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With this thought, we hereby present to you

Comparative Study On The Doctrine Of Legitimate Expectation

Authored By – Pooja

Abstract

The concept of legitimate expectation comes under public law that originates between two opposite poles of "right" and "no right". It is not considered a legal right but recognizes the expectation made based on a promise. It is a reasonable expectation of the public in the action of administrative authorities, therefore establishing a relationship between government authority and the public. However, such expectations should be valid, reasonable, and legitimate in every sense. The Indian courts have given due recognition to this concept under administrative law and ensured that the public is not subject to arbitrary actions of authorities in power. This paper examines the relevancy and evolution of the tenet of legitimate expectation in different countries. The problem is that the concept of legitimate expectation is not considered as a right in itself, therefore, it is majorly trampled upon.

Keywords: Arbitrary, legitimate, promise, administrative law, expectation.

Introduction

The public may have expectations based on past practice or promise for conduct by the administrative authorities. The first step in addressing cases with legitimate expectation is to check the existence of expectation as claimed, and the next step is to determine the legitimacy of expectation. However, if any legislation is found to override the expectation, then such expectation by the public cannot be enforceable. In 1969, Lord Denning advanced the term "legitimate expectation" and the significance of this concept increased from that time in all jurisdictions. This concept exists in various forms and there is no exhaustive list to cover the government activities falling under the doctrine of legitimate expectation.¹ This doctrine has played crucial role in the development of judicial review.² It is used

¹ Union of India v. Hindustan Development Corporation, AIR 1994 SC 988 (India).

² Findlay v. Secretary of State for the Home Department, (1984) AC 318 (India).

to keep a check on functions performed by administrative authorities. It helps in preventing arbitrary actions of discretionary powers exercised by the administrative authorities and upholds the principles of natural justice. In addition to that, legitimate expectation increases public morality and confidence in the functioning of government bodies.

The fundamental notion of this doctrine is to have administrative actions be in the best interest of the public. For example, a scheme is introduced by the government provide free sanitary product in a rural area, then later stops providing them. In such cases, the legitimate expectation of the public has been violated, therefore the public authority can be held liable for going against their undertaking as provided under the scheme. On the other hand, legitimate expectation cannot be used when the administrative authority is given full discretion in a particular matter. If a law or executive policy empowers an administrative authority to perform any function, then the doctrine has no role to play in such cases. Moreover, the doctrine does not hold back the government from introducing new policies or laws.³

The doctrine was first introduced in the United Kingdom to ensure fairness to the people and prevent abuse of administrative powers. The scope of this topic extended widely from mere procedural irregularities to substantive unreasonableness in the UK. Whereas, the scenario in United States of America, the term was differently coined as doctrine of consistency. It is very similar to legitimate expectation and closely related to the concept of rule of law. In India, the legitimate expectation is covered within the ambits of Article 14 of the Indian Constitution.

Position in the United Kingdom

The common law courts introduced this concept and recognized it as a matter of right when the public has been left with no other redressal. At first, it was considered an element in private law but later the scope expanded and it was covered under public law. Lord Denning invoked this doctrine for the first time in Schmidt's case⁴. The facts of the case are that a few foreign students, pursuing Scientology course at the Hubbard College of Scientology, filed a case against the public authority for not extending their stay permit for completion of the course. They contended that the refusal to extend the period was not valid and they were not given the right to be heard, therefore it is against the fair

³ P.T.R Exports (Madras) Pvt. Ltd. v. Union of India, AIR 1996 SC 3461 (India).

⁴ Schmidt v. Secretary of State for Home Affairs, (1969) 1 ALL ER 904.

procedure. The public authority contended that the study of Scientology was harmful to society; therefore, the application for an extension was rejected. Even though the court gave the order in support of the public authority stating that the secretary of state has full power to refuse for extending the period, without stating the reasons, Lord Denning used the term "legitimate expectation" in place of "right" and observed that the claimants have to be heard as they had the expectation for fair procedure as per principle of natural justice.

The legitimate expectation can be seen as a means of protecting procedural rights when a certain procedure is promised to be followed and the authority has deviated from it. In the *Attorney General for Hong Kong v. Ng Yuen Shiu* case⁵, the secretary of security promised that the illegal immigrants from China would be interviewed and each case would be decided on its own merits. However, the applicant received a removal order and it was contested under the doctrine of legitimate expectation. The removal order was quashed and held that the Secretary had undertaken to follow few procedures that invested in the legitimate expectation of the applicant.

The judicial position in the UK changed from procedural to substantive legitimate expectation. The two types of circumstances in substantive legitimate expectation recognized under English law are⁶:

1. The legitimate expectation of a continuation of benefit or service undertaken by the public authority. In this case, the cause of action arises when the public authority stops providing the benefit.
2. The public does not enjoy the benefit or service yet but rightfully expects a such benefit in the near future. The cause of action arises when such expected service is not provided.

Most of the cases of the doctrine of legitimate expectations are dealt with the right to be heard, but it is vital to emphasize that the doctrine is not only confined to that.⁷ In the case of *R v. Secretary of State of Home Department, ex parte Khan*⁸, the applicant wished to adopt a child of his relative from Pakistan. Only in exceptional circumstances as stated in the Home office circular such entry was permitted. The criteria were satisfied by the applicant; however, the entry was refused. The court observed that the circular gave the applicant legitimate expectations and passed an order granting permission for the entry of the child.

⁵ *Attorney General for Hong Kong v. Ng Yuen Shin*, (1983) 2 All ER 346.

⁶ LEWIS, CLIVE, *Judicial remedies in public law*, Sweet & Maxwell, 2004.

⁷ *R v. Secretary of State for the Home Department, ex parte Ruddock*, (1987) 1 WLR 1482.

⁸ *R v. Secretary of State for the Home Department, ex parte Khan*, [1985] 1 All ER 40.

The question is whether the expectations can be met if the law or policies have changed the circumstance.⁹ In the *R v. Secretary of State for the Home Department* case, ex parte Hargreaves, it was set forth that any kind of expectation that arose before the circular of policy change can be destroyed if reasonable.¹⁰ Therefore, an expectation is not honored if there is any subsequent change in law or policy on the matter.¹¹ An expectation that is against public order or national security cannot be recognized in law. The expectations cannot fetter the duty of public authority in protecting and promoting the health and safety of the public.¹²

Position in India

In India, the judiciary checks activities performed by administrative authorities through judicial review. They ensure that the actions of the administrative body are fair and reasonable in the substantive as well as procedural aspects. In Indian constitution, Article 226 and 32 empowers the High court and Supreme Court with the power of judicial review. The Indian legal system was inspired by the British judicial system in applying the doctrine of legitimate expectation. This doctrine is considered to be part of rule of law and ensures that every administrative action goes through the 3 tier test of certainty, regularity, and predictability. The doctrine was applied in *K.G. Madhavan Pillai* case¹³, where a sanction was issued by the government to allow respondents to open unaided schools. Later, a direction was issued to cancellation of the sanction. The court put forward that the sanction corroborated a legitimate expectation upon the respondent, therefore it cannot be revoked. This shows that promissory estoppel and legitimate expectation go hand in hand.¹⁴

In a case of legitimate expectation, a few important questions relating to the nature and scope of the expectation have to be determined before applying the doctrine. Mere anticipation cannot be a legitimate expectation.¹⁵ The doctrine makes right set of circumstances to invoke judicial review on the actions of the executive if it affects their rights. Every action of the public administrative authority

⁹ TREVOR ZEYL, Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law, 49 ALTA. L. REV. 203 (2011).

¹⁰ *R v. Secretary of State for the Home Department*, ex parte Hargreaves, [1997] 1 WLR 906.

¹¹ *Kioa v. West*, (1985) 159 CLR 583.

¹² *R v. Secretary of State for Health*, ex parte United States tobacco, (1992) QB 353.

¹³ *State of Kerala v. K.G. Madhavan Pillai*, AIR 1989 SC 49 (India).

¹⁴ IP MASSEY, *Administrative Law* (9th ed., 2005).

¹⁵ *Union of India v. Hindustan Development Corporation*, (1993) 3 SCC 499 (India).

is tested with the requirements of Article 14. The actions should be backed up by the principle of natural justice and rule of law. Article 14 is against any arbitrary action and ensures that every person is treated fairly. The very foundation for this doctrine can be found in article 14 as it upholds the principle of natural justice and rule of law. The state and all its instrumentalities recognized under Article 12 are bound to conform to the principle of rule of law, which is the antithesis of arbitrariness. Article 14 imposes a duty to act objectively and to cultivate a procedure that is fair and equal to both the parties before the eyes of law.¹⁶

The doctrine creates a sense of duty on the public authority to the society and before acting the relevant factors of legitimate expectations should be taken into consideration. There should be a legitimate overriding reason for not complying with the expectation and it should afford the authority to make representations with regard to that.¹⁷ In Indian constitution, any decision taken under Article 298 by public authority should comply with Article 14. The court held that Indian Oil Corporation being state instrumentality should take the parties' rights into consideration before taking action which may be arbitrary in nature. The appellants, in this case, had legitimate expectation due to continuing past practice with IOC which was upheld by the Court.¹⁸

On the other hand, a change of policy can affect the strength of the doctrine of legitimate expectation if such change is made for a bonafide reason and in the public interest. In *Suseela v. UGC*¹⁹, The legitimate expectation of exempting NET exam of the appellants was not upheld due to the reversal of policy. It was observed that the modification of policy was done for the public interest and the NET exam was made compulsory for the eligibility criteria of professors. Similarly in another case, the setting of bars by appellants resulted in a major outcry from the public and disturbed the law and order in the society. Therefore, the government repealed the rules of Tamil Nadu Prohibition Act, of 1937. As a result, the licenses of the appellants were not renewed. The Supreme Court rejected the contention of legitimate expectation and it held if there is any change in law or policy for the public interest then there can be no question of such expectations.²⁰ Therefore, this shows that the doctrine has few limitations and restrictions when it comes to protecting the public interest.²¹

¹⁶ *Food Corporation of India v. Kamdhenu Cattle Feed Industries*, (1993) 1 SCC 71 (India).

¹⁷ *Navjyoti Corporation Group Housing Society v. Union of India*, AIR 1993 SC 155 (India).

¹⁸ *Mahabir Auto Stores v. Indian Oil Corporation*, AIR 1990 SC 1031 (India).

¹⁹ *Suseela v. University Grants Commission*, (2015) 8 SCC 129 (India).

²⁰ *Madras City Wine Merchants Association v. State of Tamil Nadu*, (1994) 5 SCC 509 (India).

²¹ *Bajaj Hindustan Limited v. Sir Shadi Lal Enterprise Private Limited*, (2011) 1 SCC 640 (India).

On the other hand, in a few cases, the policy change can benefit the public in enforcing their legitimate expectations. For example, the respondent who served in jail for 15 years was eligible for a remission period, but the state did not give him one.²² It was an honest expectation of the respondent for premature release as to the new policy introduced. Therefore, the court upheld the legitimate expectation of the respondent as the policy was in favor of his premature release. In India, the importance given to the doctrine of legitimate expectation is more compared to the other countries as we can see through these cases and it is implicitly recognized under Article 14 which gives it more power for enforcing.

Position in the United States

In the United States, the doctrine of legitimate expectation is not a comprehensive concept. Even though the US law recognizes judicial review of administrative actions and ensures the public with due process, then doesn't contain comprehensive provisions of the doctrine. The US Supreme Court has differentiated a unilateral expectation and a justifiable claim of entitlement. A unilateral expectation of public action is not recognized even though it is well grounded. Only a legitimate claim of expectation from a public authority is recognized based on the law, regulation, or any other contract that the authority has bound themselves.²³ The US law prefers to use the doctrine in a different term as the "consistency" principle. The Major concern of this principle is to prevent deviation from legislative and executive practices which previously have been laid down. This principle is brought to maintain consistency in the actions of the public authorities. It applies to both contractual and non-contractual relationships like change in custom followed by the public authority that affects the expectation of the public. The consistency principle is held to be in a proximate relationship with the rule of law.²⁴ The consistency principle does not empower people with rights; however, they aid in assisting the judiciary to keep a check on any deviation by the executive body.²⁵ The principle can find its essence in legal concepts like ex post facto laws, promissory estoppel, equal protection, double jeopardy, due process of law, etc.

²² State of Haryana v. Jagdish, (2010) 4 SCC 216.

²³ Perry v. Sindermann, [1972] 408 U.S. 593.

²⁴ Shaball v. State Compensation Ins. Auth., 799 P.2d 399.

²⁵ JAYANTA CHAKRABORTY, Doctrine of Legitimate Expectation - A Comparative Study of UK, USA & India, 5 INDIAN J.L. & PUB. POL'Y 21 (2018).

Position in France

In French law, there is no explicit provision for the doctrine of legitimate expectation. The Conseil d'Etat has been compensating the public for any arbitrary administrative actions. However, French law recognizes the legitimate expectation directly under the principle of legal certainty, natural justice, protection of vested rights, non-retroactivity, etc.²⁶ Therefore, they have been less receptive to this principle because their law already provides for the protection of expectation created by authorities.²⁷ Moreover, the French courts have consistently rejected the doctrine due to the conflict between potential conflict that may arise between "Principe de sécurité des situations juridiques", that is the legal certainty principle and the legitimate expectation.²⁸ The European Convention on Human rights is one of the sources of this doctrine in protecting the property rights of the public through legitimate expectation.²⁹ In *Entreprise Transports Freyuth TA Strasbourg* case³⁰, the French government was held liable for damages for sudden changes in import regulations. The law regimes of administrative bodies in France have conceptualized the non-fulfillment of legitimate expectation and have held authorities liable for compensating for damages.³¹ On the hand, some of the actions of administrative authorities were also recognized, for example, the French court upheld the order, passed by the mayor that imposed a ban on the amusement of dwarf-tossing on the ground which infringed the human dignity.³²

Conclusion

In many countries, as we can observe that the doctrine of legitimate expectation is still in the developing process. In countries like Australia, there is skeptical adoption of substantive legitimate expectations. On the other hand, countries like Canada have adopted a procedural understanding of the doctrine. In the UK, both procedural irregularity and substantive rights are recognized whereas in the USA, it is about consistency in institutional actions. Every country strives to progress for public

²⁶ CAROL HARLOW, *Fault Liability in French and English Public Law*, *The Modern Law Review*, 516-541, (1976).

²⁷ CHESTER BROWN, *The Protection of Legitimate Expectations as a 'General Principle of Law': Some Preliminary Thoughts*, *TRANSNATIONAL DISPUTE MANAGEMENT* (2009).

²⁸ JOE TOMLINSON, *Do we need a theory of legitimate expectations?* *LEGAL STUDIES*, 286-300 (2020).

²⁹ MARTA VICENTE, *Property Rights and Legitimate Expectations Under United States Constitutional Law and The European Convention on Human Rights: Abstract Some Comparative Remarks* (2022).

³⁰ *Entreprise Transports Freymuth TA Strasbourg*, [1995] PL 657.

³¹ REBECCA WILLIAMS, *Unjust Enrichment and Public Law: A Comparative Study of England, France and the EU*, OXFORD HART PUBLISHING (2010).

³² ALEXANDER BROWN, *Justifying Compensation for Frustrated Legitimate Expectations*, *LAW AND PHILOSOPHY*, 30, 699-728 (2011).

satisfaction with the actions of government authorities. In India, the doctrine being part of Article 14 gives it more power for enforcing rights in the name of writs. However, in most cases the administrative actions are protected by the exception of public interest and it leads to gross violation of the rights of the people. The reason behind this lacuna is that the legitimate expectation is not considered a right in itself therefore, it is majorly trampled upon. The doctrine is represented in different forms in different countries. The expectation also differs according to the public and the approach of the government to the doctrine and hence, there is no exhaustive list.

