

LEGITIMATE EXPECTATIONS - JUDICIAL CONTRIBUTION AND GLOBAL ASPECTS

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The Doctrine of Legitimate Expectation is not Statutorily enacted but it takes its form and enforces a distinct right for Judicial Review of a decision taken arbitrarily and this is how the requirement of due consideration of a Legitimate Expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the Rule of Law which must pass the test of reasonableness that pervades the Constitutional provision particularly with reference to Articles, 14, 19 and 21 of the constitution which manifest positive expression in the lofty ideals of Social and Economic Justice and inspires and animates the Directive Principles and where Article 14 strikes at arbitrariness in State action.

The concept of Legitimate Expectation has been recognised by Courts in India in *Nav Jyoti Co-operative Group Housing Society*¹. It was held that the Doctrine of Legitimate Expectation imposes in essence a duty on Public Authority to act fairly by taking into consideration all relevant factors relating to such Legitimate Expectations within the conspectus of fair dealing such as reasonable opportunity to make representation by the parties likely to be affected by any change of consistent past policy.

In *Food Corporation of India*² the Supreme Court held that consideration of Legitimate Expectation forms part of principle of non-arbitrariness under Art. 14 of the constitution as well as Rule of Law. It becomes an enforceable right in case of failure of state or its instrumentality to give due weight to its.

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¹ (1992-4-See 477 para 33 p. 546)

²(AIR 1993 SC 160)

In situations where even though a person has no enforceable right yet he is affected or likely to be effected by the order passed by a Public Authority, the Courts have evolved the principle of Legitimate Expectation. *UP Avas Evam Vikas Parishad*³ Vs *Gyan Devi*

In *National Building Constructions Case*⁴ it was held that Legitimate Expectation is a source of Procedural as well as Substantive right. The person seeking to accomplish the Doctrine must be aggrieved and must have altered his position. It was further observed that the Doctrine of Legitimate Expectation assures, fair play in Administrative action which may in a given case be enforced as a substantive right whether or not an Expectation is Legitimate is a question of fact and clear statutory words override the Legitimate Expectation. *Dr. Chanchal Goyal*⁵ Vs *State of Rajasthan*.

The claim based on Legitimate Expectation can be sustained and the decision resulting in denial of such Expectation can be questioned provided the same is found to be Unfair, unreasonable, arbitrary and violative of principles of Natural Justice. In *Food Corporation Case*⁶ the observations of the Supreme Court would connote that Legitimate Expectation by itself does not furnish a cause of action but if its denial results in executive action which can be labelled as Unfair, Unreasonable, arbitrary and violative of principles of Natural Justice it can be challenged in Court Judicial Review sought.

The Doctrine of Legitimate Expectation is applied by Courts for review of Administrative action/law. Administrative action is liable to be controlled by Judicial Review in three parts.

- Illegality where the decision making authority has been guilty of an error of law e.g. by purporting to exercise a power it does not possess.
- Irrationality, where the decision making authority has acted so unreasonably that no reasonable authority would have made the decision.
- Procedural impropriety where the decision making authority has failed in its duty to act fairly.

The Courts expect Government Departments to honour their published statements or else to treat the citizen with the fullest personal consideration, Unfairness in the form of

³ (1995(2) SCC 326 para 41 P 341.

⁴(AIR 1998 SC 2776)

⁵ (2003) 3 SCC 485 para 23 p 501.

⁶(AIR 1993 SCW 1509)

unreasonableness comes very close to unfairness in the form of violation of principles of Natural Justice and the Doctrine of Legitimate Expectation can operate in both contexts.

The Doctrine of Legitimate Expectation in the sense, imposing a duty to act fairly, cannot fetter discretion of Government in formulating a policy or procedure may possible need to change it but if the practice has been to publish the current policy, it would be incumbent as the Government to publish the new policy unless such publication would complicit with Government duty. If the policy change is required for National Security reasons, Government can certainly affect the change. If these reasons present the Government also from publishing the new policy, no doubt the Government can refrain from doing so. Even if Government has decided to keep the current policy but depart from it in a single case for National Security reasons these reasons can afford the Govt. a defence to Judicial Review.

In Srinivasa Theatre⁷ Vs Govt. of Tamil Nadu it was held that Legislation can not be invalidated on the basis of theory of Legitimate Expectation though the same may be invocable to invalidate Administrative action.

In Assistant Excise Commissioned⁸ V Issac Peter it was held that the Doctrine of Legitimate Expectation cannot be invoked to alter the terms of contract of statutory nature.

In Madras City Wine Merchants Association⁹ State of Tamil Nadu it was held that Legitimate Expectation does not arise where there is change in policy or in public interest, the position is altered by a Rule or Legislation where the applicant for an export license has no vested or accrued right to grant of license, the court would not bind the Government so its old policy by invoking the Doctrine of Legitimate Expectation *ITR Export Madras¹⁰ (P) Ltd V Union of India*.

At this stage it is necessary to consider the scope of Judicial Review when a challenge is made on the basis of the Doctrine of Legitimate Expectation.

In Findlay Vs Secretary of State for the Home Department¹¹ it was observed as under:

“The Doctrine of Legitimate Expectation has an important place in the Developing Law of Judicial Review. It is however not necessary to explore the Doctrine in this case, it is enough merely to note that a Legitimate Expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the Court to

⁷ (AIR 1992 SC 999)

⁸ (1994 (4) SCC 104 para 25 p 123)

⁹ 1994 (5) SCC 509 para 48 p. 535)

¹⁰ AIR 1996 SC 346

¹¹ (1984) 3 All ER 801)

apply for Judicial Review. These two applicants obtained leave. But their submission goes further. It is said that the refusal to accept them from the new policy was an unlawful act on the part of the Secretary of State in that his decision frustrated their expectation. But what was their Legitimate Expectation? Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever policy the state sees fit to adopt provided always that the adopted policy is a lawful exercise of the discretion conferred on him by the statute. Any other view would entail the conclusion that the unfettered discretion conferred by the statute on the Minister can in some cases be restricted so as to hamper, or even prevent, change of policy. Bearing in mind the complexity of the issues which the Secretary of state has to consider and the importance of the Public Interest in the administration of parole, I cannot think that parliament intended the discretion to be restricted in this way.”

The Government cannot act in a manner which would benefit a private party at the cost of the State and there is no escape from the constitution. Whatever the practices and principles followed, the public interest being of paramount consideration, all actions of the Government have to undergo acid test under the parameters of Art. 14. Departure from the established rules can be made in exceptional cases which need to be recorded, justified and pass the test of Judicial Review.

Considering various decision of the Supreme Court it is warranted to follow the dos and don'ts necessary to comply with the dictates of Art. 14.

- State to eschew Arbitrariness & follow rules of Fair Play & Natural Justice
- State action to be free of Bias, ill will and Nepotism
- State decisions must be formed by reason, be reasonable and rational
- State to act in National Interest
- State to act on norms set by it and justify deviations
- State acts to be bonafied, clean and honest.
- State actions must satisfy the test of Non-Arbitrariness

It is to be clearly understood that any deviation would attract control by exercise of Judicial Review.

Based on the writings of commentators and relevant case law of the International Court of Justice, a policy can be said to have “Legitimate Expectation” within the meaning of the International Rule when all of the following elements are present:

- The conduct of authorized representatives of the Second Party creates expectations on the part of the First Party.
- Those expectations are reasonable and justifiable (and thus legitimate) in the light of the nature of that conduct and other relevant circumstances.
- The First Party acts in reliance on the conduct of the Second Party and
- For the Second Party not to continue to honour those Legitimate Expectations i.e to change its conduct, would result in damage to the interests of the First Party.

This rule is variously referred to as “Justified Reliance”, “Estopped”, Deemed/implicit agreement etc. Regardless of what it is called, legal commentators agree that it falls under the broader heading of “Good Faith interpretation and/or application” of a Treaty.

There is no world Government as suggested by Bertrand Russel, still, interactive exchange of goods and services is taking place across land, sea, Air and Cyberspace and these international transactions are characterized by order, stability and predictability.

Thomas G Weiss and Ramesh Thakur in *Global Governance and the UN : An unfinished Jourvag* (2010) have studied the concept Global Governance over decade and a half and found that UN's¹² work has always been developed to improving the way that international society operates.

The birth of the term Global Governance can be traced to the 1992 publication of James Rosenau and Ernst Otto Czeenpiel's theoretical collection of Essays- *Governance without Government*. Besides, UN's role in Global Government it examines the UN's intellectual and operational contributions.

Host of member States/different actors come together in predictable and unpredictable ways in international attempts to address transboundry problems the role of Member States – The first UN, The world Body's professional Secretariats – The Second UN and the UNIHP – The third UN.

The UN is comprised of such non-state actors as nongovernmental organizations (NGO), Academics, Consultants, Experts, Independent Commission and other groups of individuals who routinely engage with the first and the second UNs and thereby influence the world body's thinking, policies priorities and actions.

¹²Thomas G Weiss and Ramesh Thakur in *Global Governance and the UN : An unfinished Jourvag* (2010)

Traditionally Governance has been associated with Governing or with political authority, institutions and ultimately control. In recent years scholars have used Governance to denote the regulation of interdependent relations in the absence of overarching political authority, such as the international system.

Global Governance can thus be defined as the sum of laws, Norms, Policies and institutions that define, constitute and mediate trans border relations between states, cultures, citizens intergovernmental and nongovernmental organization, and the market. It embraces the totality of institutions, policies, rules, practices, norms procedures and initiative by which States and other citizens try to bring more predictability, stability and order to their responses to transnational challenges – named by Kafi Annam as “Problems without Passport”.

United Nations, by its policy formulation, fills up the Gaps in the world wide manifestations of the Doctrine of Legitimate Expectations by filling up Gaps.

Large majorities around the world endorse a stronger role for the United Nations. They support giving the UN a variety of Expanded Powers including having a standing peacekeeping force, the Authority to investigate Human Rights Violations, and the Power to Regulate the International Arms Trade.

In Global Governance and the UN, Weiss and Thakur identify five gaps between the nature of many current global challenges and available inadequate solutions. These gaps pertain to Knowledge, Norms, Policy, Institutions and Compliance.

The United Nations is the most universal and legitimate organization with the greatest potential to oversee worldwide development and implementation of the Doctrine of Legitimate Expectation with a view to fill up gaps pertaining to Knowledge, Norms, Policy, Institutions and Compliance in equitable uniformity to ensure interstate harmony and development, trade and transportation of technology.

Thus United Nations is the nodal point of multilateral diplomacy and collective action to solve problems shared by many Countries mandating Good Governance implying optimal partnership between diverse types of actors operating at Local, National, Regional and Global leads.