CONTRACTUAL RESTRAINTS ON ADMINISTRATIVE DISCRETION

BY

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1. INTRODUCTION

Like the legal representative of a private party, representatives of state and municipal administrative agencies may undertake contractual obligations on behalf of their principal. This may involve certain special problems as to who has the authority to act on behalf of the state or the municipality, and concerning the applicability of certain legal doctrines of constitutional and administrative law like "détournement de pouvoir" (*ultra vires,* improper motives) and rule of law. Basically and as a general rule, however, the validity and binding force of contracts are not affected by the fact that one of the parties is a governmental body, as long as the subject matter consists of traditional contractual obligations such as sale, lease, etc.

Quite different from this are those situations where contractual elements enter into the exercise of public authority. The basic problem here is to what degree the principles of private autonomy should prevail in a conflict with written and unwritten legal norms for the exercise of governmental powers; to what extent the relationship between the government and a private party can be described in traditional terms of the law of contracts in cases involving exercise of administrative decision-making authority as well as contracted elements.

Except in cases of court or out-of-court settlement of legal disputes, contractual elements can be a part of administrative decision-making only when the latter involves the exercise of discretionary powers ultimately resting with an administrative agency—"administrative" or "free" discretion, as opposed to discretionary rules of law where the courts decide what is a correct interpretation and application of the legal norms in question. The contractual elements appear where there is a reciprocal exchange of benefits; the private party influences the outcome of the administrative decision-making by offering, accepting or performing a certain obligation to the public. This may create problems mainly in three directions:

First, there is the question of how far it is permissible for a governmental agency to use its discretionary powers to extract benefits and concessions from a private party. This is commonly done by adding provisos to the administrative decision in question; the party will, in other words, obtain what is granted him here only if he performs what is provided; an exemp-

tion from a zoning regulation is, e.g., given on condition that the owner sells a certain part of his property to the local municipality at a stipulated price.

There has been some dispute about the legal nature of the restrictions on such a use of provisos, but it is generally accepted that restrictions do exist, and that one important factor determining the legality of a proviso is whether it serves the same purpose as the administrative decision itself.[1] Though there is a certain amount of disagreement among legal writers as to the proper way to describe these restrictions, and the extent to which they set limits for the administrative agencies' use of this technique, this problem is by no means a burning issue in the legal debate.

Secondly, there is the question how far it is permissible for the agency to attach importance to and be influenced by what the private party is willing and able to offer in return for a decision in his favour. Should the zoning authorities grant an exemption it would otherwise have refused, if the landowner offers to sell land to the public at a very reasonable price?

It is undisputed that because of the fact that regard should be paid to other parties with interests in the same case and in order to avoid undue distortions of the decision-making process, the principle of "détournement de pouvoir" must apply here as well as where an agency decision is influenced by improper motives to the detriment of a party. Another matter is that an administrative decision which has been influenced by such motives will rarely be held invalid to the detriment of a private party who has acted in good faith on the assumption that the decision was final and binding.

The third kind of legal problems which may arise from an intermingling in administrative acts of contractual exchange of benefits, is that of the extent to which such an exchange may create obligations for the administrative agency as to the future exercise of its discretionary authority. Will, e.g., the zoning authorities be bound by promises to a purchaser of municipal lands concerning future re-zoning of the area, exemptions to the present regulations, location of new roads and other public facilities or non-use of expropriational powers? To what extent is the government contractually bound to the terms of the individual concessions for exploitation of oil and gas? And can and should these concessions be held to restrict subsequent amendments of general administrative rules concerning this activity, to the detriment of the concession holders?

[1] In Bernt, *Forbehold ved forvaltningsvedtak* (Provisos in Administrative Decisions), *Institutt for offentlig retts skriftserie* 1977:7, Bergen, it is argued that this point of view should be supplemented with a "proportionality test", which would partly expand, partly reduce the administrative agency's liberty to use provisos.

The crucial question here is to what extent it can be considered appropriate that the power of administrative discretionary decision-making should be treated as a commodity which can be sold and bought when the agency in question finds such a transaction useful and acts on acceptable grounds. It has been argued that the administrative act is fixed to a certain time and procedure, with the consequence that the agency has no power to put advance restraints on decisions which normally would have been made at a later point of time.

This is a question to which the Norwegian Supreme Court has refused to give a straight answer on a number of occasions. During the last few years the issue has attracted considerable attention in legal articles, textbooks and monographs in Norway and Denmark,[2] and at times the debate on certain aspects of the problem has been rather heated.[3]

In this paper I will try to give a brief outline of some problems that we face in Norwegian law when trying to come to grips with the issue of contractual restraints on administrative discretionary authority. The problem thus defined is one of administrative law: whether an agency possessing discretionary powers may submit itself to future restraints on its decision-making by giving promises unilaterally or as part of a mutually binding contract with a private party. The closely related and highly controversial constitutional issue of the extent to which the *legislature* is bound by such commitments will be left aside.

[2] Torstein Eckhoff, "Uttalelser, tilsagn, avtaler og vilkår i forvaltningsretten" (Statements, Promises, Contracts and Provisos in Administrative Law), in Eckhoff, *Retten og samfunnet*, Oslo 1976, pp. 94 f. (originally published in *Jussens Venner*, vol. 10, 1975, pp. 133 ff.), pp. 110–16; Jan Fridthjof Bernt, *Forvaltningsavtaler. En introduksjon* (Administrative Contracts. An Introduction), *Institutt for offentlig retts skriftserie* 1975: 1, Bergen, pp. 24–32; Arvid Frihagen, *Avtaler med forvaltningsmyndighetene* (Agreements with Administrative Authorities), Bergen 1977 (originally published in *Jussens Venner*, vol. 12, 1977, pp. 1 ff.), pp. 36–52; Frihagen, *Forvaltningsrett* (Administrative Law) I, Bergen 1977, pp. 271–5; Eckhoff, *Forvaltningsrett* (Administrative Law), Oslo 1978, pp. 276–82; and Bernt, *Avtale og offentlig myndighetsutøving* (Contracts and Exercise of Public Authority), Bergen 1979, which deals exclusively with this issue.

[3] For the more heated part of the debate, see Sjur Brækhus, "Rettslig vurdering av hittil meddelte tillatelser til utvinning av petroleum på den norske del av kontinentalsokkelen. Særlig om den norske stats adgang til å foreta en tilbakevirkende regulering av vilkårene for tillatelsen" (Legal Evaluation of the Concessions for Extraction of Petroleum on the Norwegian Continental Shelf. With particular reference to the power of the Norwegian Government to enact retroactive changes in the conditions of the concession), in Brækhus, *Fra kredittretten og andre rettsområder*, Oslo 1978 (originally published separately, Oslo 1975); Carl August Fleischer, "Statsrett, oljeskatt og juridiske mistak" (Constitutional Law, Petroleum Taxation and Legal Errors), *Lov og Rett* 1976, pp. 399 ff.; Johs. Andenæs, "Er staten som lovgiver bundet av sine egne kontrakter?" (Is the State as Legislator Bound by Its Own Contracts?), *Lov og Rett* 1977, pp. 435 ff.: Fleischer, "Striden om statens kontrakter" (The Controversy on the Contracts of the State), *Lov og Rett* 1978, pp. 367 ff., and Andenæs, "Tilsvar til professor Fleischer" (A Reply to Professor Fleischer), *Lov og Rett* 1978, pp. 380 ff.

2. CONTRACTUAL AUTONOMY v. PRINCIPLES OF ADMINISTRATIVE LAW

The crux of the debate about contractual restraints on administrative discretion is whether there exists a contractual autonomy for an otherwise competent administrative agency which allows that agency to make binding promises or enter into contractual undertakings concerning its exercise of the discretionary authority conferred on it in the relevant statutes. Superficially this may appear obvious. Both private parties and administrative bodies operate, it seems, to a great degree upon the assumption that such an autonomy is inherent in the discretionary powers of the administrative bodies. Promises are made and formal contracts are entered into, and as a general rule the government appears to be as diligent in fulfilling its obligations in this respect as any party to a conventional contract of private law. Against this background, one rather obvious observation is that when an administrative agency has made a promise or signed a contract it may be a rather harsh denial of justice if subsequently it could declare that its act had no bearing upon its future exercise of discretionary power.

Before we jump to any conclusions it should, however, be noted that from a pure, public-law point of view, too, an agency statement concerning future use of administrative discretion will normally be an important factor in subsequent decisions on the same issue.

This may be true even if the statement does not appear as part of a final decision on the matter and, consequently, does not imply an express promise or contractual obligation on the part of the agency.

The circumstance that a private party has acted in good faith upon certain expectations concerning the agency's future use of its discretionary powers will in itself generally be a relevant factor when the agency has to decide to what extent and in what way it shall exercise its authority; and it will commonly be a factor which the agency not only may, but must, take into consideration. Furthermore, in situations where an agency decision to the detriment of a party is reviewed by the courts, the fact that the agency had given the party unfounded expectations about decisions to be made or not to be made in the future may tip the scales in favour of invalidating a later agency decision which appears unduly or disproportionately onerous for the party in question.

If, furthermore, the party's expectations are based not upon a mere statement from an agency official about how that official expects the agency to act, but upon an act which purports to be a final determination of the question in issue, the agency's discretion subsequently to overthrow

this decision to his detriment will be quite limited. The Norwegian Administrative Procedure Act 1967, sec. 35, states that, where not otherwise provided, a change of an agency's ruling on a matter to the detriment of a party who has received notification of that ruling may be made only by an agency superior to the one which made the initial decision, and only upon notification that a reevaluation procedure has been initiated. This notification has to be sent to the party not later than three weeks after the day of the ruling, and notification of a change to his detriment must be given not later than three months after the notification of the initial ruling.

This is a parallel to and an expansion of the scope of the principles of administrative appeal laid down in secs. 28–34 of the Act. From a practical point of view it means that the private party cannot rely on the finality of an administrative ruling until about three weeks after he received notification of it, even if administrative appeal has been barred or is exhausted.[4] On the other hand, it is an undisputed general principle that neither the agency which made the initial decision nor any other administrative body may revoke or change the decision to the detriment of a party after the expiration of this time limit except under quite special circumstances.

In so far as this is so, the issue of contractual limitations on the exercise of administrative discretion is merely a question of whether an agency may grant a party a special right which will be excluded from subsequent administrative review according to the Norwegian Administrative Procedure Act or based upon the established unwritten principles which supplement the Act on this point. The answer to this question should clearly be in the negative. It is obvious that an agency cannot protect itself against having its decisions reviewed by giving promises or contractual rights to the party who benefits from it. Such a promise or agreement will bind neither other private parties nor superior administrative bodies.

Furthermore, the procedural rules of the Norwegian Administrative Procedure Act and relevant special legislation will apply regardless of whether the administrative decision takes the form of a ruling or of the entering into an agreement. This means that the administrative agency cannot make any final decision of the issue before the completion of an adversary procedure which meets the requirements laid down in the Act. The agency's decision may be held invalid because of breach of these requirements, regardless of the extent to which it is a traditional unilateral administrative order or something more or less close to a contractual obligation. But the general principle that a decision should be revoked

[4] If the agency decision concerns an administrative appeal from a decision of an inferior agency, such appellate decision may not be changed to the detriment of a party later than three weeks after notification of it was made.

only when there is a clear lack of balance of interests will apply here, too, and this principle will have extra weight when the party has acted upon what he has in good faith held to be a reciprocal contractual obligation.

The issue that remains is how far the fact that the subject matter of what purports to be a binding promise or a contract is not a traditional contractual obligation, but a restriction on the exercise of administrative authority, is of importance when we determine to what extent and under what circumstances an agency may exercise its powers in a manner which conflicts with a previous valid and final determination of the same issue.

Both in the law of contracts and in administrative law there are exceptions to the general principle of the binding force of, respectively, contracts and administrative orders. In the law of contracts the doctrine of "frustration" offers a vehicle of somewhat uncertain and disputed consequences for the obligations of a party to a contract. The equivalent of this in administrative law is a certain power of the agency which made the decision in question, or an administrative body superior to it, to revoke or change the ruling to the detriment of a party, even after the expiration of the time limits in sec. 35 of the Administrative Procedure Act. Like discharge of contract by frustration, this is a legal vehicle of rare application, but there is general agreement that it is more than a mere transformation of principles from the law of contracts. In sec. 35 there is a proviso which refers to this vehicle as part of "the general rules of administrative law".

One main issue in the debate about contractual restraints on administrative discretion is whether the doctrine of frustration or its public-law counterpart should apply when an administrative agency has made promises or entered into contracts concerning its future exercise of discretion. Though both doctrines are of a rather vague and partly controversial nature, the general opinion seems to be that the choice may be of appreciable importance to the private party concerned.

The two doctrines are generally quite concrete and they add considerable importance to the question what result appears more equitable at the time of the conflict. Though there may be dissentients in both camps, it is, however, fair to say that the two systems of law approach the problem in a slightly different manner. While administrative law is more or less exclusively occupied with individual justice and fairness, the law of contracts tends to a greater extent to supplement this point of view with a more generalizing attitude; the binding force of a contract has a value in itself.

This reflects the fact that the principles of the law of contracts are addressed not only to the problem of individual justice but also, and equally, to the task of establishing and upholding an adequate legal framework for the exchange of goods and services between private parties.

In consequence, a major purpose is to make the rules as clear and as easy to apply as possible. The norms of contractual obligations should be clear-cut and easily comprehensible, so that the parties can feel reasonably certain about the content and legal nature of their rights and duties. This means that there are situations where individual fairness may have to suffer in order to avoid creating uncertainty about the legal obligations of the parties in other related present and future situations.

This is a concern which plays a very minor role in administrative law. The reasons are several, but two should be mentioned as particularly important:

One point is that the credibility of administrative bodies is to a large extent a concern which may be left to the bodies themselves to take care of. There is not—and one hopes never will be—any general market for the commodity of administrative discretion, which will suffer if the application of the general administrative principles of the finality of rulings creates an element of uncertainty in this field. The agency's interest in creating a basis for mutually binding contractual agreements with private parties will be adequately taken care of if its practice is up to standard. It should be added that in terms of general reliability and otherwise the administrative agencies will generally be very attractive parties of contract. Fears that legitimate public interests might suffer if governmental bodies were to effect unilateral alterations in what private parties have conceived of as contractual relationships have so far proved unfounded.

Another important point is that generally the harmful effect of problems in determining the exact limits for the parties' obligations will be considerably less in administrative law than in the traditional law of contracts. Commonly the agency will have it in its power to determine the issue with a finality which can only be overruled by a subsequent administrative or court review. This may, of course, be very much a mixed blessing for a party facing an adversary decision. But it means that, as a general rule, the private party will be afforded an opportunity to argue his case before a decision on revocation or a change to his detriment is made. It also normally gives him access to a less costly and time-consuming review procedure than that afforded by a court trial, namely administrative review. As every student of administrative law knows, administrative review by no means automatically guarantees a fair and just evaluation of the issue. More often than not, however, it does provide such an evaluation; generally speaking, the administrative procedure resolves conflicts of the type in question in a quite satisfactory manner.

All this does not, of course, mean that a party's claim that he has a contractual right restraining an administrative agency's discretion can be

left to the agency itself to decide. Individual justice is at stake here as well as in other administrative-law contexts, and the need for an option of review by courts or independent administrative tribunals is no less here than in other cases of exercise of administrative authority.

But this is exactly what Norwegian administrative law offers a party to whose detriment an agency decision has been revoked or changed. Once we are outside the time limits of sec. 35, the question whether an administrative order may be changed to the detriment of a party is purely a legal one, and the ultimate deciding factor is the balance between the weight of the party's interests and expectations and the strength of the public interest in overriding this particular decision. Individual justice is protected by the general assumption that such a change is impermissible. This assumption implies that as a general rule the interests of the private party should prevail, and that changes to his detriment should go no further than is absolutely necessary to protect the public interests at issue.

Applied to situations where administrative orders are intermingled with contractual elements, this point of view commonly affords the private party a fairly massive protection. In addition to the general considerations which militate against letting a party suffer loss or inconvenience because he has relied on the finality of an administrative order, there is the fact that the occurrence of contractual elements in the decision-making process normally creates an expectation on the part of the private party that the administrative agency is bound to its decision of the issue in very much the same way as when it is a party to a traditional contract of private law. In so far as the party has given any kind of remuneration—in money, goods or acts—this will both give him additional reason to rely on the administrative decision and, to the extent that restitution is denied or is impossible, an argument of considerable weight against depriving him of his part of the bargain.

The main difference between a contractual and an administrative law point of view on promises and contracts concerning future exercise of administrative discretion is the more exclusive weight attached to individual justice and fairness in administrative law. This may commonly lead to a slightly more flexible attitude in favour of the government in administrative law in situations where the strength of the public interests in a change is especially great, or where it is evident that the party will not be noticeably worse off after the change than he would have been if initially a decision in his favour had not been made.

3. THE ISSUE OF THE TIMING OF THE DECISION

There are, however, situations where the consequences of the choice between the two alternative doctrines may seem more dramatic.

Above I have maintained that non-compliance with the general written and unwritten procedural requirements may affect the validity of an agency decision even if this takes the form of a promise or contractual obligation. One such requirement is, according to the Norwegian Administrative Procedure Act, sec. 17(1), that "the agency shall ensure, to the extent possible, that it has available all information relevant to the case before reaching a decision". This rule, combined with the agency's general duty to exercise its powers in the manner which best serves the aim of the relevant statute, clearly set limits to the agency's freedom to choose at what stage it shall make a final determination of an issue.

When a promise or contract has been made without paying regard to these requirements, it may have consequences for the binding force of the obligation undertaken. The normal result, however, will not be that the promise or contractual undertaking is without relevance to later decisions concerning the same issue, but that new information emerging and new developments occurring before or at the time when the decision normally should have been made may give cause for a reevaluation of a previous decision.

This could be described as a consequence of implied limitations in the promise or the contractual obligation. But a more direct and adequate mode of describing these modifications of the binding force of such a statement is that the balance between the party's interest in an upholding of the initial decision and the public interest in a reevaluation is influenced by the fact that the decision was made prematurely, and that normally the private party should have realized that new relevant factors might occur in the time up to when the decision would take effect, or that at any rate the agency had not the authority to commit itself so strongly at the time when the decision was made.

This does not, however, imply that an agency has no right at all to make promises or enter agreements which bind its future exercise of discretion. If no relevant cause for a change can be found, the initial decision is binding, and even if new facts or new information have emerged, the agency will be bound if the use of a promise or a contract clearly had beneficial consequences for the realization of the purpose of the statute concerned, and the party will suffer appreciably through a new and different decision.

4. OBLIGATION NOT TO MAKE A RULING

Up to now, we have operated upon the tacit assumption that the subject matter of an alleged contractual obligation of an administrative agency is the exercise of its discretionary authority to make a decision which is beneficial to the private party. What distinguishes such a decision from an ordinary administrative decision is not its subject matter but the point of time when it was made and/or its binding force.

A situation different from this is that where the agency simply decides not to exercise its powers, e.g. not to expropriate land or rezone an area. Decisions of this type may be made quite informally, and the general restrictions in administrative law on revoking or changing prior decisions do not apply. In this situation the private parties' protection against harmful changes in administrative policy will as a rule be limited to the procedural requirements of the Norwegian Administrative Procedure Act and the statute in question, and limitations of the applicability and binding force of the new decision; the new zoning regulation applies, e.g., only to constructions and activities which start after the promulgation of the new set of rules.

This means that the acceptance of contractual points of view on the relationship between a private party and an agency makes much more of a difference here than where the alleged obligation of the agency is an undertaking to make a certain positive decision and/or to stand by a certain determination in the future:

Restrictions on the agency's future exercise of its authority may have much graver consequences for its ability to serve adequately the interests to which it is committed by the relevant statute. On the other hand, the situation of the private party may be rather precarious if the agency is free to neglect what appeared to be a binding promise or a contractual obligation.

The solution to this problem is uncertain. One view which has been put forward is that a promise or contract of this kind should be binding for the administrative agency in very much the same way as a contract of private law; but the contrary solution has also been proposed, namely that such a contract should not bind the agency at all.

Neither of these suggested solutions is attractive.

The application of traditional principles of the law of contracts will in practice put a very severe strain on the only flexible element in the relationship—its interpretation. The Norwegian Supreme Court has on several occasions avoided a direct confrontation with the question of the binding nature of contracts or promises of this kind by giving the state-

ment of the agency a narrow application. The best that can be said about some of these decisions by the Court is that they have led to basically sound and reasonable results.

The words that have been used by the parties and the situation at the time of the issue of the statement have proved to give only very inaccurate clues to the Court's evaluation of the relationship. The determining factor in several decisions where the Court has held that there was no contractual restraint on the administrative power in question, as well as in two cases where a municipality and the Norwegian Parliament (Stortinget), respectively, were found to be bound by contractual promises concerning future taxation, would seem to have been the balance of the conflicting interests at the time of the trial.

Such an approach implies, on the one hand, that even a decision not to use discretionary administrative powers may under certain circumstances give a private party a right which he cannot be deprived of arbitrarily. On the other hand, it rejects the notion that such a right can be described in traditional contractual terms. To what extent the private party's expectations and interests will prevail in conflict with the public interest in a new determination of his rights and duties, depends on a concrete evaluation of the same nature as the test applied to determine whether an ordinary administrative ruling may be amended or vacated to the detriment of a party.

The point of balance may, however, be quite differently located. The general presumption against the permissibility of a new decision infringing the rights of a private party is considerably weakened, if not non-existent. This reflects the fact that the typical situation of conflict between party expectations, based upon a statement promising or implying non-use of administrative discretionary powers, and public interest in favour of such a change, differs quite radically from what we face when an agency wants to deviate from a former positive determination—a traditional administrative act.

For one thing, the private party's expectations of finality will or should be considerably less absolute when the decision concerns such a drastic measure as not applying allotted discretionary powers in a certain manner within an unlimited or defined period of time. Generally speaking, his position will be weaker the more drastic is the restraint on the administrative discretion, and the longer the period of time that has elapsed since the promise was made or the contract was entered into.

From the point of view of the law of contracts, too, these would be factors of importance. But the general strength of considerations of this kind has no real counterpart in private law. This reflects the fact that the

type of problem we are facing here is without any parallel in private law. Nevertheless it may be argued that this is no more than the application of a traditional interpretation technique to an unconventional situation.

The real difference lies here, as with positive determinations of the content of an administrative decision, in the fact of an almost exclusive attention to the strength of the opposing interests at the time of the conflict. The necessity of ensuring that the authority of an administrative agency is not crippled by promises or contractual obligations will, in situations where such an obligation will run counter to important public interests, lead to the result that the interests of the party must yield, even if the circumstances at the time of the contract or promise were such that, according to traditional principles of the law of contracts, the agency would be considered bound.

This reflects the fact that the agency's power to make binding decisions affecting the rights and duties of a private party reaches no further than its authority according to the relevant statute and general written and unwritten principles of administrative law. With a positive decision—a traditional administrative ruling—this does not make a drastic difference, but as we have seen, it means that it is the written and unwritten rules of administrative law concerning a private party's protection against changes to his detriment that decide the issue. The agency has no authority to suspend these or other rules of administrative law.

As for the negative decisions, we have seen that it is questionable whether such a final determination can be made at all. If we accept that such a determination is permissible under certain circumstances, it is not because the administrative agency has any kind of private autonomy in the matter which supplements or supersedes its authority according to the statute, but because on the basis of concepts of "implied powers" a limited right exists for an agency to make decisions of non-use of its discretionary powers. But these decisions still emanate from the agency's administrative authority under administrative law, and they are subject to the same procedural requirements and the same kind of review as a ruling concerning a positive commitment. And in the same manner the nature of the decision and the force of the interests speaking for a change will have to be taken into consideration when determining the finality of the order in a concrete case of conflict between the private party and the administrative agency.

The points of view which I have put forward here are to some extent mere assertions or theoretical speculations. We have no Supreme Court decision where an agency has been found to be bound by a prior statement in which it promises not to use its authority in a certain manner. But the

doctrine which I have outlined here appears to have merits which to my mind make it highly probable that it will at least give a reasonable basis for predictions of the outcome of future cases dealing with this issue that may be brought before the Supreme Court, even if the Court should choose not to adhere to it explicitly.