

CONSISTENCY AND FAIRNESS IN PUBLIC LAW ADMINISTRATION IN NIGERIA: RATIONALISING THE CONCEPT OF LEGITIMATE EXPECTATION THROUGH THE LENS OF OTHER CLIMES

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Abstract

Government agencies carry out public functions by exercising discretionary powers to formulate and implement policies, manage and regulate social and economic life. However, administrative rules cannot with certainty, prescribe outcomes for envisaged circumstances. The doctrine of legitimate expectation operates so that any government agency which adopts a policy should be required to follow and apply the policy. It advocates consistency and fairness in government actions, protected by external administrative mechanisms, the courts and tribunals, and through rules of internalisation in administrative laws for guidance of public agencies. The paper focuses on the adoption of this doctrine in United Kingdom, South Africa and India. The adoption in these jurisdictions, provide lessons to establish certainty in the conduct and action of government agencies in Nigeria. The paper recommends the legal accountability introduced in these climes, to ensure consistency and fairness in public law in Nigeria to protect the legitimate expectations of the citizenry.

Keywords: Public Law; Legitimate Expectation; Consistency; Fairness; Administration; Students.

1. Introduction

The paper appraises how principles inherent in the concept of legitimate expectation apply to protect the legitimate expectations of individuals in other jurisdictions. The phrase, legitimate expectation was first used in the English legal system by Lord Denning, MR, in *Schmidt v. Secretary of State for Home Affairs*,¹ where he stated *obiter* that process rights should apply to all decision-making processes affecting the rights, interests and legitimate expectations of any individual. It exists essentially in external administrative law and as part of the internal normative orientation, combined with the management and implementation of policy in any administrative state.

The focus of the paper is on the lessons to be drawn from the adoption of the expanded principles in the concept from a select jurisdiction to improve the application of process

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¹ [1969] 2 Ch. p. 149.

rights in public administration in Nigeria. This is with a view to ensuring consistency and fairness in actions of government agencies. The United Kingdom (UK), South Africa and India are examined. Nigeria legal system was inherited from the UK, South Africa has adopted the concept as a constitutional provision, and the Indian constitution is akin to that in Nigeria. However, the judiciary of these administrative states have applied the equitable non-judicial concept universally, to protect the rights, interests and legitimate expectations of individuals in a plethora of cases spanning education, health and housing.

The paper is in three parts. The first discusses the protection of the legitimate expectation of individuals under English law, particularly in the UK Higher Education (HE) sector. It reveals UK administrative agencies do often take account of legitimate expectations as an internal legal norm of public administration.² The second part examines the concept as a constitutional provision in South African law.³ Here, the concept is applied as a guaranteed constitutional right for protecting expectations and a catalyst for the enhancement of the rule of law in the legal system. The third part examines the Indian approach. The concept is not only a mere directive principle as it is in Nigeria,⁴ yet Indian courts have, by invoking the principle of non-arbitrariness of actions of public authorities as enshrined in Article 14, Part III of the Indian Constitution, applied the concept to protect rights and legitimate expectations of all persons.⁵

Overall, the analysis is instructive as it portrays the flexibility, the adoption of the concept has brought into public administrative justice system; an equitable and viable mechanism for ensuring fair, consistent and just treatment of individuals.⁶ The concept is now subsumed as an operative norm by administrative agencies and comprises part of the internal law of administration, evidenced in administrative practices.⁷

2. United Kingdom Approach

In UK Administrative law, where a public authority has made a promise and or adopted a practice which denotes how it intends to act in a particular area, the law will require that the

² Roberts, T., *The Protection of Legitimate Expectations in UK Administrative Law* (Hart Publishing, London, 2016) p. 18.

³ Section 33 Constitution of the Republic of South Africa, 1996 (Just Administrative Action). Also Sch. 6, item 23(b), Section 24 Interim Constitution of the Republic of South Africa, 1993

⁴ Muzafar, S., 'Doctrine of Legitimate Expectation in India: An Analysis', *International Journal of Advanced Legal Research in Management and Social Sciences*, 2, No.1 (January 2013), p. 133.

⁵ *Food Corporation of India v. Kamadhenu Cattle Feed Industries Ltd.* (1993) AIR, S.C. p. 1601.

⁶ Ikhariale, M.A., 'The Doctrine of Legitimate Expectations: Prospects and Problems in Constitutional Litigation in South Africa', *Journal of African Law*, 45, No.1 (2001) p. 12.

⁷ Principle followed in Okogbule, N.S., 'Breathing life into the Fundamental Objectives and Directives Principles of State Policy Under the Nigerian Constitution Through Judicial Activism', in *Excellence in Governance and Creativity Legal Essays in Honour of Governor Nyeson Wike, Governor Rivers State*, p. 99.

promise or practice, which if unambiguous and clear to those to whom it is represented, be honoured unless there is good reason not to do so. Originally, the concept was introduced to procedurally protect breached expectations. It has now expanded to substantively protect benefits or reliefs that legitimately accrue to an individual. The concept mediates the competing demands of the interest of UK public agencies and the reasonable expectations generated in the minds of individuals in their dealings with administrative authorities.⁸ The rapid adoption in the UK evidences the importance the legal system attaches to protecting rights and ensuring consistency in administrative practises.⁹ These, it has done in several ways.

2.1 Application of Process Rights

The earliest mode of ensuring consistency and fairness in UK public administration was the adoption of process rights prevalent under the common law. Process rights refer to the common law adjudicative individualised rules of natural justice, applied as safeguards to protect breaches of rights of individuals. Their primacy accords with the importance English legal system attaches to common law rules of natural justice. Craig¹⁰ argued, these criteria, fashioned largely by the courts, require the existence of a right, interest or legitimate expectation before natural justice is applicable. In other words, the rules of natural justice must be accorded an individual when his or her rights, interests and legitimate expectations are breached by the action of a public authority.

Process rights were originally applied to protect procedural legitimate expectations as in *R. v. Liverpool Taxi Fleet Operators Association*.¹¹ The Council Authority was held to have failed to adhere to the procedure they promised. This conceptualisation changed in *R. v. North and East Devon Health Authority, ex parte Coughlan*,¹² following the expansion of the application of the rules of natural justice to protect substantive legitimate expectations founded on the criteria of unfairness and abuse of power.¹³

The application of process rights effectively and efficiently protected hearing rights in the UK, secured the correctness of substantive outcome of cases and guaranteed fairness and neutrality of the application of the rule of law, thus protecting the dignity of individuals.

⁸ Roberts, T., *supra* – 2, p. 5.

⁹ Hlophe, J., ‘Legitimate Expectation and Natural Justice: English, Australian and South African Laws’, *South African Law Journal*, 104, No.165 (1987), p. 181.

¹⁰ Craig, P., *Administrative Law*, 7th ed. (London: Sweet and Maxwell, Thomas Reuters, 2012) pp. 340, 349.

¹¹ [1972] 2 QB 299 CA (Civ. Div.).

¹² (2001) QB 213, p. 71.

¹³ Elliot, M., ‘Legitimate Expectations in Administrative Law’, *Public Law* (Faculty of Law, University of Cambridge), Sweet and Maxwell and its contributors (2012), p. 2. See also, T. Endicott, *Administrative Law* (Oxford: Oxford University Press, 2009), p. 226.

2.2 Reliance on the Human Rights Act, 1998

Another feature the English law had embedded in ensuring consistency and fairness in public administration practice was the adoption of the Human Rights Act 1998 (HRA) provisions on judicial review of administrative actions of public agencies in the UK.¹⁴ By incorporating certain provisions of the European Convention on Human Rights (ECHR) into the UK domestic law, English courts were obligated to interpret legislation in accordance with the Convention Rights, making acts of public authorities that were incompatible with the provisions at that time, unlawful.¹⁵ In *Stretch v. United Kingdom*,¹⁶ the Court held, the decision by the authority was a ‘disproportionate interference’ with the claimant’s rights,¹⁷ the claimant having entered the lease on the basis of the renewal and had developed the property.¹⁸

Though UK has left the European Union, it is still a participant in the European Convention on Human Rights (ECHR). With the new 2022 Bill of Rights, the HRA requires UK courts including the Supreme Court, to “take account” of decisions of the ECHR, which sits in Strasbourg. UK courts are not required, however, always to follow the decisions of that Court. The Trade Agreement did not specify what happens if UK decides not to honour commitments from the ECHR. UK is still commitment to it, but the future is not certain.

2.3 Inculcating Legitimate Expectation Principles into Internal Administrative Procedures

In the UK, legitimate expectations principles act as normative constraint upon administrative decision-making processes in several ways, though without codifications. The concept exists as a judicial principle, an “external administrative law” imposed by courts and tribunals, through judicial review.¹⁹ Commentators share different views on this.²⁰ To what extent then do UK universities and other public agencies recognise principles of legitimate expectation to be part of their internal processes? Can the principles of legitimate expectations be found within the internal rules, guidelines and procedures of public agencies in the UK?

¹⁴ Considerable changes have been made here following the recent Brexit reforms in the UK.

¹⁵ This was possible through the culture of justification principle which allows for domestication of European laws. For instance, Article 6(1) ECHR guaranteed fair trial. See Craig, P., *Administrative Law*, p. 583. *ibid* [2004] 38 EHRR p. 12

¹⁶ Craig, P., *Administrative Law*, p. 707, *ibid*

¹⁷ *ibid*.

¹⁸ Roberts, T., *supra*-6, pp 18, 19.

¹⁹ Baxi, U., ‘Courage, Craft and Contentment: The Indian Supreme Court in the Eighties’, *Bombay*; 1985, p. 10. Elliott, M., ‘Ombudsman, Tribunals and Inquiries: Re-Fashioning Accountability Beyond the Courts’, in Bamford, N., and Leyland, P., *Accountability in the 21st Century Constitutions* (2013), cited in Roberts, T., *ibid*, p. 9.

Roberts propounded UK administrative justice system has internalised legitimate expectation principles into the internal rules and procedures of public agencies in many ways. First, civil servants and officials in the UK are generally acknowledged not to be legally qualified, yet are bound by internal agency guidance and instructions containing general policies and procedures.²¹ These internal forms of administrative accountability modules appear very effective in shaping administrative behaviours of public agencies than the external control mechanism through judicial review.²² Such are, the Treasury Solicitor's Department, the UK government's Legal Service Provider, which has for several years produced a handbook, the '*Judge over Your Shoulder (JOYS)*'.²³ It contains principles of judicial review and legitimate expectations UK public agencies adhere to.²⁴ This handbook obligates agencies to follow the practical steps stated therein to meet potential legitimate expectations created when it intends to change a policy or procedure.²⁵ The UK Border Agency is another which has produced its own guidance on judicial review and legitimate expectations.²⁶

A second method is the use of transitional measures by government agencies. Transitional measures apply to familiarise the public to a new policy or system, and to try the policy on a partial basis before final decisions. In *R. v. Ministry of Agriculture, Fisheries, and Food, ex parte Hamble, (Offshore) Fisheries*,²⁷ a moratorium on the policy of licence-aggregation on stockpiling fish was introduced not to frustrate the potential legitimate expectations it earlier created by the new policy.²⁸ Again, in introducing of the Education Act, 2011 that excluded certain school children from financial assistance, government differed commencement date.²⁹ A third way legitimate expectations are protected in the UK public administration is the consideration of payment of compensations to affected individuals 'where money alone will suffice'.³⁰

Overall, representations made to individuals by government agencies are extensively protected under the under English law. This is no exception in matters concerning students in higher education.³¹

²¹ *ibid.*

²² *ibid.*

²³ (*JOYS*), 4th ed. (TSOL, 2006)

²⁴ See, The Scottish Government, *Right First Time: A Practical Guide for Public Authorities in Scotland to Decision-Making and the Law* (Edinburgh: Scotland Government, 2010); cited in Roberts, T., *ibid.*, p. 20.

²⁵ *JOYS*, *ibid.*, 258.

²⁶ UK Border Agency, Immigration Directorate Instructions, Chapter 27, 'Judicial Review', <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter27>, accessed on 27 June 2020.

²⁷ [1995] 2 All ER p. 714.

²⁸ See Roberts, T., *supra*-2, p. 22.

²⁹ Education Act 2011 (Commencement No. 4 and Transitional and Savings Provisional) Order 81 2012/1087.

³⁰ *R. v. North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at 89.

2.4 Students Dispute Resolution: Office of the Independent Adjudicator (OIA) for Higher Education

Arguably, universities will often need to change or modify their policies to accommodate and reflect changes in the wider social context. Yet, students' interests need to be protected. The role of administrative law in these situations is to ensure that students who are caught between these modifications or change of representations are treated fairly by the university.³² The desirability to protect expectations arising from the changes universities may introduce from time to time triggered the abolishment of the jurisdiction of the Visitor over students' complaints and the creation of the Office of the Independent Adjudicator (OIA), for Higher Education, a compulsory ombudsman scheme for complaints against higher education institutions.³³ The OIA provides an independent, transparent scheme under the Higher Education Act 2004 to review complaints by students arising from the acts and omissions of a university. Subject to the right of Appeal for judicial review, the OIA Scheme is intended as an informal alternative to the courts.³⁴

The OIA is however limited to complaints that have first been taken through the procedures of a higher education institution's own internal system without reaching a satisfactory conclusion from the viewpoint of the student.³⁵ This cannot be equated to the roles played by courts in Nigeria. Yes, it is adjudicatory, but the OIA often grant students damages, specifically directed at ameliorating breached students' legitimate expectations. Its review mechanism includes a finding to ensure that the higher education institution followed their stipulated procedures. The OIA has the prerogative to refer matter back to the university for reconsideration, request a university to obtain promised accreditation for a course, ask a university to provide a fresh assessment opportunity, request that work is remarked, recommend a review of university policies/procedures and staff training, demand a university to apologise to a student, give a student the opportunity to return to a course, offer mediation between university and student.³⁶ By law, all higher education bodies are to abide by the rules of the OIA scheme recommendation. The OIA is amenable to judicial review. A student that is dissatisfied with the outcome of a decision of the OIA after investigation could still

³¹ See T. Tricker, 'Students' Expectations - How Do We Measure Up?', *Unite, Students Living Report* (2003), p. 2.

³² Roberts, T., *supra*-6, p. 5.

³³ See Higher Education Act 2004. See, www.oiahe.org.uk accessed on 25 June 2019. See T. Endicott, *Administrative Law* (Oxford: Oxford University Press, 2009), pp 495-496.

³⁴ See particularly Rule 6.4, OIA Scheme Rules in <http://www.oiahe.org.uk> accessed on 09 August 2021.

³⁵ See https://en.wikipedia.org/wiki/Office_of_the_Independent_Adjudicator, accessed on 09, August 2021.

³⁶ See the OIA's approaches to remedies and redress, dated March 2013, 8. www.oiahe.org.uk, accessed on 09 August 2021.

challenge the institution in contract, or apply for judicial review of the institution's conduct, decision or inaction.³⁷

Though the right to education is non-justiciable, there is a paradigm shift demonstrating that it can be enforced in Nigeria, albeit, to a limited degree.³⁸ On the contrary, the right to education and the concept of legitimate expectation in the UK has become an aspect of administrative law which is concerned with the representations and conduct of statutory public authorities. It becomes plausible to argue that legitimate expectations have been internalised in the UK's administrative system.

3. The South African Approach

Unlike the UK model, the South African approach is quite distinct because it recognises a legitimate expectation as a constitutional right.³⁹ Instructively, the trajectory of the administrative justice system in South Africa was not different from other legal systems that were engrossed with the complexities of the right-privilege dichotomy era of classifying administrative functions.⁴⁰ Indeed, the justice process was at a time devoted to the victimisation of a large section of the South African population.⁴¹ These experiences engineered the deployment of every constitutional means possible to the arduous task of social reconstruction towards the declared objective of the evolution of a humane and just administrative process.⁴² Ikhariale noted, the aftermath was the enormous social reconstruction programmes prevalent in post-apartheid South Africa that resulted in a sophisticated mechanism for the maintenance of administrative justice.⁴³

The *locus classicus* case upholding legitimate expectation as a legal right in South Africa's constitutional history is *Premier, Mpumalanga and Another v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal*.⁴⁴ It concerned the stoppage of payment of bursaries to schools as was previously done. Where a change is envisaged, the constitution prescribed transitional measures before final implementation. These were not followed. The governing bodies jointly challenged the termination. The promulgation of the

³⁷ *ibid*, p. 496. See *R. (Siborurema) v. Office of the Independent Adjudicator*, (2007), EWCA Civ. P. 1365.

³⁸ See *Nigerian Vanguard Newspaper*, 'Now That Free Education is Justiciable'. See, www.ngrvanguardnews dated Thursday, March 9, 2017, p. 18; accessed on 09 March 2019.

³⁹ Ikhariale, M.A., *supra* - 6, p. 2.

⁴⁰ Hlophe, J., *supra* - 9, p. 165.

⁴¹ *ibid*, 1.

⁴² *ibid*, 1

⁴³ Ikhariale, M.A., *supra* - 6, p. 1.

⁴⁴ *The Premier Case 2 South Africa* (Constitutional Court), (1999), p. 91.

new 1996 Constitution for South Africa gave impetus to this matter.⁴⁵ The Constitution replaced the prevailing 1993 Interim Constitution which, though recognised the concept of legitimate expectation, did not ‘provide for the scope and applicability of the doctrine’.⁴⁶ Section 24, of the South African Interim Constitution, 1993 provides in part that:⁴⁷

Every person shall have the right to:

- i. lawful administrative action where any of his or her rights or interests is affected or threatened.
- ii. procedurally fair administrative action when any of his or her rights or interests or *legitimate expectations* is affected or threatened.

By virtue of the transitional arrangements contained in schedule 6, item 23(2)(b) of the 1996 Constitution, the provisions of section 24 of the Interim Constitution were to continue to be operative as the basis for legitimate expectation in South Africa, until such a time that the National Assembly makes a subsequent legislation as envisaged to give effect to these rights as provided for in section 33(3) of the 1996 Constitution dealing with “Just Administrative Action”.⁴⁸ The 1996 Constitution further provides that where the legislation is not amended by the National Assembly within the stipulated period of three years from the date of promulgation of the constitution, the provision of section 33 of the Constitution would lapse, and section 24 of the Interim Constitution would continue to be in force.⁴⁹ Commentators agree that so far, no such legislation has been enacted by the National Assembly.⁵⁰

The implication is that section 24 has remained the basis for the application of legitimate expectation in South Africa till date. The Constitutional Court of South Africa rightly observed, the case highlights the interaction between two constitutional imperatives.⁵¹ It affirmed the respondents’ view that “the school governing bodies had a legitimate expectation as contemplated by s. 24(b)”.⁵² It is improper to concede that “public policy” or “individual interests” consideration would override the provisions of the Constitution.⁵³ Courts cannot permit the implementation of retroactive decisions without affording effective

⁴⁵ The Constitution of the Republic of South Africa 1996, Act. No. 108 of 1996 came into force on 4th February 1997 (amended to April 11, 2003).

⁴⁶ Ikhariale, M.A., *ibid*, p. 2.

⁴⁷ Section 24, Interim Constitution of South Africa 1993.

⁴⁸ Section. 33 of the Constitution of the Republic of South Africa 1996.

⁴⁹ See item 23 (3), Schedule 6, Transitional Arrangements, Constitution of the Republic of South Africa, 1996.

⁵⁰ See Ikhariale, M.A., *supra* – 9, p. 2.

⁵¹ Per O’Regan, J, delivering judgement of the Constitutional Court of South Africa in *Mpumalanga*; see also Ikhariale, M.A., *ibid*, p. 6, the Constitutional Court had to assume jurisdiction of the case to save time and cost following the coming into force of the new constitution of South Africa in 1996.

⁵² *Premier case*, *supra*, 105H.

⁵³ Ikhariale, M.A., *supra*, p. 7.

representation thereby flouting the important principle of procedural fairness,⁵⁴ relying on Lord Roskill's speech in *Council of Civil Service Unions v. Minister for the Civil Service*,⁵⁵ that "legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practise which the claimant can reasonably expect to continue".⁵⁶

Following this conceptualisation, Ikhariale posited that the "requirement of procedural fairness as an adjunct right to legitimate expectation, only operates to reinforce the constitutional right of the citizen to administrative justice".⁵⁷ A constitutional right such as the right to administrative justice of which the doctrine of legitimate expectation is a major feature must, *ipso facto*, be conceded to the claimant irrespective of what other laws, be they statutory or judge-made, may provide.⁵⁸ The *Premier* case was a "product of the discredited apartheid in South Africa, which demonstrated the potential of the law courts as veritable instruments of social engineering".⁵⁹

A retrospective account of South Africa's constitutional history before the promulgation of the 1996 Constitution however, reveals that the concept of legitimate expectation was applied to administrative actions only as an extension of the rules of natural justice.⁶⁰ This conceptual understanding was similar to what had prevailed under the common law era in other jurisdictions.⁶¹ Courts in South Africa indulged in pick and choose approach in applying the old-fashioned approach of classification; that natural justice would apply only when acting judicially and not administratively.⁶²

Illustrative is the case of *Everett v. Minister of the Interior*.⁶³ South African courts had continually insisted that any complaint of administrative action should affect existing rights if the principles of natural justice are to be applied.⁶⁴ To give meaning to judicial or quasi-judicial acts, or to apply natural justice principles, courts define whether the administrative act affected the individual's rights, interests or privileges. The applicant in this case, a British citizen by birth, sought to be granted a permanent residence permit in South Africa. She

⁵⁴ *ibid.*

⁵⁵ (1985) AC 374 HL.

⁵⁶ *Premier case*, supra, p. 756.

⁵⁷ Ikhariale, M.A., supra, p. 7.

⁵⁸ *ibid.*

⁵⁹ Ikhariale, M.A., supra, 5; the courts treat legitimate expectation as a constitutional right.

⁶⁰ See for example, Hlophe, J. supra, 168; Ikhariale, M.A. supra, 2; and Craig, *Administrative Law*, supra, 345.

⁶¹ See *R v. Electricity Commissioner* [1974] KB pp. 171, 205; *R. v. Metropolitan Police Commissioner, Ex-parte Parker* [1953] 2 All ER, p. 717.

⁶² *Nakkuda Ali. v. Jararatne* [1951] AC 66, pp. 75-77. *Ridge v. Baldwin* [1964] AC 40, HL pp. 72-76.

⁶³ 1981 (2) SA 453 (C).

⁶⁴ Hlophe, J., supra, pp. 165, 171.

applied for an extension of her temporary residence permit for one year with the intention of making a further application for a permanent residence permit. In the interim, her temporary permit application was granted and extended until 8 July 1980. Mid way, the applicant was served with an order of deportation and withdrawal of her temporary permit, without prior notice. By invoking the principles of legitimate expectation, the court held that there was a breach of natural justice, and the purported deportation notice was set aside.⁶⁵

The *Everett* decision typified a mixed bag. The court did not only deviate from the original conceptualisation that natural justice rules only protected legal rights, it went further to hold that an alien had a legitimate expectation to be heard in an administrative act, a situation which had previously been exempted from the requirements of natural justice.⁶⁶ The case therefore, did not only succeed in recognising individual legitimate expectation, it also extended the frontiers of applying natural justice principles to purely administrative decisions. The *Everett* case no doubt, made significant conceptual advancement in protecting an individual's legitimate expectations.

The above inroad notwithstanding, the decision was criticised for tying “legitimate expectations”, which are non-legal rights, to “quasi-judicial” test, that is, a legal right in nature.⁶⁷ Leading the pack was Hlophe who opined that by considering whether the principles of natural justice applied, for a hearing to be granted before the withdrawal of the permanent residence permit, the learned judge found it necessary to ascertain whether the Minister was exercising quasi-judicial functions or purely administrative functions.⁶⁸ What this implied is that even if the applicant had a legitimate expectation flowing from that fact that she had earlier been permitted to stay for a certain period, the Minister would not have been bound to comply with *audi alteram partem* rule, had his powers been purely administrative.⁶⁹ Therefore, the judgment appears not to represent the intended interpretation of the concept of legitimate expectation. Hlophe stated, “tying up legitimate expectations with quasi-judicial test will hinder the inherent flexibility of the legitimate expectation concept.”⁷⁰ In deciding that *Everett* had acquired a right consisting of a legitimate expectation of being allowed to stay for a permitted time, the court invariably “equated the existence of a right with legitimate

⁶⁵ *Everett*, supra.

⁶⁶ *ibid.*, p. 166

⁶⁷ *ibid.*, p. 170.

⁶⁸ *ibid.*

⁶⁹ *ibid.*, p. 171. Similar thoughts were expressed by Lord Denning, M.R. in the *Schmidt* case, supra, p. 149.

⁷⁰ Hlophe, J., supra, p. 171.

expectation”.⁷¹ It is now certain and incontrovertible that a legitimate expectation is not a right.

This judicial uncertainty in *Everett* was noticeable in *Metal & Allied Workers Union v. Castell NO*.⁷² There, Wilson, J., ruled, the applicant had a legitimate expectation to be heard before the magistrate made his decision. Like the *Everett*, the decision followed the use of the concept as an adjunct to natural justice. Without doubt, the concept is still evolving. Thus, to insist on classification of rights and privileges before natural justice principles would apply to protect legitimate expectations appears to defeat the spirit of the concept. The renewed judicial approach in the *Premier* case was birthed in *Administrator of the Transvaal v. Traub*,⁷³ where Corbett, CJ., noted the law should be made to reach out and come to the aid of the persons prejudicially affected.⁷⁴ Overall, Ikhariale opined the foregoing approach was predominant in jurisdictions where the right to legitimate expectation is the product of judicial creation.⁷⁵ This was different in South Africa where the right to legitimate expectation has become a fundamental right under the constitution, and it takes precedence over all other claims acquired elsewhere.⁷⁶

Whilst reviewing the judgment in *Mkhize v. Rector, University of Zululand*,⁷⁷ Hlople submitted that if the court had applied the concept of legitimate expectation borrowed from English law and has successfully utilised it in the *Everett*⁷⁸ and *Castell*⁷⁹ cases, the principles inherent in the concept would have ameliorated the hardship caused to the students in the *Mkhize* case.⁸⁰ It is submitted that this is a plausible argument.

The *Mkhize* case⁸¹ involved an application by a final year student at the University of Zululand for readmission into the university for the second semester. Following the directive of the University Council that all requests that fell into the student’s category be refused, the applicant was declined readmission without any hearing. His application to the Supreme Court was also refused. The two issues highlighted in the case touched on the nature of the legal relationship between the student and the university, and whether natural justice should

⁷¹ *ibid.*, p. 172.

⁷² (1985) *South African Law Journal*, 2, No. 280 (D).

⁷³ (1989) SA 731 (A).

⁷⁴ *Ibid.*, p. 761.

⁷⁵ Ikhariale, M.A., *supra*, p. 8.

⁷⁶ *ibid.*

⁷⁷ (1986) (I) SA 901 (D). The decision followed the position in *Sibanyoni & Others v. University of Fort Hare* (1985) 1 SA 19 CK; both cited in Hlople, M.J., “Natural Justice: Do Students Have Rights? *South African Law Journal*, 104 (1987), 255.

⁷⁸ *Supra*, p. 453.

⁷⁹ *Supra*, 901 (D).

⁸⁰ See Hlople, J. *supra*, p. 258.

⁸¹ *Supra*, 901 (D).

apply before the university refused the student's application. While the implication of admission, request for readmission, and the wider student/university relationship issues remained extensive, it suffices to say that the court's refusal of the student's application on the grounds that the relationship between the student and the university was contractual is no longer tenable. The decision, scholars have argued, contravened both heads of natural justice rules.⁸² It also violated the rule that discretionary powers be exercised properly.⁸³

Furthermore, under English law, there are suggestions that a provision in a contract which purports to exclude the common law principles of natural justice may be unenforceable as offending against public policy.⁸⁴ The underlining principle is that possession of power to make adverse decisions against the student population was enough grounds to give rise to a legitimate expectation to be heard.⁸⁵ It must be noted that the concept of legitimate expectation has gone far beyond what was originally conceived by Lord Denning, MR in *Schmidt* case.⁸⁶ Coupled with the extensive judicial review powers of the courts over acts of the legislature and the executive, it is now part and parcel of the civil liberties firmly guaranteed right under the 1996 Constitution and a mechanism for the fair adjudication of the rule of law in South Africa.⁸⁷

Overall, the South African administrative justice system has succeeded in incorporating under its Bill of Rights in the 1996 Constitution, all manner of rights. Be they socio-economic rights (which subsume the constitutional provisions on legitimate expectations as is the case in Nigeria, where the concept is generally regarded as unjustifiable and legally unenforceable), and civil and political rights, that are generally guaranteed as legally enforceable rights.⁸⁸ The consequence is that justiciability or enforceability becomes a non-issue in claims against violations of legitimate expectations. The application of the principles

⁸² Hlophe, J., *supra*, p. 256

⁸³ Compare to the position held by the Supreme Court of Nigeria in *Magit v. University of Agriculture, Makurdi* [2005] 19 NWLR (Pt. 959), p. 211.

⁸⁴ *ibid.*, p. 257. See also *Edwards v. Society of Graphical and Allied Trades* [1971] Ch. 354, CA, pp. 377, 381-382.

⁸⁵ *ibid.*, p. 258; this is the better view compared to the position the Supreme Court of Nigeria held in *Magit*, (*supra*), p. 211; that the student had no right to be heard by the University Senate.

⁸⁶ *Supra*, p. 149.

⁸⁷ See Ikhariale, M.A., *supra*, pp. 10, 12.

⁸⁸ The Constitution of South Africa ambulates the intention of the African Charter on Human and People's Rights that 'human rights' are indivisible and ought not to be treated in line with the traditional classification of rights. See for example, section 29 of the Bill of Rights protects the right to education, amongst others.

of legitimate expectations as a constitutional requirement makes them justiciable and their “progressive realisation” as rights possible within the context of the constitution.⁸⁹

The foregoing analysis reveals that not only has the concept of legitimate expectation been entrenched in the Constitution of South Africa, but the courts have also always ensured its implementation.

4. The Indian Approach

This part discusses the protection accorded legitimate expectations in the administrative justice system in India. Arguably, the legal position in India is patterned after the evolution and application of the concept in England. The precise content of the concept which grant an aggrieved person remedy by judicial review under English law has become progressively realisable through judicial decisions in India. The rules of natural justice in India protect individual’s rights, interests and legitimate expectation, whether procedurally or substantively. What is most profound is that notwithstanding the non-legal status of the concept in India, a breach is judicially protected, but as an adjunct to constitutional provision that individuals should be treated fairly, on the basis of equality and non-discrimination principle founded on Article 14 of the Indian Constitution.⁹⁰ The provision imposes a duty on the state and its functionaries to act fairly, so that individuals can have an expectation that they will in turn be treated fairly by the state.⁹¹

Unlike the South African model, expectations are not guaranteed rights under the Indian administrative justice system, rather they form part of the directive principles of state policy under Part IV of the Constitution, otherwise referred to as the economic, social and cultural rights provisions which are generally not “enforceable by any court”.⁹² What the Indian judiciary has done to protect the legitimate expectations of individuals from adverse actions or decisions of public authorities is to invoke the non-arbitrariness principle enshrined in Article 14 of the Constitution, thereby clothing legitimate expectation with the toga of an enforceable right. This is a break-away from the Nigerian experience where legitimate expectations are also not constitutionally guaranteed.

⁸⁹ Section 26 (2) of the 1996 Constitution of the Republic of South Africa. See *Minister of Health v. Treatment Action Campaign*. (2002) AHRLR, SACC, p. 189; *Government of the Republic of South Africa v. Grootboom (The Grootboom Case)*, (2001) 36 WRN, p. 137 (Constitutional Court).

⁹⁰ See Article 14, Part III (Fundamental Rights Rules) Constitution of India. This is not the case in Nigeria.

⁹¹ Also, *Shephard v. Union of India* (1987) 4 SCC pp. 431, 448, the court held, rules of natural justice have been developed with the growth of civilisation and content thereof is often considered as a proper measure of the level of civilisation and the rule of law prevailing in the community; Muzafar, S., *supra*-8, p. 130.

⁹² Section 36, Part IV, Constitution of the Republic of India 2006. The provisions of the section contain the economic, social and cultural rights of the citizens. Such rights include the right to education.

Originally, the Indian Supreme Court conceptualised that directive principles should conform to and run subsidiary to the chapter on fundamental human rights as was held in *State of Madras v. Champakam*.⁹³ This has metamorphosed to fundamental rights and directive principles of state policies viewed as complementary, “neither part being superior to the other”.⁹⁴ In *Keshavanada v State of Kerala*,⁹⁵ the Court further held that “in building a just social order, it is sometimes imperative that the fundamental rights should be subordinated to directive principles”.⁹⁶ To achieve this, the Indian judiciary adopted two approaches.

The first, expansionist approach extended the limits of some civil and political rights that are justiciable to incorporate socio-economic rights, which are constitutionally unjustifiable. In *Carolie v Union Territory India*,⁹⁷ the Supreme Court widened the scope of the right to life to include the right to be provided with reading and writing materials and facilities, as well as the right to be able to express oneself. Also, in *Francis Mullin v The Administrator, Union Territory of Delhi*,⁹⁸ the Court reasoned that the right to life, a fundamental right under Article 21, must be interpreted to incorporate the right to health under Article 12, thus making the right to health justiciable. This interpretation also received same acclamation when right to education under Article 45 of the directive principle of state policy was held as a justiciable right in *Unnikrishan J.P. v. State of Andra Pradesh*.⁹⁹ The Supreme Court held:¹⁰⁰

The right to education further means that a citizen has the right to call upon the state to provide educational facilities to him within the limit of its economic capacity and development. By saying so, we are not transferring Article 41 from Part IV to Part III; we are merely relying on Article 41 to illustrate the content of the right to education flowing from Article 21.

The second approach was by infusing the spirit of social justice into constitutional provisions.¹⁰¹ By this, the Indian Supreme Court adopted a very progressive approach in the

⁹³ (1951) SCR, p. 525.

⁹⁴ Per, Krishna Iyer, J., in *State of Karata v. N.M. Thomas* (1976) SCC, pp. 310, 367.

⁹⁵ (1973) 2 SCC, pp. 225, 879, para. 1707.

⁹⁶ *ibid.*

⁹⁷ ALLIR (1981) SC 746, p. 5. Also, *Mahimi Jain v. State of Karnataka* (1992) SC, p. 1864 (APP6), where the court held that the right to education is part of right to life. It invalidated a policy were medical schools-imposed tuition fees which could deprive poor students, the opportunity to study medical science.

⁹⁸ (1981) 2 SCR, p. 516.

⁹⁹ (1993) 1 SCC, p. 645. Some private medical and engineering colleges challenged law on capitation fees from students seeking admission.

¹⁰⁰ *ibid.*

¹⁰¹ Highlighted in *Daily Rated Casual Labour Employed under P & T Department v. Union of India* (1988) I SCC, p. 122, the appointment of workers be regularised based on the enforceability of the Directive Principles of State Policy.

interpretation of the non-justiciability clause by refusing to classify legal rights. Thus, treated human rights as indivisible by linking the enjoyment of the civil and political rights on a prior enjoyment of economic and socio-cultural rights. Muzafar noted this approach was to eliminate the factor of discrimination from society and to guarantee fundamental rights to equal treatment irrespective of caste, creed and sex, enforceable by the state through administrative law.¹⁰² This was akin to the reasoning behind the post-apartheid constitution of South Africa which considered the availability of administrative justice for its citizens as one of the foremost civil liberties.¹⁰³ He stated, “there is constitutional assurance for equal treatment and for providing equal opportunities to the citizens. Reflection of legitimate expectation forms part of the principle of non-arbitrariness under Article 14, and it becomes an enforceable right in case of failure of the State or its instrumentality to give due weight to it”.¹⁰⁴

Through both approaches, the Indian Supreme Court ensured that directive principles provisions were protected as legitimate expectations and therefore upheld as human rights. The earliest decision to witness the test of the concept was in *State of Kerala v. K.G. Madhavan Pillai*.¹⁰⁵ A government sanction issued to respondent to open a new un-aided school to upgrade the existing ones was abruptly suspended. The court held the earlier order created a legitimate expectation on grounds of natural justice. In *Navjyoti Coop. Group Housing v. Union of India*,¹⁰⁶ the test of arbitrariness was established as a ground for invoking legitimate expectation. The court held it imposed a duty on public authority to act fairly, taking into consideration all relevant factors before effecting a change in its policies, especially where such change would affect a person who had been a beneficiary of the continuing policy.¹⁰⁷

Significantly, the Indian legal system expects the government, officials, and other agencies to honour promises, statements of policy and intention. Any unfairness in the form of unreasonableness was considered akin to violation of natural justice.¹⁰⁸ In *Confederation of Ex-Service Men Associations v. U.O.*¹⁰⁹ the court affirmed under the doctrine of legitimate expectation, a person may have reasonable or legitimate expectation of being treated in a

¹⁰² Muzafar, S., supra, p. 135.

¹⁰³ Ikhariale, M.A., supra, p. 1.

¹⁰⁴ Muzafar, S., ibid, p. 135.

¹⁰⁵ (1988) SCR Supl (3), p. 94

¹⁰⁶ (1992) 4 SCC, p. 477.

¹⁰⁷ ibid., p. 494.

¹⁰⁸ Pandey, B. N., ‘Doctrine of Legitimate Expectation’, *Ban LJ*, 31 (2002), p. 63; where he expressed this view as flowing from the legislative intention of Article 14 of India’s Constitution.

¹⁰⁹ (2006) SCC 1 AIR, p. 2945.

certain way by an administrative authority even though he has no legal right to receive the benefit. Conversely, where the decision of the public authority appears reasonable, the courts have not hesitated in holding it as correct. In *Food Corporation of India v. Kamdhenu Cattle Feed Industries*,¹¹⁰ while reversing earlier decision, the Supreme Court observed that legitimate expectation only falls under the rules of “arbitrariness”.¹¹¹ Relying on *E.C. Commission v. E.C. Council*,¹¹² the court held that the “tender could not be arbitrarily rejected, but that if the corporation reasonably felt that the amount offered by the respondent was inadequate as per the factors operating in the commercial field, the non-acceptance of bid could not be faulted”. A mere disappointment would not give rise to legal consequences.¹¹³ The concept operates only under public law but constitute a substantive and enforceable right in appropriate cases as held in *Punjab Communication v. Union of India*,¹¹⁴ the change in policy held neither irrational nor perverse; hence there was no violation of the claimant’s legitimate expectations.

The concept of legitimate expectation in India applies in a variety of ways to protect the fortitude of equality enshrined in the constitution, which thereby made the doctrine a ready vehicle to enforce a fundamental right.¹¹⁵ The concept gives a *locus standi* to a person to seek judicial review by challenging an administrative action and to have it quashed only if the decision is arbitrary, unreasonable or not taken in the public interest, and a failure to give a hearing to such affected person has resulted in failure of justice.

5. Conclusion

The overall analysis exposed divergent approaches adopted in selected climes to protect legitimate expectations. Though varying, the primacy administrative states attach to upholding the rule of law, ensuring consistency in exercise of discretion by public agencies is espoused. It portrayed that public authorities and government agencies are not allowed to frustrate the legitimate expectations they induce, irrespective of how they are couched in various constitutions and policy documents. This paper amplified the argument for a similar adoption in the Nigerian administrative law jurisprudence and justifies the views of scholars that the relevance of the concept of legitimate expectation in administrative law has not in any way been diminished by time. It is ultimately desired that the Nigerian administrative

¹¹⁰ (1993) 1 SCC, p. 71.

¹¹¹ *ibid.*, p. 1601.

¹¹² (1973) ECR, p. 575

¹¹³ In *Union of India v. Hindustan Development Corporation* (1993) 3 SCC 499, p. 540.

¹¹⁴ (1999) 4 SCC 727. See also *State v. W.B. Niranjan Singha* (2001) 2 SCC 326; where the court affirmed that legitimate expectation is based on the principle of arbitrariness as provided in Article 14 of the Constitution.

¹¹⁵ Muzafar, S., *supra*, p. 133.

justice system would emulate the adoption of the South African approach, making the concept of legitimate expectation a constitutional right. However, an interim remedy, as the Indian example would best serve the purpose to protect expectations of individuals, students in higher institutions and stakeholders. Also, such concept will ensure consistency and administrative coordination by government agencies in Nigeria.