic, and on authority.[30] He further argues that the error is as a result of "the courts failure to distinguish between ojbetive and subjective discretion.[31] This arguement is largely true in that failure to distinguish the two will soon lead to the judiciary themselves exercising discretions which have been conferred in subjective terms upon administrators, who by virtue of their training, experience, knowledge and expertise are more fit than the judiciary to exercise those discretions.

CONCLUSION

A CRITIQUE OF THE RULES AND RECOMMENDATIONS

Throughout this brief survey of discretionary powers, the discussion has been focussed on the various rules of law that govern the exercise of discretionary powers. What however emerges from this discussion is that the rules in this area are still very uncertain, flexible and sometimes complex. This is, perhaps, because the law is still developing in this field of Administrative law. It is submitted here that over the better part of the century the law has undergone a very rapid metarmorphosis which has been dtrimental to its health's growth. Consequently, it is very difficult to ascertaain when and where a certain rule is applicable.

For, example, the scope of the rule against sub-delegation discussed in chapter one is subject to several considerations. For instance, the top administrators can still violate the rule with impunity in the administration of government funcations, which are given to Ministers. This, is is argued will promote administrative efficiency since the Minister's functions are so many that he cannot attend to them all, personally. The problem however, is to what extent can a Minister delegate his powers. It is submitted here, that this has not been settled yet. In other instances, the decision-maker may take refuge in the law of agency. What all this means is that the outcome of any given case cannot be predicated with any accuracy.

It is also to be appreciated that there are various differing views on how far a decision-maker may be influenced by the so-called "national or public policy." This concept discussed in chapter two is very ambigous. On one hand it is felt that the public policy overrides all other considerations and therefore should get first preference. On the other hand it has been argued that only the element of public or national policy which is translated into a statute that should be reflected in the ~~statute~~ decision I. Moreover the range of policy considerations that an authority must necessarily take into account are so large that it becomes difficult to set any effective limit by which it may guide itself.

The rule forbidding a decision-maker from binding himself not to exercise a discretion has its share of shortcomings too. The existence of many variables has made it fifficult to ascertain what test may be applied in any given set of fact. As De Smith has rightly concluded....." the decided cases have arisen in a variety of contexts

and not all are reconciliable with one another.[2] The rules against abuse of discretion are the most confusing and at times contradictory. For instance the ground of "bad faith" is still so ambigous. And as regards the ground of "good faith" it is not yet clear as to whether it is distinguishable from that ground of "unreasonableness". But the rule requiring that one must act reasonably when exercising discretion has not itself been settled. As matter of fact the ground of "unreasonableness" is still vague and suffers inherent incapabability of definition which has led to the existence of many variables in the judicial standards of reasonableness. Some of the tests applied by the courts have added more confusion to the already existing law. A case in point is ASSOCIATED PROVINCIAL PICTURE HOUSE V. WEDNESBURY CORPORATION[3] where Lord Greene M.R. said that the ground of"unreasonableness" should only be used in extreme cases where the decision has been completely absurd. However one commentator in reference to the above test has stated that "such cases will be so rare that the test is probably on its death bed, hopefully it will soon meet a timely end and be decently burried never to be resurrected.[4]"

The same holds true in respect to rules against considering irrelevant considerations or ignoring relevant facts when making a decision. As regards this rule one judge has at leat been bold enough to state that "there is no mode of forcing a person who has a discretionary power to exercise his discretion in a particular manner.[5]" The conclusion one draws from all these illustrations is that the law is still very uncertain and in need of urgent reform.

It is often said by judges and commentators alike that one of the most important objects of a legal rule is to make the law certain and predictable. Certainly in this context, it means that one should be able to predict the outcome of litigation with a high degree of accuracy. There are several reasons why certainty can be considered to be a desirable characteristic of every rule of law. If the outcome of litigation is highly predictable, there will be less litigation and more out of court settlement of disputes. More, importantly, it is generally thought that a person is able to plan his affairs well, if he knows and understands the legal consequences of all his actions.

But for a rule of law to be certain it isproposed that several conditions must be satisfied. First and foremost, the rule must be settled, for the law cannot be certain if there is substantial

doubt as to which rule a court will apply. Secondly, the rule must make the results in a particular case depend upon easily ascertained facts, otherwise the law will not be certain because if will be difficult to predict what a court of law will determine to be the facts.

It has been so that the law in respect to discretionary powers does not satisfy these conditions. What then are the possible feforms? It is proposed that reform of the rules governing the exercise of discretionary powers can be seen best in the light of reform in the whole set of Administrative law.

One of the possible reforms, proposed is that, an attempt should be made to enact some sort of Administrative Bill of rights. There is nothing new in this suggestion. Proffessor Wade has advocated it severally.[6] The Bill should contain all rules of good administration which would be applicable to all decisions by the public bodies. Non-compliance with the rules would be ground for obtaining legal redness. It would enact that, all administrative agencies should base their determinations on substantial evidence where they are exercising any discretion at all. The rationale being that the decision-maker must justify his finding upon which his exercise of power is based. At present the courts require no more than that there be some evidence however slight upon which the finding can stand.

In the united states the courts have for some years required administrative agencies with wide unfettered discretionary powers to provide substantial evidence in support of the findings of fact which those bodies have given as their reasons or justifications for their decisions.[7] Such a move would ensure that there is always room for individual judgement.

It is further proposed that an attempt should be made to establish an administrative law court. There are a few good things that may be said about this kind of institution. Firstly, a court of this mature would have judges dealing with solely administrative matters, and this would give them the specialized knowledge,2 experience and expertise. This would halt the recent development of courts stepping into imply what matters a decision-maker should or should not have taken into account in exercising his discretion. As it had been said before the danger inherent in such a development is that soon, the judiciary may find itself exercising discretions which have been conferred in subjective terms upon administrators who by virtue of their training, experience and expertise are more fit

than the judicially to exercise the discretion in question. Secondly, this would compensate for the apparent reluctance of the High court judges especially in Kenya to deal with administrative law matters. This is so especially in matters involving the so-called public or national policy, and the sub-delegation of powers by Ministers. Finally, the administrative law court could afford to adopt a more flexible and informal procedure than the ordinary courts as it would be guided by its own rules. That this suggestion is universally accepted is seen from apparent agreement of both the progressive and conservative reformers of the law.[8]

Finally it is proposed that the office of the ombudsman should be introduced especially in this country. This is an officer to receive and investigate complaints from the citizens against unfair administrative action. The Officer is regarded as a new addition to the armoury of a democratic government. There are many versions of the office.[9] The problem in this country there is still the colonial legal theory that Civil Servant are servants of the government rather than the public and that the government can do no wrong. This is so notwithstanding the fact that we have several statutory provisions which indicate that the government is subject to law and that it can be sued and any civil servant who abuses his power may be prosecuted.[10] The office of the said ombudsman should be modified and designed to suit local conditions.

With the introductions of the reforms proposed above, our administrative law and in particular in the province of discretionary powers, will slowly emerge out of its present confused state, fully developed and equipped to cope with the needs of a modern state. What is needed is a willing Legislature for a long time has been left to the judiciary and this time a change is desirable.

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PENAL CODE, CAP 63, LAWS OF KENYA

PREVENTION OF CORRUPTION ACT. CAP 61 LAWS OF KENYA.