CHAPTER – 5
LEGITIMATE EXPECTATION – A CONCEPTUAL ANALYSIS

5.1 Introduction -

In English law, the concept of legitimate expectation arises from administrative law, a branch of public law. In proceedings for judicial review, it applies the principles of fairness and reasonableness to the situation or interest in a public body retaining a long standing practice or keeping a promise.

The traditional constraint on a public body has been the test of irrationality, also known as Wednesbury unreasonableness following Associated Provincial Picture Houses Ltd. v. Wednesbury Corpnr, which stated that a decision would be unreasonable if, “.....no reasonable authority could ever have come to it”(per Lord Greene). But if the courts are to establish a justification for a more interventionist approach, irrationality will always be defeated if the particular decision has sufficient qualities of reasonableness, i.e., it should never be irrational to prefer the good of the many to the interests of the few. Hence, when faced with claims of a legitimate expectation, the courts have begun to require public officials to adopt the same approach as in making decisions affecting fundamental human rights.

In procedural terms, a 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 expectation to arise. It is, of course, difficult to prove such a legitimate expectation unless fairly specific representations as to policies affecting future

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1 (1948)1 KB 223 p. 230 per Lord Greene M.R.
conduct have been made. The form of generalized understandings that ordinary citizens might have, will not be sufficient for this purpose. And, even if there are legitimate expectations, there is no absolute right to have those expectations met. Fairness may require no more than a hearing or consultation before any change is finally decided and, if the citizen’s expectation is real, the courts might require the public body to identify an overriding public interest to trump the particular expectation.

This supplements the *Wednesbury* approach but it may not be advancing judicial review very far since, even in cases where an estoppel might otherwise have arisen, it will be difficult to convince a court that going back on a specific representation relied on to produce detriment will be unreasonable, unfair or irrational.

Lord Scarman has recently observed that “the doctrine of legitimate expectation has an important place in the developing law of judicial review”. However, the use of this concept as a lever for expanding the range of judicial review on the basis of the *Wednesbury* principle is a some what unexpected twist in the skein.

Despite the suggestion that the idea of legitimate expectation lends itself to development as an aspect of natural justice\(^2\), the limit of the emerging principle are now demarcated with moderate precision. It is settled law that, even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, and indeed notwithstanding that the advantage contemplated conflicts with his private law rights, he may have a legitimate expectation of receiving the benefit or privilege, in which event the courts will protect his expectation by judicial review within the public law domain\(^3\). However, it has been considered essential, in the interest of preserving a realistic balance between effectiveness of administration and justice for the individual, that judicial review for denial of a legitimate expectation should be confined to cases where the complainant has been deprive of some benefit

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\(^2\) *Council of Civil Services Union v. Minister for the Civil Services* (1985) A.C. 374 at p. 415, per Lord Roskill (H.L.)

\(^3\) *O’Reilly v. Mackman* (1983)2 A.C. 237(H.L.)
which either (i) he had in the past been permitted by the decision – maker to enjoy and which he could legitimately expect to be permitted to continue to do until there had communicated to him some material grounds for withdrawing it on which he had been given an opportunity to comment, or (ii) he had received assurance from the decision – maker would not be withdrawn without giving him first an opportunity of advancing reasons for contending that it should not be withdrawn.

The basis of the expectation in the first case is the adoption of a consistent practice over a sufficiently long period to justify anticipation, in all the circumstances, that the practice would continue to be followed in the future. The Council of Civil Services Unions case offers a typical illustration. Against a background which admitted of no doubt that, ever since G.C.H.Q. was established in 1947, prior consultation had been the invariable rule when it was proposed that conditions of service relating to civil servants engaged in its work should be altered significantly, Lord Fraser of Tullybetton was satisfied that, had there been no question of national security involved, the civil servants would have had a legitimate expectation that the Minister would consult them before issuing instructions which crucially transformed the terms of their employment.

The second limb of the evolving principle has its proper application in circumstances where the expectation is further frustrated by the breach of a representation on which reliance is reasonably placed. This is exemplified by Attorney General of Hong-Kong v. Ng Yuen Shin. In this case the applicant’s expectation of the benefit of a hearing was founded upon an undertaking, expressly given on behalf of the government of Hong-Kong, that certain categories of illegal immigrants would be entitled to make representations to the immigrant authorities before orders were made for their deportation from the colony.

In this area, too, the parameters of judicial review have expanded recently. The remarkable feature of the decision of the Queen’s Bench Division in R. v.

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4 Council of Civil Services Union v. Minister for the Civil Services (1985) A.C. 318 at p. 408-9, per Lord Diplock (H.L.)
5 Ibid
6 (1985) A.C. 318 at p. 400-401
7 (1983) 2 A.C. 629
Secretary of State for Transport, ex. P. Greater London Council\textsuperscript{8} is that judicial review, predicted on 
\textit{Wednesbury} unreasonableness, was exercised in a situation where the expectation which the applicant for relief purported to entertain was not forfeited by either of the principles of sustained practice or unequivocal representation. The dispute which culminated in litigation had its origin in the provisions\textsuperscript{9} of the London Regional Transport Act, 1984, which transformed control of the London Transport Executive, the body responsible for running London Transport services, from the Greater London Council to the Secretary of State for transport, renaming it London Regional Transport. In pursuance of this legislation the Secretary of State issued a direction requiring the Greater London Council to pay London Regional Transport by installments the maximum sum which the statute prescribed, by way of grant for the remainder of the initial financial year. The governing legislation contained no requirements, express or implied, in regard to consultation between the Secretary of State and the Greater London Council before a direction in these terms could lawfully be issued. Nevertheless, the Queen’s Bench held that the G.L.C. had a legitimate expectation of being consulted in respect of the quantum of the contribution which it was required to make. McNeill, J. reasoned it as follows: ‘Parliament had legislated for a maximum payment in the initial year. That assumes that less than the maximum could be directed. Whichever phrase be used – duty to act fairly, legitimate expectation, a right to be heard – it seems to me that natural justice entitles the payer at least to make representation to the effect that he should not pay the maximum, but some lesser sum.

Clearly, there are far-reaching implications for public administration in general if extended recourse in this form is had to the principle of legitimate expectation so as to secure the result that any person or body called upon to make a payment, authorized by statute on a graduate scale entailing an element of discretion has the right to make representations to the person in whom the discretion is vested regarding the quantum of the payment that is proper in the circumstances. Not only is the wide sweep of a compulsory obligation to consult, conceived in these al-

\textsuperscript{8} (1986) Q.B. 556
\textsuperscript{9} Section 49
embracing terms, not embedded as a regular rule in the pre-existing law, but previous authority implies reluctance to fetter administrative discretion to the extent required by this development.

Re Findlay\textsuperscript{10}, typifying a less intrusive approach is a case which concerns the power of the Secretary of State to adopt changes in the policy regulating the exercise of his discretion to grant parole to convicted prisoners. The empowering legislation enabled the Secretary of State, if he saw fit, to consult the parole board before formulating new policy but did not require him to do so\textsuperscript{11}. In construing a permissive statutory power, the House of Lords, emphatically related, consultation with the parole board as a precondition of validity of changes in the parole system, which is effected by the Secretary of State\textsuperscript{12}. The Secretary of State, in basing his decision on such aspects of public policy as factors of deterrence, retribution and public confidence in the administration of criminal justice, which he had assessed independently of the board, was considered by the House of Lords not to have acted unreasonably\textsuperscript{13}. Although the circumstances of the Findlay and G.L.C. cases are not in \textit{pari materia}, in so far as it is inherent in the subject matter with which the Secretary of State dealt in the former case that the participation of the board, even though it could be expected to be useful, was not indispensable in evaluating the factors on which the contemplated changes of policy depended, it is significant that in none of the speeches in the House of Lords was there shown the slightest inclination to curtail the responsibility allocated by statute to the Secretary of State, by compelling consultation with the board. A stark contrast in judicial attitude is signified by the judgment of McNeill, J., in the G.L.C. case, where a bold application of the principle of legitimate expectation, in a context which plainly falls outside the purview of established lines of authority, controversially extends the scope of judicial review of an executive discretion on the ground of unreasonableness.

A redeeming feature of the evolving law is the indication of contemporary

\textsuperscript{10} (1985) A.C. 318
\textsuperscript{11} Criminal Justice Act, 1967, S. 59(3) (c)
\textsuperscript{12} (1985) A.C. 318 at p. 333-334, per Lord Scarman
\textsuperscript{13} Ibid
judicial awareness of the dangers attendant on too intrusive an interpretation of the idea of legitimate expectation. It has been recognized that exigencies of a political nature may, in appropriate circumstances, require drastic curtailment of the legitimate expectation to be consulted. Reasonableness of restriction in regard to the nature of the representations that may be entertained, and the period within which they are required to be made, is to a substantial extent a question of context. Moreover, the courts seem resolved to resist extension of the doctrine to embrace expectations arising from the mere scale of the implications of particular decisions. This inhibition is the product of consciousness that, if the duty of consultation were to be entirely open-minded, the probable reaction of public authorities would be to opt for safety and to assume, at the expenses of efficient conduct of public business, a duty of consultation in all circumstances admitting of doubt.

The concept of legitimate expectation first stepped in English Law in Schmidt v. Secretary of State for Home Affairs. There Lord Denning said obiter that an alien who had been given leave to enter the United Kingdom for a limited period had a ‘legitimate expectation of being allowed to stay for the permitted time’ and, hence, if that permission was ‘revoked before the time limit expires, (the alien) ought to be given an opportunity of making representations (to the Home Secretary)’. Since then ‘legitimate expectation’ has played an important part in numerous decisions in with the United Kingdom and the Commonwealth (particularly Australia, Asia).

The operation of the developed doctrine can be illustrated by A.G. of Hong Kong v. Ng Yeun Shiu. This case arose from the announcement of the Government of Hong Kong of a change in policy towards illegal immigrants from China. The original announcement left unclear what the position would be in regard to illegal immigrants from Macau (such as the respondent). In a clarifying announcement the Govt. said that ‘illegal immigrants from Macau will be treated in accordance with the procedures for illegal immigrants from anywhere other than China. No guarantee

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14 R. v. Secretary of State for Social Services, ex. p. Association of Metropolitan Authorities (1986)1 W.L.R. 1
15 Re Westminster City Council (1986)2 W.L.R. 807 at p 822-823, per Lord Bridge
16 (1969)2 Ch. 149
17 (1983)2 A.C. 629
can be given that you may not subsequently be removed. Each case will be treated on its merits. It was accepted by the Privy Council that this procedure had not been compiled with before the removal of the respondent from the colony was ordered\(^\text{18}\). Lord Fraser said that “the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, is applicable to the undertaking given by the government of Hong Kong to the respondent...... that each case would be considered on its merits”. Hence the respondent’s legitimate expectation was not fulfilled and the removal order against him was quashed.

The judicial motivation for seeking to protect such expectations is plain: if the executive undertakes, expressly or by past practice\(^\text{19}\), to behave in a particular way the subject expects that undertaking to be complied with\(^\text{20}\). That is surely fundamental to good government and it would be monstrous if the executive could freely renege on its undertakings. Public trust in the government should not be left unprotected.

However, it is far easier to find established grounds upon which to deny the protection of legitimate expectation than grounds to grant such protection. It is easy

\(^{18}\) Although the respondent had been interviewed before the order had been made, he had not been given an opportunity to explain the humanitarian grounds in support of his desire to stay.

\(^{19}\) The ways in which legitimate expectation could arise were set out by Lord Fraser in *C.C.S.U. v. Minister for the Civil Services* (1985) A.C. 374 where he said “legitimate... expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue”. Legitimate expectation is thus ‘founded upon some act, practice or situation prior to the decision... (and thus) a legitimate expectation (does not arise) simply because of the decision maker’s power to decide in a way adverse to the person’s’. (J.L. Caldwell (1983)2 Canterbury Law Review 45 at 48 relying upon *Nashua v. Cannon* (1981)36 A.L.R. 215). John Hlophe (1987) 104 S.A.L.J. 165 disagrees. He links legitimate expectation with fairness and argues that it would be unfair to deny expectations not founded upon past facts simply upon the decision maker’s power (at 178-179). Although there may be cases in which a legitimate expectation may not be founded simply upon a decision maker’s power to decide adversely to an applicant (as Hlophe points out in Schmidt v. Secy. of State for Home Affairs (1969)2 Ch. 149 itself there was no mention of undertakings or prior practice leading to legitimate expectation), such cases would in the light of the approach of the House of Lords in *CCSU v. Minister for the Civil Services* be dealt with as concerned with the duty to act fairly simpliciter without the gloss of legitimate expectation. We shall consider the relationship between the duty to act fairly and legitimate expectations below.

\(^{20}\) In *A.G. of Hong Kong v. Ng Yuen Shiu*, it is not entirely clear to what extent Ng relied upon the undertaking: he made his first visit to the immigration authorities before he learnt of the undertaking, but learnt of the undertaking from television before his voluntary return to the authorities forfeited his intention to return.
to argue, for instance, that decision makers entrusted by Parliament with discretionary powers can not hold themselves bound by their prior undertakings. For if they do so, they fetter the discretion, they are bound by law to retain in their own hands\textsuperscript{21}. Alternatively, it may be argued, to hold public bodies to their prior undertakings is to allow the principle of estoppel to operate; and the efforts of Lord Denning notwithstanding\textsuperscript{22}, estoppel has but a small part to play in administrative law\textsuperscript{23}. In other cases, the undertaking may go beyond the legal powers of the decision maker; and to hold him bound by his undertaking would be to create that legal horror; a body that can set its own limits to its jurisdiction\textsuperscript{24}. So, we will need to investigate the relationship between the protection of legitimate expectations and the grounds (especially estoppel) upon which such protection may be denied.

In addition there is also the question: how are legitimate expectations to be protected? \textit{Schmidt v. Secretary of State for Home Affairs}\textsuperscript{25} introduced the concept of legitimate expectation in the context of natural justice and this has proved the most potent strand in the decisions. Consequently, the concept has developed, particularly in Australia and New Zealand,\textsuperscript{26} into a significant aspect of the modern law of natural justice. A legitimate expectation cannot, it is argued, be denied without a hearing. Such protection is procedural protection; the decision maker is not bound to exercise his discretion in a particular way, he is only bound to grant a hearing to the person affected.

A Central argument, here, is that in addition to procedural protection legitimate expectations are, or ought to be, substantively protected, i.e. that in order to protect a legitimate expectation a public body would be bound, save in

\textsuperscript{21} See, for instance, H.W.R. Wade, \textit{Administrative Law}, 5\textsuperscript{th} ed.
\textsuperscript{22} In cases such as \textit{Lever Finance Ltd. v. Westminster (City) London Borough Council} (1971)1 Q.B. 222
\textsuperscript{24} See, for instance, Lord Greene M.R., in \textit{Minister of Agriculture and Fisheries v. Hulkin (unreported but cited in length in Minister of Agriculture and Fisheries v. Mathews} (1950)1 KB 148 at 153-4, see also, P.P. Craig, \textit{Administrative Law} (1983) at 559, 567.
\textsuperscript{25} (1969)2 Ch. 149
\textsuperscript{26} See Caldwell \textit{Administrative law}
exceptional circumstances, to exercise its discretion in a particular way. It must be frankly admitted that the general tenor of most decisions is against substantive protection, but there are two recent decisions that support the border view. Moreover, it is widely recognized that English Law frequently leaves persons misled by public authorities with scant remedy; substantive protection of legitimate expectation may help to remedy this.

One obvious protection to substantive protection – that it implies a judicial intrusion into the merits of the decision – can be immediately dealt with by pointing out that in fact the court in protecting an expectation substantively does not deal with the merits. The court is not concerned with whether the exercise of the discretion in a manner that would fulfill the expectation would be a wise exercise of the discretion or not. If that were the Court’s concern, it would, of course, be involved in the merits. But substantive protection of legitimate expectations does not require that; it requires simply that if a legitimate expectation is aroused, then, save in exceptional circumstances, the body that aroused that expectation should fulfill that expectation.

From all this it is clear that there is much to discuss about the concept. Is it naught but a useful strand of the law of natural justice or does it have a broader role to play? Let us begin by finding where it comes from.

5.2 Speculations on the provenance of the concept of Legitimate Expectation –

In his judgment in Schmidt v. Secretary of State for Home Affairs, Lord Denning makes no mention to the authority, judicially recognized or not, upon which the concept of legitimate expectation could be founded: indeed he has said that he feels ‘sure it came out of my own head and not from any continental or other

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27 Provided, of course, that such an exercise of its powers was consistent with its duty. See the dictum from Lord Fraser’s advice in A.G. of Hong Kong v. Ng Yoon Shiu cited above.
28 R. v. Secretary of State for the Home Department, ex parte Khan (1984)1 W.L.R. 1337(C.A.) and R. v. Secretary of State for the Home Department, ex parte Ruddock and others, (198 )2 All E.R. 518
29 Save to the extent that the expectation must be legitimate. In Cinnamon v. British Airport Authority (1980)1 WLR 582(C.A.) Lord Denning held that because the mini Cab drivers who were denied a hearing were of bad character that they had no legitimate expectation of a hearing. It seems quite wrong to allow the conduct of the drivers to color the nature of their expectation.
30 (1969)2 Ch. 149
source’. The later cases do not suggest any other provenances. Presumably, therefore, the origin of the concept lies within Lord Denning’s justly framed creative mind and not elsewhere.

But it may be significant that prior to the introduction of the concept into English Law there was developing in the jurisprudence of the European Communities (and based on the administrative laws of other EEC countries) a similar concept that also sought to protect the confidences that subjects had placed in governments (in this case the European Communities). This came to be called before the European Court the protection of legitimate expectations. An investigation, therefore, of the concept before the European Court (as well as its origin before that court) may prove instructive for English Law. Even if there was no cross-fertilization of ideas from European law in the introduction of the concept of legitimate expectation into English law, an analysis of the European concept may indicate or aid the lines upon which legitimate expectation may develop in English Law.

The recognized locus classicus illustrating the principle before the European Court in Re Civil Service Salaries: E.C. Commission v. E.C. Council\(^{31}\). What had happened here was that the council had made a regulation in which it departed from its previously announced guidelines for determining the salaries of employees of the community. In its typically awkward language the court held that “the rule of protection of the legitimate confidence which citizens may have in the respect by the authorities of undertakings of this sort, implies that the decision (announcing the guidelines) bound the council in its future action”. It was thought that the term ‘confidence’ might be misleading in the context of English Law, so ‘expectation’ is more frequently used\(^{32}\). Although in this case the court used the Council’s failure to protect the legitimate expectations of the staff members as a ground for overturning a particular piece of legislation, it made it clear that the rule of protection “is primarily applicable in the field of individual decisions”, i.e. the normal field for the exercise of the individual discretion. This indeed was the typical field of the


\(^{32}\) See J. Usher, The Influence of National concepts on Decisions of the European Law Review 359 at 363
operation of the related maxim *patere legem quam fecisti* and the significance of *Re Civil Services Salaries* lays not so much in its articulation of a principle in community law but in the extension of that principle to legislation as well as administrative acts.

Although *Re Civil Services Salaries* was decided after *Schmidt v. Secretary of State for Home Affairs* it is clear that the European Court did not borrow the concept of legitimate expectation from English Law. On the contrary, it is widely accepted that the idea was drawn from the administrative laws of the other member states, particularly German Law. The German concept of Vertrauensschutz is broader than that of *patere legem quam fecisti* (for it applies even when no rule (lex) has been laid down) and that of vested rights (*droits acquis*) (for it applies even when no rights have been laid down) and that of vested rights (*droits acquis*) (for it applies even when no rights have been acquired). It will be worthwhile to look more closely at it.

The concept of Vertrauensschutz arose in German law in reaction to the principle of the free revocation of administrative acts (*der Grundsatz der freien Widerrufbarkeit von Verwaltungsakten*). Where we are concerned with the revocation of a lawful administrative act nothing very novel arises. In English law, the authority which makes a decision affecting private rights has, in the absence of special provisions, no power to revoke that decision once it has been communicated to the parties. In German law the rejection of the principle of the free revocation of

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33 See, for instance, the discussion of the principle by Advocate General Lagrange in *Algera v. Assembly* (1957) E.C.R. 85
34 (1969)2 Ch. 149
35 Indeed, *Schmidt v. Secretary of State for Home Affairs* was cited to the court but in support of the argument that *legem patere quam fecisti* formed to part of English Law. Lord Denning’s dictum upon which the concept rests in English Law was not cited. It is likely though, that the name “legitimate expectation” was subsequently borrowed from English Law by commentators to describe the concept before the European Court.
36 See Usher, op. cit, supra, 364 relying in the main upon *Schmidt v. Bleibtrau and Klein, Kommtmar zum Grundgesetz*.
37 See, for example, Hans-Uwe Erichsen and Wolfgang Martens, Allgemeines *Verwaltungsrecht* (Walter de Gruyter, 5th ed.) 214-215, although at this point the learned authors are dealing with the provisions of the *Verwaltungsverfahrensgesetz* (Administrative Procedure Statute) it is plain that the point applies generally.
38 Wade, *Administrative Law*, many cases establishes this principle. See, for instance, *Re 56 Denton Road* (1953) Ch. 51, where Vaisey, J., said “...where Parliament confers on a body .....the duty of deciding or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot, in the absence of express statutory power or the consent of the persons or persons affected, be altered or withdrawn by that body".
administrative acts places the law in essentially the same position even although it is achieved by statute.\(^9\)

A more interesting question arises when the revocation of an unlawful act \((\textit{rechtwidriger Verwaltungsakte})\) is in dispute. In a crucial case in 1956\(^{40}\) a widow had moved from the German Democratic Republic to West Berlin after a senator had certified to her that she would be entitled to certain welfare payments in West Berlin. Once she arrived he arranged for the payments to be made to her. It later turned out, however, that the requirements of the law were not fulfilled and she was not entitled to the allowance. The senator now arranged that the payments should cease and informed the widow that she would have to repay the money that had already been paid. The higher administrative court in Berlin decided in favor of the widow. It recognized that there appeared to be a clash between the principle of the legality of the administration and the principle of legal certainty: the decision to make the allowance was plainly unlawful, yet citizens, such as the unfortunate widow, should be able to rely upon such decisions being valid. The court resolved this apparent clash by holding that both principles were elements of the \textit{Rechtsstaatprinzip} \((\text{the constitutional order})\)\(^{41}\). Hence neither principle prevailed over the other automatically. There had to be a weighing of the principles to determine whether the public interest in the legality of the administration outweighed the need to protect the trust placed by the citizen in the validity of the administrative act. Only in that event was an unlawful administrative act revocable.

At first sight this is a remarkable conclusion to reach\(^{42}\). It is possible for a body to make an illegal decision which will none the less be upheld should the principle of protecting the position of citizens who have placed their trust in the validity of the act outweigh the public interest in the legality of the administration. This looks to English eyes very much like a body being able to expand its

\(^9\) The various \textit{Verwaltungsverfahrensgesetz}, see Erichsen and Martens.

\(^{40}\) The case is discussed in Erichsen and Martens.

\(^{41}\) This seems a poor transaction of the potent idea of the Rechtsstaat. The idea is not of any constitutional order but of a constitutional order of a certain quality. Perhaps the ‘Rule of Law’ comes closer.

\(^{42}\) The conclusion may be compared, for instance, with \textit{Maritime Electric Co. v. General Dairies Ltd.} (1937) \textit{AC} 610 where an electricity authority which had misread a meter and therefore undercharged its customer for a period of two years was able to recover payment in full.
jurisdiction *suo motu*. The principle, however, is limited\(^4^3\). For instance, the relief available to the person whose trust is worthy of protection is often only the payment of compensation. Thus the illegal grant of license, a permit an employment contract or naturalization to a person whose trust is worthy of protection is revocable provided financial compensation is made. It is interesting to note that the absence of a right to compensation in such cases is widely recognized as a defect in English administrative law\(^4^4\) that the developing law on liability for negligent misstatements (as well as the office of Parliamentary Commissioner) may go some way towards remedying. No longer does the *Vertrauenschutz* principle seem outrageous.

Furthermore, the cases on legitimate expectation in the common law world arise when a body by a representation or by a past practice arouses expectations which it would be within its power to fulfill. In other words we are not primarily concerned with cases where a body arrogates to itself powers which it does not have, but rather cases in which a body undertakes to exercise its existing powers in a particular way. Should such a body renege on its undertakings then it does not seem outrageous to adopt the language of *Vertrauenschutz* and say that the public interest in the legality of the administration is outweighed by that of protecting the trust of the citizen in the representation of the authority.

It is time to return to English law. But first two important points need to be made. First, if the English law of legitimate expectation is to learn anything from the cognate concept of *Vertrauenschutz* it is surely that this concept is not limited to the field of natural justice. Sometimes, of course, the expectation which is created will be that a proper hearing will be given (as was the case in *A.G. of Hong-Kong v. Ng Yuen Shiu*\(^4^5\)) and on these occasions procedural protection is adequate. But on other occasions the expectation will be that the administrative body will, in certain circumstances, grant a substantive boon. If the protection of legitimate expectations is to be taken seriously it follows from this that an insistence upon natural justice will not always be an adequate remedy. Sometimes fulfillment of the expectation will require substantive protection.

Secondly, the suggestion implicit in this section that the English law concept

\(^{43}\) Erichsen and Martens, *Administrative Law*.

\(^{44}\) See, for instance, Wade, *Administrative Law*.

\(^{45}\) (1983)2 A.C. 629 (P.C.)
of legitimate expectation may be, or ought to be, influenced by ideas drawn from the law of the EEC and Germany may seem decidedly odd to many English lawyers. It is axiomatic to many English Lawyers, bred with Dicey in their bones, that English law has little to learn from continental legal systems. It is; thus, appropriate to end this section by pointing out that in Council of Civil Services Union v. Minister for the Civil Services. Lord Diplock foreshadowed such borrowing when he referred to the principle of ‘proportionality’ which “is recognized in the administrative law of several of our fellow members of the European Economic Community” in terms which suggested that the incorporation of this principle into English Law was to be welcomed. Moreover, in a debate in the House of Lords in 1977 Lord Diplock spoke approvingly of “the right to have one’s reasonable (legitimate) expectations fulfilled” and recognized that it was one of the significant points of difference between administrative law in England and on the continent; and he regretted that this principle had “not yet been accepted fully in this country”. In these circumstances there seems to be no reason why the concept of legitimate expectation should not have been borrowed from or at least influenced by the administrative law of continental Europe.

5.3 Are we concerned with the legitimate expectation of some boon or the legitimate expectation of a hearing?

We have seen in Schmidt v. Secretary of State for Home Affairs, Lord Denning spoke of a ‘legitimate expectation of being allowed to stay for the permitted time’. At this stage the learned judge plainly saw legitimate expectation as

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46 (1985) A.C. 374 (HL)
47 This is principle that the obligation imposed upon citizens in the public interest should be proportionate to the object in view, i.e., an inordinately heavy burden should not be imposed upon a citizen in order to attain a trivial public good. The principle has frequently been invoked before the European Court and forms part of the administrative law of many member states. See also, J. Bell, “The Expansion of Judicial Review over Discretionary Powers in Europe” (1986) Public Law 99 at 113
48 The principle of proportionality was in effect applied in R. v. Barnsley Metropolitan Council, ex parte Hook (1976) 1 W.L.R. 1052 (C.A.), where Lord Denning said “the court can interfere by certiorari if a punishment is altogether excessive and out of proportion to the occasion….” And Sir John Pennycuick spoke of “the disproportionately drastic step of depriving Mr. Hook of his license….” See also Woolf L.J. in R. v. Brent London Borough Council, exp. Assegai, The Times, 29 June, 1987
49 379 H.L. Deb 993 and 994 (3 Feb 1977)
50 The other significant point of difference was over the principle of proportionality.
51 (1969)2 Ch.
being the expectation of some boon or benefit from the authorities. On the other hand in *Cinnamon v. British Airport Authority* the same judge said that the appellants had in the circumstances of the case no “legitimate expectation of being heard”. Here he plainly considered that what was expected was not some boon from the authority but simply procedural justice in the form of a hearing. In *C.C.S.U. v. Minister for the Civil Service* Lord Diplock made it plain that he had in mind the legitimate expectation of one of hearing or another. And in the same case Lord Roskill said that “the legitimate expectation principle is closely connected with ‘a right to be heard’”.

This question about what is actually expected is not an idle one. If we are dealing with a legitimate expectation of some boon (or to be more mundane, a favorable decision) then it may be that the concept is naught more than a particular type of privilege and that what lurks before the surface in the discussion of legitimate expectation is a more subtle version of the discredited right-privilege dichotomy.

This is plainly the view of some learned commentators, Craig, for instance, considers legitimate expectations to be the ‘resurrection’ of the ‘dichotomy between rights and privileges’.

Craig point to some of the dangers associated with this view. The concept may be used in a drastic manner to deny natural justice as the concept of a

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52 Of course a legitimate expectation of some boon does not necessarily entitle the person entertaining that expectation to have that expectation fulfilled; it may only entitle him to be heard before his expectation is dashed. This indeed is the question discussed elsewhere of whether legitimate expectations should be substantively as well as procedurally protected. None the less, however the expectation may be protected; the person entertaining it may (like in Schmidt) expect the boon rather than the hearing.

53 (1980)1 W.L.R. 582

54 After disapproving of Barwick’s, C.J. suggestions in *Salemi v. Minister for Immigration and Ethnic Affairs* (No.2) (1977)14 A.L.R.1 that the concept of legitimate expectation adds, little, if anything to the concept of a right.

55 (1985)A.C. 374 (H.L.)

56 Ibid at 415


58 *Administrative Law* (1983), 260

59 Elsewhere he refers to ‘legitimate expectation’ as the ‘notion of privilege’ in a ‘new garb’ (op. cit. n 41, supra 284)

60 Op. cit., n 41, supra, 260
‘privilege’ was in the days prior to Ridge v. Baldwin. Hlophe, who is concerned to argue that the concept of legitimate expectation provides a means whereby the sterile conceptualism of the pre-Ridge v. Baldwin law may be avoided, is greatly concerned by this prospect. He argues that if the view that legitimate expectation relates to a favorable decision is accepted then judges will be more involved with the merits of the decision and the distinction between appeal and review will tend to break down.

Although there are criticisms to be made to both these authors’ arguments in their own terms, the major flaw in both their approaches is their common failure to recognize that the content of the expectation depends upon the circumstances that give rise to it. In some cases and A.G. of Hong-Kong v. Ng Yuen Shiu may here serve as the paradigm, an expectation of a certain kind of hearing cases. Thus in the case under discussion Ng was led to believe that he would be interviewed and that his case would be decided on its merits. Such an expectation relates to the quality and nature of the hearing and not to be outcome of the decision at all.

On the other hand there are cases in which the legitimate expectation does not relate to natural justice directly or at all. The recent case of R. v. Secretary of State for the Home Deptt., ex parte Khan may serve as an example. Briefly, what had happened was the following: the applicant and his wife, who were settled in England, wished to adopt the child (of a relative) resident in Pakistan. A Home office circular made clear that while such a child had no right to enter the United Kingdom for the purposes of adoption, the Secretary of State would in exceptional

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61 (1964) A.C. 40
62 Which is still potent in South African Law.
63 Hlophe, op. cit, n 5, supra, 176-177.
64 Regarding Craig’s point, although there are rare cases in which the absence of a ‘legitimate expectation’ has been used to deny a hearing (e.g. Cinnamon v. British Airport Authority (1980) 1 W.L.R. 582) the general trend of the decisions has been to extend rather than to deny Judicial Review (e.g. – A.G. of Hong-Kong v. Ng Yuen Shiu (1983) 2 A.C. 629 (P.C.) and R. v. Secretary of State for the Home Deptt., ex.p. Khan (1984) 1 W.L.R. 1337 (C.A.). there is merit in Hlophe’s point but he chooses the wrong case (Cinnamon) to support it. It is without doubt true that there was an improper intrusion by Lord Denning into the merits of the decision. But Lord Denning did so because he considered the applicant’s expectation was not legitimate. Insofar as the question under discussion was addressed at all Lord Denning seems to have been of the opinion that he was dealing with the ‘legitimate expectation of being heard’.
65 (1983) 2 A.C. 629 (P.C.)
circumstances exercise his discretion in favor of the child provided certain criteria were met. The circular also specified the procedure that would be followed to determine whether the criteria were met. The applicant and his wife apparently complied with the criteria, therefore, expected legitimately that the Secretary of State would exercise his discretion in their favor. In fact the Secretary of State refused entrance to the child on a completely different set of criteria, viz., the more onerous conditions applicable (in terms of the Immigration Rules) to the admission of children who had already been adopted by adoptive parents settled in the United Kingdom. In addition the Secretary of State did not follow the procedure he had said he would follow. In these circumstances Parker L.J., was doubtless correct to conclude that “the Home Office letter afforded the applicant a reasonable expectation that the procedures that it set out…. Would be followed, that if the result of the implementation of those procedures satisfied the Secretary of State of the four matters mentioned a temporary entrance clearance would be granted and the ultimate fate of the child would be decided by the adoption court of this country”. Although it is possible to analyze the expectation of Mr. and Mrs. Khan in different ways it is clear that they expected that, if they satisfied the criteria, the Secretary of State would exercise his discretion in their favor. The circular led them to expect a particular (and favorable) outcome of their application; they were not concerned with the rules of natural justice.

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67 This discretion is a common law (possibly a prerogative) power and was not statutory at all.
68 The criteria were that: the intention to adopt was genuine and not a device for gaining entry, the welfare of the child in the U.K. was assured, a U.K. court was likely to grant an adoption order, and at least one of the adoptive parents was domiciled in the U.K.
69 These criteria required ‘a genuine transfer of paternal authority on the ground of the original parents’ inability to care for the child and that ‘there are serious and compelling family or other considerations which make exclusion undesirable….’
70 In the description of the procedure to be adopted it was said that the Department of Health and Social Security would be asked to if there were “any apparent reasons why a court would refuse to grant an adoption order”. No such inquiries were made of the D.H.S.S.
71 It has been a matter of some debate whether there is distinction between reasonable expectations and legitimate expectations. In C.C.S.U. v. Minister for the Civil Services (1985) A.C. 374 (H.L.) Lord Diplock (at 408) expressed his preference for the use of ‘legitimate’ on the ground that there might be reasonable expectations which were not legitimate and hence unprotected. See also Lord Fraser in the same case (at 401) retracting the use of ‘reasonable’ in Attorney General of Hong Kong. See further Lord Roskill (at 415).
72 And they had no reason to doubt that the y would. Watkins L.J.’s dissent in ex.p. Khan is based upon a different analysis of the Home office letter. He said “I take it to be clear from the (first paragraph of the letter) that the Secretary of State was informing the intending adopted that, once those conditions were demonstrated to him have been satisfied, he would then proceed to exercise his discretion and in an exceptional case allow a child to be brought here for adoption”. 232
The recognition in ex parte Khan of the fact that what is expected may not be procedural justice, but may an expectation of a favorable decision, has been fortified by the recent decision of R. v. Secretary of State for the Home Department, ex parte Ruddock73. The Applicant74 was seeking, inter alia, judicial review of the Secretary of State’s decision to sign a warrant authorizing the interception of the telephone calls of one of the applicants75. But on what grounds might such a decision be overthrown? The power to interpret communications was non-statutory, so no reference could be made to a statute to find restrictions on the mode of exercise of the power. And questions of Natural Justice could hardly arise, for the purpose of intercepting telephone calls would be frustrated if notice was given of the impending interception! However, the interception of communications has long been a matter of public debate and the criteria, confirmed by Parliament by successive Home Secretaries, for the issue of warrants were well known and were freely available in public documents76. These criteria were in brief that “a warrant to intercept should only issue where there is reasonable cause to believe that major subversive activity is already being carried on and is likely to injure the national interest….. Normal methods of investigation must either have failed or be unlikely to succeed. Interception must be strictly limited to what is necessary to the security service’s defined function and must not be used for party political purposes or for the purposes of any particular section of the community”77. Given this the applicant argued that the he legitimately expected that these criteria would be faithfully applied.

73 (1987) 2 All. E.R. 518
74 In fact there were three applicants, Mr. J.I. Cox (whose phone was tapped), Mrs. J. Ruddock and Mgr. D.B. Kent (who both had phoned Mr. Cox). Taylor, J. however, held that only Mr. Cox had “sufficient interest to apply for any relief…….” if “a warrant was lawfully issued to tap Mr. Cox’s phone, no judicial review…. could be available to any of those with whom he spoke”.
75 The contested interception took place before the interception of Communications Act, 1985 came into force, so the Act was irrelevant to the present case. And Taylor, J. refused the invitation of counsel for the Secretary of State to deny relief to the applicants on the ground that the Act, which ousts the jurisdiction of the Courts, had rendered the present application simply of “academic or historical interest” (at 527-528)
76 The criteria were set out in the following official reports: the Birkett Report of Oct 1957 (Cmdn 283), the interception of communication in Great Britain White Paper 1980 (Cmdn 7873) and Lord Diplock’s Report on the interception of communications in Great Britain in 1981 (Cmdn 8191).
77 This description is Taylor, J.’s in ex p. Ruddock (1987)2 All ER 518 at 522
Counsel for the Secretary of State, however, argued that “the doctrine of legitimate expectation relates only to cases where the applicant’s expectation is of being consulted or given the opportunity to make representations before a certain decision adverse to him is made. Since there can be no question of such consultation or opportunity to be heard before a warrant to intercept is issued, counsel for the Secretary of State (contended) that the doctrine of legitimate expectation does not apply in this field”\(^7\)\(^8\).

Thus Taylor, J. had to consider the very question presently under discussion. He noted that in *C.C.S.U. v. Minister for the Civil Service*\(^7\)\(^9\) both Lord Diplock and Lord Roskill appeared to envisage that the principle was restricted to legitimate expectations of some form of hearing. However, in that case Lord Fraser had said that “where a person claiming some benefits or privilege has no legal right to it, as a matter of private law, he may have an expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law”.\(^8\)\(^0\) Here Lord Fraser plainly envisaged a wider view of legitimate expectation.\(^8\)\(^1\) On the basis of his review of the authorities Taylor, J. concluded that “the doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned, as Lord Roskill said, with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where ex hypothesis there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept.”

From this discussion it is clear that it is simply dogmatic to assert that the content of the legitimate expectation takes a particular form. Public authorities may, through their conduct, cause an infinitely various array of legitimate expectations in the minds of those subject to them. Sometimes, perhaps usually, those expectations may be able to be fulfilled simply by the grant of a hearing; at other times decisions

\(^7\) *Ex p. Ruddock* at 528
\(^8\) *C.C.S.U. v. Minister for the Civil Service* (1985) A.C. 374 (H.L.)
\(^9\) (1985) A.C. 374 (H.L.) at 401
\(^8\) Proceedings to the wider view of legitimate expectations expressed by Lord Diplock himself in *O’Reilly v. Mackman* (1983)2 A.C. 237 (H.L.) at 275
of a particular kind may be expected. The question which we shall shortly consider is whether procedural protection is sufficient protection for a legitimate expectation of a decision of a particular type. First, however, let us consider the relationship between the protection of legitimate expectations and the duty to act fairly.

5.4 The duty to act fairly and legitimate expectations –

We have seen that in *ex parte Ruddock* 82 Taylor, J. based his decision that the legitimate expectation in that case could be protected on the duty to act fairly. And there are other cases in which the duty to act fairly has been linked to the protection of legitimate expectation 83. However, what did the learned judges mean by these references to the duty to act fairly operates only in the field of Procedure, i.e. that as Lord Morris said in *Furnell v. Whangarei High Schools Board* 84 “Natural Justice is but fairness writ large and judicially”, then a link between the duty to act fairly and legitimate expectations would have serious consequences for the argument that the protection of legitimate expectations extends beyond procedural protection.

Now the duty to act fairly came to prominence in English Law 85 in the field of procedure. The concept was used in *Re H.K. (An Infant)* 86 as a means of escaping the rigidity of the categorization approach to natural justice 87. And since then it has been important in importing flexibility and variability of content into the rules of procedural justice.

However, is it limited to matters of procedure? The late Professor de Smith 88 said that “there is no doubt that the idea of fairness is also a substantive principle” and Professor Sir William Wade has said that the duty to act fairly “may ultimately extend beyond the sphere of procedure” 89. And this has been borne out by recent

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82 (1987)2 All ER 518
84 (1973)A.C. 660 (P.C.) at 679
85 In *Re H.K. (An Infant)* (1967)2 Q.B. 617
86 Unnecessarily, in fact, since *Ridge v. Baldwin* (1964) A.C. 40 had rendered reliance upon the categorization of functions into judicial/ quasi-judicial and administrative redundant. However, the court was not referred to *Ridge v. Baldwin* and did not refer to that case *suomoto*. See Wade, Administrative Law, 5th ed.
87 See Wade, op. cit., n. 86 supra 465-467
89 Wade, op. cit n. 86, supra 465-67
decisions of the House of Lords. In *Preston v. I.R.C.*\(^{90}\) it was held by Lord Templeman (Lords Edmund – Davies, Keith of Kinsel, Brightman and Scarman, who also delivered a separate concurring judgment), in a context quite removed from natural justice, that the court could intervene in the decisions of the inland Revenue Commissioners on the grounds of unfairness to the taxpayer “if the court is satisfied that ‘the unfairness’ of which the applicant complains renders the insistence by the commissioners”\(^{91}\). And elsewhere Lord Templeman said that “I see no reason why the taxpayer should not be entitled to judicial review of a decision taken by the Commissioners if that decision is unfair to the taxpayer because the conduct of the commissioner is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power…”\(^{92}\)

The court reached this conclusion in reliance, *inter alia*, upon Lord Scarman’s remark in *IRC v. National Federation of Self Employed and Small Businesses Ltd.*\(^{93}\) that he did not “accept that the principle of fairness in dealing with the affairs of taxpayer is a mere matter of desirable policy or moral obligation…. I am persuaded that the modern case law recognizes a legal duty owed by the Revenue to the general body of taxpayers to treat taxpayers fairly, to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise, to ensure that there are no favorites and no sacrificial victims”. Thus here we see a clear recognition that the duty to act fairly extends beyond procedure and that in proper circumstances an unfair decision could amount to an abuse of power. Thus a link between legitimate expectations and the duty to act fairly is not fatal to the argument that legitimate expectations extends beyond the field of procedure. Indeed, such a link provides a juristic basis for the substantive protection of legitimate expectations.

\(^{90}\) (1985) A.C. 837 (H.L.)
\(^{91}\) Ibid, at 864
\(^{92}\) Ibid, at 866-7
\(^{93}\) (1982) A.C. 617. Note, however, that Lord Diplock in that case had said that judicial review was not available for “acts done lawfully in the exercise of an administrative discretion which are complained of only as being unfair or unwise…..” but in Preston Lord Scarman said of this passage: “I do not understand Lord Diplock to have saying that the unfairness of what has been done can in no circumstances become relevant in determining whether what was done *ultra vires* or unlawful”.

236
Preston v. IRC\textsuperscript{94} concerned the question of whether the commissioners were bound by certain representations which a tax inspector had made to the taxpayer and which the taxpayer claimed amounted to an undertaking that no further inquiries would be made into the tax implications of the disposal of certain shares. In the event the House of Lords held that the correspondence did not bear the meaning that the taxpayer sought to put upon it. However, that matter seems to have been argued and decided without reference to the question of legitimate expectations. Doubtless this is partly due to the fact that the \textit{National Federation of Self Employed and Small Businesses Ltd.}\textsuperscript{95} case, the leading case on judicial review of the Commissioners’ decision, did not concern legitimate expectations, but the facts of \textit{Preston v. IRC} clearly lend themselves to analysis on this basis.

\textbf{5.5 The protection of legitimate expectations –}

Given that a particular person has a legitimate expectation of whatever kind, the question arises how that expectation is to be protected. The orthodox view\textsuperscript{96} is that a legitimate expectation is protected in one way only: a public body may deny a legitimate expectation provided that it complies with natural justice. This is plainly what Lord Denning had in mind in \textit{Schmidt} and it is plainly the context in which the concept operates in the \textit{Australian and South African Cases}\textsuperscript{97}. When the legitimate expectation is (as was the case in \textit{A.G. of Hong Kong v. Ng Yuen Shiu}\textsuperscript{98} simply that procedural justice would be done or that each case would be treated on its “merits” this is perfectly straightforward: the legitimate expectation is protected simply by being fulfilled; he who legitimately expects to be heard before a decision adverse to

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\textsuperscript{94} (1985) A.C. 835 (H.L.)
\textsuperscript{95} (1982) A.C. 617 (H.L.)
\textsuperscript{96} At any rate prior to \textit{ex p. Khan} (1984)1 WLR 1337 (C.A.) and \textit{ex p. Ruddock} (1987)2 All ER 518
\textsuperscript{97} See, e.g. the latest decisions in both those countries: in \textit{Kioa v. Minister for Immigration and Ethnic Affairs} (1985)62 ALR 321, although Brennan J., thought that the notion of a “legitimate expectation” bore an “uncertain connotation and..... it may be misleading if it be treated as a criterion for determining the application or contents of natural justice” (at 371), the learned judge plainly considered that, whatever role the concept might have, it was in the field of natural justice. Similarly in \textit{Boesak v. Minister of Home Affairs} (1987)3 SA 665 (c) although Friedman J., held that “the phrase ‘Legitimate Expectation’ does not constitute an additional ground for the application of the \textit{audi alteram partem} principle” (at 684) he plainly thought that, if the concept was part of South African Law, its role was in the field of Natural Justice.
\textsuperscript{98} (1983)2 A.C. 629 (P.C.)
him is made will be properly heard or else the decision will be struck down.

But where the legitimate expectation is of some boon or benefit it is far from clear that expectation is best protected or protected at all by procedural justice. Often, as in ex parte Khan, a hearing will be of no value to the applicant if the authority in making its decision is free to ignore the legitimate expectations it has previously aroused. In other cases, such as ex parte Ruddock, granting a hearing would be inappropriate and would achieve little. Plainly procedural justice will not protect such substantive legitimate expectations. Yet many cases hold that a hearing is all the protection extended to substantive expectations. For instance, Stephen, J., in Saleni v. Mackellar (No 2)\textsuperscript{99} said “where the discretionary grant of a license, permit or the like carries with it a reasonable expectation of, although no legal right to, renewal or non-revocation, summarily to disappoint that expectation is seen as unfair; hence the requirement that the expectant person should first be heard……\textsuperscript{100} and in Breen v. Amalgamated Engineering Union\textsuperscript{101} Lord Denning said if “he is a man who has some… legitimate expectation (and in the context this was a legitimate expectation of a boon, not of a hearing, or reasons given, then these should be afforded him as the case may demand”.

It is not surprising that the orthodox view should be that legitimate expectation should enjoy procedural protection. Quite apart from a judicial desire to avoid the merits the concept of legitimate expectation was introduced into English Law through the interstices of natural justice. In his celebrated dictum in Schmidt v. Secretary of State for Home Affairs\textsuperscript{102} and in Breen v. A.E.U. Lord Denning was seeking to extend the traditional range of natural justice. As he said in Breen, “if a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away without a word. He need not be heard…. But if he is a man whose property is at stake, or who is being turned down,
and he should be given a chance to be heard”\textsuperscript{103}. Lord Denning was seeking to break down this dichotomy. In this context the concept of legitimate expectation provides an escape from the restriction of the rules of natural justice to cases where the rights of the aggrieved persons were affected; the concept is a useful tool in the development of procedural justice and little more.

Many scholars approve of this utilization of the concept; and there is little doubt that legitimate expectation has played an important role in breaking down outdated concepts of the applicability of the rules of natural justice. This is the role that Hlophe would assign to it in reforming South African Law\textsuperscript{104}. But is the role of legitimate expectation limited to the field of natural justice?

As we have seen how in the two most recent decisions in English Law the concept has played a substantive role\textsuperscript{105}. Moreover, even prior to the most recent cases there are indications that a legitimate expectation (or its analog) may be substantively protected. Take, for instance, \textit{R. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators’ Association}\textsuperscript{106}. Now this case did not deal with legitimate expectations \textit{eo nomine}, but it can be analyzed by Lord Fraser in \textit{A.G. of Hong Kong v. Ng Yuen Shiu}\textsuperscript{107}. The Liverpool Corporation was the licensing authority for taxi cabs and it gave an undertaking to the Taxi Fleet Operators’ Association that it would not increase the number of licenses above 300 until certain proposed legislation had been enacted and had come into force. The Corporation decided to renge on this undertaking and the association sought to quash their decision to increase the number of licenses. Plainly it could be said that the Taxi

\textsuperscript{103} Ibid, at 191. But note that even here Lord Denning saw the concept as having a role beyond the strict confines of natural justice.

\textsuperscript{104} Hlophe, op. cit.


\textsuperscript{106} (1972)2 Q.B. 299

\textsuperscript{107} (1983)2 A.C. 629 (P.C.) there are in fact other cases where there have been suggestions of substantive protection in the context of ‘legitimate expectation’. A good example of this (prior to \textit{ex. p. Khan}) is to be found in \textit{Breen v. A.E.U.} There Lord Denning analyzed \textit{Padfield v. Minister of Agriculture, Fisheries and Food} (1968) A.C. 997 in terms of ‘legitimate expectation’. He said “the dairy farmers had no right to have their complaint referred to a committee of investigation, but they had a legitimate expectation that it would be”. Plainly the farmers did not expect a hearing; they expected that the Minister would order an investigation. A hearing would be of no avail (indeed, the Minister seems to have listened to what they had to say): they wanted their expectation fulfilled.
Fleet Operators’ Association legitimately expected that the undertaking should be honored. The Court of Appeal did not, however, approach the case in this way. Instead, it held that the Corporation was under a duty to act fairly and reneging on their undertaking without giving the Taxi Fleet Operators a proper hearing was unfair and the decision was accordingly struck down\textsuperscript{108}.

The interest of the case for present purposes, however, lies in the fact that Lord Denning did not restrict himself to natural justice but indicated that even if a proper hearing had been given before the undertaking was broken; he would still be inclined to strike down the decision. In other words breach of the undertaking (or failure to fulfill a legitimate expectation) was not purely a matter of natural justice. He said that the Corporation “was bound by (their undertaking) so long as it was not in conflict with their statutory duty….. So long as the performance of the undertaking is compatible with their public duty, they must honor it…. At any rate they ought not to depart from it except after the most serious consideration and hearing what the other party has to say: and then only if they are satisfied that the overriding public interest requires it. The public interest may be better served by honoring the r undertaking than by breaking it”\textsuperscript{109}. This dictum plainly envisages substantive and not just procedural protection of the legitimate expectation.

What is furthermore striking about this approach is its similarity to that adopted by the German Courts in deciding whether a particular confidence was worthy of protection or not. There, it will be recalled, there was a weighing of the principle of the legality of administrative acts against the principle of legal certainty in protecting the trust that citizens have placed in the administration. Surely Lord Denning has a similar process in mind here: weighing the Corporations’ plea that it should be able to escape from its undertaking because Parliament had given it discretion to determine the number of Taxi Fleet Operators’ had placed in the Corporation’s undertaking. If in fact the concept of legitimate expectation has found

\textsuperscript{108} See, e.g., Lord Denning’s judgment at 307-308

\textsuperscript{109} Ibid. Immediately, thereafter, Lord Denning refers to Robertson v. Minister of Pensions (1949)1 K.B. 227 and Lever Finance Ltd. v. Westminster (City) London Borough Council (1971)1 Q.B. 222. In these two cases Lord Denning sought to hold public bodies stopped from departing from their prior representations.
its way into English Law from *Vertrauensschutz* the law of the EEC a balancing
process such as that described by Lord Denning in *R. v. Liverpool Corporation*
would not be out of place\(^\text{110}\).

*R. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators’
Association\(^\text{111}\)* is not the only case in which Lord Denning has adopted such an
approach. In *H.T.V. v. Price Commission\(^\text{112}\)*, Lord Denning said this of the Price
He said that the duty of Price Commission was: to act with fairness and consistency
in their dealings with manufacturers and traders. Allowing that it is primarily for
them to interpret and apply the code, nevertheless if they regularly interpret the
words of the code in a particular sense… they should continue to interpret it and
apply it in the same way thereafter unless there is a good cause for departing from it.
At any rate they should not depart from it in any case where they have, by their
conduct, led the manufacturer or trader to believe that he can safely act on that
interpretation of the code or on that method of applying it, and he does so act upon
it… it has been often said, I know, that a public body, which is entrusted by
Parliament with the exercise of powers for the public good, cannot fetter itself in the
exercise of them. It cannot be estopped from doing its public duty. But that is subject
to the qualification that it must not misuse its powers: and it is a misuse of power for
it to act unfairly or unjustly towards a private citizen when there is no public interest
to warrant it\(^\text{113}\).

A similar approach was in fact envisaged by Parker L.J. in *R. v. Secretary of
State for the Home Department, ex parte Khan\(^\text{114}\)*. The learned judge said that the

\(^{110}\) A reminder note: substantive and procedural protection need not be in conflict with each other or
other or with the balancing approach of *Vertrauensschutz*. See, e.g., in *Breen* (1971)2 Q.B. 175
where Lord Denning says (at 191F) that *Breen* “had been elected to this office by democratic
process… (and) had a legitimate expectation that he would be approved by the Distt. Committee,
unless there were good reasons against him”. The suggestion that is here made is that the
substantive protection means that if an “overriding public interest” is not demonstrated then the
decision must be in favor of the claimant.

\(^{111}\) (1972)2 Q.B. 299

\(^{112}\) (1976)1 C.R. 170

\(^{113}\) This dictum was approved by Lord Templeman (speaking for a unanimous House of Lords) in
*Preston v. IRC* (1985)1 AC 835 (H.L.) at 865

\(^{114}\) (1984)1 W.L.R. 1337 (C.A.)
“Secretary of State is, of course, at liberty to change the policy but in my view, vis-à-vis the recipient of such a letter, a new policy can only be implemented after such a recipient has been given a full and serious consideration whether there is some overriding public interest which justifies a departure from the procedures stated in the letter\textsuperscript{115}. So, substantive protection of legitimate expectation does not mean that in all circumstances the expectation will be fulfilled by a favorable decision. Where there is an “overriding public interest” the expectation may be dashed\textsuperscript{116}; but in the absence of such an “overriding public interest” legitimate expectation of some boon or benefit should be fulfilled.

5.6 Legitimate Expectation and Natural Justice/ Fairness –

It is well known that the concept of legitimate expectation made an early appearance in the context of natural justice and fairness. This development will be examined in due course. Before doing so it is best to clarify an important point of principle, which is brought out clearly in the judgment of Dawson J., in the Quin case\textsuperscript{117}.

“It is when the expectation is of a fair procedure itself that the concept of a legitimate expectation is superfluous and confusing. That is not to say that where the legitimate expectation is of an ultimate benefit the concept is not a useful one to assist in establishing whether a particular procedure, it is because the circumstances make it fair to do so and for no other reason. No doubt people expect fairness in their dealings with those who make decisions affecting their interests, but it is to my mind quite artificial to sat that this is the reason why, if the expectation is legitimate in the sense of well founded, the law imposes a duty to observe procedural fairness. Such a duty arises, if at all, because the circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted”.

Later, in his judgment\textsuperscript{118}, Dawson, J., had this to say by way of comment on

\textsuperscript{115} Ibid at 1350
\textsuperscript{116} In German terms where der Grundsatz der Gesetzmässigkeit der verwaltung is outweighed by der Grundsatz der Rechtssicherheit und res rechtssfriedens.
\textsuperscript{117} Attorney General for New South Wales v. Quin, (1990)170 C.L.R. 1
\textsuperscript{118} Ibid at pg 44
Lord Diplock’s analysis in the G.C.H.Q. case:\footnote{Council of Civil Services Union v. Minister for Civil Services (1985) A.C. 374. The dicta referred to stated that in order to qualify as a subject for judicial review the applicant must come within one of two basic categories, which include a person who had in the past enjoyed a benefit which he or she could legitimately expect to continue, until having been told the contrary, given rational grounds and having been allowed to comment thereon: and a person who had received an assurance from the decision-maker that the benefit would not be withdrawn without first affording him or her the opportunity for arguing that it should not be withdrawn.}:

“It is the legitimate expectation of the continuation of the benefit or advantage in class (b) (i) which may make it unfair to deprive a person of a benefit or advantage which he has enjoyed, without an adequate hearing. It is the assurance of a hearing – not the expectation of the ultimate benefit or advantage – which may make it unfair to withdraw the benefit or privilege in class (b) (ii) without a hearing. This passage shows that the deprivation of a benefit, even where there is no legitimate expectation of its continuation, may require a hearing merely because of an assurance previously given”.

The reasoning of Dawson, J., is surely correct. It serves to emphasise and delineates the two types of circumstance in which legitimate expectation can be of relevance for the application of procedural rights. In most instances the primary focus will be on the nature of the rights infringed. Now it may well be the case that the current law protects interests which would not be classified as rights \textit{stricto sensu} and also that, in some circumstances, it does and should protect interests which the applicant does not presently possess but which he has a legitimate expectation of possessing. In such instance the law intervenes, as Dawson, J., notes, “Because that legitimate expectation is of an ultimate benefit which is in all the circumstances entitled to the protection of that procedure and not because the procedure itself is legitimately expected”. In some other cases however the primary foundation for the application of procedural rights will rest on the conduct of the public body, particularly where the interest at stake would not of itself necessarily warrant procedural protection. This duality can be exemplified by reference to case law and also by reflecting on the more general foundations of the concept of legitimate expectations.

The decision in \textit{Schmidt v. Secretary of State for Home Affairs}\footnote{Schmidt v. Secretary of State for Home Affairs (2009) 1 A.C. 374.} will serve
by way of an example. Lord Denning M.R., in a well-known passage, stated that a person would be entitled to procedural rights if he had some right, interest or legitimate expectation of which he should not be deprived without hearing what he had to say. On the facts of the case Schmidt was held not to have any such expectation, since he was allowed to remain in the country for the period of time originally granted to him. Lord Denning M.R. did, however, indicated that the position would have been different if Schmidt’s permit had been revoked before its expiry date, since it could then be said that he would have had a legitimate expectation of being allowed to stay for the stipulated time.

This reasoning can be placed within the context of analysis provided by Dawson, J., examined above. The foundation of the applicant’s procedural right is not simply that he has some legitimate expectation of natural justice or fairness. The basis of the applicant’s claim to protection is that he has a legitimate expectation of an ultimate benefit which is in all the circumstances felt to warrant the protection of that procedure, in this instances his continued presence in the country.

The essence of the argument can also be comprehended by examining the circumstances in which legitimate expectation can be said to arise and linking these to the more general justifications for according to procedural rights.

Legitimate expectation may be generated in one of the three ways. First, the courts may decide that the interest, although not presently held, is important enough that an applicant should not be refused it without having some procedural rights afforded to him. In such instances the courts are making a normative judgment to the effect that one consequence of applying for a substantive interest is that some requisites of procedural protection are warranted. Thus in McInnes v. Onslow – Fane Sir Robert Megarry V.C. held that there was a class of case in which the applicant could be said to have a legitimate expectation that an interest would be granted to him: where the applicant was an existing license-holder who was seeking a renewal of his license, or where he was already elected to a position and was seeking confirmation of his appointment from a different body. Even a ‘pure

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120 (1969)2 Ch. 149  
121 (1978)1 W.L.R. 1520
applicant’ who had never held a license before, would, said Megarry V.C., be entitled to a measure of procedural rectitude in that the deciding authority would be bound to reach its decision without bias and could not pursue a capricious policy. Precisely which future interest should be deserving of this procedural protection will obviously be controversial, as will the level of procedural rights thereby afforded.

A second way in which legitimate expectation may said to arise in pursuant to a representation, the relationship between legitimate expectation and estoppel will be considered in more detail below, but a brief discussion of the connection between such expectations, representations and procedural rights is relevant here.

A representation may generate a legitimate expectation leading to procedural rights in two types of cases. On the one hand, there may be cases in which the representation provides the foundation for the procedural rights, even though in the absence of the representation it is unlikely that the substantive interest at stake would, in itself, entitle the applicant to natural justice or fairness. This is exemplified by the decision in Attorney General of Hong Kong v. Ng Yuen Shiu. In that case it was held that although the rules of natural justice or fairness might not be generally applicable to an alien, more particularly to one who entered the territory illegally, a person could claim some elements of a fair hearing. Such an expectation could arise if, as in the instant case, the government had announced that illegal immigrants would be interviewed with each case being no guarantee that such immigrants would be allowed to remain in the territory. The point is well captured by Elias who, commenting on the Hong Kong case, states that:

“….. it was only the legitimate expectation arising from the assurance given by the Government that enabled the court to intervene on behalf of the illegal immigrants would not of itself have created any entitlement to a hearing”.

On the other hand, the presence of a representation, and the consequential legitimate expectation which flows from it, may serve to augment the extent of procedural rights granted to the applicant. The decision in R. v. Liverpool

122 (1983)2 A.C. 629
123 Supra note 122
Corporation, ex p. Liverpool Taxi Fleet Operators Association\textsuperscript{124}, provides a suitable example. In that case the city council had pursued a policy of limiting the number of licensed taxis to 300. The applicants were assured on a variety of occasions that this figure would not be increased without consultation with them. This position was reinforced by an undertaking given by the relevant committee chairman that the figure of 300 would not be exceeded until certain relevant legislation on the matter had been passed. Notwithstanding this sequence of events the committee resolved to increase the number of taxis without any further opportunity for consultation by the applicants.

It is unclear whether the applicants would have had any procedural rights in the absence of the initial assurances given on behalf of the council. Lord Denning M.R. clearly was of the opinion that they would have some such rights\textsuperscript{125}. Roskill, L.J., left the matter open\textsuperscript{126}. It is, however, evident that the scope or content of the applicants’ procedural rights were enhanced by the existence of the representations which had been made. Thus Lord Denning M.R. stated that the Council ought not to depart from the undertaking “except after the most serious consideration and hearing what the other party has to say: and then only if they are satisfied that the overriding public interest requires it”\textsuperscript{127}. Roskill, L.J., formulated the applicants’ rights somewhat differently, but it is equally apparent that the assurances had augmented the extent of procedural protection. The Council could not be allowed to resile from their undertaking “without notice to and representation from the applicants”, and while the council could depart from the undertaking it could only do so after” due and proper consideration of the representations of all those interested”\textsuperscript{128}. Sir Gordon Willmer expressed himself in similar terms\textsuperscript{129}.

The third and final way in which legitimate expectation can arise is closely related to, but distinct from the second. This is where the public body has set out the criteria for the application of policy in a certain area, an applicant has relied on these

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\footnote{Corporation, ex p. Liverpool Taxi Fleet Operators Association\textsuperscript{124} (1972) Q.B. 299}
\footnote{Ibid at pg. 307-308}
\footnote{Ibid at pg. 311}
\footnote{Ibid at pg. 308}
\footnote{Ibid at pg 311}
\footnote{Ibid at pg 312-313}
\end{footnotes}
criteria, and the public body then seeks to apply different criteria. In *R. v. Secretary of State for the Home Department, ex. p., Asif Mahmood Khan*\textsuperscript{130}, the applicant sought to adopt his brothers’ child who was in Pakistan. The Home Officer, while stating that there was no formal provision for this in the immigration rules, did provide a circular stating the criteria which the Home Secretary would use in such cases. The applicant sought entry clearance for the child on the basis of these criteria but was refused, and the Home Officer indicated in its affidavit that different tests had been applied. The court found for the applicant. Parker, L. J., developed the reasoning the reasoning employed in the *Liverpool Taxi* case. While it was true that there was no specific undertaking in this case, the principle from *Liverpool Taxi* was nonetheless applicable: thus if the Home Secretary stipulated certain conditions for entry he should not be allowed to resile from them “without affording interested persons a hearing and then only if the overriding public interest demands it”\textsuperscript{131}. A new policy could be implemented, but the recipient of the letter which of the letter which set out previous policy must be given the opportunity to argue that the “old” policy be applied to him.

The three ways in which legitimate expectations are generated can, as stated above, also be linked to the more general justifications which are advanced for the existence of procedural rights. Space precludes a detailed analysis of these background justifications, which are dealt fully elsewhere. The essence of the connection between these ideas and the role played by legitimate expectations can however be conveyed here.

One of the principal justifications for the existence of procedural rights is instrumental in nature\textsuperscript{132}. This rational emphasizes the connection between procedural due process and the substantive justice of the final outcome. All rules are designed to achieve some goal, for example, to accord welfare benefits to certain classes of applicant. Giving a person a hearing of some kind can help to ensure that

\textsuperscript{130} (1984)1 W.L.R. 1337

\textsuperscript{131} Ibid at pg. 1344

the desired end is attained; the procedural rights perform an instrumental role in the
sense of rendering it more likely that there will be an accurate decision on the
substance of the case.

The instrumental justification for process rights can be linked to the first of
the ways in which legitimate expectations arise. This is the situation in which the
law extends process rights to future interests; it decides that there is a legitimate
expectation of an ultimate benefit, which benefit is, in all the circumstances, entitled
to the protection of those procedural rights. Interests in the form of, for example,
licenses or other disbursements from the State are clearly of considerable importance
in modern society. There is therefore a strong argument that, in some cases at
least, certain process rights are afforded in order to ensure that the substantive aim
behind the licensing legislation is correctly applied. This is particularly so where the
legislation articulates criteria on which such licenses are to be allocated. The precise
content of the process rights which should exist in such situations may well be a
matter on which opinions can differ. Thus, Megarry V.-C. would afford the ‘pure-
applicant’ only limited procedural protection, such that the decision maker could not
pursue a capricious policy or one informed by bias. Lord Denning M.R. would;
it seems, be in favor of a more extensive duty to act fairly which goes beyond the
limited rights articulated by Megarry V.-C.

Other justifications for procedural rights are non-instrumental in nature. They focus on formal justice and the rule of law, in the sense that the rules of natural
justice help to ensure objectivity and impartiality, and facilitate the treating of like
cases alike. Procedural rights are also seen as protecting human dignity by ensuring
that the individual is told why he is being treated unfavorably, and by enabling him
to take part in that decision.

Such non-instrumental justifications for procedural rights may well furnish

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133 Reich, “The New Property” (1964)74 Yale L.J. 733
134 (1978)1 W.L.R. 1520
135 (1972)2 Q.B. 299
Oxford Edition) at p. 235; Michelman, “Formal and Associational Aims in Procedural Due
Process”, in Due Process, supra n. 132, chapter 4; Mashaw, Due Process in the Administrative
State (1985), Chaps 4-7
part at least of the rationale for affording these rights in some of the cases concerning legitimate expectations and representations. This is particularly so where, as in the Hong Kong case, the substantive interest at stake would not in itself warrant procedural protection. As argued above, an illegal immigrant would not normally or necessarily be granted such rights. Now it could be contended that even in this instance the real rationale for some elements of procedural fairness was instrumental, in the sense that once the representation as to how such immigrants would be treated had been made, then the requisite aspects of fairness were imposed in order to effectuate this substantive end. This may well be so, and indeed there is no reason why instrumental and non-instrumental considerations should not be present in the same type of cases. To regard such cases, turning solely on instrumental reasoning would, however, be mistaken. At the most fundamental level there is a non-instrumental theme present. The applicant is given procedural rights because the content of the representation implied that this would be so, and when he has acted on this basis it would be contrary to know individuals ought to be treated for the applicant to be denied them. In this sense, basic themes relating to human dignity are evident in such cases, and process rights should be made available even if purely instrumental considerations would not sustain these rights.

5.7 Legitimate Expectation, Estoppel and Fettering of Policy –

It is readily apparent from the preceding analysis that the concept of legitimate expectation has implications for other areas of administrative law, in particular the connected but distinct problems of estoppels and the fettering of policy. These issues were touched on in the previous sections, but will now be addressed in more detail.

Two extracts from the judgment in the Quin case provide an apt starting point for this aspect of the discussion. Dawson, J., had this to say:

“IT adds nothing to say that there was a legitimate expectation, endangered by a promise made to follow a particular procedure, that the promise would be fulfilled. It is sufficient to say that, the promise to follow a certain procedure having been

\[137\] (1983)2 A.C. 629

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made; it was fair that the public authority should be held to it”.

Brennan, J., pursues a similar theme in the course of his judgment:

“Again, if an express promise be given or a regular practice be adopted by a public authority, and the promise or practice is the source of a legitimate expectation, the repository is bound to have regard to the promise or practice in exercising the power, and it is unnecessary to enquire whether those factors give rise to a legitimate expectation”.

The significance of these observations can be appreciated by placing them in context. Representations made by public bodies can give rise to two related, albeit distinct, types of problem.

The first is concerned with the situation where the representation is *ultra vires* the public body or the particular officer who made the representation. The problem which this produces for administrative law cannot be fully explored here and are covered elsewhere. The essence of the difficulty can however be conveyed quite briefly. If the representation is held to bind the public body then there is a fear that such bodies could extend their powers by making representations outside their statutory limits which would then be binding on them though the medium of estoppel. Moreover, the effect of allowing estoppels to operate could be to prevent relevant body from exercising the powers accorded to it by Parliament. The difficulty which this creates for the individual is immediately apparent: the innocent representee may well have relied on the representation to his detriment in circumstances where, because of the complexity of the relevant provisions, it is not evident that the public body was exceeding its powers. The manner in which this conundrum should be resolved has been examined elsewhere and will be briefly discussed below. The key in the present context is the role which legitimate expectation plays in any such resolution.

The short answer is that the concept of legitimate expectation cannot resolve the dilemma adumbrated above, either in the sense of telling us when an individual

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138 Craig, *Administrative Law* (2nd Ed.)
should be able to rely, or in the sense of indicating when such reliance will not be
allowed. The reasons why it cannot do the former are as follows. It is of course true
that a representation, if made by one on whom it was reasonable to rely, can be said
to give rise to a legitimate expectation that the representation will be followed. This
is indeed the normative foundation, or at least part of it, justifying the application of
estoppels in private law. In this sense the idea of a legitimate or reasonable
expectation is inherent in the very notion of a binding representation. This fact does
not however ‘solve’ the dilemma described above quite simply because the problem
in public law cases is that even if the representation does create a legitimate
expectation in the above sense, this does not remove the difficulty that it may be
outside the power of the public body. The articulation of the concept of legitimate
expectation is not therefore some “intellectual panacea” which will make the
problem of estoppels in public law disappear. To contend otherwise would be to say
that any representation which would otherwise raise an estoppel (and in this sense
create a legitimate expectation) should do so in public law notwithstanding any
excess of power by the public body that might thereby be entitled.

Thus in cases such as Lever Finance\(^{140}\), Robertson\(^{141}\) and Western Fish\(^{142}\) it
may well be the case that the representation which was made one on which it was
reasonable or legitimate for the representee to rely. If however that representation
was outside the powers of the relevant public body, or officer of it, the problem
considered above would still be present.

The only way in which the idea of legitimate expectation could indicate when
a representation could not be relied on, would be if it were so interpreted as to mean
that a representee would never be held to have a “legitimate” expectation if the
representation was *ultra vires* in either of the above senses. This however merely
amounts to a restatement of the rule that *ultra vires* representations cannot generate
an estoppel. It adds nothing to that statement. It is also misleading in that it conveys
the impression that the individual somehow harbored an illegitimate or unwarranted
expectation that the representation would be fulfilled. The reality is rather that the

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\(^{140}\) *Lever Finance Ltd. v. Westminster (City) London Borough Council* (1971) 1 Q.B. 222

\(^{141}\) *Robertson v. Minister of Pensions* (1949) 1 K.B. 227

\(^{142}\) *Western Fish Products Ltd. v. Penwith Distt. Council* (1981) 2 All E.R. 204
representee is innocent, and has no reason to suspect that the representation is outside the complex powers of the public body. Attention should rather be focused on more sensitive ways of reconciling the needs of such innocent individuals and the requirements of the public body.

There are of course various ways to resolve this problem, which recognize the hardship to the innocent representee if he is never allowed to gain any redress for losses caused by an *ultra vires* representation. One suggestion is that compensation should be payable in such circumstances. Another is that the courts should be willing to undertake a balancing process which weighs the harm to the public interest if the representation is held to bind the public body. If the former outweighs the latter then it should be held to be an abuse of discretion to resile from the representation. There is some evidence of this approach in the current jurisprudence of the courts.\textsuperscript{143} The detailed arguments for this suggestion, and the possible objections to it, have been canvassed elsewhere.\textsuperscript{144} Other options of legitimate expectation cannot, however, in itself, resolve the problem for the reasons identified above.

The second type of problem which can exist where a representation has been made is as follows. A public body may make a specific representation which is *intra vires*, but may later seek to resile from it or the public body may have publicized policy criteria for dealing with a particular area, which criteria are *intra vires*, but may wish to adopt new tests for dealing with that same area, the new criteria also being lawful. The question which is of present relevance is how far an individual can seek to rely on the specific representation or original statement of policy, and the role played by the concept of legitimate expectations in resolving this question.

The traditional objection to allowing the individual to rely is that this would thereby fetter the discretion of the public body to develop policy in the manner it deems to be best in the public interest. Thus immediately after the passage quoted


\textsuperscript{144} Supra note 138-139
above from Brennan, J., he states that\textsuperscript{145} “the court must stop short of compelling fulfillment of the promise or practice unless the statute so requires or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power”.

While there is some force in this reasoning, the cogency of the argument is on closer examination, less persuasive and the argument less generalizable than it might initially appear. Qualifications can be and have been made to it. Two can be identified here.

On the one hand, there is authority for the proposition that where Parliament has imposed the duty of deciding an issue, the decision of which affects the rights of subjects, such a decision, when communicated in terms which were not preliminary, is final and conclusive\textsuperscript{146}. It cannot, in the absence of express statutory power or the consent of the person concerned, be withdrawn. This is surely sound in principle. A citizen should be entitled to assume that the initial decision, which was lawful within the terms of the relevant statute, should stand and not be overturned by a second, contradictory decision, even assuming that the latter was itself also a lawful possible interpretation of the statutory provisions.

On the other hand, the cogency of the “no fettering” argument is itself overstated. Policies must of course be allowed to develop, and in this sense it is correct to say that they cannot be fettered. One cannot therefore ossify administrative policy, which may alter for a variety of reasons, including experience gleaned from the operation of the previous policy, change of political outlook, or new technological developments. Nonetheless the “no fettering” theme must be kept within bounds. Where a representation has been made to a specific person, or where conditions for the application of policy in a certain area have been published and relied on, then the public body should be under a duty to follow the representation or the published criteria. This does not prevent it from altering its general policy for the future, but it should not be allowed to depart from the representation or pre-existing policy in relation to an individual who has relied, unless the overriding public

\textsuperscript{145} (1950)170 C.L.R. 1 at pp. 40
\textsuperscript{146} Re 56 Denton Road, Twickenham Middlesex (1953) Ch. 51
interest requires it, and then only after a hearing. The decisions in *Ng Shiu* and *Khan*, considered above, are therefore to be welcomed.

Whether a particular policy should be held to have generated legitimate expectations may however be debatable, as may be the issue of whether an individual has ‘relied’ on such a policy. This can be exemplified by comparing the decision in *Ng Yuen Shiu* and *Khan* with that in *Findlay*\(^{147}\). In the last case the Secretary of State decided to alter the parole policy for certain types of prisoner. The applicants were affected by this change and argued that the Secretary of State should have consulted the Parole Board prior to implementing the change; and also that the new policy was contrary to the legitimate expectations of the prisoners, namely that each prisoner would have his case for parole individually considered on the merits, whereas the new policy created a presumption against parole for certain classes of prisoners. Lord Scarman, giving the House of Lords, found against the applicants. He held that the relevant legislation did not compel the Secretary of State to consult the Parole Board before implementing the change of policy. He also held that while the concept of legitimate expectations might enable the applicants to seek the leave of the court to apply for review, it did not sustain the more particular argument which they advanced\(^{148}\).

“But what was their legitimate expectation? Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will be examine individually in the light of whatever policy the Secretary of State sees fit to adopt, provided always that the adopted policy is a lawful exercise of the discretion conferred on him by the statute. Any other view would entail the conclusion that the unfettered discretion conferred by the statute on the minister can in some cases be restricted so as to hamper, or even prevent, changes of policy. Bearing in mind, the complexity of the issues, which the Secretary of State held to consider and the importance of the public interest in the administration of parole, we cannot think that Parliament intended the restriction to be limited in this way”.

\(^{147}\) *Re Findlay* (1985) A.C. 318
\(^{148}\) Ibid at p.338
The cogency of Lord Scarman’s reasoning when placed within the statutory context of parole is an issue on which opinions may well differ. It does however serve to illustrate the need for both care and particularly when discussing the concept of legitimate expectations. It provides a useful reminder that the expectations which a person can derive from a policy are not merely a matter for factual analysis. They will depend on a normative view of the expectations which an individual can be said to derive from the original policy, combined within interpretative judgment as to whether the legislative framework will, in some way, be jeopardized by holding the administration to the original policy, even in relation to those already affected by it.

One further example can be professed which demonstrates the need for care in deciding whether an individual can be said to have a legitimate expectation flowing from a representation made by a public body. In *R. v.Board of Inland Revenue, ex. p. M.F.K. Underwriting Agencies Ltd.* ¹⁴⁹ Bingham, L.J., set out the circumstances in which an individual could rely on a representation made by the Inland Revenue. This would not be possible if the representation was outside the powers of that body. Even where it was within their powers certain more specific conditions had to be fulfilled for the applicant to succeed. It had to be shown that he had “put all his cards face upwards on the table” and made it clear that he was seeking a considered ruling from the authority which he intended to use. Furthermore that ruling had to be clear unambiguous and devoid of relevant qualification. It was, said Bingham, L.J., “one thing to ask an official of the Revenue whether he shares the taxpayer’s view of a legislative provision, quite another to ask whether the Revenue will forgo any claim to tax on any other basis” ¹⁵⁰.

The issue which remains for discussion is the role played by legitimate expectations in reaching this conclusion. If it is decided that an *intra vires* representation or statement of policy can be relied on in the above manner, the dicta of Dwason and Brennan JJ., can help us to understand why this should be so. The force of their statements resides in the realization that the concept of legitimate

¹⁴⁹ (1996)1 All E.R. 91
¹⁵⁰ Ibid at p. 110
expectations is not a distinctive one in itself, but one which is inherent in the very making of a representation. It is the representation which furnishes the basic reason for holding the public body to its previously declared stance. The ‘limits’ of the above dicta should also be borne in mind. While it is true that the idea of legitimate expectation is not distinct from that of the representation itself, there may be no harm in talking of such expectations explicitly, and thereby making cleared the normative reason why the representation should bind.

5.8 Legitimate Expectations, Procedure and Substance –

There is a continuing uncertainty and difference of opinion as to whether the concept of legitimate expectations only has an impact on procedure, or whether it also can have a substantive impact, and if so precisely what. This issue received attention in the Quin Case, principally from Brennan, J., and Mason, C.J. Brennan, J., was adamant that legitimate expectations could have effect only on procedure. He stated that legitimate expectation ought not to “unlock the gate which shuts the court out of review on the merits”151, and that the courts should not trespass “into the forbidden field of the merits”. He argued further that:

“If the court were to define the content of legitimate expectations as something less than a legal right and were to protect what would be thus defined by striking down administrative acts or decisions which failed to fulfill the expectations, the courts would be truncating the powers which are naturally apt to affect those expectations”152.

Mason C.J., was also wary of according legitimate expectations substantive as opposed to procedural protection, arguing that to do so would encounter the objection of entailing “crucial interference with administrative decisions on the merits by precluding the decision-maker from ultimately making the decision which he or she considers most appropriate in the circumstances”153.

Whether legitimate expectations should ever be held to have a substantive impact, and the force of the objections to such an effect, can only be appropriately

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151 (1990)170 C.L.R. 1
152 Re Findlay (1985) A.C. 318
153 (1972)2 Q.B. 299
assessed by considering more closely both the circumstances in which such expectations arise and the more particular sense in which the word substance is being used. There different situations can be distinguished.

The first of these is the least difficult. This is the situation where the legitimate expectation which has been created is, on the facts, no more than an expectation that a particular procedure will be followed. In this instance there is no problem of the expectations having a substantive effect. Thus in *Ng Yuen Shiu*\(^\text{154}\) the applicant was, as has been seen, held to have had some procedural rights because of the governmental announcement that illegal immigrants would be interviewed and each case treated on its merits, *albeit* with no actual guarantee that anyone would ultimately be allowed to remain in the territory.

The second situation is somewhat more problematic, but properly understood it does not raise any difficulties which are distinctive from those encountered generally in delineating the scope of judicial review. It has already been seen, from the discussion of the Findlay case, that the courts have held that an individual may have a legitimate expectation which affords him standing to seek review. Further authority for this proposition comes from Lord Diplock in *O’Reilly v. Mackman*\(^\text{155}\), who stated that the legitimate expectation gave to each appellant “a sufficient interest to challenge the adverse disciplinary award made against him…. On the ground that in one way or another board in reaching its decision had acted out with the powers conferred on it by the legislation under which it was acting”.

When the court in such a case considers, e.g., the challenge to the disciplinary award, it will consider substantive issues in much the same way as it does in any other review of the exercise of administrative discretion. Thus if it can be shown that the award was based on irrelevant considerations, or that improper purposes were being pursued, it will be struck down on ordinary *Wednesbury* criteria\(^\text{156}\). Now it is of course the case that the application of these criteria can involve the danger that the court may indirectly substitute its judgment on the merits for that of the

\(^{154}\) (1983)2 A.C. 629
\(^{155}\) (1983)2 A.C. 237 at pg. 275
\(^{156}\) *Associated Picture Houses Ltd. v. Wednesbury Corporation* (1948)1 K.B.223
administrative agency. This is however a general problem with the review of administrative discretion which is not rendered more or less difficult by the fact that the origin of the applicant’s standing is the concept of legitimate expectation.

It is the third situation which causes the most difficulty. This is the type of case where there has been an *ultra vires* representation and the individual seeks to argue that the public body should nonetheless be bound by it; or the public body has made an *intra vires* policy choice on which the individual has in some way relied in planning his conduct, but the public body has then sought to change to a different policy. In either case let it be presupposed that the representation or original policy would have enabled the individual to obtain a specific benefit. Brief examples will serve to clarify such instances. Thus if we assume that the representation in *Robertson*\(^{157}\) or *Lever Finance*\(^{158}\) were *ultra vires*, then the effect of holding the public body to such statement would have been accord the individuals specific substantive benefits, in the form of Pensions and beneficial planning permission respectively. The facts of the *Findlay*\(^{159}\) case provide a fitting example of the possible substantive impact of a change in policy. If the applicants had been enabled to rely on the earlier policy concerned with parole, this would have had a substantive effect, in the sense that their chances of being released earlier have been enhanced.

The decision as to whether legitimate expectations can or should ever have a substantive as opposed to a procedural impact is therefore simply another way of asking the questions posed above as to whether an *ultra vires* representation should ever be held to bind, and whether an individual should be able to rely on a policy previously declared by a public body. If one thinks that the answer should always be negative in both instances then “that is that”. The arguments against this draconian position have been st out above and elsewhere.

In searching a conclusion one way or another, it should moreover be borne in mind that even if one does on occasion allow such substantive effects, this is not equivalent to a wholesale substitution of judgment on the merits as that phrase is

\(^{157}\) *Robertson v. Minister of Pensions* (1949) 1 K.B. 227

\(^{158}\) *Lever Finance Ltd. v. Westminster (City) London Borough Council* (1971) 1 Q.B. 222

\(^{159}\) *Re Findlay* (1985) A.C. 318
normally understood. The normal understanding of the idea that the judiciary should not intervene on the merits is that if the agency has decided to exercise its discretion in a particular manner, it is constitutionally inappropriate for the court to interfere simply by substituting their view for that of the agency. They would rather be saying, for example, that even though an ultra vires representation had been made, the adverse impact suffered by the individual if the representation were not allowed to bind would exceed any harm to the public interest if it were to be allowed to take effect. In the case of changes of policy the court would not be preventing the agency from adopting a new substantive policy which was intra vires, nor would it be dictating the content of that policy. It would be deciding that if legitimate expectations really could, both practically and normatively, be held to have been generated by the earlier policy, then that policy should continue to apply to the relevant individuals in circumstances where the public interest was not thereby jeopardized. In a case such as Khan\textsuperscript{160}, it is difficult to see how the application of the published criteria to the individual concerned would have jeopardized the public interest, and this would obviously not have prevented the Secretary of State from changing the criteria for the future. In other cases the position may well be different. Thus, whether one agrees with the decision or not, one can see why the non-application of the new parole policy to the prisoners in the Findlay\textsuperscript{161} case could significantly weaken the effectiveness of the policy. Whichever view is reached on these and other cases may well be contestable, but the conclusion should not be preempted by general warnings against the judiciary interfering with the merits of the decisions, as if that furnished a self-evident resolution of the problems encountered in these decisions.

The issue as to whether legitimate expectations can have a substantive as well as a procedural dimension, and the need for care in interpreting the meaning of the word substantive, are both aptly demonstrated by the decision in R. v. Secretary of State for the Home Department, ex. p. Ruddock\textsuperscript{162}. The applicant, who was a prominent member of the campaign for Nuclear Disarmament, sought judicial

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\item \textsuperscript{160} (1984)1 W.L.R. 1337
\item \textsuperscript{161} Re Findlay (1985) A.C. 318
\item \textsuperscript{162} (1987)1 W.L.R. 1482
\end{itemize}
\end{footnotesize}
review of a decision to intercept her telephone calls, on the grounds, *inter alia*, that she had a legitimate expectation that the published criteria would be followed when a decision was taken as to whether this should be done. Taylor, J., acknowledged that the case law was generally concerned with legitimate expectation and procedural fairness, but did not believe that the doctrine should be so confined. He recognized that in a case such as the present, where ex hypothesis there would be no right to be heard before an interception order, it might be particularly important that a ministerial promise or undertaking be kept. Taylor, J., accepted that the Minister’s power could not be fettered, but correctly placed this idea in perspective: the publication of a policy did not preclude changing it; nor did it prevent the non-application of that policy in a particular case for reasons of national security. The Secretary of State had not however argued that the published criteria on interception should be dispensed with on either of these grounds. On the facts therefore the applicant did have a legitimate expectation that the criteria would be applied, but failed to show that the Secretary of State could not have concluded that those criteria were applicable.

The reasoning on legitimate expectations is sound in principle. On the facts of the case the concept could not have any procedural dimension. The effect of J. Taylor’s reasoning was to accord it a substantive dimension which was justifiable in the circumstances: the content of the published statement should be applied unless there was some evidence led to justify departing from it. This does not entail an unwarranted judicial usurpation of power over the merits of decision-making, since the public body can both alter the substance of its policy for the future, and also contend that special reasons exist for the non-application of the original policy in this instance.

It is therefore regrettable that the soundness of the reasoning in the *Ruddock* case has been placed in question by the recent decision in *R. v. Secretary of State for Health, ex. p. United States Tobacco International Inc.*\(^\text{163}\). The applicant manufactured oral snuff and had, in 1985, received a grant of $193,000 from the government towards the construction of a factory in Scotland. The government was aware at that juncture of the link between snuff and cancer through the advice of the Committee on Carcinogenicity of chemicals. In 1986 however, the committee

\(^{163}\) The Independent, Jan 4, 1991
advised that there should be a complete ban on oral snuff, and in 1988 the department stated that it intended to ban such snuff. The applicant company made representations to the Department which, after some delay, replied that its decision was based on the committee’s report. The applicant then sought judicial review on the ground, inter alia, that the department had acted contrary to the applicant’s legitimate expectations. While the court did find that the minister was in breach of a statutory duty to consult, it rejected the argument based on legitimate expectations.

Taylor, J., held that the Secretary of State’s discretion “could not be fettered by moral obligation to the applicants deriving from the earlier favorable treatment of them”, while Morland, J., stated that the applicants “must have been aware that their expectations could never fetter the Secretary of State’s duty to promote and safeguard the health of the public”.

The decision may well be correct on its facts, but the manner in which the conclusion is reached is open to question. It is readily apparent from the discussion of the Ruddock case above that it is necessary to keep two issues separate. The first is whether the overriding public interest nonetheless requires or justifies the government’s change of policy\textsuperscript{164}. On the facts of the present case it could well be argued that the answer to both inquiries should have been in the affirmative. Even if one disagrees with this interpretation of the facts, the point of general principle still remains: a positive response to the second inquiries should not lead to the conclusion that the applicant never had any legitimate expectation of a substantive nature at all, but rather that the expectation was overridden by the need for the public body to alter its policy in this area.

Some, but not all of the cases which have arisen concerning legitimate expectation clearly raise the issue as to how far, and in what manner, the law should protect types of interest which have not traditionally been characterized as rights. Applications for the renewal of, licenses and grants from governmental bodies are but two of the instances in which the government or an agency disburse valuable assets to individuals. Reich has argued that such interests should not be treated as ‘largeesse’ which the public body can give or withhold at will. They should rather be regarded as new forms of property which should be protected by constitutional,

\textsuperscript{164} The same point is made by Schwehr and Brown, “Legitimate Expectation – Snuffed Out?” (1991) P.L. 163 at pg. 166
substantive and procedural principles. Laudable though this general objective might be, there are a number of problems with this approach.

The first is that the denomination of these interests as a species of property might not in fact serve to ensure their protection in the manner which Reich hopes for. Welfare claimants may, for example, feel constrained from exercising their property rights against the administration. A second difficulty with this approach is that the very act of characterizing these interests as a form of property may well unduly constrain the public interest. As Baldwin and Horne note, “it may be said the real problem lies in persuading the courts to look to collective rights and the public interest and to stop seeing everything from the point of view of individual”. How far this presents a problem will depend on the more particular “consequential” provisions which are held to follow from labeling the interest as a species of property. Furthermore, as Baldwin and Horne correctly note, there are many varieties of largesse which are allocated under different types of criteria. For this reason “it can not be taken for granted that similar protections or similar arguments should apply to interests in government contracts and licenses renewals, or applications for welfare and subsidies.”

The “property solution” may well therefore be beset by problems. Notwithstanding these difficulties, the fact that the courts have realized the importance of these interests to the recipient, rather than telling them as privileges which warrant no protection, is to be welcomed, even if the precise degree of protection which is accorded in different areas may well have to be evaluated carefully.

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166 See generally, Titmuss, “Welfare Right, Law and Discretion” (1971)42 Pol. Q. 113; Adler and Bradley, Justice, Discretion and Poverty (1975)
169 Baldwin and Horne, Supra note 167 at pp.687