Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

The Doctrine of Necessity and its Implications

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Received 10 November 2022; *Accepted* 16 November 2022; *Published* 24 December 2022

Doctrine is a result of jurisprudence which come into being after it has been not only propounded but is tried, tested, and accepted only then it finds itself in the final judgment of a particular trial in the form of a reasoned decision. One such Doctrine is the Doctrine of necessity which in short revolves around accepting a biased decision over the alternative of no decision at all when the decision maker cannot be substituted. However, this is one of the approaches or implications of this Doctrine and history is witness to other implications as well however for the sake of this article we will magnify the effect that this doctrine has had on the development of judicial conscience and judgments. As the name of the Doctrine suggests necessity gives rise to a need for a customised approach towards the problems of a case. The kind of problems that cannot be solved using the usual Principles of Natural Justice.

Keywords: *necessity, biased decision, substituted, natural justice.*

INTRODUCTION

With the advent of the separation of powers in our federal system, we have seen that there is an increase in the delegation of powers from the Parliament to the Executive. Now one who is reasonably learned in legal science will object that it is contrary to the Doctrine of Separation of Powers. However, the reality is that a country cannot function strictly following the doctrine, at least in the 21st century hence some auxiliary functions of the parliament are given to the

Executive to ease the burden on the government which cannot ensure technical and exhaustive laws on all matters as they do not have enough time for perfection. Hence they provide the policy using which the Executive makes laws, one such example was making SEBI a statutory body and giving it regulatory powers to regulate the stock market. However, as the days went on the legal world noticed the outsourcing of quasi-judicial work to the Executive in the form of administrative bodies which deal with matters of a certain kind and strive towards speedy relief which the over-burdened judiciary cannot. It was a sensible solution to endless adjournments and hearings of only a few minutes which just increase the feeling of restlessness and waste of time.

As usual, whenever there is outsourcing to the Executive be it through delegated legislation or quasi-judicial bodies there will be a reasonable scope of corruption in this context, bias. Bias is one of those phenomena which can vitiate any legal order or for that matter a whole decision of any adjudicatory body, it is a state of mind which does not allow the decision maker to be objective and just, instead, it makes him biased. As the need for administrative bodies rose the need for laws curtailing their powers also increased. Quickly it was recognised that the laws of Natural Justice should also apply in all those cases where the party's rights are determined or one succumbs to prejudice. Natural Justice means justice based on the innate moral feeling of mankind. The three pillars of natural justice are; 1. Audi Altera partem (no one should be condemned unheard), 2. *Nemo judex in causa sua* (no one should be a judge in his cause) and 3. Reasoned decisions.

As we can see that the second pillar exclusively highlights the issue of bias. It requires that a decision maker must not preside over his case as he may probably give a decision that suits his needs and aspirations, rarely do we find anyone who injures his interest with a true and unbiased decision. That means the absence of bias is necessary for a fair trial as a fair trial consists of the fulfillment of all the three principles of natural justice. A breach of natural justice is very serious, bias is a serious matter more than what people think. The principles of natural justice must be abided by all the time however, as usual, there are exceptions when natural justice can be gone around of. One of those exceptions we are going to concentrate on is 'The

Doctrine of Necessity'. It is peculiar that the whole judicial system is there to ensure justice and there cannot be justice where there is even a slight tip in the scales, the scales in the hand of lady law must be exactly balanced however there are instances where the law still accepts some deviation from Natural justice. We will see in this article on the usage of 'The Doctrine of Necessity' and try to analyse the paralysis to justice given by this doctrine which allows biased decisions when no other alternative is present. 2) Is the doctrine of necessity helpful in judicial decisions? 3) When and what justifies the doctrine of necessity? 4) Is it necessary? After finding answers to these questions we will know whether this doctrine has a relevant place in the legal system or for that matter any administrative system.

WHAT IS THE DOCTRINE OF NECESSITY?

Usages or application of doctrines in legal decisions and even statutory interpretation is reasonably common in the legal world. One such doctrine is 'The Doctrine of Necessity '. The doctrine of necessity is one of the exceptions to the Principles of Natural Justice. Three principles have taken up the job of laying down the idea of a fair hearing. A fair hearing as the name suggests is when these three principles of natural justice are abided by; a) '*Nemo in propria cause judex esse debet*' which means that no one should be made a judge in his cause, 2) 'Audi Altera Partem' which means let the other side be heard and 3)Reasoned decisions.

Doctrine necessity has many applications and it depends on a case-to-case basis one kind of application we can see is in the infamous case of R v Dudley & Stephens[1] where the case was that a cabin boy was killed by the crew and feasted on his body for days until they were rescued by a ship. The issue was deciding whether necessity or survival instinct can necessitate killing a human when in dire situations. The court opined that no level of necessity can justify killing a human for survival.

[1] 'In Warm Blood: Some Historical and Procedural Aspects of Regina v Dudley and Stephens' (1967) 34(2) The University of Chicago Law Review <https://www.jstor.org/stable/1598938> accessed 07 December 2022

Another interesting case was the case of Speluncean explorers[2] where a similar situation was seen where a man was killed inside the cave who was part of a crew went into the cave to excavate but due to a landslide their exit was blocked and their survival pack which contained some food was over quicker than expected, then unanimously it was decided to throw chits and kill one person whose name unfolds, in this case, Roger Whetmore was killed as he was the one whose name was unfolded in the chits. Again in this case it was propounded that necessity cannot justify murder.

Over the years this doctrine was applied in various cases to suit the need of the hour and was also refuted many times as a result many applications have come into being but we will specifically look at its application where it accepts a biased decision when it is not possible to change the biased decision maker. To be specific we will see how this understanding affects judicial or quasi-judicial cases. This doctrine's idea is quite straightforward. The law permits many things and prohibits many things one of them being bias. However, necessity makes evil necessary. We have this doctrine that allows bias in times of need. It is like usually evil is prohibited but sometimes it is permitted or rather tolerated as there is no exception. The first-ever application of the Doctrine of Necessity was seen in the case of the Federation of Pakistan v Maulvi Tamizuddin Khan[3]. This case for the first time shows us the application of this doctrine. An ultra vires use of powers of emergency was seen in this case by the governor general however the act even ultra vires was legitimized by the usage of the doc of necessity.[4]

India is also one of those lucky countries to contribute to the usage of the doc of necessity which is a judicial anomaly and any application of this doc is fascinating as all the members of the legal field eagerly wait to see the reasons for the judgment. The first instance where the doc of necessity was invoked was the case of ***Gullapali Nageswara Rao v APSRTC***[5], in this case, there was a dispute over nationalising road transport, and the dispute was uplifted to the Supreme

[2] Lon L. Fuller, 'The Case of Speluncean explorers' (1949) 62(4) Harvard Law Review <https://www.jstor.org/stable/1336025>accessed 07 December 2022
[3] *Federation of Pakistan v Maulvi Tamizuddin Khan* [1955] PLD FC 240
[4] Snegapriya V S, 'Doctrine of Necessity' (*Law Corner*, 20 August 2022) <https://lawcorner.in/doctrine-of-necessity/#_ftn3> accessed 7 December 2022
[5] *Gullapalli Nageswara Rao v APSRTC* (1959) SC 308

Court where the department head who presided over the hearings i.e. the transport secretary was declared a biased party as he was interested in the subject matter of the case and hence his decision was struck down instead the case was allowed to be presided by the transport minister. Although the judgment is still debated today as even the transport minister is interested in the subject matter but this decision was taken on the ground that the minister is not a part of the department, unlike the secretary. There still seems to be bias but the Supreme Court upheld this decision.[6]

DID THE DOCTRINE OF NECESSITY BOLSTER OR PARALYZE THE JUDICIAL SYSTEM?

Now we know what the Doctrine of Necessity is, we can now move on to answering some of the questions which are pressing. Is it acceptable that a biased decision is accepted by anyone when he desires a fair hearing? Is it too much for a person to expect that the decisions are objective? There is an English maxim propounded by Lord Hewart in the famous case of ***Rex v Sussex*** Justices, where he said, "Justice must not only be done but must also be seen to be done." Now if we interpret this maxim we will know that Lord Hewart means simply that actions speak louder than words. One's decisions in any judicial or quasi-judicial case should be such that not only the court knows justice is done but also anyone else who has seen the proceedings or knows that fact and the nitty-gritty of the case should feel that justice is done. This maxim is violated by the doctrine of necessity which allows biased decisions in absence of the option of substitution of the biased decision maker.

Any person who follows a case and sees that a person is not allowed justice because simply there was no alternative left so the conclusion is to accept the biased decision. Does this sound like there is justice being done? Imagine a case where a petitioner files a case against a biased decision in a court and the judgment he gets is that the decision of the biased decision maker will be upheld as there is no other person to take that decision, so a biased decision is better than no decision. It is against logic for me why would anyone use this doctrine in judicial decisions.

[6] I.P. Massey, *Administrative Law* (10th edn, Eastern Book Company 2022)

People go to court because they have the belief that the courts will help them and provide the solution to the particular problem and not apply an ancient doctrine and wash their hands off.

One might say that this doctrine is an exception and it is only in the exceptional case that it is applied. I do not think that settles it, the problem is in the very idea of accepting a biased decision because it is better than having no decision. The courts have the power to order and force compliance and they should make use of this power of theirs. Our legal system strives to enforce the law and serve justice, how can it possibly become a better solution for people if they are seen actively tolerating such bias? Bias is a serious issue and for this reason, many laws were made to check bias wherever possible then why this doctrine is still prevalent I cannot see being valid, at least in the judicial or quasi-judicial decisions.

IS THE DOCTRINE OF NECESSITY HELPFUL IN JUDICIAL DECISIONS?

This issue is particularly a difficult one to answer. Judicial decisions mainly mean decisions where the rights of people are affected or they succumb to prejudice. As we can see rights of a person are his jewels hence any doctrine affecting them must be screened cautiously, especially the doctrine of necessity which tolerates biased decisions with the excuse of inability to substitute the biased decision maker. A prudent person will not be convinced by this logic that how can a biased decision be better than a non-biased or no decision at all? The better logic would be that no decision is better as at least like a biased decision it does not do injustice to the party. The doctrine of necessity in judicial decisions can have an application but it is not prudent according to me.

As courts try to do justice it means settling the scales perfectly equal and not lop-sided. Hence what I am implying is that accepting a biased decision because a person cannot be replaced by another disinterested party is nothing but an insult to the party who brought an action to the court with the faith that justice will be done. It is not that the doctrine is inherently looking to promote wrong but at the same time, its application does not seem to help in judicial matters.

In every court's decision, there is bias to an extent. Every judge has some notions, some personal outlook towards every matter that comes to him. One will want to decide the case in another

way but still choose the objective morals which the law has placed in front of him and decides the case following the law, this is not biased as we cannot erase the thoughts and personal philosophies of judges who take up the responsibility of deciding the case. We have to respect reality and strive to perfect what can be perfected and ignore what is not possible to change. However, giving an excuse that just because the one who has to take a decision cannot be changed so just accept a biased decision is preposterous according to me. There have been many cases where the doctrine of necessity has been applied, however, in this article, we will focus mainly on the case of ***Ashok Kumar Yadav v State of Haryana,***[7] which clearly shows how the doctrine of necessity can affect a judicial or quasi-judicial decision.

SCREENING OF JUDICIAL DECISION IN THE CASE OF ASHOK KUMAR YADAV

This case is an intriguing one as in this case the doctrine of necessity was tolerated. To properly understand the working of this doctrine in this case we first need to understand the facts of the case. I will now present only those facts, issues, and judgment of the case which needs to be seen in order to see how the doctrine of necessity was observed in this case

Facts

- In 1980 the Haryana Public Service Commission invited applications as there were 61 vacancies. The Punjab Civil Service Rules 1930 laid down all the rules which had to be abided by for the successful conduction of the exam. Before the exams could be held the vacancies rose to 119.
- 6000 candidates gave the exam out of which 1300 qualified for the viva exam as the criteria were that the one who gets 45% in aggregate and 33 % in each of the language papers will be eligible for the viva voice test.
- Due to the exceptionally large number of candidates for the viva, the interviews went on for half a year, and then the results were announced.
- Some candidates who had secured good marks in writing could not score well in viva as big chunks of marks were allocated for vivas. This left them aggrieved and they filed a

[7] Ashok Kumar Yadav v State of Haryana AIR 1987 SC 454

writ petition to invalidate the whole selection procedure, which had some issues according to them.

- They also questioned the selection of the relatives of the members of the committee and suspected bias in the selection process.

Issues

- Was there any favouritism or bias?
- Can the selection process be vitiated on grounds that the selection committee members were also participating in the exam?
- Was there an appreciation in the marks of the relatives and a depreciation in the mark of others?

Judgement

The court gave the judgment for the first issue that there could not be any favouritism as the HPSC did not have access to the marks of the candidates and hence they could not possibly appreciate the marks of the relatives and favour their selection. Judgment for the second issue was in reference to the case of A.K. Kraipak where the case was similar to the case at hand and the selection committee members who had relatives were advised to leave the committee altogether and just leave the room while the interview of the relatives goes on is not enough. However in this case, as the HPSC is a constitutional body and hence they don't have to retire from the commission altogether and nominate someone else.

The court did follow the principle of A.K. Kraipak but took a more relaxed approach. The court said that the principle in Kraipak does not mean that if anyone related to the HPSC members is participating the concerned member of HPSC must retire totally from the process of selection as there may not be people to substitute and this may affect the working of the HPSC, hence it is enough for the concerned member of HPSC to just leave the room when the interview of his relative is up and he must not take part in the evaluation of any kind related to his relative. The court also gave the order to the HPSC to give the students who got 45% and above another chance for the viva exams in which they failed due to higher marks allocated for the vivas.

CONCLUSION OF CASE ANALYSIS

In this case, we see that for one of those rarest times, the doctrine of necessity was used. The judgment of this case was reached after referring to another case i.e. of ***A.K. Kraipak***[8] which is another case in which the doctrine of necessity was contended but not allowed as the court said that the doctrine of necessity only applies in those exceptional circumstances where the decision maker cannot be substituted and only then a biased decision is tolerated. In Kraipak's case, there was a candidate named Naquishbund who was also the ex-officio chairman of the selection committee and was also a candidate appearing for the IFS exam. He was chosen above three senior candidates. All four were chief conservators in the forest but Naquishbund was chosen over them. They also appealed against their suppression. The selection committee selected Naquishbund as the ex-officio chairman and also gave his name to the list of recommended names and did not add the anime of the other three candidates who were senior to him.

A review was conducted but even after the review, they were not selected. Naquishbund during the process of selection did not participate when his chance to interview came but he participated in the interview of others namely the three candidates, his seniors whom he had superseded. Hence there was a reasonable apprehension that there can be bias from the side of other members of the selection committee who may out of professional courtesy favour Naquishbund by depreciating the marks of other candidates hence the court gave the judgment that the whole selection process is vitiated as Naquishbund was interested in the result of the process hence he should not have participated at all.

Now that we have a standard of comparison we now look at the case of Ashok Kumar Yadav. Honestly, the judgment may be legally correct, behind the barriers of law and perfectly valid but does it seem like justice has been done? The court said in their judgement that the member of HPSC who had relatives as candidates did not have knowledge of the marks and did not participate in any discussion related to their results. However it was also found that the marks allocated for viva were more than the written exams, this could give the other members chance

[8] *A. K. Kraipak & Ors. Etc v Union Of India & Ors* (1970) 1 SCR 457

to manipulate the marks of the candidates who are relatives of some of the members of HPSC and pay their share of the promise and favour them. Before the case went to Supreme Court the division bench held found that many candidates who had achieved good marks in the written test got low marks in the viva. It is important to note that the members of HPSC could manipulate this lot of marks which was allotted for viva and give more marks to the relatives of the members of HPSC and depress the marks of others thereby favouring the relatives. Hence this defeats the judgment that the court gave, it does not help that the members of HPSC do not know the marks the candidates are selected only when they secure good overall marks, and that is hugely determined by the vivas in this exam where the marks for viva was allotted more than the written test. One doesn't need to know the marks of others to favour anyone, they just need to give them approximately enough marks in the viva to obtain the desired mark.

The judgment of the court on the ground that to vitiate an order there must be a reasonable apprehension that there is a likelihood of bias one doesn't need to prove bias. All the logic in the judgment was arranged to show that nothing can prove that there was bias. However, that is not the question or the problem that needs a solution. Bias is a state of mind, hence it is not always possible to prove bias this is why it is said that it is enough to vitiate a process or action on grounds of a reasonable likelihood of bias. One doesn't need to prove bias. This was held in the case of ***Jiwan K. Lohia v Durga Dutt Lohia,***[9] the occasion for apprehension must be avoided that is the solution. One should not wait for a case like this to come up and then prove that there was no bias.

Any third party will still feel that if a relative appears for an exam and gets selected and to top it off his relative was on the selection committee, there is a likelihood of bias. The court should have looked to remove the whole occasion of bias by ordering the re-evaluation of the papers of the candidates who raised their voices and ordering their viva to be taken by another selection committee specially to check the papers of those who feel there is bias. This ought to have shown that justice is done. The judgment of the court although legally correct does not satisfy me personally as the courts are guardians of justice and this is not how the problem of bias will be

[9] *Jiwan K. Lohia v Durga Dutt Lohia* (1992) 1 SCC 56

solved. The court ought to have created a selection committee to screen the results of the aggrieved candidates and recommend to the President to bring his valuable attention towards the laws of UPSC and SPSC so that these kinds of problems do not take place again. Just like during board exams the scrutinizers and examiners whose children are candidates for that year, are not allowed to assess papers for that year, the same way should be for all the all India examinations as the results of the examinations can decide the fate of India as these officers are the ones who will help in the administration of the country.

WHEN AND WHAT JUSTIFIES THE DOCTRINE OF NECESSITY?

After reaching this point, one may have a fair idea that this doctrine mostly has its applications in the administrative arena and judicial cases. A better name for this doctrine would be The Doctrine of Absolute Necessity as this implies that the doctrine ought to be used in absolute necessity where there is no humanly available chance to avoid or treat bias. Even if there is a 1% chance that measures can be taken and a decision can be taken where the aggrieved person can get a just decision then that measure must be taken only then this doctrine's use will be justified. Using this doctrine does not mean justice is done, it is nothing but a compromise. Justice is will be seen when it's done otherwise when an explanation has to be given for an act then it means justice has not been done.

CONCLUSION - IS THE DOCTRINE OF NECESSITY NECESSARY?

As we exist in an imperfect world it is perfectly possible to come across occasions that just cannot be treated with the usual protocols and these may be 1 in million cases where there is an absolute dearth of reasonable measures to ensure justice. These kinds of cases can be there in so many years of human civilization all we can recollect is that things that once seemed impossible became possible at the right time and the right moment. Technically when and whether or not these kinds of helpless cases will happen or not is not in anyone's knowledge hence this doctrine should be there but only as a doctrine of absolute necessity in the literal sense.

With the growth in the legal system in the past few years and in the awareness of society there will not be much instances of exceptional cases however history always repeats itself and

humans always face something which shocks or paralyzes them. Until then this doctrine should not be used unless there is not even a 1% chance to give a just decision as courts are there to solve disputes and do justice and not motivate people to compromise if that could be done then cases would not come to the doors of the courts.