Unfairness, Legitimate Expectation and Proportionality as Foundations of Judicial Review: A Comparative Analysis of Sri Lanka and United Kingdom

Shiran Mendis*
Akalanka Thilakarathna**
Ishani Gunathilake***
Rajith Wijayawardana****

Abstract

Administrative law is a body of law which seeks to put restrictions upon executive powers which are delegated to local authorities and individuals in the discharge of their duties towards the citizens. When these authorities abuse their given powers, as individuals having a system for vindication against such abuse which may result in a violation of a given right is a sine qua non in any kind of justice system. Judicial review is one such mechanism which has been developed mainly through the judicial arm in providing these individuals with some kind of redress in an event where their rights have been violated as a result of these abuse of power. However, judicial review as a remedy as developed by the Courts of law, is a discretionary remedy exercised by the judiciary where there is a ground upon which a judicial intervention against an administrative action is justified. At the beginning, judicial intervention even in instances of abuse of power by the delegated bodies was looked with skepticism, arguing that being

* LLM (KDU), Attorney at Law, Head of Department, Military Law, Faculty of Law, General Sir John Kotelawala Defence University.

** LLM (KDU), LLB (Hons) (Colombo), Attorney at Law, Lecturer (Probationary) Institute of Human Resource Advancement, University of Colombo.

*** Attorney-at-Law, LL.B. (Hons) (Colombo).

**** BLE (Colombo), Management Service Officer, Department of National Archives.

the least democratic branch of the government, that the judiciary should stay out of making interventions concerning decisions taken by the executive arm of the government, who are at the end of the day responsible for the people whom have elected them. Hence, at the beginning, the notion of ultra vires borrowed from corporate law was used to justify the judicial intervention in administrative matters concerning abuse of powers by the delegated authorities. Then developed the notion of unfairness which was again a high hurdle to climb in order to prove and be successful in a case concerning abuse of administrative powers. However, with the development in the discourse of human rights, more vigorous and meticulous grounds such as proportionality and substantive legitimate expectation was developed, curbing the margin of appreciations and the deterrence provided to administrative bodies becoming even more thinner. This has created many tensions between the judicial arm and the executive arm of the government, where from a United Kingdoms perspective, finding the proper constitutional justification for judicial review has remained problematic over some abstract notions of parliamentary sovereignty, rule of law and human rights concerns in the absence of a written constitution. However, when one looks at the situation in Sri Lanka, as the foundation of judicial review is founded upon the constitution itself, the Sri Lankan judiciary has not met with the same criticism as with their United Kingdom counterparts of transcending into the prohibited arena of judicial law making in the realm of judicial review of administrative actions. In this backdrop, this paper examines the development of grounds of revieing an administrative action in the form of judicial review by looking at the historical development of these grounds, both in Sri Lanka and United Kingdom.

Key words: *Administrative Law, Judicial Review, Unfairness, Proportionality, Legitimate Expectation*

Introduction

Administrative law is a branch of law that was developed with the emergence of the welfare society. Prior to this, Wade observes that people were not aware of the actions

of the Government beyond the post office and the policeman[50]. With the end of the world war in particular, governments had to provide more services to the people, and there was a need for establishing authorities that were vested with powers to deliver these services to these people. In granting powers to these administrative authorities, there was a great requirement of having some kind of mechanism for stopping the abuse of such granted powers. However, building a system of checks and balances was no easy task, since the political structure and the institutions which prevailed during the time were too sceptic about appointing a separate authority to judge on the decisions of the executive arm of the government. From an English perspective, coupled with the notion of parliamentary sovereignty, allowing the judiciary to judge upon the validity of executive decisions also seemed problematic. Therefore, the approach adopted by the policymakers was to grant the Courts with the power of reviewing administrative decisions only when they were so harsh and unrealistic that it was almost questionable whether anyone would make such a decision was made by the administrative authority in question. With these historical developments, administrative law developed as a branch of law that dealt with the limitations on the actions of the governmental authorities in performing their functions.

Administrative law therefore, can be defined as the law that governs the administrative actions or omissions of the

[50] W. Wade and C. Forsyth, *Administrative Law* (10th Edn, Oxford 2009) 01.

governmental authorities who are vested with the power of implementing administrative decisions taken up by the executive branch of the government. Administrative law looks at the lawful authority of an action taken by either an institution or a person upon whom such decision-making powers are vested, to see whether the actions or the omissions of such an institution or a person amounts to a breach of the powers so granted or whether it goes beyond the powers that have been vested, which is often referred to as the question of *ultra vires* (acting beyond the power).[51] Where it is found to be *ultra vires* the Courts are given the discretion of granting relief to the parties so affected by a way of judicial review, which can be invoked by an individual, but may only be granted at the sole discretion of the courts, adopting one or more of the grounds that have been developed through judicial law making, and thereby granting the party who is aggrieved with an appropriate remedy, in the form of a writ.

Constitutional Foundation of Judicial Review

Judicial review in its historical setting was developed by the Courts, who took it upon themselves to provide redress to those who have been adversely affected by the decisions taken by administrative bodies who were supposedly acting upon the powers granted to them, but were actually abusing or misinterpreting the limitations put upon by the executive branch, which had granted

[51] D. Phillips and A de Villars, *Principles of Administrative Law* (2nd Edn, Carswell 1994) 01.

these powers to these authorities in the first place.[52] When one considers the historical development of judicial review in England, it can be seen that the progress made by the judges in providing and introducing new grounds upon which they reviewed the decisions of administrative bodies was painstakingly slow, where they had to find recourse in the traditional concepts of rule of law and the parliamentary sovereignty.

Under the notion of rule of law, the Courts tried to justify their intervention in striking out the decisions of the administrative authorities by claiming that, when such bodies act outside or beyond their authority that it constituted a breach of the rule of law, where by the judicial intervention in helping those adversely affected to protect their rights and interests were justified. The rule of law required, that everything be done according to the law and any instance in which this fundamental was broken, judicial review could be justified.

The notion of parliamentary sovereignty meant that, by whatever was said and done by the administrative bodies upon who the decision making powers were vested, that they were impact carrying out the wishes of the parliament, and that where there was a breach of this by going beyond such powers, it violated this fundamental notion of parliamentary sovereignty and that the Courts are justified in striking out such decisions in the interest of parliamentary sovereignty, which is something that the judiciary is bound to protect. However, the idea that

[52] P. Cane and L. McDonald, *Principles of Administrative Law: Legal Regulation of Government* (1st Edn, Oxford 2008) 73

judicial review is based upon the concept of parliamentary sovereignty along with the *vires* concept has been criticized by some scholar such as Paul Craig[53], authors such as Trevor Allen[54] still claims that the notion of parliamentary sovereignty and the *virus* concept plays a vital role in the legitimization of judicial review.

Judicial Review in Sri Lanka

Unlike in England, where judicial review is founded upon the principles of Common law, wherefore its legitimacy has always been questioned for a want of a proper foundation, the Sri Lanka experience is very much different since the foundation of judicial review is founded upon the supreme law of the land, the Constitution[55]. Article 140 of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka (hereafter the 1978 Constitution) declares that, '*subject to the provisions of the Constitution, the* ***Court of Appeal*** *shall have full power and authority to* ***inspect and examine the records*** *of any* ***Court of First Instance or tribunal or other institution*** *and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto* ***against the judge of any Court of First Instance or tribunal or other***

[53] Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 Cambridge LJ 63

[54] T. R. S. Allen, 'The Rule of Law as the Foundation of Judicial Review' in C. Forsyth (ed) *Constitutional Foundations of Judicial Review* (1st Edn, Oxford 2000) 413

[55] Shivaji Felix, 'The Protection of Substantive Legitimate Expectations in Administrative Law' (2006) 18 Sri Lanka J Int'l L 69

institution or any other person' (emphasis added).

Article 140 of the 1978 Constitution vests the power of judicial review in the Court of Appeal, and as such any person aggrieved from an administrative decision of a lower body or a person has the ability of making a claim for judicial review, which will lie at the discretion of the Court of Appeal in Sri Lanka. In the case of *Atapattu v. Peoples Bank*[56] where an ouster clause was in question, the Court had to decide whether it restricted the ability of the Court to review a decision under Article 140 of the 1978 Constitution. Holding in the negative, the Court opined that, an ouster clause was incapable of taking away the inherent jurisdiction of the Court of Appeal in its powers of judicial review, which is recognized under the Constitution of the country. The Court elaborated on the fact that, since the power of judicial review is vested with the Court of Appeal under the Constitution, no ordinary law could take away this inherit right, since the Constitution would constitute a higher norm when compared with ordinary legislation. From this decision, it can be argued that, unlike the controversy that remains in England with regard to finding a proper foundation for judicial review, from a Sri Lankan context, it can be found that judicial review is embedded in the Constitution itself, and as the supreme law of the country, judicial review is a creature of the Constitution and wherefore, its legitimacy stems from the supreme law of the country, i.e., the Constitution.

[56] [1997] 1 Sri L R 208

While judicial review is made available through the Constitution of the country, one must not jump to the conclusion that, judicial review is something which is available to a claimant as a way of right. Unlike an appeal, where the law itself allows an aggrieved party to make a claim before a Court to look at the merits of the decision, judicial review is something purely vested under the discretion of the Court. It is the Court alone who would decide whether to allow the application for review or not. In the case of *Public Interest Law Foundation v. Central Environmental Authority*[57] the Court held that' under judicial review procedure, the Court of Appeal is not concerned with the merits of the case, that is, whether the decision was right or wrong, but whether the decision is lawful or not'. Hence, under judicial review, even if the Court is of the opinion that, while the merits of the case does warrant the intervention of the Court, it will not do so unless there is some issue with the legality of the decision. Since a decision could be lawful while not being something that is found upon proper merits, the intervention of the Courts will be prohibited under the notion of separation of powers, since the power of making and implementing executive decisions are not vested with the Courts. This was further elaborated by Lord Brightman in *Chief Constable of North Wales Police v. Evans*[58], where his Lordship held that, 'Judicial review is concerned, not with the decision but with the decision making process'.

[57] [2001] 3 Sri LR 330
[58] [1982] 1 WLR 1155

Development in the Grounds of Review in United Kingdom.

In entertaining an application for judicial review, the Courts have developed several grounds upon which they allow an application to succeed. These grounds are the justifications put forward by the Courts in legitimizing its intervention, to otherwise a prohibited area of the law where the political democracy in a country demands the non-intervention by the Courts as being the most undemocratic arm of the government. As the legislative and the executive arms of the government consists of individuals who are elected to those positions through a process of participatory democracy, this democratic process expects that, decisions pertaining to the rights and obligations must also be taken by these individuals, whom the people have elected. Therefore, when they make decisions, it would not be right for the judicial branch as a selected group of individuals as opposed to an elected group of individuals to get themselves involved in making judgements over the decisions of the executive branch of the government in particular.

In light of the above proposition, Courts are only allowed to intervene and protect the rights and interests of the parties who make a claim for judicial review, when it became evident that the legality of the decision is in question. Therefore, even if the judiciary is of the view that an alternative path could have been taken at implementing the decisions should not warrant them with

an authority to make an intervention with the discretion given to a public authority in the discharge of its duties and functions. This discretion which is allowed for these public authorities is referred to as deference[59] or the margin of appreciation, which needs to be respected by the judiciary in entertaining claims for judicial review.

The ground of judicial review has been categorized under three main heads of review involving, illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness).[60] However, this categorization has always not remained favourable among the judges and in the case of *R v. Secretary of State for the Environment, ex p Greater London Council*[61] Lord Mustill held that, to refuse an application for judicial review based on the fact that, the application fails to fall within the three grounds [unlawfulness, unreasonableness and unfairness] would be something stunning and absurd.

When it comes to the the development of the grounds for reviewing administrative decisions, prior to the right consciousness created after the United Nations Declaration on Human Rights (UDHR) and after, in the beginning of the 20th century, the Courts were very strict in allowing claims for judicial review as the governments were wanting to rebuild their countries after the devastation of the first and the second world wars. At the

[59] Richard Clayton, 'Principles for judicial Deference' (2006) 11 Jud Rev 109
[60] M. Fordham, *Handbook on Judicial Review* (6th Edn, Hart 2012) 487
[61] [1985] 3rd April (unreported), cited in M. Fordham, *Handbook on Judicial Review* (6th Edn, Hart 2012) 487

beginning, *ultra vires* was used as the overarching ground upon which an administrative decision was struck down, which was also a borrowed concept from corporate law.[62] The doctrine of *ultra vires* was something capricious since it lacked clarity and precision. Especially with the development on the discourse on rights, it became too fragile and incapable of providing a proper guide for the judiciary in reviewing the decisions of administrative authorities. After the failure of the *vires* doctrine, the Courts developed the concepts of unreasonableness and irrationality, sometimes used interchangeably to review a decision of an administrative decision. Even this was incapable of coping up with the developments in the rights discourse as it became difficult to properly review the impact of administrative decisions upon the rights and interest of the individuals using these grounds of review. In the middle of the 1980's to the latter part of the 1990's, the grounds of legitimate expectation and proportionality was developed as possible grounds for reviewing administrative decisions, but they have been hailed as dangerous, since these grounds of review are criticized for making judicial review which goes in to the merits of a decision, which is prohibited under judicial review and is left for a body hearing an appeal to use. The following sections explores the development of grounds related to unreasonableness, legitimate expectation and proportionality in both England and Sri Lanka, with a discussion as to the foundation of such grounds of review and how they are or can be justified.

[62] In the case of *Ashbury Railway Carriage and Iron Co Ltd v Riche* [1875] LR 7 HL 653, the concept of *ultra vires* was discussed in detail.

Engaging Unreasonableness as a Ground for Review.

The ground of unreasonableness was made famous in the case of *Associated Provincial Picture House v. Wednesbury Corporation*[63] commonly known as the Wednesbury case or Wednesbury unreasonableness. In this case, Lord Green MR, formulated a threefold test to be applied in deciding the reasonableness of an administrative decision. Firstly, the administrative authority in question who took the decision must prove that all the relevant consideration had been taken into consideration. Secondly, that all the irrelevant considerations were not considered. And thirdly, that after following the first two steps, the authority did not make a decision which is so out of logic that a reasonable man ought not to have taken such a decision. This unreasonableness is associated with the exercise of the discretion that is granted to an administrative body, where the discretion has been exercised in an unreasonable manner, such a decision is liable to be struck down under judicial review. In the case of *Bromley London Borough Council v. GLC*[64] the question arose as to the reasonableness in carrying out with an election manifesto to cut down the traveling rates, since such was promised by the governing party. When this was challenged by an application in the form of a judicial review, the Court held that the decision to cut down on the rates as being unreasonable, since it was the duty of the council to

[63] [1948] 1 KB 233
[64] [1983] 1 All ER 602

utilize the funds, it generated through collecting taxes for the benefit of all and not for some. However, this creates a dilemma between the political aspirations which are a legitimate aim under the political democracy of a country and, judicial intervention which is focused on protection of the rights of the individuals, an in the case of judicial inconsistency, judiciary may very well get involved with politics[65], which is strictly prohibited for the judicial branch.

From a Sri Lankan perspective, unreasonableness has been often used as a ground for judicial review since it allows a Court to strike down any decision which is unreasonable. In the case of *Podimahaththya v. The Land Reform Commissioner and Another*[66] the Court held that, '[it] can interfere where there is manifest unreasonableness in an administrative act. The test is whether the administrative authority has acted within the rules of reason and justice. The conduct of the administrative authority must be legal and regular as one correlates the acts complained about to the power given under statute'. In the case of *Sudhakaran v. Bharathi and Others*[67] using the test laid out under Wednesbury unreasonableness, the Court while finding that the decision of the authority did not warrant an intervention of the Court. Further, in the case of *The State Bank of India v. Edirisinghe and Others*[68] the Court held that, 'an

[65] J Griffith, *The Politics of the Judiciary*, (5th edn, Fontana 1997) 126
[66] [1990] 2 Sri L R 416
[67] [1987] 2 Sri L R 243
[68] [1987] 1 Sri L R 395

excess of power could be occasioned by an abuse of discretionary power, the reliance of irrelevant considerations in reaching a decision or by patent unreasonableness.'

While the ground of unreasonableness has not made much controversies in Sri Lanka, it has been much criticized in England. Paul Craig[69] commenting on the test applied in Wednesbury comments that, the threshold provided under the Wednesbury test is so high that only a handful of decisions would become unreasonable in the Wednesbury sense. He states that, to find an administrative act unreasonable in the Wednesbury sense would require an instance that was found in *Short v. Pole Corporation*[70] where a teacher was fired since she had red hair, 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at.'[71]

As the test laid out in Wednesbury case sets a too high standard of unreasonableness, in the case of *Secretary of State for Education and Science v. Metropolitan Borough Council of Tameside*[72] the Court opined that, '[i]n public law, "unreasonable" as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To

[69] P. Craig, *Administrative Law* (8th Edn, Sweet and Maxwell 2012)
[70] [1926] Ch. 66
[71] Per Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374
[72] [1977] AC 1014.

fall within this expression, it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' This was a much more logical test to be applied in determining the reasonableness of the decision there is a link between the responsibility and the sensibleness of the action, which grant more levy for a Court to intervene than under the traditional test laid out under Wednesbury unreasonableness. The test used in Tameside was cited with approval in the case of *R v. Chief Constable of Sussex*[73] (Ex parte International Trader's Ferry Ltd) where the Court held that, '[t]hese unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers.'

With the development of discourse relating to human rights, and the enactment of the Human Rights Act of 1998, the Courts have even gone to the extent of questioning the validity of the Wednesbury unreasonableness due to its lack of ability in guiding the judiciary in questions involving issues of human rights, where a threshold proposed under the Wednesbury unreasonableness would be incompatible with protecting these human rights. Therefore, in the case of *R v. Secretary of State for the Home Department, ex parte Daly*[74] Lord Cooke opined that, 'the day will come when it will more widely be recognized that the Wednesbury case, was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that

[73] [1999] 1 All ER 129
[74] [2001] 3 All ER 433

there are degrees of unreasonableness and that only a very few extreme degrees can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd'. Even under much criticism, there have been some instances where the Wednesbury test was appreciated for its simplicity. In the case of *Regina v. British Broadcasting Corporation, ex parte Pro-Life Alliance*[75] Lord Walker opined that, '[t]he Wednesbury test, for all its defects, had the advantage of simplicity, and it might be thought unsatisfactory that it must now be replaced (when human rights are in play) by a much more complex and contextually sensitive approach.' However, he conceded that there is no alternative in light of the developments in human rights law by claiming that 'the scope and reach of the Human Rights Act is so extensive that there is no alternative.'

Engaging Proportionality as a Ground for Review.

Proportionality as a ground for judicial review has been rather controversial as it enters the dangerous territory of merits review. Proportionality is based upon the assumption that, an administrative act which has an impact upon the rights and interest of the individuals must

[75] [2003] UKHL 23

not go beyond that which is necessary to achieve the end result or one must not cause more damage than the advantage obtained. As the Courts are involved with deciding on the respective costs and benefits of the decision taken by an administrative authority, the Courts could very easily replace their decisions over that of the administrative bodies[76].

The concept of proportionality was initially found as a concept of criminal law and justice, where it was argued that the punishment must not be severe than the crime and that there should be some proportionality between the two. In the realm of administrative law, especially in the continental Europe, proportionality was developed as a ground for review. However, when one considers the situation in England, proportionality was developed as a ground for judicial review with much skepticism as it had a tendency to grant much more wider powers of review to the Courts, especially when it came to matters that had a human rights flavour to it.

Proportionality as a ground for judicial review goes beyond the traditional notions of unlawfulness, unreasonableness, and unfairness, since it is concerned with a cost benefit analysis of the decision. In particular, where human rights are involved, the decision taken by an administrative authority must not go beyond the limitation of rights which is required to achieve the desired result. Therefore, proportionality in effect reduces the

[76] P. Leyland and G. Anthony, *Textbook on Administrative Law* (7th Edn, Oxford 2012) 325

discretionary scope provided to an administrative body, where as a result their margin of appreciation along with judicial deference becomes low. As there is more ground for a Court to review, the difference between an appeal and judicial review is in a real danger of getting bleak, and as a result, the traditional notions of parliamentary sovereignty and the separation of powers could be adversely affected. In the case of *R v. Secretary of State for the Home Department, ex p Brind*[77] the Court was extremely cautious in going into a proportionality-based review. The Court opined that, 'to apply the doctrine of "proportionality" would involve the court in substituting its own judgment of what was needed to achieve a particular object for that of the Secretary of State on whom that duty had been laid by Parliament; and that, while any restriction of the right of freedom of expression could only be justified by an important competing public interest, it was impossible to say that the Secretary of State, in concluding that the modest restrictions imposed by the directives were justified by the important public interest of combating terrorism, had exceeded the limits of his discretion or acted unreasonably in making them'.

The notion that, proportionality must not be considered as a separate head of judicial review changed with the implementation of the Human Rights Act of 1998, where it warranted such an analysis to be carried out by the Courts in light of judicial review applications that were made based upon recognized human rights. In the case of

[77] [1991] 1 AC 696

R v. Secretary of State for the Home Department, ex parte Daly[78] the Court pointed out three main reasons as to why proportionality should be allowed to be used as a separate ground for review. Firstly, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. And thirdly, in light of protecting human rights, there may not be a more suitable or appropriate ground upon which an administrative decision may be reviewed. In this case, while the Court admits that proportionality may go well beyond the traditional grounds of judicial review and that it might create a conflict between the judicial branch and the executive, it justifies its decision to do so by making recourse to the developments in the law relating to human rights, and in particular the enactment of the Human Rights Act of 1998.[79] The Court proposes a threefold test to be utilized in making a review based on proportionality by having recourse to the decision in *De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[80] where the Court held that, it should ask itself, 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental

[78] [2001] 3 All ER 433
[79] Shivaji Felix, 'Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka' (2006) 2006 Acta Juridica 95
[80] [1999] 1 AC 69

right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'. The unavoidability of a proportionality approach was also emphasized in *Regina v. British Broadcasting Corporation, ex parte Pro-Life Alliance*[81] where the Court pointed out the inadequacy of the Wednesbury unreasonableness in protecting human rights of the individuals.

When one considers the use of proportionality as a ground for review in Sri Lanka, it has not become such a controversial ground for review, since judicial review is embedded in the Constitution itself. In the case of *Gooneratne v. Sri Lanka land Reclamation and Development Corporation and Others*[82] Justice Anil Gooneratne opined that, '[t]he Doctrine of proportionality, as part of the concept of Judicial review, would ensure that even on the aspect which is, otherwise within the exclusive province of the Disciplinary authority, if the decision of the authority even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction.' The Court also went on and declared that this case provided a fit and proper case to apply the doctrine of proportionality. In the case of *Sunila Abeysekera v. Ariya Rubasinghe, Competent Authority and Others*[83] the Court opined that, when one considers

[81] [2003] UKHL 23
[82] [2012] 2 Sri L R 243
[83] [2000] 1 Sri L R 314

the restrictions placed upon the enjoyment of fundamental rights under Article 15(7) of the Constitutions, it necessarily warrants a proportionality analysis, since the restrictions placed upon the enjoyment of the said fundamental rights must be proportionate to the vital interest sought to be protected by imposing such restrictions upon the said fundamental rights guaranteed under the Constitution.

Proportionality as a ground for judicial review sits on a very thin line between judging the lawfulness of a decision which falls under the preview of judicial review, and a merits review which can only take place in an appeal. Some of the later decision pronounced in England has pointed out for a very meticulous application for the doctrine. In the case of *Secretary of the State for Home Department v. McLarty*[84] the Court opined that, when applying the test of proportionality, a principle of "minimal interference" should be adopted. This meant that whilst fundamental rights could never be treated as token or as a ritual nonetheless the discretionary judgment enjoyed by the primary decision-maker, though variable, meant that the court's role was to keep in balance with that of the elected arms of Government. It can be seen that, while the Courts in England have taken a very cautious approach in utilizing proportionality as a ground for judicial review, the same restraint has not bothered the Court in Sri Lanka, since the foundation of judicial review is embedded in the Constitution which also provides for

[84] [2014] UKUT 315

the recognition and protection of the fundamental rights of the people.

Engaging Legitimate Expectation as a Ground for Review.

Among the new heads of review, legitimate expectation as a possible new ground for judicial review was hinted in the ***GCHQ***[85] case. In this case Lord Diplock pointed out that, 'where the decision is one which does not alter rights or obligations enforceable in private law but only deprives a person of legitimate expectations, "procedural impropriety" will normally provide the only ground on which the decision is open to judicial review.'. Therefore, it can be seen that, there is a interlink between legitimate expectation and procedural impropriety (unfairness). At the very beginning, legitimate expectation was taken in as a part of the broader notion of natural justice, which required that both the parties be heard before averring at a decision and that there be no biasness. In particular, legitimate expectation was linked with the right of an individual to have a fair hearing before any decision was taken against him which would adversely affect her/his rights and interest. Commenting on the development of the doctrine related to legitimate expectation, Wade and Forsyth[86] throw some caution at the possible abuse of this doctrine and they state that, this phrase should not be 'allowed to collapse into an inchoate justification for

[85] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

[86] W. Wade and C. Forsyth, *Administrative Law* (10th Edn, Oxford 2009) 447-448

judicial intervention'.

In order to succeed under a judicial review claim based upon legitimate expectation, there are certain conditions that have to be met. Firstly, the claim must be a legitimate one, meaning that the expectation was something valid in law. If the particular practice relied on was something that stemmed from an illegal act, there can be no legitimate expectation. In the case of *Union of India v. Hindustan Development Corporation*[87] the Court held that, '[t]he legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in a natural and regular sequence. Again, it is distinguishable from a mere expectation. Such expectation should be justifiable, legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and, therefore, it does not amount to a right in a conventional sense'. Secondly, where a legitimate expectation is established, the Courts would be required to weigh in the interests of the affected parties with that of the administrative body in making a decision whether to halt the administrative authority from carrying on with its decision or to allow the application for judicial review founded upon judicial review and to quash the decision of the administrative authority in question.

In entertaining a judicial review claim based upon legitimate expectation, this legitimate expectation may

[87] [1994] AIR 988

arise from one of the following ways. The first and strongest foundation for a legitimate expectation is where the public authority makes a representation that it will, or will not, act in a particular way (representations for these purposes may be found in one or more of an individual statement, a circular, a report, or some other official document). Secondly, legitimate expectations may be grounded in the practices of a public authority. For instance, an expectation of consultation may be engendered where an authority has previously consulted the affected individuals about decisions of the kind to be taken;[88] and a public authority cannot, without warning, change a long-standing practice that it is aware an individual has acted in the light of and derived a benefit from.[89] Thirdly, an individual may argue that he or she has a legitimate expectation of being treated in accordance with a policy that an authority has adopted to guide it in the exercise of its discretion. Such arguments may arise (a) where an authority decides to depart from its existing policy *vis-à-vis* the individual or (b) where an authority changes its policy and the individual considers that the previous policy should still be applied to him or her.

When one traces the historical development of the concept of legitimate expectation in England, it was in the case of *Schmidt v. Secretary of State for Home Affairs*[90]

[88] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374
[89] *R v Inland Revenue Commissioners, ex p Unilever* [1996] STC 681
[90] [1969] 2 Ch 149

that the concept of legitimate expectation was actually predicted. Though not forming a part of the judgement, Lord Denning opined that, 'had the plaintiffs' residence permits been revoked *before* they had expired, the court's approach would have been different. Under those circumstances the plaintiffs: '. . . ought . . . to be given an opportunity of making representations: for (they) would have a legitimate expectation of being allowed to stay for the permitted time'. However, Lord Denning's use of the term 'legitimate expectation' did not apparently enjoy universal judicial support, and there was even some unease with the idea that there was anything new in the concept. For instance, in *Lloyd v. McMahon*[91], where the House of Lords rejected the argument that surcharged councils should have been given oral hearings because they had previously been given such hearings, Lord Templeman stated that he did not consider that the concept added to the existing common law requirements of fairness. His Lordship made the point in respect of the argument that a legitimate expectation of an oral hearing was to be regarded as a right and that a failure to observe the right should automatically invalidate any resulting decision. Describing this argument as 'extravagant', Lord Templeman said that the test in any case remained one of 'fairness' and that the court need not look beyond established common law standards.

The case that is then often credited with giving the language of legitimate expectation a more visible role in

[91] [1987] AC 625

common law fairness is *Council of Civil Service Unions v. Minister for the Civil Service*[92] where the Court contemplated that, 'there was a legitimate expectation on the facts and that, had the circumstances been otherwise, the application for judicial review would have been granted'. While these developments took place regarding the protection of a procedural fairness, the concept of legitimate expectation went a step ahead and also looked into the substantive part of the decision, and with it developed a new concept of substantive legitimate expectation, again a rather controversial ground for judicial review which makes blur the distinction between appeal and review. In the case of *R v. Ministry of Agriculture, Fisheries and Food, ex p Hamble (Off-shore) Fisheries Ltd*[93] Justice sought to move the doctrine beyond the understanding that expectations could only ever be procedural in form (as in *GCHQ*[94]) and/or offer procedural protection of a substantive expectation (as in *Schmidt*), towards the understanding that there might also be 'substantive protection of a substantive legitimate expectation'. The corresponding controversy followed from Sedley J's suggestion as to how such protection was to be achieved. In short, the judge considered that the courts should look closely at decisions in some cases and balance the requirements of fairness against the reasons for any change in policy. That approach, which was developed with part reference to the proportionality case law of the European Court of Justice (ECJ), was

[92] [1985] AC 374.
[93] [1995] 2 All ER 714.
[94] [1985] AC 374.

subsequently criticised because it was thought to have the potential to involve the courts too closely in the review of discretionary choices.[95]

The pinnacle of substantive legitimate expectation came with the decision in *R v. North and East Devon Heath Authority, ex p Coughlan*[96] where the Court held that, 'Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

The problem with such a review is that substantive legitimate expectation aches closer to a proportionality analysis which has still remained controversial as being a ground which seriously hampers the constitutional alignment of separation of powers in England. With substantive legitimate expectation, the Court takes upon itself the task of weighing the decision to make a change in the policy against the adversity it creates upon the individuals and whether such can be justified, which is very much similar to proportionality language coined

[95] P. Leyland and G. Anthony, *Textbook on Administrative Law* (7th Edn, Oxford 2012) 361
[96] [2000] 2 WLR 622

using a different set of words.

When one considers the development of legitimate expectation from a Sri Lankan perspective, it has adopted both the procedural legitimate expectation and the substantive legitimate expectation without much controversy, since the power of judicial review is embedded in the Constitution itself, where a rights-based analysis could always be justified since the Constitution itself provides for the identification and vindication of fundamental rights. One of the early examples for the use of legitimate expectation as a ground for judicial review in Sri Lanka came in the decision of *Mowjood v. Pussadeniya*[97] where the Court held that, 'the appellants have a legitimate expectation that they would not be evicted from their present premises except on a writ of execution allowed by court after the issue by the Commissioner of a proper notification;' This was a case in which the concept of procedural legitimate expectation was discussed. Substantive legitimate expectation has also found its voice in many of the decisions pronounced by the apex Court in the Country. In the case of *Multinational Property Development Ltd v. Urban Development Authority*[98] the Court held that, '[a] substantive change to policy resulting from a change in the Executive Presidency cannot be avoided, but where a New Policy is to be applied, the individuals who have legitimate expectations based on promises made by public bodies that they will be granted certain benefits, have a

[97] [1987] 2 Sri L. R. 287
[98] [1996] 2 Sri L R 56

right to be heard before those benefits are taken away from them on the ground that there had been a change of policy'. In *Wickremaratne v. Jayaratne,* Justice Gunawardena, explicitly held that substantive legitimate expectations are protected in Sri Lankan public law, where his Lordship held that, '[t]he doctrine of legitimate expectation is not limited to cases involving a legitimate expectation of a hearing before some right or expectation was affected, but is also extended to situations even where no right to be heard was available or existed but fairness required a public body or official to act in compliance with its public undertakings and assurances. In *Samarakoon v. University Grants Commission*[99] Justice Shirani Bandaranayake held that a hand book published by the respondent gave the petitioners a "legitimate expectation" of being admitted to a Medical Faculty of a State University and directed that the petitioners be admitted to the relevant Medical Faculties. This was another instance of the Court giving effect to a substantive legitimate expectation. In the case of *Dissanayake v. Peoples Bank*[100] the Court pointed out that, '[a] promise or an undertaking could give rise to a legitimate expectation that could be enforced by Court. It could be categorized as a substantive and procedural legitimate expectation. In the case of *Galle Municipal Council v. Galle Festival Ltd*[101] Court explained the rationale behind allowing judicial review based on a claim made under substantive legitimate expectation by declaring that, '[t]he

[99] [2005] 1 Sri L R 119
[100] [2012] 2 Sri L R 43
[101] CA(PHC) No: 155/2010

arguments in favour of permitting substantive legitimate expectation are based on the principle of legal certainty. It is said that where a public body makes a promise it is in the interests of good administration that it should act fairly and should implement its promise'. The liberty enjoyed by the Sri Lanka judiciary with regard to developing grounds of judicial review is epitomised by the decision in *Ariyarathna and Others v. Illangakoon and Others*[102] where the Court while holding that, 'the doctrine of substantive legitimate expectation applies in our jurisdiction in much the same manner as it now applies in England'. Court took the liberty in holding that, 'applying a test of WEDNESBURY unreasonableness is inappropriate in cases which consider a substantive legitimate expectation'.

When one considers the development of legitimate expectation in both England and Sri Lanka, it is evident that the Courts in England had to be more cautious in developing the concept, especially when it came to substantive legitimate expectation, since the political democracy and the alignment of power sharing within the branches of government made it very clear that the Courts are always to respect the supremacy of the parliament, whereby they should show more deference to administrative decisions than other countries where the foundation of judicial review is embedded in the Constitution itself.

Conclusion

[102] SC FR Application No. 444/2012

Judicial review as a discretionary remedy provides the individuals who are adversely affected by an administrative decision to make a claim before the Court to protect their rights and interests in the absence of a right to appeal. Being a discretionary remedy and not being found upon a statutory authority, judicial review has developed through the judge made law, or the Common Law as it is termed in England. In England, the legitimacy of judicial review has always been questioned for a want of a proper foundation in the absence of a written Constitution, and the existing Constitutional arraignments requiring the Courts to play a more passive role while respecting the notion of parliamentary sovereignty. However, the situation in Sri Lanka has been totally different since the foundation of judicial review is based upon the Constitution which grants the power of judicial review to the Court of Appeal.

In this backdrop, when it comes to the development of grounds of review, Sri Lanka has been able to move ahead with the developments made in England without much controversy. Starting from Wednesbury unreasonable to proportionality and legitimate expectation, and beyond, the Sri Lanka judiciary while not being able to initiate new grounds of judicial review as in England, has nevertheless been able to develop the grounds of review in a more positive and expedient manner, as the levy enjoyed by the Courts in Sri Lanka is much higher than the one enjoyed by the Courts in England.