CHAPTER - IV

CONTRACTUAL DOCTRINES

4.1 Introduction

The contractual doctrines are very vital for the ascertainment of contractual obligation in any case. The government contracts especially in India, we see many cases of non-implementation by any one party. There are different varieties of government contracts. Some examples are as follows

- Single transaction or Fixed Price contract
- Rate contract
- Running contract
- Cost plus percentage of cost contract
- Cost plus fixed fee contract

The selection of contractor is based mainly on two generalised process

- Competitive tendering
- Negotiative tendering

The competitive tendering can be classified into two types

- Open competitive tendering
- Non competitive tendering

4.2 Developments of Doctrines

The legislative and judicial development slowly has developed certain principles or doctrines that are very vital for the understanding of the law pertaining to government contracts.
Some of the important doctrines that has to be inevitably discussed are given as follows:

- Doctrine of Promissory Estoppel
- Doctrine of Ratification
- Doctrine of Implied Contract
- Doctrine of Equitable Restitution
- Doctrine of Proportionality
- Doctrine of Legitimate Expectation
- Doctrine of Executive Necessity

4.3 Doctrine of Promissory Estoppel

The doctrine of promissory estoppel is a doctrine of equity. It makes a promise irrevocable when the acceptor acts on the promise and irreversibly changes his position. The rationale behind this doctrine is that it is unfair if one party, acting on the promise of the other, does something to his detriment and receives no consideration because the promise is revoked.

The government can enter into a contract just like any other individual or entity. Today, state officials make promises to individual parties who enter into commitments on the basis of these promises, only to find that the government’s discretion cannot be relied upon. The defence of statutory provisions provide sufficient umbrage for the government to go back on promises. Therefore, in this time of escalating administrative and executive facets of the State, the doctrine of promissory estoppel has gained considerable importance in the field of administrative law. The sanctity of promises in our society lies in the societal and moral conventions that allow a promisor to be treated as bound to his promise. This moral convention is usually reflected in law by the enforcement of promises that are given in return of
other promises or consideration, compelling the promisor to perform his end of the promise or pay expectation damages. In order to maintain this, there are yet more moral rules which govern promises, statements and agreements. These are embodied in the concept of estoppel which may be invoked in case of a breach in contract or against the government. While it can be said that it is essential in a constitutional democracy that no one howsoever high or low is above the law and that everyone is subject to the law as fully as another, the government being no exception, it is also true that this in itself is not sufficient. There remain factors such as rule of law, sovereign immunity, public interest and appropriate regard for administrative veracity of public programs that must be taken into consideration when establishing a case against the government. Indian Courts have, even whilst taking these considerations into mind, estopped the government every so often and held it to its representations. However, there is no single interpretation that can explain all the cases and the judges take on it. The various requirements of promissory estoppel are hard to state and harder still to apply. The doctrine of estoppel is one that is based on equity and accordingly applied with respect to the circumstances of the case. Such application cannot follow a set of predictive rules. In essence, the courts are required to examine whether the injustice done to an individual outweighs the disadvantages to public interest. Lord Denning explained the balancing approach in a succinct manner as follows:

“The underlying principle is that the Crown cannot be estopped from exercising its powers, whether given in a statute or by common law, when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to the private individual...it can, however, be estopped, when it is not properly exercising its powers but is misusing them; and it
does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit to the public.”

4.4 Evolution of the Doctrine of Promissory Estoppel

The foundation of the doctrine of promissory estoppel in India, as such, was laid down in the ratio of Collector of Bombay vs Municipal Corporation of the City of Bombay. In this case, expressed the following view: “But even otherwise, that is if there was merely the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfil it. Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power”.

Nevertheless, it was in the case of Union of India vs Anglo Afghan Agencies that there was a manifest depiction of the newfound stress on the principles of equity under the doctrine. The Government of India announced certain concessions with regard to the import of certain raw materials in order to encourage export of woollen garments to Afghanistan. Subsequently, only partial concessions and not full concessions were extended as announced. The Supreme Court applied the rule of estoppel based on equity and maintained that such promises may bind the Government even in the absence of constitutional formalities prescribed for government contracts. The Anglo Afghan case depicted a judicial trend. The key to this trend was to be found in the following statement of the Supreme Court

“If our nascent democracy is to thrive different standards of conduct for the people and public bodies cannot ordinarily be permitted”

However, the judicial attitude in the matter of applying promissory estoppel in the post Anglo Afghan period with respect to applying promissory estoppel against

---

1 Central London Property Trust Ltd vs High Trees House Ltd, [1947] KB 130
2 1951 AIR 469, 1952 SCR 43
3 1968 AIR 718, 1968 SCR (2) 366
administrative remained ambivalent. The doctrine was applied in some cases, and not in others. It was in *Motilal Padampat Sugar Mills vs Uttar Pradesh*\(^4\) that the doctrine of promissory estoppel was expounded afresh and given its most liberal interpretation by the Supreme Court. In this case, the Government of U. P. notified a sales tax exemption for three years to all new industrial units with a view to increase industrial progress. The appellant company wanted to avail of the exemption by setting up a hydrogen plant for Vanaspati manufacturing. In answer to the appellant company’s enquiry, the Director of Industries confirmed the tax concession as announced by the government. The appellant company thereupon took steps towards getting finances for the project and the necessary machinery. The Chief Secretary and advisor to the government made a further oral assurance about the exemption from sales tax as well as gave a written confirmation. Later, the government announced only partial sales tax concessions. The appellant agreed to these concessions. At an even later date, however, the government rescinded the concessional rates and the appellant company challenged it. The facts necessary for invoking the doctrine of promissory estoppel were, therefore, clearly present and the Government was bound to carry out the representation and exempt the appellant from sales tax in respect of sales of Vanaspati effected by it in Uttar Pradesh for a period of three years from the date of commencement of the production. The Government was held bound to the principle of promissory estoppel to make good the prosecution made by it. The importance of equity was emphasised as it was held that the doctrine of promissory estoppel was not really based on the principle of estoppel and instead was evolved by equity in order to prevent injustice. It was pronounced that there was no reason why the doctrine should be given only a limited application by way of defence and that it could be the basis of cause of action. Justice Baghavati quoted "The law may, therefore, now be taken to

\(^{4}\) 1979 AIR 621, 1979 SCR (2) 641
be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promise and, in fact, the promise, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promise, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution.”

Another important aspect of the doctrine of promissory estoppel that was argued in this case was the complexity that arose with the conflicting doctrine of executive necessity. The doctrine of executive necessity prevents the government from contracting with another party to refrain from exercising its statutory functions. Since the term ‘statutory functions’ is a very broad one, this is a major constraint to the application of the doctrine of promissory estoppel to government contracts. It was held that the doctrine could not be defeated on the plea of executive necessity or freedom of future executive action. There is, however, much controversy regarding this particular decision as there is a conflicting decision in the case of *Shri Bakul Oil Industries vs State of Gujarat*[^5]. The court held In that case, the Government of Gujarat issued a notification under Section 49 (2) of the Gujarat Sales Tax Act, 1969 exempting wholly or partly from payment of sales tax or purchase tax, as the case may be, certain specified classes of sales and purchases in order to stimulate wider distribution of industrial units in rural areas.

The appellant company set up a plant for decorticating and crushing cotton and groundnut seeds for manufacture of oil. The plant and the appellant company satisfied all the requirements laid out in the notification. When the appellant company applied for the exemption, the government rejected the offer and amended the

[^5]: 1987 AIR 142, 1987 SCR (1) 185
notification saying that this particular category of plants is sufficiently well distributed in rural areas. The appellant company challenged the rejection in Court. The doctrine of promissory estoppel was not applied and it was held that the government was not estopped from amending the notification. Though the facts are almost similar, the decisions in these two cases are in conflict with each other. This presents a divergence of opinion. In recent times, there has been a leaning towards the decision in Shri Bakul Oil Industries v State of Gujarat\(^6\) because there has been an increasing tendency of the Courts to apply the doctrine of executive necessity in cases involving changes in public policy. This virtually makes the doctrine of executive necessity an effective defence against the doctrine of promissory estoppel.

The decision in the case of *M. P. Sugar Mills vs State of U. P.*\(^7\) is one that is more in consonance with the principles of equity. The rationale behind this opinion is that though the government may be justified in making a change in public policy in exercise of its statutory powers, it is necessary to put in safeguards against the retrospective effects of such a policy change. For example, the government may be justified in saying that all industrial units that are established from this date onwards will not be entitled to the benefits but it is not justified in saying that from this date onwards all industrial units, even those that have been established earlier, will no longer be entitled to the benefits that had provided them the incentive to be established in the first place. Therefore, in the author’s opinion, the doctrine of executive necessity should not be treated as an effective defence against the doctrine of promissory estoppel. Another contention that arose was in the case of *Jit Ram Shiv Kumar vs State of Haryana*\(^8\) which diluted the impact of the decision made in

---

\(^6\) AIR 1987 SC 142
\(^7\) 1979 SCR (2) 641
\(^8\) 1980 AIR 1285, 1980 SCR (3)
Motilal. It was held in this case that the doctrine of estoppel is not available against the exercise of executive functions of the state.

However, the Apex Court in *Union of India vs Godfrey Phillips India*<sup>9</sup> removed this doubt. The Court held that the law laid down in Motilal’s case represents the correct law on promissory estoppel. It is important to note that the doctrine of promissory estoppel cannot be invoked unreservedly keeping in mind factors such as rule of law and public interest. A wanton use of this doctrine would amount to rendering the government and its agencies ineffective, presenting a difficulty. Therefore, courts have laid down certain immunities to prevent the same.

The essence of the doctrine of estoppel lies in the notion of equity. Therefore it is only expected that the doctrine must yield to equity when so requisite. A promise cannot be enforced against the government if it is inequitable to do so. It was contended in *Motilal Padampat Sugar Mills vs State of Uttar Pradesh*<sup>10</sup> that where the government claims that public interest would be at stake by enforcement of a promise, the onus would be upon the government to prove the facts and circumstances confirming the same. It is on this basis that the court would decide whether it is inequitable to enforce liability against the government. However, a plea of change of policy is not deemed sufficient. It must be shown that overriding and overwhelming public interest required that the government be absolved of its past promise. The doctrine of promissory estoppel cannot be applied against the government if it endangers the constitutional powers of the government. Similarly, the plea of estoppel also may not be enforced against the government if it has the effect of repealing any constitutional provision intended for the protection of the general public. In *C. Sankaranarayan v State of Kerala*<sup>11</sup> a notification was issued under Article 309 of the

---

<sup>9</sup> [1975] 3 SCR 583  
<sup>10</sup> Supra note 4  
<sup>11</sup> 1971 AIR 1997, 1971 SCR 654
Constitution, raising the age for retirement while a later notification brought it down again. The Supreme Court, in this case, rejected the contention of estoppel and held that the powers conferred by Article 309 could not be curtailed by any agreement. Furthermore, the principle of estoppel cannot be invoked to defeat the plain provisions of a statute as there can be no estoppel against the law. The doctrine of estoppel cannot be called upon to render valid a transaction which the legislature has said to be invalid on the basis of general public policy. Neither can it be used to give the court jurisdiction which is denied to it by statute or to oust the court’s statutory jurisdiction under an enactment which precludes the parties contracting out of its provisions. The government cannot be compelled to carry out a representation if it is in contradiction with the law or beyond its authority. It cannot be applied in the exercise of legislative power. The legislature cannot be precluded from exercising its function by this doctrine.

While the contribution and role of the Supreme Court in the development of the doctrine of promissory estoppel has been significant, the author is discontent with the restrictive view and limited application of the doctrine. The powers and limitations given to the government have a social function to perform, namely for the benefit of its people. The transformation in the attitude of the Apex Court is not an agreeable one as it tilts the balance in favour of one against the other, with the government emerging victorious against the ordinary citizen.

The doctrine of promissory estoppel is necessary to place checks on the arbitrary powers of the State and this doctrine is one that would certainly serve that purpose by protecting the freedom to contract of citizens. In recent times, there is emphasis on government promises, especially in the realm of contract law and business transactions. It follows that an ordinary citizen who invests his assets based
on the government’s promise only to find that the government does not abide by its promise must be afforded protection.

4.5 Doctrine of Ratification

Ratification is a principal's approval of an act of its agent where the agent lacked authority to legally bind the principal. Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty. The term applies to private contract law, international treaties, and constitutions in federations such as the United States and Canada. The term is also used in parliamentary procedure in deliberative assemblies. In State of West Bengal vs M/S. B. K. Mondal And Sons\(^\text{12}\) the court held that government will not be responsible on informal contracts and ratification of the same will not be valid. The Government may not be bound by the contract but that is a very different thing from saying that the contract was void and of no effect and that it only meant that the principal (Government) could not be sued but there will be nothing to prevent ratification if it was for the benefit of the Government." Mr. Chatterjee points out that this observation shows that the contract with which the Court was dealing was not treated "as void and of no effect." It would be noticed that the observation on which Mr. Chatterjee relies has to be read in the context of the question posed for the decision of this Court and its effect must be judged in that way. All that this Court

\(^\text{12}\) 1962 AIR 779, 1962 SCR Supl. (1) 876
meant by the said observation was that the contract made in contravention of Art. 299(1) could be ratified by the Government if it was for its benefit and as such it could not take the case of the contractor outside the purview of s. 7(d). The contract which is void may not be capable of ratification, but, since according to the Court the contract in question could have been ratified it was not void in that technical sense. In *State of Bihar vs M/S. Karam Chand Thapar & Brothers*\(^\text{13}\) the Court held that ratification of invalid contract the government can be considered if it is benefiting the government. In *Mulamchand vs State of Madhya Pradesh*\(^\text{14}\) the court took a different view by observing that It is not disputed on behalf of the respondent that there was no formal compliance of the provisions of Art. 299 of the Constitution but it was said that the bids were accepted by the Deputy Commissioner Balagbat and were communicated to the appellant who worked the contracts and actually collected lac in the forests in question. The trial court refused to grant a decree to the appellant in this case with regard to this claim on the ground that the contract was not void and although there was no conformity with the provisions of Art. 299 of the Constitution there was nothing to prevent the ratification of such contracts if therefore the benefit of the Government. The trial court further observed that the appellant had performed his part of the contract and worked and collected lac from the jungles in pursuance of the agreement and was therefore not entitled to refund of the amount in deposit. The finding of the trial court on this point has been affirmed by the High Court which also came to the conclusion that the, appellant bad worked for some time on the basis of the contracts granted to him but, the appellant abandoned the contracts of his own accord and the State cannot therefore be held liable for, the refund of the amount of deposit”.

\(^{13}\) 1962 AIR 110, 1962 SCR (1) 827
\(^{14}\) 1968 AIR 1218, 1968 SCR (3) 214
4.6 Doctrine of Implied Contract

An implied contract is an agreement created by actions of the parties involved, but it is not written or spoken. This is a contract assumed to have been drawn. In this case, there is neither written record nor any actual verbal agreement. A form of an implied contract is an implied warranty provided automatically by law. The presence of Article 299 very clearly prohibits the validity and enforceability of implied contract in government contracts. There are many cases where the courts have taken the view that implied contracts will not have applicability in government contracts. It was held by the Hon'ble Supreme Court in the case of K.P.Chowdhary v State of Madhya Pradesh\(^\text{15}\) that "In view of the provisions of Article 299(1) there is no scope for any implied contract. Thus no contract can be implied under this Article. If the contract between the Government and a person is not in compliance with Article 299(1), it would be no contract at all and would not be enforceable as a contract either by the Government or by the person."

The Court justified this strict view by saying that if implied contracts between the government and other persons were allowed, they would in effect, make Article 299(1) a dead letter, for then a person who had a contract with the government which was not executed at all in the manner provided under Article 299(1) could get away by pleading that an implied contract be inferred from the facts and circumstances. However, the Courts have also realized that insistence on too rigid observance of all the conditions stipulated in Article 299 may not always be practicable. Hundreds of government officers daily enter into a variety of contracts, often of a petty nature, with private parties. At times, contracts are entered through correspondence or even orally. It would be extremely inconvenient from an administrative point of view if it

\(^{15}\text{AIR 1967 SC 203: (1966)3 SCR 919}\)
were insisted that each and every contract must be effected by a ponderous legal
document couched in a particular form.

4.7 Doctrine of Equitable Restitution and Unjust Enrichment

The law of restitution for unjust enrichment is so well developed in the
common law world today that it is impossible to conceive of a coherent system of
private law without it. In India, a part of this area is codified in sections 68-72 of the
Contract Act, 1872, and some outstanding judgments of the High Courts, particularly
before and around the 1950s for example as stated in DamodaraMudaliar v Secretary
of State\textsuperscript{16} for India, contain valuable accounts of how, if at all, the common law
principles have been modified by the Indian legislature. It is therefore especially
unfortunate that this branch of the law has subsequently not developed in India as one
might have expected; and the recent judgment of the Supreme Court in \textit{Nagpur
Golden Transport vs Nath Traders},\textsuperscript{17} with respect, may not be fully correct insofar as
these issues are concerned. In \textit{Nelson vs Larhol}\textsuperscript{18} Lord Denning has observed as
follows "It is no longer appropriate to draw a distinction between law and equity.

Principles have now to be stated in the light of their combined effect. Nor is it
necessary to canvass the niceties of the old forms of action. Remedies now depend on
the substance of the right, not on whether they can be fitted into a particular
framework. The right here is not peculiar to equity or contract or tort, but falls
naturally within the important category of cases where the court orders restitution if
the justice of the case so requires."

The important point to notice is that in a case falling under s. 70 the person
doing something for another delivering something to another cannot sue for the
specific performance of the contract, nor ask for damages for the breach the contract,

\textsuperscript{16} 1894 I.L.R. 18 M. 88 at 92
\textsuperscript{17} [2012] 1 SCC 555
\textsuperscript{18} [1948] 1 K.13. 330,14
for the simple reason that there is no contract between him and the other person for whom he does something to whom he delivers something. So where a claim for compensation is made by one person against another under s. 70, it is not on the basis of any subsisting contract between the parties but a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution. *Infibrosa v. Fairbairn*¹⁹ Lord Wright has stated the legal position as follows "any civilised system of law is bound to provide remedies for cases of that has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

Perhaps the best exposition of the law of unjust enrichment is to be found in the work of the legendary Professor Peter Birks, and an interested reader may also find it helpful to refer to the comprehensive textbooks in the field (such as Burrows and Virgo). Two features sharply distinguish a claim in unjust enrichment from a claim in contract or tort – one, that it is founded neither on consent nor on wrongdoing, and secondly, that it is concerned not with compensating the loss the claimant has suffered (unlike compensation for breach of contract or damages for a tort), but with “disgorging” the gain the defendant has made “at the claimant’s expense”. It is, therefore, as Professor Birks puts it in his famous “map” of private law, an “independent causative event” that consists of four elements: (i) enrichment of the defendant; (ii) at the expense of a claimant; (iii) an unjust factor and (iv) defences, such as change of position. While the scope and correct interpretation of all of these

¹⁹ 1943 A.C. 32,61
elements are a source of considerable controversy, it is safe to say that the traditional insistence of the English and other common law courts on an “unjust factor” is what separates the common law’s approach from the civilian approach. In the common law, an “unjust factor” is a recognised reason for or basis of granting restitution to the claimant – the English courts have repeatedly emphasised that “unjust enrichment” is not just any enrichment that appears to be “unjust” or “unfair”, but enrichment that is founded on a judicially recognised unjust factor. These unjust factors are, without attempting to be exhaustive: (i) mistake (this is the archetypal unjust factor); (ii) undue influence and duress and (iii) failure of consideration. There are other unjust factors, such as ignorance/powerlessness, free acceptance, Woolwich claims, contribution/reimbursement etc., whose existence or characterisation is contested by some. It is axiomatic, therefore, that a claimant cannot obtain restitution for unjust enrichment simply by demonstrating that the defendant has been enriched and that this is “unfair” or “unjust” on the facts of the case or by “balancing the equities”. The unjust factor is as distinctly a question of law as is establishing in a negligence claim that there was a duty of care, or in a breach of contract claim that there was a valid contract. The word “unjust” should not be taken to suggest otherwise.

In *Nagpur Golden Transport*, the facts were that a consignor entered into a contract with a carrier (Nagpur Golden Transport, NGT) to transport and deliver monoblock pumps to the consignee. The consignee had paid the consignor the price of these pumps, Rs. 3,61,000. As a result of an accident involving the vehicle in which NGT carried these goods, the pumps were damaged and the consignees refused to take delivery. NGT accordingly returned the 198 damaged pumps to the consignor. The consignee then brought a claim, not against the consignor, but against NGT, in

---

20 Supra Note 17
the Consumer Forum, Gwalior, alleging negligence. This claim succeeded and NGT was directed to pay a sum of Rs. 3,61,000 (representing the payment made by the consignee), plus damages and interest. In its appeal to the Supreme Court, the question was whether, in view of its payment of this sum to the consignees, it was entitled to demand that the consignor return the 198 pumps which NGT had delivered to it on the consignee’s rejection of the goods.

At first sight, the “justice” of NGT’s case is powerful: after all, it does not seem right that the consignor retains the 198 pumps (the goods sold) as well as the Rs. 3,61,000 (the sale proceeds) or that in effect NGT had paid the consignee what in truth was the liability of the consignor (assuming that the consignee was entitled to reject the goods as defective). Yet, on closer analysis, there are considerable difficulties: for one, even assuming that the first and second elements of a claim in unjust enrichment are satisfied (enrichment and “at the expense of”), there is no obvious unjust factor that is attracted – NGT did not return the 198 pumps to the consignor under a “mistake”; nor was there a “failure of consideration” unless it is said that the “basis” of the return of goods was that the NGT would not be liable to the consignee. It may also be that NGT had “discharged” a “debt” owed by the consignor to the consignee in respect of the defective goods and that this was sufficient for it to claim in restitution from the consignor. In both of these cases, however, the Court would have had to consider difficult questions of law; in the first case the true scope of the unjust factor of failure of consideration and in the second whether it is at all possible for X to discharge A’s debt to B without A’s consent, and even if it is, whether “free acceptance” is a recognised unjust factor. If the Court had answered either question against the claimant, it would have had to reject the claim, no matter how “unfair” or “unjust” it appears to allow NGT what appears to be a windfall.
The Supreme Court decided that the consignor was liable to either return the 198 pumps to NGT or pay its realisable value. It gave the following reasons:

If the damaged monoblock pumps are not returned by respondent No.3 to the appellant or if the value of the damaged monoblock pumps realized by respondent No.3 are not paid to the appellant, respondent No.3 would stand unjustly enriched. To quote Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd*\(^{21}\) "Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

It is submitted, with great respect, that this analysis is not persuasive. For one, the Supreme Court did not consider what the unjust factor (if any) might be; nor did it, with respect, apply Lord Wright’s observations accurately. Far from holding that any enrichment that appears to be unjust on the facts of the case attracts the principle of unjust enrichment, Lord Wright’s observations in *Fibrosa v Fairbairn* actually represent a landmark in the English law of unjust enrichment, for it was this case that discarded what has subsequently been called the “heresy” of *Chandler v Webster*\(^ {22}\), in which Collins MR had held that “consideration” for the purposes of failure of consideration is to be understood as “consideration” in a contractual sense, with the result that there is no failure of consideration even when a contract is frustrated (because the “promise” to perform has not failed; only the performance of the promise has). In *Fibrosa*, Lord Wright recognised that “consideration” for the purposes of the

---

\(^{21}\) [1942] 2 ALL ER 122 (HL)

\(^{22}\) [1904] 1 KB 493
law of unjust enrichment normally refers to failure of the performance of the promise (as opposed to the promise itself), and it is a passage from this speech that the Supreme Court has quoted above. However, in Fibrosa, there clearly was a failure of consideration since a contract had been frustrated, whereas in Nagpur Golden Transport, failure of consideration could not have been invoked unless it was shown that the “basis” or “purpose” (construed objectively) of the delivery of goods by NGT to the consignor was that the consignor would return those goods in the event NGT found itself liable to pay damages to the consignee. Since the matter has now been remanded to the Consumer Forum on a question of fact, it appears that the Supreme Court has approved a claim in unjust enrichment without finding that there is an unjust factor, which, with respect, is not correct.

One very important which need a consideration here is that whether one can recover any payment made by him to the Government under a contract which is not in conformity with Article 299 (1). What is the base of restitutory claim against the government? For instance a person pays tax under a tax law which is ultra vires, whether he can claim refund of the amount paid under a void statute? These cases relate restitution to the public law doctrine of ultra vires. No charge can be levied by the administration without the authority of law so any payment in response to an unlawful official demand ought to be refunded unless there is a very good reason to the contrary. For some time however the courts are moving away the broad ultra vires principle to the narrow principle of restitution as contained in section 72 of Indian Contract Act There is no distinction made under section 72 between mistake of fact and mistake of law. However Supreme Court in ruled that the expression “Mistake” under section 72 is wide enough to include both mistake of fact and mistake of law. In State of Madhya Pradesh v. Bhailal Bhai sales tax were being levied by the

23 http://indiacorplaw.blogspot.in/2012/01/unfortunate-judgment-india-and-law-of.html
24 AIR 1963 SC 928
Government which the petitioner made the payment of tax later, the tax was held to be unconstitutional. Applicability of Doctrine of Estoppel to Government Contracts:

So far law has been made clear that if effect is given to the contract which is not in conformity with Article 299 (1) it will amount to by-passing a very important Constitutional provision. A contract which is not in conformity with article 299 (1) is void, it cannot be enforced against any party either government or private party. If the contention of the respondent regarding the ratification and estoppel is accepted that would render a very important provision useless, which is a safeguard for general public.

4.8 Doctrine of Proportionality

The classical definition of proportionality has been given by none other than Lord Diplock when his Lordship rather ponderously stated “you must not use a steam hammer to crack a nut if a nut cracker would do. Thus proportionality broadly requires that government action must be no more intrusive than is necessary to meet an important public purpose. However the greatest advantage of proportionality as a tool of judicial review is its ability to provide objective criteria for analysis. It is possible to apply this doctrine to the facts of a case through the use of various tests.

Indian Supreme Court consciously considered the application of the concept of proportionality for the first time in the case of *Union of India v. G. Ganayutham*[^25]. In that case the Supreme Court after extensively reviewing the law relating to Wednesbury unreasonableness and proportionality prevailing in England held that the Wednesbury unreasonableness will be the guiding principle in India, so long as fundamental rights are not involved. However the court refrained from deciding whether the doctrine of proportionality is to be applied with respect to those cases involving infringement of fundamental rights. Subsequently came the historic

decision of the Supreme Court in Omkumar vs Union of India.\textsuperscript{26} It was in this case that the Supreme Court accepted the application of proportionality doctrine in India. However, strangely enough the Supreme Court in this case suddenly discovered that Indian courts had ever since 1950 regularly applied the doctrine of proportionality while dealing with the validity of legislative actions in relation to legislations infringing the fundamental freedom enumerated in Article 19 (1) of the Constitution of India. According to the Supreme Court the Indian courts had in the past in numerous occasions the opportunity to consider whether the restrictions were disproportionate to the situation and were not the least restrictive of the choices. The same is the position with respect to legislations that impinge Article 14 (as discriminatory), and Article 21 of the Constitution of India. With respect to the application of the doctrine of proportionality in administrative action in India, the Supreme Court after extensively reviewing the position in England came to a similar conclusion. The Supreme Court found that administrative action in India affecting fundamental freedoms (Article 19 and Article 21) have always been tested on the anvil of proportionality, even though it has not been expressly stated that the principle that is applied is the proportionality principle\textsuperscript{47}. With respect to Article 14 of the Constitution of India, Supreme Court concluded that when an administrative action is challenged as discriminatory the courts would carry out a primary review using the doctrine of proportionality.\textsuperscript{27}

\textbf{4.9 Doctrine of Legitimate expectation}

Concept of legitimate expectation in administrative law has now gained sufficient importance. "Legitimate Expectation" is the latest recruit to the long list of concepts fashioned by the Courts for the review of administrative actions, and this

\textsuperscript{26} Supreme Court, Special Leave Petition (Civil) 21000 of 1993
\textsuperscript{27} Administrative Action And The Doctrine Of Proportionality In India

creation takes its place beside such principles as the rules of natural justice, unreasonableness, the judiciary duty of local authorities and in future perhaps, the principle of proportionality. The Word "Legitimate Expectation" is not defined by any law for, the time being in force. Yet it is another doctrine fashioned by the Court to review the administrative action.

Legitimate expectation applies the principles of fairness and reasonableness to a situation where a person has an expectation or interest in a public body or private parties retaining a long-standing practice or keeping a promise. The doctrine of legitimate expectation pertains to the field of public law. It protects an individual from an arbitrary exercise of administrative action by the public body although it does not confer a legal right on the claiming individual. The term legitimate expectation was first used by Lord Denning in 1969 and from that time it has developed into a significant doctrine all over the world. Supreme Court in India has developed the doctrine of legitimate expectation in order to check the arbitrary exercise of power by the administrative authorities. As per this doctrine the public authority can be made accountable on the ground of an expectation which is legitimate. For example, if the Government evolves a scheme for providing electric poles in the villages of a certain area but later on changed it so as to exclude some villages from the purview of the scheme then in such a case what is violated is the legitimate expectations of the people living in the villages excluded from the scheme and the government can be held responsible if such exclusion is not fair and reasonable. Thus this doctrine becomes a part of the principle of natural justice enshrining right to hearing to a person to be affected by an arbitrary exercise of power by the public and no one can deprive a person of his legitimate expectations without following the principles of natural justice.\(^\text{28}\)

“A man should keep his words. All the more so when promise is not a bare promise but is made with the intention that the other party should act upon it. Legitimate expectations may come in various forms and owe their existence to different kinds of circumstances e.g. cases of promotions which are in normal course expected, contracts, distribution of largess by the Government and somewhat similar situations i.e. discretionary grants of licences, permits or the like, carry with it a reasonable expectation though not a legal right to renewal or non-revocation, and to summarily disappoint that expectation maybe seen as unfair without the expectant person being heard. The court has to see whether it was done as a policy or in the public interest. A decision denying a legitimate expectation based on such grounds does not qualify for interference unless in a given case the decision or action taken amounts to an abuse of power. Therefore the limitation is extremely confined and if the doctrine of natural justice does not condition the exercise of the power, the concept of legitimate expectation can have no role to play and 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. In a case where the decision is left entirely to the discretion of the deciding authority without any legal bounds and if the decision is taken fairly and objectively the Court will not interfere on the ground of procedural unfairness to a person whose interest based on legitimate expectation might be affected. 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. The principle of legitimate expectation is closely connected with a 'right to be heard'. Such an action may take many forms. One

30 Union of India vs Hindustan Development Corp., (1993) 3 SCC 499 at 548
may be expectation of prior consultation. Another may be expectation of being allowed time to make representations, especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure\(^3\). Legitimate, or reasonable, expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.\(^3\)

The doctrine of “Legitimate Expectation” plays an important role in the development of administrative law, in particular law relating to “Judicial review”. Under the said doctrine a person may have reasonable or legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right to receive the benefit and in such a situation an expectation may arise either from the express promise or from regular practice which the applicant reasonably expects to continue\(^3\). It cannot be over emphasized that the concept of legitimate expectation has now emerged as an important doctrine and in appropriate cases constitutes an enforceable right. The principle at the root of the doctrine is rule of law which requires regularity, predictability and certainty in Government’s dealing with public\(^4\)

The principle of legitimate expectation is concerned with the relationship between administrative authority and the individual. An expectation can be said to be legitimate in case where the decision of the administrative authority affects the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be

\(^{31}\) (1984) 3 All.EA 935 at 954
\(^{32}\) R. vs Secretary of State of Transport Exporte Greater London Council, (1985)3 All.LR 300
\(^{33}\) Confederation of Ex-Servicemen Assns. vs U.O.I, AIR 2006 SC 2945
\(^{34}\) M.P oil Extraction co.vs State of M.P, (1997) 7 SCC 592
permitted to continue until some rational grounds for withdrawing it are communicated to such an individual or party and the affected person/party has been given an opportunity of hearing, or (ii) the affected person has received assurance from the concerned administrative authority that it will not be withdrawn without giving him first an opportunity of advancing reason for contending that they should not be withdrawn by the administrative authority. The principle means that expectations which are raised as a result of administrative conduct of a public body may have legal consequences. Either the administration must respect those expectations or provide reasons as to why the public interest must take priority over legitimate expectation. Therefore, the principle concerns the degree to which an individual’s expectations may be safeguarded in the light of a changed policy which tends to undermine them. The role of the court is to determine the extent to which the individual’s expectation can be protected with the changing objective of the policy.35

4.10 Doctrine of Executive Necessity

The **Doctrine of Necessity** is the basis on which extra-legal actions by state actors, 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 extra-legal action have been advanced by more recent legal authorities, including William Blackstone.

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.

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. The basic rule underlying this principle is that ‘Justice must not only be done but must also appear to be done’.

In J. Mahopatra and Co. vs State of Orissa\textsuperscript{36} the contention of doctrine of necessity was rejected by the Supreme Court on the ground that though members of the subcommittee were appointed by virtue of their official positions, they were holding positions in the secretary education department of the government of Orrisa and the director higher education etc. There was, however, nothing to prevent those whose books were submitted for selection from pointing out this fact to the state government so that it could amend its resolution by appointing a substitution or substitutes as the case may be. There was equally nothing to prevent such non-official author members from resigning from the committee on the ground of their interest in the matter.

\textsuperscript{36} 1984 AIR 1572, 1985 SCR (1) 322
In *Institute of Chartered Accountants vs L.K. Ratna*\(^\text{37}\) the court held that in absence of statutory compulsion the principles of necessity does not apply. In *Ashok Kumar Yadav vs State of Haryana*,\(^\text{38}\) Supreme Court showed that Doctrine of necessity acts as an exception to official bias. During the selection process in Haryana State Public Service Commission, relative of the member of the Selection Board was interviewed and later personal relationship was alleged as a ground to strike down the decision of the Selection Board. There can be no doubt that if a selection committee is constituted for the purpose of selecting candidates on merits and one of the members of the Selection Committee is closely related to a candidate appearing for selection, it would not be enough for such member merely to withdraw altogether from the entire selection process and ask the authorities to nominate another person in his place on the selection committee, because otherwise all the selection made would be vitiated on account of reasonable likelihood of bias affecting the process of selection. But the situation here is different as the selection of candidates to Haryana Civil Service (Executive) and allied services, is not done by a selection committee made for the purpose but is provided for by Article 316 of the Constitution of India. Hence, the same principle as in case of personal relationship cannot be applied in this case. If a member of Public Service Commission were to withdraw altogether from the selection making process on the ground that a close relative of his appearing for selection, no other person save a member can be substituted in his place. And it may also happen sometimes that no other member is available at all and hence functioning of Public Service Commission may be affected. In this case hence, Supreme Court invoked the Doctrine of Necessity expressly and held that the decision by the Committee valid and un tarnished by any sort of bias. Chinappa Reddy, J took the

\(^{37}\) 1987 AIR 71, 1986 SCR (3) 1048  
\(^{38}\) 1987 AIR 454, 1985 SCR Supl. (1) 657
same stand in deciding another such similar case Javid Rasool Bhat vs State Of Jammu and Kashmir.\textsuperscript{39}

The "doctrine of necessity" was pleaded on the ground that the regulation of the company provides that the disciplinary authority that happens to be Chairman cum Managing Director was required to preside over the meeting of the board. The court referring to the regulation of the company held that the regulation does not so provide and the board can be constituted excluding the Chairman-cum-Managing Director.

The "Doctrine of Necessity" is held not applicable. Doctrine of Necessity acts as an exception to ‘\textit{Nemo judex in causa sua}\textsuperscript{40}'. 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 favour 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’

\textsuperscript{39} 1984 AIR 873, 1984 SCR (2) 582
\textsuperscript{40} "No-one should be a judge in his own cause"
4.11 First use of the Doctrine in Pakistan

On October 24, 1954 the Governor-General of Pakistan, Ghulam Mohammad, dissolved the Constituent Assembly and appointed a new Council of Ministers on the grounds that the existing one no longer represented the people of Pakistan. Stanley de Smith argues that the real reason for the dissolution was because Mohammad objected to the constitution which the Assembly was about to adopt. The President of the Constituent Assembly, Maulvi Tamizuddin, appealed to the Chief Court of Sind at Karachi to restrain the new Council of Ministers from implementing the dissolution and to determine the validity of the appointment of the new Council under Section 223-A of the constitution of Pakistan.

In response, members of the new Council of Ministers appealed to the court saying that it had no jurisdiction to approve the request of the President to overturn the dissolution and appointments. They argued that Section 223-A of the constitution had never been validly enacted into the Constitution because it was never approved of by the Governor-General, and therefore anything submitted under it was invalid. The Chief Court of Sind ruled in favour of President Tamizuddin and held that the Governor-General's approval was not needed when the Constituent Assembly was acting only as a Constituent Assembly and not as the Federal Legislature. The Federation of Pakistan and the new Council of Ministers then appealed to the court, the appeal was heard in March 1955.

In the appeal hearing under Chief Justice Muhammad Munir, the court decided that the Constituent Assembly functioned as the 'Legislature of the Domain' and that the Governor-General's assent was necessary for all legislation to become law. Therefore, the Chief Court of Sind had no jurisdiction to overturn the Governor General's dissolution and it was held as valid.
However, the ground of which the court found in favour of the Federation of Pakistan called into question the validity of all legislation passed by the Assembly, not to mention the unconstitutionality of the Assembly itself since 1950. To solve this problem, the Governor-General invoked Emergency Powers to retrospectively validate the Acts of the Constituent Assembly. An appeal was filed against the Governor-General for invoking emergency powers and the Chief Justice had to determine the constitutionality of invoking the Emergency Powers and whether the Governor-General could give his assent to legislation retroactively.

The Court held that in this case the Governor-General could not invoke emergency powers because in doing so he validated certain laws that had been invalid because he had not assented to them previously. Justice Munir also ruled that constitutional legislation could not be validated by the Governor General but had to be approved by the Legislature. The lack of a Constituent Assembly did not transfer the Legislature's powers over to the Governor-General.

The government contracts entered should not always be affected because of the application of the doctrine of executive necessity. The application of the doctrine of executive necessity should be bonafide and malafide use should be restricted.

4.12 Conclusion

The contractual doctrines referred above clearly indicate that the government contracts and their subsequent disputes have been interpreted in the lights of these doctrines which are well established principles in the field of law. The judiciary should maintain sustainability with the help of these doctrines in all cases where government contracts are interpreted for their validity and enforceability.