

Legitimate Expectations in the Common Law World

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The Legitimate Expectation as an Instrument and Illustration of Common Law Change

MATTHEW GROVES AND GREG WEEKS

THIS BOOK MIGHT be understood as an extended essay in family relations. After all, the countries within the common law world are united to a significant extent by their shared heritage of English legal principles. As with all families, the younger members grow up and change but do so in different ways. Some stay close to their parents. Some do not. If the common law is placed within this analogy, it would be cast as a parent whose influence is imprinted deeply and hard to let go of. But as with all parents, the common law knew its children would leave home and change during that time.

Not long before it lost appellate jurisdiction over the courts of New Zealand, the Privy Council conceded that ‘the common law is no longer monolithic’.¹ The Law Lords accepted that one consequence of this change was that courts of other jurisdictions could ‘make a deliberate policy decision to depart from the English approach’ as part of the development of the common law of their own jurisdictions.² The distinguished New Zealand jurist Lord Cooke was not a judge in the just quoted Privy Council decision but, in a speech delivered around the same time, he approached the very same issue from a very different perspective. Lord Cooke suggested that the common law was becoming less English.³ The important subtlety of this

¹ *B v Auckland District Law Society (New Zealand)* [2003] 2 AC 736, 759 [55]. The same point was acknowledged by Lord Robert Walker, ‘Developing the Common Law: How Far is Too Far?’ (2013) 37 *Melbourne University Law Review* 232, 234.

² *Auckland District Law Society*, *ibid.* In the case at hand, the Lords deftly enforced English law by finding that the New Zealand courts had purported to apply rather than change English law. Since that law had been misunderstood, the decision of the New Zealand Court of Appeal was overturned.

³ Sir Robin Cooke, ‘The Road Ahead for the Common Law’ (2004) 53 *International and Comparative Law Quarterly* 273, 274.

point was not that Commonwealth courts could depart from principles of English common law, as the Privy Council suggested, but rather that the English courts might be losing control of the common law itself. One can easily understand why the Privy Council did not express the point in such terms. After all, it is one thing to lose territory acquired by an empire. It is quite another to accept that former colonies may have seized a cherished part of the old country. While the Privy Council's admission anticipates that different common law jurisdictions may adopt differing principles, that possibility typically comes into sharpest focus when jurisdictions outside the UK decide to reject or change principles developed by courts within the UK.

The emergence of different approaches within the common law is not limited to variations to common law principles and can sometimes identify the UK as a recipient rather than originator of change. In an influential article, Gardbaum explained the different paths taken by some of the common law countries which had adopted bills or charters of rights in recent times.⁴ He examined the different such instruments adopted by Canada, New Zealand and the UK, all of which had deliberately departed from the model of rights protection, adopted in the US, that allows courts to invalidate legislation. He noted that different common law jurisdictions had incorporated different means within their new human rights instruments to enable courts to deal with legislation that contravened those instruments. A common theme of these instruments was that they had 'decoupled judicial review from judicial supremacy by empowering legislatures to have the last word'.⁵ A little noticed aspect of Gardbaum's analysis was the idea that the UK was only one of several nations that was following and adjusting the earlier model adopted in the US.⁶ That occurrence has a long history, not limited to UK legislation that draws from innovations elsewhere in the common law world. Recent empirical research on the Privy Council has found that it did not simply influence the law through much of the common law world but also provided a means by which English doctrines could be tested and sometimes adjusted by reference to the colonial variations that came before the Judicial Committee in its appellate jurisdiction.⁷ The key question about legitimate expectations therefore cannot focus simply on the departure of various jurisdictions from the English approach. Instead, the key questions

⁴ Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 102.

⁵ *Ibid*, 709. This analysis is also consistent with the human rights instruments that were adopted in some Australian jurisdictions after Gardbaum's article.

⁶ Gardbaum extended this theory beyond those bills and charters of rights to constitutional doctrine more generally in Stephen Gardbaum, *The New Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

⁷ Paul Mitchell, 'The Privy Council and the Difficulty of Distance' (2016) 36 *Oxford Journal of Legal Studies* 26.

are the more open ones of what different approaches to legitimate expectations have arisen in the common law world and why.

Much of the previous paragraph is at odds with a decision the Privy Council delivered shortly before this book was sent for copy editing. The case was yet another messy criminal prosecution that came to the Judicial Committee with much political baggage. In this instance, dispute arose about legislation that sought to repeal a legislative prohibition on criminal prosecutions for conduct alleged to have occurred more than 10 years earlier. The prohibition was repealed only two weeks after it commenced and seemed only to serve the purpose of giving those who stood to benefit from it a reason to launch further litigation to forestall their prosecution. The Privy Council dismissed every one of a swathe of objections, including a claim of legitimate expectations—the expectation being that those who benefitted from the legislative prohibition expected to continue to enjoy that benefit. Delivering judgment on behalf of the Judicial Committee, Lord Sumption accepted that parliaments could repeal legislation that they were empowered to enact. He explained:

The Constitution does not protect legitimate expectations as such, and there must be some doubt whether, and if so when, breach of a legitimate expectation can ever, in itself, be the basis of a constitutional challenge to the validity of an otherwise regular law.⁸

That reasoning was ostensibly directed to the Constitution of Trinidad and Tobago but also appeared to confirm the constitutional position of legitimate expectations more generally. The Privy Council seemed anxious to make clear that legitimate expectations sit below higher constitutional questions and, by implication, within constitutional fundamentals. That last point is made clear by the examination of different jurisdictions in this book and their common concern that legitimate expectations, especially their substantive enforcement, must sit within constitutional boundaries. It is, however, notable that the Privy Council felt the need to reiterate a basic limit on the legitimate expectation. The doctrine cannot provide a restraint on an otherwise plenary legislative power. The message is two-fold. First, to the extent that legitimate expectations restrain official power, they do so against executive or bureaucratic rather than legislative power. Second, legitimate expectations will not provide a form of bottom up reasoning in which a restraint on official power at one level of our constitutional arrangements may travel upwards to influence higher level constitutional doctrine.⁹

⁸ *Ferguson v Attorney-General of Trinidad and Tobago* [2016] UKPC 2 [36].

⁹ We take this from Richard Posner, 'Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433. We also note that the top down/bottom up metaphor has long since moved beyond public law: Keith Mason, 'Do Top-down and Bottom-up Reasoning Ever

The Privy Council addressed the constitutional basis of legitimate expectations about a year earlier, when it located the doctrine within the common law constitutionalism. In *Rainbow Insurance Company Ltd v Financial Services Commission (Mauritius)*,¹⁰ the Council rejected a claimed legitimate expectation in great detail. The expectation was claimed on so many different bases that it appeared to provoke the Council to explain what it regarded as the first principle of the doctrine. The Privy Council explained:

The courts have developed the principle of legitimate expectation as part of administrative law to protect persons from gross unfairness or abuse of power by a public authority. The constitutional principle of the rule of law underpins the protection of legitimate expectations as it prohibits the arbitrary use of power by public authorities.¹¹

This reasoning locates legitimate expectations firmly within the realm of the common law and in the particular realm of common law constitutionalism and all of its associated questions. The most obvious problem is the circular and self-reinforcing nature of principles of common law constitutionalism. They are defined by the courts, justified by the courts and protected by the courts.¹² The executive is subject to legitimate expectations but has little say in their content or application.

The role of the courts in legitimate expectations is controversial for another reason related to constitutional law at the higher level because it provides yet another example of the ‘last word’ debate that has always dogged constitutional law. A perpetual question in constitutional law, particularly constitutional judicial review, is who should have the last word on issues, the legislature or the courts? This question divides constitutional lawyers largely into opposing camps, so that one favours the last word on the legality and legitimacy of legislation being exercised by either the courts or parliaments.¹³ It is only more recently that some authors have accepted that the better approach might be a middle ground, in which all of the different institutions might serve distinct and complementary

Meet?’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 19; Carmine Conte, ‘From Only the “Bottom Up”? Legitimate Forms of Reasoning in Private Law’ (2015) 35 *Oxford Journal of Legal Studies* 1.

¹⁰ *Rainbow Insurance Company Ltd v Financial Services Commission (Mauritius)* [2015] UKPC 15.

¹¹ *Ibid.*, [51] (Lord Hodge, delivering judgment for the Council).

¹² The true problem is not the judicial origin of such principles but their ad hoc nature, which makes the search for coherence principle a deep problem. See eg, Tom Poole, ‘Back to the Future? Unearthing the Theory of Common Law Constitutionalism’ (2003) 23 *Oxford Journal of Legal Studies* 435.

¹³ Aileen Kavanagh, ‘Constitutional Review, the Courts and Democratic Scepticism’ (2009) 62 *Current Legal Problems* 102, 134–35.

roles.¹⁴ That possibility aligns with recent suggestions that the age of a rigid approach to the separation of powers has passed, or should pass, into history.¹⁵ To the extent that the separation of powers is viewed as explicit within a written constitution, as is the case in Australia, history shows that its rigidity is not easily tempered.¹⁶

The legitimate expectation raises a similar problem but with a slight change, so that the question of who should have the final say involves the courts and the executive. That question is the administrative law equivalent of the perpetual question in constitutional law but is acutely felt in legitimate expectations because the traditional settlement of administrative law does not unfold as expected. That settlement accords the last word on the law to the courts and the last word on the facts to the executive. There will always be a hazy dividing line between the two but in itself does not mean the basic segmentation in this division and allocation of functions is not real or workable. As a former Chief Justice of Australia explained when he acknowledged that judicial review on the ground of unreasonableness can often edge close to a form of factual or merits review, the blur between judicial and other review ‘is not always clear cut; but neither is the difference between night and day; and twilight does not invalidate the distinction between night and day...’¹⁷ The enforcement of legitimate expectations, or principles that make actions contrary to legitimate expectations overly difficult, may still contradict this doctrinal fundamental. This is because, even though courts do not formally exercise the power vested in administrative officials, it is often argued that they nonetheless do so in a practical sense. Thomas contradicts that longstanding objection with two key arguments. First, that the steps of judicial reasoning taken in the more controversial legitimate expectations cases are actually modest in a doctrinal sense. His second and closely related point is that the few instances where substantive enforcement occurred can be entirely justified.

Weeks extends these possibilities by posing a question that is surprisingly neglected in the legitimate expectation cases, namely are the courts the best

¹⁴ A valuable recent example, made by reference to rights protection, is Murray Hunt, ‘Introduction’ in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliament and Human Rights* (Hart Publishing, 2015).

¹⁵ Eoin Carolan, *The New Separation of Powers* (Oxford University Press, 2009).

¹⁶ The *Boilermakers’ Case* has a virtually unassailable place in Australian constitutional thought, belying the narrowness of the result in the case itself: *R v Kirby; ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254. That its strict separation of judicial functions from non-judicial bodies, and vice versa, remained contentious was illustrated by the fact that two High Court justices invited, without undue subtlety, argument that *Boilermakers’* should be overruled: *Re Joske; ex parte Australian Building Construction Employees & Builders Labourers Federation* (1974) 130 CLR 87, 90 (Barwick CJ); 102 (Mason J). That challenge never transpired and it is now extremely unlikely that it ever will.

¹⁷ Murray Gleeson, ‘Judicial Legitimacy’ (2000) 20 *Australian Bar Review* 4, 11.

placed to provide the remedies that these cases typically require? Legal scholars typically approach this question from entirely the opposite direction, by arguing that courts can and should extend their form of adjudication (and, it follows, develop suitable legal principles) for those disputes which have traditionally been thought to be better determined by the executive. The classic example is the polycentric dispute, which raises a multitude of complex and often interrelated issues. *Coughlan*¹⁸ can be labelled as a prime example of polycentricity if the case is placed in the wider perspective of all of the many funding decisions the respondent authority had to make. What had to be allocated for Ms Coughlan's home (Mardon House) would have to be taken from, or not allocated in the future to, another health programme or perhaps another area of the authority's work. The authority's capacity to develop its own policy, or to follow government policy more generally for the delivery of health services, was compromised. When these possibilities come into play, the continued operation of Mardon House can be seen to have affected many programmes and people other than the parties to *Coughlan's* case. Many now argue that polycentric disputes are neither unique to public law disputes nor ones that the political process can invariably resolve in a better way than the courts,¹⁹ though such arguments have some notable unbelievers.²⁰ If the courts are able to undertake a context-sensitive balancing of finely weighed issues, or seemingly veer closer to deciding the factual merits of a decision, as arguably occurred in *Coughlan*, one can ask why the traffic should be all one way. Is the executive perhaps better suited to crafting remedies in many of the disputes that are currently argued as legitimate expectation cases?

At first glance, this book may be understood as providing competing narratives about the growing differences between the law of England and other common law jurisdictions. That is correct because, at one level, the book examines whether and why different jurisdictions have adopted the substantive legitimate expectation that was given effect in *Coughlan's* case, or taken quite different approaches to the recognition and enforcement of legitimate expectations. But closer analysis of the legitimate expectation reveals that *Coughlan* and the many other equivalent landmark cases of other common law jurisdictions are more about the balanced and evolving relations between the courts, governments and citizens. That is because the recognition and enforcement expectations serve as an expression variously

¹⁸ *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 1 QB 213.

¹⁹ Jeff King has developed these arguments with clarity in 'The Pervasiveness of Polycentricity' [2008] *Public Law* 101 and 'The Justiciability of Resource Allocation' (2007) 70 *Modern Law Review* 197.

²⁰ See, eg, Tom Poole, 'Questioning Common Law Constitutionalism' (2005) 25 *Legal Studies* 142.

of when and why officials should be held to legal account, what people who deal with government may rightly expect in those dealings and, finally, just how far courts may devise legal principles that reflect and direct the administrative process. These issues are as much moral as they are legal because how they are approached and resolved reflects interwoven questions of morality, expectation, fairness and reasonableness. The solution posed in one paper written prior to this volume is to use ‘a clear and unequivocal promise’ as ‘the gateway for a legitimate expectation arising because it is the point at which a public authority assumes moral and legal obligation for the individual’.²¹

Perhaps the most important moral issue underlying the enforcement of legitimate expectations is their very recognition. The notion that governments and their agencies and individual bureaucrats can create expectations on the part of people who are affected by the exercise of official power presumes a level of responsibility for the expectations so created. It follows that accountability, transparency and consistency for expectations created by public entities or their officers either do or should exist. Elliott argues that the evolution of legitimate expectations has helped this presumption to become part of orthodoxy in English law. In England, people can now expect as a matter of law that public officials will be held to their word by the courts. That does not seem to be the case in the other particular jurisdictions examined by other articles in this volume. The emergence of distinct approaches to similar issues within the common law world is hardly surprising in light of the quite different constitutional structures of many former British colonies. Those differences have led to quite different constitutional structures, even if they are located within the same central elements of liberal democracy, ministerial responsibility, cabinet government and a rule of law system that incorporates some form of the separation of powers. There are enough differences in these constituent elements of governance that developments in British public law often cannot now translate easily throughout the Commonwealth.

The most striking example comes from Australia. The relatively strict Australian conception of the separation of judicial power has led the High Court of Australia to reject both *Coughlan* and its normative principles as incompatible with the limits placed upon the constitutionally entrenched role of the courts. The analysis of Groves suggests that this position is explicable as much to the allocation of providing fuller rights of merits review to administrative tribunals as to constitutional doctrine. However, he also makes clear that any significant changes to the principles governing judicial

²¹ Jack Watson, ‘Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations’ (2010) 30 *Legal Studies* 633, 651.

power could easily bring wider constitutional principles undone. The weight of too much constitutional doctrine now sits on the separation (and protection) of judicial power for it to be brought undone by the acceptance of a substantive approach to legitimate expectations.

Stern and Davidson take a more pragmatic approach to change in Australia which, at one level, appears to identify the path of least resistance. They acknowledge the constitutional obstacles to substantive enforcement of expectations identified in Australia but note that the growing focus on an ‘outcome focussed’ form of unreasonableness review may be evolving in a form that can give effect to the underlying values of an otherwise prohibited doctrine. This approach would be limited and heavily dependent on the statutory context of each case. Those elements of expanding unreasonableness review avoid the recourse to normative considerations that is common in England but still go some way to using an approach not so far away from the forbidden English one.²² That assessment aligns with that of Elliott, who locates *Coughlan* within a wider journey of substantive review in English law. The substantive legitimate expectation has served as both a cause and effect of this journey and can be used to map changes to orthodoxy in English law.

One key assumption of Australian law—which is that notions of substantive justice or fairness form part of the merits and thus lie beyond the reach of judicial review in any formal sense—is completely alien to South Africa’s constitutional structure. Hoexter explains how South African courts rejected historical distinctions between ‘quasi-judicial’ and ‘purely administrative’ traces and other technical distinctions during a time when South Africa’s new constitutional structure largely excised such formalities. This contrasts with Joseph’s analysis of how New Zealand shed formalism from its administrative law through adopting legitimate expectations as a common law doctrine. Hoexter notes the subtle but crucial point that, while the South African Constitution grants people a clear right to administrative action that is ‘lawful, reasonable and procedurally fair’,²³ neither this clause nor the legislation enacted pursuant to it clearly adopt the language or concepts of legitimate expectations.²⁴ Hoexter nonetheless traces how the legitimate

²² We feel compelled to point out that this may be the only known instance where Australians are offended by the frank language of the English, rather than the reverse.

²³ Constitution of the Republic of South Africa, 1996 s 33(b).

²⁴ Hoexter usefully traces the causative effect of a single confusing reference to legitimate expectations that was included in the Promotion of Administrative Justice Act 3 of 2000 (SA). The effect of this point is especially counterintuitive in legitimate expectations, where so many cases are founded on attempts to use the doctrine to resolve claims of unfairness or uncertainty due to administrative conduct. The South African experience in part shows how similar issues elided with what arguably should have been an unremarkable question of statutory interpretation.

expectation has gained traction in modern South African law, initially as a device to free notions of fairness and natural justice from a narrow range of deprivation cases, releasing them into a wider range of public entitlements. According to Hoexter, South African law now stands at the edge of the divide between procedural and substantive expectations. The contrast to Australia could not be more striking. Legitimate expectations have fallen prey to wider constitutional doctrines in Australia but in South Africa they are being enlivened, and may even be extended, by constitutional change. This reinforces the point that a country's constitutional arrangements are paramount to the treatment of legitimate expectations in that country's administrative law jurisprudence.

Constitutional considerations of a different kind are revealed by the analysis of Hong Kong and Singapore by Jhaveri, and also the Australian experience recounted by Groves. These chapters examine three jurisdictions with quite different constitutional frameworks. All have the common quality of rejecting much of the core reasoning used of *Coughlan*, though to quite different effect. In Australia, both acceptance of *Coughlan* specifically and a substantive legitimate expectations doctrine generally remain impossible on constitutional grounds. The doctrine simply cannot stand with the quite rigid conception of the separation of powers that has evolved in Australia. The obstacle presented by the separation of powers is not self-evident in Hong Kong and Singapore. Jhaveri makes clear that separation of powers considerations have influenced but not precluded the adoption of forms of the substantive legitimate expectation in those jurisdictions. The clear lesson seems to be that constitutional issues in general, and separation of powers doctrines in particular, can greatly influence whether a substantive version of legitimate expectations may be adopted and what form it may take. The reasons in each instance were largely anchored in domestic constitutional considerations and the wider legal balance that courts in each jurisdiction have reached as they fashion constitutional doctrines.

The Indian experience documented by Chandrachud is entirely different. Indian courts have accepted the legitimate expectation in many forms, including the notion that expectations can sometime be given or deserve substantive effect. That possibility is at odds with the Australian position noted by Groves and is all the more curious because Chandrachud notes that Indian courts make frequent reference to the key Australian case that ultimately doomed any substantive enforcement of legitimate expectations.²⁵ At the same time, Indian courts also make regular reference to *Coughlan*

²⁵ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1. This decision is an exemplar of top down reasoning because Brennan J explained the constitutional allocation of powers and functions at a high level of abstraction, so much so that he did not refer to a single provision of the Australian Constitution during several key pages of his judgment.

which adopts a position entirely at odds with the Australian one. Chandrachud's ironic conclusion is that Indian courts have accepted the legitimate expectation but in name only. Their purported adoption of the doctrine simply does not survive close scrutiny. The reason is surely that the underlying issue of *Coughlan* is more about the nature of the review it embodied rather than the particular doctrine by which it was done.

To an outside observer, *Coughlan* may be best explained as an important stepping stone in the longer English journey from estoppel to a more substantive form of judicial review of administrative action.²⁶ The case clearly marked a 'giant step', to quote from one of the leading works on judicial review outside of England, because it added a 'third basis for attack' on decisions by allowing a court to 'conduct its own evaluation of the authority's policy decision in terms of its fairness'.²⁷ The longstanding criticism of this new basis for judicial attack on administrative decisions is that its intrusion into the executive realm lacks a coherent underlying basis. Varuhas and Daly offer solutions which are similar in their rationale but entirely different in their approach. Each argues for greater clarity and internal consistency within legitimate expectations but takes an entirely different path. Varuhas essentially strips away the accumulated complexity and detail of layers of cases to reveal the apparent core of the legitimate expectation—a promise made by an authority. The pluralist focus of Daly is complementary because it argues that the differing purposes or underlying values of the legitimate expectation cases can be reconciled but should not be somehow compressed into a single overarching moral or normative goal. Each of these approaches proceeds on the twin assumptions that the overall doctrine of legitimate expectations lacks coherence but can become coherent if properly refined and revised. This recognises that current judicial methodologies are not always successful.

In her analysis of proportionality and legitimate expectations, Boughey notes that the Court of Appeal objected to a rationality standard in *Coughlan* because such a principle would allow public authorities to be a judge of their own cause. She notes that Laws LJ addressed that same issue in *Nadarajah*²⁸ and concluded that 'the court is the judge, or the last judge' of the question of whether any asserted public interest justified a public agency in departing from a promise.²⁹ Boughey rightly questions the value

²⁶ The case has also been explained as a key driver in the movement of English public law towards the adoption of a 'rights focus': Tom Poole, 'The Reformation of English Administrative Law' (2009) 68 *Cambridge Law Journal* 142. The case was also given a clear (and very favourable) human rights analysis in Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *Public Law* 671, 677–78.

²⁷ Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action*, 5th edn (Lexis Nexis, 2013) 385.

²⁸ *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

²⁹ *Ibid.*, [68].

of the proportionality approach suggested by Laws LJ. The problem may be due in part to the obvious contradiction when courts identify the danger of public authorities acting as a ‘judge in their own cause’ about legitimate expectations. In one sense, such cautions simply express the enduring concern that judges in public law cases express against the possibly untrammelled power of public agencies.

Lawyers are understandably attuned to the dangers of unfettered power in the hands of public agencies and typically deploy separation of powers in their response. Public agencies should not be able to decide those legal elements of the problem because that function is allocated to the courts, which usefully prevents those agencies from deciding matters of policy and also law. The difficulty with any use of this justification in the legitimate expectation cases is that the courts assert their jurisdiction over those legal elements of the dispute but fail to grapple with the extent to which their assumption of that power inevitably draws in questions of both law and public interest. It is not clear why the courts are simultaneously uneasy with the possibility of public agencies making decisions about matters of public interest which are tied to legal principles, while also developing legal principles that allow courts the final say over many public interest issues. If the courts rightly believe that law and public interest can and should be blended, they need also to explain why we should be assumed to know all of the issues that should be blended, let alone do the blending. Put simply, are judges better suited to assessing the public interest consequences of their decisions than bureaucrats are to deciding the legal implications of the expectations they may create? *Bouhey* leaves no doubt that the question of how this balance should be struck cannot be decided by proportionality, at least not as proportionality is currently known.

The UK Supreme Court appeared to recognise this difficulty in *Mandalia v Secretary of State for the Home Department*,³⁰ a decision delivered in the months before the chapters in this book were finalised. In that case, illegality was claimed after English authorities refused the applicant an extension on his visa without first providing him a chance to submit information in support of an extension. The failure to provide that chance was all the more striking because the authorities’ own policy provided that such a chance should be given, particularly where applications appeared to contain a minor error or be missing the sort of documents this applicant’s document omitted.³¹ The UK Supreme Court essentially required that the policy be

³⁰ *Mandalia v Secretary of State for the Home Department* [2015] 1 WLR 4546.

³¹ The information was copies of bank statements confirming the funds available to the applicant. Such information was crucial to satisfying the very prescriptive criteria for a visa extension. The document allowing applicants a chance to provide information for this criteria was described as a ‘process instruction’, which seems an apt label because it was an internal administrative guidance document for those who administered the relevant legislation.

enforced by use of principles that were ‘no doubt related to the doctrine of legitimate expectations but free-standing’.³² That independent principle, the Supreme Court made clear, was ‘best articulated’ in *Nadarajah* as one that required a promise or practice adopted by a government agency to be honoured unless there was a good reason to the contrary. The Supreme Court also cited the explanation for this legal requirement for governments and their agencies to adhere to promises and policies as clearly ‘grounded in fairness’ but resting in the wider proposition of a ‘requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public’.³³

Interestingly, the Supreme Court drew support from other decisions for the questionable assertion of Laws LJ in *Nadarajah* that the court should have the final and binding word on whether any asserted public interest was sufficient for departing from a policy.³⁴ We say ‘questionable’ because it is one thing to accept that the courts should have the final word over legal issues. This is largely uncontroversial in those issues where the courts have particular expertise, such as statutory interpretation and matters affecting the evolution of the common law. While theories about the rule of law vary almost infinitely, few would disagree that the courts can and should exercise the last word on such issues when discharging their function in a society governed by the rule of law. However, it is another matter entirely to take a step further, as Laws LJ did in *Nadarajah* and the Court of Appeal did in *Coughlan*, by asserting that the court should undertake a balancing exercise. Such a function could easily be done by another arm of government and is arguably unsuited in any case to the judiciary.

One subsequent English case suggested that *Mandalia* had the virtue of providing a ‘rather less technical approach to the [Migration] Rules than had previously been the case’.³⁵ Lord Wilson made a similar point in *Mandalia* when he noted that the guidance in issue may have been difficult for applicants to understand but it almost certainly made life easier for the officials required to administer the law. That was because those officials ‘have to a substantial extent been relieved of the obligation to consider whether to exercise discretion in their processing of applications’.³⁶ The Supreme Court was able to insist on observance of the policy without attracting such loud disapproval as that which met *Coughlan* because in *Mandalia* it was the

³² *Mandalia* (n 30) [29].

³³ *Mandalia* (n 30) [29], citing *Nadarajah* (n 28) [68].

³⁴ Authority for this proposition was taken from *R (SK (Zimbabwe)) v Secretary of State for the Home Department (Bail for Immigration Detainees Intervening)* [2011] 1 WLR 1299 [36].

³⁵ *MH (Bangladesh) v Secretary of State for the Home Department* [2015] EWCA Civ 1442 [17].

³⁶ *Mandalia* (n 30) [2].

government rather than the court that trimmed the discretion of the decision maker. The role of policy and other forms of soft law in both creating expectations and regulating the decision-making processes of administrators is adroitly covered by Ansari and Sossin.

A book which attempts to knit together views on a single doctrine from common law countries whose legal systems developed from England's legal influence embarks to some extent on a fool's errand. These are not countries which share an overarching, shared legal structure, as is the case in the EU. The countries whose approaches to legitimate expectations are addressed in this book do not belong to a monolithic legal tradition but one which is fragmented. Importantly, the common law is subject in every one of these countries to the constitutional arrangements that they have adopted, whether they are unwritten or written, include a bill or charter of rights or not. It follows that one country's approach to dealing with legitimate expectations, whether recognised procedurally or enforced substantively, will always be different to the approach of other countries. What does not follow is that these differences are never susceptible to change or that one country's approach is right and the others' are wrong.

We have pointed out elsewhere that:

There are compelling constitutional reasons for courts in each jurisdiction to decide matters regarding legitimate expectations as they do and UK courts can scarcely avoid applying a rights-based analysis any more than Australian courts can ignore the Australian Constitution. However, the dialogue between the two countries remains and has been beneficial to developing the law. It is noteworthy and oddly pleasing that the High Court devoted so much of its judgment in *Lam* to refuting Coughlan even though the applicant had not mentioned Coughlan at all. While the Court of Appeal did not directly influence the result in *Lam*, the thinking of the High Court had certainly been affected by developments in the United Kingdom. Nobody need feel defensive about this, since it proves that neither Australia nor the United Kingdom is truly isolated from each other or the rest of the common law world.³⁷

What is true of Australia and the UK is also true of Canada and New Zealand, Hong Kong and South Africa, India and Singapore. The common law world may not be legally unified in the manner of the EU but this book demonstrates that the countries in it still have much to say to one another. Within the acceptance that common law doctrines and innovations must fit within constitutional structures, rather than the reverse, there remains much that each jurisdiction can learn from its common law family. This book is not only a sustained analysis of legitimate expectations but a

³⁷ Matthew Groves and Greg Weeks, 'The Legitimacy of Expectations about Fairness: Can Process and Substance be Untangled?' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 165, 187.

celebration of the common law mosaic of which the countries represented herein form part.

The most recent word on legitimate expectations from the most senior UK judges suggests that this common law mosaic is continuing and that the UK law is now taking account of developments from other common law jurisdictions in this area. The decision in question came not from the Supreme Court but the Privy Council, which perhaps gave the Supreme Court judges sitting in that jurisdiction a useful means to consider developments outside the UK. The case was *United Policyholders Group v Attorney-General of Trinidad and Tobago*,³⁸ which turned on the question of whether statements made by officials from the government of Trinidad and Tobago during the global financial crisis of 2009 had created a legitimate expectation among policy holders of an insurance company that the government had assumed control of a large insurance company during the crisis. After a national election, a newly elected government did not honour the statements of the previous one. The Privy Council held that no legitimate expectation has arisen in the circumstances and, even if one had, the government was justified in breaking the promises that underpinned the expectation. Lords Neuberger, Mance, Clarke and Sumption were able to reach these findings after reciting the key, settled principles governing the legitimate expectation in the UK.³⁹

Lord Carnwath agreed with the other Lords but made several important points about the uncertain and perhaps narrowing focus of the legitimate expectation. He conceded that the many cases and academic commentary that followed *Coughlan* had not clarified the uncertainties surrounding legitimate expectations. Although that point appears obvious from the papers in this book, it was still surprising that Lord Carnwath suggested that many of these problems were perhaps because ‘the court in *Coughlan* may have been unnecessarily ambitious in seeking a grand unifying theory for all the authorities loosely grouped under the heading of legitimate expectation’.⁴⁰ Lord Carnwath also questioned whether the courts should continue that search when the underlying basis of *Coughlan* could be justified on the more narrow idea from a view founded in the ‘basic rule of law and human conduct that promises relied on by others should be kept.’⁴¹ Lord Carnwath drew support for this proposition from the chapter of Elliott in this volume but also accepted that attempts to give substantive enforcement of expectations had not gained traction outside the UK.⁴²

³⁸ *United Policyholders Group v Attorney-General of Trinidad and Tobago* [2016] UKPC 17.

³⁹ *United Policyholders* (n 38) [37]–[39].

⁴⁰ *United Policyholders* (n 38) [112].

⁴¹ *United Policyholders* (n 38) [117].

⁴² *United Policyholders* (n 38) [119].

The remarks of Lord Carnwath align usefully with both the individual papers in this book and their wider purpose but that is clearly not the end of it. It is not clear whether the other Lords might agree with the more focused view of the legitimate expectation favoured by Lord Carnwath. Nor is it clear why the legitimate expectation should be rested on a 'basic rule of human conduct' rather than a coherent and clear principle. Attempts to refine the focus or basis of legitimate expectations may simply narrow its foundations.