

The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests

Daphne Barak-Erez*

The article examines the nature of the interest protected by the administrative law doctrine of legitimate expectations. It suggests that the independent development of administrative law in this context should be considered in light of the distinction between the reliance and expectation interests established in private law. It does not argue, however, that the protection of reliance and expectations in administrative law should overlap their protection in private law, since the relevant considerations in these two contexts are not identical. After explaining the distinction between the reliance and expectation interests and the respective justifications for their protection, the article addresses their relevance in the context of administrative law, including special considerations that apply to it and, especially, the problem of fettering administrative discretion. The discussion reveals reasons for protecting 'pure' expectations but shows that these justifications become particularly significant once reliance is also involved, highlighting the importance of assessing the involvement of a reliance factor in the case. The theoretical discussion serves as a basis for analyzing some of the main English precedents concerning the implementation of the doctrine of legitimate expectations. The article argues that the distinction between the reliance and expectation interests goes a long way toward explaining the relevant case law. Only in a minority of cases does the doctrine of legitimate expectations protect expectations per se, while the focus is usually on the protection of reliance. Although the protection of 'pure' expectations sometimes prevails, its scope is relatively narrow due to the public interest in avoiding restrictions on administrative discretion. When reliance is involved, the balance tilts against changes in official decisions. Conversely, when a remedy is sought for the

* Professor, Law Faculty, Tel-Aviv University. E-mail: barakerez@post.tau.ac.il. The article is based on a research conducted during my stay as an Honorary Senior Research Fellow at the Faculty of Laws of University College, London and supported by the Cegla Center for the Interdisciplinary Research of the Law. I thank Prof. Jeffrey Jowell for his comments on earlier drafts. Batya Stein edited the article.

protection of expectations in the 'pure' sense, without involving reliance, the claim will be considered sustainable only when affecting a limited group, without fettering administrative discretion in general.

Introduction

This article examines the nature of the interest protected by the doctrine of 'legitimate expectations.' As is well known, the protection of legitimate expectations has gradually become a central principle of administrative law, first in Europe¹ and then in England.² Traditionally, English administrative law had recognized only procedural protection for legitimate expectations (so that when legitimate expectations were infringed, only additional procedural rights, such as a hearing, were granted). At present, however, support has been established for granting substantive protection to legitimate expectations through the enforcement of individual expectations when these were generated by the administrative authorities.³ This development was mainly guided by moral intuitions favoring respect for legitimate expectations, but often lacked a sound theoretical basis regarding the definition of the protected interest and the precise reasons for protecting it. More specifically, the question should be: Are legitimate expectations intrinsically protected due to respect for the individual concerned, or are they protected only to the extent that they constitute a basis for reasonable reliance? This article suggests that the independent development of administrative law in this context should be considered in light of the distinction between the reliance and expectation interests established in private law. So far, the research on due protection of legitimate expectations in administrative law has

¹ For the influence of German Law, see: Georg Nolte 'General Principles of German and European Administrative Law: A Comparison in Historical Perspective' 57 *M.L.R.* 191, 195 and 203 (1994).

² See: Robert Thomas *Legitimate Expectations and Proportionality in Administrative Law* (2000); Soren Schonberg *Legitimate Expectations in Administrative Decision-Making* (2000).

³ For the spectrum of views on this topic, especially regarding the scope of the substantive protection of legitimate expectation, see: C. Lewis 'Fairness, Legitimate Expectations and Estoppel' (1986) 49 *M.L.R.* 251; R. Badwin and D. Horne 'Expectations in a Joyless Landscape' (1986) 49 *M.L.R.* 685 (1986); Michael Kerry 'Administrative Law and Judicial Review: The Practical Effects of Developments Over the Last Twenty-Five Years on Administration in Central Government' 64 *Public Administration* 163, 169-170 (1986); C.F. Forsyth 'The Provenance and Protection of Legitimate Expectations' 47 *C.L.J.* 238 (1988); P. Elias 'Legitimate Expectation and Judicial Review' *New Directions in Judicial Review* (J.L. Jowell and D. Oliver ed., 1988) 37; P.P. Craig 'Legitimate Expectations: A Conceptual Analysis' (1992) 108 *L.Q.R.* 79; Ross Cranston 'Reviewing Judicial Review' in: *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (Genevra Richardson & Hazel Genn ed., 1994) 45, 55-58; P.P. Craig 'Substantive Legitimate Expectations in Domestic and Community Law' (1996) 55 *C.L.J.* 289; C.F. Forsyth 'Wednesbury Protection of Substantive Legitimate Expectations' (1997) *P.L.* 375; Dawn Oliver 'A Negative Aspect to Legitimate Expectations' (1998) *P.L.* 558; Jeffrey Jowell 'Beyond the Rule of Law: Towards Constitutional Judicial Review' (2000) *P.L.* 671, 676-678.

not resorted to the rich literature on the subject developed in private law (mainly contract law), probably due to historical and cultural reasons.

Close examination of many cases involving legitimate expectations meriting *substantive* protection indicates that reliance played a major role in justifying this protection. Only in a minority of cases, the protected interest was expectations as such. With this observation in mind, the article examines the doctrine of legitimate expectations in administrative law, using the distinction between the reliance and expectation interests and the different justifications for protecting them. This perspective might serve to develop a more coherent theory to describe the conditions and the limits of the *substantive* protection of expectations in administrative law.

Note that this article will not argue that the protection of reliance and expectations in administrative law should overlap their protection in private law, since the relevant considerations in the two contexts are not identical. Lord Hoffman's opinion in *R. (Reprotech Ltd.) v. East Sussex County Council*,⁴ warning against the application of the private law doctrine of estoppel against public authorities and stating that public law should apply its own rules adjusted to the special considerations applicable to the actions of public authorities, is worth noting in this context.⁵ Nevertheless, the literature on the reliance and expectation interests in private law could perhaps shed light on justifications supporting their protection also in public law (although additional considerations should also be taken into account).

a. The Lack of Distinction between the Reliance and Expectation Interests in European Administrative Law

In European legal systems that acknowledge the concept of legitimate expectations in administrative law, reliance appears to be the basis for most precedents. The literature, however, does not make the distinction between the reliance and expectation interests and they are discussed together, one of the reasons being that expectations often prompt reliance. This factual (and conceptual) overlap is particularly evident in the national reports submitted at the Fifteenth International Conference of Comparative Law, which devoted one of its sessions to the doctrine of legitimate expectations. The German report, for instance,⁶ focused on uses of the concept of legitimate expectations for dealing with retroactive decisions and the amendment of illegal decisions. In an important precedent from 1961, the German

⁴ [2003] 1 W.L.R. 348 (hereinafter: *Reprotech*).

⁵ According to Lord Hoffman: 'There is of course an analogy between a private law estoppel and the public law concept of legitimate expectation created by a public authority, the denial of which may amount to an abuse of power... It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its two feet'. *Ibid.*, at p. 358.

⁶ Volkmar Gotz 'Protection of Legitimate Expectations' *German Reports on Public Law Presented to the XV International Congress on Comparative Law* (Eibe Riedel ed., 1998) 133.

Constitutional Court held that the prohibition against retroactive legislation in the civil domain rests on the need to sustain the citizens' trust in the government and on the protection of legitimate expectations.⁷ Clearly, however, the interest protected in this context is reliance upon the law prior to the introduction of retroactive changes, rather than the expectation that the law will never be altered in the future. Moreover, the report adds that limitations on the amendment of illegal decisions apply when people had actually acted on them, thus emphasizing the reliance factor.⁸

b. The Distinction between the Reliance and Expectation Interests in Anglo-American Private Law

The discussion of reliance and expectation as two distinct interests is based, as noted, on a well-established distinction in the jurisprudence of Anglo-American private law. This distinction was first highlighted in the classic article by Fuller and Perdue, who dwelt on it as part of their theory concerning the basis of contract damages.⁹ In this context, the reliance interest relates to the financial loss resulting from actions performed and costs incurred due to reliance on the contract, whereas the expectation interest relates to the financial loss incurred due to frustration of the expectation to profit from the contract. Beyond the context of contract law, the protection of the reliance interest could be said to reflect financial losses incurred due to failure to consider the fact of reliance (not necessarily reliance on a contract). By contrast, protection of the expectation interest reflects the legitimate expectation of profit from actions taken (again, not necessarily in the context of a contract).

The main critique against the traditional distinction between reliance and expectation is its vagueness. First, the protection of expectations often includes protection of the reliance interest as well. In the typical contractual case, the expectation of profit leads to reliance on the contract. When the court grants expectation damages, this remedy also ensures protection from any detriment to the infringed party due to reliance. Moreover, in the context of contract law, the reliance interest also includes the expectation of profit from rejected alternative contracts. Second, the reliance interest is protected only when the relying party had legitimate expectations regarding others' behaviour.¹⁰ Third, wherever well-founded expectations exist, we can plausibly assume that action will be taken relying on these expectations;

⁷ BverfGE 13, 261.

⁸ Section 48(2) of the German Administrative Procedure Law of 1976, states: 'an unlawful administrative decision granting a pecuniary benefit may not be revoked as far as the beneficiary has relied upon the decision and his expectation, weighed against the public interest in revoking the decision, merits protection'.

⁹ L. L. Fuller & E. R. Perdue 'The Reliance Interest in Contract Damages' 46 *Yale L.J.* 52 and 373 (1936-37)

¹⁰ An additional question in this context is to which extent expectations are constituted by the law that protects them. See *infra* section c (3) of this article.

especially action intended to increase profits (e.g. preparations in anticipation of a contract's performance). Fuller and Perdue actually regarded the protection of expectations as a means of protecting reliance, both because proving the extent of reliance is difficult and because protecting expectations encourages readiness for reliance¹¹

Despite these objections, the distinction between the two interests is still useful and should also be applied in the context of administrative law. Admittedly, there *is* a causal-circumstantial link between reliance and expectations – expectations lead to reliance. The frequency of this link, however, is not proof of its necessity, nor should it blind us to the fact that expectations do not always lead to reliance (as, for instance, when the performance of the contract is still pending). Furthermore, even when reliance is encouraged, the value of the expectation interest (for instance, concerning the revenues from contract performance) is not necessarily identical to the financial loss incurred through reliance. In the typical case, it is actually considerably bigger. Ensuring independent protection of the expectation interest means that the remedy granted is not contingent on the existence of a reliance interest. The scope of the expectation interest is not determined by the extent of reliance but by the value of the expectations. In this light, the question in the context of administrative law is: Are legitimate expectations protected even when no reliance is involved, or is their protection premised on the existence of a reliance interest?

c. Arguments for the Protection of the Reliance and Expectation Interests

The study of the distinction between the reliance and expectation interests should be extended to include a more detailed discussion of the theoretical justifications supporting their protection. Generally speaking, particularly strong arguments may be offered for the protection of the reliance interest, but arguments can also be adduced for the separate protection of the expectation interest. The discussion below will begin by presenting these arguments, and then evaluate their suitability within the context of administrative law.

(1) Arguments for the Protection of Reliance

Protection of the reliance interest hinges on both utilitarian concepts and non-utilitarian moral grounds. Utilitarian arguments supporting the protection of reliance relate to the desire to preclude the waste of resources and encourage actions that society deems desirable. Disregard for other people's reliance could lead them to lose their investments and preclude the use of these monies for social purposes. People whose reliance has been ignored may prove unwilling to rely in

¹¹ Fuller and Perdue, *supra* note 9, at p. 60.

the future, when such action might be vital for guaranteeing socially beneficial cooperation. Moral, non-utilitarian approaches also support reliance protection. A Kantian view stating the imperative to respect each person's humanity also dictates protection of reliance, because taking into account the damages inflicted on relying parties shows consideration for their needs as creatures endowed with dignity.¹² From this perspective, however, no real difference prevails between reliance and expectations, in the sense that respecting other people's humanity also mandates respect for their expectations. Hence, focusing on a non-utilitarian argument in the context of protecting reliance derived from the concept of corrective justice may prove more useful. This concept emphasizes the duty to repair damages inflicted on others, regardless of social utility considerations.¹³

(2) Arguments for the Protection of Expectations

Contrary to the reliance interest, the protection of the expectation interest (in the absence of reliance) rests mainly on moral, non-utilitarian justifications. The two main justifications for protecting expectations are: respect for the other person's humanity (derived from the Kantian model noted above), and the importance of social commitment.

The Kantian explanation argues that frustration of one's reasonable expectations causes anguish, destabilization, and demoralization. Respect for someone's humanity, therefore, must take that person's reasonable expectations into account. Charles Fried, who emphasized the moral importance of keeping promises, adduced this argument in favor of the protection of expectations in the context of contract law.¹⁴ The second argument for protecting expectations (even without detrimental reliance) rests on the value of social commitment. Respect for someone's reasonable expectations conveys a commitment to that person. Hence, supporters of

¹² Immanuel Kant *Groundwork of the Metaphysics of Morals* (trans. and ed. by Mary Gregor, 1997).

¹³ The distinction between corrective justice and distributive justice derives from Aristotle *Nicomachean Ethics* (trans. and ed. by Roger Crisp, 2000). Corrective justice refers to a wrongful harm caused by one person to another, which is rectified by restoring the latter to the position s/he had held prior to the harm as opposed to distributive justice, which refers to the just allocation of goods and duties in society. The difficulty with the application of corrective justice is that it defines only the desired result – the restoration of the injured party to its original state – without specifying what constitutes wrongful behavior. The answer to this question may vary according to the respondent's moral views. Accordingly, legal writings (mainly in the area of contracts and torts) offer different applications of corrective justice. Most writers, however, characterize this principle in non-utilitarian terms. See, e.g., Ernest J. Weinrib 'Toward a Moral Theory of Negligence Law' *2 L. & Phil.* 38 (1983).

¹⁴ Charles Fried *Contract as Promise* (1981) 17-21. For a critique of this approach, see: P.S. Atiyah 'Contract as Promise: A Theory of Contractual Obligation (Book Review)' *95 Harv.L.Rev.* 509 (1981).

communal and social commitment should also value the protection of reasonable expectations.

Arguments advocating the protection of expectations are essentially non-utilitarian, and might therefore be considered weaker than arguments supporting reliance, which also cite utilitarian grounds. Hence, claims stressing the connection between reasonable expectations and the protection of other vital interests can serve to strengthen the case for the protection of expectations.

First, the protection of expectations is bound up with the protection of equality. Past experience is generally crucial in the formulation of expectations, and information about specific past behaviors is a basis for assuming that, should the same circumstances prevail, these behaviors will recur. Expectations tend to be frustrated when similar circumstances yield different behaviors. Discriminatory conduct will thus necessarily thwart expectations. Therefore, laws forbidding discrimination protect expectations of equal treatment. The protection of expectations to equal treatment is thus a significant dimension of the right to equality.¹⁵

Second, the inner relation between the protection of reasonable expectations and the protection of reliance should also be noted in this context. As already indicated, Fuller and Perdue held that protecting expectations is crucial, given the difficulties of proving the actual extent of reliance interests.¹⁶ According to this explanation, utilitarian arguments used to justify the protection of reliance should also apply to the protection of reasonable expectations, since the protection of reasonable expectations guarantees the protection of reliance, which is hard to prove.

(3) Social Expectations and Legal Expectations

The most prevalent argument against the protection of the reliance and expectation interests is that the protection of expectations is based on circular reasoning. Since reasonable expectations are the product of law, people will normally formulate expectations to the extent that such expectations are recognized and protected by the law.¹⁷ Similarly, concerning the protection of reliance, people will rely upon specific actions that the law enables them to rely upon.¹⁸ This objection should be dismissed in both contexts. Although the law does admittedly contribute to the encouragement of reliance and the formulation of expectations, it is neither a necessary nor a sufficient condition for them. Expectations engendered by the other

¹⁵ The right to equality is obviously relevant in the context of government action. With the increasing application of human rights in private law, the connection between the protection of expectations and equality may also be relevant to the private context. See generally: *Human Rights in Private Law* (ed. by Daniel Friedmann and Daphne Barak-Erez, 2001).

¹⁶ See the text accompanying *supra* note 11.

¹⁷ See: P.S. Atiyah 'Contracts, Promises and the Law of Obligations' 94 *L.Q.R.* 193, 214 (1978); Richard A. Posner *The Economics of Justice* (1981) 322.

¹⁸ See: Randy E. Barnett 'A Consent Theory of Contract' 86 *Colum. L. Rev.* 269, 275 (1986).

party's conduct result from the general culture of society and are not exclusively a product of the law. The cultural framework also defines the circumstances in which the other's conduct provides the ground for formulating specific expectations. As Roscoe Pound explained:

'Apart from philosophical or metaphysical ethical considerations, a person may have reasonable expectations based on experience, or on the presuppositions of civilized society, or on the moral sentiment of the community. Some one or all of these may be recognized and backed by the law whereby they become the more reasonable.'¹⁹

At most, then, one may point to a reciprocal strengthening between social expectations and the law.²⁰ Obviously, the reverse is also true: the protection of expectations is also limited by the law, in the sense that legal rules may limit the formulation of expectations originating in prevalent practice.

d. Arguments for the Protection of the Reliance and Expectation Interests in Administrative Law

Let us evaluate the validity of these arguments when transposed to the context of administrative law.

(1) Arguments for the Protection of Reliance in Administrative Law

The utilitarian arguments supporting the protection of reliance are also relevant in administrative law because efficiency is one of the social interests that administrative law seeks to promote. First, protecting reliance promotes the goals of administrative intervention in the free market, requiring people to take official initiatives 'seriously.' When the administration gives financial backing to an economic activity, the citizens' willingness to rely upon it is crucial. Investors will not cooperate if promises of support prove undependable. The ability to rely, therefore, is closely connected to the achievement of government goals. This line of argument follows the basic claim of Fuller and Perdue in the context of contract law. Fuller and Perdue stated that the protection of reliance guarantees the continued flow of commercial life.²¹ Similarly, in the context of administrative law, the protection of reliance guarantees the attainment of the goals set by the government in deciding on an intervention policy.

¹⁹ Roscoe Pound *Social Control through Law* (1942) 80.

²⁰ For a similar claim of reciprocal influence, see B.H. Kuklin 'The Plausibility of Legally Protecting Reasonable Expectations' 32 *Val. U. L. Rev.* 19 (1997).

²¹ Fuller and Perdue, *supra* note 9, at p. 61.

When individuals plead protection of their reliance interest in court, *ex post facto*, the government may appear uninterested in this protection. But the government's interest in protecting individual reliance should be evaluated through an *ex ante* perspective, when refraining from discouraging future individual participation in state initiatives would appear vital.²² For instance, a government subsidy may serve to illustrate the link between the protection of the reliance interest and the attainment of government goals. Administrative officials appeal to individuals to adopt a behavior they wish to develop. Ideally, the authorities are interested in the individual's reliance on a subsidy policy and only *ex post facto*, if and when the policy fails, they might be interested in withholding their support from it.

Another efficiency-based argument for the protection of the reliance interest in the context of administrative law concerns the results of official actions that disregard it, which entail a waste of resources. Administrative decisions oblivious of their implications for third parties who had relied on them tend to externalize their costs to the individuals affected. Attention to the reliance factor, then, implies avoiding actions actually involving more harm than benefit. Internalizing costs is at the heart of the general deterrence approach, stating that the efficient allocation of social resources requires each action to bear its costs.²³ This theory, although formulated in the context of tort law, is also relevant in the administrative context. When considering a decision, the authorities should weigh not only its potential benefits but also the damages it might inflict on those who had relied on a previous policy or decision. If a municipality decides to revoke a restaurant license in an attempt to reduce local noise pollution, it must consider not only the ecological benefits of its decision but also the owners' investments relying on the license. Failure to consider these investments is an externalization of costs, which may ultimately lead to inefficient results.

Non-utilitarian arguments can also be cited in this context. From the perspective of the corrective justice theory, it may prove useful to apply George Fletcher's version of it, which justifies compensation when the tortfeasor creates a non-reciprocal risk to the injured party.²⁴ The relationship between the authorities and the individual is indeed characterized by lack of reciprocity. The scope and intensity of the authorities' administrative involvement in the daily life of individual citizens who are frequently subject to their dictates (for instance, in the area of licensing), makes reliance on administrative actions unavoidable. Therefore, frustration of this reliance is entitled to compensation.

Another non-utilitarian argument for the protection of the reliance interest in administrative law rests on the principle of equality. The right to equality should be interpreted as mandating, *inter alia*, equal participation in defraying the costs of

²² For the use of *ex ante* considerations in the context of contract law, see: Anthony T. Kronman 'Specific Performance' 45 *U. Chi. L. Rev.* 351 (1978).

²³ See: Guido Calabresi *The Costs of Accidents* (1970) 68-94.

²⁴ George P. Fletcher 'Fairness and Utility in Tort Theory' 85 *Harv. L. Rev.* 537 (1972).

government actions. When reliance on such actions is frustrated, its cost should be considered part of the general costs of government and should not be externalized to the relying party but rather divided among the public as a whole. This division can be achieved by imposing liability on the administration, which is ultimately financed by taxpayers. By contrast, official indifference to individual reliance is likely to disrupt the balanced allocation of the burden created by administrative costs.

A third, non-utilitarian argument in this context relates to its positive impact on the protection of civil rights and liberties. If the authorities are free to disregard individual reliance, the risk of misuse of power increases to the point of infringing individual civil rights. For instance, the fear of losing a license or a contract may place individuals in a position of exaggerated dependence on the authorities, preventing them from exercising such rights as freedom of speech. Although the arbitrary exercise of power as a means of control is clearly forbidden, the illegality of administrative reasons for action is often hard to prove. In these circumstances, an independent doctrine focusing on the protection of the reliance interest can indirectly prevent the exercise of unlawful pressure on the individual, obviating the need for aiming directly at the thorny evidential problem of motive. The fear of losing personal liberties when sources of important wealth are in the hands of the authorities was a central issue in Charles Reich's writings. Reich attacked this problem using concepts derived from property law, and argued that administrative powers by which 'new property' (such as licenses and franchises) are granted to the public²⁵ are a source of wealth rather than mere privileges. Bearing in mind the same concerns, the protection of reliance on administrative action is recommended, even without resorting to the 'magic word' – property.

(2) Arguments for the Protection of Expectations in Administrative Law

Arguments justifying the legal protection of expectations acquire additional weight in the administrative context, where the obligation to respect the humanity of others is transformed into a demand that authorities treat citizens with respect. This demand is particularly important in the modern bureaucratic state, which tends to treat individuals as 'numbers' or 'files' rather than as human beings deserving individual consideration.²⁶ Therefore, the argument stressing the importance of social commitment is transformed in the administrative context into a claim emphasizing the importance of strengthening reciprocal trust between the citizens and the authorities, thereby reducing feelings of alienation from the bureaucracy. This

²⁵ Charles A. Reich 'The New Property' 73 *Yale L. J.* 733 (1964).

²⁶ See: P. Berger, B. Berger & H. Kellner *The Homeless Mind: Modernization and Consciousness* (1973) 41-62.

change could even involve utilitarian advantages – assuaging adversary feelings toward the authorities might increase the citizens' willingness to cooperate.

In addition, the circumstantial connection between equality and the protection of expectations is even more important in the administrative context than it had been in private law. Given equality's central role in administrative law (as part of public law), individual expectations must be protected, at least insofar as they involve treatment of similar cases.

Last but not least, the protection of expectations in administrative law can also be premised on their link with the protection of reliance. For example, revoking a license prior to its original termination date violates not only the license holder's expectations but also his reliance interest. Restrictions on official powers to revoke a license before its expiry date protect the license holder's expectations but also his reliance interest, without burdening him with the onus of proving the scope of reliance.

e. Administrative Actions Encouraging Expectations and Reliance

The discussion has so far focused on arguments bearing on the protection of expectations created by the authorities or on the reliance they have encouraged. Note that government activity is indeed often characterized by practices that generate expectations through ongoing, accepted codes of conduct. In other words, the protection of the reliance and expectation interests in administrative law is crucial when we take into consideration the prevalence of administrative activity generating expectations. Typical courses of administrative action that tend to generate expectations (and often lead to reliance as well) include: explicit promises; public announcements regarding a legal position or policy, and established official practices.

A promise is the most accepted social format for generating expectations, and probably *the* paradigm of an action generating expectations. In private law, expectations created by promises (and reliance on them) are protected when given in the framework of a contract.²⁷ In the context of administrative law, the discussion should expand to include promises given in the course of processing decisions in individual cases, even if they do not constitute a formal contract. As noted, such decisions create expectations developed according to prevalent social norms.

A public announcement regarding a legal position or policy is another action generating expectations. An official publication (as opposed to an internal document) announcing the administration's position or intentions, serves the public and promotes expectations that the authorities will behave according to the contents of the announcement, unless they declare otherwise. The publication can certainly

²⁷ According to the concept of 'contract as promise.' See the text accompanying *supra* note 14.

restrict the scope of expectations by specifying the conditions and the qualifying terms for applying the rules it has detailed.

An additional set of circumstances that can generate expectations relates to the authorities' accepted practices. Ongoing practice is actually a public (albeit unofficial) advertisement of official policy, with its ongoing character substituting for its informality. A one-time act by the authorities can also become a basis for expecting a similar conduct in similar circumstances. An expectation based upon a single official decision is nevertheless far weaker, given that the specific conduct could have represented a mistake or a non-binding, experimental new policy.

f. Arguments against the Protection of Reliance and Expectations in Administrative Law

The main argument against the doctrine of legitimate expectations in administrative law is that it clashes with the aim of securing administrative freedom of discretion. An accepted axiom of administrative law states that the authorities must be free to change their policies without their discretion being fettered.²⁸ Ideally, freedom of action regarding future events precludes binding the authorities to previous policies or positions. This principle of securing the freedom of action of public authorities is supported by weightier reasons: it enables them to act for promoting the public interest. In private law, precluding a person who instigated expectations from changing his position puts the burden of paying for his mistakes on him. In contrast, in public law, precluding a public authority from changing a decision or a policy puts the burden on the public at large, in a way that may be very detrimental to the public interest.²⁹

It is important to note that the problem of restricting administrative discretion does not arise when the protection of legitimate expectations is only procedural. The procedural protection of legitimate expectations requires the authorities, having created a legitimate expectation regarding a particular policy or action, to adopt a proceeding providing the individual concerned with the right to a hearing or to participation in another procedure, such as a consultation.³⁰ This protection

²⁸ See e.g. *Hughes v. Department of Health and Social Security* [1985] A.C. 776. According to Lord Diplock: 'Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government.' *Ibid.*, at p. 788.

²⁹ In *Reprotech*, Lord Hoffman explained that the analogy to private law is limited 'because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote'. *Reprotech*, *supra* note 4, at p. 358.

³⁰ Legitimate expectations were cited as a basis for procedural rights when an explicit promise to grant the right of a hearing had been made, or when the authorities purported to adopt a decision altering a previous one. Although the expectation relates to the contents of the decision, the remedy awarded for its violation in this case is not the substantive right to a decision conforming with the previous policy, but rather the procedural right pertaining to the manner in which the decision was

of legitimate expectations is procedural in the sense that it does not relate to the substance or the merits of the final decision adopted by the authorities. Procedural protection, therefore, does not conflict directly with the principle endorsing the authorities' freedom to alter their policy in the future. The real issue, therefore, is the appropriate balance between unfettered administrative discretion and claims relating to the substantive protection of legitimate expectations.

Although administrative freedom of action is extremely important, it should be balanced against those considerations which support the protection of the reliance and the expectations of the individuals who interacted with the authority which now has to change its earlier decision. In this context, as evinced by the discussion so far, a crucial question is whether the concerned individual had relied on the expectations induced by the authorities. The question of reliance is important in two senses. First, the reasons for supporting the protection of the reliance interest are far weightier than those supporting the protection of expectations that did not serve a basis for reliance. Second, if the protected interest is primarily reliance rather than expectations in the strict sense, awarding remedy to the individual is more easily balanced against the prohibition on the restriction of administrative discretion. In these cases, individuals can be granted pecuniary remedy to compensate them for their detrimental reliance, without limiting the authorities' future action. Note that, often, a significant difference could exist between the value of the expectations and the actual scope of reliance (for instance, when the continued operation of the noisy restaurant is expected to yield significant profit, but the reliance of the restaurant owner on the license was confined to advancing rental payment for the asset in which it is operating).

g. Evaluating the Practice of Legitimate Expectations in Administrative Law

Let us now examine some of the main precedents concerning the implementation of the doctrine of legitimate expectations in light of the distinction between the reliance and expectation interests. My argument is that the distinction between the reliance and expectation interests goes a long way toward explaining the relevant case law. I do not argue that expectations *per se* do not warrant protection. Justifications for the protection of expectations exist independently, even barring detrimental changes. If no reliance is involved, however, the consideration of the authorities' freedom to alter their policy in relation to the future assumes further significance in the

adopted. Thus, e.g., in *A.G. of Hong Kong v. Ng Yuen Shu* [1983] A.C. 629, the court enforced a promise that illegal immigrants would be interviewed prior to their deportation. An early decision exemplifying the procedural protection of expectations was given by Lord Denning in *Schmidt v. Secretary of State Home Affairs* [1969] 2 Ch. 149, who therefore ruled (in an *obiter dictum*) that the revocation of a license prior to the date originally fixed constitutes grounds for the individuals concerned to state their case.

balance to be weighed by the court. This is especially important with regard to the substantive protection of legitimate expectations this article concentrates on.³¹

The analysis focuses on four important decisions of the Court of Appeal in the last few years. The discussion does not profess to review all the relevant precedents, but rather to illustrate the argument of this article by a close analysis of leading precedents.³² All the cases chosen for discussion relate to the substantive protection of legitimate expectations because, as noted, the procedural aspects of protecting expectations do not raise problems of fettering administrative discretion. The facts of these cases, together with the arguments of the judges, will be presented and later on evaluated vis-à-vis the justifications for protecting reliance and expectation, discussed in the previous sections.

The discussion should start with *R. v. Inland Revenue Commission, ex p. Unilever Plc*,³³ considered an important example of protecting substantive legitimate expectations. The decisions dealt with a change in the tax authorities' twenty-year-old custom to refrain from insisting on time limits for the setting of losses against profits. In contrast to its long established custom the Revenue refused to allow the applicant's loss relief against profits of the current year on the ground that the claims were not made within the statutory time limit. The Court of Appeal decided for the applicant. Since the acceptance of a legitimate expectations claim was considered, at the time, problematic, the judges tried to base their judgments on the special features of the case, without establishing general criteria in this area. Sir Thomas Bingham MR explained that 'on the unique facts of this case the Revenue's argument should be rejected. On the history here, I consider that to reject Unilever's claims in reliance on the time-limit, without clear and general advance notice, is so unfair as to amount to an abuse of power'.³⁴

The year after, the Court of Appeal gave another often quoted decision in the domain of legitimate expectations – *Secretary of State for the Home Department, ex p. Hargreaves*³⁵ – this time dismissing a claim based on the same doctrine. This decision dealt with a change in the policy governing prisoners' home leaves and temporary release. When the applicants arrived at prison to commence their sentences they were issued a notice indicating that they would qualify to apply for temporary release on home leave as a privilege when they had served one-third of their sentences. Later on, a new policy was announced that deferred the earliest

³¹ There is no doubt that procedural protection of legitimate expectations, which does not limit future decision-making, can be applied even when there is no detrimental reliance. See: De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th ed., by Lord Woolf and J. Jowell, 1995) 427 – 428.

³² For a recent review of the case law, see: Philip Sales and Karen Steyn 'Legitimate Expectations in English Public Law: An Analysis' (2004) *P.L.* 564.

³³ (1996) S.T.C. 681 (hereinafter: *Unilever*).

³⁴ *Ibid.*, at p. 691.

³⁵ [1997] 1 W.L.R. 906 (hereinafter: *Hargreaves*).

date on which the applicants could seek temporary release. The applicants argued that they had been deprived of the legitimate expectation that they would be considered eligible for home leave after having served one-third of their sentences. Their applications were dismissed. The main judgment, delivered by Lord Justice Hirst, emphasized the basic doctrine regarding the administrative liberty to change policies,³⁶ citing Lord Diplock's famous words in *Hughes*.³⁷

The third precedent to be evaluated here is *R. v. North and East Devon Health Authority, ex p. Coughlan*,³⁸ this time giving full and effective protection to substantive legitimate expectations. In the *Coughlan* case the applicant was a gravely disabled patient who agreed to be transferred from the hospital where she had received treatment to a National Health Service facility. She (and several other patients) relied on a promise stating that the institution would serve as their 'home for life.' Later, the authorities decided to close that institution. The petitioner claimed that she would not have agreed to a transfer had she not been promised the right to permanent residence, and asked the court to protect the legitimate expectations raised by this promise. The Court of Appeal accepted this view in a judgment that shows a greater tendency to recognize the protection of substantive legitimate expectations. According to Lord Woolf MR the protection of legitimate expectation is derived from the role of the court to ensure fairness to the individual.³⁹ More specifically, the court has to ask 'whether the application of the policy to an individual who has been led to expect something different is a just exercise of power'.⁴⁰ Eventually, Lord Woolf found that the decision in the applicant's matter had obstructed her legitimate expectations because it did not consider the significance of the promise for a permanent 'home', in contrast to a promise to guarantee the supply of health services.⁴¹

The fourth and newest precedent is *R. (on the application of Bibi and Al-Nashed) v. Newham London BC*.⁴² This case dealt with a promise given by a local authority to homeless refugees to provide them accommodation with security of tenure. The local authority gave this promise based on the premise that it had a duty to supply the applicants with accommodation. Subsequently, the House of Lords held that local authorities were not obliged to secure permanent accommodation to homeless persons within its area. As a result, the local authority had refused to comply with its original decision, and the applicants sought judicial review based on the frustration of the legitimate expectations raised by the promise. Lord Justice Schiemann starts

³⁶ *Ibid.*, at p. 919.

³⁷ See *supra* note 28.

³⁸ [2000] 2 W.L.R. 262 (hereinafter: *Coughlan*).

³⁹ *Ibid.*, at p. 649.

⁴⁰ *Ibid.*, at p. 654.

⁴¹ *Ibid.*, at p. 656.

⁴² [2002] 1 W.L.R. 237 (hereinafter: *Bibi*).

his evaluation of the case by stating that '[S]everal attempts have been made to find a formulation which will provide a test for all cases. However, history shows that wide-ranging formulations, while capable of producing a just result in the individual case, are seen later to have needlessly constricted the development of the law'.⁴³ Following that, he dismissed narrow formulations of the doctrine, argued for by the authorities, which asked to restrict it only to circumstances of improper motive or detrimental reliance. Citing an earlier precedent, as well as Craig's textbook, he states that 'reliance, though potentially relevant in most cases, is not essential'.⁴⁴ At any rate, the judgment considered the case as one that may have involved reliance, due to the possibility that the refugee family might have looked for another area to settle.⁴⁵ Eventually, the basis for the Court's decision to partially allow the appeal was that '[T]he authority in its decision making process has simply not acknowledged that the promises were a relevant consideration in coming to a conclusion as to whether they should be honoured and if not what, if anything, should be done to assuage the disappointed expectations. In our judgment that is an error of law'.⁴⁶ The local authority erred when it refrained to take into account also expectations raised by the promise given to the applicants. The mode of judicial intervention chosen by the Court this time was mild. It did not order the authority to respect the legitimate expectations of the applicants, and found it 'better simply to declare that the authority is under a duty to consider the applicants' applications for suitable housing on the basis that they have a legitimate expectation that they will be provided by the authority with suitable accommodation on a secure tenancy'.⁴⁷

Do these decisions have a common denominator? Can they be justified based on the justifications proposed for the protection of expectation and reliance in administrative law? Should any of them be considered wrongly decided against the background of the normative considerations discussed earlier?

My first conclusion regarding these precedents centers on the importance of reliance. De Smith, Woolf & Jowell's textbook considers reliance a 'relevant' factor.⁴⁸ I

⁴³ *Ibid.*, at p. 245.

⁴⁴ *Ibid.* The decision cited is *R. v. Secretary of State for Education and Employment, Ex p. Begbie* [2000] 1 W.L.R. 1115.

⁴⁵ *Ibid.*, at p. 250.

⁴⁶ *Ibid.*, at p. 249.

⁴⁷ *Ibid.*, at p. 252.

⁴⁸ 'Although detrimental reliance should not therefore be a condition precedent to the protection of a substantive legitimate expectation, it may be relevant in two situations: first, it might provide evidence of the existence or extent of an expectation. In that sense it can be a consideration to be taken into account in deciding whether a person was in fact led to believe that the authority would be bound by the representations. Second, detrimental reliance may be relevant to the decision of the authority whether to revoke a representation'. De Smith, Woolf & Jowell, *supra* note 31, at p. 574.

would like to argue much more than that. Not only reliance has significance, but in fact it has almost a decisive impact, more than the judgments are willing to state. In the absence of reliance, legitimate expectations will usually not be enforced, subject to rare exceptions. In the two cases where petitioners relied upon the authorities' actions and saw their position change for the worse – *Unilever* and *Coughlan* – the judgments granted them a remedy. In *Unilever*, the tax authorities' ongoing practice was the basis of the corporation's business, and canceling it would have caused the firm severe loss. In *Coughlan*, the petitioner's consent to leave the hospital and go to a home, as had been suggested to her, shows clear reliance. In *Hargreaves*, the announcement of the new policy regarding home leaves did not lead to any change in the applicants' position. The absence of reliance can therefore serve as part of the explanation for dismissing the applicants' argument. The *Bibi* case is an intermediate example. Here too, the petitioners could not show any concrete reliance upon the promise given to them. This promise did not lead them to refrain from accepting other residential proposals. At the same time, the Court pointed at the possibility of potential reliance (which was not proved or argued expressly), mentioning that the applicants' may have tried to move to another place in the absence of a promise regarding their eligibility for permanent accommodation. The lack of reliance served an additional factor in dismissing the application also in another case, given during the period reviewed in this article, *R. v. Secretary of State for Education and Employment, Ex parte Begbie*.⁴⁹ In this case, the applicant was a child, who studied at an independent school under a state-funded scheme. Later on, the government changed its policy regarding funding the program and decided to enable the pupils who had participated in it to continue in this scheme only until the end of the school year. The applicant argued to have legitimate expectations to carry on with her studies (with state funding) beyond this time limit, and based her claim on statements made by officials. In this case, the judgment rejected the idea of legitimate expectations based on statements made by officials when they were still in opposition (before the elections). It is important to notice, however, that the *Begbie* case was another example of legitimate expectations that were not supported also by detrimental reliance. Indeed, in another section of his judgment in this matter, Lord Justice Gibson added that 'it would be wrong to understate the significance of reliance in this area of the law. It is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation'.⁵⁰

At the same time, my second conclusion is that neither the judicial precedents nor the normative analysis which preceded them had overruled the possibility of protecting legitimate expectations even in the absence of reliance. However, since the protection of 'pure' expectations runs directly against the public interest in enabling the possibility of changing administrative policies, the protection of

⁴⁹ [2000] 1 W.L.R. 1115 (hereinafter: *Begbie*).

⁵⁰ *Ibid.*, at p. 1124.

expectations should be possible only when it does not prevent the change of policy itself. In other words, the protection of legitimate expectation should be in the form of making exceptions to the new policy; exceptions applicable to a limited number of individuals and not barring the possibility of advocating the new policy as a general rule. This is an additional explanation for the decision in *Hargreaves*. Enforcing the previous policy would have restricted the authority's freedom to alter its policy regarding a large number of prisoners, thereby thwarting future policy changes. In contrast, all the other precedents dealt with legitimate expectations of concrete individuals, whose circumstances could be differentiated from the ordinary cases to which the new policies would apply.

The distinction between the reliance and expectation interests, emphasized in this article, contributes to the analysis of the doctrine of legitimate expectations in several ways. It shows that when reliance can be traced, the courts will almost invariably give remedy to the party claiming legitimate expectations. It also shows that difficulties arise mainly when the court is requested to protect 'pure' expectations, where no reliance can be traced. As noted, although a reasonable claim may also be made for the protection of expectations as such, it is relatively weaker than the arguments justifying the protection of reliance. Nevertheless, courts should also provide remedy in instances of 'pure' legitimate expectations, unless officials can show good cause for failing to respect them. When the petitioner's request is not *sui generis* and the new administrative decision affects others in a position similar to that of the applicant's, protecting his or her expectations is more problematic. Such cases are classic instances of a direct conflict between legitimate expectations and the prohibition against fettering administrative discretion. From this perspective, the decision in *Hargreaves* can be justified, although not its negative rhetoric against the doctrine of legitimate expectations in general. It is interesting to note that in the two clear reliance cases discussed earlier – *Unilever* and *Coughlan* – the impact of the remedy was confined to one or few individuals only.

Conclusion

This article examined the proposition that administrative law gives substantive protection to legitimate expectations. It argued that the distinction between the reliance and expectation interests is also useful in administrative law, in accordance with the conceptual separation between them developed in private law. As it turns out, only in a minority of cases does the doctrine of legitimate expectations protect expectations per se, while the focus is usually on the protection of reliance. Although the protection of 'pure' expectations sometimes prevails, its relative scope is narrow, given the public interest in avoiding restrictions on administrative discretion. The suggested understanding of the doctrine of legitimate expectations is based on an evaluation of the arguments justifying the protection of the reliance and expectation interests, in general as well as in the context of administrative law. The discussion of these arguments reveals reasons for protecting 'pure' expectations,

but also shows that these justifications become particularly significant once reliance is also involved, thus highlighting the importance of assessing the involvement of a reliance factor in the case. Where reliance had occurred, the balance tilts against changes in official decisions. Moreover, even when the administration is allowed to change its decision (for important public reasons) the private party who had relied on the authorities should still be compensated. Conversely, where a remedy is sought for the protection of expectations in the 'pure' sense, without involving reliance, the claim will be considered sustainable only when it is expected to affect a limited group without fettering administrative discretion in general.

