

## Doctrine of Legitimate Expectation in Administrative Law : A Bangladesh Perspective

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### 1. Introduction

Most legal systems are currently facing many administrative law challenges because of the growth of administrative power. The range of tasks performed by the administration has increased, so has the potential for arbitrary or unfair action as regards the individual.<sup>1</sup>

The government is under an obligation to respect the humanity of the others and to treat the citizens with respect.<sup>2</sup> This demand is particularly important in the modern bureaucratic state, which tends to treat individuals with reference to 'numbers' or 'files' rather than as **human beings** deserving individual consideration.<sup>3</sup> Therefore, the argument stressing the importance of keeping administrative authorities within their limit is transformed in the administrative context into a claim of practicing different doctrines that debar an administration from turning out to be an irrational or arbitrary authority. The doctrine of legitimate expectation has appeared as a new tool to prevent such arbitrariness or misuses. It

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<sup>1</sup> Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law*, (2000:Hart Publishing Ltd.) p.1.

<sup>2</sup> Daphne Barak-Erez, *The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests*, *European Public Law*, Volume 11, issue 4, Kluwer Law International, 2005, p. 583.

<sup>3</sup> See: P. Berger, B. Berger & H. Kellner *The Homeless Mind: Modernization and Consciousness* (1973) 41-62. *The Doctrine of Legitimate Expectations* 593.

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is the 'latest recruit' to a long list of concepts fashioned especially by the Western courts for the review of administrative actions.<sup>4</sup>

This article focuses on an overview of the doctrine, its scope, and its application as a check against arbitrary decisions of the administration. In Bangladesh it is true that there is no general statute like Administrative Justice Act laying down the minimum procedure which administrative authorities must follow while exercising decision making power. Nonetheless the court has always insisted that administrative authorities must follow a minimum standard of fair procedure (ensuring legitimate interest of individual). This minimum procedure refers to the concept of natural justice which ultimately protects and ensures legitimate expectation.<sup>5</sup> Focusing on this fact, this paper examines how this doctrine has been integrated into Bangladeshi case laws in the particular setting of Bangladesh's constitutional-administrative law.

### **2. An overview of the doctrine of legitimate expectation**

The doctrine of legitimate expectation operates as a control over the exercise of discretionary powers conferred upon a public authority. It is fair to say that the doctrine is certainly not as established and simple as a person having an enforceable right requiring a public body in all circumstances to act in a particular way. The law is still developing on a case-by-case basis both in the context of reasonableness and in that of natural justice. In this section, attempt has been made to explain the doctrine of legitimate expectation, to explore its scope and to evaluate its practice in Administrative law.

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<sup>4</sup> C. K. Takwani *Lectures on Administrative Law*, (2006: Eastern Book Company, 4<sup>th</sup> Edn.) p. 278.

<sup>5</sup> Md. Harun Reza, *Scope of legitimate expectation doctrine*, The Daily Star, 22 January, 2011.

## 2.1 Doctrine explained

The doctrine of legitimate expectation belongs to the domain of public law and is intended to give relief to the people when they are not able to justify their claims on the basis of law in the strict sense of the term though they had suffered a civil consequence because their legitimate expectation had been violated.<sup>6</sup> The term ‘legitimate expectation’ was first used by Lord Denning in 1969<sup>7</sup> and since then, it has assumed the position of a significant doctrine of public law in almost all jurisdictions.<sup>8</sup> The term ‘legitimate expectation’ means the act or state of expecting; that which is or may fairly be expected; that which should happen according to general norms or custom or behaviour...<sup>9</sup>

A person may have a legitimate expectation of being treated in a particular way or of receiving any substantive benefit by an administrative authority even though he has no legal right in private law to receive such treatment or benefit. The right to a hearing or to be consulted, or generally to put in one’s case may arise out of the action of the authority. Thus a promise made in the shape of a statement of policy or a procedure regularly adopted by the authority may give rise to what is called legitimate expectation.<sup>10</sup> That is, expectation of a kind which the court now enforces.

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<sup>6</sup> I. P. Massey, *Administrative Law*, (2001: Eastern Book Company, 5<sup>th</sup> Edn.) p. 285.

<sup>7</sup> *Schmidt v. Secretary of State* (1969) 1 All ER 904. In this case it was held that an alien who was granted to enter the U.K. for a limited period had legitimate expectation of being allowed to stay for the permitted period.

<sup>8</sup> Clerk, R., In pursuit of Fair Justice, AIR 1996(J) 11.

<sup>9</sup> Md. Harun Reza, *Scope of legitimate expectation doctrine*, The Daily Star, 22 January, 2011.

<sup>10</sup> Mahmudul Islam, *Constitutional Law of Bangladesh* (2008: Mullick Brothers, 2nd Edn.) p. 497.

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There has been some debate as to whether a legitimate expectation of any person in a particular decision can indeed give rise to a substantive benefit or a mere entitlement to have a process conducted in a particular way. In its initial stage, the common approach was that legitimate expectation is only procedural and does not have any substantive impact. However this traditional approach is losing dominance with the increasing support for the view that it can be applied to a benefit which is desired in a particular case. In *R v. North and East Devon HA ex p Coughlan (2001)*<sup>11</sup> the Court of Appeal significantly clarified the doctrine of substantive legitimate expectations. This *Coughlan* case has affirmed substantive legitimate expectation as a mainstream principle of administrative law.<sup>12</sup> With the authority of this expanded view, the doctrine of legitimate expectation constitutes a procedural as well as substantive rights.

The doctrine of legitimate expectation confers upon persons a right which is enforceable in case of its denial. But whether an expectation is legitimate or not is a question of fact which has to be determined not according to claimant's perception but on some considering factors;<sup>13</sup> such as, clearness and unambiguity of the statement or practice, the impressions-whether the statement or

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<sup>11</sup> [2001] QB 213. The applicant had been very severely disabled in a road traffic accident in 1971 and was placed in the care of a local area health authority. In 1993 she and seven other seriously disabled patients were moved to a new facility at Mardon House with an assurance that they could live there "for as long as they chose". Following a public consultation in 1998, the health authority decided to close Mardon House and transfer the applicant to a local authority home. Miss Coughlan brought judicial review proceedings.

<sup>12</sup> Richard Clayton, (visiting fellow, Centre for Public Law, University of Cambridge) *Substantive Legitimate Expectation: some unresolved questions*; this article is based on a paper given to the Cambridge University Public Law Discussion Group.

<sup>13</sup> I. P. Massey, *Administrative Law*, (2001: Eastern Book Company, 5<sup>th</sup> Edn.) p. 291.

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practice is binding or merely tentative, public interest and so on. In the Case of *Madras City Merchants' Association v. State of India (1994)*<sup>14</sup> S.Mohan, J. held as “...(l)egitimate expectation may arise –a) if there is an express promise given by a public authority; or b) because of the existence of a regular practice which the claimant can reasonably expect to continue; c) such an expectation must be reasonable.

A comparatively recent decision is found in this regard in *Glencar Exploration v. Mayo County Council (2002)*.<sup>15</sup> In this case, Mr. Justice Fenelly propounded that in order to succeed in a claim based on a failure of a public body to respect a legitimate expectation, the following three matters need to be established:

“Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity.

Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected annually or potentially in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority, or that the person or group has acted on the faith of the representation.

Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public body will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it.”

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<sup>14</sup> (1994) 5 S.C.C. 509.

<sup>15</sup> Mason Hayes+Curran, 2008. *The Doctrine of Legitimate Expectation: Recent Developments*. (A version of this article was first published in the March, 2008 issue (no.46) of Public Affairs Ireland Journal).

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These considerations propounded by Mr. Justice Fenelly play vital role in justifying a claim based on both procedural and substantive legitimate expectation. Thus a past practice or statement made in the shape of policy, a present action on the basis of such practice or presentation and a future expectation to continue with it are the preconditions for the doctrine to be invoked. However as an equity doctrine it is not rigid and extensions or refinements of these propositions are obviously possible.<sup>16</sup>

### **2.2 Scope of the doctrine of legitimate expectation**

With the recognition of substantive legitimate expectation, the scope of judicial review of administrative action on the basis of legitimate expectation has been expanded. But this expanded view has not yet been applied in a way which permits a person to challenge every administrative action invoking the principle of legitimate expectation. The claim based on the principle of legitimate expectation can be sustained only when the challenged decision is found to be unfair, unreasonable, arbitrary or violative of principles of natural justice.<sup>17</sup> In other words, to fulfill legitimate expectation, the various interests should be balanced. In *Howrah Municipal Corporation v. Ganges Road Company Ltd.* (2004),<sup>18</sup> it has been held that no right can be claimed on the basis of legitimate expectation when it is contrary to statutory provisions which have been enforced in public interest. Thus the court may uphold the decision taken by the authority on the basis of overriding public interest.<sup>19</sup>

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<sup>16</sup> Ibid.

<sup>17</sup> Halsbury's Laws of England, 4<sup>th</sup> Edn., Vol. 1(1),p.151,see also *Union of India v. Hindustan development Corpn.*, (1993) 3 SCC 499: AIR 1994 SC 980; *Madras City Wine Merchants' Assn. v. State of T.N.*, (1994) 5 SCC 509.

<sup>18</sup> (2004) 1 SCC 663.

<sup>19</sup> C. K. Takwani *Lectures on Administrative Law*, (2006: Eastern Book Company, 4<sup>th</sup> Edn.) p. 281.

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Legitimate expectation can not prevail against statute.<sup>20</sup> There is no legitimate expectation against statutory regulation.<sup>21</sup> That means, if any legislation is passed or amended in such a way that goes against the regular policy or practice, the person affected thereby cannot challenge this on the basis of legitimate expectation. If a legitimate expectation is based on a mistake and that mistake has been made as a result of erroneous interpretation of any statutory provision, the administrative authority will not be bound by the expectations.<sup>22</sup> In the recent High Court decision in *Cork Opera House Plc v. The Revenue Commissioners (2007)*,<sup>23</sup> Mr. Justice Hedigun had found that the applicant for judicial review was wrong in law in contending that the Revenue Commissioners had the power to grant it a retail license to sell beer, wines and spirits under an Act of 1835, and even if this was not, the applicant nevertheless had an enforceable legitimate expectation that the Revenue Commissioners would continue to act as they had done for many years, (incorrectly) granting such a license under the 1835 Act. So a claim based on legitimate expectation does not operate to confer upon a statutory authority a power which that authority does not have under the terms of the relevant statute.

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<sup>20</sup> Mason Hayes+Curran, 2008. *The Doctrine of Legitimate Expectation: Recent Developments*. A version of this article was first published in the March, 2008 issue (no.46) of Public Affairs Ireland Journal).

<sup>21</sup> C. K. Takwani *Lectures on Administrative Law*, (2006: Eastern Book Company, 4<sup>th</sup> Edn.) p. 281.

<sup>22</sup> Mason Hayes+Curran, 2008. *The Doctrine of Legitimate Expectation: Recent Developments*. A version of this article was first published in the March, 2008 issue (no.46) of Public Affairs Ireland Journal).

<sup>23</sup> (2007) I.E.H.C., 388.High Court, unreported, 21 November, 2007. see also Mason Hayes+Curran, 2008. *The Doctrine of Legitimate Expectation: Recent Developments*. A version of this article was first published in the March, 2008 issue (no.46) of Public Affairs Ireland Journal

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The doctrine of legitimate expectation must not be understood that the authority is not able to change its policy.<sup>24</sup> In fact, changing policy can defeat a substantive legitimate expectation if it can be justified on ‘Wednesbury reasonableness’.<sup>25</sup> So, the existence of a policy does not carry with it an entitlement to prevent the policy-maker from changing that policy - particularly where there is evidence of a rational and reasonable basis for doing so, including public interest considerations though the doctrine of legitimate expectation may require that the way in which policy changes are effected does not breach existing legitimate expectations.<sup>26</sup> In the recent High Court decision in *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council (2007)*<sup>27</sup> Mr. Justice Clarke stated as follows:

.....the executive enjoys a constitutional entitlement to change policy...Subject only to the overall requirement that whatever policies are adopted must be consistent with their statutory role as defined. It is clear, therefore, that a legitimate expectation cannot arise to the effect that a policy will not be changed.

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<sup>24</sup> *PTR Exports (Madras) (P) Ltd. v. India*, (1996) 5 SCC 268.

<sup>25</sup> The traditional constraint on a public body has been the test of *irrationality*, also known as Wednesbury unreasonableness following *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* (1948, 1KB 223) which stated that a decision would be unreasonable if, ". . . no reasonable authority could ever have come to it" (per Lord Greene); see, Wikipedia, the free encyclopedia. In this case, “Associated Provincial Picture Houses” were granted a license by the defendant local authority to operate a cinema on condition that no children under 15 were admitted to the cinema on Sundays. The claimants sought a declaration that such a condition was unacceptable and beyond the power of the Wednesbury Corporation to impose. The Court upholds the decision.

<sup>26</sup> Mason Hayes+Curran, 2008. *The Doctrine of Legitimate Expectation: Recent Developments*. A version of this article was first published in the March, 2008 issue (no.46) of Public Affairs Ireland Journal.

<sup>27</sup> (2007) I.E.H.C., 298.

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Demarcating the scope of the doctrine, the Court held that legitimate expectation gives sufficient *locus standi* to the applicant for judicial review.<sup>28</sup> But as discussed above, a case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its power to fulfill. The protection is limited to that extent and a judicial review can be within that limits. Even if a case of legitimate expectation is made out, the decision or action of the authority will not be interfered with unless it is shown to have resulted in failure of justice.<sup>29</sup> To sustain a claim based on legitimate expectation the decision of the authority must be arbitrary or must not come within the Wednesbury principle. The statement or practice giving rise to the legitimate expectation must be sufficiently clear and unambiguous, and expressed or carried out in such a way as to show that it was intended to be binding.<sup>30</sup> A statement will not be binding if it is tentative,<sup>31</sup> or if there is uncertainty as to what was said.<sup>32</sup>

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<sup>28</sup> I. P. Massey, *Administrative Law*, (2001: Eastern Book Company, 5<sup>th</sup> Edn.) p. 291.

<sup>29</sup> *India v. Hindustan Development Corp.*, AIR 1994 SC 988; *North South Property Development Ltd. v. Ministry of Land*, 52 DLR 7.

<sup>30</sup> The foundation for legitimate expectation must be laid in the pleadings and cannot be allowed to be raised at the stage of argument-*National Buildings Construction Corp. v. Raghunatahn*, AIR 1998 SC 2779.

<sup>31</sup> *R. v. Board of Inland Revenue ex p MFK Underwriting Agencies Ltd.*, (1990) 1 All E.R. 91; *R v. Jockey Club, ex p RAM Racecourses*, (1993) 2 All E. R. 225.

<sup>32</sup> *R v. Shropshire Health Authority ex p Duffus*, (1989) Times, 16 August; *North South Property development Ltd. v. Ministry of Land*, 52 DLR 7 (affirmed by Appellate Division in C.P. no.552 of 1999).

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### 2.3 Evaluating the practice of legitimate expectation in Administrative Law

While evaluating the application of doctrine of legitimate expectation it is worth to note here the sayings of C.K.Takwani<sup>33</sup>: “the existence of legitimate expectation may give sufficient *locus standi* to a claimant to seek leave to apply for judicial review”. The doctrine in essence imposes a duty on the authority to act fairly.<sup>34</sup> It imposes limits on the arbitrary exercise of power by the administrative authority. It is also an important factor in answering the question whether a decision once given can be withdrawn or modified and also provides a legal basis for holding that administrative authorities are to a considerable extent bound by policy rules, promises and past practices. Finally, the principle of legitimate expectations is one of the principles which is able to cover the administrative authority within the ambit of judicial review. Consequently, it would be hard to overestimate the importance of the principle of legitimate expectations.

Nonetheless, this doctrine is not free from criticisms; it has also a downside.<sup>35</sup> The main allegation it does suffer is about its uncertainty. Gio ten Berge<sup>36</sup> and Rob Widdershoven<sup>37</sup> truly said that usually it is rather difficult to predict in which cases a claim based on the principle of legitimate expectations will be honoured. Although it is possible to identify in case laws, different factors

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<sup>33</sup> C. K. Takwani, *Lectures on Administrative Law*, (2006: Eastern Book Company, 4<sup>th</sup> Edn.) p. 280.

<sup>34</sup> *Ibid*, p. 283.

<sup>35</sup> Gio ten Berge and Rob Widdershoven, *The principle of Legitimate Expectation in Dutch Constitutional and Administrative Law*, p. 452.

<sup>36</sup> Professor of Administrative and Constitutional Law in the Institute of Constitutional and Administrative Law of the University of Utrecht, the – Netherlands.

<sup>37</sup> Jean Monnet Professor of European Administrative Law in the same university.

that can play a role in answering this question, it is not so simple to draw out any straight-cut formula on where arises legitimate expectation. Whether the presentation or past practice is in the nature to arise legitimate expectation; or whether honouring one person's legitimate expectation will result in the derogation of public interest is absolutely a matter of individual concern which involves individual discretion, fact analysis in every individual case. But a strong defense may be advanced against this uncertainty is that a legal right ensured and guaranteed by any statute has some inherent limitations. A statutory right can be applied only on the fulfillment of the conditions prescribed for its application. But in practice, some unforeseen situations may arise which can not be covered by any law as it is beyond its scope. A court while dealing with a claim based on legitimate expectation, it is in each case necessary to weigh the individual interests that would profit from recognition of the legitimate expectations against the public interest.<sup>38</sup> And thereby it is possible to provide, a 'tailor made' judgment<sup>39</sup> best suited to the claimant's needs. In today's welfare state concept, where existing statutes prove themselves inadequate to deal with present multidimensional administration, the doctrine of legitimate expectation comes forward to fill up the nothingness as this doctrine provides a central space between 'no claim' and 'legal claim'.<sup>40</sup>

### 3. Legitimate expectation: Bangladesh experience

The capacity of the Apex court to import legal doctrines and to plant them in a different soil and climate and to make them flourish

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<sup>38</sup> Gio ten Berge and Rob Widdershoven, *The principle of Legitimate Expectation in Dutch Constitutional and Administrative Law*, p. 452.

<sup>39</sup> Ibid.

<sup>40</sup> I. P. Massey, *Administrative Law*, (2001: Eastern Book Company, 5<sup>th</sup> Edn.) p. 293.

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and bear its fruit is tremendous.<sup>41</sup> Though the importation of the concept of legitimate expectation is recent in Bangladesh, it managed to establish a strong position for itself shortly after the inception. It only because this doctrine acts as a supplement to the principles of natural justice against the growing abuse of administrative power. Like in the administrative sphere of different countries, it acts in Bangladesh as a deterrent factor for the administrative authority to take any whimsical decision or action detrimental to the interest of the people even though the people concerned do not have any legal right in this respect. To determine how far this doctrine has been accepted in the legal system of Bangladesh, one has to go through the cases in which the issue has been discussed. *Sharping Matshajibi Samabaya Samity Ltd. V. Bangladesh and others (1987)*<sup>42</sup> was the first case where the court in essence referred to the doctrine, but the phrase ‘legitimate expectation’ did not appear anywhere in the judgment. Rather the court relied on common phrases like ‘arbitrariness’ or ‘natural justice’. This case involved a breach of contractual obligation for a lease of fishery between the government and a private party. Later, the lease was cancelled without giving any reasons for such cancellation. The Court in this case viewed government’s obligation under the contract not as in its ‘trading capacity’ rather in its ‘capacity as sovereign’.<sup>43</sup> In spirit what the court asserted in this case was somehow in essence the early version of doctrine of legitimate expectation where the English courts tended to ascribe it solely to the rules of natural justice, particularly the requirement to hear the other side or *audi alteram partem*.<sup>44</sup>

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<sup>41</sup> Ibid. p. 289.

<sup>42</sup> 39 DLR (AD) (1987) 85.

<sup>43</sup> Islam, Rumana. 2006. ‘Doctrine of Legitimate Expectation: An Overview’, in Rahman, Mizanur (ed.). Human Rights and Domestic Implementation Mechanism. Dhaka: ELCOP, p. 235.

<sup>44</sup> Ibid.

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The doctrine of legitimate expectation was first baldly referred by the supreme judiciary in this country in *North South Property Ltd. V. Ministry of Land and another (2000)*.<sup>45</sup> Here, the respondent (Ministry of Land) took up a project for construction of 16000 flats for shelter less and low income group slum dwellers of the Dhaka city. The Government planned to do it on 47.90 acres of Government land at Bhasantek through private financing of the developers. The respondents had discussion with different developers including the petitioner. The petitioner was assured of being engaged to execute the said project and was asked to submit a detailed lay out plan in this regard. The petitioner did all those things as the respondent instructed. Subsequently, the respondents published a notice inviting bids for executing the said project. Only two companies including the petitioner participated in the said bid and it was unanimously resolved in the concerned committee that the technical offer of the petitioner was responsive. But the respondents decided not to accept petitioner's lone bid as the participants were only two. They decided to call a fresh bid to make the process competitive and transparent. The petitioner challenged the decision of the authority on the basis of his legitimate expectation that arose on the assurance given by the authority to employ him for the project and his spending an amount of taka twenty-five lac to develop and finalise the plans and technical support on the basis of such assurance. The facts of the case in itself can be a good example in explaining the criteria of 'clear, unequivocal and unambiguous' statement or promise by a public authority.<sup>46</sup> But the court did not go to the depth of the issues of 'assurance' or 'understanding' as claimed by the

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<sup>45</sup> 52 DLR (2000) 7.

<sup>46</sup> Islam, Rumana. 2006. 'Doctrine of Legitimate Expectation: An Overview', in Rahman, Mizanur (ed.). Human Rights and Domestic Implementation Mechanism. Dhaka: ELCOP, p. 235.

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petitioner<sup>47</sup> rather termed the claim of legitimate expectation as ‘ a disputed question’.<sup>48</sup> The court missed the opportunity to adopt the contemporary concept of legitimate expectation in this case but immediately after one year, the scenario is improved.

The first successful reference to the doctrine is found in *Bangladesh Soya-Protein Project Ltd. v. Secretary, Ministry of MDMR (2001)*.<sup>49</sup> In this case, the government initiated ‘School Feeding Programme’ under a policy aimed at eradicating malnutrition of the under-nourished child and entered into a contract with the petitioner for the supply of Soya-protein biscuits to schools for a fixed period. The petitioner took all the accomplishments to perform the contract including to set up a new industry incurring huge expenditure within the full knowledge and cooperation of the government, just in order to produce the required quantity of Soya-products to make their school feeding programme a success. The continued success of this programme and the support of the government caused the petitioner reasonably to expect that it would be continued till the fulfillment of the purpose of the project that is to eradicate malnutrition of under-nourished children. But on the expiry of the contract period, the government discontinued the programme without showing any reason. The High Court Division held that such discontinuance of the programme violating its own policy was in gross violation of the legitimate expectation not only of the petitioner but also of the millions of under-nourished children warranting interference of the court and directed the government to implement its policy decision. Though the government contended that it was not bound to renew the contract and the last contract not being renewed it simply expired by efflux of time without giving any right of action

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<sup>47</sup> Ibid, p. 236.

<sup>48</sup> *North South Property Ltd. v. Bangladesh and another*, op cit note 96 at Para 8.

<sup>49</sup> 2001, 6 BLC 681.

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to the petitioner, the court held that the government is always obliged to act fairly and reasonably even where the other party has got no legal right in the conventional sense, to enforce. This is so even in a contract where the government is one of the contracting parties. Here, though the petitioner does not possess the right in conventional sense to claim renewal of contract, the MDMR in discontinuing the programme miserably failed in their social commitment to the people of Bangladesh as spelt in their own policy decision under which the programme was initiated.

There seems that the doctrine of legitimate expectation in Bangladesh has been developed mainly covering the contractual obligation of the government. A modern government has multifarious activities and in performance of those activities, the government has to enter into contracts of different types. And the doctrine of legitimate expectation has been developed, focusing on the point that in a contract between the government and any individual, though the state is in the equal footing of other party of the contract, at the same time, the duty of the government to act fairly which is implied in the contract can not be ignored. Like an individual, the administration is to abide by the terms and conditions of the agreement. There is hardly any scope to apply the principle of equity where terms and conditions of the tender documents are there to provide for legal and proper dispensation.<sup>50</sup>

The second major area in which a frequent application of this doctrine can be seen is the service matter that is a contract of employment. Though an employment in the service of Republic initiates a contract, the relationship of the government with the servant is more of a status than contract and is controlled by the

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<sup>50</sup> *Ataur Rahman v. Secretary, Ministry of Communication, Roads and Railway Division, Bangladesh*, (HCD) (49 DLR).

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provisions of the Constitution and the laws and rules.<sup>51</sup> This contention gives an employee in the service of Republic an extensive opportunity to challenge any administrative action affecting his service. This opportunity includes confronting the authority even when his service is based on a contract and the impugned action has been taken under the guise of the contract of employment. A landmark case in this respect is *Bangladesh Biman Corporation v. Rabia Bashri Irene and others (2003)*<sup>52</sup> where writ petitions were filed challenging validity of some parts of the individual contract of employment as violative of legitimate expectation of the employees of being absorbed as permanent staff after completion of their 5 years tenure and their expectation was reasonable in view of the practice existing at the time of their employment. They were not absorbed as permanent employee rather reappointed under a fresh contract depriving them of some benefits including of being absorbed as permanent staff. The state contended that the expectation that has arisen between the petitioners and the Corporation is of a relationship pursuant to a contract and beyond contract the petitioners are not entitled to anything as regard their service. Rejecting the contention of the state the supreme judiciary held that in the context of employment by statutory corporations, the relationship of the corporation with its employees is not that of master and servant and all contracts with statutory corporation are subject to challenge in the writ jurisdiction. The corporation by its past practice has created the legitimate expectation in its employees that after completion of the prescribed period they would be absorbed as permanent staff. By not absorbing them as permanent and appointing them under a new contract, the corporation has acted discriminatorily. In this connection it is worth to mention here the case of *Md. Shamsul*

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<sup>51</sup> Mahmudul Islam, *Constitutional Law of Bangladesh*, (Mullick Brothers, second edition) p. 576.

<sup>52</sup> 55 DLR (AD) (2003) 132.

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*Huda and others v. Bangladesh and others (2009)*<sup>53</sup> where ten additional judges were not appointed as judges in the High Court Division ignoring the recommendation of Chief Justice and without communicating any reasons to the Chief Justice and thereby, violated the expectation of the petitioners which was based on the established practice being followed over thirty years. Thus the doctrine of legitimate expectation has been emerged in the employment sector in Bangladesh as a safeguard for the employees in the service of Republic sometimes by upholding past practice<sup>54</sup> sometimes by resorting to constitutional convention<sup>55</sup> or sometimes promoting the practice of seniority.<sup>56</sup>

The general concept of the doctrine of legitimate expectation is that the administrative authority can not abuse its discretion by following any inconsistent policy by disregarding undertaking or statement of intent or by ignoring any past practice covering this matter. This doctrine in essence requires the concerned authorities to act reasonably in dealing with the rights and interests of the people under given circumstances.<sup>57</sup> But at the same time, the concept of legitimate expectation can not be given such wide interpretation so as to allow any wishful hope without lawful

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<sup>53</sup> 17 BLT (HCD) 2009, p. 62.

<sup>54</sup> *Bangladesh Biman Corporation v. Rabia Bashri Irene and others*, 55 DLR (AD) (2003) 132.

<sup>55</sup> *Md. Shamsul Huda and others v. Bangladesh and others*, 17 BLT (HCD) 2009, p. 62.

<sup>56</sup> *Faruk Ahmed and another v. Bangladesh, represented by Secretary, Ministry of Home Affairs and another*, 61 DLR, HCD, p. 151.

<sup>57</sup> *Bangladesh Soya-Protein Project Ltd. v. Secretary, Ministry of MDMR*, (2001), 6 BLC 681.

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root.<sup>58</sup> In *Hafizul Islam (Md.) v. Government of Bangladesh and Other (2002)*,<sup>59</sup> Justice Amirul Kabir Chowdhury held that-

[L]egitimate expectation to be enforceable shall have some legal basis. Mere wishful expectation without legal basis is not sustainable in the eye of law. When the action of the government is taken fairly showing reasons, it cannot be struck down.....

Advocating the true essence of this doctrine, the supreme judiciary, in *Chairman, Bangladesh Textile Mills Corporation v. Nasir Ahmed Chowdhury (2002)*,<sup>60</sup> goes as follows: For a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue until some rational grounds for withdrawing it are communicated to him and he is given an opportunity to defend his cause.....'. A descriptive idea of this doctrine is restated in *Golam Mustafa v. Bangladesh*,<sup>61</sup> where the Court observed that judicial review may be allowed on the plea of frustration of legitimate expectation in the following situations :

- I. If there is a promise by the authority expressed either by their representations or conducts.
- II. The decision of the authority was arbitrary or unreasonable within the Wednesbury principle.
- III. There was a failure on the part of the concerned authority to act fairly in taking the decision.

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<sup>58</sup> *Hafizul Islam (Md.) v. Government of Bangladesh and Others*, (2002), 7 MLR (HC) 433.

<sup>59</sup> *Ibid.*

<sup>60</sup> 2002 BLD (AD) 199, 7 MLR (AD) 265, 7 BLC (AD) 144.

<sup>61</sup> 15 BLT 128, 4 LG 125.

IV. The expectation to be crystallized into a legitimate one, it must be based on clear facts and circumstances leading to a definite expectation and not a mere anticipation or a wish or hope and also must be reasonable in the circumstances.

V. Judicial review may allow such a legitimate expectation and quash the impugned decision even in the absence of a strict legal right unless there is an overriding public interest to defeat such an expectation.

The concept of legitimate expectation is to some extent uncommon in our jurisprudence.<sup>62</sup> But the doctrine has been adopted in our legal system with its true concept. Though the doctrine of legitimate expectation was imported from English Law and greatly influenced by Indian case laws where legitimate expectation was only procedural in its initial stage and substantive legitimate expectation was comparatively a recent experience, in Bangladesh, the legitimate expectations are not classified as either procedural or substantive. If an expectation is found to be legitimate the Apex court will protect that expectation by holding the relevant administrator to the representation that gave rise to the expectation. The development of the doctrine of legitimate expectation in Bangladesh is overall a symbol of positive sign to ensure a more accountable administration by force of expectation beyond the law.

#### 4. Conclusion

The emerged concept of legitimate expectation has gained sufficient importance in Administrative law.<sup>63</sup> The doctrine has been developed to check and to control the exercise of powers by the administrative authorities and thereby it aims at the main aspect

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<sup>62</sup> *Bangladesh Soya-Protein Project Ltd. v. Secretary, Ministry of MDMR*, 2001, 6 BLC 681.

<sup>63</sup> I. P. Massey, *Administrative Law*, (2001: Eastern Book Company, 5<sup>th</sup> Edn.) p. 293.

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of this branch of public law. The substance of the doctrine is implied commitments without hampering express policies. The doctrine is invoked to enforce regularity, predictability and certainty in government dealings. It is the tool of protecting individual citizens against the administrative actions subject to the satisfaction of the court as to the existence of the factors necessary to justify the expectation as legitimate. For this reason, the court should exercise self-restraint and restrict the claim of denial of legitimate expectation to the legal limitations. It is submitted that the following observations of Brennan, J. in *Attorney General for New South Wales v. Quin (1990)*<sup>64</sup>, lay down the correct law on the point:

“(T)he Court must stop short of compelling fulfillment of the promise or practice unless the statute so requires or the statute permits the repository of power to bind itself as to the manner of the future exercise of the power. It follows that the notion of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not unlock the gate which shuts the court out of review on the merits.”

The doctrine of legitimate expectation in Bangladesh, is still in an evolutionary stage; but one thing is certain that it managed to have its position entrenched in the same line with other contemporary world practicing this doctrine successfully. But this is not the end. To continue with this success, the judges are to play the lead role by being well-resourced with different facets of this doctrine. As there are no fixed rules to express this principle, the judges should

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<sup>64</sup> 64 Aust LJR 327, cited in *Union of India v. Hindustan Development Corpn.* (supra); *Madras City Wine Merchants' Assn. v. State of T.N.*, (1994) 5 SCC 509. see also C. K. Takwani *Lectures on Administrative Law*, (2006: Eastern Book Company, 4<sup>th</sup> Edn.) p. 283.

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be more careful in deciding a claim based on legitimate expectation so that nobody can use the inherent uncertainty of this principle. At the same time, a constant comparative analysis with other countries and to import new ideas from them will be of use for the smooth development of legitimate expectations in Bangladeshi law.