
ESTOPPEL AND SUBSTANTIVE LEGITIMATE EXPECTATION - PARALLEL DOCTRINES IN PUBLIC LAW?

1. Introduction

Estoppel¹ is premised on the notion that justice prevails over truth. Thus, a person who makes some statement or representation which induces another to act to his detriment in reliance on the truth of the statement or representation, is not allowed to later deny the truth of it, notwithstanding that the same may have been wrong. The recent decision in *Boustead Trading (1985) Sdn. Bhd. v Arab-Malaysian Merchant Bank Bhd.*² depicts the giant stride made by estoppel in private law. In the realm of public law, however, estoppel has only succeeded in finding a limited niche. On the other hand, public law in England and Malaysia have witnessed the emergence of a new doctrine, hailed as substantive legitimate expectation. The purpose of this paper is to examine the ambit of the operation of both these doctrines in public law and to highlight the parallels that appear between them.

¹*Coke on Littleton* has defined three kinds of estoppel, i.e., estoppel by record (which corresponds in modern times to *res judicata*), estoppel in writing (which corresponds to the modern estoppel by deed) and estoppel in pais (which corresponds to common law estoppel by representation). Coke's third classification of estoppel has given rise to another species of estoppel, known as equitable or promissory estoppel. The main difference between common law estoppel and equitable estoppel is that the former relates to a representation as to an existing fact whilst the latter arises out of an assurance as to the future. In this paper, references to estoppel are confined to equitable or promissory estoppel.

²[1995] 3 MLJ 331.

2. Estoppel and Public Law

(a) The Role of Estoppel in Ensuring Good Administration

In the context of public law, it is a public body or an official in its employ who makes the statement or representation, either to a specific individual or more generally to a group of individuals, that is, by way of formal policy statements or published criteria. In such situations, if the public body is allowed to resile from its representations, it would threaten the trust placed by the citizens in the promises made by the government. Given that estoppel strives to ensure some degree of accountability on the part of the maker of such representations, it is an ideal principle to assist the courts in the protection of the people's trust in the government and to ensure good, fair and reliable administration.

In India, the Supreme Court has, in *Motilal Padampat Sugar Mills v State of Uttar Pradesh*³ and a series of other decisions,⁴ applied the doctrine of estoppel against the government on the rationale that if the government makes a promise and some individual acts upon the promise and alters his position, there is no reason why the government should not be compelled to make good such promise like any other individual. The Supreme Court reasoned in *Motilal Padampat*, that if the government did not wish to have its freedom of action curtailed or restricted, it should simply forbear from making promises or assurances to the people. Thus, in India, the judiciary has utilized the doctrine of estoppel as a means of imbuing official pronouncements with legal significance. The judicial stance in England and Malaysia differs

³AIR 1979 SC 621.

⁴*Union of India v Anglo-Afgan Agencies Ltd* AIR 1968 SC 718; *Century Spinning & Mfg Co v Ulhasnagar Municipality* AIR 1971 SC 1021; *Asst Commr, Commercial Taxes v Dharmendra Trading Co* AIR 1988 SC 1247; *Gujarat State Financial Corp v Lotus Hotels Ltd* AIR 1983 SC 849; *Amrit Banaspati Co Ltd v State of Punjab* (1992) 2 SCC 414. For a fuller exposition of the law on promissory estoppel in India, see Jain, *A Treatise on Administrative Law II*, Chapter XXII; Jain, *The Evolving Indian Administrative Law*, pages 135-162 (1983); Jain, *Cases IV*, Chapter XXI.

radically. The courts in England and until very recently⁵ in Malaysia, have demonstrated an acute reluctance to admit the doctrine of estoppel into public law, save in very limited instances.

(b) The Limited-Estoppel Rule in England

Numerous reasons have been given by the courts in England for the very limited role accorded to estoppel in the realm of its public law. Firstly, it has been held⁶ that estoppel has no application where the representations made are *ultra vires* the powers of the public body on the ground that estoppel cannot be permitted to enlarge the powers of public bodies beyond that which has been prescribed by legislation. No quarrel can be had with this view. There is no denying that if estoppel is successfully invoked to uphold representations which are *ultra vires* the powers of public bodies, it would annihilate the much treasured and cardinal doctrine of *ultra vires* on which pivots judicial review of administrative action. Even a remote possibility of this occurrence is anathema to almost all public law academicians.⁷ Secondly, it has been held that estoppel cannot operate to prevent the performance by the public body of its statutory duties.⁸

The above rationale for the no-estoppel rule disappears where the representations made are *intra vires* the powers of the public body. However, in these instances the courts have founded their refusal to allow the operation of estoppel on the rationale that the estoppel doctrine conflicts with two other entrenched public law principles, namely that neither the statutory discretion of public bodies⁹ nor the ministerial

⁵*Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1.

⁶Per Lord Greene M.R. in *Minister of Agriculture and Fisheries v Hulkin*. This unreported decision is cited in *Minister of Agriculture and Fisheries v Mathews* (1950) 1 K.B. 148.

⁷For the interesting and unique proposition why estoppel should be allowed even in respect of representations which are *ultra vires* the powers of a public body, refer to P.P. Craig, *Representations by Public Bodies* (1977) LQR (Volume 93) 398.

⁸*Maritime Electric Co. v General Dairies Ltd* (1937) AC 610.

⁹*Southend-on-Sea v Hodgson (Wickford) Ltd.* (1962) 1 Q.B. 416; *Rootkin v Kent County Council* (1981) 1 WLR 1186.

freedom of the government to formulate and re-formulate policies¹⁰ is to be fettered. Essentially therefore, the issue trickles down to the perennial problem of two competing notions: on one hand, the freedom of public authorities to change their policies and on the other, the need to protect the ordinary citizen's faith and trust in the assurances made by the public authorities or the officials in their employ. Suffice to say, the judicial attitude as reflected in the above mentioned cases favour the former and not latter notion.

Lord Denning, throughout his judicial career, sought valiantly to break away from such a rigid stance and to invoke estoppel in the public law of England as a method of attaching legal weight to assurances made by public officials. In *Robertson v Minister of Pensions*,¹¹ Denning J. (as he then was) had the occasion to consider the effect of representations made by a public official, who although *unauthorized* to make the same on behalf of the public authority, has held himself out to have such authority. His Lordship held that a public body was bound to honour the representations made by officials who had either the actual or ostensible authority to make the same. In this regard, his Lordship remarked:

The Crown cannot escape by saying that estoppels do not bind the Crown for that doctrine has long been exploded ... In my opinion if a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know and cannot be expected to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent for the Crown, it binds the Crown also.¹²

A year or so later, in *Falmouth Boat Construction Ltd. v Howell*,¹³ Denning LJ (as he then was) applied the same principle and held that permission to effect certain repairs, granted by a licensing officer who

¹⁰Per Lawton J. in *Laker Airways Ltd. v Dept of Trade* (1977) Q.B. 643.

¹¹(1949) 1 K.B. 227.

¹²*Ibid*, at pages 231-232.

¹³(1950) 1 All ER 542.

in fact had no authority to grant it, was nevertheless binding on the government department concerned. When the decision went up on appeal to the House of Lords, some of the Law Lords expressed their disapproval of Denning L.J.'s approach. Lord Simonds countered vehemently that he knew 'of no such principle in our law nor was any authority for it cited.'¹⁴ Similar views were adopted in *Att-Gen for Ceylon v Silva*¹⁵ and *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd.*¹⁶ The decisions in the *Howell*, *Silva* and *Hodgson* cases are said to have heralded 'the end of the *Robertson v Minister of Pensions* era'.¹⁷

Lord Denning, undeterred by the above decisions, persevered to carve exceptions for the operation of estoppel in public law. In *Wells v Minister of Housing and Local Government*,¹⁸ Lord Denning decided as part of the majority in the Court of Appeal, that estoppel may be raised to bind a public authority to representations made by an official in its employ where the same pertained to a waiver of a defect or irregularity in procedure. Then again, in *Lever Finance Ltd. v Westminster (City) L.B.C.*,¹⁹ Lord Denning held that where there was an *established practice* by the public body of allowing its officers to make the representations in question, it would be bound by such representations. This decision is clearly in conflict with the decision of the House of Lords in *Howell* and notwithstanding the good intentions of Lord Denning, the fundamental issue of when public officials were bound by their assurances to the citizen became riddled by uncertainty. This confusion was resolved eventually by the Court of Appeal in *Western Fish Products Ltd v Penwith District Council*.²⁰ It was held that the strict no-estoppel in public law was subject to the following

¹⁴*Howell v Falmouth Boat Construction Co. Ltd* (1951) AC 837, at page 845.

¹⁵(1953) AC 461.

¹⁶*Supra*, note 9.

¹⁷MA Fazal, *Reliability of Official Acts and Advice* (1972) PL 43, at page 44.

¹⁸(1967) 1 WLR 1000.

¹⁹(1970) 3 WLR 732.

²⁰(1981) 2 All ER 204.

exceptions: firstly, estoppel may be raised to bind a public authority to representations made by an official in its employ if the public authority had the statutory power to delegate functions to its officials and there were special circumstances to justify the individual in thinking that the official thus had the authority to bind the public authority irrevocably and secondly, where the representations by the official were in respect of a waiver of a defect or irregularity in procedure. This decision reflects an effort by the Court of Appeal, to accommodate to some extent, the persistent views of Lord Denning on the question of the reliability of assurances made by public officials. To sum it up, the concerted efforts of Lord Denning to invoke estoppel in the public law of England, has been reduced by his brethren and is currently confined to the two exceptions enumerated in *Western Fish Products Ltd.*

(c) The Limited-Estoppel Rule in Malaysia

The judicial stance in England regarding the operation of estoppel in public law is echoed closely in Malaysia. The Federal Court has, in *Public Textiles Berhad v Lembaga Letrik Negara*,²¹ held that estoppel cannot be raised against a public body in respect of representations which are *ultra vires* its powers, or to prevent it from exercising either its statutory duty or discretion. Several years later, in *The Government of the State of Negeri Sembilan v Yap Chong Lan & 12 Ors*,²² the Federal Court, having reiterated that the doctrine of equitable estoppel applies only to private and not public law, went on to refer to the limited exceptions outlined in *Western Fish Products Ltd* with implicit approval.²³

A relaxation of this somewhat rigid stance may be gleaned from the very recent decision of the Federal Court of Malaysia in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*.²⁴ In this case, the local authority

²¹(1976) 2 MLJ 58.

²²(1984) 2 CLJ 150.

²³*Ibid*, at pages 153 and 154.

²⁴*Supra*, note 5.

after having granted planning permission (valid for a year) for the proposed construction of low cost flats, granted an extension of the same subject to an additional condition which required the applicant to sell 30% of the flats below the sum of RM25,000 per unit (the disputed condition). The imposition of the disputed condition was challenged by way of *certiorari* by the applicant. One of the arguments advanced by the applicant was that the local authority could not resile from its earlier and categorical representation that the pricing of the units was a domestic matter for the applicant since the applicant had, relying on such representation, gone ahead to sell several of the flats at a higher price. The Federal Court found in favour of the applicant and issued an order of *certiorari* quashing the entire extension of planning permission which had been given subject to the disputed condition. One of the grounds given by the Federal Court in support of its decision was that the local authority was estopped from imposing the disputed condition after having made a representation to the contrary effect. In the course of arriving at its decision, the Federal Court whilst acknowledging the existence of the no-estoppel rule in public law, nevertheless proceeded to hold the local authority estopped on the facts of the instant case. Edgar Joseph Jr FCJ referred to the following passage from the judgment of the Court of Appeal with approval:

The Respondent's Council's decision of the 14th February 1992 was a clear unambiguous representation that the Appellant was not pegged to selling its units at prices not exceeding RM25,000. The Appellant relied on the representation and in accordance with its internal procedures fixed the new prices at which the units would be sold and proceeded to sell them. Since the Respondent was fully aware of these prices and had stated a Council's decision that the prices were an internal matter for the Appellant we are of the view that the Respondent was not entitled to change its decision so as to adversely affect the claimant. **There is an estoppel here.**²⁵ (emphasis own)

One striking and indeed remarkable aspect of this decision begs mention. Quite apart from quashing the extension and remitting the matter to

²⁵*Supra*, note 5, at page 65. Refer also to the decision of the Court of Appeal (1996) 2 MLJ 697, at page 738.

the local authority for re-consideration and re-determination, the Federal Court wisely forestalled any future attempt by the authority to re-impose the disputed condition by making a consequential order that the disputed condition could not be imposed upon re-consideration. The consequential order reveals the determination of the Federal Court to hold the local authority to its earlier representation to the applicant.

Some may try to dilute the impact of this decision with the argument that the ruling on estoppel by the Federal Court is limited to planning permissions. However, the fact remains that notwithstanding the Federal Court's acknowledgement of the existence of the general principle of public law that the statutory discretion of a public body cannot be fettered, it quite readily proceeded to engraft an exception upon this principle. The willingness on the part of the highest court in this land to shift from its earlier rigid stand is encouraging and may augur new horizons for the operation of estoppel in Malaysian public law. It is submitted that there is room now for the argument that other exceptions to the no-estoppel rule ought similarly to be countenanced, if and when, the circumstances of the case and justice, require it.

(d) The Parameters of Estoppel in Public Law

In the limited instances where estoppel has been held to apply in the public law of England and Malaysia, the courts have outlined certain parameters for its operation. Firstly, as has been mentioned earlier, estoppel can only be invoked in respect of representations which are *intra vires* the powers of the public body and in situations falling within the ambit of the exceptions in *Western Fish Products Ltd.* Secondly, the doctrine cannot be invoked where there are overriding public interests.

In so far as the ingredients of the doctrine are concerned, a marked distinction emerges between estoppel in public and private law. In the context of the latter, estoppel has been freed from its traditional detriment requirement.²⁶ On the contrary, in the context of public law, the courts have adhered to the traditional three-fold requirement of

²⁶*Supra*, note 2. Refer to the judgment of Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn. Bhd. v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

representation, reliance and detriment. In particular, it is significant to note that the Federal Court in *Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* made references to the existence of a *clear, unambiguous representation* by the local authority, a *reliance* on such representation by the applicant and the applicant being *adversely affected* as a consequence. It is difficult to envisage the possibility of the detriment requirement of estoppel being discarded in the context of its operation in Malaysian or English public law since it would be difficult to justify binding a public body to an earlier representation or fettering it from changing an earlier policy purely to accommodate an individual who has suffered no detriment whatsoever.

At this juncture, it is also interesting to note that where estoppel is raised against a public body, it inevitably serves to equip the affected individual with a cause of action against the public body. Thus, the doctrine of estoppel in public law operates as a sword to combat the misuse of administrative power through unfair changes in policy or renunciation of representations. This is precisely the role envisaged and indeed fashioned for estoppel in private law by Gopal Sri Ram JCA in *Boustead Trading*.

3. The Emerging Doctrine of Substantive Legitimate Expectation

(a) The Distinction between Procedural and Substantive Legitimate Expectation

The protection of legitimate expectations is a principle fundamental to European Community Law. There are two dimensions to the doctrine of legitimate expectation, one procedural and the other substantive. At the very outset, it is necessary to draw a distinction between the two.

In its procedural dimension, this doctrine serves to protect two different types of expectation in two altogether distinct instances. The first is where a public body has led a person legitimately to expect that a certain state of affairs would continue and that the same would not be discontinued without the individual being given the opportunity to be heard on the matter.²⁷ In this instance, the expectation of the individual

²⁷*AG of Hong Kong v Ng Yuen Shiu* (1983) 2 AC 629; *Council of Civil Service Union v Minister for Civil Service* (1985) AC 374.

is that he would have the opportunity to be heard and the doctrine protects such an expectation by insisting that the public body give the affected individual the expected opportunity to be heard. The second is where the public body has led a person legitimately to expect a particular benefit or that a particular procedure will be followed *without* creating the expectation of an opportunity to be heard.²⁸ In this second instance as well, the doctrine protects the individual's expectation of the particular benefit or procedure by insisting that such expectation is not to be dashed by the public body without first affording him the opportunity to be heard. It is significant to note that although the nature of the expectations differ in the two instances, the protection afforded in both is one and the same, i.e., procedural protection in the guise of an opportunity to be heard, hence the term *procedural legitimate expectation*. Procedural legitimate expectation is today, fully accepted both in English²⁹ and Malaysian³⁰ public law as a principle governing the exercise of discretion by public bodies.

In contrast, where substantive legitimate expectation is relied upon, the affected person is not content to be given bare procedural protection in the form of an opportunity to be heard. After all, there is nothing to prevent the public body from going through the motions of hearing without paying actual heed to the representations made by the individual. The individual, therefore, demands something more, i.e., he demands the actual substantive benefit which he legitimately expected from the public body or to put it simply, the individual seeks the substantive protection of his expectation, hence the term *substantive legitimate expectation*.

Clearly, the doctrine of substantive legitimate expectation is more controversial than procedural legitimate expectation. When an individual relies on procedural legitimate expectation, he is merely seeking an opportunity to be heard. In contrast, when an individual relies on the

²⁸*Schidmt v Secretary of State for Home Affairs* (1969) 2 Ch 149; *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association* (1972) 2 Q.B. 299.

²⁹*Ibid.*

³⁰*John Peter Berthelsen v Director General of Immigration* [1987] 1 MLJ 134; *Lee Freddie v Majlis Perbandaran Petaling Jaya* [1994] 3 MLJ 640.

doctrine of substantive legitimate expectation, he is in effect attempting to tie the public body to the terms of some earlier policy statement or published criteria, not unlike the doctrine of estoppel.

(b) The Emergence of the Doctrine of Substantive Legitimate Expectation in England

In England, the doctrine of substantive legitimate expectation has gained prominence in the context of situations where the public body, by adopting a new policy, dashes the expectations of those relying on the continued application of an earlier policy. An argument based on the substantive protection of legitimate expectations in such situations comes into direct conflict with the principle that the freedom of a public body to formulate and re-formulate policy cannot be fettered. For this reason, the doctrine has generated great controversy in England and there is a cleavage in judicial opinion, both at the High Court and Court of Appeal stages, on whether legitimate expectation does indeed have a substantive impact.

The first inkling that the courts in England would be willing to countenance the doctrine of substantive legitimate expectation appeared in *R v Secretary of State for the Home Department, ex parte Khan*,³¹ although admittedly, the case did not refer specifically to the substantive impact of the doctrine as such. In this case, a Home Office circular specified the criteria which had to be met before a child would be granted the right of entry into England for purposes of adoption. The applicant and his wife who were settled in England wished to bring a relative's child into the country to be adopted by them. Although they had complied with all of the requirements in the circular, the Secretary of State refused entrance to the child on a completely different and more onerous set of criteria. The Court quashed the refusal of the Secretary of State on the ground that the applicants, having fulfilled the criteria in the circular, had a legitimate expectation that the child would be given the right of entry into the country, which expectation should not be denied 'without affording the interested persons a hearing

³¹(1984) 1 WLR 1337.

and then only if the overriding public interest demands it'.³² (Emphasis own).

The criterion stipulated in the above dictum of Parker L.J. comprises *two* parts. The first part with its requirement of hearing affords procedural protection of the expectations of the applicants in the instant case whilst the second part with the *additional* requirement that overriding public interest warrants the departure from the pre-existing policy affords their expectations a substantive protection.³³ Thus, it is submitted that Parker L.J. implicitly endorsed the operation of the doctrine of substantive legitimate expectation in English public law.

The judgment of Taylor L.J. in *R v Secretary of State for the Home Department, ex parte Ruddock*,³⁴ unlike that of Parker L.J. in *ex parte Khan*, is more explicit on the availability of the doctrine of substantive legitimate expectation in public law. In the instant case, the Secretary of State had published the criteria for telephone surveillance. The applicant challenged the issue of the warrant by the Secretary of State to have the applicant's telephone tapped on the ground that he did not fall within the ambit of the published criteria. The applicant argued that he had a legitimate expectation that the criteria would be faithfully followed. It is pertinent to note that the applicant in question was not claiming that he should have been given an opportunity to be heard before the warrant to tap his telephone was issued. Rather, he was claiming the *substantive benefit* that his telephone would not be tapped. One of the central arguments thus pivoted on the issue of whether the doctrine of legitimate expectation had a substantive impact or if it was to be confined to its procedural context.

Taylor J. took the view that the doctrine was not confined to conferring purely a procedural benefit. In this context, the learned judge stated:

³²*Ibid* at page 1344.

³³C.F. Forsyth, *The Provenance and Protection of Legitimate Expectations* [1998] CLJ 238; P.P. Craig, *Substantive Legitimate Expectations in Domestic and Community Law* [1996] CLJ 289; Refer also to the views of Sedley J in *R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* (1995) 2 All ER 714, at page 731.

³⁴(1987) 1 WLR 1482.

...I conclude that the doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned...with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where *ex hypothesi* there is no right to be heard, it may be thought the more important to fair dealing that *a promise or undertaking given by a minister as to how he will proceed should be kept*.³⁵ (emphasis own)

Notwithstanding that the argument of legitimate expectation did not succeed on the factual merits of the instant case, it is clear that Taylor L.J. accepted in principle the operation of the doctrine of substantive legitimate expectation in public law.

A similar view is apparent from the judgment of Bingham L.J. in *R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd.*³⁶ After articulating the various requirements that have to be fulfilled before a tax-payer could rely on the doctrine of legitimate expectation based on informal representations made directly by the Revenue Department, the learned judge went on to remark:

In so stating the requirements I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness.³⁷

Then again in *R v Devon C.C. ex parte Baker*,³⁸ Simon Brown L.J. held that the doctrine of legitimate expectation had not only a procedural but substantive impact as well. In *R v Ministry of Agriculture Fisheries*

³⁵*Ibid*, at page 1497.

³⁶(1990) 1 All ER 91.

³⁷*Ibid*, at pages 110 and 111.

³⁸(1995) 1 All ER 73.

and Food, *ex parte Hamble (Offshore) Fisheries Ltd*,³⁹ Sedley J. appeared to take the view that a policy maker could by the terms of its policy, in appropriate cases, be regarded as having induced the legitimate expectation of an individual and that a subsequent change in policy could be challenged by way of judicial review on the basis of the doctrine of legitimate expectation. In this context, the learned judge stated:

...the real question is one of fairness in public administration. It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take a particular step.⁴⁰

At another juncture of his judgment, Sedley J. clarified that where the change in policy is reviewed by the court in judicial review proceedings, the court's criterion was *not the bare rationality* of the policy-maker's conclusion and its task was not only to recognise the constitutional importance of the ministerial freedom to formulate and reformulate policy but also to protect the interests of those individuals whose expectations of a different treatment had a legitimacy which in *fairness* outweighed the policy choice which threatened to frustrate it.⁴¹

It is pertinent to note that Sedley J. correctly drew a distinction between the concepts of fairness and rationality of the policy-maker's decision. Judicial review premised on the doctrine of substantive legitimate expectation evaluates the fairness of a decision to implement a policy change unlike the *Wednesbury* unreasonableness ground which merely protects the individual against an irrational policy change. It is submitted that irrationality as a ground of judicial review cannot suffice to protect an individual whose interests are adversely affected by a policy change since in most situations the same may well be justifiable

³⁹(1995) 2 All ER 714.

⁴⁰*Ibid*, at page 724.

⁴¹*Ibid*, at page 731.

on rational grounds. It is important therefore that the individual is able to argue successfully that any policy change must be carried out in a manner which is *fair* to him.

There is, on the other hand, the diametrically opposite view that legitimate expectation is to be confined to its procedural dimension and that any substantive protection to be accorded to the legitimate expectations of individuals rests on the *Wednesbury* unreasonableness ground. In *R v Secretary of State for Transport, ex parte Richmond L.B.C.*,⁴² Laws J. stated that 'there is no case ...in which it has been held that there exists an enforceable expectation that a policy will not be changed even though those who have been affected have been consulted about any proposed change.'⁴³ The learned judge opined that it is 'misleading'⁴⁴ to describe the type of situations as exemplified by either *ex parte Ruddock* or *ex parte Khan* as one of substantive as opposed to procedural expectations. The judge however conceded that it was open to the aggrieved individual to 'assert that a change in policy must not transgress *Wednesbury* principles.'⁴⁵

Similar views were put forward by the Court of Appeal in *R v Secretary of State for the Home Department, ex parte Hargreaves*⁴⁶ and *R v Inland Revenue Commissioners, ex parte Unilever*.⁴⁷

In *ex parte Hargreaves*, the court overruled the approach taken by Sedley J. in *ex parte Hamble (Offshore) Fisheries Ltd.* Hirst L.J. was of the view that 'On matters of substance (as contrasted with procedure) *Wednesbury* principles provides the correct test'.⁴⁸ Pill L.J. stated that:

The court can quash the decision only if, in relation to the expectation and in all the circumstances, the decision to apply the new policy in the particular case was unreasonable in the *Wednesbury* sense ...The claim to a broader power to judge the fairness of a decision of substance, which I understand Sedley J. to be making in *R v Ministry*

⁴²(1994) 1 WLR 74.

⁴³*Ibid.*, at page 93.

⁴⁴*Ibid.*, at page 92.

⁴⁵*Ibid.*, at page 94.

⁴⁶(1997) 1 WLR 906.

⁴⁷(1996) STC 681.

⁴⁸*Supra*, note 46, at page 921.

of Agriculture, Fisheries and Food, Ex parte Hamble (Offshore Fisheries Ltd is in my view wrong in principle.⁴⁹

From the foregoing, it becomes apparent that the area of law pertaining to the doctrine of substantive legitimate expectation is bedevilled with conflict.⁵⁰ Notwithstanding, several eminent jurists on public law⁵¹ maintain their stand that the legitimate expectations of individuals aroused by the assurances of a public body ought to be protected on the wider basis of fairness and not merely on the ground of irrationality.

(c) The Emergence of the Doctrine of Substantive Legitimate Expectation in Malaysia

In Malaysia, the doctrine of substantive legitimate expectation has arisen to-date in a less controversial context. None of the cases involved a policy change by a public body. In *Majlis Perbandaran Seberang Perai v Tropiland Sendirian Berhad*⁵² and *Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor v Majlis Perbandaran Pulau Pinang*,⁵³ the issue arose in the context of conditions imposed by the local authority in the course of granting planning permissions. In *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang*,⁵⁴ the issue was whether the employees of a public body had a legitimate expectation in respect of certain terms of employment. In all of the aforesaid cases, the Court of Appeal accepted in principle the operation of the doctrine of substantive legitimate expectation in Malaysian public law.

⁴⁹*Supra*, note 46, at pages 924-925.

⁵⁰The House of Lords in *R v Inland Revenue Commissioners, ex parte Matrix-Securities Ltd* (1994) 1 WLR 334 referred to requirements stipulated by Bingham L.J. in *ex parte MFK Underwriting Agencies Ltd* (*supra*, note 36) with approval. However, it is difficult to gauge with any certainty the stance of the Law Lords on this controversial doctrine.

⁵¹*Supra*, note 33.

⁵²(1996) 3 AMR 3101.

⁵³(1996) 2 AMR 1697.

⁵⁴(1997) 1 MLJ 241.

When the decision in *Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor* went up on appeal to the Federal Court, the opportune moment arose for the highest court in the land to deliberate on whether the doctrine of legitimate expectation had a substantive impact. One of the arguments relied on by the applicant in this case was that the representation of the local authority that the pricing of the flats was to be a domestic matter for the applicant operated to confer upon the applicant the substantive right to fix the prices beyond the limit that was subsequently imposed by the authority. The Federal Court, after referring to and carefully considering the conflicting judicial opinion in England on this issue, endorsed the view that legitimate expectation had a substantive impact. In this context, Edgar Joseph Jr. FCJ remarked:

For our part, we prefer the view of Simon Brown L.J. in *Ex parte Baker* and Sedley J. in *Ex parte Hamble* as we find the reasoning there more persuasive⁵⁵.

The view adopted by the Federal Court on the availability of the doctrine of substantive legitimate expectation is one which is progressive and in keeping with the spurt of judicial creativity recently witnessed in Malaysian public law. By endorsing the views of Sedley J in *ex parte Hamble (Offshore) Fisheries Ltd.*, the Federal Court has not only admitted this invaluable doctrine into the shores of Malaysian public law, but it has also premised the doctrine on the wider notion of fairness as opposed to the more limited one of irrationality. Premising the doctrine of substantive legitimate expectation on the concept of fairness sits well in Malaysian public law. Recently, the Court of Appeal⁵⁶ introduced the doctrine of substantive fairness, housed within article 8(1) of the Federal Constitution,⁵⁷ as a ground of judicial review of administrative action. Accordingly, it is only logical to accept the doctrine of legitimate expectation in its substantive dimension. In fact,

⁵⁵*Supra*, note 6, at page 59.

⁵⁶*Sugumar Balakrishnan v Pengarah Imigresen, Negeri Sabah* [1998] 3 MLJ 1.

⁵⁷Article 8(1) of the Federal Constitution provides that 'All persons are equal before the law and entitled to the equal protection of the law.'

it may be argued that the doctrine of substantive legitimate expectation is simply another facet of article 8(1) of the Federal Constitution.⁵⁸

Furthermore, by endorsing the views of Sedley J., the Federal Court has reserved for the courts in judicial review proceedings the power to determine the legitimacy of an expectation. This, according to Sedley J., will entail the court embarking upon on a balancing exercise: the importance of upholding the individual's expectation to be weighed against that of the general good of the public. Therefore, unless overriding public interests dictate otherwise, it is open to the courts to accept the expectation of the individual as legitimate and to uphold and protect such expectation by insisting that the public body exercise its discretion in a manner consistent with the assurances made in an earlier policy.

There is the view that Sedley J.'s approach will allow the courts to enter into the merits of governmental policies. It is submitted that this fear is ungrounded. Both the earlier and later policies are made by the public body. In requiring the public body to honour the terms of its earlier policy, the court is in no way concerned with the merits of either policy.

In any event, the decision of the Federal Court in *Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor*, to endorse the substantive impact of legitimate expectation is unsurprising in the light of its ruling on estoppel. A ruling that the local authority is estopped from imposing any ceiling on the price of the flats is tantamount to conferring upon the applicant the substantive right to price the flats as it thinks fit. The decision of the Federal Court thus clearly depicts that in the ultimate analysis, the effect achieved by both estoppel and substantive legitimate expectation is identical, that is, the public body is prevented from resiling from its representations. This striking parallel between the doctrines is difficult to ignore.

⁵⁸A more detailed discussion by this writer on the different facets of article 8(1) appears in *The New and Multi-Faceted Dimensions of Articles 5(1) and 8(1) of the Federal Constitution in the Control of Administrative Action* published in the 1999 issue of the *JMCL*.

(d) The Parameters of Substantive Legitimate Expectation

The parameters of this doctrine, being in its infancy stages, have yet to be defined with adequate clarity or consistency by the courts in England and Malaysia. Notwithstanding, the following observations have been made:

- (a) The expectation has to be legitimate, i.e., induced expressly by representations or implicitly by the settled past conduct or practice on the part of the public body;⁵⁹
- (b) The representations cannot conflict with a statutory duty of the public body;⁶⁰
- (c) The representations in respect of which the doctrine is sought to be invoked must be *intra vires* the powers of the public body⁶¹ and made by public officials with the actual or ostensible authority to do so;⁶²

⁵⁹*Ex parte Hamble (Offshore) Fisheries Ltd*, *supra*, note 39; *Ex parte Unilever*, *supra*, note 47. The Court of Appeal appeared to accept that in the 'exceptional' circumstances of the case, it would be an abuse of power to refuse to follow the past practice. It is pertinent to note that by contrast, estoppel can only arise out of representations and not merely past practice. In this respect therefore, the doctrine of substantive legitimate expectation is wider than estoppel. Refer also to a similar view expressed by Professor M.P. Jain in *MP Jain, Administrative Law of Malaysia and Singapore*, Third Edition, at page 527.

⁶⁰*Ex parte Ruddock*, *supra*, note 34, at page 1497; *Ex parte Hamble (Offshore) Fisheries Ltd*, *supra*, note 39, at page 728.

⁶¹The general tenor of the judgments in *Ex parte Ruddock*, *Ex parte MFK Underwriting Agencies Ltd* and *Ex parte Hamble (Offshore) Fisheries Ltd* suggest this. Refer also to the views expressed by Rabinder Singh, *Making Legitimate Use of Legitimate Expectation*, (1994) NLJ 1215.

⁶²*Ex parte MFK Underwriting Agencies Ltd*, *supra*, note 36; Note however that in *Ex parte Matrix-Securities Ltd*, *supra*, note 50, the House of Lords held the view that a representation may not be legitimately relied on where the body concerned had issued statements making it clear that another of its offices was the appropriate one to give a ruling and the tax-payer either knew of that or should have known of that.

- (d) The representations can be made to a specific individual or more generally to the public at large by means of a formal policy statement or published criteria;⁶³
- (e) Where representations are made by a public body to a specific individual, the same must be clear, unambiguous and devoid of relevant qualification and based on full disclosure by the individual;⁶⁴
- (f) The doctrine cannot be invoked successfully where there are overriding public interests;⁶⁵ and
- (g) It is not a strict requirement that the individual must have changed his position or acted to his detriment in order to obtain the benefit of the doctrine of substantive legitimate expectation.⁶⁶

⁶³*Ex parte Ruddock, supra*, note 34; *Ex parte MFK Underwriting Agencies Ltd, supra*, note 36.

⁶⁴*Ex parte MFK Underwriting Agencies Ltd, supra*, note 36, at pages 110 and 111.

⁶⁵*Ex parte Khan, supra*, note 33. In *Ex parte Hamble (Offshore) Fisheries Ltd*, Sedley J. remarked that the concept of legitimacy is not absolute and that the expectation must be one worthy of protection, i.e., it must outweigh public interest. His Lordship was of the view that where a policy change was challenged, it was the task of the court to determine the legitimacy of the expectation. As mentioned earlier, this approach by Sedley J. was overruled in *Ex parte Hargreaves*. However, in Malaysia, the Federal Court, has in *Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor*, endorsed Sedley J.'s views on substantive legitimate expectation.

⁶⁶*Ex parte MFK Underwriting Agencies Ltd, supra*, note 36, at page 110. The dictum of Bingham L.J. '*particularly if he acted upon it*' has been interpreted by some quarters as meaning that detriment is not a strict pre-requisite for invoking this doctrine, unlike that of estoppel. This view is shared by Professor M. P. Jain, *supra*, note 55. Note however that the Federal Court has, in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor*, required proof of detriment to the individual. A similar approach has also been expressed by Rabinder Singh, *supra*, note 57.

4. Parallels Between the Doctrines of Substantive Legitimate Expectation and Estoppel

Firstly, neither doctrine can be invoked successfully where the representations made are *ultra vires* the powers of the public body. Secondly, both doctrines must necessarily give way to overriding public interests. Thirdly, the ingredients of both doctrines are essentially the same. An individual who seeks to rely on either estoppel or substantive legitimate expectation has, in both cases, to prove a clear, unambiguous representation on the part of the public body and a reliance by him on such a representation to his detriment.⁶⁷ Fourthly, both doctrines equip the aggrieved individual with a cause of action against the public body. Fifthly, the ultimate effect achieved by both doctrines is the same, that is, the public body is prevented from resiling from its representations. Last but not least, the spirit underlying both doctrines are the same. In *Boustead Trading*, Gopal Sri Ram JCA premised estoppel on the invaluable notion of fairness. Likewise, substantive legitimate expectation has been pegged to the fairness tag. As mentioned earlier, in *ex parte Ruddock*, Taylor J. commented that “the doctrine of legitimate expectation in essence imposes a duty to act fairly”⁶⁸ whilst in *ex parte M.F.K. Underwriting Agents Ltd.*, Bingham LJ. remarked that “the doctrine of legitimate expectation is rooted in fairness”.⁶⁹

The parallels between the two doctrines may also be discerned from certain comments made by the judges in the following cases. For instance, in *ex parte Khan*, Parker L.J. remarked that the Secretary of State having induced the expectation that the circular advice would be followed could not “resile from that undertaking without affording interested persons a hearing and then only if the overriding public interest demanded it”.⁷⁰ It is submitted that the references to “inducing

⁶⁷Refer to the discussion in note 62. In Malaysia, the decision of the Federal Court in *Syarikat Bekerjasama-samu Serbaguna Sungai Gelugor* is authority that the ingredients of estoppel and substantive legitimate expectation are the same.

⁶⁸(1987) 2 All ER 518, at page 531.

⁶⁹(1990) 1 All ER 91, at page 111.

⁷⁰(1985) 1 All ER 40, at page 46.

of expectation", "undertaking" and "resile" smack clearly of the elements of estoppel. In fact, in *ex parte Hamble*, Sedley J. who had occasion to refer to *ex parte Khan* commented on the case, "*This is as near as public law is able to approach to estoppel...*".⁷¹ It has also been commented elsewhere that the arguments under the labels of estoppel and substantive legitimate expectation are substantially similar.⁷² Perhaps, the most telling of all is the decision of the Federal Court in *Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor*. In this case, the Federal Court deliberated on estoppel and substantive legitimate expectation separately. Yet, the court approved of one *specific passage* taken from the judgment of the Court of Appeal in the context of *both* estoppel and substantive legitimate expectation. The relevant passage is set out below:

Taking this concept (Legitimate Expectation) in the first sense the said planning permission granted the Appellant a substantive right. The Respondent's Council's decision of the 14th February 1992 was a clear unambiguous representation that the Appellant was not pegged to selling its units at prices not exceeding RM25,000. The Appellant relied on the representation and in accordance with its internal procedures fixed the new prices at which the units would be sold and proceeded to sell them. Since the Respondent was fully aware of these prices and had stated a Council's decision that the prices were an internal matter for the Appellant we are of the view that the Respondent was not entitled to change its decision so as to adversely affect the claimant. There is an estoppel here."⁷³ (emphasis own)

The above dicta of the Court of Appeal (with which the Federal Court concurred) begins with a discussion on substantive legitimate expectation only to halt at estoppel. This clearly depicts the close link

⁷¹*Supra*, note 15, at page 731.

⁷²Per Dillon LJ in *Oloniyi* (1989) Imm AR 135 referred to by Gummow J in *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93.

⁷³*Supra*, note 5, at page 58. Refer also to the decision of the Court of Appeal reported in [1996] 2 MLJ 697, at page 738.

between the two doctrines. Further, it becomes apparent from the above dicta that both the Court of Appeal and Federal Court endorse the view that the elements which give rise to substantive legitimate expectation could equally give rise to estoppel.

6. Conclusion

Notwithstanding that estoppel and substantive legitimate expectation are usually referred to and treated as distinct doctrines,⁷⁴ it is submitted that the close parallels between the two give room for the argument that they are in essence identical doctrines, albeit dressed in different garbs. At any rate, it cannot be denied that the distinction between both doctrines is miniscule, to say the least. It has been opined that the reasoning denying estoppel has all the beauty of logic and ugliness of injustice.⁷⁵ Perhaps, irrespective of the label given to it, the new doctrine of substantive legitimate expectation provides an escape from the estoppel straightjacket and goes some way towards restoring justice in public law.

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⁷⁴Per Dunn LJ in *ex parte Khan*, *supra*, note 31, at page 1352; per Sedley J in *ex parte Hamble (Offshore) Fisheries Ltd*, *supra*, note 39, at page 728; C.F. Forsyth, *The Provenance and Protection of Legitimate Expectations*, *supra*, note 33, at page 257; *Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor*, *supra*, note 5, where Edgar Joseph Jr FCJ discussed the concepts of estoppel and substantive legitimate expectation under distinct and separate heads.

⁷⁵Schwartz, *Administrative Law* (1976), at page 134.

ESTOPPEL IN THE LAW OF BANKING AND NEGOTIABLE INSTRUMENTS

The area covered by the subject of 'estoppel in the law of banking and negotiable instruments' is a wide and diverse one. In this paper the discussion will be confined to two areas:

- (i) forgery of drawer's signature; and
- (ii) payment made under a mistake of fact.

(i) Forgery of Drawer's Signature

Section 24 of the Bills of Exchange Act 1949¹ provides:

"Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, *unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.*"²

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery."

Section 24 of BEA renders a forged or unauthorized signature (subject to the provisions of the Act) wholly inoperative. Thus a banker who

¹Act 204. Hereinafter referred to as 'BEA'.

²Emphasis added.