

Administrative law: Doctrine of necessity, doctrine of legitimate expectations and doctrine of delegation

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Abstract

In field of administrative law, doctrine is nothing but the set of rules, framework, test, or procedural steps via the common law precedent using which the judgements can be determined for particular case. When judge defines the ruling, doctrine comes in place in which process is outlined as well as applied. This process is then further equally applied on all other cases. When enough judges make use of the process soon enough it becomes established as the de facto method of deciding like situations. In this paper, we are presenting the study on different doctrines such as doctrine of necessity, doctrine of legitimate expectations, and doctrine of delegation with respect to administrative law.

Keywords: administrative law, administrative actions, doctrine, legitimate, necessity, delegation

1. Introduction

1.1 Doctrine of Necessity

The term Doctrine of Necessity is a term used to describe the basis on which administrative actions by administrative authority, which are designed to restore order, are found to be constitutional. The maxim on which the doctrine is based originated in the writings of the medieval jurist Henry de Bracton, and similar justifications for this kind of administrative action have been advanced by more recent legal authorities, including William Blackstone. In modern times, the term was first used in a controversial 1954 judgment in which Pakistani Chief Justice Muhammad Munir validated the extra-constitutional use of emergency powers by Governor General, Ghulam Mohammad. In his judgment, the Chief Justice cited Bracton's maxim, 'that which is otherwise not lawful is made lawful by necessity', thereby providing the label that would come to be attached to the judgment and the doctrine that it was establishing ^[1].

The Doctrine of Necessity has since been applied in a number of Commonwealth countries, and in 2010 was invoked to justify administrative actions in Nepal. What is objectionable is not whether the decision is actually tainted with bias but that the circumstances are such as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision ^[2]. The basic rule underlying this principle is that 'Justice must not only be done but must also appear to be done'.

1.2 Necessity excludes bias

An adjudicator who is subject to disqualification on account of bias may nevertheless, can validly adjudicate if:

- No other person competent to adjudicate is available;
- A quorum cannot be formed without him; or
- No other competent tribunal can be constituted.

In such situation the rule against bias has to give way to the necessity. If the choice is between allowing a biased person to adjudicate or to stifle the action altogether, the choice must fall in favour of the former, as it is the only way to promote decision-making. Where statute empowers a particular minister

or official to act, he will naturally be the one and the only person who can do so ^[3]. There is no way escaping the responsibility, even if he is personally interested. Transfer of responsibility is, indeed a recognized type of ultra vires. In one case it was unsuccessfully argued that the only minister competent to confirm a compulsory purchase order for land for an airport had disqualified himself by showing bias and that the local authority could only apply local act of parliament. A governor of a colony may validly assent to an act of indemnity for his own actions since otherwise the act could not be passed at all ^[4].

Bias would not disqualify an officer from taking an action if no other person is competent to act in his place. This exception is based on the doctrine which it would otherwise not countenance on the touchstone of judicial propriety. The doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It can be invoked in cases of bias where there is no authority to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit from it. If the choice is between either to allow a biased person to act or to stifle the action altogether, the choice must fall in favor of the former as it is the only way to promote decision-making. Therefore, the Court held that bias would not vitiate the action of the Speaker in impeachment proceedings and the action of the Chief Election Commissioner in election matters ^[5, 6].

In the USA, the disqualification arising out of bias arises from the due process of the American Constitution. Therefore, an administrative action can be challenged in India and England. Recent trends in the judicial behavior of the American Supreme Court also indicate that where the administrative authority prejudged the issue, the action will be vitiated.

However, the term 'bias' is must be confined to its proper place. If bias arising out of preconceived notions means the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial, and no one ever will. Therefore, unless the preconceived notions are such that it has the capacity

of biasing the mind of the judge, administrative action would not be vitiated^[7, 8].

1.3 Summary

Doctrine of Necessity acts as an exception to 'Nemo iudex in causa sua'. Bias would not disqualify an officer from taking an action if no other person is competent to act in his place. This exception is based on the doctrine which it would otherwise not countenance on the touchstone of judicial propriety. The doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It can be invoked in cases of bias where there is no authority to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit from it. If the choice is between either to allow a biased person to act or to stifle the action altogether, the choice must fall in favor of the former as it is the only way to promote decision-making. But it has also been made very clear by the Supreme Court that Doctrine of Necessity cannot be invoked every now and then, as if that is done, it might lead to absence of Rule of Law in the Society. Hence, Doctrine of Necessity should be taken as 'Doctrine of Absolute Necessity'.

Every kind of preference is not sufficient to vitiate an administrative action. If the preference is rational and unaccompanied by consideration of rational interest, pecuniary or otherwise, it would not vitiate the decision. Similarly, there must be a real likelihood and not a mere suspicion of bias, before the proceedings can be quashed on the ground of bias. It is also important to note that this rule is not confined to cases where judicial power *stricto sensu* is exercised. It is appropriately extended to all cases where an independent mind has to be applied to arrive at a fair and just decision between the rival claims of the parties. The strict standards applied to authorities exercising judicial power are being increasingly applied to administrative bodies for it is vital to the maintenance of rule of law in a welfare state where the jurisdiction of administrative bodies is increasing at a rapid pace that the instrumentalities of the State should discharge their functions in a fair and just manner.

2. Doctrine of Legitimate Expectations

What is legitimate expectation? It is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established."

In order to maintain the balance between the continuously evolving freedom of individuals and state authority, the Administrative law has to also evolve itself to suit the needs and expectations of people and their rights and duties. There are several principles of Administrative Law, which have been evolved by the courts for the purpose of controlling the

exercise of power so that it does not lead to arbitrariness or abuse of power. These principles are intended to provide safeguard to the citizens against abuse or misuse of power by the instrumentalities or agencies of the State. One of the latest and important of these principles is the 'doctrine of legitimate expectation', which is an outcome of synthesis between the principle of administrative fairness (a component of the principles of natural justice) and the rule of estoppels.

2.1 Evaluation

The evolution of the doctrine of Legitimate Expectation in the Common law jurisdiction can be traced to an obiter dictum of Lord Denning M. R in *Sehmidt v. Secretary of Home Affairs*³. Lord Denning observed in *Sehmidt*:

"The speeches in *Ridge v Baldwin* show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add, *some legitimate expectation*, of which it would not be fair to deprive him without hearing what he has to say."

In this case certain non national students at Hubbard College of Scientology had been given leave to enter the United Kingdom before July, 1968, initially for a period of a month. The periods had been extended to the end of August and September 1968, respectively. Applications were made on behalf of the plaintiffs to the Home Office on June 11 and July 15, 1968 for extensions of their stay until November and December 1968, to complete their studies. By letters of July 29 and 30 the Home Secretary, the defendant, rejected the applications. The plaintiff's stay was, however, extended to September 30 to let them make arrangements to leave.

The Plaintiffs, on behalf of themselves and 50 other alien students of the college, claimed declarations against the defendant that his decision not to consider further similar applications for extension of stay was unlawful, void, and of no effect and the defendant was bound to consider such applications on their merit and in accordance with the principles of natural justice. The court of appeal held that they had no legitimate expectation of extension and therefore no right to hearing, though revocation of their permits within the earlier granted period of permit would have been contrary to legitimate expectation.

The legitimate expectation referred to in, this case did not give the alien students an enforceable right to stay for the time originally permitted but an enforceable right to be heard before the decision to revoke his permit was taken: a procedural protection only⁴.

2.2 Evolution in India

As already stated that the Doctrine of "Legitimate Expectation" is not a legal right in itself embedded in some statute of Code readily available for its inference and applicability. However it is a right to be treated fairly and the same has been fashioned by judicial precedents of various courts over a period time and is still in its evolving stage.

The Supreme Court in *M/S Sethi Auto Service Station vs Delhi Development Authority & Ors*⁵. has examined the concept of '*legitimate expectation*'. While dealing with the question of allotment of a plot by the DDA, the Supreme Court has enumerated various decisions of the concept of Legitimate

Expectation and examined the law relating thereto. The Court held as under;

"19. The protection of legitimate expectations, as pointed out in De Smith's Judicial Review (Sixth Edition) (para 12-001), is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public. The doctrine of legitimate expectation and its impact in the administrative law has been considered by this Court in a catena of decisions but for the sake of brevity we do not propose to refer to all these cases. Nevertheless, in order to appreciate the concept, we shall refer to a few decisions. At this juncture, we deem it necessary to refer to a decision by the House of Lords in Council of Civil Service Unions & Ors. Vs. Minister for the Civil Service, a locus classicus on the subject, wherein for the first time an attempt was made to give a comprehensive definition to the principle of legitimate expectation. Enunciating the basic principles relating to legitimate expectation, Lord Diplock observed that for a legitimate expectation to arise, the decision of the administrative authority must affect such person either

(a) by altering rights or obligations of that person which are enforceable by or against him in private law or;

(b) by depriving him of some benefit or advantage which either: (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until some rational ground for withdrawing it has been communicated to him and he has been given an opportunity to comment thereon or (ii) he has received assurance from the decisionmaker that they will not be withdrawn without first giving him an opportunity of advancing reasons for contending that they should be withdrawn.

25. This Court in Punjab Communications Ltd. Vs. Union of India & Ors., referring to a large number of authorities on the question, observed that a change in policy can defeat a substantive legitimate expectation if it can be justified on "Wednesbury" reasonableness. The decision maker has the choice in the balancing of the pros and cons relevant to the change in policy. Therefore, the choice of the policy is for the decision maker and not for the Court. The legitimate substantive expectation merely permits the Court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made. (Also see: Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer & Ors.

26. Very recently in Jitendra Kumar & Ors. Vs. State of Haryana & Anr. It has been reiterated that a legitimate expectation is not the same thing as anticipation. It is distinct and different from a desire and hope. It is based on a right. It is grounded in the rule of law as requiring regularity, predictability and certainty in the Government's dealings with the public and the doctrine of legitimate expectation operates both in procedural and substantive matters.

2.3 Summary

An examination of the afore-noted few decisions shows that the golden thread running through all these decisions is that a case for applicability of the doctrine of legitimate expectation, now accepted in the subjective sense as part of our legal jurisprudence, arises when an administrative body by reason of a representation or by past practice or conduct aroused an expectation which it would be within its powers to fulfill unless

some overriding public interest comes in the way. However, a person who bases his claim on the doctrine of legitimate expectation, in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power. The court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. Therefore, a legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited.

3. Delegation Doctrine Law

The Delegation doctrine is a principle limiting Congress's ability to transfer its legislative power to another governmental branch, especially the executive branch. This is based on the separation-of-powers concept. It says that the power to declare whether or not there shall be a law, to determine the general policy to be achieved by the law, and to fix the limits within which the law shall operate is vested by the constitution in the legislature and it shall not be delegated. Therefore any statute conferring excessive legislative power is invalid because it is unconstitutional to delegate powers. Delegation is permitted only if Congress prescribes clear and adequate standards to guide an executive agency in making the policy.

All states whose constitutions contain a separation of powers doctrine have adopted some version of the delegation doctrine, which permits the legislature to delegate the administration of the law, to non legislative entities, such as administrative agencies. Thus, the delegation doctrine allows the legislature to focus on the fundamentals of a law leaving to the agencies the task of filling in the gaps by promulgating rules to administer the law. However, if legislation does not provide adequate standards for the agency charged with the task of filling in the legislative gaps, courts can invalidate the legislation.

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