

Doctrine of Legitimate Expectation: *A weapon against abuse of discretion and tool to secure accountability*

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ABSTRACT

This article throws light upon the new legal order which has influenced the administrative process greatly. Life of every individual is greatly influenced by the administrative process. In the actions of a Welfare State, the constitutional mandates occupy predominant position even in administrative matters. It operates in public domain and in appropriate cases constitutes substantive and enforceable right. The term legitimate expectation pertains to the field of public law and envisages grant of relief to a person when he is not able to justify his claim on the basis of law in true sense of term although he may have suffered a civil consequence. The concept of legitimate expectation is being used by the courts for judicial review and it applies the ethics of fairness and reasonableness to the situation where a person has an expectation or interest in a public body retaining a long-standing practice or keeping a promise. The courts have emphasized that legitimate expectation as such is not an enforceable right. However, non consideration of legitimate expectation of a person adversely affected by a decision may invalidate the decision on the ground of arbitrariness.

KEY WORDS: *Legitimate Expectation, Administrative Actions, Judiciary*

INTRODUCTION

Public authority has a legal obligation to act fairly, by its very nature of being 'public'. The Doctrine of legitimate expectation is the unwritten code of accountability imposing an ethical duty on public authority to act fairly before taking policies affecting the community at large. It is an essential part of governance norm, administrative ethics and constitutional morality. This doctrine deals with enabling an aggrieved person to seek legal remedies through judicial review. Thus the moral value and ethical norm in certain circumstances becomes a legal right, though not declared in a statute. It is enforceable through court of law.

Generally the concept of imposing an obligation in tune with the reasonable expectation of citizen evolved from the basic nature of administrative law. And that adds legitimacy to the expectation. Thus it is a branch of public law. The English courts in their proceedings for judicial review, applied the principles of fairness and reasonableness to the situation where a person has an expectation or interest in a public body retaining a long-standing practice or keeping a promise. The promise made or practice in vogue is the source of this 'expectation' by citizen from public authority.

The irrationality is what public body has to necessarily avoid. In 1948, English law on 'unreasonableness of public body decisions' is settled in case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*¹. The 'unreasonableness' of public body's decision will render it liable to be quashed on judicial review.

In this case, the Wednesbury Corporation granted license to a cinema company, Associated Provincial Picture Houses, to operate a cinema with a condition that no children under 15 should be admitted to on Sundays. The Associated Provincial Picture Houses challenged the order and sought a declaration that such a condition was unacceptable, and outside the power of the Corporation to impose. Because of disagreement only the order cannot be reversed. There are three conditions at least one of which has to be fulfilled for the court to intervene for unreasonableness of the order. They are:

1. The Wednesbury Corporation, in making that decision, took into account factors that ought not to have been taken into account, or
2. The Corporation failed to take into account factors that ought to have been taken into account, or
3. The decision was so unreasonable that no reasonable authority would ever consider imposing it.

The court held that the condition imposed on the exhibition license did not fall into any of these categories. Therefore, the claim failed and the prohibitory decision of the Wednesbury Corporation was upheld. Lord Green has explained in his classic statement:

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v Poole Corporation*² gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

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¹[1948] 1 KB 223

²[1926] Ch. 66, 90, 91

The test laid down in the above case was named after the Judge and it became "the *Wednesbury* test" and the term "*Wednesbury* unreasonableness" is so unreasonable that no reasonable authority could have decided that way.

This doctrine of unreasonableness was later articulated in *Council of Civil Service Unions v Minister for the Civil Service*³ by Lord Diplock:

So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Fair hearing as a normative right

Every person is entitled to a fair hearing before a decision is taken if he or she has a legitimate expectation of being heard. But the fact that a person is entitled to make representations does not, of itself, constrain public bodies which, subject to a duty not to abuse their power, are entitled to change their policies to reflect changed circumstances even though this may involve reneging on previous undertakings. If there is a substantive limitation on this right to make changes, it lies in a test of fairness where the public bodies are equivalent to a breach of contract or there have been representations that might have supported an estoppel and so caused legitimate expectations to arise. It is difficult to prove such a legitimate expectation unless fairly specific representations as to policies affecting future conduct have been made.

The idea of legitimate expectation with the support and repeated justification by very logical rationalization and the academic advocacy emerged into a doctrine acquiring inherent strength of enforceability.

On the formidable foundation of different jurisprudences this doctrine gained its strength from various judicial decisions in India. In *Navjyoth Group Housing Society v Union of India*⁴, the judge explained in simple terms:

...if he could show that a decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he was given reasons for withdrawal and the opportunity to comment such reasons⁵.

The Supreme Court derived a legal duty from this doctrine, imposed on public authority to act fairly taking into consideration all relevant factors before effecting a change in its policies which would affect a person who had been beneficiary of the continuing policy. The discretion is associated with power of administration, which has to be exercised reasonably, not arbitrarily and abuse should be always avoided. The duty of the state or administrator is two-fold: One – while framing policy the public interest should be the prime

³ *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6 at para. 410, [1984] 3 All ER 935

⁴ (1992) 4 SCC 477

⁵ *Ibid*, at page 494

consideration, two- such a policy statement could not be disregarded unfairly or applied selectively for the reason that unfairness in the form of unreasonableness is akin to violation of natural justice. The rule in Article 14 of the Constitution is the guiding principle. The policies and actions have to be in conformity of Article 14. It is said that the non-arbitrariness is an essential component of this article.

This Article embodies the essence of rule of law and considered the heart of the democratic constitution as manifest in Indian Constitution. Article 14 will never allow any authority in the Constitutional frame an unfettered discretion. No public authority can claim to have unfettered discretion in public law because such authority is conferred with power only to use them for public good.

The Origin: Lord Denning's Procedural Protection

It is the legend Lord Denning M R in *Schmidt v. Secretary of Home Affairs*, who first talked about this doctrine.⁶ He observed:

The speeches in *Ridge v Baldwin*⁷ show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add, *some legitimate expectation*, of which it would not be fair to deprive him without hearing what he has to say.

However this protection was not made available to the alien students. It is only a procedural protection. Some foreign students were permitted to enter and live in United Kingdom for a month to study at Hubbard College of Scientology. Their stay period was extended for couple of months thereafter. They wanted further extension for completion of their study. The Home Secretary refused and also declared that such applications would not be considered further. The plaintiffs claimed that such a declaration was void and they had right to expect reasonable consideration of their applications. The Court of Appeal held that they had no legitimate expectation of extension and therefore no right to hearing, though revocation of their permits within the earlier granted period of permit would have been contrary to legitimate expectation.

Legitimate Expectation arising out of Promise and Policy: Germany case 1983

On the basis of legitimate expectation an illegal immigrant could seek review of his removal in Germany. Lord Fraser in *Attorney-General of Hong Kong vs. Ng Tuen Shiu*⁸ has relied on this doctrine to

⁶[1969] 2 Ch 149; (1969) 1.All E.R. 904.

⁷[1964] AC 40

⁸[1983] 2 AC 629

grant the stay for this foreigner.⁹ It was the declared policy of the Government to repatriate illegal immigrants after examining merits of each applicant in an interview. Mr. Ng, who was an illegal immigrant from Macau, complained that he was removed after interview in which he was not given sufficient time to explain his humanitarian grounds, but only to answer the questions put to him. The policy inherently includes a promise to hear him in an effective manner giving opportunity to plead for mercy on humanitarian grounds. That promise was not realized. Out of that promise, the alien immigrant has a legitimate expectation that he could get stay granted on humanitarian grounds, provided he was heard properly. The judicial Committee agreed with the contention and held that the government's promise had not been implemented; his case had not been considered on its merits, and the removal order was quashed. Thus Ng succeeded on the basis that he had a legitimate expectation that he would be allowed to put his case, arising out of the government policy consisting of such promise.

Thus the idea of legitimate expectation growing from strength to strength and came to be known as yet another category of 'fairness'.

Legitimate Expectation out of Practice, 1985 UK case

While the 'right to review' has arisen out of promise from the policy of the government in the above referred German case, it was found in an English case that the legitimate expectation could arise out of practice also.

In UK it was an established practice that the civil servants would be consulted before refusing them the permission to be members of trade unions. Some civil servants who were engaged in certain fields would not be allowed to join trade union. In *Council of Civil Service Unions vs. Minister for the Civil Services*,¹⁰ (CCSU case) the Prime Minister issued an instruction that civil servants engaged on certain work would no longer be permitted to be members of trade unions. The House of Lords held that those civil servants had a legitimate expectation that they would be consulted before such action was taken. It is a significant change in their terms and conditions of service and thus they have every right to expect that they would be consulted before effecting such a significant change.

Expectation of consultation

In London the local authority used to consult widely the parents about the educational matters. The Secretary of State exhorted the need of consulting the parents, and suggested the education authorities to consult parents with reference to retention of all school sites. Later the Government decided to close down the

⁹(1983) 2 A.C. 629, (1983) 3 All.E.R. 346.

¹⁰(1985) A.C. 374, (1984) 3 All.E.R. 935.

school without consulting or with inadequate consultation. Whether parents had legitimate expectation to be consulted before such a decision was taken? This question was addressed in *R v. Brent London Borough Council, exp Gunning*.¹¹ A group of parents and tax payers and parent governors question the decision of closure without sufficient consultation. The court held that parents had no statutory right to be consulted, though they were consulted earlier on education related matters. Hodgson J. said:

The parents had no statutory right to be consulted, but that they had a legitimate expectation that they would be consulted seems to me to be beyond question. The interest of parents in the educational arrangements in the area in which they live is self-evident....local education authorities habitually do consult on these matters. In 1980 and 1983 this local authority itself had comprehensive consultations which had led to the decision in 1983 to retain all school sites. Local education authorities are exhorted by the Secretary of State to consult and results of the consultations are something which takes into account (in deciding whether to agree to closures). On any test of legitimate expectation, it seems to me that these parents qualify.

The CCSU case of 1985 is a paradigm case of procedural legitimate expectation. In this case a public authority has provided an unequivocal assurance, (whether by means of an express promise or an established practice) that it will give notice or embark upon consultation before it changes an existing substantive policy.

From this promise or practice a substantive legitimate expectation arises where the court allows a claim to enforce the continued enjoyment of the content – the substance – of an existing practice or policy, in the face of the decision-maker's ambition to change or abolish it.

Doctrine of substantive legitimate expectation

It is not just a procedural right. And it has to be distinguished from a merely procedural right. Another aspect to be noted is that the doctrine of substantive legitimate expectation plainly cannot apply to every case where a public authority operates a policy over an appreciable period. That would expand the doctrine far beyond its proper limits.

Here again the Wednesbury's principle of fairness or reasonability becomes relevant as the establishment of any policy, new or substitute, by a public body will be subject to Wednesbury review. But it has to be tested on a much more rigorous standard whether a substitute policy has been established in breach of

¹¹(1986) 84 LGR 168.

a substantive legitimate expectation or not. The court of law has to decide what fairness requires. Public authorities generally enjoy very wide discretions which need to be exercised in the public interest. It is their legitimate duty to balance different, conflicting interest across a wide spectrum. They have to consider the rigorous procedures and keep their own counsel. If affected person is not consulted, the court has to examine whether the decision maker has regard to his views or otherwise was so unfair as to amount to an abuse of power, for which the earlier conduct of the public authority will be taken into consideration.

Unending Categories of unfairness, the estoppel and abuse of power

In *Regina vs. Inland Revenue Commissioners Ex Parte Unilever Plc and Others*¹² Sir Thomas Bingham MR said 'the categories of unfairness are not closed, and precedent should act as a guide not a cage'. The basic idea behind this doctrine is that once a public authority makes a promise, it effectively becomes a contract and its breach will be unfair. With this further development of the doctrine, the legitimate expectation was regarded equivalent to the doctrine of estoppel in public law.

Another judge Simon Brown LJ who decided the above case said: "Unfairness amounting to an abuse of power' as envisaged in Preston and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power".

The case of *R v North and East Devon Health Authority, Ex parte Coughlan*¹³ showed that legitimate expectation is recognized in cases where the relevant authority had made an unequivocal promise to provide the pensioner with a home for life on which she subsequently relied on that promise and sold her house. Hence one can find specific references to the parallel both with contract and also the doctrine of estoppel.

Fairness as the test

As Lord Donaldson MR said in *R v Independent Television Commission ex-p-TVNi Limited*¹⁴: 'The test in public law is fairness, not an adaptation of the law of contract or estoppel' and 'on the one hand mere unfairness – conduct which may be characterised as 'a bit rich' but nevertheless understandable, and on the other hand a decision so outrageously unfair that it should not be allowed to stand.'

¹² [1996] STC 681

¹³ Coughlan & Ors, R (on the application of) v North & East Devon Health Authority [1999] EWCA Civ 1871 (16 July 1999)

¹⁴[2001] 1 Q.B. 213 <http://business.highbeam.com/437256/article-1G1-179568131/r-v-independent-television-commission-ex-p-tvni-limited>

Promise or Practice: Dicta of Laws LJ

English law on this point was enriched by the dicta of Lord Justice Laws. His judicial explanation in 2005 in the case of *R (Nadarajah) v Secretary of State for the Home Department*¹⁵ in which Laws LJ was significant. Laws LJ stated that 'the principle of good administration required public authorities to be held to their promises would be undermined if the law did not insist that any failure of refusal to comply is effectively justified as a proportionate measure in the circumstances' with proportionality depending on the interests being balanced on each case. The important thing to note from Laws LJ dicta is that he is effectively recognizing the doctrine of estoppel as a legitimate grievance on its own.

In Nadarajah case, Laws has analysed the doctrine based on promise as follows:

'... a public body's promise or practice as to future conduct may only be denied, and thus... may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise... a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.'

Then Laws LJ talks as to how the proportionality is judged. He says:

'... by the respective force of the competing interests arising in the case. Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure'.

Political issues and policy:

Nicholas Dobson, Senior Consultant, Local and Public Law gives an analysis of the judgment of Laws LJ, saying: However, Laws LJ had considered that judicial enforcement would 'encounter a steeper climb' where the government decision-maker is 'concerned to raise wide-ranging or "macro-political" issues of policy'. He had also cautioned that the considerations then highlighted were pointers and not rules. For the 'balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact'.

¹⁵Abdi&Nadarajah v. Secretary of State for the Home Department [2005] EWCA Civ 1363 at [67]

Lord Justice Laws was again explaining this doctrine in yet another case during 2008. He observed: 'Legitimate expectation is now a well-known public law headline. But its reach in practice is still being explored' in *R (Bhatt Murphy (a firm) and others v Independent Assessor; R (Niazi and others) v Secretary of State for the Home Department*¹⁶.

With this background analysis, Laws LJ identified two types of substantive legitimate expectation.

- (1) **Equivalent to breach of contract:** Where the policy constitutes a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured. In essence, this is conduct 'equivalent to a breach of contract or breach of representations'. *Rv North and East Devon Health Authority, ex parte Coughlan*¹⁷ was cited as a 'strong case'. There a severely disabled lady had been given a clear promise by the health authority that a residential facility would be her home for life but subsequently the health authority decided to close that facility. The Court of Appeal in *Coughlan* took the view that: 'This is not a case where the Health Authority would, in keeping the promise, be acting inconsistently with its statutory or other public law duties. A decision not to honour it would be equivalent to a breach of contract in private law'.
- (2) **Breach of promise of consultation:** Where a decision-maker will be required before effecting a change of policy to afford potentially affected persons an opportunity to comment on the proposed change and the reasons for it, although there has been no previous promise or practice of notice or consultation. For this to arise, the impact of the authority's past conduct on potentially affected persons must be 'pressing and focused'. An individual or group would need to demonstrate substantial grounds to expect that the substance of the relevant policy will continue to ensure for their particular benefit, not necessarily forever, but at least for a reasonable period to provide a cushion against the change. In such case an abrupt change cannot lawfully be made in the absence of notification and consultation.

Another situation is located in the absence of assurance of consultation or continuation of policy where there is no scope for abuse of power. Where there has been no promise either of consultation (the paradigm case of procedural expectation) or as to the continuance of the policy (substantive expectation), there will generally be nothing in the case to save a decision by the authority in question to effect a change in its approach to one or more of its functions. In such situation there can be no objection to that, for it involves no abuse of power. Lord

¹⁶[2008] EWCA Civ 755

¹⁷[2000] 3 All ER 850

Woolf said in *Coughlan*: “In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process.”

Substantive Legitimate Expectation

*Coughlan*¹⁸ case is a land mark in development of the doctrine of substantive legitimate expectation. Before the judgment in *Coughlan*, it was unclear “whether substantive legitimate expectations were recognized in the UK law”. Briefly the facts of this case are as follows: Miss Coughlan, was a quadriplegic who lived in a hospital for the chronically disabled from 1971-1993 called Newcourt hospital. Finding the Newcourt hospital unacceptable for modern care, she was moved to a new, Mardon House, relatively new specialty hospital built in 1993 specifically designed to accommodate severely disabled patients. Miss Coughlan and other residents in the new facility were given an explicit “promise that they could live there ‘for as long as they chose’ whereby it would be their “home for life”. In 1998, the Health Authority in charge of the new residence decided to close the facility on the grounds that the unit was “prohibitively expensive” and not “financially viable” because it “left fewer resources for other services”. Then the health authority decided to transfer Miss Coughlan and the other residents to a home run by the local authority that was not purposely built for their care, unlike Mardon House. Miss Coughlan sought judicial review on the basis that by closing the new facility, the health authority conducted its affairs unlawfully “in breaking the recent and unequivocal promise given by it that the applicant and other patients could live there for as long as they chose”.

Miss Coughlan had a ‘legitimate expectation’ that she would be able to remain at Mardon House as long as she chose to. Though there were other grounds of challenging the legality of the health authority's decision in the closure of a long-term care facility specifically designed for the purposes of severely disabled patients, the judicial examination in *Coughlan* case primarily focused upon the Health authority's promise in providing a ‘home for life’ to the claimant.

The court held that the health authority's breach of that expectation unfairly amounted to a significant abuse of power and consequently ruled in favour of the applicant.

Calling it a seminal judgment on the topic, an article in Law Teacher website analyzed this judgment¹⁹. The court identified three scenarios of reviewing cases relating to legitimate expectations wherein a member of

¹⁸*Rv North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850.

¹⁹ <http://www.lawteacher.net/health-law/essays/substantive-legitimate-expectations.php>

public generally expects to be treated in a particular way by a public body, but the treatment was contrary to the expectation.

1. **First Scenario: Test of Rationality:** The court could conclude that the public authority is only required to uphold its previous representation if it has carefully and reasonably exhausted all of the available options available to it at the time before deciding to resile from its initial promise. In this context the court reviewed on *Wednesbury grounds* and *Hargreaves*²⁰ is cited as an example of this type of case. This scenario applies the test of “rationality and whether the public body has given proper weight to the implications of not fulfilling the promise”.
2. **Second scenario: Test of breach of promise:** The court could “decide that the promise...induces a legitimate expectation of (for example) being consulted before a particular decision is taken”. Here, the courts will require that there is an opportunity for consultation before a decision is to be provided unless there is a prevailing reason to detract from that promise. In this instance, the court would determine whether such a breach was procedurally fair.
3. **Third scenario: Test of unfairness:** is that the court could explore whether a lawful promise has induced a legitimate expectation of substantive benefit to the claimant. Here, the court will have to determine whether such a decision to breach a promise was so grossly “unfair that to take a new and different course will amount to an abuse of power”. Additionally, the court must decide if there was “a sufficient overriding interest to justify a departure from what has been previously promised”.

The court held that *Coughlan* case fell within the third scenario. The court gave reasons for placing *Coughlan* in the third category as:

- (1) “the importance of what was promised to” the claimant,
- (2) “the fact that the promise was limited to a few individuals” and
- (3) because the consequences to the health authority of requiring it to honour its promise” were merely financial.

The courts held in favour of the applicant in *Coughlan* on the grounds of decision in case of *Preston*²¹, which suggests that it is an abuse of power if an authority reneges on its promise towards a limited number of individuals without justification. Furthermore, *Coughlan* acknowledged that the proper test was located in *Unilever* where the courts in that case concluded that “for the crown to enforce a time limit which for years it had not insisted upon would be so unfair as to amount to an abuse of power”.

²⁰R v. Home Secretary Ex p. Hargreaves. [1997] 1 WLR 906

²¹R v. Inland Revenue Commissioners Ex p. Preston. [1985] AC 835.

Rejection of Wednesbury test

Another significant turn in this decision is that the court in Coughlan rejected the Wednesbury test as the grounds for reviewing substantive legitimate expectation cases because it would not be conducive to striking the appropriate balance between the aims and priorities of the administration whilst simultaneously upholding the principle of fairness towards the claimant. Ultimately Coughlan held that there was no overriding interest in frustrating the claimant's expectations of remaining at Mardon House for the rest of her life because the health authority “failed to weigh the competing interests correctly” and does not appear to have made an offer of suitable, alternative accommodation.

Criticism of Coughan case

Coughlan while rejected the Wednesbury test of rationality was in favour of an approach of ‘substantive protection’. Author Elliot who analysed this judgment contends that ‘the foundations of the judicial decisions are on dubious grounds because there is (1) “no clear guidance as to when such protection should be afforded” and (2) the reasoning outlined in Coughlan fails to sketch the times in which the courts ought to intervene where a “departure from previous policy is not...objectively justified”, or when a departure from policy is irrational.

Elliot substantiated this point saying that the courts are better equipped to make their legal decisions on procedural, as opposed to substantive dimensions of executive decisions in its use of the Wednesbury test²². Referring to the Wednesbury test and its influence upon human rights cases, Elliot explained that the Wednesbury test is the underlying ‘organising principle’ in the sense that it is the cornerstone of adjudication and refers to the LJ Brown's judgment in *ex p Smith*²³ whereby the courts had to examine the legitimacy of the armed forces' policy of excluding homosexuals from service on the conventional Wednesbury basis adapted to a human rights context and ask: can the Secretary of State show an important competing public interest which he could reasonably judge sufficient to justify the restriction of the applicant's rights? The primary judgment is for him to make. Only if his purported justification outrageously defies logic or accepted moral standards can the court, exercising its secondary judgment, properly strike it down. Thus, Elliot insists that the decision in Coughlan and its ‘intrusive mode of review’ of cases involving substantive expectations is incompatible with

²²Elliot, M. “Legitimate Expectation: The Substantive Dimension”. Cambridge Law Journal.Vol. 59, no. 3 (2000). P. 421-425, and Elliot, M. “Coughlan: Substantive Protection of Legitimate Expectations Revisited”. Judicial Review.Vol. 5, no. 1 (2000). P. 27-32.[Substantive legitimate expectations | Law Teacher http://www.lawteacher.net/health-law/essays/substantive-legitimate-expectations.php#ixzz2MdLmoOP9](http://www.lawteacher.net/health-law/essays/substantive-legitimate-expectations.php#ixzz2MdLmoOP9)

²³Regina v. Parole Board (Respondents) *ex parte Smith (FC)* (Appellant), [2003] EWCA Civ 1269 [2002] EWCA Civ 1641

the decision in Smith and Hargreaves, thus casting its appropriateness into serious doubt because of its failure to acknowledge how the Wednesbury test of unreasonableness restricts the courts adjudication of executive decisions.

Scope of doctrine of substantive legitimate expectation, Clayton' view:

In this connection, Clayton²⁴ asserts that the decision in Coughlan further complicated the scope of substantive, legitimate expectations. He argues that the Court's decision in Coughlan obfuscated the ambit of substantive legitimate expectations and consequently extended the principle beyond its appropriate boundaries. Clayton also highlights that substantive expectations generated as a result of representations and/or promises from a public body ought to be distinguished from policy based expectations; consequently, he contends that “policy based expectations are more satisfactorily analysed as illustrations of the principle of consistency rather than the principle of substantive legitimate expectations”. In other words, he maintains that it is difficult to defend departures from policy-based expectations—in favour of substantive expectations towards particular individuals—because they form the basis of a consistent, principled approach to good administration. Additionally, Clayton also directs his critique towards the reasoning affirmed in Coughlan by suggesting that its employment of the legal principle that it is an abuse of power if an authority reneges on its promise towards a limited number of individuals is an uncertain measurement. Clayton, finally suggests that the principle of consistency ought to be applied whereby public authorities adhere to their policies—and that inconsistency—ought to be perceived as a dimension of Wednesbury unreasonableness. Clayton cites Hoffman's observations in *Matadeen v. Pointu*²⁵ as the rationale for his argument: Equality before the law requires that people should be uniformly treated, unless there is some valid reason to treat them differently... Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution... Treating like cases alike and unlike cases differently is a general axiom of rational behaviour.

The Law teacher article did not agree with the criticism of Elliot and Clayton approach and considered the Coughlan decision was correct. It says: The decision of Coughlan and its affirmation of substantive legitimate expectations illustrate the court's awareness of the tension between prizing administrative freedom on the one hand and fairness on the other, while recognising that neither perspective should triumph over one another. Although it could be argued that the principle of ‘substantive legitimate expectation’ did indeed triumph over the Wednesbury test—as Elliot and Clayton seem to suggest—the particular facts of the Coughlan case indicates that the courts attempted to strike the appropriate balance in reconciling the two doctrines.

²⁴Clayton, R. “Legitimate Expectations, Policy, and the Principle of Consistency”. Cambridge Law Journal.Vol 62, no. 1 (2003). P. 93-105.

²⁵Matadeen v Pointu [1998] UKPC 9.

The author in Lawteacher agreed with Schonberg and Craig²⁶, saying they provided a convincing analysis of the importance of substantive legitimate expectations as a principle of law and suggest that four considerations ought to be at the forefront of determining whether an appropriate standard of review is being exercised:

1. A public body may lead an individual to experience severe hardship if it acts in a manner that is contrary to what the individual may have been led to expect; thus, the law ought to protect an individual's interests if they are led to rely upon an expectation to his/her detriment;
2. "Protection of legitimate expectations is closely linked with the rule of law"
3. "A lack of respect for individual expectations may undermine trust in public authorities", and
4. "Public authorities must comply with the general principles of EU law, including that of legitimate expectations, in situations which fall within the scope of Community law".

Additionally, Schonberg and Craig also propose that the 'proportionality test' would be an appropriate mechanism in refining the judicial approach to substantive, legitimate expectations ²⁷ .

Evolved Doctrine

Within the branch of Administrative Law this doctrine has evolved into a kind of a right. A duty to act fairly has been created over a period of time. This again means that an aggrieved party can seek judicial review if he had 'a reasonable expectation' of some action which led to decision and that the 'reasonable expectation' was not fulfilled. The reasonable expectation does mean the legitimate expectation. This doctrine evolved out of thinking of judges like Lord Denning and not out of any explicit source or authority. In fact Lord Denning is the author of this aspect of that concept. However, Laws LJ has further constructed this doctrine.

Legal duty to be fair

After analyzing the case law on this developing doctrine of public law, Laws LJ offered the following 'very broad summary of the place of legitimate expectations in public law'. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A

²⁶Schonberg, S., and Craig, P. "Substantive Legitimate Expectations after Coughlan". Public Law. (Winter 2000). P. 684-701.

²⁷ <http://www.lawteacher.net/health-law/essays/substantive-legitimate-expectations.php>

change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority.

For a public authority to do otherwise than as indicated, in any of the following instances, would be to act sounfairly as to perpetrate an abuse of power:

- a) If the authority has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation).
- b) If the authority has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation).
- c) If, without any promise, the authority has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation).

Good Administration and Proportionality

According to *Nadarajah* the idea that the underlying principle of good administration which requires public bodies to deal straightforwardly and consistently with the public (and by that token commends the doctrine of legitimate expectation) should be treated as a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. Any departure from it must therefore be justified by reference among other things to the requirement of proportionality.

Lord Justice Laws has made clear that the legitimate expectation is essentially a feature of the duty upon public authorities to act fairly and not abuse their powers. There is of course a tension between the requirement for local authorities to act properly within the ambit of their statutory powers (not fettering their discretion) and the doctrine of legitimate expectation which may under certain circumstances compel an authority in fairness to behave as it may reasonably be expected to do, even though this may not accord with its corporate wishes.

This concept is dynamic and developing. It stood firmly on the foundation of the equitable doctrine of estoppel which had been developed so energetically by former Master of the Rolls, Lord Denning. At the same time Lord Hoffman pointed out the differences and distinguished both from each other. In the *Reprotech* case in

2002²⁸ whilst equitable estoppel and legitimate expectation may be cousins they do have rather different personalities:

'There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power . . . [Coughlan. . .] But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote'.

The decision in Coughlan is hailed as a positive development in the law. However there are several conflicting perspectives regarding the appropriate balance between administrative discretion and the expectations of individuals on executive assurances, as the lawteacher article explains. The doctrine is being expanded and explained by the courts and authors.

It might be easy to say that public authorities should be fair in exercising their public discretion in public interest. Then what is fairness? It is a creature of particular sets of circumstances and there are as infinitely variable as human beings and indeed human nature itself. However when a person is aggrieved by unfair decision making he has to naturally look to an appropriate remedy within the reach. In those circumstances the analysis by Laws LJ on this doctrine of legitimate expectation will come as handy tool. Still his conclusion may not be the last word.

In India: Analysis of Doctrine by the apex court

In India the doctrine has similar foundation as found in England and it is consolidated by the catena of pronouncements by the apex court of India. The Supreme Court in *M/S Sethi Auto Service Station vs Delhi Development Authority &Ors*²⁹ has extensively dealt with the concept of 'legitimate expectation'. While dealing with the question of allotment of a plot by the DDA, the Supreme Court has enumerated various decisions of the concept of Legitimate Expectation and examined the law relating thereto. Most of the cases discussed above were

The protection of legitimate expectations, as pointed out in De Smith's Judicial Review (Sixth Edition), (para 12-001), is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public. The Supreme Court referred to the decision by the House of Lords in *Council of Civil Service Unions &Ors. Vs. Minister for the Civil Service*,

²⁸R v East Sussex County Council, ex pReprotech (Pebsham) Ltd; Reprotech (Pebsham) Ltd v EastSussex County Council [2002] UKHL 8

²⁹ <http://www.indiankanoon.org/doc/1954714/>

and the basic principles relating to legitimate expectation, as explained by Lord Diplock saying that for a legitimate expectation to arise, the decision of the administrative authority must affect such person either:

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

Lord Fraser in *Attorney General of Hong Kong Vs. Ng Yuen Shiu* said: "when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty".

Necessary concomitant of Rule of Law

The Supreme Court explained the doctrine of legitimate expectation as necessary concomitant of the rule of law. Discussing such nature and scope of the doctrine of legitimate expectation, in *Food Corporation of India Vs. M/s Kamdhenu Cattle Feed Industries*³⁰, a three-Judge Bench of the Supreme Court observed:

The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand

³⁰ <http://www.indiankanoon.org/doc/298443/>

judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

Thus in the above case the doctrine is related to non-arbitrariness and rule of law.

Frustrating the expectation, violation of Article 14

Frustrating this expectation should naturally result in challenge before judiciary. It should be considered as violation of Article 14. It was so observed in *Union of India & Ors. Vs. Hindustan Development Corporation & Ors*³¹: "If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognized general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not unlock the gate which shuts the court out of review on the merits", particularly when the element of speculation and uncertainty is inherent in that very concept."

The Australian High Court in *Attorney General for New South Wales Vs. Quinn*³² held that "to strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the Courts adrift on a featureless sea of pragmatism".

Violation of Natural Justice

The goal of good administration is to avoid the abuse of discretion. Unfairness is also considered as violation of natural justice. In *National Buildings Construction Corporation V . S. Raghunathan & Ors*³³, a three-Judge Bench of Supreme Court observed as under: "The doctrine of "legitimate expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice.

³¹ <http://indiankanoon.org/doc/1964881/>

³² *Attorney-General (NSW) v Quin* (1990) 170 CLR 1;

³³ <http://www.indiankanoon.org/doc/1908449/>

It was in this context that the doctrine of "legitimate expectation" was evolved which today has become a source of substantive as well as procedural rights. But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel."

Balancing consequences of policy change

The Supreme Court in *Punjab Communications Ltd. Vs. Union of India &Ors*³⁴, referring to a large number of authorities on the question, observed that a change in policy can defeat a substantive legitimate expectation if it can be justified on "Wednesbury" reasonableness. The decision maker has the choice in the balancing of the pros and cons relevant to the change in policy. Therefore, the choice of the policy is for the decision maker and not for the Court. The legitimate substantive expectation merely permits the Court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made. (Also see: *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer &Ors*³⁵)

The legitimate expectation does not mean anticipation or hope. In *Jitendra Kumar &Ors. Vs. State of Haryana &Anr*³⁶ it has been reiterated that a legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. It is grounded in the rule of law as requiring regularity, predictability and certainty in the Government's dealings with the public and the doctrine of legitimate expectation operates both in procedural and substantive matters.

Thus a public body or administrative authority will be under an obligation by reason of

- a) representation,
- b) past practice, or
- c) conduct giving rise to an expectation which would be within its powers to fulfill.

Expectation can be frustrated in case of overriding public interest. When state action is based on public policy the doctrine does not work.

The person who is making a claim based on this doctrine has to satisfy that

- a) he relied on the said representation and
- b) the denial of that expectation has worked to his detriment.

The aggrieved can seek intervention of the court which could do so only

³⁴ <http://www.indiankanoon.org/doc/349643/>

³⁵ <http://indiankanoon.org/doc/1890994/>

³⁶ <http://www.indiankanoon.org/doc/952671/>

- a) if the decision taken by the authority was found to be arbitrary,
- b) unreasonable or
- c) in gross abuse of power or
- d) in violation of principles of natural justice and
- e) not taken in public interest.

Limitations on Court's intervention

There are several limitations on interventions by the court on the ground of doctrine of legitimate expectation. Abuse of the power is the essential element. But a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. With several judicial pronouncements in India and different jurisprudences it is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power.

The apex court explained that the court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. Therefore, a legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited.

CONCLUSION: The plea of legitimate expectation still remains a very weak plea in Indian Administrative Law. A claim for a benefit on the basis of legitimate expectation is more often negated by the courts. It is rarely that such a plea is accepted by courts in India. It is humbly submitted, therefore, that in situation of confusion of ideas regarding the concept of legitimate expectation what needs to be realized is that the concept envisages not merely "expectation" but "legitimate expectation" which means that there is already something super-added to just "expectation" - some kind of assurance or representation by the administration or the fact that the expectation has been recognized over a period of time. What needs to be realized is that the concept is more of an equitable nature rather than legalistic in nature.³⁷

The doctrine of legitimate expectation is expected to be adhered voluntarily to by the administrators. As already explained it is the ethical point of administrative law. However, the enforceability depends upon

³⁷ Ban.L.J.(2002) 57-65, B BPandey, Doctrine of Legitiamate Expectation:
www.bhu.ac.in/lawfaculty/vol31/P_N_PANDEY_final.doc

various factors including the proof of abuse of power and resulted loss out of arbitrary exercise of the discretion. Because it is not a codified legislative ‘right’, the difficulties of interpretation, circumstances and problem of variance in different courts at different times cannot be avoided. This doctrine imposes a moral but enforceable duty on the public authority. Generally it is said that ethics cannot be enforced but this equitable and ethical doctrine of legitimate expectation is an exception and thus it is an enforceable ethics.

