

# Articulating Rights Consciousness: Reinterpreting the Frontiers of the Concept of Substantive Legitimate Expectations as a Ground of Judicial Review in Sri Lanka

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**Abstract**— *The concept of legitimate expectations is among the tools developed by courts to impose a check on administrative discretion for the purpose of safeguarding the citizens against the arbitrary exercise of power by public authorities. It can be either procedural or substantive. Given the possibility of the usurpation of executive powers and fettering of administrative discretion in the hands of the judiciary, traditionally it has often been treated as ‘a corollary of natural justice’ as opposed to a substantive outcome. However, this doctrine has evolved to the extent that courts now inquire into the merits of administrative decisions thereby scrutinizing its substantive content. In this backdrop the main objective of this study is to analyze as to what extent the judicial scrutiny of administrative decisions upholds the principles of good administration and rule of law in the Sri Lankan context. For this purpose this research has been conducted as a qualitative research with extensive scrutiny of case laws and data gathered from books with critical analysis, journal articles and conference papers. This research examines how the criticisms in favour of and against the doctrine of substantive legitimate expectations have influenced the Sri Lankan jurisprudence in recognizing it as an autonomous ground of judicial review. A comparative analysis will be made to its reception in England. The Constitutional foundation of judicial review in Sri Lanka has enabled the judiciary to introduce progressive trends in the contemporary world into the domestic system and expand the frontiers of judicial review. Nevertheless, in certain instances the courts seem to have confused the procedural aspect of the doctrine with its substantive aspect. Despite these pitfalls the approach taken by the Sri Lankan courts to supplement the substantive legitimate expectations with the fundamental rights regime can be recognized as a plus point as it would address many of the deficiencies acquainted with this doctrine in particular the need to define demarcate the frontiers of the doctrine.*

**Keywords**— *Substantive Legitimate Expectations, Judicial Review, Right to Equality*

Expectations regarding the exercise of administrative powers are created by public authorities by way of representations, promises or by their conduct. It has been observed that “The protection of legitimate expectation is at the root of the constitutional principle of the rule of law, which requires regularity, predictability and certainty in government’s dealing with the public.” (De Smith et al, 1995) Hence, legal certainty and good governance requires public authorities to adhere into such expectations they create, so that the individuals whose interests are affected by such administrative decisions can plan their lives accordingly. However, such expectations may be frustrated in exercising administrative discretion in the public interest. On contrary, certain other frustrations would amount to ‘abuse of power’ which warrants judicial review of administrative decisions.

Traditionally, courts in treating legitimate expectation as a ground of judicial review has solely confined to the procedural aspect. At present, this doctrine has evolved to the extent that courts now inquire into the merits of the administrative decision and therefore the substantive content is scrutinized.

In this backdrop, the main research problem analyzed by this paper is to what extent the judicial scrutiny of administrative decisions upholds the principles of good administration and rule of law in Sri Lankan context. However, given the possibility of the usurpation of executive powers and fettering of administrative discretion in the hands of the judiciary, the emphasis has been on the necessity of placing substantive legitimate expectations within the proper boundaries. Hence, the main argument put forward by this paper is the judicial interpretation of the doctrine of substantive legitimate expectations can be used to safeguard individual’s rights which are at stake due to the arbitrary exercise of administrative discretion. In the absence of any governing statutory instrument, nevertheless, the issue arises as to what the ‘proper boundaries’ are, where to demarcate them and how to do that. To this end this paper first focuses on the origin of the concept of the substantive legitimate expectations, and

## I. INTRODUCTION

secondly, its reception in England. Thirdly, this paper evaluates the reception and application of this doctrine in Sri Lanka and the judicial attempt to interpret it as a rights preserving tool.

## II. THE CONCEPT OF SUBSTANTIVE LEGITIMATE EXPECTATIONS

The doctrine of legitimate expectations gained recognition a long ago. Back then it was regarded solely as a 'corollary of natural justice'; the right to be notified of reasons and the right to be heard before the change of an existing benefit comes into effect. (Felix, 2006) One of the earliest cases to give expression to the notion of 'legitimate expectation' was *Schmidt v Secretary of State for Home Affairs* where the plaintiffs alleged for the denial of natural justice on the ground of being refused for the extension of their permission to remain in the United Kingdom without a hearing being granted. Lord Denning M.R. was on the opinion that plaintiffs being aliens who were entitled to remain in the country "by license of the crown", had no legitimate expectation of a hearing.

At present, this concept has evolved to the extent that courts now scrutinize administrative decisions for their substantive content rather than imposing a mere check on procedural fairness. Over the years, the doctrine of substantive expectations has been invoked in varying instances. Accordingly, an individual may claim for a substantive benefit of an administrative decision when a general policy or a norm upon which he relied is replaced by a different policy or norm. The second scenario is that the existing general policy or norm is not applied in the given case. Thirdly, when a promise or representation made to an individual is not honoured owing to a policy change. And the fourth instance is where a representation given to an individual is not honoured because the public authority has changed its mind. (Craig, 2003)

## III. THE RECEPTION OF THE DOCTRINE OF SUBSTANTIVE LEGITIMATE EXPECTATIONS IN ENGLAND

Traditionally, English courts regarded the notion of legitimate expectations solely as 'a corollary of natural justice'. Owing to the notions of parliamentary supremacy, immense resistance was expressed from English courts to expand the frontiers of the notion of legitimate expectations so as to grant a substantive benefit to individuals. It was only in the aftermath of the adoption of Human Rights Act of 1998 the notion of substantive legitimate expectations started gaining recognition. The impact of the Human Rights Act of 1998 on the reception of substantive legitimate expectation as a ground of judicial

review will be discussed under the topic of rights based approach towards the end of this paper.

A significant breakthrough in the common law jurisprudence was marked with the acknowledgement of the notion of substantive legitimate expectations by the Court of Appeal in *Coughlan* case. Ms Coughlan who was gravely injured at the time was assured by the health authority to provide life time nursing care at Mardon House. Later on, when the health authority decided to close down Mardon House and relocate its residents, Ms Coughlan sought judicial review of this decision. It was held that since the assurance given to Ms Coughlan has induced a legitimate expectation of a substantive character, frustration of such assurance would give rise to an abuse of power.

The *Coughlan* case articulated the proposition that when a public official acts contrary to an expectation of a substantive benefit induced by him, it amounts to an abuse of power which warrants judicial review. Not only the court formulated a new ground of review but also laid down the standard of review to be applied. The emphasis was thus placed on the balancing approach whereby the courts role was to ascertain whether such frustration was to pursue any overriding public interest.

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

The *Coughlan* case thereby laid the platform for a substantive legitimate expectation jurisprudence which was further shaped in subsequent cases. Hence, in *R v Secretary of State for Education and Employment; Ex parte Begbie* ('*Begbie*') Mrs Begbie sought judicial review of decisions concerning the assistance provided for her disabled child's education on the ground that the promises made by an opposition party were not followed when they assured government. The case could have been simply dismissed on account of the fact that any expectation induced by an opposition party is not one induced by a 'public body' and therefore does not give rise to any possible claim of substantive legitimate expectations. (Groves, 2014) Nevertheless, Laws LJ was on the opinion that "abuse of power has become, or is fast becoming, the root concept at

which governs and conditions our general principles of public law.”

The balancing approach enunciated in the *Coughlan* case was further refined in the subsequent *R (Bibi) v Newham London Borough Council*. The Court of Appeal articulated that the government body which performs this balancing function is as important as the balancing function itself. Accordingly “the task for the law in this area is to establish who makes the choice of priorities and what principles are to be followed”. Another considerable development in respect of the doctrine of substantive legitimate expectation as formulated in *Coughlan* case arose in the *R (Nadarajah) v Secretary of State for the Home Department* (*‘Nadarajah’*) by means of an attempt to incorporate the wider norms of good governance in to the *Coughlan* foundation.

#### IV. THE RECEPTION AND APPLICATION OF THE CONCEPT OF SUBSTANTIVE LEGITIMATE EXPECTATIONS IN SRI LANKA

In Sri Lanka judicial review is constitutionally established and well documented. Consequently, the judiciary could welcome with a positive note the new developments in the contemporary world into the domestic system and thereby expand the frontiers of the judicial review. Accordingly, the legitimate expectations of a substantive benefit soon earned the judicial recognition in Sri Lanka unlike in England.

*Mowjood v Pussadeniyacan* be regarded as one of the earliest cases to grant implicit recognition upon the notion of substantive legitimate expectations. Here, a notice made by the commissioner of National Housing to the District Court that he is able to provide alternative accommodation to the petitioners was challenged on the ground that the premises provided by the commissioner did not constitute alternative accommodation within the meaning of the empowering statute.

While granting a writ of certiorari Sharvananda CJ was on the opinion that, “The notification of the Commissioner is clearly susceptible to judicial review as it affects the legal rights of the appellants to continue in the occupation of the premises until evicted by writ of execution on a proper notification by the Commissioner. Further the appellants have a legitimate expectation that they would not be evicted from their present premises except on a writ of execution allowed by court after the issue by the Commissioner of a proper notification in terms of section 22(1C).” Though not specifically stated, the legitimate expectation referred to in this case is not of a procedural benefit but involves a substantive outcome. Hence, this

case provide evidence to the fact that even from the initial stages the Sri Lankan courts have recognized the breach of substantive legitimate expectations as giving rise to enforceable rights in Sri Lanka.

In *Galappaththy v Secretary to the Treasury*, the withdrawal of a duty waiver granted to MPs who had not been re-elected was challenged on the ground of breach of legitimate expectation. However the case was dismissed owing to the petitioner’s failure to establish a breach of legitimate expectation. Nevertheless this case is of vital importance as it endorsed the position that substantive legitimate expectations could give rise to enforceable rights in Sri Lanka. The claimant in the present case failed solely because he could not establish a breach of legitimate expectations. It does not imply that substantive legitimate expectations are not subjects worthy of protection. Hence, he could have succeeded had he been able to establish a breach of his substantive legitimate expectations.

In *Wass Gunawardena v Perera and Another*, the petitioner challenged an appointment made outside the normal cadre of a state bank where there were no rules regulating the procedure for such appointment. Although the court took position that there was no breach of the petitioner’s legitimate expectations, it should be noted that the legitimate expectation referred to here is substantive in character.

Another coherent analysis of the substantive legitimate expectation was brought out in *Vehicles Lanka (Pvt) Ltd v Minister of Railways, Transport, Petroleum and Petroleum Resources Development*. The petitioner was engaged in a business of assembling vehicles. He challenged the lawfulness of two regulations laid down by the Minister on the ground that said regulations were unreasonable, unfair and disproportionate thereby amounting to the breach of his legitimate expectations. The court issued a writ of certiorari quashing the minister’s regulations.

In this case the gazette issued by the authority gave rise to the expectation that the petitioner could continue with its operations. It could thus be observed that the expectation triggered here is of substantive in character. The gazette was not specifically concerned with the petitioner’s case but was of general application. As it was observed by Craig and Burca the requirement that a person’s legitimate expectation should not be thwarted without just cause is a basic tenet of rule of law. (2003) Hence, the court made it clear that where public assurances are involved, policy changes should be justified with compelling public interests.

The said requirement of a just cause can be traced back to balancing approach adopted in the landmark Coughlan case. As it was observed by the Lord Woolf MR:

“once the legitimacy of the expectation is established the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy”

This case thereby laid down not only the grounds of review but also the standard of review to be applied where substantive legitimate expectations are involved. Hence this attempt to incorporate Common law developments into the domestic context can be commended as a favorable development in the substantive legitimate expectation jurisprudence in Sri Lanka.

However, the instances where the courts have confused the procedural aspect of the legitimate expectation doctrine with its substantive aspect could also be observed. The supreme court decision in *Sundakaran v Bharathi* warrants analysis in this regard. The petitioner sought a writ of mandamus to compel the issue of a liquor licence. Having been granted the license for two preceding years, he was not granted the license for 1987 on account of the fact that he had failed to obtain the consent of all the members of Parliament in the constituency as required by the circular concerned. The Court of Appeal refused to entertain the application holding that judicial review was inappropriate because this was a matter of executive policy. Thereafter the petitioner appealed to the Supreme Court.

Amarasinghe J. was on the opinion that since a vested right in property of the petitioner was affected, it gave him a legitimate expectation of a hearing before the renewal of his licence was refused.

“no man is to be deprived of his property without having an opportunity of being heard. Even if what he had was mere permission to which the Appellant-Petitioner had no legal entitlement or claim of right, the refusal of the permission which had previously been granted I think may be at least sufficiently comparable to the act of taking away property so that the audi alteram partem rule will apply. I am unable to agree with learned Counsel for the Respondents that the Petitioner-Appellant was simply "hoping" against "hope" of being granted a renewal of a licence. He had, in my view, a legitimate expectation of success and therefore a right to a full and fair opportunity of being heard.”

It can be observed that the expectation created in this instance is that the renewal of license would not be refused without just cause. The unfairness caused to the appellant owing to the frustration of this expectation would amount to abuse of power. Hence the legitimate expectation that

arise in this instance is of substantive in character rather than a procedural one. Hence it is submitted with due respect that the refusal of the renewal of the license therefore does not call for the breach of any process rights but entails a substantive benefit. (Felix, 2006)

Despite this confusion as to the substantive and procedural aspects of the doctrine of legitimate expectations, the judges in Sri Lanka do not seem to have hesitated to make use of this doctrine where possible. The favourable approach taken by the judiciary to this new concept thereby reflects on the less fettered judicial discretion prevailing in Sri Lanka.

#### V. A RIGHTS BASED APPROACH

The constitutional foundation of judicial review in Sri Lanka has enabled the judiciary to introduce progressive trends into the subject. An attempt can be observed on the part of the Supreme Court of Sri Lanka to make reference to the doctrine of substantive legitimate expectations where fundamental rights applications are concerned. It thereby depicts an effort to articulate a rights based approach to judicial review which warrants analysis.

Where fundamental rights applications are involved, the task of the judiciary is obviously not to oversee whether the procedural requirements have been observed by the administrative authorities in their dealings with the public. The role of the judiciary in these circumstances is to scrutinize the merits of the decision so as to unveil whether an infringement of fundamental rights has taken place. Hence, an effort to supplement the substantive legitimate expectation jurisprudence with the fundamental rights regime in particular, right to equality can be observed in the Sri Lankan context.

Art 12(1) of the Constitution which refers to the right to equality reads as:

“All persons are equal before the law and are entitled to the equal protection of the law.”

As observed by Sir Ivor Jennings among equals the law should be equal and therefore should be equally administered. Art 12(1) thereby guarantees that persons who are similarly placed under similar circumstances would be granted with equal treatment and protection of the law.(Bandaranayaka J in *Visal Bhashitha Kavirathne and Others v Commissioner General of Examination and Others*) It is discernible that the Supreme Court has made use of the frustration of substantive legitimate expectations to substantiate a breach of the said guarantee against the abuse of power in the hands of administrative authorities

Hence, the Supreme Court in *Dayarathna v Minister of Health and Indigenous Medicine* examines the scope of both procedural and substantive aspects of legitimate expectation doctrine in light of right to equality. Ministry of Health called for applications from persons desiring to follow a course of training leading to the award of the certificate of competency as Assistant Medical Officers. The petitioners who were eligible to follow the course applied and then sat for an examination as well. Although the published scheme referred to an interview as the next step of the process it was not held. Instead of this course the petitioners were later invited to apply for training as Pharmacists, Medical Laboratory Technologists and Public Health Inspectors. It was held that the petitioners had a legitimate expectation that they would be provided with the training leading to the award of the certificate of competency as Assistant Medical Practitioners, upon satisfying prescribed conditions.

It is well established in the common law that in addition to the procedural requirements, a change of policy frustrating an individual's expectation survives only where substantive requirement of an overriding public interest prevails. Amarasinghe J in the said case, seems to have made use of this balancing approach to establish an infringement of right to equality as guaranteed in Art 12(1).

A sound exposition of the nexus between the substantive legitimate expectations and right to equality was analyzed by Dr Shirani Bandaranayaka in *Lancelot Perera v National Police Commission and Others*. Petitioner, an SSP, alleged that non appointment of him to the post of DIG of police infringed his fundamental rights guaranteed in terms Art 12(1). Initially the Police Commission had come to an arbitrary decision not to allow the petitioner to apply for further promotions which was departed later on. Consequently, he was called for the interviews held for the promotion to the rank of DIG of police. Though he had performed exceptionally well in the interviews, officers junior to him were promoted but not him. Having analyzed the all the circumstances of this case, her ladyship were on the opinion that:

“It is apparent that the application for the promotion and the invitation to attend the interview and by its successful completion the petitioner had a legitimate expectation that he would be promoted to the rank of Deputy Inspector General of Police.”

The legitimate expectation created in this situation is substantive in character and not a procedural one. A frustration of a substantive legitimate expectation in the

eyes of her ladyship has amounted to the infringement of petitioner's fundamental rights granted under Art 12(1). Art 12(1) provides those who are similarly situated should be granted with equal treatment before law infringement of which amounts to discrimination. Accordingly, the petitioner is entitled to an expectation of a substantive character, that he will be promoted to the rank of DIG like others who are similarly situated. Therefore, the frustration of the said expectation thereby constitutes an infringement of his right to equality which warrants judicial review. Hence it can be observed that the court has made use of the right to equality as intermediate ground between the doctrine of substantive legitimate expectation and the judicial review.

Another aspect that should be given due consideration is how the court has paved the way for using the rights based approach as a standard of review in judicial review of administrative decisions concerning substantive legitimate expectations. So far, the doctrine of substantive legitimate expectation has been perceived as a weighing process, a choice between two alternative intensities. The courts determined whether the frustration of the expectation of substantive benefit was so unfair as amounting to abuse of power by weighing such expectation against any overriding public interest relied upon. Instead, in this case the right to equality was used as the standard of review. Hence the petitioner has to meet the threshold of right to equality as spelt out in Art 12(1) so as to earn protection for his expectation in terms of judicial review. This approach taken in this case can be hailed as a progressive development in the substantive legitimate expectation jurisprudence in Si Lanka.

These commendable characteristics have been further endorsed in subsequent decisions. The Supreme Court in *K. Abiramy v University Grants Commission* observed how the frustration of an expectation of a substantive benefit in the context of Directive Principle of the State Policy on universal and equal access to education warrants judicial review. Here, the petitioner claimed for a writ of mandamus on the ground that the admission rules contained in the University hand book has given rise to a legitimate expectation that he would be taken in for the Faculty of Medicine.

The Article 27(2) (h) of the Constitution grants assurance to all persons of the right to universal and equal access to education at all levels. As observed by K. Sripavan J, “The Directive Principles which are fundamental in governance of the country cannot be isolated from the fundamental rights guaranteed under Chapter 111. These principles have

to be read into the fundamental rights enshrined in the Constitution”.

The court therefore interpreted the directive principle on universal and equal access to education in the context of fundamental right to equality as embodied in Art 12(1). The frustration of the petitioner’s expectation to enter the Faculty of Medicine thereby amounts to the infringement of his right to education which warrants judicial review. His lordship has thereby extended the scope of the rights based approach to directive principles of state policy read with Art 12. Not only the fundamental rights but also directive principles of state policy read with Art 12 has been recognized as the threshold of protection of legitimate expectations which are substantive in character.

One of the prominent criticisms against the doctrine of substantive legitimate expectations is the absence of a documented foundation laying down its frontiers. In the absence of any legal foundation to rely on it is up to judges to interpret the doctrine in the circumstances of each case. This may result in the excessive and unnecessary judicial encroachment on the administrative discretion. The doctrine of substantive legitimate expectations was initially devised to impose a check on the arbitrary exercise of power by the administrative authorities in their dealings with the public. Since there is no any legal basis to rely upon there is a high possibility for the judiciary to get carried away when inquiring into the merits of administrative decisions. Hence contrary to its counterpart the doctrine of substantive legitimate expectations failed to receive a favorable recognition in many jurisdictions.

In Sri Lanka the substantive legitimate expectations is often coupled with fundamental rights, in particular right to equality as laid down in the Chapter 111 of the Constitution. Hence the fundamental rights chapter thereby lays down the frontiers of the doctrine of substantive legitimate expectations and most importantly serves as the basis which guides the judiciary as to the path it should take when giving recognition to this doctrine. The approach taken by the Sri Lankan courts to supplement the substantive legitimate expectations with the human rights perspective can be commended as a means devised to overcome the pitfalls acquainted with this doctrine.

However, in the absence of a written constitution and a human rights charter in England, the determination and demarcation of the scope of the doctrine of substantive legitimate expectations was solely depended on the judicial interpretation. Hence, given the dangers acquainted with such interpretation, English judges at the inception were careful enough to treat legitimate expectations solely as a ‘corollary of natural justice’. It was only in the aftermath of

the European Convention of Human Rights in 1998 radical developments took place in the common law jurisprudence; judges started giving expression to theories like proportionality and substantive legitimate expectations. However, had they given recognition to substantive legitimate expectations at an earlier stage many circumstances which were then merely treated as coming under the procedural aspect would have come within the ambit of substantive aspect thereby rendering great deal of justice to the people. In *R v Secretary of State for Home Department, ex parte Khan* the criteria laid out in a published circular were not applied in respect of the plaintiff. The court was on the opinion that the plaintiff is entitled to a hearing at which he could argue why the stated criteria should apply to him as well. It submitted that the expectation arose here is not procedural but substantive in character. But by the this case was decided, that was in 1985, it was much unlikely that something as substantive legitimate expectations which perceived to be much radical would be given expression. Similarly, many of the cases which should have fallen within the ambit of substantive legitimate expectations were merely treated as being coming within the scope of procedural fairness.

#### VI. CONCLUSION

The judicial acknowledgement of substantive legitimate expectations can be commended as a progressive development in the realm of public law in Sri Lanka. It empowers the judiciary to investigate into the merits of the decision. Hence, if properly handled substantive legitimate expectations can be used as a weapon to protect individual’s rights which are at stake owing to the arbitrary exercise of administrative discretion. However, given the possibility of excessive judicial intrusion upon the administrative discretion it is vital to keep it within proper boundaries. In this sense the absence of any defined frontiers and demarcations stand as its main pitfall. To this end the attempt taken to supplement the substantive legitimate expectations with the fundamental rights regime in Sri Lanka can be recognized as a plus point. Nevertheless, the interpretation of rights in light of substantive legitimate expectations totally depends on the judicial discretion. Hence, the judiciary can interpret and give effect to many other rights, benefits and privileges within the purview of rights enshrined in the Constitution thereby encroaching upon the administrative discretion once again. On the other hand, the very fact that recognition of substantive legitimate expectations is solely a matter of judicial interpretation raises the question as to what extent substantive legitimate expectations has become successful in its role as a rights preserving weapon.

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