From *Preston* to *Prescott*: Globalizing Legitimate Expectation

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Discretionary acts and legitimate expectation: concepts central to a new approach.

Two principal concepts have come to dominate the legal approach to the review of administrative acts by the judiciary. A long-standing tradition has established the discretionary nature of acts of the administration, what generally meant that such acts were not subject to judicial review.[2] However, this very concept was qualified in a number of ways, particularly when some form of abuse of power or procedural irregularity tainted the act.[3] The second and more recent concept has been that of legitimate expectation, dealing in part with procedural matters but also with substantive expectations.

Both concepts, while originating in domestic decisions, have come to an important degree of global application, mainly by means of the work of international administrative tribunals and in some specialized matters by tribunals established under the ICSID Convention. This contribution shall examine the main evolution of these jurisprudential developments and how they offer new perspectives on the approaches taken by domestic and

international tribunals in handling the issue of individual rights in the context of the administrative acts of the State.

Regulatory power and its limits.

In order to better understand the issues underlying this evolution it is necessary first to identify which are the main legal interests that need to be taken into account and protected to the extent appropriate by the law.

The first such interest is the right of the State to adopt regulatory measures in implementation of legislation and other expressions of sovereignty. This right, generally brought under the vague concept of administrative or police powers, has not been questioned nor could it be unless one is aiming at the total dissolution of State functions. Even in the context of a globalized legal structure this dissolution is not quite evident nor is it likely to be so in the future.

The second legal interest at stake is that regulatory authority cannot be validly exercised if it violates the framework of legal rights and obligations in which it operates. It is quite clear today, for example, that regulatory measures cannot be validly adopted contrary to constitutional standards, legislative mandate or human rights. This will be subject to scrutiny both by constitutional bodies, judicial entities or even international mechanisms.

As noted above, the concept of discretionary powers has been progressively qualified so as to prevent the abuse of discretion that

ultimately results in abuse of power. Courts have been generally open to consider the review of irregularities that could have such a result, first in the context of procedural irregularities and next in substantive terms, dealing with issues such as improper motive and discrimination.

Beyond the tradition of domestic courts it is of interest to note that some key decisions adopted by international administrative tribunals incorporated this very approach into international law.

The contribution of International Administrative Tribunals.

As was explained by Judge Gentot at a recent Conference convened by the World Bank Administrative Tribunal on the comparative experience of these entities,

> "All tribunals appear to allow for the possibility of limited reviews of cases involving the exercise of discretionary power, although the language used to describe such reviews is not always identical (even within the same tribunal). It is a widely held belief that while discretionary power is not synonymous with arbitrary action (and that it therefore must be subject to review), judges should not substitute their own assessments for those of organizations (meaning their reviews must therefore be limited). Whatever the terminology used, it would seem that judges have the right — and the duty — to censure decisions (even if the decisions resulted from the exercise of discretionary power)

> which were issued by an authority that was not competent to act in the situation, which were taken in violation of procedural rules, which were based on errors of fact or of law, or which indicate the existence of abuse or misuse of authority".[4]

This approach has been constantly affirmed since the *Desgranges* case, decided in 1953 by the Administrative Tribunal of the International Labor Organization.[5] As explained by Judge Valticos in the same Conference referred to above, "the *Desgranges* opinion had, as early as *1953,* begun to sound the death knell of an absolutist concept of discretionary power…".[6] Recent decisions of the Administrative Tribunals of the International Labor Organization,[7] the International Monetary Fund,[8] the World Bank[9] and the Council of Europe[10] have all confirmed this understanding of the limits of discretionary power and the existence of a limited power of judicial review.

As with the decisions of domestic courts, the gradual refinement of the limits of discretionary powers has been noticeable in the jurisprudence of international tribunals. The grounds for review have generally been related to the concept of *détournement de pouvoir,* substantive irregularities or procedural irregularities. In this connection, for example, the most common phrase appearing in the decisions of the World Bank Administrative Tribunal is that the Tribunal will not interfere with the exercise of discretion unless the decision contested "constitutes an abuse of

discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure".[11]

Extending the protection of individual rights.

Various developments, however, have taken this broad definition further so as to take care of changing concerns in respect of individual rights. Some particularly noteworthy developments are the following:

(i) Processes. In many cases a tribunal will be concerned not so much with a single decision that might affect an individual but with a decisional process as a whole. While a decision in itself might not be seriously objectionable, the aggregate of decisions taken might eventually amount to an abuse of discretion. Such adverse process can reveal "errors of judgment which taken together amount to unreasonableness and arbitrariness".[12]

(ii) Commitments. Tribunals generally, and the World Bank Administrative Tribunal in particular, have emphasized the need for the administration to honour the commitments made to individuals. It has thus been held, for example, that the "possibility exists also that there may be something in the surrounding circumstances which creates a right to the conversion of a fixed-term appointment to a permanent one".[13] In a recent case it was found that a promise of conversion had been validly made and that the Applicant had met the required conditions; a decision not to convert was therefore held to be an abuse of discretion.[14]

(iii) Quasi-judicial powers. Some discretionary powers amount in fact to the exercise of a quasi-judicial function by the administration, as is typically the case of the adoption of disciplinary measures. The standard of review generally becomes stricter in this connection and might lead the Tribunal to examine the decision *de novo,* as if the Tribunal itself had been requested to take the decision originally.[15]

(iv) Appellate jurisdiction. In some matters administrative tribunals are given a special appellate jurisdiction. This jurisdiction is both exceptional and broader than the mere review of managerial discretion.[16]

(v) Legislative functions. In the leading case of *de Merode,* the World Bank Administrative Tribunal gave a first step in reviewing administration policies that might affect fundamental and essential elements of the rights and duties of staff members.[17] In that case it introduced a meaningful limitation to the exercise of discretion in this context holding that such elements, unlike those which are less fundamental, cannot be changed without the consent of the individual concerned. A second step in this direction relates to the regular review by tribunals of legislation that entails discrimination or other anomalies.[18]

<u>Judicial review of legislative authority</u>.

Recently, however, the need arose to take this review a step further on account of the legislation enacted by the World Bank on pension reform. In *Crevier* and other cases that followed, the Applicant and the Staff

Association raised, in addition to discrimination and other alleged deficiencies, an objection to the very objective pursued by the reform and its inspiring philosophy independently from the manner how this could affect the individual claimant.[19] The World Bank Administrative Tribunal examined each aspect of the Applicant's contentions in order to establish the reasonableness and fairness of the Bank's legislation, which it upheld. It follows, therefore, that in certain circumstances the enactment of legislation by administrative bodies can be reviewed as a discretionary power subject to limitations.

The evolving scope of legitimate expectation.

The marked evolution characterizing judicial review of discretionary powers gradually led to the emergence of the second concept of interest, that of legitimate expectation. English courts in particular have refined the application of this concept, also following a gradual progression.

As with many other contemporary legal developments, it was Lord Denning who emphasized the role of legitimate expectation in protecting the rights of the citizen before the State.[20] It has been rightly explained that at first the main ground for the intervention of the courts in the light of this concept was to enforce procedural rights, and hence emphasis was placed on how decisions were adopted rather than on their content.[21] This soon led, however, to the *Wednesbury* principle allowing for judicial intervention when the content of a decision is manifestly unreasonable.[22]

Although at first the standard of review was not entirely clear or defined, in 1985 the House of Lords gave an important step forward in the *Preston* case.[23] A decision may be *ultra vires* and amount to an abuse of power through unfairness, arbitrariness or other situations. As expressed by Lord Templeman:

> "Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers".[24]

Similarly Lord Scarman stated that "the principle of fairness has an important place in the law of judicial review…".[25] A century earlier Lord Russell had also underlined that the limits of the court's benevolence is related to those regulations that are "manifestly unjust, partial, made in bad faith or so gratuitous and oppressive that no reasonable person could think them justified".[26] Or in the words of Judge Bingham, "the doctrine of legitimate expectation is rooted in fairness".[27]

As cases determined a progression in the reasoning underlying the concept of legitimate expectation, many views were expressed either in support or criticism of new approaches.[28] The fact is, however, that the progression continued. This is perhaps well evidenced in the recent case *R. v. North and East Devon Health Authority, ex p. Coughlan* [29], where the

Court of Appeal in England sought to redress the inequality of power between the citizen and the State.[30] In this case it was held that:

> "Where the Court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is son unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."[31]

The Court, having examined prior cases, then added:

> "The court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or extant promise".[32]

Reasonableness and fairness thus became the central tenets of the conceptual evolution linking the control of discretionary power with legitimate expectation and not just with the traditional standards guiding the role and availability of judicial review.

Legitimate expectation before international tribunals.

Just as the evolution of the review of discretionary powers before national courts led to a subsequent development in the same direction before international tribunals, so too the emergence of legitimate expectation attending rather to the substance of the claim has had similar repercussions before such international tribunals.

The various directions indicated above in respect of processes, commitments, appellate jurisdiction, quasi-judicial powers and legislative functions were largely related to the issue of fairness and reasonableness, in addition to elements connected with due process. Procedure and substance thus came together, albeit many times inadvertedly.

The question of fairness and reasonableness became paramount in a series of recent cases decided by the World Bank Administrative Tribunal in respect of the pension reform enacted by the Bank and its implications for Non-Regular Staff members, who were not included in the reform. Unjustifiable differentiation was one of the arguments raised in the claims concerning this situation, thus pointing again in the direction of the substantive content of the decisions questioned.

In *Caryk* and *Madhusudan*, after considering various initiatives directed to correct adverse consequences of the pension reform, the Tribunal held:

> "These examples of policy initiatives or studies…show that the

> Respondent, far from being involved in a *détournement de pouvoir* and *détournement de procedure*, was sensitive to a wide range of different, and occasionally conflicting, factors. The task of the Tribunal cannot possibly be to judge whether the Respondent could have been wiser".[33]

Procedural and substantive aspects thus became intertwined in the reasoning of the Tribunal, but the observance of the privileges of managerial discretion still prevailed. This reasoning was taken a step further in the *Prescott* case where no longer managerial discretion would be considered enough if considerations of fairness should determine a different outcome. The Tribunal thus held:

> "As a general principle, the Bank did not have an obligation to regularize the Applicant. This was a discretionary decision, which was final unless the decision constituted an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure. But under the applicable policy and rules, and in the context of contemporaneous communications to staff and managers, the Bank had an obligation to consider his regularization after four years in the light of the unique circumstances of the case. The Bank undertook no such consideration and thus failed to comply with this obligation. Moreover, the Bank at the time offered no

valid reason for this failure".[34]

The Tribunal concluded that the managers concerned had abused their discretion having incurred in an element of arbitrariness.[35] While not explicitly mentioning legitimate expectation, in fact the whole case dealt with the legitimate expectation of Mr. Prescott to be regularized in the light of the policies and the statements of the Bank's managers. This legitimate expectation was violated and hence the Tribunal upheld the claim, not quite on the consideration of procedural aspects but rather on the importance attached to fairness and substantive rights of the individual. On the basis of this decision the Bank's management and the staff later came to an agreement about extending the pension reform and related benefits to some classes of Non-Regular Staff.

Although the conceptual evolution examined has been mostly related to the field of administrative law, whether domestic or international, its implications for the broader spectrum of international law are becoming increasingly evident. There is also a growing connection of this matter with the international law of human rights.[36]

Influencing the law on foreign investments.

It is first important to note that this concept has not only permeated the work of international administrative tribunals but also that of a number of other tribunals dealing in particular with foreign investment. The case law of ICSID and NAFTA shows an increasing concern for the right

interpretation of the "fair and equitable" treatment and other standards of substance embodied in Bilateral Investment Treaties and similar instruments.[37] Although there are wide variations in the reasoning of tribunals on this question, the basic underlying premise seems to be that what is reasonable and fair on the part of States and investors alike ought to prevail, but what is abusive ought to be controlled.

Next it is also evident that the process of protecting foreign investment is becoming global through numerous bilateral investment treaties.[38] To this extent the standards of treatment become global in their application. This phenomenon is enhanced by other concurrent developments, most notably the enactment of broad multilateral conventions such as the Energy Charter Treaty[39] or the application of the most favored nation clause to both procedural arrangements and substantive treatment accorded to foreign investors.[40]

Since a good number of claims deal with administrative decisions by governments and local authorities, the reasoning that international tribunals might wish to apply is not altogether different from the reasoning that domestic tribunals have followed. In many instances legitimate expectation arising from contracts or other forms of agreement and from legal principles of general application will be at the heart of the dispute, thus allowing the tribunal to examine with grater ease the substantive treatment

embodied in the treaties or applicable legislation and principles. The process as a whole relates then to a broader question of legal interpretation.

Influencing the development of international law.

It is in this process that also the role of general international law becomes important, The "fair and equitable treatment" or other standards of protection might change from case to case, be broader or narrower in the light of bilateral investment treaties, the NAFTA, the Energy Charter Treaty or to the extent applicable customary law,[41] but what finally matters is that such standards and their judicial implementation cannot fail to protect individual rights from arbitrariness and excess on the part of regulatory bodies.[42] The philosophy underlying these developments is then the same.

There is still one other development that must be borne in mind for it might have important implications for international law. Thus far the immunities of States before foreign courts has included without hesitation administrative law matters as they are associated to the concept of sovereign power and the exercise of discretionary power by States. However, as noted by Lady Fox, "The exclusive powers of regulation of its civil service and internal administration for which States have reciprocally granted each other immunity dates from a period before the development of judicial review of governmental activities".[43]

Because in later periods both domestic and international courts have increasingly resorted to judicial review of discretionary acts, the inevitable question is then "Should the law of State immunity accommodate this increased supervision of government by including within the commercial exception matters which have given rise to a legitimate expectation on the part of an individual?" [44]

This proposition has been met with both favorable and unfavorable opinions. The latter are of course associated to the view that no court can sit in judgment of the sovereign acts of foreign States.[45] However, Professor Ian Brownlie has already cautioned against a distinction that would allow private law claims to be decided by foreign courts and not allow the same right in respect of other relationships which although not being of a private law character are equally based on good faith and legal security.[46] Often the acts of the administration fall under this last category when they affect the rights of individuals.

Also Lady Fox has examined this potential development: "Another approach is to treat the legitimate expectation raised by an administrative decision or act as an approximation to a private law right, and hence not immune because the restrictive rule allows such private law rights to be pursued against a foreign State by way of exception to State immunity".[47]

Democratization, globalization and individual rights.

In the end the essential question both in domestic and international legal developments is that "The democratization of the internal government of States and their subjection to the rule of law has led to increased accountability before their own domestic courts of the executive branch of government…(and) national courts increasingly take it upon themselves to determine the appropriate balance between executive effectiveness and protection of the citizen".[48] In a globalized international society also international courts and tribunals are gradually moving in the same direction, just as eventually will foreign courts do.

NOTES

[1] President of the World Bank Administrative Tribunal, Member of the Chairman's list of conciliators and arbitrators, ICSID, Member of the Institut de Droit International.

[2] See for example the decision adopted by the French Conseil d'Etat in *Abbé Bouteyre*, 10 May 1912, in M. Long et al.: Les grands arrets de la jurisprudence administrative, 2001, 150.

[3] Conseil d'Etat: *Daudignac*, 22 June 1951, in Long, op. cit., supra note 2, 447.

[4] Michel Gentot: "Review of Discretionary Power by International Administrative Tribunals", Conference convened by the World Bank Administrative Tribunal with occasion of its twentieth anniversary, Paris, April 2001, at 2.

[5] *Desgranges*, International Labor Organization Administrative Tribunal, Judgment No. 11, 1953.

[6] Nicolas Valticos: "Checks Exerted by Administrative Tribunals Over the Discretionary Powers of International Organizations", Conference cit., supra note 4, at 2.

[7] See for example *Beaucent v. UPU*, ILO Administrative Tribunal, February 3, 2000.

[8] See for example *Mrs. C*, Administrative Tribunal of the International Monetary Fund, No. 1997-1, July 22, 1997.

[9] See for example *Ezatkhah*, World Bank Administrative Tribunal, Decision No. 185, May 15, 1998.

[10] See for example *Sixto*, Administrative Tribunal of the Council of Europe, Appeal No. 210, April 26, 1996.

[11] See for example *Montasser*, World Bank Administrative Tribunal, Decision No. 156, 1997, par. 10.

[12] See for example *Chhabra*, World Bank Administrative Tribunal, Decision No. 139, 1994, par. 57.

[13] See for example *Mr. X*, World Bank Administrative Tribunal, Decision No. 16, 1984, par. 38.

[14] See *Bigman*, World Bank Administrative Tribunal, Decision No. 209, 1999.

[15] See generally C. F. Amerasinghe: The Law of the International Civil Service, Vol. 1, 1994, at 267.

[16] See for example *Shenouda*, World Bank Administrative Tribunal, Decision No. 177, 1997, par. 12.

[17] See *de Merode*, World Bank Administrative Tribunal, Decision No. 1, 1981, pars. 41, 42.

[18] Francisco Orrego Vicuña: "The Review of Managerial Discretion by International Administrative Tribunals: Comments in the Light of the Practice of the World Bank Administrative Tribunal", Conference cit., supra note 4, at 4.

[19] See *Crevier*, World Bank Administrative Tribunal, Decision No. 205, 1999.

[20] Mark Elliott: "Case and Comment. House of Lords Decisions: "Legitimate Expectation: The Substantive Dimension", Cambridge Law Journal, Vol. 59, 2000, 421, at 423.

[21] Ibid., at 422.

[22] *Associated Provincial Picture Houses Ltd v Wednesbury Corp*, 1947, 2 All ER 680, 1948 1 KB 223, CA.

[23] *Preston v IRC*, 1985 2 All ER 327, 1985 AC 835.

[24] Ibid., 1985 at 337.

[25] Ibid., 1985 at 329.

[26] *Kruse v Johnson*, 1898 2 QB 91, 1895-9 All ER Rep 105.

[27] *R v. IRC, ex p MFK Underwriting Agents Ltd*, 1990 1 WLR 1545, at 1569-1570.

[28] Elliott, loc. cit, supra note 20, at 423-424.

[29] *R v North and East Devon Health Authority, ex Parte Coughlan* (2000) 3 All ER 850.

[30] Elliott, loc. cit, supra note 20, at 421.

[31] Supra note 29, par. 57.

[32] Supra note 29, par. 65.

[33] *Caryk*, World Bank Administrative Tribunal, Decision No. 214, 1999, par.40; *Madhusudan*, World Bank Administrative Tribunal, Decision No. 215, 1999, par. 49.

[34] *Prescott*, World Bank Administrative Tribunal, Decision No. 253, 2001, par. 25.

[35] Ibid, par. 27-28.

[36] For a discussion of the decisions of English Courts and the related views of the European Court of Human Rights, see for example Jane Wright: "The retreat from *Osman*: *Z v United Kingdom* in the European Court of Human Rights and Beyond", in Fairgrieve et al. (eds.): Tort Liability of Public Authorities in Comparative Perspective, 2002, 55-80.

[37] Asan Sedigh: "What Level of Host State Interference Amounts to a Taking under Contemporary International Law?", The Journal of World Investment, Vol. 2, 2001, 631; Thomas Waelde and Abba Kolo: "Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law", International and Comparative Law Quarterly, Vol. 50, 2001, 811-848.

[38] See generally UNCTAD: World Investment Report 2002; and Eloise Obadia: "ICSID, Investment Treaties and Arbitration: Current and Emerging Issues", in Gabrielle Kaufmann-Kohler et al. (eds.) : Investment Treaties and Arbitration, Swiss Arbitration Association, 2002, 67-76, both reporting over 2000 bilateral investment treaties in force.

[39] Antonio R. Parra: "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment", 12 ICSID Review-Foreign Investment Law Journal, 1997, 287.

[40] Francisco Orrego Vicuña: "Bilateral Investment Treaties and the Most-Favored-Nation Clause: Implications for Arbitration in the Light of a Recent ICSID Case", in Kaufmann-Kohler, op. cit., supra note 38, 133-144.

[41] See for example the discussion of fair and equitable treatment by a NAFTA Tribunal in the light of customary law and domestic legislation in *Mondev v. United States*, 42 International Legal Materials 85 (2003), pars. 94-127.

[42] An interesting example of application by British Courts of the legitimate expectation doctrine to the judicial review of the traditional privilege of foreign policy decisions in the context of diplomatic protection of citizens abroad is found in the *Abasi* case, Case No: C/2002/0617A; 0617B, Court of Appeal, Civil Division, November 6, 2002.

[43] Hazel Fox: The Law of State Immunity, 2002, at 298.

[44] Ibid., at 299.

[45] Ibid.., at 299.

[46] Institut de Droit International, Resolution on Contemporary Aspects concerning Jurisdictional Immunities of States, Art. 2 (d), Annuaire de l'Institut de Droit International, 1991-II, Basle Session, 64, at 266, as discussed by Fox, op. cit., supra note 43, at 299.

[47] Fox, op. cit., supra note 43, at 299-300.

[48] Ibid., at 298.